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AN ENVIRONMENTAL BILL OF RIGHTS FOR CANADA

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INTRODUCTION

Since the 1960s, when North Americans began to express concern about protection of the environment, one proposal for achieving this has been the formulation of a "right" to environmental quality. In Canada, environmentalists have been pressing for an environmental bill of rights since the early 1970s. They reason that as fundamental as the right to food, shelter or freedom from discrimination is the right of all members of society to live in a safe physical environment in which the continued diversity of non-human life is also ensured. The most recent opinion polls in this country confirm the increasing commitment of Canadians to the well-being of their natural environment.(1)

As early as 1978, a survey conducted for Environment Canada found that 89% of Canadians considered the deterioration of the natural environment to be of major concern.(2) This finding has been reinforced by subsequent polls, including the December 1990 Gallup Poll, which indicated that more than two-thirds of Canadians are buying "environmentally friendly" products.(3)

Establishing environmental rights is an attractive answer to our need to balance the right of property holders to develop their properties with society's right to environmental safety.(4) The formulation of rights could be a legal mechanism for creating or shifting the balance between competing interests. Such a right residing in each Canadian would provide the

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(1) "Les Canadiens se préoccupent de plus en plus de leur environnement," *La Presse*, 15 January 1991.

(2) Canadian Environmental Law Research Foundation, *Preliminary Analysis of a Federal Environmental Bill of Rights*, Toronto, 1984, p. 7.

(3) "Les Canadiens…," *La Presse*, 15 January 1991.

(4) John Swaigen and Richard E. Woods, "A Substantive Right to Environmental Quality," in *Environmental Rights in Canada*, Butterworths, Toronto, 1981.

courts with direction in, for example, determining the strength of the individual Canadian's claim for environmental health in cases where it competed with the right of another individual or corporation to develop property.

An environmental bill of rights would be a law seeking to remove obstacles that prevent individuals and public interest groups from participating in the environmental decision-making process and litigating issues of environmental degradation. In recent years a number of drafts of such a bill have been introduced at the federal and provincial levels in Canada but have resulted in only one qualified success, in Quebec.(5) The creation of a right which would have the desired effect on the quality of the environment would be difficult; some have suggested that a duty placed on the state and individuals to avoid harming the natural environment might be more effective than the vesting of "rights" in each Canadian.(6)

Concern for the environment has been increasing around the world since the early 1980s. In 1987, the Brundtland Report heightened awareness of the need for significant legislative and other changes, none of which has yet materialized.(7) Because we have now recognized the direct link between the health of our environment and our quality of life, we should also recognize the individual's interest in environmental health, and his or her duty to act to preserve it.

It is important that an environmental quality right be a substantive one, which would give the right-holder status to participate in decisions affecting the protected right. Holders of a substantive right to a healthy environment could sue; any injury to them would have to be compensated; and the remedy would be for their benefit. An environmental bill of rights would be "a statutory guarantee of the right of each person to a healthy environment, and the duty of governments to ensure this healthy environment in their role as the trustees of all public lands, waters and resources for the benefit of present and future generations."(8)

An environmental bill of rights is seen as part of an effort to make Canadian environmental law more democratic. Recognizing a right to a healthy environment, both directly

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(5) Quebec, *Environment Quality Act*, R.S.C., c. Q-2, 1977.

(6) Swaigen and Woods (1981), p. 199.

(7) World Commission of Environment and Development, *Our Common Future*, ("the Brundtland Report"), Oxford University Press, London, 1987.

(8) Paul Muldoon, "The Fight for an Environmental Bill of Rights," *Alternatives*, Vol. 15, No. 2, 1988, p. 35.

and indirectly through procedural and substantive reforms, would be an important part of this effort. More democratic environmental law is necessary to empower citizens to protect the quality of the natural environment for their own and future generations.(9) An environmental right is seen as being similar to a civil liberty, in that it would constrain government action.

Proponents of the environmental bill of rights would want it to constrain any potentially harmful uses of private property by individual owners.(10) The right would have to be an interest in environmental quality that was recognized and protected by the law to the same extent as property rights are protected. Compliance with the environmental right would be a legal duty, whose contravention would be actionable.

Environmental rights might also be of indirect benefit in one or more of the following ways:

i. they might contribute to higher political visibility for conflicts between environmental values and other social goals;

ii. they might shift the burden of proof from those who want to protect the environment to those whose actions might harm it; and

iii. they might have a subtle positive moral effect, which might be of more real effect than new legislative standards.

Some have suggested that the introduction of a substantive environmental right in Canada could lead to attitudinal change that would eventually encourage improvements in environmental protection and quality.(11) Systems of rights might be more flexible environmental protection tools than specific rules and standards set out in legislation and regulations. Also, the use of a language of environmental rights might contribute to the development of more effective environmental rules. Individual Canadians who became

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(9) Franklin Gertler, Paul Muldoon and Marcia Valiante, “Public Access to Environmental Justice,” in *Sustainable Development in Canada: Options for Law Reform*, Canadian Bar Association, Ottawa, 1990, p. 80.

(10) Swaigen and Woods (1981), p. 200.

(11) *Ibid*., p. 201.

committed to environmental protection might be more effective as stewards of the environment and agents of change than the courts, regardless of legislative initiatives.

Other commentators have suggested that the most important effect of a substantive right to environmental quality would be the promotion of an "environmental ethic": "a new way of thinking about [the human] relationship to nature which could permeate [our] world-view and infuse [our] plans with a new concern for maintaining the balance and diversity of nature."(12) This ethic would be effective in leading us toward a better social and legal climate for environmental protection.

