AVENUES FOR CITIZEN PARTICIPATION IN THE ENVIRONMENTAL ARENA: SOME THOUGHTS ON THE ROAD AHEAD

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The road to a cleaner environment is more difficult than ever to negotiate. Governments are largely without road maps and are looking for assistance from the public and other stakeholders to help them chart an acceptable environmental course. Citizens are often frustrated and wondering who is behind the wheel, for they want control over their environmental futures, and they want to redress the atrocities of past environmental history.

This paper discusses avenues for citizen participation in the environmental arena and is divided into three parts. The first part briefly outlines some of the roadblocks to citizen participation which have traditionally been encountered in the Canadian environmental arena. The second part describes, in overview, the avenues which are currently available for citizen participation in the Canadian environmental arena – particularly in Ontario which has been the traditional leader in the area in Canada and is most familiar to the authors. The third part, which is the the primary purpose of this paper, discusses the development of environmental bills of rights as a new avenue for citizen participation.

At the end of the paper, we will leave the reader to decide whether the forging of a new avenue will expedite our journey toward a cleaner environment, or whether we could get there more efficiently simply by repairing the roads currently travelled.

Part I Traditional Roadblocks to Citizen Participation

The common law allows various causes of action to be brought in situations of environmental harm, such as nuisance,[1] riparian rights,[2] the rule in *Rylands* v.

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[1]The most common examples of nuisance in the environmental context are those in which the defendant, through his or her activities, interferes with the plaintiff's use and enjoyment of his or her land by producing such things as: noise (see: *Banfai* v. *Formula Fun Centre* (1984), 51 O.R. (2d) 361 (H.C.); *Walker* v. *Pioneer Construction Co.* (1975), 56 D.L.R. (3d) 677 (Ont. H.C.)); smoke (see: *Cox* v. *Warne*, [1939] 1 D.L.R. 718 (N.S.C.A.); *Sadowski* v. *Scoon*, [1943] 2 D.L.R. 472 (Ont. H.C.)); odours (see: *Appleby* v. *Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Div. Ct.); *Atwell* v. *Knights*, [1967] 1 O.R. 419 (H.C.); *Sullivan* v. *Desrosiers* (1987), 40 C.C.L.T. 66 (N.B.C.A.)); and noxious fumes (see: *Cairns* v. *Canada Refining & Smelting Co.* (1914), 6 O.W.N. 562 (C.A.); *McKinnon Industries Ltd.* v. *Walker*, [1951] 3 D.L.R. 577 (P.C.); *Heard* v. *Woodward* (1954), 12 W.W.R. (N.S.) 312 (B.C.S.C.)).

Fletcher,[3] negligence,[4] trespass,[5] and breach of contract or misrepresentation.[6] The pursuit by citizens of these private causes of action has traditionally been riddled with roadblocks. There are several hurdles which must be overcome by the individual litigant, such as the following: standing, causation, limitation period, evidentiary issues, the high cost of legal proceedings, the distinction between private and public nuisance,[7] the scope of the remedies available, the damage restrictions and the likelihood of recovering any potential award, the ultimate awards of costs, and the range of defences available.

Although a private citizen can carry a prosecution for an offence, there is always a risk of expropriation of that private action by the government. For example, under the *Crown Attorneys Act* in Ontario, the Crown Attorney has the unfettered right to take over any prosecution and conduct it.[8] Although this happens less frequently today, such intervention in the past has not always brought the desired results.

Lack of protection for employees, who "blow the whistle" on their employers, has been another issue which has provoked some frustration. Although certain

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[2]See: *Groat* v. *City of Edmonton*, [1928] S.C.R. 522; *K.V.P. Co.* v. *McKie*, [1949] S.C.R. 698.

[3]*Rylands* v. *Fletcher* (1866), L.R. 1 Ex. 265; *aff'd* (1868), L.R. 3 H.L. 330, 37 L.J. Ex. 161. See: Bohlen, "The Rule in *Rylands* v. *Fletcher*" (1910-11) 59 U. Pa. L. Rev. 298; Blackburn, "The Rule in *Rylands* v. *Fletcher*" (1961) 4 Can. Bar J. 39; Stallybrass, "Dangerous Things and the Non-Natural Use of Land" (1929) 3 Camb. L. J. 376. In Canada, the rule in *Rylands* v. *Fletcher* has been used in a wide variety of circumstances, for example see: *Chamberlin* v. *Sperry*, [1934] 1 D.L.R. 189 (Man. K.B.) (storage of gasoline indoors in drums); *J.P. Porter Co.* v. *Bell*, [1955] 1 D.L.R. 62 (N.S. C.A.); and *MacDonald* v. *Desourdy Construction* (1972), 27 D.L.R. (3d) 144 (N.S. S.C. T.D.) (use of explosives).

[4]See: *City of North York* v. *Kert Chemical* (1985), 32 A.C.W.S. (2d) 271 (Ont. H.C.); *Hutchinson* v. *York Sanitation Co. Ltd.* (1986), 56 O.R. (2d) 778; *Beaulieu* v. *Riviere-Vert* (1970), 13 D.L.R. (3d) 110 (N.B. C.A.); *Gertsen* v. *Municipality of Metropolitan Toronto* (1974), 2 O.R. (2d) 1 (H.C.).

[5]See: *R.* v. *Gingrich* (1959), 29 W.W.R. 471 (Alta S.C. T.D.); *Mann* v. *Saulnier* (1959), 19 D.L.R. (2d) 130 (N.B. C.A.); *Hole* v. *Chard Union*, [1894] 1 Ch. 293 (C.A.).

