CITIZEN SUITS TO PROTECT THE ENVIRONMENT: THE U.S. EXPERIENCE MAY SUGGEST A CANADIAN MODEL

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Introduction

Arguably, there are three broad approaches one might take to increase an individual citizen's right to protect the environment and incidentally to be free from the adverse consequences of environmental harm and damage. The first approach involves elevating the right to be free of environmental harm to the status of a constitutionally protected right.[1] Though discussed in the U.S. during the late 1960s and early 1970s, it did not happen at the national level in the U.S.[2] and, one is led to believe, it is not in the offing in Canada. A second approach would recognize ambient natural resources (land, air, water) as interests of such concern to the public that they are protectable by and within the historic (or, if necessary, an expanded) doctrine of public trust.[3] This approach, also discussed

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[1]See Kirchick, "The Continuing Search for a Constitutionally Protected Environment" (1975) 4 Envt'l Aff. 515; Klipsch, "Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process" (1974) 49 Ind. L. J. 203; Perttigrew, "A Constitutional Right of Freedom from Ecocide" (1971) 2 Env. L. 1; Pearson, "Toward A Constitutionally Protected Environment" (1970) 56 Va. L. Rev. 458; Roberts, "The Right to a Decent Environment" (1970) 55 Cornell L. Rev. 674. The few court cases that have considered whether freedom from environmental harm is a constitutionally protected right have not been sympathetic, see *Tanner* v. *Armco Steel*, 340 F. Supp. 532 (S.D. Tex. 1972).

[2]A number of individual states have amended their state constitutions to provide individual citizens with protections from environmental harms, see, for example, *Constitution of the Commonwealth of Massachusetts* art. 49; *Michigan Constitution* art. IV, §52; *Illinois Constitution* art. XI, §§1-2; *New York Constitution* art. XIV, §§4-5; *Constitution of the Commonwealth of Pennsylvania 1971* art. 1, §27. See also Howard, "State Constitutions and the Environment" (1972) 58 Va. L. Rev. 193. Even constitutional language, however, is not a guarantee against unwanted environmental intrusions, see, *Commonwealth* v. *National Gettysburg Tower, Inc.*, [1973] 454 Pa. 193, 311 A.2d 588 (the court holds that the constitutional language does not bar a 300-foot tower that would loom over a portion of the historic Gettysbury battlefield).

[3]See Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970) 68 Mich. L. Rev. 471; Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right" (1980) 14 U.C. Davis L. Rev. 195; Sax, "Liberating the Public Trust Doctrine from Its Historic Shackles" (1980) 14 U.C. Davis L. Rev. 185; Myers, "Variations on a Theme: Expanding the Public Trust Doctrine to Include Protections of Wildlife" (1989) 19 Env. L. 723; McCurdy, "Application of the Public Trust: Public Trust Protection for Wetlands" (1989) 19 Env. L. 683; Rieser, "Ecological Preservation As A Public Property Right: An Emerging Doctrine In Search Of A Theory" 15 Harv. Env. L. Rev. 393. See also *National Audubon Society* v. *Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (the court in the so-called Mono Lake case relied heavily on the public trust doctrine to fashion environmental safeguards).

over the last twenty years, is rarely used in the U.S. today, and apparently (for historical and/or procedural reasons) is rarely used today in Canada.

The third approach to increase citizen participation in environmental protection efforts involves broadening the law of standing – not only must the traditional plaintiff requirements of "injury in fact" (often narrowly defined as economic injury) be broadened, but the range of potential defendants also must be broadened to include private as well as public instrumentalities that are arguably in violation of environmental laws or regulations. This is the approach that will be discussed more fully in this paper. Aside from the footnote references which give the interested reader access to the legal literature on the first two approaches, nothing more will be said of them.[4] They should, however, be seen as viable alternatives that would, if implemented, allow citizens to play a role in preventing environmental harm. As noted, though, they are alternatives that have not been widely used to date in either the U.S. or Canada.

A Broadened Law of Standing

Broadening the law of standing to allow citizen plaintiffs greater access to the courts to protect the environment may be accomplished in one of two ways. Either the general law of standing within a jurisdiction may be statutorily enlarged – this is the approach that has been taken in Michigan and a number of other states in the U.S.,[5] but not by the federal government – or individual pieces of environmental legislation may include their own citizen suit provisions. This is the approach that has been taken by the U.S. federal government – the *Clean Air Act*,

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[4]Perhaps the best general reference on the current status of U.S. federal and state constitutional protections for the environment and public trust doctrine approaches to environmental protection is found in, Z. Plater *et al.*, *Environmental Law And Policy: Nature, Law, And Society* (St. Paul, Minnesota: West Pub., 1992), (specifically, chapter 8, "Fundamental Environmental Rights: Federal And State Constitutions, And The Public Trust Doctrine").

