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Pollution Exposed:
*An Overview to the Right to Know Concept in Canada**

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1. INTRODUCTION

The Canadian public has a growing thirst for environmental information. This thirst was witnessed in the U.S. throughout the late 1980s with the "right-to-know" movement where the public demanded to understand the nature of environmental threats potentially impacting on their community.[1] The right-to-know concept is now firmly entrenched in Canada and still continues to evolve. Simply put, the "right-to-know" concept is a systematic attempt to have environmental data, and in particular, pollutant data from public and private sectors placed in a publicly accessible format.

The purpose of this paper is to provide some insight on the right-to-know concept in the Canadian context as well as the mechanisms that have evolved to further this concept. The paper will then turn to a number of issues arising from this concept with some commentary on its future.

[1] The "right-to-know" concept has been defined in a number of ways. One broad definition defines it in this way: "'right-to-know' (RTK) ensures a citizen's ability to access a variety of facts relating to environmental health, and public, worker, and consumer safety." See: D. Davis and B. Mausberg, *Transparency, Reporting, and Accountability: A Comparative Overview Between Ontario and the United States of the Public's Right-to-Know About Drinking Water* (Canadian Environmental Defence Fund Paper prepared for the Walkerton Inquiry, April 2001), p. 7. See: www.walkertoninquiry.com, "Part II - paper submitted by parties with standing."

2. THE RIGHT-TO-KNOW MOVEMENT IN CANADA

The right-to-know movement emerged in response to a number of trends. These trends are founded upon the basic premise that in an open society, the public should have the right-to-know about existing or potential environmental threats since the public's ability to act is contingent on such information.[2]

In the U.S., right-to-know emerged at the community level following the 1984 Bhopal chemical disaster in India. Soon after the alarming and eye-opening event followed the enactment of the first national right-to-know law entitled, *Emergency Planning and Community Right-to-know Act* (1986).[3] This legislation requires facilities within certain industrial sectors to report on releases and off-site transfers of over 350 substances to the U.S. Environmental Protection Agency. The data is then compiled into the Toxic Release Inventory (TRI),[4] a national publicly available on-line database.[5]

Similar to the American experience, environmental disasters in Canada have also provided persuasive arguments and encouragement for the right-to-know movement. Events dating back to the 1970s with the Mississauga train derailment, followed by such environmental

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[2] See: N. Zimmermann, M. M'Gonigle and A. Day, "Community Right-to-know: Improving Public Information About Toxic Secrets" 5 Journal of Environmental Law and Policy 95, at p. 96.

[3] 42 U.S.C. 11001. EPCRA is Title III of the *Superfund Amendments and Reauthorization Act of 1986*, 42 U.S.C. 9601. A good description of this law is provided in Zimmermann, *Ibid*., at pp. 101-112.

[4] The TRI is a database of emission releases and off-site transfers. TRI was used as model for the development of the Canadian National Pollutant Release Inventory (NPRI), discussed below.

[5] The TRI was then expanded by the *Pollution Prevention Act* of 1990 (42 U.S.C. para. 13101).

disasters such as the Plastimet fire in Hamilton, contaminated drinking water in Walkerton and literally hundreds of small and more local events have left communities wanting to know more about what environmental threats exist in their neighbourhoods.

Apart from environmental disasters, another catalyst to right-to-know is the diminishing government capacity to address environmental challenges and the increasing oversight role being imposed on non-governmental organizations to play a "watchdog" role. In this regard, and for well over thirty years, public interest groups in Canada have been advocating more comprehensive and more stringent pollution limits. During this time, government response has been, at best, mixed in its attempt to reconcile competing social, environmental, economic and public health interests. Throughout the late 1970s and the 1980s, science revealed with increased clarity the environmental and human health impacts associated with both conventional and toxic pollutants. By the early 1990s, non-governmental groups devoted significant energy to developing pollution prevention strategies that would avoid the use and generation of toxic substances while phasing out the most problematic substances. During this time, government resources to address pollution related matters grew steadily.

In Ontario, the Ministry of the Environment's (MOE) funding peaked in the early 1990s. Since that time, there has been a steady decline in resources. From the early 1990s, there has been at least a 40% reduction in the operation budget of the ministry, excluding reductions in the capital budget[6], which have also been severe. This alarming reality was entered into evidence in the course of the Walkerton Inquiry. These cuts have affected most aspect of MOE operations.

