Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

LEGAL TOOLS FOR IMPLEMENTING SUSTAINABLE DEVELOPMENT

Publication #176
ISBN# 978-1-77189-553-8

An Address to the University of Western Ontario Faculty of Law Interdisciplinary Conference on

"PLANET OUT OF BALANCE: IS SUSTAINABLE DEVELOPMENT THE SOLUTION"?

prepared by:

Toby Vigod
Counsel

Canadian Environmental Law Association

October 14, 1989

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I. INTRODUCTION

I have been asked to speak about the legal tools for implementing Sustainable Development in Canada -- a daunting task, indeed.

As the Brundtland Commission itself noted:

> " National and international law has traditionally lagged behind events. Today, legal regimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature."[1]

What I propose to do is start with some general comments about sustainable development. Then I will review briefly a history of environmental law before discussing three general areas where the law might aid in implementing the principles contained in the Brundtland Report. These three areas are:

(1) the need for a legal regime that can assess environmental impacts of policy, programs and undertakings before they are put into place (in other words, the strengthening of environmental assessment processes);

(2) the need to establish clear environmental goals, standards and incentives and to examine current legislation, regulations and policy to see whether they are consistent with principles of sustainable development; and

(3) the need for an environmental bill of rights and increased role for the public in environmental decision-making.

I will then conclude with some remarks on the issue of trade and the environment that threatens to undermine environmental initiatives that might be undertaken by national governments.

First, my two cents about sustainable development. Since the release of the Brundtland Report two years ago -- sustainable development has quickly become the new buzzword that is in

danger of becoming meaningless. As a friend of mine said to me early on -- you environmentalists lost this one -- you got the adjective and they got the noun and we all know that nouns are more important than adjectives. On a more serious note, during the past two years I have heard everything from the cutting down of the old growth forest in Temagami to the pavement of agricultural land for development called sustainable development. Is there anything meaningful left? I believe there is.

It is my submission that what the Brundtland Commission did exceptionally well was to set out a comprehensive and well documented account of many of the current environmental problems facing us and to tell us that action must be taken now if we are to avoid extinction. It clearly and forcefully put the case for implementing preventive and anticipatory strategies rather than what have become known as reactive and curative measures. It also stressed the importance of integrating economic and environmental decision making. In fact, the quote in the conference pamphlet says it very succinctly-all policy must be evaluated for its ecological impacts.

However, the Commission, which represented many different viewpoints, was not so clear in its specific recommendations for reform. It coined the term "sustainable development" which it defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It emphasized the essential needs of the world's poor, and recognized the <u>limitations</u> imposed by the environment's ability to meet these needs. It also embraced the principle that governments act as stewards who hold the world's resources in trust for future generations. Yet at the same time it talks about "more rapid economic growth in both industrial and developing countries." This contradiction has been the subject of much recent criticism.

Perhaps one of the best papers I have seen on this issue is one by Dr. Herman Daly - an Alumni Professor of Economics at the Louisiana State University and presently senior economist at the World Bank. He recently spoke in Toronto on the issue of "Sustainable Development - From Concept and Theory Towards Operational Principles."[2] He makes a clear distinction between

growth and development using development to mean qualitative improvement while growth means quantitative increases. He says we must wake up to the existence of scale limits or the greenhouse effect, ozone layer depletion, and acid rain will be just a preview of disasters to come, not in the vague distant future, but in the next generation.

He says we need something like a Plimsoll line to keep the economic scale within the ecological carrying capacity. Within the line we can engage in various allocations but we cannot avoid limiting scale. He sets out four operational principles of sustainability. The first principle at a macro level, is to limit the human scale to a level which is within carrying capability and therefore sustainable. His other three principles try to translate this macro level constraint to a micro level. The second principle maintains that technological progress for sustainable development should be efficiency-increasing rather than throughput-increasing. The third principle applies to renewable resources. These resources should be exploited on a sustained yield basis and not driven to extinction. Specifically this would mean that harvesting rates should not exceed regeneration rates. His fourth principle is that nonrenewable resources should be exploited but at a rate equal to the creation of renewable substitutes.

In his conclusions, Daly poses the question of whether nations seeking sustainable development will be able to operationalize a concept from which such radical principles follow so logically. Or will they, rather than face up to population control, wealth redistribution, and living on income, revert to the cornucopian myth of unlimited growth, rechristened as "sustainable growth"? As he says, it is easier to invent bad oxymorons than to resolve real contradictions.