[5]See Mich. Comp. Laws Ann. 691.1201-1207 (Supp. 1991) (the Michigan *Environmental Protection Act*, particularly §691.1202, defines a broad category of potential plaintiffs and defendants, including public and private entities in both categories, that may sue or be sued, "[to protect] the air, water, and other natural resources and the public trust therein from pollution, impairment or destruction."; Minn. Stat. Ann. §116B.01-116B.13 (Supp. 1992); S. D. Comp. Laws Ann. §34A-10-1 to 34A-10-15 (Supp. 1991); Fla. Stat. Ann. §403.412 (Supp. 1992). The Michigan statute has been the subject of considerable commentary, see Sax & Connor, "Michigan's *Environmental Protection Act* of 1970: A Progress Report" (1972) 70 Mich. L. Rev. 1003; Sax & DiMento, "Environmental Citizen Suits: Three Years' Experience Under the Michigan *Environmental Protection Act*" (1974) 4 Ecol. L. Q. 1; Haynes, "Michigan's *Environmental Protection Act* in its Sixth Year: Substantive Environmental Law from Citizen Suits" (1976) 53 J. Urb. L. 589; Olson, "Michigan *Environmental Protection Act*: An Experiment That Works" (1985) 64 Mich. B.J. 181; DiMento, "Return to Debate Over MEPA" (1984) 63 Mich. B. J. 348; Slone, "Michigan *Environmental Protection Act*: Bringing Citizen Initiated Environmental Suits into the 1980's" (1985) 12 Ecol. L. Q. 271.

the *Clean Water Act*, the *Toxic Substances Control Act*, for example,[6] all contain specific provisions allowing citizens, including environmental organizations, to bring suit against public and private instrumentalities allegedly violating environmental laws, regulation, standards, licenses, etc. The scope of these individual citizen suit authorizations are not identical, and not all federal environmental laws contain such provisions. But the major pieces of federal environmental legislation have citizen suit provisions in one form or another. This has given rise to active citizen involvement in the enforcement of this body of law.

Congress has shown no inclination to cut back or narrow these provisions – why should they? Such provisions are in accord with the principles of participatory democracy; they are a useful safety valve. Moreover, citizen plaintiffs continue to come forth in steady, but not unwieldy, numbers – they are prepared, represented by competent counsel, and have for over twenty years performed a useful watchdog role that the courts, the public, even the agencies themselves have, for the most part, come to respect. In short, whether one examines the Michigan model or the approach taken by the federal government, the general consensus is that broadened laws of standing allowing citizens to sue either or both the government and polluters to enforce the environmental laws of the land is a strategy that has worked.[7] A commentator on the Michigan experience has bluntly noted:[8]

> The [citizen suit] law has made a difference in environmental management and the protection of the public health and welfare. It works.

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[6]See 42 U.S.C.A. §7604 (CAA citizen suit provision); 33 U.S.C.A. §1365 (CWA citizen suit provision; 15 U.S.C.A. §2619 (TSCA citizen suit provision); also Boyer & Meidinger, "Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws" (1985) 34 Buff. L. Rev. 833; Austin, "The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General" (1987) 81 NW. U. L. Rev. 220; Alpert, "Citizen Suits Under the *Clean Air Act*: Universal Standing for the Uninjured Private Attorney General?" (1988) 16 B.C. Envtl. Aff. L. Rev. 283. Not all comment on citizen suits to protect the environment has been favourable, see Blomquist, "Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the *Clean Water Act*: Some Overlooked Problems of Outcome-Independent Values" (1988) 22 Ga. L. Rev. 337.

[7]Broadened standing laws have worked in another important way as well – in the U.S., standing before the courts almost always draws in its wake some form of standing to participate in environmental agency rulemaking and quasi-judicial proceedings. Here the potential environmental plaintiff is not merely playing (or preparing a record which will enable him to play) an enforcement role, but he is in a position to help shape and to influence at an early stage, the outcome of substantive agency decisions in a manner more protective of the environment than might otherwise have occurred. This participation can benefit both the agency and those whose activities may harm the environment, in that a sharpened environmental perspective can be laid on the table early on, underlying assumptions and data (from whatever source) may be questioned, additional data may be seen to be necessary, potential risks and problems can be focused upon, etc. If done with skill, citizen participation may broker compromises that will obviate the need for later enforcement proceedings.

