INDIVIDUAL AND GROUP ENFORCEMENT OF ENVIRONMENTAL LAW IN QUEBEC

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A. Introduction

When one considers existing environmental law with a view to options for enforcement by private individuals or groups, one should be careful to distinguish several sets of issues. First, there is the question of whether and to what extent individuals or groups have "public interest standing" to demand that public authorities adhere to laws and regulations. Secondly, there may be the possibility of initiating the private prosecution of environmental offences under a given statute. Thirdly, a right protected by a charter of rights (federal or provincial) may be a vehicle to address a given environmental concern. And, finally, there is a question as to what avenues for environmental protection are provided by private law and against private parties. This paper will provide a brief overview of the relevant law in Quebec.

B. Litigation for the Environment

1. Challenging Public Conduct

There has been considerable movement towards granting public interest standing in the areas of constitutional and administrative law.[1] The Supreme Court of Canada has, in a series of decisions, held that even in the absence of a direct and personal interest, a Court may exercise its discretion to grant standing where the plaintiff has a genuine interest in the matter, where a serious issue is to be tried, where there is no better way for the matter to get to court and where the question as such is justiciable.[2] These requirements have been discussed in great detail elsewhere.[3] Suffice it to mention here, the entire trend toward more liberal

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[1]Note the irony in the fact that a restrictive line of thought on standing in constitutional matters had brought about the introduction of the "public nuisance standing rule" into this area. It is this very rule from which exceptions are now made to liberalize the law of standing. See, in this regard, W.A. Bogart, "The Lessons of Liberalized Standing" (1989) 27 Osgoode Hall L.J. 195.

[2]See *Thorson* v. *A.G. Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors* v. *McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada* v. *Borowski*, [1981] 2 S.C.R. 575; *Finlay* v. *Minister of Finance of Canada*, [1986] 2 S.C.R. 607.

[3]For a discussion of the decisions and the criteria established see, for example, A.J. Roman & M. Pikkov, "Public Interest Litigation in Canada" in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990) 165 at 170ff; Ontario Law Reform Commission, *Report on the Law of Standing* (1989) 17ff; W.A. Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada* v. *Finlay*" (1988) 10 Sup. Ct L. Rev. 377; T.

(public interest) standing rules is restricted to cases where individuals or groups take issue with the actions of government. Within the exceptions delineated by the aforementioned cases, public interest standing may be granted where there is an issue of public authorities acting unconstitutionally or contrary to their duties under a given law. The rationale behind the liberalization in this area may be said to be that the public has a legitimate interest in the constitutionality and lawfulness of government actions.

2. Challenging Private Conduct

What remains a bone of contention is whether individuals or groups should also be given public interest standing to challenge private actions. There is obviously a difference between allowing citizens to take issue with the "guardians of public interest" when they feel that they are not fulfilling their task, and allowing citizens to question the conduct of fellow citizens or corporations. Traditionally, law has permitted the latter only in limited circumstances – those that fit into well-established conceptions of law and its functions. Three main circumstances can be distinguished.

i) Private Prosecutions

Most modern environmental protection laws support their regulatory scheme by the creation of offences which are subject to prosecution.[4] In such cases, private prosecution may be an option for the enforcement of environmental law as against another private party.[5] However, such actions, for a variety of reasons, least of all being the costs involved and the fact that a private prosecutor has to meet onerous proof requirements, have their own limitations. In Quebec, an additional constraint is that private prosecutions of offences under the *Environment Quality Act* (E.Q.A.) require the written authorization of the Attorney-General.[6]

ii) *Charter* Actions

Apart from private prosecutions, private action against another private party

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Cromwell, "From Trilogy to Quartet: *Minister of Finance of Canada*, v. *Finlay*" (1987) 7 Windsor Y. B. Access Just. 103; H. Trudeau, "L'intérêt à poursuivre du citoyen québécois en droit de l'environnement" (1988) 29 C. de D. 183 at 187ff.

[4]See, for example, *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16; *(Ontario) Environmental Protection Act*, R.S.O. 1980, c. 141; *(Quebec) Environment Quality Act*, R.S.Q. 1977, c. Q-2.

[5]See L.F. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 1990); K. Webb, "Taking Matters Into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" (1991) 36 McGill L.J. 770.

[6]R.S.Q. 1977, c. Q-2, s. 112.1.

traditionally required the infringement of a right of the former by the latter. In Quebec such a scenario is conceivable under its *Quebec Charter of Human Rights and Freedoms*[7] which, unlike the *Canadian Charter of Rights and Freedoms*,[8] applies to the relations of private parties.[9] However, as is the case with the Canadian *Charter*, the Quebec *Charter* is limited in its usefulness for the purposes of individual and group enforcement of environmental law. It requires the infringement of one of the entrenched rights (s. 49) which do not include an explicit right to a healthy or clean environment.[10] An applicant would have to establish the violation of the right to life, security, integrity and liberty of the person (s. 1) or to the peaceful enjoyment and free disposition of her or his goods (s. 6). In both cases, environmental protection interests would be incidental to the protection of other rights, so that not much may be gained by proceeding under the Quebec *Charter*. Similar to the Canadian *Charter*, enforcement in the public interest is conceivable only insofar as the constitutionality of a law or regulation is challenged (s. 52).[11] In such cases, standing would have to be determined – in Quebec as elsewhere in Canada – pursuant to the Supreme Court's decisions in *Thorson*, *McNeil* and *Borowski*.[12] In such a scenario, however, we would not be dealing with an action of one private party directly against another.

iii) Private Law

Such actions against private parties traditionally belong to the realm of private law. Private law, by definition, requires that private rights be at issue before any private party can take another to court. Only where the actions of a private individual or corporation injure the private rights of another will the party have a legally-recognized interest in bringing the matter before the (civil) courts. Therefore, in the environmental context, only where an environmental concern coincides with a recognized private right will current private law provide a remedy. Again, one is dealing only with incidental environmental protection.

