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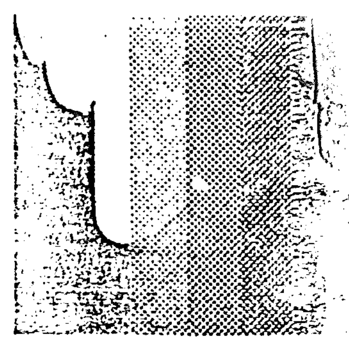

Canadian
Environmental
Law
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L'Association
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du droit
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THE NEED FOR AN ENVIRONMENTAL BILL OF RIGHTS IN ONTARIO

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for the
OBJECTIVES / ONTARIO CONFERENCE

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SUMMARY

An Environmental Bill of Rights would enshrine in legislation the right of any citizen to go to court to defend the environment; the right of access to information on which environmental decisions are made; and the right of citizens to have a voice in setting standards for acceptable emission levels.

AN ENVIRONMENTAL COMMON LAW FOR ONTARIO

Legislative efforts in the area of environmental quality have thus far been essentially limited to setting out standards for particular problems, and creating some administrative machinery for enforcement. Permit and approval controls play a role as well, but generally deal with only a narrow range of potential environmental effects. Moreover, even decisions on environmental effects that are subject to permit control may be largely dictated by prior decisions under other regulatory legislation with conflicting objectives, or indeed may be influenced by prior political decisions or financial commitments. Such environmental legislation is important, but it is not sufficient. Under such a system, every problem cannot be foreseen or is likely to be dealt with; a means must be provided for coping with unanticipated or neglected matters in the area of environmental abuse.

The old way is to wait for a disaster and then legislate. But that is a luxury we can ill afford with reference to environmental problems.

Use of the courts would add a weapon to the arsenal of the public interest: the ability to meet problems as they arise, formulating a solution appropriate to the occasion, flexible, innovative, responsive. In short, the inventiveness of the common law system should be brought to the environmental crisis. We need to develop a common law for the environment; an Environmental Bill of Rights opens the door that makes this vitally needed development possible.

Our failure thus far to open the way to the development of a common law in this area has been very damaging. In a number of cases, judges have been deeply troubled by complaints put before them, which raised serious environmental problems; but they have felt duty bound to dismiss the cases because they felt the legislature had given them no mandate to cope with environmental problems. This is wrong and should not be countenanced. For example, the next time you're interrupted by a jet or other aircraft roaring into some national

or local airport or buzzing your home, be sure to give credit, at least in part, to limited judicial review of matters committed to the discretion of the federal Minister of Transport pursuant to the Aeronautics Act. This was the rationale for the recent dismissal of a suit in the Federal Court of Canada, seeking some solution to the noise problem at a local airport outside of Toronto.

Despite this and other examples-it will be said- we have administrative agencies to protect us. So we do, and we hope we will not be thought unkind if we suggest that our administrative agencies at times leave something to be desired.

Official agencies which are created to promote and protect the public interest sometimes become too single-minded. In the recent past, a number of cases have brought home the degree to which important regulatory agencies failed to take into account all the information and all the perspectives which a proper regard for the public interest required. The Ministry of the Environment's handling of the Canada Metal case and lead pollution in Toronto, generally, is an example we've alluded to previously.

An agency ought not to be embarrassed to have it pointed out from time to time that it is not infallible, and if the citizens of the province, in whose interest the province's resources are to be maintained, do not have a legitimate interest in such vigilant regard for their own interest, who does?

THE NEED FOR SUCH LEGISLATION

A letter on file with the Canadian Environmental Law Association in Toronto, written May 11, 1974 by the Ontario Minister of the Environment, William G. Newman, in rejecting the concept of an Environmental Bill of Rights, suggests that we have or will shortly have all the remedies we will need for dealing with environmental problems. A careful reading of that letter makes clear just how limited are the citizen's right's in this province. He says that within the Government's proposals for establishing an environmental assessment process will be the "ample opportunity for concerned citizens to review the implications of the proposal and 'to voice their concern,' before the appropriate tribunal" or agency. So they may, but we assume that even in the days of the monarchy citizens were perfectly entitled to "voice their concern" to the king. Notably, much existing provincial legislation as well as the Government's proposals for environmental assessment do not provide any general requirement that the agencies in the first instance, undertake a proceeding in response to such "voicings of concern" however meritorious(Mr. Newman refers

to situations where the government has determined that a hearing is in order to begin with); nor does existing or proposed legislation give citizens a right to challenge agency decisions in court.(See the new Pesticides Act, 1973 for example.)

