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Environmental Law Association

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LEGAL WEAPONS FOR ENVIRONMENTAL QUALITY

A revised version of a paper presented at the Annual Meeting of the Federation of Ontario Naturalists at Sarnia, April 29, 1972

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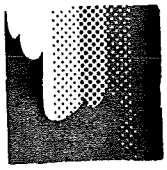

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By virtue of our Canadian citizenship we all enjoy the right to a healthy and attractive environment, don't we?

We all not only think we want, but that we have, a right to clean air, pure water, freedom from excessive noise and the right to enjoyment of scenic, historic, natural and aesthetic values, don't we?

We may think and wish all we like, but let me tell you frankly that if I was asked the question - "Ontario, is there any place you'd rather be?" - as an environmental lawyer I'd have to answer yes: Manitoba, British Columbia, or even yes, almost all of the various states of America.

The reason: Ontarians possess practically no environmental rights, and citizens in Manitoba, British Columbia and various American states really do have such rights.

In Ontario today we have tremendous gaps in our environmental planning legislation. To say we have an "Environmental Bill of Rights", as Premier Bill Davis told us before the last election when he brought in the Environmental Protection Act, is false and misleading advertising. Bill Davis sold us a bill of goods on the environment.

Unilaterally and in secret, and without guidelines from the legislature, civil servants, who are usually on good terms with industry (and often need industry expertise) set the maximum levels of pollution allowable in the Province.

When there is no opportunity given to the public to consider and comment on such maximum effluent levels before they are set, the public is left to wonder what values the government is protecting with its regulations.

The impression is easily gained that the levels are those which industry can live with but are not levels which protect the environment.

Further, there is no obligation on the Environment Ministry civil servants to establish regulations covering pollution of any specific types. Whether something is subject to the scrutiny of the Environment Ministry is strictly a matter again for the civil servant. And once maximum levels are established, there is no provision for their review even if they were initially deficient or if new technology renders such standards obsolete.

Assuming there are regulations covering maximum effluent levels (as of course there are in regard to certain specific contaminants), the next step in the Environment Ministry's scheme is for an industry to apply for a certificate of approval from the Ministry in order to pollute to the levels allowed by the regulations.

Such applications for a certificate of approval are strictly a cosy secret process between the applicant and the government department. No notice of the application for the certificate is given to other industries or residents in the area who will be affected by the applicants' proposed operation. And there is no duty on the Environment Ministry to investigate local conditions. If the applicant proposes using equipment that will bring emissions within the regulations (remember regulations are set in secret and are province-wide in application) the Environment Ministry feels itself bound to issue a certificate of approval. The maximum permissible levels of air pollution may be tolerable for Hamilton or Sarnia, but what about Muskoka

or the Madawaska Valley?

If the Environment Ministry decides to impose a term on obtaining the certificate of approval that the applicant does not like, the applicant has an appeal - but still there is no right for anyone in the area to be notified about the appeal or appear to argue against the application.

And who appoints the Appeal Body? The same government that wrote the regulations. And what criteria is the Appeal Body to use? Again, there are no guidelines.

Another problem with the Environment Ministry is lack of co-ordination. For example, an industry might apply to the Air Management Branch for approval of its planned abatement equipment for air pollution. But that Branch has no concern whether the afterburners which constitute the abatement equipment will create a noise problem. Even if such abatement equipment would be very noisy and disturb others in the surrounding area there now exist no regulations in Ontario for the Ministry to apply. And even if such regulations with regard to noise did exist, since the Environment Ministry has no need to consult anyone else in the area, and thus can overlook local conditions, it might easily be possible for the Environment Ministry Air Management Branch to licence noisy abatement equipment which would prove a noise problem to people that the Air Management Branch did not even know existed.

These are some aspects of Ontario's supposedly fantastic Environmental Protection Legislation.

If you own a summer home, a farm, operate a bird sanctuary or have

a wildlife preserve on your property, a charcoal factory can be built next door to you, or a hydro-line can be run right by it, and you have no right to have any notice of the new development and no right to object to it. You will likely first hear about it when the bulldozers start construction.

