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**THE ENVIRONMENTAL RIGHTS APPROACH UNDER THE  
ONTARIO ENVIRONMENTAL BILL OF RIGHTS:  
SURVEY, CRITIQUE AND PROPOSALS FOR REFORM**

by

**Shirley-Anne Levy-Diener**

**A thesis submitted in conformity with the requirements  
for the degree of Master of Laws  
Graduate Department of the Faculty of Law  
University of Toronto**

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Master of Laws Thesis  
Faculty of Law  
University of Toronto  
1997

**Abstract**

One of the most recent environmental law reform initiatives was the enactment of the Ontario *Environmental Bill of Rights*. The purpose of this thesis is to provide a critique of the environmental rights approach embodied in the Ontario *Environmental Bill of Rights* and to suggest reforms which can improve the enactment. The critique focuses on the deficiencies in the environmental rights approach of the legislation with respect to public participation, government accountability and access to the courts to protect the environment. This thesis provides a survey of the issues relating to the need for substantive environmental rights and the utility of the public trust doctrine. For the purpose of comparison, the environmental rights initiatives in Quebec, the Northwest Territories and the states of Michigan and Minnesota are examined. Following this examination, the environmental rights provided in the Ontario *Environmental Bill of Rights* are considered. This thesis concludes that the Ontario *Environmental Bill of Rights* is primarily procedural in nature and thus falls short of what has been envisioned for a true environmental bill of rights. It is argued that the Ontario legislation is fundamentally deficient due to the absence of a substantive right to environmental quality and the public trust doctrine and its limited role for the courts.

## **Acknowledgements**

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## CHAPTER I

### INTRODUCTION

Our laws are the most precise, if not the most poetic, expression of man's relationship to his government, his fellow citizens, and his environment. Laws alone cannot transform our relationship to our environment from rape to caress, but they can describe the intended relationship with a degree of clarity and prescribe its consequences. Whether we have an environmental bill of rights or a patchwork quilt of symbolic gestures will determine whether our laws are intended to protect the environment or pay lip service to it.<sup>1</sup>

Despite the major advances in environmental law in the last forty years, the environment continues to be degraded. Through a better understanding of the workings of nature we have come to understand that the consequences of environmental degradation have global, long-term and perhaps irreparable effects on the health of the planet and all its inhabitants. The vital importance of environmental quality has been recognized, and efforts have been made to more adequately respond to the challenges which environmental protection imposes on us all.

Throughout the history of industrialization, our institutions and laws have evolved as the necessities of the day required, in an effort to control the harmful effects of human impact on the environment and to confront the hard decisions which need to be faced in deciding the appropriate trade-offs between "progress" and environmental protection. However, as the pace of "progress" continues to take its toll on the quality of the environment and the long-term health of all of the earth's inhabitants, it has become increasingly recognized that our institutions and laws have not evolved sufficiently to meet the environmental challenges ahead.

The motivation for this thesis is to critique the "environmental rights" approach of the

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<sup>1</sup>J. Swaigen, "Introduction: The Emergence of the Public in Environmental Decision-Making" in J. Swaigen, ed., *Environmental Rights in Canada*, (Toronto: Butterworths, 1981) 1 at 8.

Ontario *Environmental Bill of Rights*.<sup>2</sup> The discussion will show that this law falls short of the level of environmental considerateness intended from a true “environmental bill of rights” and primarily imposes a new and cumbersome layer of procedural safeguards onto an inherently deficient environmental protection regime. The environmental decision-making process is flawed, not because there is not enough procedure, but because there are a lack of substantive rights vested in each member of the public to affect environmental decision-making and therefore little means to hold government accountable for its environmental responsibilities. The Ontario *EBR* does little to change the actual position of the public to protect the environment since it provides few enforceable governmental obligations and no substantive citizen rights. Until our government is ready to accept and live up to its environmental responsibilities, by legislating the public trust and substantive environmental rights, the citizen will be relegated to the role of a supplicant, to receive notice of impending environmental decisions, but as one who does not really have any rights from which genuine changes in environmental decisions can be made.