Even in the academic debate about the efficacy of an environmental bill of rights, doubts have been expressed. It has been suggested that the energy devoted to this very legal solution to environmental problems has diverted attention away from the original goals of the environmental movement, which, without the limitations of the legal context, would have led to more constructive means of measurably improving environmental quality. Environmental problems are not legal ones, nor will legal solution necessarily provide all the answers. Some writers suggest that the environmental movement should be seeking to develop an environmental moral code that would lead to world-wide environmental reform: "the development globally of a whole new perspective on the interrelatedness of humankind and nature."(13)

A number of writers have explored this idea. Some have suggested that legislative measures would not lead to a real difference in environmental quality unless they were preceded by the widespread adoption of a new ethic. Canadians' growing awareness of environmental issues and increasing public support for measures to protect the environment may suggest that this environmental ethic is already being developed in Canada. Whether the ethic should precede the legislation is an interesting question, but an academic one.(14) Clearly, legislative initiatives should not be stalled until such time as there might be sufficient documentation of adherence to an environmental ethic.

In spite of any potential shortcomings, public support for more comprehensive environmental protection legislation, including an environmental bill of rights, is widespread.(15)

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(12) *Ibid*., p. 202

(13) Cynthia Giagnocavo and Howard Goldstein, "Law Reform or World Re-form: The Problem of Environmental Rights," *McGill Law Journal,* Vol. 35, 1990, p. 345.

(14) Swaigen and Woods (1981), p. 235.

(15) "The Environment and Environmentalism: Our Progress, Problems and Prospects," *Probe Post*, Vol. 11, Winter 1989, p. 14.

The environmental bill of rights is only one proposal within the new legislative approach that is being called for to improve the protection of Canada's natural environment.

Environmental rights legislation has been enacted by legislators in a number of North American jurisdictions, most recently the Northwest Territories. *The Environmental Rights Act* passed by the Territorial Assembly on 6 November 1990 gives individuals the right to clean air, water and soil, and the power to sue polluters if the government fails to act.(16)

Canada has endorsed the 1987 Brundtland Report, one of whose cornerstone principles is sustainable development. Canada may thus be committing itself to a new legislative scheme for fulfilling its environmental responsibilities, globally and locally. One arm of this scheme might be the enactment of an environmental bill of rights.

THE INADEQUACY OF CANADA'S EXISTING LEGISLATIVE SCHEME

The details of the local and global environmental problems Canadians now face, including air pollution, global warming and concerns about waste management, are becoming better understood and may even seem overwhelming. Clearly, any single legislative response cannot allay all of these fears, or establish an omnibus solution. Those who have called for an environmental bill of rights have claimed that it would enable individual Canadians to contribute in an active, concrete way to the protection of their own environment. This particular solution would not exclude others, but would be central in that it would put responsibility and control squarely in the hands of individual Canadians.

How has the existing legislative scheme failed? The following ways have been suggested:

1. The legal rules of causation make it difficult for individuals to succeed with tort actions in cases of environmental negligence or nuisance. For example, in an attempt to stop, or recover damages from, an industrial polluter, the onus is on pollution victims to prove that a particular polluter has caused the alleged environmental damage. In most cases, several pollution sources could also have contributed to the problem, rendering it impossible for liability to be located in one polluter, even if that polluter is the major cause of the problem.

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(16) "Environmental Rights Act Approved," *National*, Vol. 17, No. 10, Dec./Jan, 1990, p. 8.

For example, in a situation of lead contamination, it would be difficult to establish that factory lead emissions were the cause, since car exhaust might also be largely to blame.(17)

2. Individuals are discouraged from court action by the costs of participation in hearings, and the possibility, if unsuccessful, of having to pay the polluter's court costs.

3. Individuals affected by industrial pollution seldom receive notice of applications for permits for pollution discharge, even if they are directly downwind or downstream of the source of the emissions. As a result, they cannot make their own concerns known during the permit-granting process.

4. Limited access to scientific evidence often makes it difficult for the public to discharge the burden of proof when attempting to influence the setting of environmental standards.

Environmentalists and other advocates of an environmental bill of rights point out that under the existing legislative scheme the government is not obliged to enforce its own environmental laws. It can decide at its own discretion whether any provision will be enforced. In most circumstances, individuals and environmental groups are unable to compel the government to act to protect the environment, except through the force of political pressure.

Even where the common law does afford a remedy to the individual who seeks to litigate an environmental concern, there are serious obstacles to proceeding or being successful before the courts. These obstacles are dealt with below under the headings "Standing" and "Private Prosecutions."

A. Standing

The first hurdle for an individual attempting to litigate an environmental problem in the public interest is the question of whether permission will be granted to bring the case to court; that is, whether the plaintiff will be granted "standing." Unless the court grants standing to the would-be litigant, the action cannot proceed. Historically, for an individual to have standing to litigate a claim, he or she had to establish some private concern that justified access

(17) Muldoon (1988), p. 34.

to the courts. Thus, the standing rule restricted the right to use the courts to those seeking to protect their own rights, and to the government itself.(18) The basis for the latter was that the government was the sole protector of the public interest.(19)

The standing barrier has been the subject of much academic attention, and some judicial attention, in recent years. In the field of constitutional law, the Canadian courts have created several openings in the standing barrier,(20) so that individuals have been granted status to challenge the constitutionality of certain laws or activities. Similar reasoning has yet to be applied to environmental litigants before the Supreme Court of Canada.

On a number of occasions, environmental groups in the United States have sought standing before the courts to prevent development which members feared would have negative environmental consequences. In 1972, in response to the case of *Sierra Club* v. *Morton*,(21) which was then before the U.S. Supreme Court, Professor Christopher Stone wrote an article called "Should Trees Have Standing?"(22) In it, he developed a theory for the extension of legal personality so that a right to standing could be conferred on natural objects, such as trees or mountain ranges.

Stone's argument was that the judicial system in the past extended legal personality to entities such as women, slaves and corporations, and that there is no reason why this status should not be extended to natural objects. Stone claimed that environmental groups could represent such objects and argue their interests before the courts.