[6]A vendor of a property may be liable for damages, where he or she was aware of a latent defect, such as contaminated land, and failed to disclose the defect (see: *Sevidal* v. *Chopra* (1987), 64 O.R. (2d) 169; *Jung* v. *Ip* (1988), 47 R.P.R. 13: 50 R.P.R. 180; *Caleb* v. *Potts* (1986), 2 A.C.W.S. (3d) 2, *aff'd* 7 A.C.W.S. (3d) 107 (Ont. C.A.); *Heighington* v. *The Queen in the Right of Ontario* (1987), 6 O.R. (2d) 641; *aff'd* (1989) 69 O.R. (2d) 484 (Ont. C.A.); *Hoy* v. *Lozanovski* (1987), 43 R.P.R. 296).

[7]Nuisance can be public or private. A public nuisance has been defined as "a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large" (see: *Attorney General* v. *P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894 at 908 (C.A.), Denning L.J.). It has been judicially stated in Canada, however, that what constitutes a public nuisance to the many may also be a private nuisance to the few (see: *Hill* v. *Vernon* (1989), 43 M.P.L.R. 177 (B.C. S.C.)).

[8]*Crown Attorneys Act*, R.S.O. 1990, c. C-49, s. 11(d).

labour[9] and environmental[10] statutes have begun to include protection for such employees, this protection does not exist in many jurisdictions.

Finally, there has been an increased demand for mandatory response legislation which could be invoked by a private citizen to force the government to act in an environmental matter. We shall discuss this further below.

Part II Current Avenues for Citizen Participation

(a) The Public Opinion Poll and Enforcement

The original avenue for citizen participation in the environmental arena was the public opinion poll. In the 1980s, public opinion polls indicated widespread support for environmental activism, initiatives, and protection, including support for throwing convicted polluters in jail. The pressure from such polls appeared to reach a critical mass in the mid-1980s and governments began to respond. Ontario, being the most industrialized province, was the first to react in Canada. Suddenly, it appeared that environmentalists were Ministers of the Environment, and resources were dedicated to enforcement for the first time in a meaningful way.

In Ontario, as well as in Quebec and British Columbia, the primary reaction has been to respond to citizen complaints by enforcing the laws and regulations that already exist. In 1991, there were 1,974 charges laid in Ontario, solely under "environmental" laws and regulations.[11] If the charges laid under other natural resources or fisheries legislation were included, the number would be substantially higher.

Ontario has taken particularly strong measures to protect the environment and, in this regard, is in some respects a world leader. Environmental officers regularly attend at sites throughout Ontario to determine whether a company or individual is in compliance with environmental regulation. The Investigation and Enforcement Branch of the Ministry of the Environment in Ontario is aggressive and powerful, and treats environmental violations very seriously.

In addition to increasing the enforcement of existing regulation, public pressure has led to stiffer penalties and widened the net of liability. We now have specific provisions in environmental statutes that allow for the prosecution of the

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[9]See: *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1, s. 43(3)(b).

[10]See: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 174.

[11]Ministry of the Environment, Investigations and Enforcement Branch. 1991. *Annual Enforcement Activity Report.*

officers and directors of a company, regardless of whether the company is charged or convicted.[12] Under Ontario law, an officer or director may be liable for an environmental offence, regardless of whether that person had any knowledge of the circumstance of that offence. In Ontario, this has had a dramatic impact with the first company president going to jail last year[13] and other directors personally receiving fines as high as $12, 000 each.[14]

(b) Civil Liability Imposed by Statute

In addition to liability for environmental offences, an individual may be held civilly responsible for loss or damage resulting from environmental offences, particularly spills. The loss or damage may include personal injury, death, loss of the use or enjoyment of property, financial loss and loss of income. Such civil liability has been imposed through specific provisions in environmental legislation and this has removed some of the obstacles to citizen participation in certain jurisdictions.

Although the ability to bring a private action is limited in many provincial jurisdictions, examples can be found in federal legislation. For instance, the *Canadian Environmental Protection Act* provides that private lawsuits may be brought by any person who has suffered loss or damage to person or property as a result of the conduct.[15] Under the *Fisheries Act*, liability for the loss of income by licensed fishermen is provided for.[16] Further, the *Fisheries Act* allows a private citizen to commence a prosecution and collect one half of any fine imposed.[17] Under the *Transportation of Dangerous Goods Act*, no civil remedy is suspended or affected by reason only that the act or omission which gives rise to the cause of action is also an offence under the Act.[18]

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[12]See: *Canadian Environmental Protection Act*, S.C. 1988, c. C-22, s. 122; *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19, s. 11; *Hazardous Products Act*, R.S.C. 1985, c. H-3, s. 28; *Environmental Protection Act*, R.S.O. 1990, c. E.19, s.194; *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, s. 116.

[13]*R.* v. *Blackbird Holdings Ltd.* (1991), 6 C.E.L.R. 138 (Ont. Prov. Ct).

[14]See: *R.* v. *Bata Industries, Marchant and Weston*, decision of Ormston J., sentence rendered orally 6 April 6 1992 at Belleville, Ontario (Ont. Prov. Ct). The company was ordered not to pay the fine on their behalf.

[15]*Canadian Environmental Protection Act*, S.C. 1988, c. 22, s. 136(1).

[16]*Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(3).

[17]*Penalties and Forfeiture Proceeds Regulations* (CRC, vol. VII, c. 827, s. 5).

[18]*Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19, s. 18(5).

(c) Assessment and Approval Processes

Extensive approval and assessment processes have also been introduced in Canada. In many instances, these processes can result in appearances before administrative tribunals rather than courts. In an environmental assessment hearing in Ontario, for example, lawyers representing their clients call expert evidence on the environmental impacts of a project in an adversarial forum.[19] One such hearing which is currently taking place is being conducted to evaluate the environmental impact of all forestry activities on Crown lands in Ontario (e.g. putting in a culvert, putting in a new road, pesticide spraying, etc.).[20] That hearing has just finished its third year, and is expected to continue for at least another year. At the end of this process, a detailed approval document for forestry activities will exist. Another current example is the environmental assessment into Ontario's energy needs for the next 25 years.[21] This hearing could last many years. As well, the Ontario Waste Management Corporation environmental assessment[22] is in its third year, to seek approval for the development of a hazardous waste facility in the Niagara Peninsula. The hearing is expected to continue into the fall of 1992. In addition to large and involved hearings of this type, there are also many small hearings which typically take a few days to several months. For example, every proposed landfill site in Ontario requires either an environmental approval or assessment hearing.