The very fact you are there, the fact that there may be no reason for the charcoal factory of hydro line in the first place, or that better sites - less costly environmentally speaking - may exist, are arguments that you are not given any opportunity to present. New developments are considered to be strictly a matter for the developer and the government.

Such a situation is of course disastrous in parts of the province where there is no zoning. And what about government projects or government agency undertakings : decisions, for example, to allow logging or mining in provincial parks, or to flood one quarter of the Province of Quebec and displace 6,000 Indians?

Who polices the government? Nothing in present legislation, either Ontario or federal, requires governments to prepare studies telling the people (or even telling themselves for their own peace of mind) the environmental impact likely to occur as a result of the project, or to consider the very necessity for the project and possible alternatives. Even if the government department does prepare studies on environmental impact, there is no duty on the government to make them public and only if the government is put under great pressure, as it has been at the federal level with the Pickering Airport, will those studies become public.

When one government agency is breaking an environmental law is another government agency - the Environment Ministry - going to take the violator to court?

These are some of the critical deficiencies in Ontario's environmental planning legislation - deficiencies which will give weight to the first statements - that we have no environmental planning rights in Ontario.

We also have few environmental rights when it comes to cleaning up existing pollution. Rather, we have no right to ensure that the government departments which we are paying to ensure there is no pollution act in a responsive and responsible manner.

At the moment there is no government agency or official responsible for noise abatement. Only at the municipal level, where building inspectors are concerned with noise from construction sites, do we find a government concerned with a noise abatement programme.

And except as incidental to garbage collection or the cleaning of highways, there is no government agency in Ontario charged with the responsibility of enforcing anti-litter laws and of encouraging the use of receptacles and systems which do not contribute to either noise (through clanking of cans and pick-up trucks) or litter problems.

Where such abatement programmes do exist, as in the Air Management Branch and the former Ontario Water Resources Commission, there are several reasons why such programmes are not effective insofar as many citizens, environmental groups and industries are concerned.

First, too often the very existence of a government agency equipped to deal with a problem is hidden by a lack of imaginative public relations. People do simply not know the agencies exist. The agencies apparently believe

advertising their existence will either seem frivolous or will inundate them with petty problems.

Secondly, assuming a citizen discovers the existence and the phone number of the remedial government agency, too often the first and the last contact the complainant has with the agency is the phone call in which he makes known his problem. His name and address are noted, and in the majority of circumstances that is the last the complainant will hear from the department. Further, insufficient numbers of inspectors to handle even those that do find the right phone number often results in insufficient time to find out further details from the complainant. Often the cause of a complaint will continue unabated for months and no explanation is given the complainant. Government inspectors are not equipped and rarely respond immediately to problem situations, and when they visit a site too often they miss the offending plant or source at its worst.

Rarely is any effort made to enlist the complainant in recording observations or to obtain similar recordings from other residents who may be affected.

Thirdly, when and if a finding is made by a government inspector indicating a violation of environmental legislation, further problems can appear. The government agency can co-operate in obtaining abatement with the polluter to such an extent that those in the area surrounding the source will remain adversely affected for months while the polluter is playing a brinksmanship game with the government agency.

A paucity of prosecutions by such agencies result in this game of

brinksmanship. The problem is further aggravated by the fact that even when prosecutions are taken by such agencies, not enough counts or charges are laid so as to make the fines meaningful to the polluter. While this programme of co-operation is being executed, the government agencies rarely reveal to those who originated the complaints any details of their efforts - the fact they did investigate, the fact a violation was found to exist, and that deadlines for change have been set.

Abatement agencies in Ontario legally, and in fact, operate in a manner which shows they are not responsible to anyone but those to whom they are responsible for regulating.

No one in Ontario is going to have true environmental rights until such disastrous gaps are closed in Ontario's legislation, until we have set up, not government department or agencies, but independent commissions to administer our environmental laws and to do some realistic environmental planning.

You and I and groups such as the Federation of Ontario Naturalists must tell this government to stop selling us a bill of goods and give us some meaningful environmental rights and to do some realistic environmental planning.

Yet, political lobbying can often fall on deaf ears, especially when governments win landslide victories.

Until we get these inadequacies remedied what can we do to ensure environmental quality? One answer is to fight the battle in the courts. The employment of legal remedies is a vital and indispensable weapon in the fight for environmental quality.