Although Stone's reasoning was not accepted by the majority of the Court, it clearly influenced the strong dissent of Mr. Justice Douglas, with which Mr. Justice Blackmun concurred. Since that decision, Stone's article has not been referred to again by a U.S. court, but it is often cited in legal writing on environmental rights. This lack of standing to represent the natural environment for its own sake continues to prevent Canadians from legal recourse for their environmental protection concerns.

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(18) David Estrin and John Swaigen, *Environment on Trial: A Handbook of Environmental Law*, Revised Edition edited by Mary Anne Carswell and John Swaigen, Canadian Environmental Law Research Foundation, Toronto, 1978, p. 460.

(19) Muldoon (1988), p. 35.

(20) *Ibid.*

(21) 405 U.S. 727 (1972).

(22) Christopher D. Stone, "Should Trees Have Standing?" (1972) 45 *Southern California Law Review*, 450.

In lawsuits against the Canadian government for damages in cases of environmental wrongs, the private law rules of standing apply.(23) More liberal rules of standing apply where equitable relief, such as injunctive or declaratory relief, is sought.(24) The Supreme Court of Canada has confirmed the more liberal standing rule in such cases.(25) Public interest standing will be granted where a serious issue is raised, where the plaintiff has a genuine interest in the issue, and where there is no other reasonable and effective way for the issue to come before the courts.

The result of these standing rules is that environmental groups should be granted standing where they seek prerogative remedies, such as declarations, injunctions and orders quashing government decisions, unless the relief sought is against a federal board, commission or other tribunal.(26) The liberal standing rules developed in the context of constitutional litigation will be applied in environmental cases involving the *Canadian Charter of Rights and Freedoms*.(27) However, there has been no expansion of the common law standing rule as regards actions in tort, such as negligence or nuisance actions.

Some federal environmental statutes provide legislated standing rules that enhance individuals' access to the courts. An example is the *Canadian Environmental Protection Act* (CEPA).(28) CEPA has little or no effect on standing with respect to civil remedies other than those specifically provided for in the Act and has no effect on standing to sue for damages. In Ontario, the Ontario Law Reform Commission has recommended the elimination of a number of present barriers to standing, so that the public could have standing in public nuisance cases and litigants in public interest cases would not face cost penalties should they lose in court.

An environmental bill of rights would make it possible for Canadians to sue for nuisance in the civil courts, or to stop any project or program that was not being conducted legally. It would also grant a right to prosecute environmental wrongdoers before courts and

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(23) Gertler, Muldoon and Valiante (1990), p. 86.

(24) *Energy Probe* v. *Atomic Energy Control Board*, [1984] 2 F.C. 227 (T.D.), aff'd. [1985] 1 F.C. 563 (C.A.).

(25) See *Finlay* v. *Canada (Minister of Finance)* (1986), 2 S.C.R. 607; and, most recently, *The Canadian Council of Churches* v. *Canada*, 23 January 1992 (S.C.C.) (unreported).

(26) Gertler, Muldoon and Valiante (1990), p. 87.

(27) *Ibid.*

(28) R.S.C. 1985, c. 16 (4th Supp.).

administrative tribunals, and allow individuals to speak before the courts on behalf of the environment.

B. Private Prosecutions

The only means for individual Canadians to enforce environmental protection statutes is the historical common law right to launch a private prosecution and thereby gain access to our criminal justice system, acting in the place of the Crown Attorney as the prosecutor in enforcing a law. This tool is rarely used, although some environmental advocates have begun to re-examine its possible usefulness. Professor Linda Duncan of Dalhousie University has recently written a guide to using this common law remedy.(29)

There are limitations on the impact this remedy will have. First, offences may be prosecuted privately only by summary conviction, for which much less serious penalties are available;(30) the more serious indictable offences can be prosecuted only by the Attorney General. Also, the Attorney General may intervene at any time to take charge of a private prosecution, or may even stay the case.(31) An individual who is considering incurring costs, legal and otherwise, to pursue a prosecution, may be discouraged from doing so on realizing that he or she may at any time lose control of the action.

Any proceeding in the criminal law context must be proven by the prosecutor "beyond a reasonable doubt," which is a more onerous burden of poof than the civil law standard, "balance of probabilities." Given the obvious difficulty of proof of causation of environmental damage and risks, this burden makes the environmental litigant's success before the criminal courts even more unlikely.

More serious criticisms of private prosecutions include the point that such prosecutions are based upon past actions and cannot prevent future environmental damage. The criminal law requirement of *mens rea*, or intention to commit a crime, may also make success more elusive. Also, the only remedy available to the criminal courts is the imposition of a fine, which is usually small in relation to the extent of the environmental damage suffered. As well,

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(29) Linda F. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution*, Environmental Law Centre, Edmonton, 1990.

(30) Section 787 of the *Criminal Code*, R.S.C. 1985, c. C-46, limits of the penalty upon conviction by summary conviction to a fine of not more than $2,000, or six months' imprisonment, or both.

(31) Gertler, Muldoon and Valiante (1990), p. 90.

any moneys recovered by the criminal justice system revert to the government's general revenues and do not go towards the cost of repairing the environmental damage. There is an exception to this rule in Ontario, where the court is empowered to order that the polluter must prevent further harm and restore the natural environment.(32)

Most American environmental protection statutes provide for individual access to the courts for enforcement purposes by way of a citizen suit provision.(33) This allows individuals to enforce any legislative environmental standard, or to bring an action to compel a government agency to fulfil any statutory duty. It has been suggested that this mechanism should be considered for inclusion in Canada's legislative environmental protection scheme.(34)

A FEDERAL ENVIRONMENTAL BILL OF RIGHTS

The enactment of an environmental bill of rights for Canadians should be a start to implementing the principles of sustainable development conceptualized in the Brundtland Report. These principles were welcomed by environmentalists worldwide, and embraced in Canada by the National Task Force on Environment and Economy in a report to the Canadian Council of Resources and Environment Ministers.(35) The principles are a source of policy direction for Canadian legislators as they seek to take legislative action that recognizes the interdependence of the environment and the economy.