[8]Olson, *supra*, note 5 at 186.

The same commentator at an earlier point in his article observed:

> The courts have been fairly proficient and innovative in their response to the MEPA's commitment to the development of an environmental common law. Nearly a decade of diverse factual circumstances and legal issues under the MEPA in both the courts and administrative proceedings attest to the vitality of the citizen suit law and its application in resolving environmental conflicts.[9]

A commentator on the federal government's approach to enabling citizen suits has noted:[10]

> The persistent inclusion of citizen-suit provisions in environmental statutes suggests a strong congressional commitment to a viable role for private attorneys general in the enforcement of environmental laws. Undoubtedly, one major reason for such congressional persistence is distrust of EPA's ability (or willingness) to enforce the often harsh requirements of the law.

Governmental enforcement agencies often need to be prodded to take a more active role in protecting the environment; not only are they prone to capture by the interest groups they are charged with regulating, but they are too readily moved by, and subject to, the political pressures of the moment. Citizen plaintiffs are less amenable to these pressures and considerations; they can and do prod agencies like the EPA[11] to do more than they otherwise might. Government enforcement agencies also, almost always, find themselves overextended; there is insufficient money, insufficient staff, insufficient data, and too few enforcement eyes. Citizen plaintiffs bring private resources and personnel to bear on environmental enforcement efforts. They have shown themselves adept at monitoring ambient conditions, gathering sophisticated environmental data, and finding the necessary technical and legal people to present their case. Most importantly, citizen eyes and ears are everywhere; like the sparrow that falls, no environmental depredation goes unnoticed for long by citizen environmentalists and/or environmental organizations. This considerable array of benefits provided by citizen plaintiffs can and does augment and complement both the federal and state government's environmental enforcement efforts in the U.S. There is no reason to believe a Canadian experience would be any different. The commentator on federal citizen suit provisions cited above, after noting these and other, perhaps more arguable, benefits of citizen involvement in environmental enforcement concluded:[12]

> Allowing citizen suits as part of environmental policymaking makes sense.

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[9]*Ibid.* at 185.

[10]Austin, *supra*, note 6 at 261.

[11]The U. S. Environmental Protection Agency (EPA) is the major federal administrator and enforcer of the nation's environmental laws.

[12]Austin, *supra*, note 6 at 261.

The single most frequently heard argument in opposition to a broadened law of standing that would allow citizens to bring suit to enforce environmental laws is that such a provision would unleash a flood of litigation; much of this litigation would be duplicative of governmental enforcement efforts; much of it would be nothing more than harassment of licensed and regulated dischargers that environmentalists either did not like or were feared. The stridency of some environmental rhetoric has at times fuelled these contentions. But these contentions must finally give way to twenty years of experience. Rhetoric aside, there simply has not been a flood of citizen initiated environmental enforcement litigation anywhere in the U.S., and, if one objectively examines even the hypothetical possibility that such might have been the case, there are any number of reasons to explain why there has been no flood of litigation. To begin with, complex enforcement litigation is economically costly and emotionally draining; few citizens and/or environmental organizations have the monetary resources, the organizational structure, or the staying power necessary for meritorious efforts, much less for frivolous or duplicative litigation efforts. More important, though, is the continuing power of the court to screen and manage the cases that present themselves. In the U.S., broadened laws of standing do not eliminate "case and controversy" requirements;[13] they do not rob the court of its traditional powers to control proceedings before it.[14] A court, operating under a statute conferring

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[13]The "case and controversy" requirement is grounded on Article III, Section 2 of the U.S. *Constitution*; these provisions require those who would invoke the jurisdiction of the court to present real (as opposed to hypothetical) issues; there must be a concreteness which allows the issues to be sharpened and thus more readily addressed by the parties and the court; the parties themselves must be adverse; the plaintiff must have a stake in the proceedings; the issues must be ripe for adjudication. If these threshold requirements are not met, a would-be plaintiff is readily (and required to be) dismissed; the court is without jurisdiction. See Brilmayer, "The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement" (1979) 93 Harv. L. Rev. 297.

[14]See *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966). This is an extraordinarily interesting case worth reading in its entirety. The opinion was written by Justice Burger, later to become Chief Justice of the U.S. Supreme Court. The case is one in a line of cases that had the effect of judicially broadening the law of standing in the U.S. At page 1000, Justice Burger notes: "that the same standards are applicable to determine standing before the [agency] and standing [before] this court." See *supra*, note 7. Justice Burger's response to the hypothetical floodgates argument is particularly pertinent to the present discussion. He notes on pages 1005-06:

> We recognize this [broadened standing] will create problems for the Commission but it does not necessarily follow that 'hosts' of protestors must be granted standing ... or that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate regulations ... . The Commission should be accorded broad discretion in establishing and applying rules for such public participation, including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs ... . The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation.

