A BRIEF HISTORY OF ENVIRONMENTAL LAW

Prepared as background information for jounralists

by

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This paper outlines the evolution of environmental law from basic common law rights to comprehensive future planning legislation which can minimize environmental damage.

From the earliest times, people had common law rights to protect themselves and their property from damage. If harm was caused, then the courts could be asked to order the defendant to repair the damage or pay money compensation. If the harm was a continuing one, such as a daily discharge of a noxious substance, then the courts could grant an injunction forbidding the defendant to repeat the behaviour which caused the harm.

Using the early common law remedies presented two problems. Firstly, one usually had the difficult task of proving not only that a defendant had caused the harm but also that he had been negligent; and secondly, if the harm affected the whole community, such as an airborne contaminant might, then no one person was allowed to sue on behalf of all to stop the problem.

The problem of proving negligence was partly solved by the case of Rylands v. Fletcher decided in 1866. In that case, the defendant built a small dam on his property which burst, flooding Mr. Ryland's land. The defendant said that he had not been negligent; he had built the dam carefully and therefore could not be held responsible. The Court, however, rejected his argument and decided that if a person chose to keep a dangerous substances on his property, then he would be liable if the substance escaped and caused damage even if there were no negligence on his part.

The problem of no one person being able to sue was partly solved by the creation of the office of the Attorney General who was empowered to sue to protect the "public interest", and partly by the creation of statutes which made certain polluting activities illegal which meant that persons guilty of such activities were subject to prosecution and fines. In 1895, the federal government passed the Fisheries Act making it illegal to deposit substances in navigable waters which might be deleterious to fish, and the Criminal Code offence of creating a public nuisance could be used in a case where damage occurred to the community at large. By 1900 all jurisdictions had passed public health acts, aimed

During this period, the federal government also started to exercise its jurisdiction. It strengthened the Fisheries Act and the Canada Shipping Act; and passed regulations limiting pulp and paper mill effluent and oil pollution. In an effort to prevent pollution havens in Canada, the federal government passed The Canada Water Act, The Clean Air Act, The Arctic Waters Pollution Prevention Act and The Northern Inland Waters Act.

All of the post war legislation adopted a case by case approach solving specific problems as they arose. By the end of the 1960's, however, many jurisdictions had concluded that management of the environment would be a better solution. Ministries of Environment were created and given comprehensive environmental protection legislation to administer. Statutes such as the British Columbia Pollution Control Act, The Manitoba Clean Environment Act, The Nova Scotia and Ontario Environmental Protection Acts, The Quebec Environmental Quality Act, The New Brunswick Clean Environment Act, The Newfoundland Environment Act and The Northwest Territories Environmental Protection Ordinance were all statutes which offered comprehensive environmental protection.

The importance of these statutes in the development of environmental law is not their promise of comprehensive protection but their centralization of environmental management in one government ministry. In fact, the promise of comprehensive protection has not been fulfilled, nor has the promise that the legislation would be a citizens' "Environmental Bill of Rights". Firstly, it is more appropriate to call the legislation "stack and sewer" legislation than "environmental protection" legislation because it contains no requirement that projects such as hydro-transmission lines, dams, airports, or nuclear waste disposal sites mitigate the environmental effects of their construction and operation. Secondly, the public is excluded from participation in environmental decision-making and has no right to get information about proposed projects. For example, neighbours of a proposed new industry have no right to be notified that the industry is coming to their area and neighbours of a polluting company have no right to be notified of what a pollution inspector finds when he inspects the site. If the government issues a clean up order instead of a stop order, then the clean up order can be kept secret and neighbours have no chance to object or to ask for stricter standards. The standards for permissible limits of contaminants are written by civil servants who based their decisions on data supplied by the industry they are regulating. The public is only informed after the standards are published and in force.

Valley Pipeline Inquiry has set the standard for environmental hearings in the future. Applying its practice of comprehensive consideration of alternatives to other projects with environmental consequences will be the next step in the evolution of environmental law.

While environmental law has evolved from basic common law remedies sought by each individual to comprehensive future oriented planning to minimize environmental harm to the whole community, many problems must be solved if environmental law is to protect community health and wellbeing. Answers are needed to problems of the definition of constitutional jurisdiction between the federal and provincial governments, problems of inter-provincial and international pollution, problems of excessive discretion left to civil servants without public scrutiny and problems presented by statutes which impose penalties and fines so small they are absorbed as a cost of doing business instead of being high enough to provide an incentive to clean up.