The Brundtland Report encourages governments to reformulate legislation so as to recognize the rights and responsibilities of citizens and states with respect to sustainable development. Governments are reminded of their responsibility as stewards holding resources in trust for future generations.(36)

Environmentalists have called for a bill that would create substantive and procedural rights. The substantive rights would include the following:

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(32) Muldoon (1988), p. 37.

(33) Gertler, Muldoon and Valiante (1990), p. 91.

(34) *Ibid.*

(35) Richard D. Lindgren, "Future Directions for Environmental Law: Implementing the Brundtland Report," Paper given at Workshop on Environmental Law and Practice, Canadian Bar Association – Ontario, Toronto, 1989, p. 8.

(36) *Ibid*., p. 9.

1. The right to a clean, healthy environment, and the preservation of its natural, historic and aesthetic values, for present and future generations (there would be a corresponding duty on governments to ensure the preservation);

2. A public right to participate in the regulation process;

3. The right to sue polluters for actual or apprehended environmental harm, without having to show any private interest, and to require the government to enforce environmental protection laws;

4. The right to access to information and adequate intervenor funding.

Procedural rights would include: reforms of the standing rules, class actions and burden of proof requirements in environmental litigation; new costs rules; and a law to protect from reprisal any employees who reported environmentally harmful conduct by their employers. It has also been suggested that the onus of proof should be shifted from plaintiffs to defendants, so that polluters (or alleged polluters) would have to establish the environmental safety of their activities.(37)

Creating environmental rights for Canadians would alter the existing balance between the right of individual property holders to develop their property and the right of the community to freedom from environmental harm resulting from that development. One result might be to shift the burden of proof to those who propose to engage in environmentally harmful activity, that is, on to the party who is doing the harm, not its victims.

The Canadian Bar Association (CBA) has recommended that the Canadian government work toward a long-term strategy of entrenching the right to a healthy environment in the Constitution, and that, as an interim step, it enact a statute enshrining this right.(38) The recommendations include: detailed provisions for formalizing public participation; the enhanced availability of civil and criminal remedies for citizens in environmental litigation; abolition of the common law limits on standing in relation to nuisance actions; expanded access for individuals and environmental groups; and a greater variety of remedies for environmental harm.

(37) Muldoon (1988), p. 35.

(38) Gertler, Muldoon and Valiante (1990).

The Canadian Environmental Law Research Foundation (C.E.L.R.F.) in 1984 produced a *Preliminary Analysis of Elements of a Federal Environmental Bill of Rights* for Environment Canada. This work contained detailed submissions on more than 14 specific elements that could or should be included in an environmental bill of rights.

In order to be effective enforcers of environmental protection measures, individuals and public interest groups need an access-to-information statute requiring government departments to keep indexes of their materials and to make information available on request.(39)

Environmental activists have also suggested that an environmental bill of rights provide for an office of an environmental ombudsman,(40) or a Parliamentary Commissioner for the Environment. This office exists in New Zealand, having been established under the *Environment Act 1986*, which was introduced on 15 July 1986. The New Zealand Parliamentary Commissioner has been given various powers that enable her to fulfil her role as the non-partisan auditor of the government's performance of its environmental protection responsibilities.

An environmental bill of rights might also include a provision enabling citizens to bring class actions in environmental litigation.(41) A class action allows any citizen to sue for damages on behalf of others who are similarly aggrieved. This innovation would go beyond the broadening of the standing rule, to allow the courts to assess and compensate an injury to the entire community affected by environmental damage, not just the individual litigant.

An environmental bill of rights would also have to provide for intervenor funding if public participation in litigation is to become a reality. The cost of a civil action is beyond the means of an individual or an environmental interest group. As well, awards of funds to cover the litigation costs of deserving litigants or interest groups might encourage constructive, informed and useful public participation in hearings and litigation.

EXISTING AND PROPOSED ENVIRONMENTAL BILLS OF RIGHTS IN OTHER JURISDICTIONS

Some American jurisdictions, including Illinois, Massachusetts, Rhode Island, Texas and Pennsylvania, have implemented constitutional protection of the right to a healthy environment. Recent constitutions enacted in other countries, including Brazil, have included

(39) Estrin and Swaigen (1978), p. 469.

(40) *Ibid*., p. 472.

(41) *Ibid*., p. 473.

guarantees of safe environmental quality.(42) In Canada, there has been since 1977 a partial environmental bill of rights in place in Quebec, in the *Environment Quality Act* (EQA).

Quebec legislation provides that every person has a right to a healthy environment and to its protection and gives individuals recourse to the Superior Court, where an injunction may be granted to prohibit any act that interferes with the right to a healthy environment.(43)

Quebec's legislation is seen as a "qualified success" by environmentalists.(44) The right to a healthy environment is only operative to a limited extent, in that the generally restrictive standing rule is relaxed only when there is contravention of regulatory provisions in the EQA. The Act does create an expedited process for groups wanting to enforce environmental laws. Quebec also has innovative class action law, giving Quebeckers better access to the courts in environmental matters than other Canadians enjoy.

A more comprehensive environmental bill of rights was proposed in Ontario in 1987. Bill 13, the Ontario Environmental Rights Act, was introduced in the Ontario legislature by Ruth Grier of the New Democratic Party as a Private Member's bill. The bill would have given every Ontario resident a right to a healthy environment, and would have recognized the government as trustee of all public lands, waters and resources, for the benefit of present and future generations. It would have allowed any person to sue to halt potentially harmful activities, and empowered the court to award damages for harm already done and ordered the polluter to install pollution control equipment. Bill 13 would also have provided for environmental class actions; reduced the burden on the claimant to prove the causal link between the polluter and the environmental harm; enhanced public participation in the regulation process; granted intervenor funding; and given improved access to information.