There are three main players in the environmental protection regime, namely, government, the polluters and the public. The inherent nature of the government-polluter relationship, and its impact on the content and implementation of environmental policies, laws and regulations and their ultimate enforcement, compounds the need for legal recognition of each citizen’s right to environmental quality and the enactment of the public trust doctrine. In the account of the evolution of environmental law and policy, particularly in Ontario, it is necessary to examine the realities of the process and the nature of the roles played by government, industry and the public in the existing system of environmental protection. An understanding of the contours and character of environmental decision-making, and the role of these three players in environmental decision-making, is necessary in order to place the most recent environmental law reforms, embodied in the Ontario *EBR* in context. Since it was expected that the Ontario *EBR* was to have a profound affect on environmental decision-making in Ontario, presumably to improve environmental protection, it is necessary to examine the environmental decision-making framework which has existed prior to the Ontario *EBR*. Only after such an examination will it be

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<sup>2</sup>An Act Respecting Environmental Rights in Ontario is cited as the *Environmental Bill of Rights*, 1993, S.O. 1993, c.28 [hereinafter Ontario *EBR*].

possible to evaluate the potential success or failure of these reforms to ensure greater and more appropriate consideration of the environment in decision-making and ultimately better environmental protection.

A substantive right to environmental quality can be expected to have several important effects. Its primary effect is that it will empower each citizen to protect the environment directly. In addition, a substantive right to environmental quality can act as a legally enforceable counterweight in all environmental decision-making, against both traditional private property rights and what has been termed industry's *de facto* right to pollute.<sup>3</sup> Thus, such a right can act as a fetter on government discretion to ensure that environmentally harmful decisions are only made after open and meaningful consideration of the distribution of environmental costs and benefits and a thorough examination of alternatives. An important advantage of the recognition and enforcement of such a right is that it provides citizens with a direct and effective means to hold these players accountable for environmental decision-making. That accountability can only come when citizens are able to exercise their right to environmental quality in all environmental decision-making processes including in our courts of law. The legal recognition of the public trust doctrine and a substantive right to environmental quality in each citizen, enforceable by the courts, are important and essential means for ensuring that incentives exist to require that environmental implications are given more adequate consideration when decisions which impact on the environment are made.

The deficiencies in the existing environmental law regime were the impetus for the enactment of the Ontario *EBR* and the "environmental rights" enactments in various other jurisdictions both in Canada and the United States.

An "environmental bill of rights" is generally thought to be a law which is designed to (a) remove obstacles to court actions and (b) ensure meaningful public participation in environmental decision-making processes. A further advantage of such a law is to provide mechanisms to the public to ensure that the government is held accountable for its environmental decision-making. One commentator has described an environmental bill of rights as follows:

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<sup>3</sup> D. Trezise, "Alternative Approaches to Legal Control of Environmental Quality in Canada" (1975) 21 McGill L. J. 404 at 407.

[A]n environmental bill of rights attempts to restore the balance between the state and its citizens, making it clear that government exists to serve the citizenry, not the other way around. Thus, an environmental bill of rights would provide for the right to government information, to participate in government decisions, and use the courts and environmental tribunals to compel government and powerful corporations to respect the environment.<sup>4</sup>

The next chapter will discuss the nature of the environmental protection regime and the roles played by government, polluters and the public in environmental-decision making. This discussion will elucidate the reasons necessitating the enactment of environmental rights and will describe their intended form and content. In particular, it will be shown that the challenge of environmental protection requires the active and effective participation of all members of society and all our institutions. But, more importantly, the challenge posed by the demands of environmental protection requires that government have a legally recognized and publicly enforceable obligation to accord environmental protection paramount importance and that each citizen be recognized as having a substantive legal entitlement to environmental quality.

As a point of comparison to the environmental rights in the Ontario *EBR*, Chapter III will examine the “environmental rights” enactments in various jurisdictions in Canada and the United States with a particular emphasis on the *Michigan Environmental Protection Act*.<sup>5</sup> In Michigan, environmental rights, which are enforceable in the courts, have been accorded to its citizens. The environmental rights accorded to the citizens in Michigan reveals that primacy is placed on the quality of the environment when environmental decision-making is undertaken. Furthermore, legal recognition of such environmental rights emphasizes that securing environmental quality is to be considered an integral part of the government’s role in a democracy. As a result of the environmental rights included in the *Michigan Environmental Protection Act*, the “environmental rights” experience in Michigan comes closer to the essence of an “environmental bill of rights” than any other such enactments to date. Chapter IV will then turn to examine the environmental

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<sup>4</sup> Swaigen, *supra.*, note 1, at 6.