Until recently, the requirement for an environmental assessment had only applied to government projects. Public pressure, however, has forced the extension of such assessments into the private sector. Some governments have, for some time, had the power to designate private projects for environmental assessment on a case-by-case basis. For example, a proposed private sector gold mine in northern Ontario was designated, and will have to go through an environmental assessment process similar to the one applicable to government projects.[23] However, some of the public have been demanding that the process apply to *all* private projects, not merely government-designated projects.

Without intervenor funding, however, citizen involvement in these hearings would not be possible. Some governments, particularly Ontario, have become strong supporters of providing resources to citizens to involve themselves in these processes. Under the intervenor funding legislation in Ontario, citizens may apply

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[19]See: *Environmental Assessment Act,* R.S.O. 1990, c. E.18.

[20]Class Environmental Assessment Hearing on Timber Management on Crown Lands in Ontario.

[21]Environmental Assessment on Ontario Hydro's Demand/Supply Plan.

[22]Environmental Assessment on the Proposed Ontario Waste Management Corporation Facility.

[23]*Environmental Assessment Act – Designation – Mines at Stevens Island, Cameron Island and Shoal Lake,* O. Reg. 486/89.

for funding to participate in a hearing before the Environmental Assessment Board.[24] This funding is to be provided by the proponent of the project, and there is an administrative regime established to determine who gets funding, why they get it, how they spend it, and when they get it. In the timber management environmental assessment, for example, approximately $4,500,000 has been provided to coalitions of environmental groups to enable their participation. In the Ontario Hydro environmental assessment, the initial funding for the 150 parties who are opposing Hydro's plans is in excess of $10,000,000. In the Ontario Waste Management Corporation environmental assessment, several million dollars have been provided to intervenors to date. Clearly, when this kind of funding is made available, it removes one of the principal obstacles to citizen participation.

(d) Standard Setting Processes

There are a limited number of instances where standard setting processes are being opened up to citizen participation. For example, citizen input through committees is part of the processes under which standards may be set in Ontario for discharges into waterways[25] and into air.[26]

Part III The New Avenue: An Environmental Bill of Rights

The rationale for an environmental bill of rights comes from the basic premise that people have a right to a healthy environment. The problems outlined above as traditional roadblocks to citizen participation are commonly cited in support of environmental bills of rights. It is believed that pollution can be controlled by giving people the right to sue for damages or injunctions, and that the current obstacles to such litigation should be removed. This would involve making litigation less expensive and complex by changing the rules on standing and class actions, providing access for intervenors, dealing with the cost issue, and simplifying some of the causation issues. In addition, there is a public perception that business is unaware of, or avoids, environmental responsibility; and that government does not have the resources to deal with environmental concerns or the ability to enforce environmental regulation. There is a desire for more public participation in the actual decision-making, such as the setting of standards.

There are a number of environmental bill of rights precedents available. For example, in the United States, a right to sue for the protection of the environment

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[24]*Intervenor Funding Project Act*, R.S.O. 1990, c. I.13.

[25]Ontario Ministry of the Environment. 1986. *Municipal/Industrial Strategy for Abatement (MISA): Abatement (MISA): A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges into Surface Waters.* (White Paper) at 12-14.

[26]Ontario Ministry of the Environment. 1987. *CAP – Clean Air Program Discussion Paper* at 22.

has existed in the Michigan *Environmental Protection Act of 1970* since 1970.[27] In Canada, Quebec has had a substantive right to environmental quality in their *Environmental Quality Act*[28] since 1972. On 6 November 1990, the Northwest Territories (the NWT) proclaimed in force the *Environmental Rights Act*,[29] the express purpose of which is to provide environmental rights for the people of the NWT. The Yukon *Environment Act*,[30] which was assented to on May 29, 1991, but has not yet been proclaimed in force, also contains environmental bills of rights concepts.

Other Canadian jurisdictions are proposing the implementation of environmental bills of rights. Bill 12 - *An Act respecting Environmental Rights in Ontario*[31] (*Bill 12*) was introduced by the current New Democratic Party (NDP) government when it was in opposition. On 1 October 1991, the Honourable Ruth Grier, who is now the Minister of the Environment in Ontario, announced the formation of a new Task Force to produce a draft environmental bill of rights for Ontario. Although the NDP government had received pressure from various interest groups to proceed expeditiously with this legislation, it is apparent that the government intends to carefully consider the impacts of such legislation on all of society, including commercial and business interests. Although it is unlikely that the draft environmental bill of rights for Ontario will resemble *Bill 12*, the Bill has provided a good starting point to review the principles in issue. The report on the draft is expected in early May 1992. Further, the new Premier of Saskatchewan, Roy Romanow, has recently indicated during his campaign that his province intends to introduce an environmental bill of rights. First reading is anticipated in the 1992 spring session. A federal environmental bill of rights is a key element in a new Liberal Party discussion paper.[32]

These precedents and proposals have some differing provisions but contain many of the same concepts and raise many of the same questions. A discussion of these concepts and questions is provided below.

(a) Right to Environmental Quality

It is important to know exactly what an environmental bill of rights is designed

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[27]*Environmental Protection Act of 1970*, P.A. 1970, No. 127, Mich. Comp. L. Ann. § 691.1201.

[28]*Environmental Quality Act*, R.S.Q. 1977, c. Q-2.

[29]*Environmental Rights Act*, S.N.W.T. 1990, c. 38.

[30]*Environment Act*, S.Y.T. 1992, c. 5.

[31]Bill 12, *An Act respecting Environmental Rights in Ontario*, 2d Sess., 34th Leg. Ont., 1989. Bill 12 received 2nd reading on 29 June 1989 and has not been reintroduced by the current Ontario government.