Private actions through the courts, either against the acts of government agencies or in pursuit of private redress, have been the hallmark of our political system. Enlightened legislation can be encouraged and often has been preceded by a long history of litigation. Yet when the Ontario government last summer brought in its Environmental Protection Bill, the government tried to remove many rights of the citizen to go to court on environmental issues. The government's attitude was "trust us". After much lobbying, and a sixty page brief by the Canadian Environmental Law Research Foundation, the government decided to allow individuals to maintain private prosecutions and take polluters to court whenever they break the law.

So while we and you are working on the government to re-write its environmental legislation, if we want to assert rights to a healthy and attractive environment, we must and can act in court without relying on the administrative agencies, or at least have the courts act to force the agencies to perform their supposed role.

And even when, if ever, we do get these defects remedied, private litigation still should not be forgotten as a check on government activities in the tradition of the use of the courts as a safeguard for individual rights.

Alright, you have been convinced. You want to take legal action. The government has failed to act, or gives you some unreasonable excuse. Read closely this summary of the law and on the environment - or -

"You too can prosecute polluters and be the thorn in the side of the Environment Ministry."

COMMON LAW - CIVIL COURT REMEDIES - Action for Damages and Injunction

1. Nuisance - can be applied to any type of pollution: air, sound, land (garbage).

You have a right to sue for past damages and an injunction to stop future damages if you can establish someone is causing you a nuisance - that is, anything that interferes with the enjoyment of your property, whether it is rented or owned.

2. Riparian Rights - for water pollution.

This common law doctrine protects anyone who owns or rents property on a lake or regularly flowing stream. That person is a "riparian proprietor" and as such he has the right to the continued flow of the water to and from his property, in its natural state, sensiby undiminished in either quantity or quality. This right is absolute, subject only to the right of upper owners to use as much as is reasonably necessary for domestic and household use.

If you don't think such things can be useful look at the Sudbury Regatta case last summer.

Now of course there are some difficulties with the common law civil aourt system:

1. Expense
2. Delay
3. "Public" Nuisance - such an action can only be brought if you can prove you are suffering harm of a different degree and kind than your

neighbours - and in urban settings this is highly unlikely. Here the theory is the Attorney General will act in "a matter of public nuisance" - but a highly illustory protection it is, as the Attorney General is subject to the same political influences as the Environment Ministry.

However, the difficulties of expense and delay that are common to civil law suits can be overcome through private prosecutions, which are speedy, inexpensive and, most important, can be brought by any citizen, whether or not he lives in the area where the pollution is - that is whether or not he is suffering special harm. Just like the policeman who lays charges with regard to any incident he investigates - after all he doesn't suffer personally from the criminal acts - any citizen can do likewise in our criminal courts to enforce statutory prohibitions.

CRIMINAL PROSECUTIONS

We are talking about criminal courts - where the result of the court proceeding is not the recovery of compensation or an injunction order to stop future illegal conduct - but the imposition of a fine or jail term on a party who is breaking a statute regulation or municipal by-law.

Of course it is the government environment Ministry that prima facie ought to be enforcing the various statutes and regulations - but there is no comprehensive jurisdiction in the Environment Ministry to administer all laws concerning the environment, and, for reasons mentioned earlier, the Environment Ministry often fails to act.

We come to the right of the private citizen to prosecute. Let me

make it clear that government agencies, and indeed the police, have no more right to lay and prosecute charges for breach of statute than any private citizen. Indeed, every citizen has an equal ability with the police to obtain a search warrant and to enter thereunder upon private property to obtain evidence of an alleged offence and to remove such evidence for use at trial.

Thus when you have reasonable grounds to believe a statute is being breached, and the Environment Ministry refuses to act, you have the right, if not the duty, to prosecute the offender.

What are some of the more interesting laws available for private enforcement? A quick glance through Ontario laws, federal statutes and municipal by-laws provides some interesting potential:

Air Pollution

Section 6 of the Air Pollution Regulations makes it an offence to cause or permit the emission of any air contaminant to such extent or degree as may cause discomfort to persons (so watch out smokers), or which causes loss of enjoyment of normal use of property.

