TO: THE LEGISLATIVE COMMITTEE

ON NATURAL RESOURCES

PROPOSALS

FOR AN

INDEPENDENT ENVIRONMENTAL TRIBUNAL

Presented by:

CONSERVATION COUNCIL OF NEW BRUNSWICK, INC.

April 12, 1973

OUTLINE

INTRODUCTION

This brief is written on the premise that the air, water and, to an extent, the land of New Brunswick are the property of all citizens. With this in mind, it is intended to present our views on the present situation the citizen finds himself in, together with proposals for improvement. In order to do this, the various interests connected with environmental matters will be outlined. The way in which the common law developed respecting these interests will be examined. The present statutory framework in New Brunswick will be commented upon. With these as an introductory background, specific proposals will follow.

INTERESTS CONCERNED

In any given environmental situation, many interests are present. These can be categorized for purposes of the present discussion as economic and non-economic interests.

The most obvious economic interest is that of property rights in the traditional sense. These involve the use and protection of property for such purposes as residence, agriculture, industry, and forestry. Another major economic interest is the use of air and water for various purposes, specifically waste disposal. Such use is economically beneficial to the user, who escapes waste disposal as a cost of doing business. However, real costs are passed on to the public.

There are many non-economic interests. Perhaps the most important one is the public interest in clean air and water. In some jurisdictions, particularly that of New York State, this interest has been enshrined in the State Constitution.

Some other interests are recreation, aesthetics and the preservation of natural eco-systems. There is also the conservation interest in its narrowest sense, that is, the interest in conserving open space, free-running water and so on.

Finally there is the interest of future generations in all of these.

COMMON LAW

In the history of the English Common Law only economic interests, specifically the propriety economic interest, acquired a body of protective rights. Other uses, not susceptible to economic analysis, were overlooked.

The common law was reasonably simple. A property owner could use and enjoy his land as he pleased, as long as his use did not impair his neighbour's enjoyment of his property. Enforcement of property rights lay largely in the actions of trespass and nuisance. These carried the remedies of damages or injunction or both. Damages were recoverable if the injured owner could demonstrate some damage which could be assessed in money. Similarly, the harmful activity could be enjoined if it interfered with another owner's enjoyment of his property.

The common law developed largely from small, neighbourly matters. When disputes are relatively uncomplicated, it is still serviceable. However, in the context of the tremendously large and complicated environmental problems of the present time, it is inadequate for a number of reasons.

Firstly, and most importantly, the common law recognised only propriety interests. It is submitted that this is outmoded. Every citizen has a very real interest in the way that his environment is treated. Not only must he live in it on a daily basis, but also his future depends on wise use of natural resources in many ways. Secondly, law suits under our adversary system are slow and involve considerable expense and trouble on the part of a litigant. Many people who have suffered damage are reluctant to resort to the courts even when their cases are good ones and their damages have been substantial.

The effects of damage caused by environmental abusers are liable to be diffuse, making it difficult to bring a suit for full damages. As has been pointed out above, damage can assume different characteristics with regard to various interests.

Thirdly, proving the claim on the merits may be difficult in itself. Almost all the knowledge and the means of knowing are in the hands of the defendant, making it extremely onerous on the part of the plaintiff to prove the cause of his damage. He is liable to find that the expert testimony that he needs must come from people who are timid or who are kept by the opposition.

Fourthly, the above discussion demonstrates the problem with our traditional onus of proof being on the plaintiff. In environment matters, this is one of the main impediments to progress. It would seem to be sensible to put the onus of proof upon the party with the means of knowledge

and resources at its disposal, the one who is engaged in the risky activity. This burden is now imposed upon the producers of drugs, whose products have to be proved safe before release.

There is also the problem of standing to sue in civil litigation. It is based on the principle that the courts should decide actual, concrete cases by people wronged and claiming a specific remedy, usually economic. The policy is to avoid litigation and to avoid courts getting into politics and advising governments what to do. So generally a litigant must be trying to enforce a right which he has either by statute or common law. A good example is the concept of riparian rights. A person who owns land on a river has a right to clean water and may bring an action against an upstream polluter. However, a person who does not own land on the river has no remedy, notwithstanding the fact he may use the river in any number of ways. This aspect of the law is based on the precept that only propriety rights are worthy of protection. This is under attack elsewhere, especially in the United States, where there is a trend to recognizing the right of non-propriety interests to standing before the courts in suits involving environmental issues.