[32]*The Environment: A Liberal Vision – Discussion Paper* by P. Martin, M.P., 1992 at 3 and 22-23.

to protect and to what degree that protection extends. Some of the precedents are more specific than others.

In the United States, the Michigan *Environmental Protection Act of 1970* gives the people of Michigan the right to maintain an action for the protection of the air, water and other material resources or the public trust therein from pollution, impairment or destruction.[33] Under Quebec's *Environmental Quality Act*, every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided by the Act.[34] Under the NWT *Environmental Rights Act*, every resident in the NWT has the right to protect the environment and the public trust from the release of contaminants.[35] Under the Yukon *Environment Act*, the people of the Yukon have the right to a healthful environment.[36] *Bill 12* stated that the people of Ontario have a right to a healthy and sustainable environment, including clean air and water, to the conservation of the natural, scenic, historic and aesthetic values of the environment, and to the protection of ecosystems and biological diversity.[37]

The difficulty with these statements, obviously, is that terms such as "healthy" and "impairment" are relative, and the term "environment" can encompass a broad range of components. There is still little agreement in our society about what "environment" includes, what level of "health" we are striving for, or willing to accept, and at what cost or at the expense of what other interests.

(b) Public Trust Doctrine

Many of the precedents contain a public trust concept.[38] Under such a concept, natural resources are said to be held in trust by the government and if environmental degradation occurs, in other words if the trust is violated, a citizen can bring an action for damages against the government.

"Public trust," in the NWT *Environmental Rights Act*, is defined as the collective interest of the people of the NWT in the quality of the environment and

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[33]*Supra*, note 27, §. 691.1202, s. 2(1) and § 691.1204, s. 4(1).

[34]*Supra*, note 28, s. 19.1.

[35]*Supra*, note 29, s. 6(1).

[36]*Supra*, note 30, s. 6.

[37]*Supra*, note 31, s. 3(1).

[38]See: Michigan *Environmental Protection Act of 1970*, *supra*, note 27, § 691.1204, s. 4(1); *Environmental Rights Act*, *supra*, note 29, s. 6(1); *Environment Act*, *supra*, note 30, ss 7-8, Bill 12, *An Act respecting Environmental Rights in Ontario*, *supra*, note 31, s. 3(3).

the protection of the environment for future generations.[39] A similar definition exists in the Yukon *Environment Act.*[40] Under the Yukon Environment Act, a person is not permitted to commence an action for the violation of the public trust until a regulation governing the activity in question comes into force, or until 1 October 1996.[41] *Bill 12* declared that it is in the public interest to provide every person with an adequate remedy to protect and conserve the environment and the public trust therein from contamination and degradation.[42] The province of Ontario, as trustee of Ontario's public lands, waters and natural resources, shall conserve and maintain them for the benefit of present and future generations.[43] "Public trust" was defined as the collective interest of residents of the Province of Ontario in the quality of the environment and the protection thereof and the heritage therein for future generations.[44]

An important question to be addressed in the development of an environmental bill of rights is whether the government will be able to sanction degradation in specific legislation.[45] It is obvious that a government may have to sanction some degradation every time they approve or embark upon a new development. Further, another significant issue is whether the concept of "sustainable development" should be expressly provided for within the public trust doctrine. For example, under the fish habitat guidelines established under the *Fisheries Act*, a person may negotiate for the destruction of a particular fish habitat provided that some new fish habitat is established elsewhere.[46] One then ends up with a net balance in theory – the same amount of fish habitat you had before. This is referred to as the "no net loss" principle. Should the government be required to abide by such a principle for the whole of the natural environment? These are questions which are currently on the table and should be addressed.

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[39]*Supra*, note 29, s.1.

[40]*Supra*, note 30, s. 2.

[41]*Ibid.*, s. 8.

[42]*Supra*, note 31, s. 3(3).

[43]*Ibid.*, s. 3(2).

[44]*Ibid.*, s.1.

[45]Section 2 of the NWT *Environmental Rights Act*, *supra*, note 29, provides that the Act does not apply to any person who is authorized to do the thing in question, under an Act of the Parliament of Canada. Section 6(5)(b) of the NWT *Environmental Rights Act*, provides that compliance with an established standard or approval is a complete defence. A similar defence exists under the Yukon *Environment Act*, *supra*, note 30, with respect to actions against persons impairing the natural environment, however, with respect to actions against the government for protection of the public trust, the Act provides in s. 10(2) that no action shall be dismissed on the ground that an authority has the power to authorize an act which may impair the natural environment.

[46]Department of Fisheries and Oceans, Ottawa, Ontario. 1986. *The Department of Fisheries and Oceans Policy for the Management of Fish Habitat* at 12.

What is clear, however, is that a public trust section establishes a new basis for governmental liability; it establishes a new substantive right which is to be enforceable against the government. How should such a right be enforced? Judicial review proceedings are possible. Civil lawsuits against the government which are regulated in some fashion by existing tribunals may be possible. The process which is adopted to enforce this right may have its own inherent roadblocks. Assuming this right of action is made available, will we continue to allow the old common law remedies; that is, will a person still be able to sue the government for negligence, or will the public trust doctrine create a new regime[47]? If such an action is brought against the government and is successful – who will pay whom, and for what[48]? Aren't "they" us? These are the sorts of interesting questions which such a public trust concept evokes, and will need to be answered for an environmental bill of rights to operate as an effective and acceptable medium for citizen participation.

(c) Right to Protect the Environment

Most of the precedents enable a citizen to bring an action or application against another individual in order to protect the environment. The precedents provide for slightly different remedies and defences; however, they all attempt to remove some of the traditional roadblocks to the pursuit of private actions. The precedents reverse the onus of proof of causation such that where the plaintiff has proved that the release of contaminant has impaired the natural environment and that the defendant released a contaminant of that type at the material time, the onus shifts to the defendant to prove that he, she or it did not cause the impairment. Some of the precedents address the problem of standing directly, by stating that an individual will not be prohibited from pursuing an action only because he or she is unable to show any greater or different right, harm or interest than any other person, or any pecuniary or proprietary right or interest in the subject matter of the proceeding.