Whether or not private law should be opened to public interest standing has been the focus of the debate that is currently taking place in Ontario. One of the key questions is whether standing to bring an action for public nuisance, a tort well-suited to environmental concerns, should be granted to individuals even in the

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[7]R.S.Q. c. C-12 [hereinafter Quebec *Charter*].

[8]Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter Canadian *Charter*].

[9]See Trudeau, *supra*, note 3 at 206.

[10]The corresponding provision in the Canadian *Charter* is s. 24.

[11]See s. 52 of the Canadian *Charter*.

[12]See Trudeau, *supra*, note 3 at 208.

absence of personal proprietary interests in the matter.[13]

C. The Legal Situation in Quebec

A comparable debate is absent in Quebec. While a number of Quebec courts follow the Supreme Court's approach to public interest standing in constitutional and administrative law,[14] there has been no drive to extend this trend to other areas. There are several reasons for this.

1. The "Sufficient Interest" Requirement

It is suggested that Quebec law is more restrictive than the common law.[15] Even in areas covered by the Supreme Court's decisions, Quebec courts are said to have no discretion to grant public interest standing, as article 55 of the *Code of Civil Procedure of Quebec* (*C.C.P.*)[16] requires that "whoever brings an action at law must have a sufficient interest."[17] Courts have defined this "sufficient interest" as a direct and personal interest and have held that individuals should be allowed to vindicate public interests or rights only where they are "exceptionally prejudiced."[18]

2. The *Civil Code of Québec*

The second reason for the absence of a similar debate is the fact that the *Civil Code of Québec* (*C.C.Q.*) – as in other civilian systems – contains no cause of action equivalent to common law public nuisance.[19] This is easily overlooked because older decisions often use language similar to that employed in the

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[13]See *infra*, note 40 and accompanying text.

[14]See *Paquet* v. *Mines S.N.A. Inc.*, [1986] R.J.Q. 1257 (C.A.); *Beaulne* v. *Kavanagh-Lemire et autres et l'office des professions du Québec*, [1989] R.J.Q. 2343 (C.A.).

[15]See Trudeau, *supra*, note 3 at 187-88 where she takes issue with this view.

[16]R.S.Q. c. C-25.

[17]See *Conseil du Patronat du Québec* v. *Commission de la santé et de la sécurité du travail du Québec*, [1984] R.D.J. 279 at 285.

[18]*Jeunes canadiens pour une civilisation chrétienne* v. *Fondation du théâtre du nouveau monde*, [1979] C.A. 491 at 493-94.

[19]See, in this context, R. Pépin, "L'intérêt à poursuivre en droit public canadien" (1975) 6 R.D.U.S. 3 at 22-23 where he notes that in Quebec "plusieurs concepts juridiques mettant en oeuvre des règles différentes servent à réglementer ce que le droit anglais regroupe sous le vocable de 'public nuisance'."

nuisance debate or even draw upon common law principles.[20] However, for historical reasons, the common law categorizes certain situations affecting private interests as "public nuisances" and thus in the hands of the Attorney-General,[21] whereas Quebec law has never barred individual right holders from bringing an action simply because a large number of individuals is affected.[22] As soon as private rights are at issue an individual will have the "sufficient interest" required by article 55 *C.C.P.* On the other hand, where there is no such interest, the matter is no longer one of private law so that only the Attorney-General will have standing pursuant to the provisions of the E.Q.A.

i) Servitudes

There are two main provisions in the *C.C.Q.* which are relevant to environmental concerns. Articles 501 and 503 describe a right similar to the common law riparian right. The owner of land bordering a stream has a right to the use of water undiminished in its quantity and quality by the use of an upper riparian.[23] In these limited circumstances, the *C.C.Q.* provides for a claim that can be made regardless of the fault of the defendant. As the balancing of two property related interests is at issue, the rights of one owner define the rights of the other and vice versa.[24]

ii) Abuse of Rights and Article 1053 *C.C.Q.*

The *C.C.Q.* itself makes no provision for a similar definition of the rights of neighbouring property owners as far as other interferences such as fumes, smells or noise are concerned. At first glance, all other actions of victims of environmental problems must rely on the delictual provision of article 1053 *C.C.Q.* That again would, at first blush, mean that actions can only be successful where the defendant's conduct involved some element of fault that is either the intentional

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[20]See *Adami* v. *City of Montreal* (1904), 25 C.S. 1; *Canada Paper Co.* v. *Brown* (1922), 63 S.C.R. 243 at 255-56; *Dame Chartier* v. *British Coal Corp.* (1938), 76 C.S. 360. See also *infra*, notes 28ff. and accompanying text. More recently the issue has lost its relevance as Quebec has given individuals standing under the E.Q.A. See *infra*, notes 42ff. and accompanying text.