The fiction of the common law that there is a distinction between a public and a private nuisance also impairs the effectiveness of the nuisance remedy. A public nuisance is defined as one which inflicts damage, injury or inconvenience upon all citizens, or upon all of a class who come within the sphere or neighbourhood of it's operation. *Halsbury's Laws of England*, 3d, vol. 28, p. 128. A private individual has no right of action concerning

a public nuisance, unless he can show that he has sustained some special damage over and above that inflicted upon the community at large. This means that for most major pollution sources, the private citizen has no remedy, except to rely upon the Attorney-General. Thus, if a pollution source broadcasts widely enough, such as industrial air pollution, it is virtually immune from civil action. A recent illustration is the case of *Hickey et al v. Electric Reduction Company of Canada Limited* (1971), 2 Nfld. & P.E.I.R. 246. In that case commercial fishermen were held not entitled to bring an action for damages for damage to the fishery by an industrial polluter. It is submitted that this fiction is outmoded and contrary to the public interest.

In New Brunswick, ineffective as the nuisance action is, in many cases it has been completely taken away by statute. It is the practice of the Legislature when incorporating industries by statute to include a section which grants immunity from suits in nuisance to the industry. A recent example is the *Fundy Forest Industries Limited Act*, S.N.B. 1971, c. 80. Section 2 of that *Act* states:

> No action founded on nuisance shall lie against the company either by way of injunction or for damages for using its property, for forming its operations or for the doing without negligence of any act necessarily incidental to the exercise and enjoyment of the powers herein granted ...

Similar examples are Brunswick Mining and Smelting Corporation Limited Act, S.N.B. 1961-62, c. 83; East Cost Smelting and Chemical Company Limited Act, S.N.B. 1961-62, c. 98; Bathurst Power & Paper Company Limited Act, S.N.B. 1961-62, c. 82; MacMillan Rothesay Limited and Rothesay Paper Corporation Act, S.N.B. 1970, c. 58. This list is not exhaustive.

Such provisions permit industries to inflict damage, economic and otherwise, to their neighbours. Those damaged have no legal recourse for compensation. The industry not only is free of the cost of effluent disposal, but is free from liability for the costs imposed on others.

It is submitted accordingly that the citizen of New Brunswick is virtually powerless to protect his interests in environmental matters, even the traditional propriety ones.

STATUTE LAW

In view of the citizens powerlessness at common law, the statutory position will be examined to determine whether it adequately protects the public.

Until comparatively recent times legislation in the environmental field was largely nonexistent in New Brunswick, as in other jurisdictions. Other than the *Health Act*, R.S.N.B. 1952, c. 102, which has obvious application to the public health aspects of pollution, the only Act which existed prior to 1971 is the *Water Act*, S.N.B. 1960-61, c. 19, and this only pertained to the area of water resources.

The Water Act provides at least a kernel of potential protection to the public. It is even provided (Section 6) that the Act is to prevail in case of conflict with any other Act with one exception, the Clean Environment Act. However, it will be seen that the Clean Environment Act is weaker than the Water Act, thus reducing the potential effectiveness of

the latter. One good feature of the Water Act is the constitution of the Water Authority, which is at least token recognition of the necessity for inter-departmental consultation and planning. It is provided that the Water Authority is to have control of pollution and the allocation and use of water.

Basically, the operative sections of the Water Act are sound. Pollution is defined (Section 1e) as:

> Any alteration of the physical, chemical, biological, or aesthetic properties of the waters of the Province, including change in temperature, taste or odour of the waters, or the addition of any liquid, solid, radio-active, gaseous or other substance to the waters or the removal of such substances from the waters, which will render or is likely to render the waters harmful to the public health, safety or welfare, or harmful or less useful for domestic, municipal, industrial, agricultural, recreational, or other lawful uses, or for animals, birds or aquatic life.