In the United States, the Michigan *Environmental Protection Act of 1970* gives the people of Michigan the right to apply for an injunction to prohibit any act or operation which interferes with their right to protection of the air, water and other material resources from pollution, impairment or destruction.[49] Where a plaintiff has made out a *prima facie* case, the defendant may rebut this by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defence, that there is no feasible and prudent alternative to its conduct,

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[47]Both the Yukon *Environment Act*, *supra*, note 30, s. 37 and the NWT *Environmental Rights Act*, *supra*, note 29, s. 9, specifically state that existing remedies and defences are still available.

[48]See discussion below under subsection (g) "Receipt of Damages."

[49]Michigan *Environmental Protection Act of 1970*, *supra*, note 27, § 691.1202, s. 2(1).

and that such conduct is 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. The principles of the burden of proof and evidentiary weight which are generally applicable in civil actions in the circuit courts apply to actions brought under the Michigan *Environmental Protection Act* (except with respect to the affirmative defence).[50] Costs can be awarded if the interests of justice so require.[51] The court can also grant temporary and permanent equitable relief, or impose conditions on the defendant.[52]

Every person resident in the NWT has the right to protect the environment, and the public trust, from the release of contaminants by commencing an action in the Supreme Court of the NWT against any person releasing any contaminant into the environment.[53] The standing issue is directly addressed; it is expressly stated that no person is prohibited from commencing such an action only because he or she is unable to show any greater or different right, harm or interest than any other person, or any pecuniary or proprietary right or interest in the subject matter of the proceeding.[54] It is important to note that under the NWT *Environmental Rights Act*, it is a complete defence to any action that:

> (a) the release of the contaminant is, and will remain, entirely restricted to lands owned by the defendant, or to lands in respect of which the owner has expressly authorized the defendant to release a contaminant;
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> (b) the release of the contaminant does not, and will not, materially impair the quality of the environment; or
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> (c) the defendant's activity is in compliance with an established standard or an approval given under an enactment.[55]

The Supreme Court of the NWT may: (i) grant an interim or permanent injunction in respect of any activity of the defendant; (ii) order the defendant to remedy any damage caused by the release of the contaminant into the environment; (iii) order the defendant to pay an amount by way of satisfaction or compensation for loss or damage resulting from the release to either a person having interest in the property that is affected, or to the Minister; or (iv) impose

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[50] *Ibid.*, § 691.1203, s. 3(1).

[51] *Ibid.*, § 691.1203, s. 3(2).

[52] *Ibid.*, § 691.1204, s. 4(1).

[53] *Supra*, note 29, s. 6(1).

[54] *Ibid.*, s. 6(2).

[55] *Ibid.*, s. 6(5).

any other order that it considers appropriate.[56]

In the Yukon, every resident who has reasonable grounds to believe that a person has impaired, or is likely to impair, the natural environment may commence an action against that person.[57] Where the plaintiff has proved that the release of contaminant has impaired the natural environment and that the defendant released a contaminant of that type at the material time, the onus shifts to the defendant to prove that he, she or it did not cause the impairment.[58] The available defences[59] are similar to those provided under the NWT *Environmental Rights Act.* Also available is a defence similar to the affirmative defence available under the *Michigan Environmental Protection Act of 1970.* Again, the standing issue is addressed; no person is prohibited from commencing an action by reason only that he or she is unable to show any greater or different right, harm or interest than any other person, or any pecuniary or proprietary interest in the subject matter of the proceeding.[60] Further, no such action shall be dismissed on the ground that: (i) the public trust is not irrevocable or certain; (ii) a beneficiary cannot be identified; or (iii) an authority has the power to authorize an act which may impair the natural environment. The available remedies include remedies similar to those available under the NWT *Environmental Rights Act*, but additional, more extensive and specific remedies are available.[61] For example, the court may order monitoring and reporting, rehabilitation of the environment, preventative measures, suspension or cancellation of permits, environmental impact reviews, provision of financial assurance, etc.

Bill 12 provided for a cause of action against any person who is responsible for the contamination or degradation of the environment.[62] Such an action could be commenced without any requirement that the plaintiff allege, or establish, that there has been, is, or will be, an infringement of an approval, permit, license, standard, regulation, rule or order.[63] Indeed, *Bill 12* stated that, in the event that there is no established standard, the court could hear evidence as to what standard should apply, and could order the defendant to comply with a standard that the court, itself, determines is appropriate.[64] Are judges equipped to set technical

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[56]*Ibid.*, s. 6(3).

[57]*Supra*, note 30, s. 8.

[58]*Ibid.*, s.11.

[59]*Ibid.*, s. 9.

[60]*Ibid.*, s. 10.

[61]*Ibid.*, s. 12.

[62]*Supra*, note 31, s. 5(1).

[63]*Ibid.*, s. 5(2).

[64]*Ibid.*, s. 5(3).

environmental standards, such as how many parts per million of a particular substance should be allowed to come out of a pipe and be discharged into the environment?

Bill 12 dealt directly with the traditional problems which litigants faced in establishing causation. It provided that once a plaintiff established that the activity of the defendant contaminated or degraded, or was likely to contaminate or degrade, the quality of the environment, the onus shifted to the defendant to establish that there was not a feasible and prudent alternative to the activity, and that such activity was in the best interest of the public, having regard to the purposes of the Act.[65] Authorization of the defendant's activity by a standard established by, or under, one of the listed Acts, would be a defence unless the plaintiff could establish, on a balance of probabilities, that the activity caused, or was likely to cause, severe or irreparable contamination or degradation to the environment.[66] It was expressly stated that it would not be a defence to an action that the defendant was not the sole cause of the alleged or potential contamination or degradation.[67] Furthermore, the fact that it could not be established that the contaminant which the defendant discharged was definitely the cause of the contamination or degradation, would not be a defence if the effect on the environment was of a nature consistent with the contaminant being a cause.[68]

(d) Cause of Action for Violation of an Act or Standard

Many of the precedents specifically provide that a person may bring an action or application to protect the environment to the extent provided for by the Act or any authorizations issued thereunder.