Bill 13 moved through first and second reading in the Ontario legislature with support from all parties. It had not been defeated, and was assigned to the Resource Development Committee, when Ruth Grier introduced and moved second reading of Bill 12, which she hoped would replace the identical Bill 13. Unfortunately, neither bill had been passed before a provincial election was called. Indeed, Bill 12 was one of at least eight unsuccessful attempts to introduce a provincial environmental bill of rights. The current N.D.P government in

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(42) Cyril de Klemm, "The Conservation of Biological Diversity: State Obligations and Citizens' Duties," *Environmental Policy and Law*, Vol. 19, No. 2, 189, p. 53.

(43) Quebec, *Environmental Quality Act*, R.S.C., c. Q-2, 1977, sections 19.1 and 19.2.

(44) Muldoon (1988), p. 33.

Ontario is now studying the issue in committee. Environmental lawyers for the most part expect that this government will advance environmental reforms, beginning with an environmental bill of rights.(45)

The first example of a more comprehensive and successful environmental bill of rights was passed in the Northwest Territories in November 1989. The Northwest Territories *Environmental Rights Act* provides guarantees for:(46) public access to government information; protection from retaliation for employees who report their employers' environmentally harmful activities; the right to demand a government inspection of a suspected environmental problem; the right to prosecute polluters privately; and the diversion of fines paid by polluters to pay the costs of citizens who have launched a private prosecution. Commentators expect that this legislation will be a model for legislation in other Canadian jurisdictions.

A draft Charter of Environmental Rights will be considered for signing at the 1992 meeting of the Economic Commission for Europe (ECE).(47) The Charter would proclaim a number of rights based on the fundamental principle that "everyone has the right to an environment adequate for his general well-being."(48) The Charter would make ECE governments responsible for enforcing its provisions.

A number of American states have enacted environmental rights legislation, including Michigan and Minnesota. U.S. constitutional law doctrines related to property law have had significant impact on the implementation of these statutes and the evolution of environmental protection law.

The *U.S. Constitution* affords protection to individual property owners from economic loss caused by government interference with their property interests, and this doctrine is based on the "takings clause." A related doctrine, the "public trust doctrine," has developed in American case law; it has been described as a right to a clean or attractive environment.(49) The public trust doctrine provides that certain kinds of land, such as shorelands and parks, are the

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(45) "Legislative Reform to Quicken under NDP Government, Experts Predict," *Law Times*, 17-23 September 1990, p. S-1, S-8.

(46) "Environmental Rights Act Approved," *National*, 1990, p. 8.

(47) "A Charter of Environmental Rights?" *Brundtland Bulletin*, Issue 9/10, Sept./Dec. 1990, p. 6.

(48) "ECE Charter on Environmental Rights and Obligations," *Brundtland Bulletin*, Issue 9/10, Sept./Dec. 1990, p. SF-10.

(49) Swaigen and Woods (1981), p. 208.

subject of a public trust, and may not be alienated to private owners or used in such a way as to decrease their value to the general public. Clearly, if this is a right to a clean environment, it is a limited one.

The public trust doctrine gives members of the public standing to challenge government decisions regarding the subject land, regardless of any pecuniary of proprietary interests the individual litigant may have. The doctrine is said to have been rejuvenated for use in the environmental protection context in the writings of Professor Joseph Sax of the University of Michigan, who was also the drafter of the *Michigan Environmental Protection Act* (MEPA),(50) which was first enacted in 1971.

MEPA provides that an action may be brought for declaratory or injunctive relief against anyone who has polluted, or "is likely to pollute, impair or destroy air, water or other natural resources or the public trust therein."(51) Subsection 1202(1) grants any member of the public standing to sue other members of the public and government agencies. Defendants may argue that they have acted reasonably by complying with government standards, but these standards are subject to review by the courts, which may impose a new standard, and direct that it be adopted by the government.(52)

The burden of proof has been shifted by MEPA to the extent that the plaintiff need only establish the existence or likelihood of pollution or other damage and need not establish that the defendant's conduct was unreasonable. Once the plaintiff has proved the likelihood of harm, the burden shifts to the defendant to show that its conduct was reasonable. Reasonableness can be proven by establishing that there was no prudent and feasible alternative to the conduct, which was "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."(53)

The implementation of MEPA is considered to have resulted in a major extension of the public trust doctrine.(54) The public trust doctrine, as applied under MEPA, has been used

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(50) *Ibid*., p.213.

(51) *Ibid.*

(52) Frank P. Grad, *Treatise on Environmental Law*, Vol. 2, Matthew Bender & Co., New York, 1989, p. 10-315.

(53) Swaigen and Woods (1981), p. 214.

(54) Grad (1989), p. 10-316.

to check and control development and has not overturned standards set by government agencies in most instances.(55) The power of the courts to do so was intended to allow the law that developed under MEPA to keep pace with technological changes that could not have been foreseen by the legislature.(56)

Since MEPA was enacted, at least four studies have reviewed the emerging case law, the first three between 1970 and 1976,(57) and the most recent in 1985.(58) The initial studies arrived at two important conclusions: that the law had significantly enhanced the opportunities available to individuals to act in the courts to protect the environment; and that the courts had not been flooded with frivolous claims. Indeed, the courts have not been over-burdened with MEPA litigation at any time since its passage. Subsequent studies confirmed the continuation of these two trends, and also established that technical issues associated with environmental litigation were not overwhelming the courts.

The studies of MEPA demonstrated, however, that its proponents' hopes for improved environmental quality have not been realized. The cases have been relatively few, and the costs of litigation seem to be discouraging private individuals from litigating environmental claims (although the contingency fee system of legal fees in the U.S. should make representation more accessible than it is in Canada). The 1985 study determined that costs are stimulating a large number of settlements of MEPA cases.(59) Although settlements may represent a positive result in some instances, it is also possible that they are an undesirable compromise caused by financial pressure. To the extent that individuals cannot afford to make real the environmental rights created by MEPA, the statute will have failed to accomplish its drafters' objectives.