This definition is all-embracing and considers all interests. The prohibition section (s.10) states as follows:

> Unless approved by the Minister and the Minister of Health, no municipality or person shall discharge or deposit any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir, or other water, or water course or on any shore or bank thereof, or into or in any place that may cause pollution or impair the quality of the water for beneficial use.

But for the usual and crippling loophole of ministerial discretion provided by the first clause, this section, if enforced, could be quite effective.

This loophole of ministerial discretion is too widely used. It is submitted that if a polluter can convince the Government that it is economically important enough, it is likely that ministerial discretion will be used to protect it.

The Clean Environment Act, S.N.B. 1971, c. 3, is legally the most important statute with regard to environmental matters. It is extremely disappointing in its weakness, largely but not wholly due to the usual ministerial discretion. For example, its definition of "contaminant", which is substantially lifted from the Manitoba Clean Environment Act, is a reasonably broad definition, except that nothing is a contaminant unless prescribed by regulation to be one. Thus, any pollutant, no matter how dangerous, could be left off the list and unregulated. Similarly, the definition of waste is emasculated. Compounding the effectuality, it is even made discretionary whether contaminants or wastes are to be prohibited or limited from being released into the soil, water or air.

No regulations under the Clean Environment Act have been promulgated, but proposed Air Quality Regulations have been made public. The proposed regulations provide primarily for the licensing of air pollution sources. This at least should provide for some Governmental control. However, the private citizen is given no access to the licencing process and is completely reliant upon the effectiveness of ministerial action.

In summary it is submitted that the state of the law in New Brunswick today, including the legislation and the common law, provides little or no

protection to the public from abusers of the environment. None of the statutes in question has teeth and there is no coordination between them. The problem is twofold: The rights of a citizen are severely restricted and there is no effective way at present to protect those rights which do exist.

PROPOSALS

It is submitted that the Legislature should grant legal status to what are in reality natural rights of the citizen - rights to clean air and water and intelligent development and use of the land. In achieving this two approaches might usefully be taken.

CITIZEN'S RIGHTS OF ACTION

Firstly, legislation should be passed which would restore the right of the citizen to protect himself. An obvious first step would be to remove the immunity from suit granted to statutorially incorporated industries. Such immunity merely enables the industry to carry on business free from a liability which constrains the behaviour of most other businesses and citizens in general. Further, citizens should be permitted to bring civil actions against environmental abusers even where they cannot show damage to a traditional propriety right. This has been proposed by the Ontario Section of the Canadian Bar Association and was enacted in the State of Massachusetts in 1971. Chapter 214 of the General Laws of the State of Massachusetts provides as follows:

> SECTION 10A
> The Superior Court for the County in which damage to the environment is occurring or is about to occur, may, upon the petition of not less than ten persons domiciled within the Commonwealth, or upon the petition of any political subdivision of the Commonwealth determine the issue in equity or in a petition for declaratory relief, and may, before the final determination of the cause, restrain the person causing or about to cause such damage; provided,

that decision-making in the environmental field should be removed from the political process. It is the nature of politics that demands are made on politicians by various special interest groups. It is obvious that the public at large has very little practical access to this process. When decisions are made by various departments of Government, sometimes without consultation with other Government departments, it is submitted that the decision made will likely not reflect an impartial and thoroughly considered judgment.

In the past Government departments and agencies have operated virtually as they wished within their own areas of responsibility. This is natural enough; a department will understandably wish to promote the development of activities it is concerned with. The problem is that there is a tendency to fail to consider other interests. There has been little inter-departmental communication. The problem has been compounded by the pressure of special and vested interest groups upon a given department.

Accordingly, it is submitted that an independent decision-making tribunal should be established to regulate and control activities which affect the environment. Such a body would not be innovative, especially in New Brunswick. Various such independent tribunals already exist with power to make independent decisions in their respective fields. There are for example the Industrial Relations Board, the Public Service Labour Relations Board, the Tax Appeal Board, and the Courts themselves.

