Environmental Law Association

Publication # 18
ISBN# 978-1-77189-711-2

#18

NEEDED: AN ENVIRONMENTAL BILL OF RIGHTS

An Address Delivered
to the
Pollution Control Association
of Ontario
1973 Annual Conference
Hamilton, Ontario

David Estrin,
General Counsel,
Canadian Environmental Law Association,
Toronto, Ontario.

The experience of the Canadian Environmental Law Association in dealing with our present environmental laws and their administrators has made the following fact clearer and clearer. Our present laws cannot protect the environment. Why? Because laws only reflect the agreed consensus of the power elite, and the present elite in Ontario and Canada has a vested interest in ensuring maximisation of profit and economic growth, both of which are virtually incompatible with a clean and attractive environment.

A look at the current catalogue of environmental laws shows they are the equivalent of equipment stored in Fire Stations. They are there to be used in an attempt to put out the fire after it has started - to levy penalties from polluters after the damage is done. Potential heavy fines are meaningless when a government is afraid to use the laws for fear of causing economic dislocations. That is the basic reason why we see so little court action in Ontario or elsewhere in Canada.

The only rational approach is one which provides for planning. We need laws which make industries internalize the costs of pollution control equipment; which prevent incompatible land uses from arising; which recognise as their premise a basic human right to a healthy and attractive environment and which prevent activities from ever going ahead if the environmental and economic costs exceed the benefit.

The blame for the present uselessness of our laws must fall primarily on our past and present politicians - for failing to provide leadership away from our prehistoric value system.

Industry exists to make money; social benefits to the community are always secondary. Some industries of late try to give the impression they are concerned about the environment. A harsh and critical look would probably reveal however that they are doing this primarily because abatement of pollution will save them money in the long run, probably by stopping excessive waste of raw material and through recycling of what used to be going

up the stack or out the sewer. It is only secondary to industry that such measures result in good public relations, please their employees, or mean that the industries will not get caught out by some anti-pollution law.

Government, which should be providing leadership to industry, also has many reasons for not putting priority on a clean and attractive environment. Governments also try and give the impression of being concerned - for example enacting $10,000 a day fines into their legislation. But when we realise that government election expenses are financed almost entirely by industry (at the federal level 90% of campaign expenses come from 500 industries); and when unemployment is always a large issue, we come to a vicious circle where the government must always appear to be trying to stop unemployment by keeping the economy expanding, by supporting the industries which keep the government in power. Governments find it difficult if not impossible to put the environment in priorities if this would mean any industrial dislocation.

A root cause of both industry and government myopia, a failing to see where this type of thinking is leading, is their failure to use a broad enough cost-benefit analysis in their planning. Taking the shortest route for a new highway may save money in the short run but what about the value of recreational space destroyed. For example, recently in Ontario the County of Wellington determined to put a new bridge and highway through a conservation area and over a scenic gorge in the conservation area. This was definitely the shortest route but ironically it would have taken the highway through the most scenic part of the whole area. It was obvious that the planners did not put any value on the recreational and scenic value that would be destroyed by such a straight through route.

Another example was the Ontario government's give-away of the unique sand dunes near Picton at $1 a year to Lake Ontario Cement Company. This was a nice gift to the government's political friends and although the government used the excuse that it may have been in a tenuous legal position if it should not have given the lease to the cement company, never-

...3

the less the government allowed the removal of some of the most unique and beautiful sand dune formations in Ontario from an area which had always been intended to be included in one of Ontario's provincial parks. Again, the value of recreational lands was ignored.

A third example of the narrow cost-benefit analysis used by governments and industries is to be seen from the way in which the pulp and paper industry is treated in Canada. It is one of the largest Canadian industries and yet it is responsible for the grossest impairment of Canada's water ways. The pulp and paper industry earns us vast export dollars, but on the other hand mercury pollution has caused several provincial governments and the federal government to pay millions of dollars to Indians and fishermen and tourist camp operators who have had their livelihoods ruined and industries disrupted by this industry which treats the water ways as their lawful and rightful sewers.

INCO and Falconbridge may be great for the Sudbury economy but they have ruined the fishing-tourist industry in that area and are on their way to destroying Killarney Provincial Park and wreaking havoc in much of the northern recreational areas in Ontario.

DOFASCO and STELCO employ many people in the Hamilton area but how much will the taxpayers have to pay for the increased cost of medical care necessary to treat the increased cancer rate and respiratory diseases rate in Hamilton, and the extra cleaning costs for houses? And what about interference with enjoyment of the natural environment? What price are we going to put on that?

If we agree that there are social and environmental costs that are not being considered and yet ought to be when cost-benefit analyses are being made (and they are not made often enough even on the narrow basis described) then we must adopt new mechanisms. As individuals we probably can agree that there are such "costs" that are never reckoned. But nevertheless it is our official selves that are making the laws and decisions.

...4

How are we going to change both government and industry? Assuming we want the possibility of a healthy and attractive environment considered in our future industrial and governmental activities, we need a legally recognised right to ensure that this takes place. We need mechanisms whereby both industry and government can be forced to scrutinise their plans and made to consider alternatives less costly socially and environmentally.

That our politicians have failed dismally to provide leadership is clear. Given the vicious circle described earlier, they need a rocket launcher to break them out of their dilemma - and this is where the law can be of great assistance. If there is a legal right in any citizen to invoke a procedure that forces the government and industry to at least openly evaluate and be responsible for the trade-offs, we will have accomplished a great deal.

For we have not treated and will not treat environmental resources as property entitled to be maintained and protected for the benefit of its owners the public, and subject to infringement only when it can be demonstrated that some other need is paramount and is being carried on with minimum possible harm - we have not done this and will not because our business and industrial and official selves rule otherwise.