Particularly scarce have been cases in which the courts have interfered with pollution standards set by government agencies, the most important innovation in MEPA. It may be that its use will be expanded as the case law evolves and litigants and judges become more prepared to interfere with agency discretion.

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(55) *Ibid.*

(56) *Ray* v. *Mason County* (1975), 224 N.W. 2d. 883 (Sup. Ct. Mich.), cited in Grad (1989), p. 10-316.

(57) Referred to in Swaigen and Woods (1981), p. 214.

(58) Daniel K. Stone, "The *Michigan Environmental Protection Act*: Bringing Citizen-Initiated Environmental Suits into the 1980s," *Ecology Law Quarterly*, Vol. 12, 1985, p. 271.

(59) *Ibid*., p. 291.

At the federal level in Canada, the first motion for the adoption of an environmental bill of rights was made unsuccessfully by Charles Caccia, then Minister of the Environment, in the House of Commons on 9 July 1981.(60) Since then, the federal N.D.P. has advocated an environmental bill of rights, but has made no specific proposals.(61)

THE CONSTITUTIONAL ALTERNATIVE

Some environmental advocates have expressed their preference for a constitutional guarantee of environmental health, rather than the statutory guarantee that would be created by an environmental bill of rights. Indeed, during the 1981 negotiations leading to the *Canadian Charter of Rights and Freedoms*, environmentalists recommended that a fundamental right to safe environmental quality be entrenched in the Canadian constitution. A constitutional guarantee would have given Canadians a right to good environmental quality that would have prevailed over all federal and provincial legislation, and would have constrained government action. Every statute in Canada, existing or future, would have been required to protect the constitutional right to a healthy environment.

The constitutional protection of environmental quality is still the long-term goal of most advocates of an environmental bill of rights. There is some suggestion that this right may be judicially interpreted as already being protected by one of the existing Charter provisions. This would render it unnecessary to add any amendment to the Charter to create such a constitutional guarantee. The long process of litigating the cases that could lead to such an interpretation by the Canadian courts, or, alternatively, the lengthy period necessary for any constitutional amendment, have led proponents to conclude that a statutory guarantee is desirable in the interim. Indeed, statutory protection of the right to a healthy environment may have some advantages over a constitutional guarantee.

The disadvantage of a Charter right is that it would be effective only against the government, and not against private polluters. A statutory bill of rights would provide recourse against both governmental and non-governmental polluters. Also, a statutory scheme would be more useful in terms of altering the procedural hurdles to enforcement of environmental

(60) House of Commons, *Hansard*, 9 July 1981, p. 11385.

(61) New Democratic Task Force on the Environment, “Toward a Sustainable Future,” *Report*, June 1989.

protection legislation, to adjusting the onus of proof, and to changing the system of cost recovery so as to reduce its dampening effect on citizen participation in litigation.

A statutory guarantee of environmental protection in an environmental bill of rights would, if it so provided, take precedence over all federal legislation except the Charter. However, it would not be binding upon provincial legislation, as the Charter is. Only a Charter guarantee can create a right to environmental quality that is of the same force as the other guaranteed rights.

Linking a constitutional guarantee of environmental protection to the Charter would ensure that the "reasonable limits" qualification set out in section 1 of the Charter would be applicable, as would the court's remedial powers under section 24 of the Charter.(62) The section 1 limit would allay the fears of those who suggest that a constitutional guarantee might prevent governments from acting effectively to respond to issues that in some instances might override environmental concerns. Also, section 33 of the Charter would allow any legislature expressly to opt out of the Charter guarantee in cases of unforeseen emergencies.

There are several ways in which a right to environmental quality might be linked to the Charter, including a declaration in the Preamble of the Charter, the expansion of existing Charter rights (by judicial interpretation), or the establishment of an entirely new right.(63) Ultimately it may be necessary to resort to the last, although it would be the most politically difficult to achieve. It would, however, be preferable to a preambular declaration, which would likely be effective as a guide to judicial interpretation only, and might be of uncertain effect.

If a constitutional guarantee of environmental health can be interpreted as being already contained within one of the Charter's existing provisions, its discovery awaits only the process of judicial interpretation and application. Some consider this possibility to be a "long shot,"(64) though several Charter provisions have been identified as possibly enshrining some right to environmental protection.

A measure of constitutional protection for the environment may be afforded by section 35, which affirms aboriginal peoples' treaty rights that existed at the time the Charter was

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(62) Dale Gibson, "Constitutional Entrenchment of Environmental Rights," *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir*, Proceedings of the Fifth International Conference on Constitutional Law, Montreal, Quebec, 1988, p. 285.

(63) *Ibid*., p. 286.

(64) *Ibid*., p. 275.

passed. The wording of section 35 has given aboriginal peoples hope that environmental rights may be included in their negotiations of land claims with the federal government.(65) This may provide an indirect route to environmental protection for one segment of Canada's population, but its effectiveness has yet to be tested.

Case law arising under the Charter's equality guarantee, section 15, has suggested that geographic discrimination may be prohibited by this section, although it is not a specifically prohibited ground of discrimination. This protection might lead a court to set aside pollution laws that provided for uneven standards of environmental protection across Canada. Given that the provinces have exclusive jurisdiction to legislate in the field of property and civil rights,(66) however, a certain amount of provincial disparity is probably inevitable. Even if section 15 were effective in the field of environmental protection, it would apply only in cases of inequality, and could not provide a general guarantee to a healthy environment.