[21]See P.S. Elder, "Environmental Protection Through the Common Law" (1973) 12 West. Ont. L. Rev. 107 at 115; J.R. Spencer, "Public Nuisance – A Critical examination" (1989) 48 Cambridge L.J. 55.

[22]See Y. Duplessis, J. Hétu & J. Piette, *La protection juridique de l'environnement au Québec*, (Montreal: Thémis, 1982) at 12 [hereinafter Duplessis *et al.*]; *Canada Paper Co.* v. *Brown*, *supra*, note 20 at 262; *Dame Chartier* v. *British Coal Corp.*, *supra*, note 20 at 367.

[23]See *Carey Canadian Mines* v. *Plante*, [1975] C.A. 893, and J. Hétu & J. Piette, "Le droit de l'environnement du Québec" (1976) 36 R. du B. 621 at 634. In turn, where no such "riparian right" exists, a land owner will lack sufficient interest to bring a suit against the pollution of a river in general. See *St. Pierre* v. *Duke Price Power Co.* (1932), 70 C.S. 541.

[24]See *Carey Canadian Mines* v. *Plante*, *ibid.* at 899.

or negligent causation of harm.[25] In cases which meet all the requirements set out in article 1053, this poses no problem. Beyond that, however, courts and academics have developed the doctrine of *abus de droit* which covers situations quite similar to those addressed by common law nuisance.[26] Even in the absence of fault in the traditional sense, there will be an abuse of rights where activities on one property have effects on a neighbouring property that go "beyond the ordinary inconveniences in the neighbourhood."[27]

Some have based this result on article 1053 *C.C.Q.* by interpreting it to encompass the balancing and mutual limitation of property interests, in the sense that a use surpassing the "ordinary inconveniences" is sufficient to constitute fault.[28] Others look to the *C.C.Q.*'s property law and the Roman maxim of *sic utere tuo ut alienum non laedas* to explain the proprietor's liability in absence of fault. Articles 399, 406 and 1053 *C.C.Q.* are interpreted to imply the limitation of an owner's right to use property at his or her discretion by the obligation not to interfere with the neighbours' rights to enjoy their property.[29] Baudouin comments that the discussion as to whether or not the "abuse of rights" is based on fault is "somewhat artificial."[30] This is certainly true in the sense that the result – the balancing of neighbouring property interests at the "ordinary inconvenience" benchmark – is an established part of Quebec law. However, one should note that it is curious that the *C.C.Q.*, while expressly acknowledging the balancing of property interests in articles 501 and 503, lacks a similar provision regarding neighbouring property interests in general. Nonetheless, in light of articles 501 and 503, it would appear more consistent to base the "ordinary inconveniences" limit in property rather than in delict.[31] Additionally, in relying on the latter, one is faced with the somewhat awkward situation of having to accept the notion of "delicts without fault" or stretching the meaning of "fault"

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[25]Article 1053 *C.C.Q.* stipulates that "[e]very person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

[26]See Duplessis *et al.*, *supra*, note 22 at 9; Hétu & Piette, *supra*, note 23 at 621; *Canada Paper*, *supra*, note 20 at 247; *Drysdale* v. *Dugas* (1896), 26 S.C.R. 20 at 23.

[27]Hétu & Piette, *supra*, note 23 at 637; J.-L. Baudouin, *La responsabilité civile délictuelle* (Cowansville, Que.: Yvon Blais, 1985) at 80.

[28]See *Drysdale* v. *Dugas*, *supra*, note 26 at 23; *Canada Paper Co.* v. *Brown*, *supra*, note 20 at 251; *Lapierre* v. *P.G. Québec*, [1985] 1 S.C.R. 241; *Boisjoli* v. *Goebel*, [1982] C.S. 1 at 3.

[29]See *Katz* v. *Reitz*, [1973] C.A. 230 at 237. See also *Carey Canadian Mines* v. *Plante*, *supra*, note 23 at 899; Duplessis *et al.*, *supra*, note 22 at 10; Baudouin, *supra*, note 27 at 85; R.I. Cohen, "Nuisance: A Proprietary Delict" (1968) 14 McGill L.J. 124.

[30]Baudouin, *supra*, note 27 at 85.

[31]Note that the *C.C.Q.* reform project, Bill 125, appears to lean this way. Its article 975 reads: "Neighbours shall put up with the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom."

well beyond its traditional meaning.[32]

Only where personal property or physical well-being are concerned, will plaintiffs be limited to relying on article 1053 in its strict sense. In such cases, the plaintiff's task is more demanding in that fault in the traditional sense, usually negligence, on the part of the defendant must be established.[33] Causes of action independent from the presence of fault are thus only available for the protection of real property interests.

