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ONTARIO'S ENVIRONMENTAL BILL OF RIGHTS: ENHANCING ACCESS TO ENVIRONMENTAL JUSTICE

Publication# 214
ISBN# 978-1-77189-516-3

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October 1992

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1. INTRODUCTION

Generally, civil causes of action (i.e. nuisance, negligence, trespass, riparian rights, strict liability) have evolved to permit persons to seek compensation for personal harm, property damage, or pecuniary loss caused by tortious conduct. However, it has been exceptionally difficult for public interest litigants to use these causes of action to protect air, land and water from contamination or degradation. For example, the law of standing, the public nuisance rule, and existing cost rules have presented substantial barriers to public interest environmental litigation. These barriers have prompted several commentators to question the utility of existing civil causes of action to protect the environment.[1]

Ontario's proposed Environmental Bill of Rights[2] (EBR) contains several provisions which are designed to overcome the procedural and substantive hurdles to public interest environmental litigation. In particular, the

EBR creates a new civil cause of action to protect public resources from significant harm, and reforms the public nuisance rule in order to enhance access to environmental justice.

The purpose of this article is threefold: to briefly review the rationale for public interest environmental litigation; to discuss the approaches undertaken in other jurisdictions to facilitate public interest environmental litigation; and to describe the provisions of the EBR which provide enhanced access to Ontario's courts in order to protect the environment.

2. RATIONALE FOR PUBLIC INTEREST ENVIRONMENTAL LITIGATION

Public interest environmental litigants are individuals or groups who bring legal action to protect the environment where they have not suffered any personal, proprietary or pecuniary harm. This is not to suggest that public interest environmental litigation should be undertaken for its own sake:

> There is no intention to imply that litigation is a "good" or "successful" activity which should be pursued as an end in itself... For many groups, litigation has been a very costly and negative experience. Nevertheless, it is fair to suggest that litigation is a potentially useful tool, if applied with skill, in appropriate cases, provided that the groups has sufficient financial and legal resources to fight the inevitably tough opposition. Hence, the presence or absence of public interest litigation in the environmental field in Canada can have an important impact, not only on specific environmental decisions made but also on the bureaucratic and corporate atmosphere in which such decisions are considered.[3]

Public interest environmental litigation can be used to advance various environmental objectives,[4] including:

- stopping or delaying environmentally harmful development or projects;[5]

- ensuring governmental compliance with regulatory requirements (i.e. environmental assessment laws);[6] and

- educating and motivating governments and citizens in relation to necessary law and policy reforms.[7]

Despite the benefits associated with public interest environmental litigation, there are significant hurdles to such litigation in Ontario. For example, a number of public interest environmental lawsuits have been dismissed or discouraged as a result of the law of standing.[8] In addition, the law and practice relating to costs have been identified as a "formidable barrier" to public interest litigation.[9] Accordingly, the EBR Task Force was directed to develop a bill which included the following policy objectives and principles:

- the public's right to a healthy environment; and

- the enforcement of this right through improved access to the courts and/or tribunals, including an enhanced right to sue polluters.[10]

These objectives necessarily required the EBR Task Force to examine a variety of legal tools, models and approaches, including those used in other jurisdictions.

3. APPROACHES IN OTHER JURISDICTIONS

(A) Canada

A number of other jurisdictions in Canada have passed or proposed laws which provide opportunities for the public to go to court to restrain polluting activities. For example, the Yukon's Environment Act[11] provides a legal mechanism to enforce Yukon residents' "right to a healthful natural environment". This mechanism may be summarized as follows:

- any resident may commence an action in the Supreme Court where he or she has reasonable grounds to believe that another person has impaired or is likely to impair the natural

environment, or that the government has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment;

- defences to the action include statutory authority, and the lack of a feasible and prudent alternative to the activity;

- the plaintiff does not have to establish any pecuniary or proprietary right or interest, or any greater or different right, harm or interest than any other person;

- a copy of the writ of summons must be served upon the Minister responsible for the Act, and the Minister may seek to be added as a party to the action; and

- the court is empowered to grant injunctions, grant declarations, award costs, award damages payable to the Minister, order restoration, suspend or cancel permits, or require financial

assurances for the performance of specified actions.