[6] See: Canadian Institute for Environmental Law and Policy, *Ontario's Environment and the Common Sense Revolution - A Four Year Report*, prepared by M. Winfield and G. Jenish, September, 1999, pp. 1-4 to 1-9.

The "downsizing" of environmental agencies is not reserved to Ontario, some provincial ministries were reduced by up to 60%. Environment Canada undertook a program review in 1995 that resulted in a 30% reduction to the department.[7]

The overall decline in government capacity in the environmental field has resulted in a number of consequences, three of which are discussed here. First, there has been a loss of government oversight of certain key environmental issues. Simply put, government has constrained its capacity to provide or oversee the monitoring, testing, analysis, auditing and like functions over all activities that it once did, or some would say, should now be involved in. Second, there is a reluctance by government to pursue regulatory approaches. Instead, there is a trend to take more collaborative approaches such as voluntary compliance approaches, using economic instruments, and other "tools in the policy tool box of government." A third, and implicit, effect of this decline is an increased reliance on non-governmental groups to "take up the slack" by supplementing government oversight and holding governments accountable as a way to ensure the appropriate development or implementation of government policy. This is an "implicit" attribute because few, if any, new resources have been transferred to non-government groups and indeed their workload has grown in disproportionately to their resource base. As government resources and enthusiasm for strong environmental measures diminished, public interest groups realized that it is imperative the public be informed of progress in responding to the environmental and public challenges in both the public and private sectors.

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[7] Quoted from: Paul Muldoon and Ramani Nadarajah, "A Sober Second Look - The Regulatory Approach Looks Better When the Context and Consequences of Voluntary Initiatives Are Taken Into Account" in B. Gibson (ed.) *Voluntary Initiatives - The New Politics of Corporate Greening* (Toronto: Broadview Press, 1999), p. 54.

The importance of the right-to-know is greatly implied by the ever growing challenge of protecting the environment on one hand and the declining government capacity to respond to the challenge on the other. Right-to-know initiatives enhance traditional government approaches by providing an on-going reporting regime, giving the public the information tools needed to keep up-to-date on the relative progress of those issues affecting the environment or their health. Of course, right-to-know initiatives should only supplement regulatory programs not supplement or replace them. In other words, the right-to-know concept is a crucial tool for the public, even if government capacity was restored; however, its usefulness is made extremely clear where that capacity is diminished.

3. RATIONALE FOR RIGHT-TO-KNOW

While much literature has been written on the movement, there are at least three reasons to support the furtherance of right-to-know initiatives. These reasons can be summarized as follows:

- *Transparency* - By disclosing information on emission releases, approvals and like information, governments, the public and other stakeholders have a clearer or more transparent view of what is or not being done.

- *Accountability* - The transparency of decisions encourages and enhances accountability of decision-makers. As one report noted, the right-to know concept "serves as a check on government, industry and other entities by using transparency to achieve greater accountability. Increasing the accessibility of high quality information raises public expectations of sound policy and practice in the public health and environmental protection fields."[8]

- *Motivator for Action* - Information that reveals problems or lack of action motivates people to act and helps define public priorities. For example, a trend analysis of pollutant release data may reveal that while progress is being made in one industrial sector, another industrial sector is lagging behind and hence requiring more attention. Similarly, a community may not have been aware that a particular facility in the neighbourhood is storing, using or processing toxic substances in a manner or quantity that community considers imprudent. Hence, the availability of this information may assist to mobilize the community to respond to a change with respect to the environmental approvals for that facility.

[8] D. Davis and B. Mausberg, *Transparency, Reporting, and Accountability: A Comparative Overview Between Ontario and the United States of the Public's Right-to-Know About Drinking Water* (Canadian Environmental Defence Fund paper prepared for the Walkerton Inquiry, April 2001), p. 7.

4. RIGHT-TO-KNOW IN CANADA - SOME EXAMPLES

There are many examples of efforts to provide accurate and accessible data to the public. Some of the right-to-know initiatives that are often used and can be said to be reflective of the current trend are briefly described.

Environmental Bill of Rights Registry

The enactment of the *Environmental Bill of Rights*[9] (EBR) significantly enhanced public participation in environmental decision making. First, it provides an established opportunity for public comment on environmentally significant acts, regulations, policies and instruments, which was not previously available. Second, it requires the establishment of an Environmental Registry.[10]

The Registry is an Internet accessible database where Ontario residents can access information on environmentally sensitive proposals, decisions by prescribed government ministries, as well as court actions and appeals on instruments (eg., permits, certificates of approvals, licences).[11] Prescribed ministries are required to put environmentally significant

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9 S.O. 1993, c. 28.