Any resident of the NWT can lay an information, in writing and under oath, if he or she believes on reasonable grounds that an offence has been committed under an Act listed in Schedule A to the *Environmental Rights Act*.[69] The court may order that a portion of the monetary penalty imposed be paid to the person conducting the prosecution to reimburse that person for costs and expenses.

An adult person resident in the Yukon may institute a private prosecution in respect of an offence under the Environment Act or an Act listed in Schedule A,

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[65] *Ibid.*, s. 9(1).

[66] *Ibid.*, s. 9(2).

[67] *Ibid.*, s. 9(3)(a).

[68] *Ibid.*, s. 9(3)(b).

[69] *Supra*, note 29, s. 5.

or regulations thereunder.[70] A portion of the fine imposed, when collected, may be ordered to be paid to the person instituting the private prosecution.

Under Quebec's *Environmental Quality Act*, every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by the Act and the regulations, orders, approvals and authorizations issued under any section of the Act.[71] An application for an injunction may be brought to prohibit any act or operation which interferes or might interfere with the exercise of this right.[72] This application may be made by any person domiciled in Quebec frequenting a place or the immediate vicinity of a place in respect of which the contravention is alleged. It may also be made by the Attorney General and by any municipality where the contravention is being, or is about to be, committed.[73]

Bill 12 provided that a person could commence an action if another person was in violation of one of the listed Acts, or of any approval, permit, license, standard, regulation, rule or order, but that no such action shall be commenced if the responsible Ministry is diligently pursuing enforcement against the potential defendant.[74]

(e) Multiple Causes of Action

As the above indicates, there are various ways in which a person's right to sue could be triggered. One way is through breach of a person's substantive right to the protection of the environment by the contamination or degradation of the environment. Another trigger arises from a breach by the government of the public trust. A person may also be able to sue where another person has breached an Act or approval. There are, of course, hybrids; there will be many circumstances which will fall under more than one section. One of the issues which must be considered, therefore, is whether a person can exercise his or her rights under more than one section at a time and, if so, how?

(f) Class Actions

One of the roadblocks faced by plaintiffs in pursuing a common law cause of action in public nuisance is that of standing. Generally, for harm suffered through a public nuisance, the public must rely upon the discretion of a minister of the

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[70] *Supra*, note 30, s. 19.

[71] *Supra*, note 28, s. 19.1.

[72] *Ibid.*, s. 19.2.

[73] *Ibid.*, s. 19.3.

[74] *Supra*, note 31, s. 6(1) and s. 6(2).

Crown as to whether an action is commenced. A private plaintiff will not be able to pursue an independent legal action unless he or she can show special damages. In response to this difficulty, *Bill 12* specifically empowered individuals to bring a class action for public nuisance, thereby increasing access to justice for otherwise uneconomical claims.[75]

In Ontario, such actions are also proposed in Bill 28 – *An Act respecting Class Proceedings.*[76] It is anticipated that this Bill will become law sometime in 1992. This Act will enable a representative plaintiff to bring a civil lawsuit on behalf of other persons who have suffered similar losses. The representative plaintiff will be required to ensure that the class members receive notice of the proceeding. Defendants will also be able to defend lawsuits as a group. There will be a controlled contingency fee arrangement under the Act, and a Class Proceedings Fund will be established for financial assistance. Under this fund, representative plaintiffs will be able to apply for financial assistance with disbursements, the cost of providing notice to the members of the class, and for experts' reports. The fund will also indemnify the representative plaintiff for adverse costs awards.

(g) Receipt of Damages

Another question which must be addressed is whether an individual who brings an action should be entitled to receive the damages awarded in an action. Damages under *Bill 12*, with respect to actions brought for violations of any Acts listed in the schedule, were to be paid to the government of Ontario.[77] In Ontario, monies collected by the government go into the Consolidated Revenue Fund and are allocated accordingly.[78] If the intent of an environmental bill of rights is to protect and conserve the natural environment, however, it would seem more appropriate that any damages awarded be used to protect the environment, and remediate any damage which may have been caused. Under the NWT *Environmental Rights Act*, any money received by the Minister shall be deposited in an account in the Consolidated Revenue Fund and disbursed for the repair of any damages caused by the release of the contaminant, or for the enhancement or improvement of the environment.[79] Similar provisions exist under the Yukon *Environment Act*.[80]

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[75]*Ibid.*, s. 13.

[76]Bill 28, *An Act respecting Class Proceedings*, 2d Sess., 35th Leg. Ont., 1992.

[77]*Supra*, note 31, s. 6(3).

[78]*Supra*, note 28, s. 6(4).

[79]*Supra*, note 29, s. 6(4).

[80]*Supra*, note 30, s. 12(6).

It will be interesting to see how this issue is dealt with in the draft environmental bill of rights for Ontario, especially where a person brings an action against a polluter which involves damage to property with which the plaintiff has no connection. If it is decided that individual plaintiffs are to receive part, or all, of the award, will this encourage a growth of environmental vigilantes who are merely financially motivated? This is probably not of great concern. Under the Fisheries Act, there is a fine splitting provision,[81] and there does not appear to be an industry of people bringing actions under the *Fisheries Act*. If the government is to receive the award, where will it go then? Some have suggested it would be appropriate if the damages collected in environmental cases were put into a separate environmental fund. The monies in this fund could then be used to fund environmental litigation or special environmental projects.