The Charter provision expected to be most effective in affording environmental protection is section 7, which enshrines the right to "life, liberty and security of the person." Environmental hazards that threaten human life or health may well conflict with this guarantee. The possibility that section 7 may protect against government actions that endanger the lives or personal security of Canadians was suggested in the *Operation Dismantle Inc.* v. *The Queen* case.(67) The Supreme Court of Canada in that case was considering the plaintiff's claim for a declaration that cruise missile testing in Canada would endanger Canadian lives by increasing the risk of nuclear war. The action was dismissed because the Court found that the plaintiff could not establish the causal connection between testing and an increased risk of nuclear war. However, the Court did not deny that section 7 could be relevant where "a deprivation of life and liberty of the person could be proven to result from the impugned government act."(68)

Even if section 7 does contain a constitutional right to a healthy environment, however, it will be applied only to risks created by a government. Its significance will also be

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(65) John U. Bayly, "Section 35 of the Constitution Act, 1982, and Collective Aboriginal Rights to Environmental Quality," *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir*, Proceedings of the Fifth International Conference on Constitutional Law, Montreal, Quebec, 1988, p. 256.

(66) Pursuant to the constitutional division of powers between the federal and provincial levels of government in Canada set out by sections 91 and 92 of the *Constitution Act, 1867*.

(67) (1985) 18 D.L.R. (4th) 481 (S.C.C.).

(68) *Ibid*., p. 491.

limited by the absence of substantive and procedural provisions to make the guarantee more than a simple declaration of a principle.

A number of American states have included guarantees of environmental health in their constitutions. Their experiences have demonstrated that the advantages of constitutional protection include the creation of a higher authority and the enhanced permanence of the provision.(69) Constitutional provisions are more difficult to repeal or amend than are statutory provisions.

The American experience has also made it clear that a constitutional provision that is a mere statement of policy does not narrow the powers of government, nor does it make environmental protection a concrete governmental obligation. Only where the provision is "self-executing"(70) (i.e., where it is operative as a basis for judicial action without the need for further legislation), does it expand people's substantive environmental rights.

The source of this limitation on the effectiveness of constitutional guarantees is, in part, the constitutional law background of the U.S.. State legislatures are not granted powers by their constitutions. Indeed, they are granted jurisdiction by the U.S. Constitution over any area of legislative competence that is not foreclosed by the federal government and the provisions of the U.S. Constitution. State constitutions can limit jurisdiction only within the fields of competence left open by the federal government's actions and the areas of jurisdiction expressly conferred on the federal government by the Constitution.

A number of the states' constitutional provisions establishing environmental rights are of limited scope, where they apply only to a few, or even only one, resource. The effect is that any resource not specifically mentioned in the Constitution cannot be protected by state legislation.(71)

Of the 16 states that have broad constitutional provisions, 11 have mere policy statements.(72) The five states whose constitutional provisions may create significant environmental rights are Illinois, Massachusetts, Pennsylvania, Rhode Island and Texas. Pennsylvania's "environmental rights amendment" appears to provide an independent basis for

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(69) Swaigen and Woods (1981), p. 221.

(70) *Ibid*.

(71) *Ibid*., p. 222.

(72) *Ibid*., p. 223.

citizens to constrain both government action and that of private landowners. However, judicial resistance to the recognition of a substantive right to environmental quality seems to have weakened the amendment's effectiveness.(73)

The American courts seem to have treated a possible substantive environmental right as merely a formal right to procedures;(74) the constitutional protection has been limited to a right to be balanced against other rights. Commentators have concluded that environmental rights are more likely to be treated as substantive when they are set out in detailed statutes, rather than when they are created by constitutional amendments.

Another shortcoming of the constitutional approach is that it is almost wholly dependent on human beings to trigger litigation enforcing or implementing environmental laws. It may not adequately incorporate the need to protect non-human environmental values, since no action will commence without human motivation, effort, and financial commitment.(75)

It would seem to be in the interests of the environment to consider both statutory and constitutional approaches to environmental rights. An environmental quality right in the Charter would give the Courts a mandate to place substantive limits on governments and to examine legislative policy.(76) The effectiveness of this type of measure would be dependent on judicial interpretation. Statutory measures might prevent the weakening of the environmental protection scheme and inhibit any judicial erosion of its potential impact.

INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

There is an international declaration of the right to environmental quality in the 1972 *Stockholm Declaration on the Human Environment*, which provides that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being."(77) This declaration is not strictly binding

(73) *Ibid*., p. 226.

(74) *Ibid*., p. 232.

(75) Gertler, Muldoon and Valiante (1990), p. 83.

(76) Mary Hatherly, "Constitutional Amendment," *Environmental Protection and the Canadian Constitution*, Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment, Environmental Law Centre, Edmonton, 1987, p. 130.

(77) *Declaration of the United Nations Conference on the Human Environment*, adopted 16 June 1972, cited in Gertler, Muldoon and Valiante (1990), p. 81.

on states; international instruments of a binding nature contain only certain elements of this right. *The International Covenant of Economic, Social and Cultural Rights* (ESC) is binding on Canada, however; it provides a right to physical and mental health, and includes an obligation to prevent air, water and land pollution.(78)

Canada is at least obliged to implement measures to meet its obligations under the *ESC Rights Covenant*, which, as long as they make up the customary international law, are part of the law of Canada. Canada's constitutional provisions and statutes must be interpreted in accordance with the right to environmental quality.

In June 1986, the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED) submitted its report to the Brundtland Commission. It underlined new imperatives for nations' co-operation in environmental protection, citing the permeable nature of international boundaries when confronted with environmental hazards. The Report recommended the significant strengthening of the international legal framework in support of sustainable development. It said that gaps left by the 1972 *Declaration* must be overcome in the move toward sustainable development. Rights and responsibilities of both states and individuals were said to require recognition and respect.

The WCED recommended that the General Assembly of the United Nations commit itself to preparing a Universal Declaration and later a Convention on Environmental Protection and Sustainable Development.(79) These recommendations were put forward with an urgency that cannot be overstated. In the words of the Report, "if man does not heed the warnings given by nature he will not only put an end to his very existence, but will destroy all life on earth."(80)

In fact, there is already a rising trend in the number of existing international agreements on environmental protection; more than 140 international treaties are now in place and are having some impact.(81) On the other hand, increasing environmental degradation is at least as visible. Existing environmental agreements have been uncoordinated and piecemeal. A

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(78) Cited in Gertler, Muldoon and Valiante (1990), p. 81.