10 *Ibid*., sections 5-6.

11 For more discussion on the evolution of the registry and how it works in practice, see: David McRobert and Catherine McAteer "The Nuts, The Bolts and the Rest of the Machinery: A Guide to and Update on Ontario's *Environmental Bill of Rights*" Background paper for presentation to: Environmental Law 2001: New Developments and Current Issues to Comply in Today's Environment, Toronto, Ontario, September 20-21, 2001, pp. 13-18.

proposals on the Registry and allow a minimum of a 30-day comment period.[12] The registry can be accessed through the Ministry of the Environment's website.[13]

For the practitioner, the Environmental Registry can be an important source of information. The postings include practical information such as the ministry contact person and contact information. The search page allows a search by keyword, EBR registry number, ministry, type of posting, status of posting (i.e. decision, proposal, etc.), date, or a combination of these categories. The information contained on the Registry and its availability in consistent format can be an important tool in protecting your clients' interests.

For public interest groups, it is the primary source of notification of the environmentally significant activities being planned or permitted by a ministry. Notice affords an opportunity for comments to be made and taken into consideration before a final decision is posted on the Registry. The posting of court actions, and appeals on instruments is also a valuable source of information that encourages the public generally and public interest group involvement in these proceedings. Public interest groups use this information to monitor activities of government ministries to assure public interest is taken into account during the decision making process. In the absence of the Registry, keeping up-to-date with potential or actual environmentally significant decision would be much less accessible.

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[12] Approximately 95% of the postings on the Registry are related to the approvals of proposed instruments (licences, certificates of approvals, permits, etc.)

[13] The website can be found at: www.ene.gov.on.ca/envision/ebr/index.htm>

In his most recent report, the Environmental Commissioner highlights his views as to how the recently improved registry (which now allows the user to download data as a single file) can be useful for different constituencies:

- Media outlets could set up a database program that would scan Registry information for keywords and topics, and then print out summaries for reporters.
- Businesses can keep on top of all proposals for approvals, policies and regulations that will have an effect on the business sector.
- Municipalities could set up a database program that would create reports about ministry permits, licences, or approvals for activities that could affect the environment within their municipal boundaries – whether, for instance, local businesses are asking a ministry for permission to release substances into the air or into a local river.
- Changes to Registry notices can be monitored and compared.
- Environmental organizations would be able to develop complimentary systems to notify their members about significant pending proposals.[14]

The Environmental Registry continues to be used widely[15] and is generally regarded as useful tool for the public and other stakeholders.[16] In 2000, user sessions averaged between 2,500 and 3,000 per month. From May to September of 2001, visits to the site ranged from 17,000 to over 37,000.[17]

Attachment 1 provides a print-out of the Environmental Registry homepage for the purposes of giving the reader a glimpse what to expect when visiting the cite.

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[14] Environmental Commissioner of Ontario, *Annual Report 2000/2001 – Having Regard* Toronto, 2001, p. 25.

[15] McRobert, *supra*, note 10, p. 14.

[16] McRobert, *supra*, note 10, p. 17.

[17] Ministry of the Environment, Environmental Registry Statistics May, June, July, August, September, 2001.

National Pollutant Release Inventory

The National Pollutant Release Inventory (NPRI) is an Internet accessible database[18] first introduced in 1994. It requires certain facilities to report annually on designated substances they release into the air or water, bury in landfills on their property, dispose of in deep wells or ship off-site for recycling, treatment or disposal.[19] In particular, it provides: site-specific information on 268 substances (as of 2000), including what pollutants, the amounts that certain facilities release to the environment and what quantities are shipped off-site for disposal, treatment or recycling. The NPRI information is relatively consistent year to year, which provides a basis for trend analysis.

The NPRI has been of enormous use to the public in a number of ways. Most important, the publication of the data generates considerable media and public interest in terms of identifying which facilities are making progress in reducing emissions or off-site transfers and what facilities are the largest emitters both locally and nationally. Indeed, while national public interest groups may use this data to identify facilities failing to make progress, local groups use the information to highlight the need for action in that community. In addition, it is clear that consultants, competitors to the reporting facilities, along with a host of other interests may find this information useful, and use this data.

