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"EVALUATION OF ENVIRONMENTAL LAW
IN ONTARIO AND PROSPECTS FOR REFORM"

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Evaluation of Environmental Law in Ontario and Prospects for Reform

Introduction

My talk today has been broadly entitled "Evaluation of environmental law in Ontario and Prospects for Reform." I would like to start by setting out the historical framework for the development of environmental legislation and then provide an evaluation of the present regulatory regime before concluding with some comments on prospects for future reform.

I think it is fair to say that it was not until the late 1960s that environmental quality concerns became major social and political issues attracting national and provincial attention in Canada. Pollution horror stories such as the environmental impacts of the highly persistent pesticide DDT, mercury contamination in the St. Clair River and other Canadian waterways, and phosphates in laundry detergents polluting the Great Lakes, made the front pages of the newspapers daily. Public pressure on governments to clean up pollution increased dramatically and led ultimately to all levels of government undertaking legislative and regulatory actions to deal with this public concern. As well, the common law was proving increasingly inadequate to deal with modern day pollution problems. While, for example, nuisance and trespass actions may still be useful where private property has been affected, these are largely remedial, expensive actions that need to be brought by

affected individuals. Given the fact that environmental damage was often widespread and did not always affect private property,---- governments saw the need to develop regulatory regimes to both prevent and control pollution in this country.

Constitutional Framework

Before I discuss the various phases of environmental regulation I will deal briefly with the constitutional framework in which we operate. The constitution, which reflected the problems and concerns of 1867 when it was enacted, did not allocate legislative authority for the environment to either the federal or provincial governments. As a result, there is a large degree of overlapping jurisdiction because of the generality of the federal and provincial powers as defined in the Constitution. Broadly speaking, the federal government has the legal authority to make laws concerning matters that were considered to be national in scope at the time of Confederation, such as navigation and shipping, and seacoast and inland fisheries. The federal government also has exclusive jurisdiction to pass laws in relation to criminal law, trade and commerce, interprovincial undertakings, federally owned land and other matters. Residual powers were also given to the federal government to enact laws for the peace, order and good government of Canada.

The provinces have a broad range of powers in relation to environmental matters. They have power over property and civil rights, natural resources and provincial lands, local works and undertakings, municipal institutions and local and private matters. Agriculture is a matter of shared jurisdiction.

The constitutional division of powers has created many problems. Deciding whether a matter of environmental concern is within provincial, federal or concurrent jurisdiction is often very difficult. Without clear responsibility for environmental concerns, both levels of government have been able to disclaim authority for dealing with environmental problems by alleging that it is within the other's jurisdiction. This has resulted in "jurisdictional buck-passing." One example of this was the refusal of either the federal government or the Ontario government in the late 1970s to close the English- Wabigoon River to sports fishing in the face of high mercury levels in the river system.

Constitutional questions often arise in relation to the question of which level of government will deal with emerging environmental concerns of the late 20th century (eg. biotechnology or the clean up of hazardous waste sites).

Constitutional challenges are often brought by polluters in the courts in an attempt to avoid prosecutions. For

example, one company charged with offences under the federal Clean Air Act challenged the constitutionality of that statute by arguing that air pollution was only a matter of provincial jurisdiction. This attempt failed. However, there have been some successful challenges. In 1980, a section of the federal Fisheries Act, which prohibited the dumping of logging waste into waters frequented by fish was struck down as the Court held that control of logging activities fell within exclusive provincial jurisdiction and further that the section made no attempt to link the dumping activities with an impact on fish. Even more recently, the National Research Council and its employees were charged under the Ontario Environmental Protection Act with illegal transfers of liquid industrial waste to an unauthorized waste hauler without completing any of the waste manifests required by the regulations. Instead of arguing the merits of the case, the federal Justice Department argued that the NRC was immune from the application of provincial environmental law, as it was an agency of the federal crown. This argument prevailed at trial as the court held that the Ontario legislation did not bind the federal crown. The charges were dismissed.