The Northwest Territories' Environmental Rights Act[12] similarly permits residents to commence actions to protect their rights to a healthful environment, and the court is empowered to issue injunctions and to order the defendants to restore the environment. Similar provisions are found in Quebec's Environment Quality Act,[13] and Saskatchewan's proposed Charter of Environmental Rights and Responsibilities.[14]

(B) United States

Many state and federal environmental statutes in the United States permit members of the public to undertake "citizen suits" in order to enforce environmental laws.[15] Because citizen suits permit public law enforcement against alleged polluters, they may be viewed as a supplement to limited government enforcement resources and as a means of enhancing government accountability.

Federal statutes, such as the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and the Toxic Substances Control Act, have substantially similar citizen suit provisions, which may be summarized as follows:

- any person may commence a civil action against any other person (including most government agencies) to enforce regulatory standards or regulations, or may bring an action for mandamus against the Administrator of the Environmental Protection Agency (EPA) to execute any mandatory duties;

- the federal district courts have jurisdiction over such suits, and they may order injunctive or other equitable relief;

- the plaintiff must give notice to the EPA, the respective state agency, and the violator prior to commencing the action, and the Administrator may intervene as of right;

- citizen suits cannot be brought if the Administrator is already diligently prosecuting an action on the same or similar grounds, but the petitioner may intervene in such actions as of right; and

- citizen suit provisions do not exclude a person's other rights under statute or common law to otherwise seek enforcement.[16]

Similarly, in 1970, Michigan enacted the Michigan Environmental Protection Act (MEPA), which was the first state environmental statute to expressly permit citizen suits.[17]

This statute may be summarized as follows:

- any person may bring an action against any other person (including the state and government agencies) for the protection of the air, land water and other natural resources and the public trust therein from pollution, impairment or destruction;

- the plaintiff must show a prima facie case that the defendant's conduct has, or is likely to pollute, impair or destroy the environment, but the defendant can rebut the case by demonstrating that there are no feasible and prudent alternatives consistent with the promotion of public health, safety and welfare; and

- the court may grant temporary or permanent equitable relief, or may impose conditions on the defendant to protect the environment.

It should be noted that despite the sweeping language of MEPA, there has not been a floodgate of citizen actions in Michigan; in fact, in some years, only four cases were commenced.[18]

4. ONTARIO'S ENVIRONMENTAL BILL OF RIGHTS

As noted above, the EBR Task Force was directed to draft a bill which provided enhanced opportunities for Ontario

residents to commence legal actions to protect the environment. The Task Force Report notes that under current law, residents may commence private prosecutions or undertake judicial review applications in respect of environmental matters; however, the Report goes on to discuss the practical and legal limitations of these existing remedies.[19] Accordingly, the Task Force Report unanimously recommends that:

- an Environmental Bill of Rights should increase the public's access to the court where public resources are harmed or could imminently be harmed by someone who is not acting within environmental laws and the government has not taken action; and

- an Environmental Bill of Rights should address the need to reform the public nuisance rule.[20]

Each of these recommendations are reflected in various provisions in the EBR, which are discussed below.

(A) New Cause of Action

The EBR creates a new civil cause of action which allows Ontario residents to sue persons who contaminate or degrade public resources (i.e. air, water, public land, and related natural resources) in contravention of applicable environmental laws, regulations, or instruments (i.e. licences, permits or certificates of approval). In particular, s.41 of the EBR provides that where a person has contravened or is about to contravene an environmental law, regulation or instrument, and where the contravention has caused or will imminently cause significant harm to a public resource of Ontario, then any resident may bring an action in the Ontario Court (General Division) in respect of the harm. The normal civil burden of proof applies to such actions: the plaintiff must prove his or her case on a balance of probabilities.