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[18] The NPRI can be found at www.npri-inrp.com. The legislative basis for the NPRI is found in the *Canadian Environmental Protection Act*.

[19] For a full description of the NPRI, see: John Jackson, *A Citizens' Guide to the National Pollutant Release Inventory* (Toronto: Canadian Institute for Environmental Law and Policy, 2000).

Attachment 2 provides a print-out of the NPRI homepage for the purposes of giving the reader a glimpse what to expect when visiting the cite.

PollutionWatch

While NPRI provides a rich database, other organizations have used, and built upon this information. For example, the Commission for Environmental Cooperation uses this database to rank facilities in Canada, United States (which is anticipated for Mexico once it develops a similar database).[20]

Another example is another Internet database called PollutionWatch.[21] PollutionWatch has a number of interesting and some unique features, including:

- The option to search by entering one's postal code, to identify all of the NPRI reporting facilities within that community, an outline the names of the facilities, what they are emitting, the quantities of releases and off-site releases and a ranking system that compares that neighbourhood to others;
- A map can also be called up to assist in physically locating the facilities;

[20] For example, see: Commission for Environmental Cooperation, *Taking Stock – North American Pollutant Releases and Transfers* (Montreal, 2001).

[21] PollutionWatch can be found at: www.pollutionwatch.org It is a project of the Canadian Environmental Law Association, the Canadian Institute for Environmental Law and Policy and the Canadian Environmental Defence Fund. PollutionWatch is modelled after a U.S. website that uses the U.S. Toxic Release Inventory. This website can be found at: www.scorecard.org.

In addition, PollutionWatch accesses a number of other databases or information sources creating a number of interesting search options, including:

- *Pollution Locator* - This function allows one to review the releases and transfers of facilities at a local, provincial or national level;
- *Pollution Rankings* - This function provides the ability to compare and rank substances and facilities both locally and nationally. Hence, the site allows one to access a health-based ranking system to weigh and rank toxic substances in terms of severity of health hazards.
- *About the Chemicals* - This section gives a profile of the NPRI chemicals.
- *Health Effects* – PollutionWatch accesses a health effects database, which is regularly updated, that gives clear and readable material on the environmental and human effects of that substances;
- *Regulatory Controls* - PollutionWatch also gives a description of the regulatory framework governing those substances; and
- *Take Action* - PollutionWatch also encourages and provides options for a person reviewing this data to directly contact a facility by way of an email should that person have comments, questions or issues for discussion.

This database has been very popular with just under a million visitors within the first month of operation in April of 2001. The partner organizations managing this site intend to further enhance this site over time. From a practical point of view, the site has been used by individuals, community groups, consultants, local agencies and business for information on

releases and transfers within a community, to review the rankings of facilities, and generally to review the status of facilities in terms of releases and transfers.

Ontario's Drinking Water Protection Regulation

Right-to-know reports were one of the key changes to the1996 amendments to the U.S. *Safe Drinking Water Act*.[22] Under the Act, public water systems must submit Consumer Confidence Reports (CCR) which, in effect, is an annual water quality report.[23] Through these reports, consumers can attain a more complete understanding of the quality of their drinking water. Some of the required elements of these reports must include:

- identification of the source of the drinking waters;
- a survey of the possible threats to the drinking water based on source water assessments;
- a summary of the range of any regulated contaminants found in the drinking water and the health-based standard for comparison;
- the potential health effects of any contamination violation of a health standard and a description of actions taken to ensure safe drinking water;
- the water system's compliance with water drinking rules, including monitoring and testing requirements;
- an educational statement for vulnerable populations about avoiding *Cryptosporidium*

[22] A general description of how the Act works can be found at: Submission to Part II of the Walkerton Inquiry from Concerned Walkerton Citizens and the Canadian Environmental Law Association, *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act* (May, 2001), pp. 56-63. [Hereinafter referred to as the CWC/CELA study]

and contact names to find out more information, including both government contacts and the operators as well as the Environmental Protection Agency's Safe Drinking Water Hotline.[24]

In some states, such as California and New Jersey, these requirements are enhanced with other requirements.[25]

Prior to 2000, there were no similar requirements in Ontario. However, a new drinking water regulation was put in place some three months after the Walkerton tragedy where 7 people died and over 2000 were made ill through contamination of the town's drinking water. The *Drinking Water Protection Regulation*[26] does require the disclosure of far more information than ever before.[27]

One of the most important aspects of this new regulation relates to the requirements of a quarterly report.[28] Under the regulation, all public water systems distributing to more than 5000 or more households or more than 50,000 litres of water per day, must make quarterly reports

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[23] The provisions of the U.S. legislation pertaining to information and drinking water is summarized and discussed in Davis, *supra*, note 1, at pp. 11-14; 19-20.