Constitutional issues have also been raised in the context of the proposed federal Canadian Environmental Protection Act (CEPA). Under that act, the federal government will have the power to pass regulations dealing with toxic chemicals. The statute however will require that the

provinces be consulted prior to any regulations being passed. Further, recent amendments passed at Committee stage provide that where provinces have equivalent regulations under provincial law, and an agreement is reached between the feds and the province, that provincial law will apply. In our opinion, CEPA is a step backwards from existing federal law, as the Clean Air Act presently gives the government the authority to pass national air emission standards without consulting the provinces. The feds seem to be ducking their responsibility to enact strong national standards to prevent the creation of pollution havens. This also seems to run counter to the recommendations of the Brundtland Commission which favoured a strong environmental protection role for national governments.

One result of the feds abdication of their responsibility is that the provinces will be expected to take on a greater role.

Evolution of Environmental Legislation

During the past three decades commentators have identified three phases in environmental protection legislation. Phase I consisted of statutes designed primarily to deal with the pollution of specific media, i.e., air, land and water. Sewage and water pollution were often the first areas targeted for legislative attention during the 1950s. This was often reactive legislation prohibiting the discharge of

pollutants into air, water unless approved on a case to case basis. The Ontario Water Resources Act (OWRA) is a good example of this type of legislation in Ontario. In fact that act was passed after a number of celebrated riparian rights cases in which injunctions were granted to individuals for pollution of rivers by upstream sewage treatment plants. The new legislation set out a licensing scheme for these plants and provided that as long as these plants were operating according to their licenses, they would be immune from prosecution. At the federal level we saw, for example, the Clean Air Act, and the Motor Vehicle Safety Act passed.

After this first flurry of legislative activity, there was a change in emphasis. Phase II was to encompass a more comprehensive approach. So-called comprehensive acts were passed and environmental departments were created from staff from existing government departments. Environment Canada came into existence in 1971. In Ontario, the Ministry of the Environment was created and the Environmental Protection Act passed. In Ontario Phase II in reality involved a repackaging of Phase I acts. For example, the Ontario Waste Management Act became Part V of the Environmental Protection Act. In other provinces where there had been no phase I legislation, these Clean environment or environmental protection statutes were the first attempt at environmental protection legislation. Governments tried to persuade their constituents that new legislation meant that environmental

problems were now fully under control. In Ontario, then Premier Davis described the EPA as an environmental bill of rights---- a line used 15 years later by the federal Minister of the Environment to describe CEPA.

Unfortunately, these phase II pieces of legislation were far from comprehensive and did not constitute an environmental bill of rights.

Phase II legislation did not lead to :

- 1) an efficient abatement of present problems;
- 2) comprehensive planning to eliminate future environmental problems;
- 3) adequate protection of individual and societal rights to a clean environment (lack of public input into the regulatory process); or
- 4) elimination of procedural impediments to law suits (ie overcoming standing difficulties in relation to public nuisance cases).

Phase III consisted of the passage of laws or policies requiring in certain circumstances, the assessment of environmental impact of public and private projects which might have a significant negative impact on the environment. An attempt was made to move from a reactive approach to a positive role of preventing environmental pollution from occurring. In the provinces there was a move to enact environmental assessment legislation, and federally a non-statutory environmental assessment and review process

was put in place. In Ontario, the Environmental Assessment Act was passed in 1975. It provided that all public undertakings would be subject to the Act unless specifically exempted. Unfortunately, many major public sector undertakings were exempted from the coverage of the legislation in the late 1970s. Municipal projects, while initially exempt, were brought under the Act in 1980 for undertakings in excess of \$2,000,000. The private sector is still not covered by the Act unless an undertaking is specifically designated by order. Very few private sector projects have been so designated.

While these three phases have not been mutually exclusive, they have not given the protection to the environment or the remedies originally contemplated.

We may be very slowly moving toward phase 4, an anticipate and prevent strategy as outlined by the Brundtland commission. The multimedia approach to toxic chemicals and an integration of concepts such as total loading are an important part of such a strategy. While the ecosystem approach has received lip service in recent years--- regulators are beginning to understand that we must begin to regulate chemicals on this basis and look at air, water and land effects together. However, our legislation does not yet reflect this approach.

State of the Environment

However is the state of the environment improving in Canada and Ontario?

Last June, Barry Commoner wrote a thought-provoking article on the environment in the New Yorker magazine. What he did was attempt to assess the impact of the environmental movement by looking at the quality of the environment- that is, the amounts of harmful pollutants in the air, water and our bodies and in animals. The prognosis is not good.