Before such an action can be commenced, the plaintiff must file a request with the government to investigate the alleged contravention. If the government's response to the request is not received within a reasonable period

of time, or if the government's response is unreasonable, then the plaintiff may proceed with the action. It must be noted that this condition precedent does not apply in two circumstances: first, where the delay involved in filing a request for an investigation would result in significant harm or serious risk of harm to a public resource, and second, where the alleged contravention concerns a federal law, regulation or instrument.

The EBR recognizes three specific defences to such an action: first, that the defendant exercised due diligence; second, that the defendant's conduct was statutorily authorized; and third, that the defendant complied with a reasonable interpretation of its instrument. Other defences available at law are also preserved by the EBR.[22]

The government may be named as a defendant in a s.41 action. However, if the government is not a defendant, then the government must be given notice of the action through service of the statement of claim upon the Attorney General.[23] The plaintiff must also give the general public notice of the action by placing a notice on the electronic "Environmental Registry" established by

the Bill, and by other means ordered by the court. However, the court is empowered to order parties other than the plaintiff to give or fund notice of the action.[24] Similarly, the court is empowered to order any party to give further notice at any stage of the action to ensure fair and adequate representation of the private and public interests at stake in the action.[25]

Given the public interest nature of s.41 claims, the court has been given broad powers to permit the participation of non-parties in the action, but such participation shall be in the manner and on the terms prescribed by the court. This should enable other persons to intervene in the action where appropriate, but the court can limit the scope and nature of the participation.[26]

The court has been empowered to stay or dismiss the action if it is in the public interest to do so. In determining this issue, the court must have regard for the environmental, economic and social concerns arising out of the action. The court may also consider whether the issues raised in the action would be better resolved

by another process; whether there is an adequate government plan to address the public interest concerns; and any other relevant matter.[27] The Task Force contemplates that in appropriate circumstances, the Attorney General may intervene and move for a stay of the action on public interest grounds; however, the Attorney General's position is not binding on the court, which must consider the submissions of all parties before making a decision on the proposed stay.

In a s.41 action where the plaintiff has requested an interlocutory injunction or mandatory order, the defendant may ask the court to order the plaintiff to provide an undertaking to pay damages to the defendant if the pre-trial relief is granted but the action is dismissed at trial. However, the EBR codifies the court's discretion to dispense with this undertaking if the court finds that the action is a test case, raises a novel point, or other special circumstances exist.[28]

If the court finds that the plaintiff is entitled to judgment, the court is empowered to order various remedies, including:

- granting an injunction;

- ordering the parties to negotiate a restoration plan;

- granting declaratory relief;

- making any other orders, including cost orders, that the court considers appropriate.[29]

However, the court cannot award any damages to the plaintiff, nor can the court make an order which is inconsistent with s.2 of the Farm Practices Protection Act,[30] which is intended to protect certain agricultural practices against nuisance claims.[31]

The court has been given broad powers respecting the negotiation and content of restoration plans. In particular, the court shall not order the parties to negotiate a restoration plan where adequate restoration has already been undertaken , or where an adequate restoration plan has already been ordered under the laws of Ontario or any other jurisdiction.[32] However, if a

restoration plan is necessary, then the parties may be ordered to negotiate a reasonable, practical and ecologically sound plan which provides for:

- the prevention, diminution or elimination of the harm;

- the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention; and

- the restoration of all uses, including enjoyment, of the public resource affected by the contravention.[33]

The restoration plan may also include provisions requiring research into pollution prevention or abatement technology; community, education or health programs; and the transfer of property by the defendant so that the property becomes a public resource. However, such provisions can only be included in a restoration plan with the consent of the defendant.[34] Similarly, a

restoration plan can provide for money to be paid by the defendant only where the money is paid to the Treasurer of Ontario; the money is to be used for general restoration purposes or similar purposes; and both the Attorney General and the defendant consent to the provision.[35]