This situation has two important implications for the environmental litigation debate. Both considerations, it should be noted, apply equally to common law. First, private law does not protect interests other than the traditionally-recognized private rights of property and health. Other, often vital, interests that we may today consider equally important are not reflected in the private law system so that environmental causes can only be advanced where they coincide with property or health injuries.[34] Within the already narrow protective scope of private law, the relative weight accorded to the rights protected may no longer be in line with our values of today: property interests receive more and stronger protection than health interests.[35]

iii) Reform Options

There are two options for making private law more relevant to our current environmental concerns. The first would be to make the rights recognized by private law more relevant to environmental protection. After all, is a healthy environment not a more vital – a more direct and personal – interest than property? The most radical approach would be to elevate the "right to a clean

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[32]The German Civil Code, for example, adheres strictly to the distinction between property and delictual law. In § 906, it establishes a neighbourhood regime balancing conflicting property rights independent from fault. The application of the delictual provision of § 823, by contrast, would be unthinkable without fault on the defendant's part.

[33]"Fault" can consist of negligent or intentional causation of harm and of a statutory breach entailing damage. For the acceptance of the latter in Quebec, see *Morin* v. *Blais*, [1977] 1 S.C.R. 570.

[34]Similarly, apart from negligence actions, all relevant common law causes of action (*i.e.* nuisance, trespass, riparian rights, the doctrine of *Rylands* v. *Fletcher*) depend on the plaintiff having some real property interest. On the common law causes of action see P.S. Elder, *supra*, note 21 and E.J. Swanson, "The Common Law: New Developments and Future Trends" in D. Tingley, ed., *supra*, note 3 at 79-100.

[35]In civil as in common law there are more causes of action available for the protection of (real) property interests than of health interests.

environment" to the ranks of private rights.[36] There are many arguments that one could field against this approach.[37] This option was extensively debated, but ultimately abandoned, in Germany.[38] This can mainly be attributed to the fact that it appeared to German jurists to be the only option. Only where there was an individual right could there be standing pursuant to the *C.C.Q.* and as there was no environmental right, the only solution would be to create one. Within the German legal system which is, in private as in public law, based strictly on subjective rights as a requirement for law suits, the idea of standing in the public interest, of an *actio popularis*, is a misfit.[39]

The second option theoretically available to give a remedy to individuals concerned about the environment, however, amounts to no less than that: to give individuals or groups standing notwithstanding the fact that they have no personal right to vindicate. This is also the route followed in the Ontario debate.[40] As the rights approach, this strategy raises several questions.[41]

3. The *Environment Quality Act*

Quebec has chosen neither option but has provided a solution that avoids many of the objections that can be levelled against the German and Ontario approaches. There is a third reason why the debate found elsewhere did not arise

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[36]Less "radical" approaches may lie in making the existing rights more environmentally relevant. For example, in determining the "ordinary inconveniences" in a given neighbourhood, courts could give more consideration to the heightened importance of environmental values. Similar considerations could be brought to bear on the balance of inconvenience and could thus provide a counterweight to considerations regarding the economic importance of a polluting enterprise. One could also consider addressing the imbalances in the protection currently granted to property and health interests respectively.

[37]Particular concerns are the need to define such a right in a meaningful way and the extent to which private law should address questions belonging in the planning and policy domain. For a critical review of the rights debate in a broader sense see C. Giagnocavo & H. Goldstein, "Law Reform or World Re-Form: The Problem of Environmental Rights" (1990) 35 McGill L.J. 345.

[38]See M. Kloepfer, "Umweltschutz als Aufgabe des Zivilrechts – aus öffentlich-rechtlicher Sicht" (1990) 12 Natur + Recht 337 at 346; U. Diederichsen, *Ausbau des Individualschutzes gegen Umweltbelastungen als Aufgabe des bürgerlichen und des öffentlichen Rechts*, in Ständige Deputation des Deutschen Juristentages, ed., Verhandlungen des 56. Deutschen Juristentages, Teil L, at L 72-75.

[39]See D. Medicus, "Zivilrecht und Umweltschutz" (1986) 41 Juristenzeitung 778 at 779, who suggests that even the creation of "private environmental rights" would amount to creating a (highly undesirable) "civil *actio popularis*." See also Diederichsen, *ibid.* at L 55-56.

[40]See Ontario Law Reform Commission, *Report on the Law of Standing*, *supra*, note 3; and *Report on Damages for Environmental Harm* (1990).

[41]These questions include the extent to which private law should be available to promote public policy goals, the search for a reasonable definition of the circumstances in which standing should be granted and the type of remedy that should be granted where no private rights are at issue.

in the same way in Quebec. In 1978, the province amended its E.Q.A. to provide for a right to a clean environment *and* for "public interest standing" in certain circumstances.[42] According to s. 19.1 of the E.Q.A., every person has a right to a healthy environment and to its protection, as well as to the protection of the living species inhabiting it. However, s. 19.1 qualifies this statement by adding that this right exists "to the extent provided for by this act and the regulations, orders, approvals and authorizations issued under any section of this act."