[24] CWC/CELA study, s*upra*, note 22, at pp. 59-60; *Ibid*., p. 20.

[25] CWC/CELA study, s*upra*, note 22, at pp. 65-68.

[26] Regulation 359/00.

[27] For a more detailed review of this regulation generally, see: CWC/CELA study, *supra*, note 22, at pp. 1422.

[28] For a more complete review of information requirements of the regulation, see: CWC/CELA study, *supra*, note 22, at pp. 135-136.

[29] See section 12 of the regulation. Also for a more detailed discussion, see: Davis, *supra*, note 1, at pp. 18-19.

available publicly. These reports give the consumer a picture of the quality of the drinking water, and require the following elements to be included in the report:

- A description of the water system and its operations;
- information on the source of the drinking water;
- a review of the analytical tests results taken during the quarter;
- a description of the measures taken by the operator to comply with the regulation;[29] and
- the operator must make efforts to ensure that the report is publicly available while facilities that serve more than 10,000 consumers are also required to post the report on the Internet.

Although these reports are an improvement, they have not been free from criticism. One report submitted to the Walkerton Inquiry noted that the operators:

> …required to include neither violations of sampling, testing, or treatment requirements, nor variances or exemptions from provincial standards. Moreover, important information is frequently absent from these reports, including health language for violation of standards, warnings for vulnerable populations, and opportunities for public involvement. Summary tables are often not easily understood, as they either are cluttered with information about non-detects nor do not clearly identify violations.[30]

It should however be noted that another report describes the provisions as "somewhat rudimentary and incomplete."[31]

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[30] Davis, *supra*, note 1, at 18.

[31] CWC/CELA study, *supra*, note 23, at 138 and generally at135-39.

Canadian Environmental Protection Act Registry

The *Canadian Environmental Protection Act* (CEPA) establishes an environmental registry. This registry became operational in March of 2000 and is accessible to the public through the Internet.[32]

CEPA outlines the type of information available on the registry, which can be summarized as follows:

- Environment Canada notices and documents published or otherwise made available to the public;
- Notices of Objections, which are notices allowed under the Act where the public is given the right to challenge a decision or lack thereof;
- Notices of any approvals under the Act;
- Copies of policies made under the Act;
- Copies of proposed regulations made under the Act;
- Copies of proposed orders made under the Act; and
- Copies of court documents submitted by the Minister with respect to environmental protection actions.

The CEPA Registry is not a public consultation mechanism, unlike the EBR Registry, designed to given notice to stakeholders and then request comments on proposals. However, the

[32] The CEPA registry can be found at: www.gc.ca/ceparegistry.

Registry certainly could serve such a purpose, at least to some extent, should Environment Canada use it in that manner.[33]

Attachment 3 provides a print-out of the CEPA Registry homepage for the purposes of giving the reader a glimpse what to expect when visiting the site.

Other Registries

Other noteworthy existing registries or those being developed include:

- *Canadian Environmental Assessment Act*;[34]
- Workplace Hazardous Materials Information System (WHMIS), developed under the authority of the *Hazardous Materials Information Review Act*[35] provides workers with information about hazardous materials in the workplace; and
- Air Reporting Regulation under the *Environmental Protection Act.*[36]

Other provinces have also undertaken right-to-know measures.[37] There are numerous campaigns advocating for right-to-know measures, one example is the campaign to have genetically altered food labeled for the benefit of consumers.

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[33] For a comparison and discussion of the EBR and CEPA Registries, see: David McRobert and Robert Cooper, "The Environmental Registry, The Right to Request an Investigation and Environmental Protection Action Under CEPA: Implementation Issues and Lessons from Experience with Ontario's *Environmental Bill of Rights* (EBR)" Paper for presentation to "Working with Bill C-32: the New CEPA" Insight Conference, Toronto, November 22 & 23, 1999.

[34] S.C. 1992, c. 37, as amended, s. 55.

[35] R.S.C. 1985(4th Supp.) Part III.