Where the court orders the parties to negotiate a restoration plan, the court may make a number of interim and ancillary orders respecting restoration of the public resource and the negotiation process.[36] If the parties successfully negotiate a restoration plan, then it must be approved by the court and the defendant will be ordered to comply with the plan.[37] If the parties cannot agree upon a restoration plan, then the court may develop its own restoration plan with the assistance of court-appointed experts.[38] The EBR Task Force expects that this provision will provide a substantial incentive for the parties to work out an acceptable plan.

The judgment of the court in the action is binding on all residents of Ontario by reason of the doctrines of res judicata and issue estoppel.[39] Thus, where the court has

dismissed a s.41 action, then another resident cannot bring a subsequent action against the same defendant arising out of the same harm to the same public resource.

While the normal cost rules apply to a s.41 action (i.e. the loser pays the winner's costs), the EBR codifies the court's discretion to not order costs against an unsuccessful plaintiff where the action was a test case, raised a novel point, or involved any other special circumstance.[40] It must be noted that Ontario's recent Class Proceedings Act contains a similar cost provision.[41]

Finally, the EBR provides that the filing of an appeal from an order under the EBR does not operate as a stay of the order. However, a motion may be brought before an appellate judge to seek a stay of the order under appeal.[42]

Having regard for the experiences of other jurisdictions, the EBR Task Force does not expect that this new cause of action will result in a floodgate of litigation in Ontario. In addition, it must be noted that the new

cause of action is subject to the existing rules of procedure which enable courts to dismiss or discourage frivolous or vexatious litigation. For these reasons, the Task Force believes that the s.41 action will likely be used as a last resort by environmentalists, particularly since the comprehensive public participation regime in Part II of the EBR will minimize the need for public interest environmental litigation. In addition, as a practical matter, it must be noted that most environmental groups tend to prefer other non-judicial means to achieve their objectives:

> The central finding of this limited survey is that... litigation is not widely used as a tool by environmental groups across Canada. Instead, the overwhelming majority of activity is focused on policy work, lobbying, public education and media relations. On the other hand, in the few situations in which litigation has been used it has tended to be quite significant. Although major litigation victories have been relatively scarce, there is no evidence of that stereotype of environmental litigation so commonly complained of

in the United States, namely, cases brought simply to delay large projects for merely vexatious or obstructive reasons.[43]

(B) Reform of the Public Nuisance Rule

The creation of a new civil cause of action does not assist persons who have suffered loss or injury from a public nuisance causing harm to the environment. Traditionally, widespread public harm has been actionable only at the instance of the Attorney General, who was presumed to be the guardian of the public interest. Tort law, however, developed a distinction between a "public" and "private" nuisance, and the courts generally recognized that any person who has suffered "special" or "unique" damages above that suffered by the community at large could seek compensation for his or her private loss caused by the public nuisance. However, in practice the distinction between private and public nuisance has been blurred by many courts.[44] Moreover, many actions to recover private loss arising from a public nuisance have been dismissed on the grounds that the plaintiffs lacked

standing and lacked "special" damages that set them apart from other members of the community.[45]

The EBR remedies this situation by providing that:

> No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing action in respect of the loss only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or degree as other persons.[46]

5. CONCLUSIONS

As described above, the EBR Task Force anticipates that the EBR will not result in a floodgate of litigation in Ontario, particularly since environmentalists will continue to utilize the courts as a last resort to resolve environmental disputes. At the same time, however, the Bill provides an effective mechanism for members of the public to enjoin unlawful conduct which

has significantly harmed public resources. Similarly, the Bill modifies the public nuisance rule in order to facilitate claims arising out of public nuisances causing environmental harm.