In addition to the enunciation of this right to a healthy environment, the Act provides individuals with standing to challenge its violation. According to s. 19.2 of the E.Q.A., a judge of the Superior Court may grant an injunction to prohibit any act or operation "which interferes or might interfere with the exercise of the right conferred by s. 19.1."[43] In addition to the Attorney-General, the application for such an injunction may be made by "any natural person domiciled in Quebec frequenting a place or the immediate vicinity of a place in respect of which a contravention is alleged" (s. 19.3 E.Q.A.).[44] The barriers to bringing an action are further lowered by s. 19.4 of the E.Q.A. which stipulates that the security required pursuant to article 755 *C.C.P.* may not exceed $ 500.[45]

These amendments merit a number of comments. First, by giving citizens a right to a healthy environment defined by the E.Q.A., Quebec not only acknowledges the existence of such a right, it also grants citizens a stake in the statute intended to protect the environment. At the same time, it avoids the definition problems usually facing proposals for a right to a healthy/clean environment. By linking the right to the standards set in and pursuant to the E.Q.A., the extent of the right is predictable to all involved (it is easier to determine when a violation occurred). Citizens may challenge the actions of other private parties – and thus indirectly the enforcement (in)action of the government – but only insofar as they do not adhere to the E.Q.A. The government gains an additional enforcement arm, but retains control over environmental management by setting the standards defining the citizens' rights.

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[42]L.Q. 1978, c. 64, s. 4. For discussions of this régime see J. Hétu, "Les recours du citoyen pour la protection de son environnement" (1989) 92 R. du N. 168; L. Giroux, "Le droit québécois de la qualité de l'environnement et l'équilibre des divers intérêts" in N. Duplé, ed., *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (Montréal: Québec/Amérique, 1988) 395 [hereinafter Giroux, 1988]; "La loi sur la qualité de l'environnement: les principaux mécanismes et les recours civils" in Barreau du Québec, *Developpements récents en droit de l'environnement* (Cowansville: Yvon Blais, 1991) 1 [hereinafter Giroux, 1991]; Trudeau, *supra*, note 3 at 199.

[43]Prior to the 1978 amendments, the Attorney-General could apply to the Superior Court for an injunction to stop an activity contravening the E.Q.A. See Giroux, 1991, *supra*, note 42 at 38.

[44]Notice of all such applications must be given to the Attorney-General. See s. 19.5 E.Q.A..

[45]*Supra*, note 16.

This latter aspect invites a second look at what is actually gained. The right to a healthy environment is certainly more than a clever way of packaging what the statute should do in any event. At the same time, one must assess it in light of the regime set up by the E.Q.A., as well as a noticeable trend toward carving more and more areas out of its general application. Several developments are evidence of this trend.

First, a series of special regimes such as the *Loi sur les pesticides*[46] or the *Loi sur l'aménagement d'urbanisme*[47] emerged under which the rights granted to citizens are far more restricted than under the E.Q.A.[48]

Secondly, a key offence provision of the E.Q.A., s. 20, has recently been interpreted by the Quebec Court of Appeal in a fashion that severely curtails its scope.[49] Beyond the prohibition of emissions of certain substances, and beyond prescribed emission levels, s. 20 stipulates that "the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment ... is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage or to otherwise impair the quality of the soil, vegetation, wildlife or property" is prohibited. This prohibition was thought to provide an inroad for environmental protection even where the polluting facility otherwise complied with the Act and its regulations.[50] However, the Quebec Court of Appeal decided that this portion of s. 20 does not apply in such a case. Suggesting that s. 19.1 of the E.Q.A. gave citizens only a relative right to a healthy environment, the court expressed its difficulty with the notion that the government, in setting emission standards, would at the same time permit emissions and prohibit them via s. 20 *in fine*.[51] Rather, the court concluded, s. 20 *in fine* had to be interpreted to address only emissions that were otherwise not regulated.[52]

A further narrowing of the scope of s. 19.1 came with the 1978 amendments themselves, which inserted s. 116.2 into the E.Q.A. Pursuant to this provision, no

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[46]R.S.Q. c. P-9.3.

[47]R.S.Q. c. A-19.1.

[48]See Giroux, 1991, *supra*, note 42 at 43-44.

[49]See *Alex Couture Inc.* v. *Piette*, [1990] R.J.Q. 1212 (C.A.), (1990) 5 C.E.L.R. (N.S.) 314 [hereinafter cited to C.E.L.R].

[50]The court of first instance had found Alex Couture Inc. guilty of emitting odours which were "likely to affect the health, life, safety, welfare or comfort of human beings" contrary to s. 20 E.Q.A. The Superior Court did not follow the corporation's argument that it was operating within the maximum permissible concentration for the emission of odours set by s. 16 of the *Regulation respecting the quality of the atmosphere*, R.R.Q. 1981, c. Q-2, r. 20). See *Piette* v. *Alex Couture Inc.*, J.E. 86-396.

[51]*Supra*, note 49 at 324-25.

[52]*Ibid.* at 325.

proceedings may be instituted for an offence where the person responsible submits a "depollution program" to the responsible minister.[53] Such depollution programs are thus based upon individual negotiation with a (usually large) source of pollution which is then, provided it stays within the negotiated program, sheltered from private or public challenges based upon ss. 19.1 and 20 *in fine* E.Q.A. So far, depollution programs have largely been negotiated with facilities discharging contaminants into water.[54] The trend to individualized pollution standards will continue once the new ss. 31.10ff. of the E.Q.A. have come into force. The entry into force of these 1988 amendments[55] depends on a government order determining the classes of industrial establishments covered.[56] Under the amendments, industry will require a depollution attestation to emit, deposit, release or discharge any contaminant into the environment. It is suggested that although regulations will be relevant, further individually-negotiated regimes are to be expected.[57]

Notwithstanding these criticisms, one should acknowledge that the E.Q.A. goes beyond the trend sketched by the Supreme Court's decisions on public interest standing. At issue is not citizens having standing to ask the government to adhere to or enforce the E.Q.A., but having standing to reach directly to the sphere of other private parties where they are not complying with the Act.