Commoner first states that he is able to do his analysis because of one offspin of the environmental movement and governmental activity -- the monitoring of environmental pollutants which has resulted in our knowing a good deal more about the state of the environment than we used to. He points out that while there are a few success stories-- notably the reduction of lead emissions between 1975 and 1985 by 86%--- and the corresponding reduction of average blood lead levels by 37% between 1976 and 1980, that there has been a failure to achieve a comparable reduction in the emission of other air pollutants, including dust, sulfur dioxide, carbon monoxide, photochemical smog, and nitrogen oxide. In the water field, Commoner notes that there has been little or no overall improvement in the levels of fecal coliform bacteria, dissolved oxygen, nitrate, phosphorus and suspended sediments. Again in the area of groundwater

pollution- he points to surveys that show that groundwaters have become increasingly polluted by nitrates and toxic chemicals. Commoner points out that 15 years ago water and air pollution were at the top of public opinion polls on environmental issues, while today even though these problems are largely unsolved, toxic chemicals are at the top of the agenda. Commoner notes that while the banning of certain chemicals such as DDT and PCBs has been effective, that hundreds of toxic chemicals, many of them carcinogenic, have been detected in water supplies, air and food. In the Great Lakes, for example, the toxic chemical levels of salmon, trout and walleye often exceed FDA standards for human consumption. Tumours are found on fish with increasing frequency.

Commoner also notes that from 1973-79 the annual number of civil enforcement actions by EPA increased year by year, paralleling the modest decline in pollution levels at least in the air. Then after Reagan took office, budget cuts with resultant decrease in enforcement took place. Reagan's message was "regulatory flexibility" ie a well known euphemism for relaxing the enforcement of regulations.

After painting this grim picture of the state of the environment, Commoner goes on to ask the question--what do all these statistics mean.

Commoner tries to analyze the few success stories and notes that the few real improvements have been achieved not by

adding control devices or concealing pollutants but simply by eliminating the pollutants. For example, the reason there is much less strontium 90 in milk and in childrens bones is that the US and the Soviet Union stoped atmospheric testing of nuclear weapons. He says that pollution levels can be reduced only if the production or use of the offending substance is halted or achieved by altering technologies. Another example he cites is the reduction of mercury pollution by changing the technology of chlorine production. Commoner summarizes that the decisions that govern environmental quality originate in the economic realm and the technology of production. He says one can find ways of improving both the economy and the environment by examining different technologies. He cites as examples large scale Midwestern organic farms which provide both environmental and economic gains to farmers. He says the existing legal framework of environmental impact statements may provide one avenue for an examination of alternatives. Unfortunately, Commoner lets the reader down with the lack of a blueprint for action. He advocates the building of coalitions with other movements and cites Martin Luther King JR.'s attempts before he died to link up the issue of racial discrimination to other social issues.

In Canada, it is often harder to get a picture of the state of our environment, because we often don't collect statistics, but it appears that we can not pat ourselves on

the back for vast improvements in environmental quality. It was only in 1987, that Environment Canada issued its first state of the environment report. However, again by examining this report and other reports issued by the MOE we can get some picture of environmental quality.

For example, in the area of pesticides, which are of course the one class of chemicals designed to be toxic and dispersed to the environment, between 1973-78 alone quantities of active ingredients of herbicides used in the Ontario part of the Great Lakes Drainage Basin increased from 1,613,030 to 2,922,320 kilograms in 1978.

One of the most disturbing trends is the increased incidence of fish tumours. As well, beluga whales in the St Lawrence River downstream from Quebec City show PCBs in the milk of these mammals is up to 800 times greater than the amount considered safe for humans.

Again the most positive trends are shown in the cases of reduction of mercury in water, and reduction in radioactive fall-out measurements--- for example in regard to the latter--surface air monitoring data for 1960 to 1983 show that overall annual averages during the early 1960's exceeded 100 millibecquerels per cubic metre but by the late 1970s the annual average rarely exceeded 1 millibecquerels per cubic metre. Following the 1963 Nuclear Test Ban treaty the contamination levels in the atmosphere and milk

gradually declined as a result of radioactive decay processes and absorption into soil water and plants.

The report also asks the question Barry Commoner asks-- that is, is the situation becoming worse or improving over time?

According to Environment Canada the answers to these questions provide a complex and far from certain picture.