Moreover, the Minister's letter, while it states that the new assessment proposals "would allow the proponent the legitimate right to pursue his proposal provided that he could demonstrate that it was a needed benefit to society," it completely omits the fact that the process is not to apply to the very substantial disruptions created by private enterprise for an undetermined amount of time, according to the Ministry's Green Paper on the subject, and other governmental pronouncements. Rather than deal in generalities, however, let us look at some specific examples of problems which have arisen in Ontario, for which the Minister's letter supplies no answers.

CASE NO. 1

A city attempted to install water and sewer lines. During this time there was considerable dumping of raw sewage and pollutants into the nearby river and creek. Of course a provincial agency has jurisdiction over such matter and we are informed by the court decision, that decisive action could have prevented serious damage. Our regulatory agency did not act decisively, however; only afterwards did remedial action get underway-after the fact, and after the damage was done. Concerned citizens might have provided that needed impetus for decisive action; but the law does not provide any clear right of action.

Indeed, a number of cases presently in their early phases before the civil courts raise the very question whether private citizens could attack pollution alleged to have been inadequately dealt with by the provincial agency charged with that function. It is likely that suit will only be allowed by those who could qualify as property owners-but not by other plaintiffs without that traditional property interest. Even this decision as to property owners is by no means clearly allowed by our law; and, of course, the scope of legitimate interest in environmental problems is by no means limited to those who hold adjacent property, as the next example illustrates.

CASE NO. 2

An Ontario municipality, county and conservation authority have road and bridge building plans for construction across one of the most scenic and

unique gorges in the province. The plans were made a long time ago, and many well informed persons believe they are unwise and ill-considered. They implement all the worst elements of the old "shortest, straightest, cheapest" philosophy of highway building-- and the devil take anything that happens to be in the bulldozer's path. Among other problems with the present plan, it is said to unnecessarily disrupt and disfigure the natural quality of the gorge, as well as create excessive noise, growth and traffic problems in the area. Citizens in the area want very much that alternate routes--which they claim are feasible--be considered. But the officials won't be persuaded. Perhaps they think they are correct; perhaps they balk at having their authority challenged; perhaps they are too eager to save a little money; or too lazy to reconsider a job that was once done. Troubled citizens today have no place to turn once "responsible" officials reject their pleas.

CASE NO. 3

A charcoal company owner bought a choice piece of land in a lush, virtually unpopulated eastern Ontario valley with no zoning by-law or other land use control in effect. He commenced quickly with bulldozers to clear the land and began constructing a large charcoal production plant 100 yards from an individual's farm despite having failed to obtain certificates of approval from the Ministry of the Environment for the expected air contaminants.(The MOE is not presently required to review the total environmental impact of such a scheme.) No one, including the agency charged with the protection of the province's air resources did anything even after complaints were received. Individuals living in the area were outraged. When one subsequently took the Ministry(which had by this time merely acquiesed to the company's illegal initiative and issued a certificate of approval) and the company to court charging that his rights had been affected by the issuance of a certificate without an opportunity being provided for him to present his views, the action was dismissed because the Environmental Protection Act does not provide a right of hearing to an objector before the issuance of a certificate of approval and because property rights were not likely to be adversely affected by this "administrative" decision. Public officials might have acted, but they did not--except to place the stamp of approval on a patently illegal act. Perhaps they were busy with other things and didn't realize what they were doing; perhaps they were afraid of controversy; perhaps they were simply unimaginative. The fact is they did not

act affirmatively-and concerned citizens did not have the legal wherewithal.

CASE NO. 4

Last we come to a case(and general situation) which is widely known, involving the leasing of public lands for oil, gas, mineral and pit and quarry operations. The situation is an important one, for the process of disposition and leasing of public lands is one prolific source of environmental problems everywhere, and it is typically an area of government in which no regularized means is provided for citizen participation.

One might ask provincial officials to explain what the situation is if, for example, public land is proposed for leasing to a private company for mineral exploration and concerned citizens believe they have sound and powerful evidence which would cast serious doubt on the proposal--evidence which the provincial agency fails adequately to consider. The issue is by no means a fanciful one. Indeed, it is precisely the fact situation surrounding the Sandbanks affair, which has been alluded to previously by our organization. There, land slated to become part of a provincial park--and immediately adjacent to an existing one--was leased to a cement company for $1 a year so as to remove the valuable and unique dunes(from which the company needed sand.

It is traditional for many agencies to view citizen interest, and a desire for citizen participation, as a nuisance, while still paying lip service to it. It may give a little perspective on this attitude to recall that before federal oil leases were granted at Santa Barbara, California, local citizens wanted to have a forum to raise some questions and objections. But the lease-granting agency refused, assuring them that "maximum protection has been made for the local environment." Privately, a memorandum was circulated in the U.S. Interior Department arguing against holding public hearings because the Department "preferred not to stir the natives up any more than [necessary]". Of course the "natives" eventually got very stirred up, when oil began covering their beaches. Will anyone say it can't happen here?!