At this point it needs to be reiterated that the remedy provided under the E.Q.A. is an injunction. Pursuant to s. 19.7, an injunction is available unless an activity is "duly authorized" under the Act and not in breach of the certificate of authorization or a regulation. Accordingly the Act helps individuals only insofar as they hope to stop the polluting activity or to curb it to a level no longer infringing the right to a healthy environment. If individuals wish to gain compensation for damage suffered, they will have to proceed under the *C.C.Q.*[58] With respect to the injunctive relief envisaged under the E.Q.A., there is a strong line of opinion suggesting that the E.Q.A., being "ordre public," injunctions should

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[53]The program must be approved by the Deputy Minister, made public by notices in two consecutive issues of a daily newspaper, and then faithfully complied with. See ss. 116.2 -116.4 E.Q.A. On citizen involvement, see *infra*, notes 76ff. and accompanying text.

[54]Giroux, 1991, *supra*, note 42 at 30, illustrates the popularity of these programs. As compared to only four regulations regarding industries enacted under the E.Q.A.'s broad regulatory powers since 1972, there have been approximately 400 negotiated depollution programs since 1978.

[55]L.Q. 1988, c. 49, art.8.

[56]See s. 31.10 E.Q.A..

[57]See Giroux, 1991, *supra*, note 42 at 31.

[58]This option exists notwithstanding a proceeding under the E.Q.A. As Vallerand J. held in *Entreprises B.C.P. Ltée* v. *Bourassa* J.E. 84-279 (C.A.) at 6, 7, even a governmental authorization to carry out certain activities will not prevent the civil courts from providing a remedy where the accepted standards of tolerance in the neighbourhood are exceeded.

be granted without regard to the balance of inconvenience.[59] This would appear to be significant, especially in environmental cases, as economic and other considerations too often slip into the assessment. However, it should also be said that a number of judges feel that disregarding the balance of inconvenience would often lead to inappropriate results (shut-downs in trifling cases) and that the "ordre public" consideration should only prevail in cases of "flagrant violation."[60] Yet, even in these cases the right to a healthy environment pursuant to s. 19.1 of the E.Q.A. makes a difference. Only this right makes it possible for citizens to bring public interest in the environment into the court-room in the first place. Even where it ultimately does not prevail, it will have been weighed against other public concerns.

Section 19.3 is perhaps the most noteworthy element of the amendments to the E.Q.A. It is the key to standing irrespective of a personal, proprietary or pecuniary interest. Any resident of Quebec frequenting a place in respect of which a contravention is alleged or its immediate vicinity has standing to bring an action. Accordingly a wide range of individuals may have standing in any given case.[61] The experience has been that from among the considerable number of applications, most applications were made by persons who would have qualified under traditional standing rules, and thus did have a proprietary or other personal interest.[62] In one respect, the E.Q.A. amendments did not go as far as some of their models, most notably the *Michigan Environmental Protection Act*.[63] Only "natural persons" may apply for injunctions, so that interest groups are excluded

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[59]See Hétu, *supra*, note 42 at 200; *P.G. Québec* v. *Société du Parc Industriel du Centre du Québec*, [1979] C.A. 357 at 359; Gouthier J. in *P.G. Québec* v. *Carrière Landreville Inc.*, [1981] C.S. 1020 at 1027: "Il s'agit d'une loi d'ordre public destinée à protéger la santé et le bien-être de la population, non seulement en éliminant ou contrôlant les sources de contamination ou pollution actuelles mais en contrôlant les exploitations de façon à protéger le milieu de vie à l'avenir." See also, *Béchard* v. *Selenco*, [1988] R.J.Q. 2267 (Sup. Ct).

[60]See *Poulin* v. *Agrinove* (1983), J.E. 83-977, where the court considered the economic and social importance of a polluting factory and thus, arguably, considered "economic public interests" to be more urgent than environmental ones. Most recently, the Court of Appeal decided that the balance of inconvenience should only be disregarded where no authorization was granted or where the contravention concerned a norm objectively determined by the legislator (*i.e.* emission standard). Where the contravention concerns "flexible concepts" which can change according to time and circumstances, the court may accordingly consider the balance of inconvenience. See *Gagué* v. *Boulianne*, [1991] R.J.Q. 893 (C.A.).

[61]Hétu, *supra*, note 42 at 197 suggests that the criterion of frequentation is sufficiently wide to encompass all persons pursuing recreational, commercial or other activities in the relevant area.

[62]See Trudeau, *supra*, note 3 at 201 who notes that the applications came mainly from individuals suffering from neighbourhood troubles. But see Giroux, 1991, *supra*, note 42 at 40-41, who cites two cases where the plaintiffs merely frequented the neighbourhood: *Bernier* v. *Immeubles Charlevoix Inc.* (20 avril 1979) (C.S.), Philippon J.; *P.G. Québec* v. *Béchard*, [1989] R.J.Q. 261.