For these reasons, Ontario's EBR has been properly described as "evolutionary" rather than "revolutionary", and it creates no new liability for companies operating in compliance with environmental laws:

> Companies which are already making serious and sustained efforts to comply with the law have little to fear from this Bill. Lawbreakers, however, will have additional headaches.[47]

NOTES

1. See, for example, J.P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?" (1972), 10 Osgoode Hall L.J. 505; Andrew J. Roman, "Locus Standi: A Cure in Search of a Disease", in J. Swaigen (ed.), Environmental Rights in Canada (CERLF, 1981); and Ontario Law Reform Commission, Report on the Law of Standing (OLRC, 1989), Chapter 3.

2. Report of the Task Force on the Environmental Bill of Rights, Chapter 3.

3. Andrew J. Roman and Mart Pikkov, "Public Interest Litigation in Canada", in D. Tingley (ed.), Into the Future: Environmental Law and Policy for the 1990's (Environmental Law Centre, 1990), p.165.

4. Elizabeth J. Swanson and Elaine L. Hughes, The Price of Pollution: Environmental Litigation in Canada (Environmental Law Centre, 1990), pp.104-05.

5. See, for example, Waste Not Wanted Inc. v. Her Majesty the Queen in Right of Ontario (1987), 2 C.E.L.R. (NS) 24 (F.C. T.D.).

6. See, for example, Canadian Wildlife Federation, Inc. v. Canada (Minister of the Environment) (1989), 3 C.E.L.R. (NS) 287 (F.C. T.D.); affd. 4 C.E.L.R. (NS) 1 (F.C.A.); and Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), 7 C.E.L.R. (NS) 1 (S.C.C.).

7. Swanson, supra, note 4, p.105 and pp.112-114.

8. See, for example, Green v. The Queen in Right of Ontario, [1973] O.R. 396 (Ont. H.C.); and Rosenburg v. Grand River Conservation Authority (1976), 12 O.R. (2d) 496 (Ont. C.A.).

9. Ontario Law Reform Commission, supra, note 1, p.137.

10. EBR Task Force Report, supra, note 2, p.2.

16. Paul Muldoon et al., Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem (Carswell, 1986), pp.182-83.

17. Daniel K. Slone, supra, note 15, p.276.

18. Ibid., pp.273-76. See also Joseph L. Sax et al., "Michigan's Environmental Protection Act of 1970: A Progress Report", 70 Michigan L.R. 1003; Joseph L. Sax et al., "Environmental Citizen Suits: Three Years Experience under the Michigan Environmental Protection Act", 4 Ecology L.Q. 1; and Jeffery K. Haynes, "Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits", 53 Journal of Urban Law 589.

19. EBR Task Force Report, supra, note 2, pp.10-13.

20. Ibid.

21. EBR, s.41(2)-(5).

22. EBR, s.42.

23. EBR, s.43.

24. EBR, s.44.

25. EBR, s.45.

26. EBR, s.46.

27. EBR, s.47.

28. EBR, s.48.

29. EBR, s.49.

30. Farm Practices Protection Act, R.S.O. 1990, C-F.6.

31. EBR, s.50.

32. EBR, s.50.

33. EBR, s.51(2).

34. EBR, s.51(3) and (4).

35. EBR, s.51(7).

36. EBR, s.52.

37. EBR, s.53.

38. EBR, s.54.

39. EBR, s.55.

40. EBR, s.56.

41. Class Proceedings Act (Third Reading May 4 1992), s.31.

42. EBR, s.57.

43. Andrew J. Roman, and Mart Pikkov, supra, note 3, p.166.

44. Beth Bilson, The Canadian Law of Nuisance. (Butterworths, 1991), chapter 3.

45. See, for example, Hickey v. Electric Reduction Co. (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.); Fillion v. News Brunswick International Paper Co. , [1934] 3 D.L.R. 22 (N.B.C.).

46. EBR, s.58.

47. Dianne Saxe, "The Bill of Rights: Evolutionary, not Revolutionary", Hazardous Waste Management (August, 1992), p.25.