Indeed, in 1973 in Uxbridge County in Ontario, a number of residents were denied a hearing by the Minister of Natural Resources pursuant to the Pits and Quarries Control Act before that Ministry gave licences for enormous gravel extracti in the area.

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The foregoing examples are, of course, only a few instances of situations where the opportunity for some initiative outside the official channels of agencies which are supposed to be protecting the public interest might be quite

useful. Anyone can compile his own list by simply walking around the province looking and smelling; we have lots of laws and lots of agencies which are charged with their enforcement, but we also have a lot of environmental problems. We are sure that everyone present has heard more examples than we of pollution clean-up orders which have been outstanding for years, unfulfilled and for some reason unenforced; of towns and cities where pollution of the air is heavy and odors atrocious. A liitle private initiative by members of the community are the daily victims of these problems might do wonders.

In citing these cases, we do not assert that in each instance the municipality, or the provincial administrative agency, is wrong and the objecting citizen right. We only say that the questions sought to be raised are substantial-and that concerned and affected members of the public are entitled to have a forum in which such questions can be raised and considered.

Note too that opening a public right is not merely designed to challenge an agency which is ill-informed or willfully wrong. Public intervention may help to strengthen the resolve of an agency which is under pressure from interested parties, or it may encourage an agency to reconsider a problem it has ignored or held too long in abeyance. In short, we can sometimes help to liberate public agencies to do what they ought to be doing. We have spoken harshly and often of the situation surrounding the leasing of public lands in the Sandbanks case, but it is important to note that the lawsuits which were filed--though unsuccessful because of the inadequacy of existing law--made enough of an impression by their presence that they helped regain the lands in question for their original public uses.

We ought not to forget how useful it can be--indeed how essential-- to ventilate important issues of policy outside the often confining traditional channels of the bureaucracy; particularly is this so when a concept like an Environmental Bill of Rights receives such a negative response from senior officials in government who denigrate it on the ground that it might shake up the well established formal channels of government a little bit. It might--and it should.

WHY SHOULD AN ENVIRONMENTAL BILL OF RIGHTS PROVIDE FOR CITIZEN INITIATED SUITS?

The idea of citizens suing to protect the public interest is not a novelty at all. Under the Municipal Act, Ontario has long permitted any ratepayer to use our civil courts to obtain an injunction to restrain the breach of a

municipal by-law. This is an exception to the common law rule. Similarly, the Planning Act provides that any ratepayer can also ask for an injunction in the civil courts to restrain the breach of an official plan or zoning by-law. It might well be asked why this principle should be denied extension to matters pertaining to the conservation of our resources.

That the concept of the citizen's suit is no novelty is clear enough. But is it necessary, when we have public officials who have authority to bring such suits? The answer to this question is clearly "yes." Taking again the Sandbanks case, as an example, a citizen sought to enjoin the giveaway of public lands slated to become part of a provincial park to a cement company. The land was leased by a provincial minstry and the citizen contended that the company would seriously impair the quality of this unique resource(ie the sand dunes) and that the ministry and the government were violating a public trust it was required to uphold under the Provincial Parks Act. The Attorney-General could, in theory, have challenged this leasing arrangement. But it was the government itself that was causing or permitting the breach of trust, thus putting itself in a potential conflict of interest situation. Perhaps in any event it was determined in the Cabinet that it would be unseemly for two equal provincial ministries to fight out a public question in the courts; and that it would have been improper for the Attorney General, who must defend provincial agencies in court, to be lawyer for both plaintiff and defendant in a single suit. Whatever the merits of such views, they are facts of life which tell us that without citizen participation, important issues will sometimes go unexamined and unchallenged. Indeed, in the Sandbanks instance, because that citizen was deemed not to have standing to litigate the matter, the government, in effect, could ignore the law.

Moreover, citizen prodding may be required to encourage an agency, busy with its routine work, to take a careful look at all the implications of a program which it is promoting or regulating. Maple Mountain is here a case in point.

ARE THE COURTS COMPETENT TO CONSIDER AND EVALUATE ENVIRONMENTAL QUALITY QUESTIONS?

This is perhaps the most commonly asked question whenever it is suggested that the judiciary has a role to play in promoting the public interest in natural resource protection. The recent Quebec Superior Court decision regarding the

James Bay Project speaks impressively in response to this concern; it deserves the attention of every person who asks this question. The facts of the case are sufficiently well known to this group, to forego repeating them here. A careful examination of the transcript demonstrates beyond doubt that the judge, an ordinary trial court judge, like hundreds of others across the country, could and did do a perfectly competent and knowledgeable job of evaluating and sifting the evidence offered by each party.

Similarly, a reading of a recent decision by a judge of the British Columbia Supreme Court in dealing with a suit to stop a housing project development from being built in a potential rock slide area, found the court devoting most of its decision to the engineering and geological evidence of the potential for a rock slide on the proposed subdivision site.