I have spent these few moments on Dr. Daly's paper as I think it puts squarely the issues that our governments must face. As well, it is my opinion that all the green rhetoric we have been hearing from all levels of government must be turned into action quickly. The warnings at the 1988 Toronto conference on the Changing Atmosphere must not go unheeded. In fact, at a recent UNESCO conference held in September, the members had harsh words for the concept of sustainable development. Dr. Digby McLaren, president of the Royal Society of Canada was

quoted as saying that while the 1987 Brundtland report signalled the limit of Earth's resources, the concept of sustainable growth is simply an excuse to carry on our current practices.[3]

A. Overview

What can the law do? I believe there are a number of initiatives that can translate the recommendations of the Brundtland Report into legislative action.

First a brief look at the history of environmental law. During the past three decades, commentators have identified three discernable yet often overlapping stages in the evolution of environmental legislation at both the provincial and federal levels.[4] Phase I consisted of statutes designed primarily to deal with the pollution of specific media, ie. air, land and water. Sewage and water pollution were often the first areas targeted for legislative attention at the provincial level during the 1950s. At the federal level, between the fall of 1968 and the summer of 1972, in a flurry of legislative activity, nine statutes dealing with the environment were enacted. These included the Clean Air Act and the Motor Vehicle Safety Act among others. While these statutes were well-intentioned, their ex post facto approach was generally ineffective in preventing pollution.

Accordingly, during the second phase, governments in the early 1970's enacted statutes that attempted to take a more comprehensive approach with respect to environmental degradation. An example of this was Ontario's Environmental Protection Act passed in 1971. In addition, staff from existing government departments and agencies were integrated into a new Department of Environment at the federal level and into new Ministries or Departments of the Environment at the provincial level. While these phase II statues represented an improvement over the first generation of environmental legislation, they were still largely reactive rather that preventative in nature.

Phase III consisted of the passage of laws or policies requiring, in certain circumstances, the assessment of the 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 (EARP) was put in place. In Ontario, the Environmental Assessment Act was passed in 1975. However, the effectiveness of the EAA has been undermined by the numerous exemptions for large public sector undertakings and the general non-application of the Act to private sector projects. At the federal level, EARP has been criticized over the years for its ineffectiveness as it is still largely a self-assessment procedure in which federal departments and agencies decide internally on the significance of the environmental impacts of their own undertakings.[5]

Therefore, while these three phases have not been mutually exclusive, they have not adequately protected the environment. Global warming, ozone layer depletion, acid rain, hazardous waste disposal and control of toxic chemicals are problems that endanger not only the local environment and public health, but also the long-term sustainability of the planet.

From the Canadian perspective, some of these environmental problems such as acid rain, or the clean up of the Great Lakes, are bilateral in nature and require the co-ordinated efforts of the American and Canadian governments. Other issues, such as ozone depletion, are truly global in terms of both cause and effect, and therefore require multi-lateral cooperation. However, until the necessary bilateral and international action is undertaken, Canadian legislators must be prepared to exercise leadership in the development and implementation of what I will call the fourth phase of environmental legislation. They should not take the attitude of waiting for international action before taking action nationally, provincially or even municipally. In short, Canada must think globally, but act locally.

The fourth phase of environmental legislation must encompass an anticipate and prevent strategy as outlined by the Brundtland Commission. This preventative approach must address not only

the overt symptoms of environmental problems, but also target the root causes of these problems.

II. ENVIRONMENTAL LAW REFORM

A. Environmental Assessment

One of the recurring themes of the Brundtland Report is the need to anticipate and prevent harm to the environment before it occurs. Thus, the report calls upon governments "to ensure that major new policies, projects and technologies contribute to sustainable development." The Report notes that many countries currently require certain major investments be subject to an environmental impact assessment; however, the Report recommends that the scope of environmental assessment be considerably broadened to policies, programmes, especially major macroeconomic, finance, and sectoral policies that induce significant impacts on the environment.[6]

At the same time, the Report correctly states that there must be greater participation in decisions that affect the environment, particularly since there is a common public interest in ensuring the long-term sustainability of the environment.

These Brundtland recommendations have been strongly endorsed in Canada by the National Task Force on Environment and Economy. In particular, the Task Force recommends that governments must assume a leadership role in the integration of environment and economy and increased public participation by:

- requiring cabinet documents and major government economic development documents to demonstrate that they are both economically and environmentally sound; and

- taking steps to open environmental, resource and economic development policy making and planning to greater public input.[7]

The Task Force also recommends the increased use of environmental impact assessment as a tool for environment-economy integration. Ontario's Environmental Assessment Act is presenting undergoing a review under the Environmental Assessment Program Improvement Project. This process has been underway for over a year and recently the Environmental Assessment Advisory Committee held hearings on Phase I on "so-called" non-controversial amendments to the Act.