[63]Mich.Comp. Laws Ann. §§ 691.1201-691.1207 & 1973 Supp.

from this privilege.

4. Group Litigation

We have seen thus far that the situation for individual and group enforcement of environmental law in Quebec is similar to that in Canada's common law provinces in some respects, and different in others. The handling of public interest standing against government in constitutional and administrative cases is by and large the same as elsewhere. The situation in private law is largely the same as well. Remedies against other private parties are limited to the protection of personal and property interests. However, whereas the common law provides one cause of action potentially useful for the advancement of environmental causes, the situation under the *C.C.Q.* is more narrow. Before the 1978 amendments to the E.Q.A. the Attorney-General, relying on the Act, was the sole guardian of public interest as against private parties. Individuals, but not groups, since have gained standing to vindicate a statutory right to a healthy environment.

What about groups? With a view to interest groups the options are indeed narrow. Beyond the directing and sponsoring of individual actions, they may resort to the purchase of litigious rights – an option provided for in articles 1582 to 1584 of the *C.C.Q.* and tested a number of times.[64] Overall, this strategy does not hold a very prominent position among the options available.

Some progress, however, was most recently made in the area of class actions. The *Loi sur le recours collectif* was a 1978 amendment to the *C.C.P.*[65] Section 1003 permits individuals to bring an action not only to address injury caused to them, but also to all others in the same situation.[66] Accordingly it permits an individual to bring an action on behalf of others. The recourse must, in each case, be authorized by the court. The first few years of the new law – notably in the environmental field – saw many rejections at this stage.[67] In spite of a 1980 decision of the Quebec Court of Appeal rejecting this restrictive approach,[68] the

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[64]See *Fasano* v. *Ville de Pierrefonds*, (8 May 1974), Montreal 05-008-291-72 (C.S.), Montpetit J. See also *L'Association des Propriétaires des Jardins Taché Inc.* v. *Entrprises Dasken*, [1974] S.C.R. 2. In the latter case, the plaintiff was a non-profit company among whose aims was to preserve the character of the grounds at issue and to promote the interests of property owners and tenants. The court held that the fact that some of the association's members were property owners did not give it the power to represent its members in the action.

[65]L.Q. 1978, c. 8.

[66]Pursuant to s. 1003 (a) it is required that "the recourse [...] raise identical, similar or related questions of law or fact." Section 1003 (c) requires in addition that "the composition of the group makes the application of article 59 or 67 difficult or impracticable."

[67]See *Tremblay* v. *Alex Couture Inc.*, [1983] C.S. 1663.

[68]*Syndicat National des Employés de l'Hôpital St. Charles Borromé* v. *Lapointe*, [1980] C.A. 568.

courts of first instance remained reluctant to authorize class actions. In a recent decision, the Court of Appeal reversed a lower court and expressed the view that class actions represented an especially appropriate remedy for environmental issues.[69] In this important case, 2400 residents of the town of La Baie, presumably based upon article 1053 or *abus de droit*, wanted to sue for damages for air pollution generated by a local Alcan facility. They applied to the Superior Court for an authorization to bring a class action. The court rejected the application suggesting that the plaintiffs were complaining about different types and degrees of injuries so that the questions of law and fact were not sufficiently similar or related as required by s. 1003 *C.C.P.*[70] The Court of Appeal held that it was adequate that some of the questions raised were sufficiently similar and related.[71] With a view to class actions in general Rothman J. noted:

> *The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage.* Air or water pollution rarely affects just one individual or one piece of property. They often cause harm over a large geographic area. The issues involved may be similar in each claim, but they may be complex and expensive to litigate, while the amount involved in each case may be relatively modest. The class action, in these cases, seems an obvious means for dealing with claims for compensation for harm done when compared to numerous individual law suits, each rasing many of the same issues of fact and law. [Emphasis added.][72]

Rothman J. concluded by noting that the class action provisions should be interpreted and applied with their social purpose in mind.[73] With this latest decision of the Court of Appeal, explicitly taking issue with the restrictive views held by lower courts, the class action should have become an important option for environmental litigation.[74] Although each member of a class must qualify under traditional standing rules, it will be possible to spread risks and costs. It is also to be expected that polluting enterprises faced with class actions of the significance at issue in *Comité de la Baie* – the claims amounted to $ 21 million – will consider their options in a different light.

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[69]*Comité d'environnement de la Baie* v. *Société d'électrolyse et de chimie Alcan*, J.E. 90-422; (1991) 6 C.E.L.R. (N.S.) 150 [hereinafter cited to C.E.L.R.].

[70]See summary in *Comité de l'environnement de la Baie*, *supra*, note 69 at 157-58. For the Superior Court decision see J.E. 88 - 541 (C.S.).

[71]*Ibid.* at 158.

[72]*Ibid.* at 162.

[73]*Ibid.* at 164.

[74]Note that this is a significant development. Only in 1988, after the first decision in *Comité de la Baie*, Hétu, *supra*, note 42 at 186 commented that "selon l'état de la jurisprudence, *il est presque impossible pour une personne d'être autorisé à agir pour le compte de toutes les personnes victimes du même acte de pollution*." [Emphasis added].