<sup>5</sup> *Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979) [hereinafter *Michigan Environmental Protection Act*].

rights reforms embodied in the Ontario *EBR*. Chapter V will provide a critique of the Ontario *EBR* by identifying the deficiencies in its provision for public environmental rights in environmental protection, government accountability for the quality of the environment in Ontario and the implications of these deficiencies for the role of the courts in environmental protection. This thesis will conclude with some suggestions for reform which can provide the citizens of Ontario with a true “environmental bill of rights” that can more effectively protect the environment rather than providing a mere “patchwork quilt of symbolic gestures”.

## CHAPTER II

### THE NEED FOR ENVIRONMENTAL RIGHTS

#### 1. The Nature of the Environmental Protection Regime

##### (a) The Common Law

Prior to the enactment of environmental protection legislation, the environment was accorded protection through the common law. The traditional common law doctrines of private nuisance, negligence, trespass, riparian rights and *Rylands v. Fletcher*<sup>6</sup> were used by those who were harmed in their use and enjoyment of their private property rights by the activities of others to seek redress from the courts. The common law doctrines of private nuisance, trespass and riparian rights, for example, proved to be important means for persons to seek redress for harm to the air, water or land that imposed on their private rights to use and enjoy their land, waters, and air.<sup>7</sup> In fact, the usefulness of these common law causes of action to protect against the harms caused by environmental degradation proved too powerful a weapon for environmental protection. Our government thus stepped in to curtail the exercise of individual private property rights to protect the environment by enacting legislation which either precluded the exercise of private property rights altogether, or limited the relief available to an aggrieved property owner to an award of damages.<sup>8</sup>

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<sup>6</sup>(1866), L. R. 1 Ex. 265, aff'd. (1868), L. R. 3 HL. 330, 37 L. J. Ex. 161.

<sup>7</sup>For an account of the use of common law causes of action, in particular, trespass, nuisance and riparian rights, as environmental protection tools see E. Brubaker, *Property Rights in the Defence of Nature* (Toronto: Earthscan Publications Ltd., 1995).

<sup>8</sup>See, *ibid.*, for example, where Brubaker provides an account of the various legislative efforts over the years to curtail the use and effectiveness of these common law causes of action to protect the environment. In addition, see, A. Bryant, "An Analysis of the Ontario Water Resources Act," in P. Elder, ed., *Environmental Management and Public*

Furthermore, as the destructive consequences of environmental degradation began to have more pervasive and widespread effects, the judiciary, through the common law, developed obstacles to the exercise of the rights of individuals to seek redress for widespread harm to the environment through the creation of the public nuisance rule. Assaults on the environment often create no direct harm to a given person's property, person or economic interests. The assaults originate from many different sources and there is generally no direct cause and effect reaction between the assault on the environment and direct harms to particular persons or their property. Rather, the direct harm is to the environment itself. Presumably, we could all degrade and destroy the environment with impunity if there were no negative repercussions to such actions. However, it is not credible to deny that environmental harm causes harm, both to persons today, and to future persons. The public nuisance rule has created a barrier to persons seeking redress for harm to the environment itself. Thus, where an activity which harms the environment affects many people, the common law denies any one person the right to sue, unless he or she can show damage to his or her property or that any damage suffered is much different from or much greater than that suffered by his or her neighbours. Failing that, it has become the responsibility of government to protect the environment in these circumstances. Only the Attorney General has the right to take legal action to protect the environment where the harm effects everyone equally. Furthermore, the Attorney General has absolute discretion to decide whether such an action, to protect the public interest, and particularly the public interest in the environment, will be brought. The public has no avenue to challenge the decision of the Attorney General should he or she decide that bringing a public nuisance action to curtail the environmental harm is not "in the public interest". As a result, the public has had limited means available to it to use the courts to protect the environment where no immediately discernable human harm is caused by environmentally destructive behaviour.

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*Participation* (Toronto: Canadian Environmental Law Association, 1976) at 165 discussing the dissolution by statute of injunctions granted by the courts against polluting industries and sewage treatment plants in Ontario.

**(b) The Administrative Context**

Over time governments have assumed ever increasing control over the environment and environmental decision-making processes. Initially, citizens were seemingly content to rely entirely on government action to protect the air, water, public lands and other natural resources from harm. Due to the complexity of modern industrialized society, particularly with respect to the environment, it is implicit that it is neither feasible nor desirable for the legislature to write statutes in sufficient detail to translate broad public policies and environmental concerns into rules which are specific enough to deal with all situations where human activity negatively impacts on the quality of the environment. For this reason, legislatures have therefore normally enacted environmental legislation that grants to a department or delegates to an administrative agency the power to take certain actions to protect the environment. Typically these departments and administrative agencies, possessing persons with specialized expertise in various related areas of environmental concern are given express and typically broad discretionary authority under statutes to establish emission controls or pollution standards which spell out in greater detail the standard of conduct or performance expected or contemplated under the legislation. Moreover, the legislation typically only authorizes but does not require environmental controls or measures of any kind.