We are all greedy and selfish, as Hobbes said centuries ago, and will continue to treat those resources as the domain of no one, as wild fruits to be plucked at will by the first hungry claimant. We have designed a zero price for them, and we are reaping the inevitable consequences in the form of extravagant and largely unrestrained use.

What will happen if we begin to treat these resources as rights which as citizens we are entitled to maintain at law? Does this mean that no development can ever go forward, that consulting engineers will all be out of work, that our society will be condemned to remain at a standstill without another tree cut, another stream dammed or another road built? Of course the answer is a resounding "no". Just as a

...5

landowner or a first home-builder in a neighbourhood may not enjoin all subsequent home-building just because it would impair his unrestricted view of the scenery out of his living room window, the public, as a holder of rights, has no absolute claim against developments which will affect that right. The public right to public resources, like private rights, must be subject to reasonable demands of other users, whether they be factories, power companies or residential developers. Thus, as Professor Joseph Sax of Michigan has said, "A public right to clean air will not necessarily be a right to maintain the air as fresh as it is on the top of the highest mountain", (obviously he was not referring to Hamilton Mountain) "rather", says Professor Sax, "it will be a right to maintain it as clean as it ought to be to protect health and comfort when considered against the demands for spill-over use of the air by other enterprises - with due consideration of the need for such uses, the alternative available to the developers, existing and potential technology, and the possibility of other less harmful locations. Those are the issues at stake in environmental disputes."

Well what about the administrative agencies, the various branches of the Ministry of the Environment or of Environment Canada. Can't they at least be expected to take a fresh approach? They do not have the vested interest that government and industry have, you say. But of course that is totally wrong. Administrative agencies everywhere, and Ontario is a good example, display a number of "disturbing tendencies" as Professor A.R. Lucas of the University of British Columbia's faculty of law has noted. That is,

- They may become enmeshed in the bureacratic web created by the particular system of administration.

- Or they may tend to acquiesce in the elevation of certificates of approval to the status of vested property interests.

- Or they tend as a result of prolonged contacts through the secret, cosy, regulatory process, to adopt the values and biases of the

...6

industry sought to be regulated. An accord may then be reached and maintained through agency officials moving to the industry side.

- Or they may fail to strongly enforce their legislation perhaps on the basis of policy directives from their minister; but more likely simply through inertia and fear of generating political heat.

Administrative agencies are after all not really independent agencies but creatures of and responsible to the governments that created them.

The time has come then, it is long overdue, for our legislators to get themselves freed of the vicious circle that they are in, by giving citizens what they were always told they had - rights, legal rights, to a healthy and attractive environment. Rights, as a member of the public, equal in dignity and status to those of private property owners. An Environmental Bill of Rights, which is the primary aim of the Canadian Environmental Law Association, enacted in each of the Provinces, must:

1. Recognise the public right to a clean and attractive environment as an enforceable legal concept.

2. Make this right enforceable by private citizens suing as members of the public.

3. Establish a broad criteria for the Courts to use in weighing activities affecting the environment and which will set the stage for the development of a common law of environmental quality.

The Canadian Environmental Law Association wants the Courts to be allowed to restrain any activity, private or governmental, if the environmental and economic costs exceed the benefits, or if the purpose of the activity can be achieved in a more environmentally acceptable and no less socially useful manner.

Under such legislation, administrative agencies would continue to exist. They are indeed necessary to regulate the myriad daily activities which require that standards be set, permits granted, and routine rules

...7

enforced; but, such administrative agencies must have their activities open to scrutiny because of the difficulties set out above.

Under such legislation, a Court would have the right, where an agency has set a standard for pollution or for an anti-pollution device or procedure, to:

(a) Determine the validity, applicability and reasonableness of the standard; and

(b) When a Court finds a standard to be deficient, direct the adoption of a standard approved and specified by the Court.

Such legislation would remove the heavy burden that is normally placed upon a plaintiff in our civil courts system by requiring him, if the court has reasonable grounds to doubt the solvency of the plaintiff or his ability to pay any costs or judgement which might be rendered against him, to order the plaintiff to post a surety bond or cash <u>not to exceed $500.</u>

Further, the legislation proposed would allow the defendant accused of being about to impair the environment or who is presently impairing it to show that there is no feasible and prudent alternative to his conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the Province's paramount concern for the protection of its natural resources from pollution, impairment or destruction.

Such an Environmental Bill of Rights would necessarily force both government and industry to face up to the issues that the individuals in both government and industry, as people, know that they should be considering in environmental planning. It will force them to stop counting everything in dollars, or at least force them to count dollars into recreational use, health, and enjoyment of natural resources.

Assuming that we agree that we need such legally recognisable and enforceable rights, do we have them and if not how are we going to get them?

...8

We have no such rights in Ontario or in any other Province of Canada at this time. We have no legislation dealing with environmental impact. No legislation providing guidelines as to maximum permissible levels of pollution or legislation allowing for judicial review of agency inaction; and no good laws allowing private citizens to ask the Courts to invoke the good-looking but often meaningless legislation that we do have such as The Provincial Parks Act and The Pits and Quarries Act of Ontario. And while the Ontario government in its March 1973 Speech from the Throne announced it was considering an environmental agency which would deal with environmental impact, at least with regard to major governmental activities, it did not in any way mention the recognition or desirability of an Environmental Bill of Rights.

New agencies with public proceedings will be of some assistance in ensuring environmental impacts are assessed. But without a legally recognised right to a healthy and attractive environment, such hearings can become meaningless.

We must have an Environmental Bill of Rights if the law is to play its role in improving environmental quality - if we wish the government to show leadership and we want industry to act accordingly.

- ooOOoo -