D. Conclusion

Many arguments for and against private and group enforcement of environmental law have been raised over the years. Critics may pose the following questions: Should individuals or groups be allowed to hold themselves out as guardians of public interest? Is there even "a" public interest? Should individuals and groups be able to interfere with policy and planning decisions, with what may be consciously-set government priorities? Should such policy questions be moved into the courts because, for whatever reason, the required choices were not made elsewhere? Do courts have competence and legitimacy to deal with such issues?

Proponents of environmental litigation in the public interest may ask a different set of questions: Have there not been too many cases where only citizen action prompted government action and provided a counterweight to interests which would otherwise have dominated the decision process? Should one not take advantage of the private enforcement potential in light of often lacking government means and resources? Why should citizens, at least where laws are not enforced or adhered to, not take matters into their own hands and demand that expectations raised and choices made by law makers be acted upon?

There are, as we have seen, several options for giving individuals and groups enforcement rights. These options need to be carefully examined with a view to their implications and their potential for fitting into the legal system in which they are to operate.

There appears to be a consensus growing in Canada that citizens have a stake in the application and enforcement of laws and regulations by public authorities. Implicit in the Supreme Court's decisions on public interest standing is citizens' legitimate interest in measuring government actions, not only against their subjective rights, but also against an objective standard of constitutionality and lawfulness. Within the confines of the channels thus provided for public interest standing, citizens may accordingly challenge government to live up to existing provincial and federal environmental law. As, in the final analysis, laws are statements of a society's collective goals and rules, it would seem consistent to allow members of society to demand that public authorities – the "guardians of public interest" – live up to these goals. Experience has shown that citizen actions are useful in forcing either the redefinition of imprecise or unrealistic goals or the accordance of more weight to environmental concerns in the application of rules.[75]

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[75]The events surrounding the Federal Court decisions on the federal EARP are a perfect illustration of this. Not only had the Federal Government failed to live up to expectations raised by legislation, there also had been confusion as to the scope of the legislative statement. Only court challenges inititated by citizens led to the current review of the process and a clarification of legislative goals.

The picture is far more diverse and controversial when it comes to giving citizens rights to vindicate environmental interests as against other private parties. The adherence to rules and priorities expressed through the law can be said to be of utmost importance here as well. Predictability demands that private parties will be measured against available standards. The public interest in environmental protection would appear to justify citizen actions against those who act in defiance of such existing standards.

In Quebec, citizen actions cannot take a route similar to that considered in the Ontario reform debate. As actions solely in the public interest under the *C.C.Q.* are inconceivable, the debate and possible reforms must take place at a different level. As we have seen, Quebec has chosen to grant its residents a statutory right to a healthy environment as well as standing to enforce it against private parties. The advantages of this approach – avoidance of definition problems, retention of government control, predictability – overlap with deficiencies, that is largely the fact that the government can reduce the scope of this right at various levels. For this reason, Quebec authors have highlighted the importance of procedural rights such as the right to information and to participation in environmental decision-making.[76] Such rights would appear to be particularly important in the context of negotiated depollution programs and attestations that would otherwise be largely withdrawn from effective citizen interventions.[77] Information and participation rights could provide a counterweight to the shielding of such regimes from court challenges once they are in place and observed.

At the end of the day one must keep in perspective that it is not enough to make remedies available; they must also be effective. Notwithstanding the importance of making remedies more widely available, one should, therefore, not neglect the positive side-effects for public interests of more traditional litigation based on private interests. However, once in court, a plaintiff will often be faced with prohibitive costs and insurmountable difficulties in attempting to meet the burden of proof. The environmental law reform debate must continue to concern itself with these difficulties.[78]

See *Canadian Wildlife Federation Inc.* v. *Minister of the Environment* (1989), 26 F.C. 245 (T.D.); *Friends of the Oldman River Society* v. *Minister of Transport* (1990), 5 C.E.L.R. (N.S.) 1 (F.C.A.D.); M.-A. Bowden, "Damning the Opposition; EARP in the Federal Court" (1989) 4 C.E.L.R. (N.S.) 227.

[76]See M. Bélanger, "Ce que le droit peut faire" in Environmental Law Association of McGill, *Law and Policy for an Ecological Age*, Conference held at McGill University, October 10-11, 1990 at 53; D. Morneau, "Vers une ère environnementale: une charte de l'environnement, une priorité," *ibid.* at 74.

[77]See *supra*, note 53 and accompanying text.

[78]On this debate, see in the common law context, B. Wildsmith, "Of Herbicides and Humankind: Palmer's Common Law Lessons" (Spring 1986) 24 Osgoode Hall L.J. 161; J.M. Olson, "Shifting the Burden of Proof: How the Common Law Can Safeguard Nature and Promote an Earth Ethic" (1990)

In spite of the constraints discussed in the preceding pages, Quebec law has gone some distance toward creating more effective remedies. In the public interest field, actions based upon ss. 19.1 and 19.3 E.Q.A. face less severe proof problems, as there is no need to show actual environmental damage; the mere contravention of the Act suffices. Some of the cost problems and the resulting imbalance in the parties' starting positions, in terms of influence and in terms of resources to compile the necessary evidence, can be alleviated by increased availability of class actions.

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20 Environmental Law 891.