The report sets out a number of caveats, first the difficulty of measuring manmade contaminants in the environment, the short time frame, and the increased use of these chemicals and the introduction of new ones. The

report states that we are only at the beginning of even establishing comprehensive monitoring for environmental contaminants. The limited conclusions point to the few success stories ie reduction in DDT, PCBS and radiation---

The report then states that the prevalence of trace contaminants, the toxicity of many chemicals and the nature of interactions among the chemicals are unknown--- not a very comforting thought.

In Ontario, the annual reports on industrial dischargers to Ontario waterways are not good news. The recent 1986 report found that 101 out of 154 dischargers did not meet ministry requirements during one or more months of 1986. In 1985, 98 of 147 sources monitored exceeded ministry limits during one or more months. 17 of the 101 dischargers that failed to meet monthly levels in 1986 are under Control Orders requiring improvements. Under the Environmental Protection

Act, companies can be prosecuted for breaches of control orders. Only 8 prosecutions were initiated against dischargers listed in the 1986 report.

In the case of sewage treatment plant dischargers, 17% of 385 plants reporting failed to meet annual effluent requirements for at least one of the 3 applicable provincial guidelines: phosphorus, suspending solids and biological oxygen demand. Moreover, 49% of the 258 STPs discharging into the Great Lakes Basin were out of compliance in one or more months for phosphorus loadings.

Adequacy of Environmental Laws

Are our environmental laws adequate---- and what reforms are necessary to help us protect and clean up the environment, a goal that is near the top of the public's political agenda?

First of all, it seems clear to me that an extremely strong case can be made for a strong regulatory regime in the environmental field. We have had the experience of trying to obtain voluntary compliance, and frankly it doesn't work. Witness the pulp and paper industry which was for years under voluntary programs, and which failed to take any significant steps to clean up its effluent. Again, even the development of the MISA program was a result of the fact that the Ministry finally decided that we needed legally enforceable effluent and water quality standards. We should remember that while Ontario has enforceable air

quality standards, we still do not have legally enforceable water quality, drinking water or effluent standards.

Even the Macdonald Commission which reported in 1985 supported an active federal role in environmental protection. While in many other areas the Commission called for less government intervention, in the area of environmental regulation, it was obliged to call for more. The Commission noted that:

Over the long term the task of environmental regulation promises to be immense. We shall have to deal with the growth in the number and size of projects which may adversely affect the environment, with an increasing number of pollutants and hazards, with the irreversible, and sometimes unquantifiable, effects of a growing range of industrial substances and processes, and with the emerging international aspects of our environmental responsibility.

It seems this mantle, at least for the present time has been passed to the provinces.

What has Ontario done during the past few years in the environmental protection area:

- on the positive side, the Minister finally passed the spills bill after years of stalling by the former government
- initiated more prosecutions and conviction rates improved. Ontario went from a low of one conviction in 1972, edged up to 6 convictions in 1978 and in 1986/87 had 138 convictions.
- passed Bill 112 setting out increased fines and innovative sentencing provisions

- taken some initiatives in the acid rain field
- started MISA and now CAP--- but progress on MISA has stalled to a snail's pace.

It appears that since the election and the majority government, things have slowed down.

What has the province promised but failed to deliver on??

1. The application of the environmental assessment act to the private sector. The government has now set up an internal review of EA which means we won't hear anything for quite a while. With the exception of energy from waste projects, major private sector projects are not placed under the same scrutiny as public sector projects.

2. Intervenor funding---- here the government has long stated that it realizes that a policy is a necessity to ensure that the public input which is encouraged under at least some of our environmental legislation will be made meaningful through a process of intervenor funding. Presently, there is just an ad hoc policy of funding which quite frankly is inadequate.

3. Remedial Action Plans--- As part of our commitments under the Great Lakes Water Quality Agreement, remedial action plans are being developed for a number of areas of concern around the Great lakes Basin---- unfortunately, there is no money in budgets to carry out the clean up plan

and the RAP process has become a haphazard exercise in public relations.

4. the blueprint for waste management has never been fully implemented -- we still don't have any superfund legislation at either the federal or provincial level.

5. pesticide reduction was promised by the Premier, but there are no plans to change existing provincial pesticide laws.