It should not be surprising that courts can work effectively in these cases, which are no more or less technical or obscure than a wide range of matters that routinely come before judges, ranging from the need to determine negligence in running an atomic power plant to railroad reorganizations, stock swindles and patent applications.

Many of you will be told or perhaps believe that these matters cannot be tried practically. The above examples and other cases we think can persuade you differently.

For lack of an environmental bill of rights judicial cognizance of such cases has been irregular and uncertain. But historically, in toto, there have been enough such cases to make clear their practicality and feasibility.

SHOULD THE COURTS GET INVOLVED IN ADMINISTRATIVE AGENCY MATTERS?

It has often been questioned whether lawsuits by citizens would undercut comprehensive administrative regulations on pollution and environmental degradation. We hope to persuade you otherwise. We have already mentioned in some of our examples, the easy cases.

First, the administrator or ministry refuses to act or there are otherwise no regulations on the subject. Why should not citizen suits operate to fill the gaps? Pre-emption by nothing is a strange concept. (For example, after three and a half years there are still no provincial noise regulations pursuant to the EPA)

The second cases are equally easy - the administrative agency or ministry violates the law. Where the legislature has directed, for example, that new source

pollution control standards are to be achieved by the "best technology" available, we see no reason why a court should not be able to determine that what the administrative agency or ministry designates as the "best technology" was outdated twenty years ago.

The third category of cases, thought to be the hardest ones, are those where th ministry sets a specific standard and it is attacked nonetheless as constituting an impairment or degradation of environmental quality. Should the courts be disabled from improving upon that standard? We think not. The lead pollution problem in Toronto for example is in good measure a result of questionable levels of safety propounded by the Ministry of the Environment with reference to lead in the environment ten or so years ago.

A business whose operations are affected by a government emission standard can mount a challenge that the regulation is so strict as to amount to a taking of its enterprise. We believe that citizens ought to a similar opportunity to challenge it as too lax. If you accept that there is such a thing as a ridiculously generous standard, one that is incompetently or corruptly conceived, it seems to us that you must have difficulty resisting the principle of judicial review.

It should be made clear, in any environmental bill of rights, however, tha the courts should, to the extent it is at all feasible and practical, assure that the existing regulatory and administrative system is <u>not</u> circumvented. An environmental bill of rights is designed to fill gaps in the present system, not to displace it.

WILL THE COURTS BE FLOODED WITH LITIGATION?

This has been the historical complaint wherever a new or expanded legal right was recognized; it has been raised with monotonous predictability as an objection to every new idea that has ever been advanced in the law. It is simply a version of the argument that nothing new should ever be done because it is either unnecessary or dangerous.

Three years of experience with the Michigan EPA (which embodies many of the concepts of an environmental bill of rights) shows that there has been no flood - several other states with such legislation have also not been innundated.

For those who are inclined to worry, an environmental bill of rights as envisioned by our organization contains several safeguards against unwarranted litigation. First, unless the plaintiffs can make out a prima facie case, they cannot

succeed; thus frivolous cases can be disposed of at an early stage. Also a provision permitting the court to allocate costs of litigation to the parties, gives the court authority to impose economic burdens associated with the case upon those who unreasonably impose upon the court. Finally, for better or worse, the economics of instituting litigation have always acted as a substantial deterrent to those who do not have a case with any reasonable prospect of success.

This initial requirement on the plaintiffs also puts to rest the fear of so-called crank cases. Unable to meet the initial burden of substantiality, such cases can be quickly and decisively dismissed by the court.

AN ENVIRONMENTAL BILL OF RIGHTS WILL NOT PREVENT NEEDED DEVELOPMENT

An Environmental Bill of Rights is a concept that must of necessity be designed to steer a middle course between unthinking exploitation and unyielding preservation. Those who would wish to object to any proposed project or activity would first have to bear the burden of showing that there is a reasonable likelihood that there will be some significant adverse effect on the province's resources. Only then is it incumbent upon the party who is proposing to act to show that his conduct is reasonable; i.e., that what he wants to do is consistent with the public welfare and that no feasible or prudent alternatives exist for getting the job done. Consideration of alternatives would be necessary to assure that the forum in which such controversies are worked out will not be mired down in abstract consideration of benefits and detriments, but will have before it solid and substantial proposals and alternatives to weigh and evaluate comparatively.

Moreover, to put the burden of establishing alternatives on the proponent of action is a simple matter of common sense, for we expect the proponent of any activity to have considered all reasonable alternatives and to have chosen the best of those available; to ask him to support his decision is merely to ask that he reveal the process which he must - if he operates rationally and with the public interest in mind - already have undertaken.

(See our submission to the Ministry of the Environment re environmental impact and factors affecting public input for more details.)