It is not envisaged that such a tribunal would supplant the Department of Fisheries and the Environment. Rather, it would be an independent branch of that Department or even a completely autonomous body. For example, the Industrial Relations Board is independent, but is affiliated with the Department of Labour.

The tribunal should have three basic powers.

Firstly, the tribunal should have the power to conduct a continuing review of policies and programs of the Government and Government agencies on matters pertaining to the environment for the purpose of making reports and recommendations to Cabinet. This should also involve the responsibility for encouraging the coordination and communication between the various Government Departments.

Secondly, the tribunal should have the power to conduct inquiries on its own motion into any matter which affects the environment and to make reports and recommendations thereon. For this purpose the tribunal should be adequately supplied with financing and staff to ensure that it is capable of satisfactory performance. In a rudimentary way the present Environmental Council is intended to have such a function.

Thirdly, and most importantly, the Board should have the power to administer a statutorily established licensing system for all activities which may affect the environment. This would seem to be a relatively simple way of controlling the use of the environment. It is

already employed under various other statutes and, indeed, is utilized in a limited way in the proposed Air Quality Regulations under the Clean Environment Act, already discussed.

It is submitted that all persons who intend to engage in a project or activity which may have environmental effects should be required to make an application for a licence. The application would be scrutinized in its environmental aspects in accordance with statutory standards. A licence might then be granted or be refused. If granted it may be conditional or unconditional. Such a system is already in existence in the State of Maine and a copy of portions of the legislation are attached.

The procedure for the application for a licence must permit the intervention and participation of third parties.

Such a licensing system would ensure that the applicant's case in support of the granting of a license would be thoroughly examined. This, together with an examination of any other aspects of the application, would ensure a decision which was as sound as possible.

The procedure for processing applications for licenses should follow established principles for the conduct of adjudicatory proceedings. There are three basic requirements of such a licensing procedure: It must be open, fair and impartial.

Two basic requirements must be met before any hearing. Firstly, the public must be fully informed of the nature and purpose of the process

and of the ways in which involvement may be achieved. Secondly, all interested parties must have notice of the application and the time and place of the hearing of the application. Notice of application and hearing may be given publicly or specifically to people who request notice.

Persons who intend to appear at a hearing to intervene should be required to file a notice of intervention in advance to give the applicant fair warning and to promote an orderly hearing. The notice of intervention should contain the grounds for intervention.

At the hearing itself, a number of aspects require attention to ensure a fair hearing.

There must be the right of all intervening persons to attend the hearing and be heard.

Unless special circumstances exist, all hearings should be held in public.

The hearing should be conducted in an orderly and predetermined manner to ensure the effective presentation of evidence and argument.

Parties participating at the hearing should be entitled to be represented by Counsel.

The tribunal should have the power to issue subpoenas for the attendance of witnesses and the production of documents.

Similarly, the tribunal should have the power to administer oaths.

The parties must have the right to examine their own witnesses and to cross-examine the witnesses of other parties adverse in interest in order to ensure full disclosure of the facts.

The tribunal should not be required to follow the formal rules of evidence, but should be governed by the standard of proof commonly relied on by reasonably prudent men in the conduct of their own affairs. A transcript of the oral evidence should be prepared.

Following the hearing, the tribunal should come to a decision which is reduced to writing with reasons. The requirement for reasons leads to better considered decisions and ensures that decisions are made for certain reasons. It is also important in cases of appeal.

The written reasons for the decision should set out the findings of fact on the evidence and the conclusions based on that evidence.

The tribunal should be required to compile a record consisting of the procedural documents and rulings in the case, the documentary evidence, a transcript of oral evidence and the final decision.

An appeal to the Supreme Court should be permitted only for errors of law made by the tribunal on the face of the record.

Finally, the decision of the tribunal should immediately be given to the persons who participated in the decision making process.

CONCLUSION

It is submitted that implementation of these proposals result in better decision-making in environmental matters. They would ensure adequate consideration of all aspects of proposed activity. They would eliminate the present powerlessness of those who are in reality affected greatly by environmental disruption, but whose interest has no legal status. They would, it is submitted, result in fair treatment of New Brunswickers.