Section 8 of the same Regulations makes it an offence to cause or permit the emission of anything but just about pure white smoke.

Section 14 of the Environmental Protection Act makes it an offence to emit anything into the natural environment that is likely to impair the quality of the natural environment for any use that can be made of it, or which is likely to cause harm or material discomfort to any person or that is likely to injure property or plant or animal life.

Noise Pollution

Noise is also a contaminant to which Section 14 of the Environmental Protection Act applies. You can also look at municipal by-laws such as the one in Toronto which makes it an offence for any person to ring any bell, blow or sound any horn or cause the same to be rung, blown or sounded, shout or create, cause or permit any unnecessary noise which disturbs the inhabitants.

Or we can look at the Highway Traffic Act which provides that it is an offence for which the owner of the vehicle can be fined, not just the driver, to have a motor vehicle that is not equipped with a muffler in good working order and in constant operation, so as to prevent excessive or unusual noise and excessive smoke; and "no person shall use a muffler cut-out, straight exhaust, gutted muffler, hollywood muffler, by-pass or similar device upon a motor vehicle."

Waste and Litter

The Environmental Protection Act, Section 65, provides that no person shall abandon any material in a place, manner, receptable or wrapping such that it is reasonably likely that the material will become litter.

Various municipal by-laws make littering of a private or public property an offence.

And the Highway Traffic Act provides that littering is an offence for which the owner of a motor vehicle can be charged.

Water Pollution

Here there are various statutory provisions, including those under the Environmental Protection Act and the federal Fisheries Act, which make it an offence to deposit or permit the deposit of a deleterious substance of any type in water "frequented by fish" or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water. A $5,000 fine is provided as a maximum for breaching that statute. A deleterious substance is defined as any substance that if added to any water would degrade or alter or form part of a process of degradation or alteration of the quality of the water so that it is renedered deleterious to fish or to the use by man of fish that frequent that water, etc.

Municipal by-laws make it an offence to dump chemicals into sewers and the Migratory Birds Convention Act, a federal statute, makes it an offence to dump substances harmful to migratory birds in waters likely to be frequented by migratory birds. Any fines recovered under that act are split between the government and the person prosecuting.

Criminal Code of Canada Provisions

The Criminal Code is not a useful tool for the average citizen but it does have some interesting provisions with regard to environmental considerations. For example, "common nuisance" is an indictable offence and imprisonment for two years can result for anyone who does an unlawful act or fails to discharge a legal duty and thereby endangers the lives, safety,

health, property or comfort of the public.

"Mischief" is also a criminal offence. Any person who willfully renders property dangerous, useless, inoperative or ineffective or obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, is committing an act of "mischief". A maximum penalty of life imprisonment can be imposed for anyone who commits mischief that causes actual danger to life. If a person commits mischief in relation to public property the maximum is fourteen years in jail, and if it's in regard to private property, a maximum of five years.

I've only mentioned some of the "environmental" laws having effect in Ontario. They are outlined in considerably more detail in our book Environment on Trial: A Citizen's Guide to Ontario Environmental Law. The scope of these, combined with the hundreds of years old common-law remedies described earlier, gives no credence to those politicians who say we need more anti-pollution laws. For present pollution sources, we have an ample armoury. The problem is to get those ammunitions used.

Even with private prosecutions there are difficulties - even though the only thing necessary to get a private prosecution rolling is for a citizen to swear a statement under oath before a Justice of the Peace that on a certain day at a certain place he saw a certain company emit black smoke or unnecessary noise, etc. He would then have to come back to court one or two times and testify and that would be the extent of the case except in some cases where expert testimony would be needed.

What is really required to make private prosecutions and even civil suits easier to bring and win are citizen resource centres to provide scientific

and legal assistance. That is why the Canadian Environmental Law Association was set up. Such centres might be provided by government departments but this suggestion is a bit naive. The government more likely and more realistically ought to provide funds to organizations such as the Canadian Environmental Law Association until they, through private support, can be self-sustaining. Such centres, equipped with laboratory and scientific facilities for testing, staffed by expert scientists and engineers and lawyers, and funded to help citizens where necessary get into court to protect the environment, would do much to ensure the protection and enhancement of our environmental rights pending the re-writing of environmental laws to provide for public input and to drastically restrict the discretion of environmental agencies so that they are required to act in the public interest.