However, the recent release of the leaked Ontario government document entitled "Reforming our Land Use and Development System" makes a mockery of Ontario's oft-stated commitment to the principles of sustainable development and the commitments of the National Task Force to more rather than less environmental assessment and public consultation. The document, written under the Treasurer's direction would give a green light to unrestrained growth and would put environmental considerations on the back burner. The document would minimize provincial involvement in land use planning decisions. It would provide that where provincial review does take place it should be consolidated in the Ministry of Municipal Affairs - a ministry without any particular expertise in environmental protection. It would result in important environmental matters being taken out of the hands of the Ministry of the Environment. One of the report's most disturbing aspects is its treatment of agricultural land as "raw land" to be developed. It complains that "in some cases, it can take up to seven years to bring raw land in a large municipality from an agricultural designation to development."[8] Unfortunately, this damn-the-torpedoes approach will accelerate the already rapid destruction of prime agricultural land in Ontario.

In an abuse of the principles of sustainable development, the government recommends that new legislation be developed to consolidate all existing land use and environmental legislation in Ontario into a new act -- called "the Sustainable Development Act". The document, in an amazing example of double speak, says that our existing policy framework reflects an outdated protectionists perspective -- rather than one built on the principle of SUSTAINED development. (A Freudian typo that was corrected in the copies released to interested members of the public a week or so after the document was leaked.)

The document is also a clear and unwarranted attack on the Environmental Assessment Act. It goes so far as to suggest that strengthened environmental regulations under the MISA or CAP programs could eliminate the need for Environmental Assessment over the long term. This statement reveals a fundamental misapprehension of the difference between remedial legislation or end - of - pipe programs which MISA and CAP are, and environmental assessment which is intended to identify and mitigate environmental impacts before they arise. The report also suggests that the EA Act should be amended to only apply to designated projects and further that the definition of environment be changed to only include the "physical, natural environment". These latter recommendations would represent a step backward and would gut the environmental assessment process.

Thirteen of Ontario's major environmental groups have written to Premier Peterson asking that he confirm the government's commitment to rigorous environmental assessment and that the mandate of EAPIP be clarified as the legitimate vehicle for the review of environmental assessment in Ontario. While we do not have anything official in writing, we understand that a letter will be forthcoming indicating that EAPIP will be the process that is examining the Environmental Assessment Act.

The prognosis for environmental assessment reform at the federal level is uncertain at this point. The federal government's environmental assessment review process currently remains on a non-statutory basis, and its deficiencies have been roundly criticized by a number of players and acknowledged by the government itself. There is no comprehensive definition of environment, no requirements that alternatives be examined and no requirement for public hearings.

While the Rafferty Dam decision of the Federal Court[9] indicated that the EARP Guidelines Order was mandatory, as we have seen from subsequent events, compliance can be rather perfunctory and no public hearing will take place. The need for reform is clear. It is expected that draft legislation may be issued later this fall. What has to be ensured is that the existing process is

significantly reformed before it becomes law. Unfortunately, none of the mega-projects announced during the last federal election will be undergoing a thorough review.

B. Environmental Standards, Regulations, and Incentives

To date, the battle against environmental degradation and resource depletion has been undermined by the lack of quantitative governmental objectives, and the proliferation of non-enforceable environmental guidelines. In this regard, the Brundtland Commission recommended that "national governments should establish clear environmental goals and enforce environmental laws, regulations, incentives and standards...[that] give priority to public health problems associated with industrial pollution and hazardous wastes." More importantly, the Report states that these regulations and standards must apply to a variety of environmental concerns:

> " The regulations and standards should govern such matters as air and water pollution, waste management, occupational health and safety of workers, energy and resource efficiency of products or processes, and the manufacture, marketing, use, transport, and disposal of toxic substances. This should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms."[10]

This comprehensive regulatory approach is necessary since there are limits to what society can expect industries to undertake voluntarily when they are in competition with other industries. While the government may want to deregulate in other areas, even the Macdonald Commission, a number of years ago, supported an active federal role in environmental protection and stated that it was obliged to call for more regulation in that area.[11]