Nothing in Burger's analysis suggests that with the same reasoning, the same limitations, a similar set of rules could not be fashioned and applied to those who obtain standing before the courts. In short, courts, operating under a broadened law of standing, can and should control those who would appear

broadened standing rights is not prevented from imposing certain burdens[15] on would-be citizen plaintiffs[16] – notice requirements, bonding requirements,[17] a *prime facie* case requirement.[18] The latter, for example, could require plaintiffs to show (in greater depth than is shown on the face of the complaint) actual injury or the probability of harm, the nature of the alleged violation of environmental law, the short and long-run consequences of the alleged violation (including any irreparable consequences that might arise) and the nature of, and reason for the relief sought. If these requirements cannot be met by the plaintiff to a reasonable degree, courts can quickly dismiss, on their own, or on defendants motion, the proceeding before it. Little judicial or defendant time and energy will have been wasted. If truly frivolous suits are presented, a broadened law of standing does not rob the court of its inherent power to sanction the plaintiff and/or counsel. In sum, broadened standing laws have not precipated a flood of litigation in the U.S. because a host of practical reasons, and the powers of the court have not permitted it. Once again, there is no reason to believe that the same factors, with the same beneficial result, would not operate in Canada.

In closing, there are two final reasons why a broadened law of standing, like some form of citizen suit provision, should be fashioned to enable environmental laws to be enforced by those not directly connected with government. First, government, at every level, is a major polluter; it may not be the worst polluter, or the biggest, but it is in an impossible conflict of interest when it is the only enforcer on one hand, and in violation of environmental laws on the other. A broadened law of standing,[19] allowing individual citizens or environmental organizations to enforce environmental laws against any and all governmental instrumentalities avoids this problem. Second, the meaningful existence of

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before them – there need not be any disruptive flood of litigants – and, in fact, there has not been.

[15]Alternatively, these burdens could be imposed by the statute itself, as part of the conferral of broadened standing rights.

[16]See for example, 33 U.S.C.A. §1365(b), requiring citizen suit plaintiffs under the *Clean Water Act* to give 60 days notice before filing suit.

[17]See for example, Minn. Stat. Ann. §116B.06 allowing the court under Minnesota's *Environmental Rights Act* to impose a bond requirement on plaintiffs. See also *State by Drabik* v. *Martz*, 451 N.W.2d 893 (Minn. 1990) (bond imposed on party seeking a temporary injunction for payment of costs and damages incurred or suffered by party who may, pending final determination by the court, be wrongfully enjoined).

[18]See for example, Minn. Stat. Ann. §116B.04 imposing under the rubric "burden of proof," a *prima facie* showing requirement. See also *State by Powderly* v. *Erickson*, 285 N.W.2d 84 (Minn. 1979) (court held plaintiffs established a *prime facie* case).

[19]Though not elaborated upon in this paper, it should be emphasized here that all of the broadened standing provisions operating in the U.S., see notes 5 and 6, *supra*, allow, almost without exception, the broadest range of private and governmental entities to be named as defendants by citizen plaintiffs.

broadened laws of standing allowing citizens to participate at the agency level and in courts in the enforcement of environmental laws (and per force in the making and shaping of environmental policy) will have a variety of beneficial effects: existing enforcement agencies will be kept on their toes; polluters will be more likely to adhere to environmental laws, regulations, the provisions of licenses under which they operate, because they will face more frequent, and often more committed, enforcement action; citizens will be less cynical – they will be participants – they can shape the environmental processes and policies of the society – "participatory democracy" will be a phrase with a less hollow ring to it; the quality of environmental laws and regulations will be improved by the contributions of this broadened cross-section of citizen participants; the ambient environment itself will be improved – what more could we ask for?

Conclusion

Citizen participation in protecting the environment is an idea whose time has come. It works. It does not produce miracles over night; it does not dispense with the need for vigorous public enforcement of environmental laws. It is an approach with some potential for excess, but as noted above, these propensities can be controlled by the courts and/or by the very legislative enactments which give rise to broadened standing rights. Moreover, twenty years of experience with these tools in the U.S. provides a valuable learning curve upon which Canadian citizens, lawyers, legislatures, agencies, and courts can build. One would hope (on behalf of the environment) that they would set about the task immediately.