(h) Access to Information

Some of the precedents specifically provide for access to information in the possession, or under the control, of the government. In the NWT *Environmental Rights Act*, every person has the right to obtain environmental information, in the possession of, or under the control of, a Minister of the government, concerning the quantity, quality or concentration of any contaminant released, or likely to be released, into the environment.[82] A person can also apply to examine any license, permit, approval, order or notice, as well as any data or information in respect of any such documents, and has the right to be provided with a copy of the document, data or information.[83] If the government refuses to permit such access, notice of the refusal must be sent to the person who made the application, and that person can then apply to a judge for an order directing that the information be provided.[84]

In the Yukon, every person has the right to obtain information from the government which reveals a grave threat to the natural environment or to the health or safety of the public.[85] Further, any information submitted as a condition of a permit, or under regulation, must also be made available, unless its release would be damaging to the competitive position of the person who originally submitted the information. Results of environmental testing and information with respect to regulatory proposals and amendments must also be released.

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[81] *Supra*, note 17.

[82] *Supra*, note 29, s. 3(3).

[83] *Ibid.*, s. 3(2).

[84] *Ibid.*, s. 3(5).

[85] *Supra*, note 30, s. 21(a).

(i) Investigation Requests

Some of the precedents contain provisions enabling a person to request that the government investigate alleged degradation of the environment. The results of such an investigation would then be reported to the person requesting the investigation.

Any two persons resident in the NWT who are over 19 years of age, and who believe that a contaminant has been released, or is likely to be released into the environment, can apply to the Minister for an investigation.[86] The Minister must acknowledge, in writing, receipt of the application, and must investigate all matters that the Minister considers necessary for a determination of the facts relating to the application. Within 90 days after receiving the application, the Minister must report in writing to the applicant on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take. The Minister can discontinue an investigation where the Minister is of the opinion that the release, or the likely release, does not constitute a threat to the environment. If an investigation is discontinued, the Minister must, within 90 days, prepare a written report to the applicants. Similar provisions exist under the Yukon *Environment Act*.[87]

Under both the NWT Environmental Rights Act and the Yukon *Environment Act*,[88] *two* people are required to jointly submit the investigation request. It is difficult to see why two people are considered necessary. Under *Bill 12*, a single person who considered that the environment was being contaminated or degraded could, in writing, specify the nature of the problem and request an investigation.[89]

Under *Bill 12* the request was to be made in good faith and would result in a mandatory investigation by the government and a written report within 90 days of the request.[90] The 90-day time frame is currently under debate with respect to the draft environmental bill of rights in Ontario and there is argument over whether the government will be given a discretion to extend that time. It is likely that such discretion will be given.

This type of forced investigation provision may be a good tool for individual citizens, but could be extremely expensive. Indeed, responding to such

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[86]*Supra*, note 29, s. 4(2).

[87]*Supra*, note 30, ss 14-17.

[88]*Ibid.*, s. 14(1).

[89]*Supra*, note 31, s. 4(1).

[90]*Ibid.*, s. 4(2) and s. 4(3).

investigations could potentially drain all of the resources of the government, and might not be the most environmentally beneficial use of limited resources.

(j) "Whistle Blower" Protection

Some of the precedents contain specific protection for employees who "blow the whistle" on employers suspected of causing pollution. Under the NWT *Environmental Rights Act,* it is an offence, subject to fine or imprisonment, for any employer to dismiss, threaten to dismiss, discipline, suspend, impose any penalty on, intimidate, or coerce an employee who reports or proposes to report a release, or likely release of a contaminant, or wishes to make an application or commence an action under the Act.[91] The court may order reinstatement of the employee with compensation for loss of wages and other benefits.[92] Similar provisions exist under the Yukon *Environmental Act.*[93] In the Yukon, the protection applies notwithstanding any enactment or contractual provision which imposes a duty of confidentiality on an employee.

Bill 12 provided protection, for employees who reported, or proposed to report, an act of an employer that contaminated or degraded the environment, similar to that provided by the *Environmental Protection Act.*[94] To obtain a remedy an employee would file a complaint, in writing, with the Ontario Labour Relations Board, which initiates a review procedure.

(k) Complaints and Judicial Review of Government Action

Some of the precedents allow citizens to lodge a complaint or instigate a judicial review of a government decision, recommendation, act or omission. Under the Yukon Environment Act, any person or group may complain, orally or in writing, to the Minister with respect to a decision, recommendation, act or omission of an authority under the Act, including an exercise of discretionary authority.[95] On receipt of the complaint, the Minister must make a record of the complaint and send a copy of the record to the Council and the complainant, notify any other relevant authority, and attempt to resolve the complaint. The Minister must report to Council and may cease to consider the complaint where the Minister believes that the complaint is not made in good faith or concerns a trivial matter. The complaint may be referred to mediation. Council may make recommendations as to the conduct of the steps taken by the Minister or the

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[91] *Supra,* note 29, s. 7.

[92] *Ibid.*, s. 7(4).

[93] *Supra*, note 30, s. 20.

[94] Bill 12, *supra*, note 30, s. 17.

[95] *Supra*, note 30, s. 22.

merits of the complaint. The Minister must report annually to the Legislative Assembly on the complaints received and disposed of.

Bill 12 provided that a person could seek judicial review of the exercise or non-exercise of any power, or the fulfillment or non-fulfillment of any duty conferred or imposed by any Act on the Minister of the Environment, or any other Minister responsible for regulatory, fiscal or proprietary control of the activity.[96]

(l) Public Notice and Standard Setting

One of the primary things that an environmental bill of rights can do is open up decision making processes by providing for public notice and review. One of the biggest issues which will be faced by a government in the development of an environmental bill of rights will be determining the amount of access that should be allowed to individuals during the passing of regulations, the setting of standards and the issuance of permits and certificates of approval.