6. environmental bill of rights--- while in opposition Stuart Smith was the first to put forward a private members environmental bill of rights. Subsequently Murray Elston made some changes and put forward a number of private members bills. Now Ruth Grier of the NDP has put forward an identical bill to Murray Elstons and the government has not taken the initiative to finally put such a bill into law.

7. Greater public input into regulation-making-- while attempts are being made to issue both policies and regulations in draft form for public comment, there is no statutory opportunity for public notice and comment on regulations and for formal input into the setting of control orders.

8. environment and economy-- while roundtables will be set up--- these are only useful if some action results.

The best way to integrate environment into economic-decision making is to have comprehensive legislation and to prosecute--- that will ensure that people think about the environment before acting.

The two cases that Metro Toronto brought against metal platers dumping illegally into the sewers had probably the most effect on companies especially when imprisonment of corporate officers turned out to be a real possibility.

There are really two aspects to ensuring environmental clean up and prevention of degradation of the environment---- comprehensive and strong legislation and comprehensive enforcement policy. In Ontario, the enforcement side has been greatly tightened up during the past few years, but as we see in the case of the Great Lake dischargers, companies are still being given licences to pollute.

Recent amendments to the Great Lakes Water Quality Agreement reconfirm the commitment of both Canada and the United States to virtual elimination of persistent toxic substances in the Great Lakes and to zero discharge as the ultimate goal. As well the 1986 Great Lakes Toxic Substances Control Agreement adopted by the Great Lakes governors and premiers commits the signatories to reducing toxics in the Great Lakes.

The question is whether the existing regulatory framework is capable of achieving this goal.

The Canadian Environmental Law Research Foundation (CELRF) in a recently released study entitled "Zero Discharge" describes limitations to the existing regulatory regime and offers recommendations for law reform in moving towards this goal.

The authors note that:

- medium specific standards often result in the transfer of pollutants from one medium to another rather than the elimination of the pollutants;
- single medium standards do not take into account the cycling of pollutants through the environment;
- ignore multiple exposure routes on a particular receptor--- eg assume that the receptor will only be exposed to that chemical through that single medium.

CELRF advocates the adoption of a cross-media approach which has been examined by the OECD, US EPA and non-governmental organizations such as the U.S. Conservation Foundation. In a cross media approach regulators ask what is the optimum form of control to reduce risk from a pollutant in the environment as a whole. For persistent toxics, where the goal is virtual elimination, there should be a review of the entire manufacturing process to see if source reduction techniques or recycling can reduce outputs. In Canada, neither source reduction nor waste reduction command much regulatory attention.

CEPA has been claimed by the federal Minister to take a preventive approach, but the legislation neither mentions nor contains any provisions to implement source reduction or even waste reduction. The Act takes a 1970s approach to environmental protection by attempting to manage waste, and not reduce it.

The objective of source and waste reduction should be legislated. Support should be given for the development of technology for substitute products. It is time to stop producing poisons.

Free Trade

However, all these recommendations for reform of Canadian environmental laws must be examined in the framework of the free trade agreement. In our opinion, the free trade deal will have negative impacts on the environment.

With respect to both energy and natural resources, the deal will require us to sell off our resources to the Americans even if there are shortages in Canada.

A specific "Pesticides" schedule (Schedule 7) requires us to work towards "equivalency in risk-benefit assessment."

Since we do not currently have risk benefit assessment legislated in our federal pesticides law, it appears direction in pesticide law will be coming from the United States. This is most unfortunate as risk-benefit assessment

is not an approach we would advocate for the regulation of pesticides.

A consumer society rather than a conservor society will be the wave of the future.

The federal government has claimed that the deal has no environmental impact-- this is just not the case. It is also interesting to note that the National Task Force on Environment and Economy recently recommended that all economic policies and planning documents should be reviewed for environmental consequences and should demonstrate that they are environmentally sound and therefore sustainable. Unfortunately, the actions of the federal government in negotiating the free trade agreement, one of the most important trade deals negotiated in Canadian hisotry, are in direct contradiction with its claim that it has adopted the recommendations of the Task Force on the Environment and Economy. Environmental implications were clearly ignored.

This conference has been called "Time for Action"--- in regard to the free trade deal, it's time to urge our governments to recognize the profound implications of the deal for the Canadian environment and to reconsider their misguided support for it-----in regard to environmental legislation, it is clear that continued reform and updating to our legislation is important to ensure that the environment will be protected.