There is a further category of court action that should be applied to the environment and which unfortunately is very ineffective given present legislation. That is the ability of courts to review administrative agency action or inaction, to force these agencies to carry out statutory duties or to review unlawful decision. The problem is that present laws give so much discretion to agencies, without any guidelines from the legislators, that a failure by such agencies to make regulations prohibiting contaminants from being emitted into the environment or a laxity in enforcing them will simply not be reviewed by our courts, because they are loath to interfere where governments have imposed no duties on these civil servants to act.

Administrative law review will not be of any significant use to private citizens until legislation imposes some guidelines on these administrative agencies and gives some mandatory duties to civil servants.

CONCLUSION

I. Ontario environmental planning legislation needs the following fundamental reforms:

1. Public hearings when maximum effluent levels are being set.

2. A requirement for environmental impact statements to be filed by any private person or government agency undertaking projects likely to significantly affect the environment well in advance of start-up, outlining possible environmental changes and alternatives. These statements would be linked with public hearing procedures where there is opposition to the project.

3. Concrete guidelines from the legislature against which environmental agency action (or lack thereof) can be reviewed by an environmental ombudsman and the courts, and drastic restriction on environmental agency discretion.

4. Guaranteed access by the public to governmental information and expertise, removal of the civil service secrecy oath, and the provision for financial support to assist those persons appearing in the public interest before environmental tribunals.

5. An Environmental Ombudsman, whether one person or an Environmental Council, to advise on policy, demand review of Environment Ministry decisions, report periodically on the state of the provincial

environment, and act as a watchdog on environmental abuse.

6. Procedural Law Reforms would also be assured:

(a) Any citizen would be allowed to sue

(i) in the civil courts in regard to a public nuisance; and

(ii) to obtain an injunction to stop any project or environmental proceeding not conducted according to law.

(b) The threat of having to pay costs where a person is suing for public nuisance or law enforcement would be removed, except where the suit is completely frivolous.

(c) The requirement that the plaintiff give an undertaking to pay damages to obtain a temporary injunction would be eliminated, or the amount limited to one which the ordinary citizen can afford, such as $500.

(d) If a plaintiff or prosecutor shows, in a suit or private prosecution, that there are probable grounds to support his case, the burden of proof would shift to the defendant or accused. That is, it would be up to him to show that the contaminant or other harmful activity was not the result of his actions.

Too often the private citizen does not have the resources to obtain evidence that the government possesses. It is very difficult for him to obtian a search warrant; he cannot inspect a polluter's property and equipment the way government inspectors often can; he does not have technical knowledge nor the money to hire a technical expert. All he knows, for example, is that his children are being

poisoned by lead. It should be up to the defendant or accused to show that the contaminant or degrading activity does not emanate from his particular operation. This appears to be the effect of Section 3(1) of the Michigan EPA.

(e) All environmental laws would be amended so that once the plaintiff or prosecutor has demonstrated that environmental harm has occurred or is likely to occur, the defendant or accused should prevail only if he proves that there is "no feasible alternative to (his) conduct and that such conduct is consistent with the promotion of the public health, safety, and welfare", as in Michigan.

II. Until such reforms take place, environmental rights must be protected, and this can be done by private citizens and environmental groups asserting rights in court:

- Present laws provide ample ammunition for private prosecutions against present polluters, and these should be used frequently.
- Given more resources in terms of scientific skills and legal talents, present anti-pollution and zoning laws can and should be made to force the government to undertake vital environmental planning.

The Canadian Environmental Law Association was established to bring such scientific and legal skills to bear on these problems, to assist individuals and conservation groups who wish to act to protect the environment. CELA ought to receive some government assistance,

in the form of grants and a change in the federal Income Tax Act to make it clear that such activities are clearly charitable. Legal Aid, which, even in Ontario does not cover these situations, should.

III. Even when and if we achieve decent environmental planning legislation, it will always be necessary for private citizen initiatives to prevent abuse of power or to meet unforeseen situations. But until that time, and certainly right now, it is critical to use courts to achieve what the government is failing to provide, the right to a healthy and attractive environment.