(79) Experts Group on Environmental Law of the WCED, *Environmental Protection and Sustainable Development*, Graham & Trotman/Martinus Nijhoff, London, 1986, p. xx.

(80) *Ibid.*

(81) Patricia M. Mische, "Ecological Security and the Need to Reconceptualize Sovereignty," *Alternatives*, XIV, 1989, p. 402.

more comprehensive system is needed at the international level. Any such system cannot be effective until it has been implemented and adopted by most of the states, and has developed a widespread cultural base. Both international law and customary norms are necessary to create a global sense of responsibility that will enable us to preserve the natural environment for the world as a whole.

DRAWBACKS TO LEGISLATIVE SOLUTIONS

The fears of those opposed to or uncertain about an environmental bill of rights take several forms. One argument is that the court system and administrative tribunals would be flooded with numerous frivolous or undeserving cases. Of course, as the purpose of such a law would be to improve citizen access, even its proponents hope it would increase the number of environmental cases before the courts. An increased number of cases should be a drawback only if the cases currently before the courts have more social merit than would cases under the environmental bill of rights. The enactment of an environmental bill of rights would reflect a legislative commitment to the worthiness of environmental issues for adjudication, and recognition that environmental protection concerns are deserving of judicial time and resources; these advantages would presumably outweigh any possible cost factor.

Courts would continue to have tools to discourage the frivolous litigant. The enactment of an environmental bill of rights would not stop the courts from applying the rule that the losers in litigation generally pay the costs of the winners, nor would it prevent courts from ordering those who seek to advance unworthy cases to post security for costs. The courts could strike out such claims, and order unsuccessful litigants to pay especially high costs where their cases were shown to have been without merit.

The Michigan experience under MEPA establishes that an environmental bill of rights would not "submerge the court system in an uncontrollable deluge of litigation."(82) MEPA neither inspired the quantity of litigation hoped for by its proponents, nor overloaded the courts as anticipated by its detractors. The legislation did not lead to vexatious litigation, nor did it cause unnecessary delays in approvals or the construction of development proposals.(83)

The drawbacks of a legislative scheme that seeks to create an environmental right in the absence of a constitutional provision have been discussed. In order to accomplish all the

(82) Estrin and Swaigen (1978), p. 462.

(83) Swaigen and Woods (1981), p. 214.

objectives that have been linked to the concept of an environmental bill of rights, a two-pronged approach would be required. A scheme incorporating both the statutory and constitutional environmental rights components would avoid many of the potential disadvantages associated with either standing alone.

Any legislative or constitutional approach to the entrenchment of environmental rights will only be as good as the clearness of the direction it gives the courts.(84) Given the conservatism with which American judges have applied the legislative and constitutional measures adopted in the U.S., and the possibility that Canadian judges might be even more conservative,(85) Canadian legislators would have to be explicit about the substantive nature of the environmental right being created in any proposed environmental bill of rights. Any discretion left to the courts must be the discretion to impose more, and not less, stringent environmental standards than those in existence.(86)

Some have questioned the utility of law as a solution to environmental problems. Law is perhaps unavoidably concerned with human interests like ownership and sovereignty. Law is concerned with those elements of the natural environment that can be used by human beings, and it seeks to resolve disputes between human users of natural objects.(87) Thus, law can grasp only some of the components of an ecosystem that is an unseverable whole.

It has been said that an injury to nature itself will almost never be considered an injury that could or should be repaired in law.(88) For the natural environment to be adequately protected, there has to be a recognition in law and among human resource-users, that biological diversity is in itself of value. The human interest in biological diversity is at least equivalent to other human interests that are protected by law. Any attempt to protect the natural environment that is based only on a human-oriented right to a healthy environment is bound to fail.(89) Indeed, science is making it clearer that a natural environment capable of supporting human life is dependent on the preservation of all the elements of the complex worldwide ecosystem.

On a more practical level, enabling individuals and interest groups to act through the courts to protect the natural environment raises questions about the legitimacy of

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(84) *Ibid*., p. 234.

(85) *Ibid*., p. 233.

(86) *Ibid*., p. 234.

(87) Cyril de Klemm (1989), p. 51.

(88) *Ibid*., p. 52.

(89) *Ibid*., p. 53.

environmental organizations and their ability to reflect the interests of natural objects.(90) It is certain that, as human observers, their ability to supply precise evidence about present and future environmental effects will be limited. The legitimacy of the groups is an issue that will arise on a case-by-case basis; the courts in Canada and the U.S. are developing experience with environmental advocacy groups who seek to intervene in litigation. Already, environmental groups in both countries have represented their members in litigation and have been successful in the interests of the natural environment in constraining government action. Also, in Canada the courts are developing rules to allow them to determine which interest groups in general are proper parties to Charter litigation.

An environmental bill of rights that provided extensive substantive and procedural provisions should overcome the potential difficulty of judicial resistance to procedural innovation. New legislation that left too much room for discretion, or did not provide special procedures for emergency remedies, might lead the courts to hesitate to substitute their discretion for that of a government agency.(91) This could reduce the measure's overall contribution to a healthy environment.

CONCLUSION

Given our growing understanding of and sense of responsibility for the escalating risks to environmental health, Canadians and others around the world are expressing a desire for access to legal means to protect the environment. The concept of an environmental bill of rights is attracting international interest as a legal tool to enable individuals and groups to participate in this area. Much academic thought has been given to developing the idea, and now more and more practical energy is going toward its implementation. An environmental bill of rights has been promoted by the environmental movement for several decades; environmentalists hope that it will soon find a place on the legislative agenda.

(90) *Ibid*., p. 54.

(91) *Ibid*., p. 55.