[36] Regulation 127/01 requires certain industrial sectors to monitor and report its air emissions. For a further Regulation 127/01 requires certain industrial sectors to monitor and report its air emissions. For a discussion, see: Environmental Commissioner of Ontario, *supra*, note 13, pp. 107 to 109.

5. ISSUES FOR CONSIDERATION

The thesis of this paper is that the right-to-know concept should continue to be built upon as it serves a legitimate and needed purpose in the context of environmental policy development and decision-making. However, the right-to-know concept does raise a number of important issues. A few of these issues are discussed below.

Confidentiality

Until the early 1990s, there has traditionally been a cloak of secrecy concerning environmental information, including emission data, environmental approvals and even proposals for some policies. The lack of available information limited public participation opportunities and where there were public participation opportunities, there were qualitative limits due, at least in part, to the absence of full public disclosure of relevant information.

Within the last decade, however, the right-to-know movement has caused the pendulum to swing to the other side of the spectrum, implanting the working assumption that public disclosure of pertinent information should be the norm, excluding only information that falls within a limited number of exemptions. This statement is a splinter too optimistic, although significant strides have been made in recent time.

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[37] For the initiatives in British Columbia, see: Zimmermann, s*upra*, note 2, pp. 128-131.

One example of how the spectrum has swung is with respect to the EBR. Prior to its enactment, it was difficult and often simply not possible to know when a business was applying for an approval and to obtain the application for approval to understand what was being proposed. With the notice and comment rights given under the EBR and the electronic registry, the issue has come up as to where the line should be drawn between confidential information and the public's right-to-know.

The *Freedom of Information and Protection of Privacy Act* (FIPPA) in Ontario generally allows information to be kept confidential where the information is supplied in confidence and the release of the information would harm the applicant's commercial interests. A 1997 decision of the Information and Privacy Commissioner (IPC) provided some clarity with respect to these provisions as it relates to the EBR. In that case, a company applied to build a new facility and posted the approval application on the EBR registry. A neighbour of the facility asked for the application itself, which included emission data, through the Freedom of Information process. Although the MOE approved the request, the facility opposed and appealed the matter to the IPC. The IPC dismissed the appeal and essentially noted that this information should be accessible to the public due to the compelling public interest in its disclosure without the necessity of invoking the Freedom of Information process. Moreover, the seeking of this kind of information through the FIPPA would frustrate the notice and comment rights of the EBR since the information may be released through the FIPPA process until after notice and comment rights have expired.[38]

[38] Information and Privacy Commissioner of Ontario Order PO-1688, June 16, 1999. This matter is also discussed in McRobert, *supra*, note 10, at p. 19.

Nevertheless, legislation incorporating right-to-know features invariably has some limits to protect confidential information. In the context of the NPRI, industry has raised concerns that some release data is confidential since it may reveal trade secrets or some other sensitive information. Under the NPRI, industries raising confidentiality concerns must still report to Environment Canada. However, a company can request that the information be kept confidential based on specific reasons outlined in the legislation.[39]

The Minister of the Environment is then given the discretion to release the information based on the following factors as outlined in section 52(3) of the Act:

(a) the disclosure is in the interest of the protection of the environment, public health or public safety; and

(b) the public interest in the disclosure outweighs in importance

(i) any material financial loss or prejudice of the competitive position of the person who provided the information or on whose behalf it is provided; and

(ii) any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure.[40]

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[39] *Canadian Environmental Protection Act, 1999*, section 51. Section 52 states:

> 52. Despite Part 11, a request under section 51 may only be based on the following reasons:
> (a) the information constitutes a trade secret;
> (b) the disclosure of the information would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and
> (c) the disclosure of the information would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

[40] *Ibid*., also see sections 313-321 of the *Canadian Environmental Protection Act.*

Surprisingly, the number of requests to keep information confidential that was submitted to the NPRI is actually quite small. In 1993, the first reporting year under NPRI, there were 130 requests to Environment Canada to keep the data confidential. Four of these requests were granted. In the 1997 reporting year, only six requests were granted although there were a larger number of facilities reporting under NPRI.[41]

Industry Response from Public Exposure

The Canadian public has been very receptive to the opportunities now available from right-to-know initiatives. Although many of these initiatives are still relatively new and developing, they have become integral to the environmental protection policy framework and the public increasingly relies upon them.