Financial incentives in the form of subsidies can also be used to induce industry to invest in pollution abatement equipment; the Brundtland Report, however, argues that subsidies should be avoided as they run counter to the "Polluter Pays Principle" endorsed by many countries. Thus, the Brundtland Report recommends that other forms of financial incentives be used by governments:

> " Energy and water pricing policies, for example, can push industries to consume less. Product redesign and technological innovations leading to safer products, more efficient processes, and recycling of raw materials can also be promoted by a more effective, integrated use of economic incentives and disincentives, such as investment tax breaks, low-interest loans, depreciation allowances, pollution or waste charges and non-compliance fees."[12]

In Canada, environmentalists have often proposed various initiatives that would give effect to these Brundtland recommendations. For example, Canadians presently lack enforceable standards relating to drinking water quality, although certain water quality policies and guidelines for certain substances exist at both the federal and provincial level. Thus, environmental groups have lobbied for the enactment of a Safe Drinking Water Act, largely because current legislation controlling water pollution at source has not been effective in preventing the continued degradation of Canada's water resources.[13]

While we do have some standards at the provincial level, we have often seen a piecemeal approach to standard setting. Traditionally, we have always dealt with air, water and land pollution separately. However, in the same way we learned that tall stacks are not the answer to air pollution -- often going after air or water pollution in isolation may lead to increased pollution in the media not tackled.

The principle environmentalists have been urging the government to adopt is that presently enshrined in the Great Lakes Water Quality Agreement-- that is the virtual elimination of persistent toxic substances with zero discharge as the ultimate goal. We have been urging the adoption of a cross-media approach-one that asks 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.

Reduction at source as a general principle can be applied to a number of environmental issues.

For example, many groups have called upon the government to enact legislation that would reduce the amount of packaging waste, which now accounts for 30% by weight and 50% by volume of the municipal waste stream.

While the Toronto conference on the Changing Atmosphere called for a target of 20% reduction of 1988 CO2 levels by 2005 as an initial step towards the longer term goal of 50% reduction[14] -- we have yet to have any firm commitments by our governments to aggressively pursue this initial goal. A 20% reduction by 2005 may not even do the trick. Energy efficiency is key yet at the federal level, we have seen budgets for research cut drastically and agreements to finance enormously expensive megaprojects without any environmental assessment. Canada can play a leadership role hear by adopting the Toronto conference target immediately.

We must also analyze our present legislation, regulations and policies to see if they are sustainable. In an excellent address to the Council of Provincial Energy Ministers in august 1989, Jim McNeil, former secretary to the Brundtland Commission raised the issue of Canada's energy subsidies.[15] He noted that these subsidies promote the very opposite of what is needed for a sustainable energy future. As he stated it would make little sense to recommend some of the Federal/Provincial Task Force's recommendations to reduce CO2, if at the same time we continue with massive subsidies to megaprojects that will increase fossil fuel production and thereby accelerate global warming.

Another area that needs attention is agriculture. If we are to move towards sustainable agriculture we need to look at government programs that take us in the opposite direction. While on the one hand we can say that we must drastically reduce our pesticides use--- we must examine for example, government grading regulations which reinforce the notion that cosmetic perfection of our fruits and vegetables equals nutritional quality and support programs that encourage the use of pesticides in production systems. As well crop insurance programs may be a barrier since one requirement for eligibility is "good management". A farmer who does not use pesticides and fertilizers may not be considered a good manager and may be denied coverage.

This could easily be remedied by broadening the concept of "good management", adopting a national soil conservation policy and establishing a national organic agriculture certification program.[16]

Finally, in regard to forestry, the concept of sustained yield is well known and is written right into Ontario's Crown Timber Act.[17] Quite simply, it means one should not cut down more trees than one plants. However, in practice this does not always happen, Replants on clear cut land may not be successful, we may not be replacing what we cut with the same quality -- in other words, in practice we may not really be operating in a sustainable fashion.

This type of analysis must be done in each sector. Our current laws, regulations and policies should be examined on the basis of whether they are sustainable and then where necessary, new instruments put in place to meet defined goals against which we can measure our progress.