The Yukon *Environment Act* provides a scheme for rulemaking and public review.[97] The Act provides that the Minister shall consult with affected interests in the development of a proposal to make, amend or revoke a regulation. A similar proposal by the Commissioner in Executive Council must be referred to the Minister who shall then initiate a public review. Participant funding programs may be established by the Minister to enable the participation of Yukon First Nations, municipalities, businesses, non-governmental organizations and individuals.[98]

Notice of the proposal shall be published along with an invitation to the public to make submissions to the Minister within a certain time period not less than 60 days from the publication of the notice. Any person or group of persons may request that their name be placed on a notification list. The Minister may hold public hearings, or refer the proposal to an advisory committee to hold public hearings, and carry out economic, socioeconomic and environmental analyses of the proposal. After considering any submissions or other information the Minister shall report to the Commissioner in Executive Council concerning the proposal and may make recommendations. This report shall be sent to all persons who made submissions on the proposal.

The Yukon *Environment Act* also provides that a person or group of persons

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[96]*Supra*, note 30, s. 5(4).

[97]*Supra*, note 30, ss 29-32.

[98]*Ibid.*, s. 36.

may, by petition to the Minister, propose the establishment amendment, or revocation of a regulation or waste management plan, and request that the proposal be submitted to public review.[99] Within 30 days of the receipt of the proposal and request for review, the Minister must either initiate, or refuse to initiate, a public review. Where the Minister refuses to initiate a public review reasons must be given.

The public notice section in *Bill 12* provided that notice must be given to the public where a new instrument, or a revision to an existing instrument, is proposed.[100] With respect to the development of the draft environmental bill of rights in Ontario there is still some argument about what is to be included in the term "instrument." It will, however, likely include an approval, permit, or regulation. Under *Bill 12*, such notice was to be published in *The Ontario Gazette* and in two general circulation newspapers.[101] The public was then permitted to make written submissions or request a hearing by the appropriate board.[102]

Public participation in the setting of standards is revolutionary and it will be interesting to see whether the draft environmental bill of rights for Ontario will adopt the framework established by *Bill 12*. The involvement of the public in the process will undoubtedly lead to uncertainty, and a myriad of questions will need to be resolved. For instance, how will public participation in the setting of standards operate? Which members of the public should be involved, how many of them are necessary, and how should they make decisions? If these questions cannot be agreed upon, will the remedy be to go to the court and require a judge to set the standard? As questioned above, are judges equipped to set technical environmental standards?

Even if such standards can be established when can they be challenged and what defences will be available, if any? If there is already a standard built into an approval, or a regulation that applies to you, how will a challenge to that standard arise? Will it arise anytime someone wants to challenge it, or only if you are out of compliance? Will it let judges negotiate new standards with the public in situations where the original standard had been set with public participation? How will such a standard setting process work with the existing processes by which we set standards? Will a standard that is set with public participation be retroactive? Will existing permits be open to scrutiny? How long will a permit be allowed to last? Will there be any limits on the ability of people to sue on standards which have been set under the new standard setting mechanisms? If the

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[99] *Ibid.*, s. 33.

[100] *Supra*, note 31, s. 14(3).

[101] *Ibid.*

[102] *Ibid.*, s. 14(4).

public is going to be involved in the establishment of standards, perhaps it will be appropriate to allow individuals and companies to completely rely on the regulations and permits as absolute defences. These are a few of the questions and concerns which must be addressed with respect to public participation in the setting of standards.

Such public notice does not occur in Ontario now. Currently, the first notice a citizen may get of any particular matter is notice that a regulation has been passed or an approval has been given. Such notice is often "too little, too late." One thing is clear: mandatory notice requirements will be great business for the newspapers, if nobody else. In any event, it would seem that we are coming to the end of closed-door negotiations between the government and developers or industries. The trend is clearly to require the developer or industry to put public notices in the newspaper, to invite the public to come to meetings and make submissions, and in some cases, to open the doors to specific appeals through tribunals or through the courts in regard to those initiatives.

(m) Review of Regulations

Bill 12 provided that initially, and every fifth year thereafter, a board would review all regulations that relate to the quality of the environment, having regard to their adequacy to protect the environment, and the public trust therein, from contamination and degradation.[103] Experience has shown us, however, that such reviews take more than five years to conduct, and thus overlapping reviews would likely result.

(n) A Separate Document

Why should governments enact a specific document called an "Environmental Bill of Rights"? Having such a separate document or statute has stirred some controversy. It has been argued that provisions could be put into existing legislation in order to deal with current deficiencies. These critics question the necessity of an environmental bill of rights and the attendant debate surrounding it. They point to the tremendous expense involved in the consultations surrounding the enactment of an environmental bill of rights especially where tools to deal with identified problems in existing processes are otherwise available. It has been suggested that the motivation for a separate document is purely political – a government wants to pass a separate environmental bill of rights so that it will be seen to be doing something profound, something that can be pointed to as a product of that government.

For example, instead of enacting an environmental bill of rights in Ontario,

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[103] *Ibid.*, s. 16.

one possibility would be to amend its *Environmental Protection Act*.[104] The *Environmental Protection Act* has undergone a number of changes over the past twenty years and could be reviewed and overhauled again. In the course of amending the *Environmental Protection Act*, the government could provide mechanisms to allow people to address the issues discussed above, including accessibility to the environmental decision-making process and the ability to initiate and require investigations and prosecutions. As well, the intervenor funding legislation and the proposed class action legislation, discussed above, could address some of the traditional roadblocks and concerns.

Conclusion

When citizens complain, there is a reaction by the government. Such reaction has recently focussed on passage or a discussion of an environmental bill of rights. It is hoped, however, that governments will first consider whether any deficiencies in its existing regime for environmental protection can be addressed in existing legislation. If there are gaps remaining in the road map to environmental quality after the existing avenues have been repaired, a government may want to add the flexibility of an environmental bill of rights. However, it is important to keep in mind that where there is a responsive government, or an "environmentalist" government, citizens might not need independent recourse to the courts. If legislation is to be introduced allowing direct public participation in the environmental arena, it should be legislation which is fair, reasonable, understandable, certain and enforceable.

[104] *Environmental Protection Act*, R.S.O. 1990, c. E.19.