It is difficult to succinctly and accurately summarize the varied views of the industrial sector with respect to the right-to-know concept. A number of industries and industrial associations should take credit for getting some of the initiatives off the ground. Two examples are the National Pollutant Release Inventory and EBR Registry, both being the product of multistakerholder consultations. Moreover, it should be noted from the onset that the right-to-know movement has given the industrial sector a number of benefits. For example, there is no doubt that industry does use the Registry to find out whether or not other companies have applied for approvals, the nature and scope of the applications and whether those applications have been approved. Similarly the NPRI can be used to compare performance with other like facilities.

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[41] Jackson, *supra*, note 18, p. 9.

According to one commentator with respect to Ontario's *Environmental Bill of Right's* Registry, some industries are very progressive and have embraced the right-to-know initiatives. The public expectation around transparency and accountability on part of government has mushroomed and is now spilling over to industry and that is creating an ethic that more, rather than less, information should be available. This view is not true for all industry, and in particular, small industry that often resist as much as possible.[42]

Delay and Cost

One of the key concerns from the private sector is that right-to-know initiatives lead to delays in receiving approvals (such as when proposals for approvals have to be posted on the Environmental Registry) and require significant resources to undertake the reporting requirements.

There is no doubt that public disclosure of release data or other data required by one of the registries may increase costs to industry or contribute to delays in approval time. However, these problems must be examined in the light of the benefit of the right-to-know initiatives. Public accountability, transparency and public participation are important principles that should be of equal importance to, or even outweigh, some modest increases in costs or short delays.

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[42] Interview with David McRobert, In-House Counsel and Senior Policy Advisor, Environmental Commissioner of Ontario, December 12, 2001.

Governments have been attempting to ensure that right-to-know initiatives are not contributing to delay. For instance, efforts are being made by the Ministry of the Environment to ensure that the posting of information on the EBR registry does not cause undue delay. For instance, by posting the proposals and screening the applications is done concurrently, rather than in a sequential fashion.[43]

In terms of costs, electronic reporting forms for NPRI and similar databases contribute to a more streamlined regime. It should also be clear that some delays should not be attributed to the right-to-know initiatives, but to inappropriate program design. For example, environmental groups have argued that the NPRI, a national database, should be harmonized or at least closely coordinated with provincial reporting regimes. The recent air reporting regulation by the Ministry of the Environment does not seem to achieve this aim. Hence, industries will be required to report releases to the NPRI and also report some of the same substances to the province. It is too early to determine if these reporting requirements will be "user friendly" for industry, although both environmental groups and industry would agree to a coordinated approach.

[43] McRobert, s*upra*, note 10, p. 18.

Impact of September 11

The major and yet unanswered question since the September 11, 2001 terrorist attacks on the U.S. relate to their impact on the right-to-know initiatives. Immediately following the attack, the U.S. Toxic Release Inventory website was closed. Although the Inventory is now available, other databases relating specifically to facility specific information has not been accessible to the public since they closed down following the attacks on the World Trade Center. There is now a robust debate with respect to access to environmental information and that debate will no doubt continue for some time.

In Canada, the National Pollutant Release Inventory was not closed down. However, security authorities, apparently, did review the type of information available through this database and determined that it was not a threat to security. Nevertheless, now the concern is that any new or enhanced right-to-know initiative will have to be weighed against the security screens being erected.[44] In effect, the new security measures will bring to the forefront the need to reconcile the public's right-to-know about the environmental and human health threats from industrial and other activities on one hand, and the desire to restrict information that may in some way be used to create a security risk on the other hand.

There is no doubt that this reconciliation will not be resolved in the short term. It would be unfortunate should any gains in the furthering the right-to-know concept be lost or any new

[44] Discussion with an Environment Canada official, December 14, 2001.

initiatives compromised due to increased security measures. The right-to-know principle is part and parcel of a functioning democracy and any unreasonable limits on such principles directly affects the vitality of a country's democracy itself.

6. CONCLUSIONS

By all indications, the right-to-know concept is here to stay. Its intent is to enhance and supplement regulatory programs to protect the environment. There are a number of initiatives in Canada, although most them are still evolving and in the 'developmental stage'. As these initiatives mature, the concept continues to face a number of issues such as confidentiality that must be worked out with a fair process. While significant gains may be made, there is some concern that the recent emphasis on security measures will hinder further development and possibly force our democracy a few steps backwards. This would be an unfortunate consequence since the right-to-know concept, with its key principle to inform the public, is a foundation of any vibrant democracy.