C. Environmental Bill of Rights

The Brundtland Report has urged governments to take steps to reformulate their legislation in order to recognize the rights and responsibilities of citizens and states regarding sustainable development. In particular, the Report states that governments must recognize not only their responsibility in ensuring a viable environment for present and future generations, but they must also recognize certain other environmental rights by citizens:

> "... progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected."[18]

In the Final Report on Legal Principles for Environmental Protection and Sustainable Development written by an Experts Group on Environmental Law for the Brundtland

Commission, the group recommends a set of general principles concerning natural resources and environmental interferences. Article 1 would provide that "all human beings have the fundamental right to an environment adequate for their health and well-being."[19]

In Canada, environmentalists have lobbied governments since the early 1970's to promulgate an Environmental Bill of Rights that would entrench and expand procedural and substantive rights in an environmental context. Currently, neither the federal or Ontario government have legally recognized the right to clean air, water or land. As well, governments are not obliged to enforce present laws. Unfortunately we never did get a right to a clean environment in the Canadian constitution.

Key aspects of an environmental bill of rights would include:

- the right to a healthy environment;
- the right for citizens to take polluters to court for actual or apprehended environmental harm, and to take the government to court for non-enforcement of environmental laws;
- the right for citizens to participate in regulation-making and permit-issuing process;
- the right to increased access to environmental information.

In Ontario, the Liberals, while in opposition, and the NDP have introduced several private member's bills that would have established a provincial environmental bill of rights. However, none of these bills have progressed much beyond first or second reading stage. The most recent attempt was Ruth Grier's Bill 12 which received second reading at the end of June 1989. However, the bill now sits in limbo at Committee of the Whole House and while the government for a while talked about introducing their own legislation, it is my understanding that cabinet does not want to proceed.

One encouraging development has been the release of the long-awaited report of the Ontario Law Reform Commission on the law of standing.[20] The Commission recommends the introduction of an Access to Justice Act that would provide for eliminating a number of present

barriers to standing. This report is very significant in the environmental area as citizens are often denied access to the courts in public nuisance cases. The Commission also recommends changes to the costs rules that would result in litigants in public interest cases not facing the spectre of paying the other side's costs should they lose in Court. The government has also launched another initiative to reform our class action rules. CELA will be urging the government to move quickly to implement the OLRC recommendations.

At the federal level, there had been a lot of hype about the Canadian Environmental Protection Act being a bill of rights -- unfortunately none of the key elements are found in that bill and while there was discussion about bill of rights provisions during the public consultation, there is no indication that the federal government will implement such a bill.

III. TRADE AND ENVIRONMENT

As stated a number of times, Canadian governments have clearly committed themselves to the principles of sustainable development. The task for these governments is now to translate that commitment into effective legislative and non-legislative initiatives that contribute to the long-term sustainability of the local and global environment.

However, the wild card in this matter is the free trade deal and upcoming GATT negotiations. During the last federal election, over 90 environmental groups from across the country assailed the deal for its profound and adverse implications for the Canadian environment.[21] In particular, we argued that the deal would fundamentally undermine the principles of sustainable development as espoused by the Brundtland Report. One of our major concerns was that Canada's ability to manage resources in a sustainable manner would be constrained by guaranteed US access to a proportionate share of Canadian resources, even in times of shortage. We further noted that Canadian subsidies and financial incentives designed to encourage environmental and resource management objectives are vulnerable to attack as non-tariff barriers to trade; only oil and gas exploration subsidies have been specifically preserved under the deal.

Unfortunately, our worst fears are coming true. Our energy resources are being exploited for the American market and in the future Canadians may have to develop more resources in the environmentally sensitive north while our cheaper, more excessible supplies of for example, natural gas are tied up in contracts with the United States. These new energy mega-projects intended to serve US markets will also significantly increase carbon emissions to the atmosphere.

At the same time, negotiations proceed in regard to GATT. These negotiations aimed at reducing tariffs will have a significant impact on environmental protection laws. A recent decision of the Court of Justice of the European Communities illustrates one type of contradiction that can arise between the objective of liberalized trade on the one hand and environmental protection on the other. The court held that a Danish environmental law requiring all beer and soft drinks to be sold in returnable containers was a non-tariff barrier. This was so even though the regulation was non-discriminatory and "highly effective."[22] This case sets a dangerous precedent and shows the need to amend the GATT rules to allow nations to take measures to protect the environment.[23]

IV. CONCLUSIONS

In summary, the Brundtland Commission clearly outlined the case for governments to act in response to the environmental crisis facing us. Sustainable development can be a meaningful concept as long as it is understood that there is a Plimsoll line in the real world. Legal tools for implementing sustainable development are necessary and regulation will continue to be one of the most effective means of steering a course towards an improved environment. I have tried to outline three general areas in my paper today. The challenge is for governments to put the green rhetoric into action.

V. ENDNOTES

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