Government efforts to protect the environment are conducted primarily through this institutional mechanism, and has retained much of its character even today. The public has not historically had a role to play in this decision-making process. The public has no legal right to require that certain action be taken by government to protect the environment even where the legislation appears to authorize it. As Joseph Sax, the author of the *Michigan Environmental Protection Act* remarks on the nature of environmental decision-making:

We are a peculiar people. Though committed to the idea of democracy, as private citizens we have withdrawn from the governmental process and sent in our place a surrogate to implement the public interest. This substitute--the administrative agency--stands between the people and those whose daily business is the

devouring of natural environments for private gain.<sup>9</sup>

Canadian commentators have noted these same tendencies in the Canadian context and have indicated that this substitute, the bureaucratic agency or department, which is charged with looking after the public interest, often seems to impede desired environmental action.<sup>10</sup>

The record of the problems which pervade the environmental decision-making process, from the level of policy through actual implementation in the form of licences and permits to enforcement, has served as the motivation for efforts to reform the process. The overriding concerns have been the lack of adequate and meaningful participation by the public in environmental decision-making processes undertaken at the legislative and administrative levels and the absence of access to the judicial process to hold both private parties and the government accountable for their obligations to protect the environment. Concern over the lack of public participation cannot simply be viewed as a ploy by "busybodies" to stop all economic activity and to bring industry to a crashing halt. Rather, the concerns over the lack of public participation and the lack of access to courts to protect the environment are grounded in the historical factual record of environmental decision-making in Ontario and the continuing and increasing level of understanding of the vital importance of the need to protect our environment.

## **2. The Historical Factual Record of Environmental Decision-Making in Ontario**

A discussion of the environment, environmental law and environmental decision-making cannot be undertaken in a contextual vacuum. The economic context continues to assert a significant influence on the nature of the Ontario environmental law regime. The contending economic paradigm does not presently foster incentives for government to protect the environment. Often it does the opposite, as it encourages government to disregard environmental considerations in favour of economic interests.

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<sup>9</sup>J. L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred A. Knopf, 1971) at xvii.

<sup>10</sup>D. Estrin and J. Swaigen, *Environment on Trial*, 3rd ed. (Toronto: Emond Montgomery Publications Limited, 1993) at xvii.

There are two fundamental deficiencies which all government, but particularly our government, suffers from in this regard. A major dilemma is that governments are elected for relatively short periods of time and therefore inherently have a relatively short-term mandate. As a result, short-term and often ephemeral economic "gains" usually take precedence over long-term environmental protection. A second deficiency endemic to government relates to the nature of its relationship with business and the powerful position held by business as a result of both its financial wealth and political resources.<sup>11</sup>

The interrelationship between our environment and our economy and the apparent tensions between them has pervaded all environmental protection efforts to date. The choices we have made in respect of that interrelationship have heretofore emphasized the implications for economic concerns while seemingly ignoring the environment.

From an economic perspective, pollution is but one instance of competition among users of natural resources. The competitors can be, on the one hand, firms using land, air or water for the dilution or disposal of production wastes, and on the other, those who wish to use bodies of water for fishing, drinking or swimming, the air for breathing, or the land for purposes other than the disposal of toxic industrial wastes.<sup>12</sup> As a result of the nature of the environmental decision-making process, essentially dominated by the wealth and power of polluting interests, and the absence of enforceable public rights to environmental quality, industry has enjoyed a traditional *de facto* right to deposit its wastes in the natural environment.<sup>13</sup> Furthermore, according to Trezise, this right has played an important role in our market economy by enabling producers to pass the costs of pollution, in the form of damages and clean-up costs, on to society as a whole rather than adding such expenses to the costs of production.<sup>14</sup> Economics refers to such effects

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<sup>11</sup>For an in depth account of industry's ability to resist regulation see, T. Schrecker, "The Political Context and Content of Environmental Law" in T. Caputo, M. Kennedy & C. Reasons *et al.*, eds., *Law and Society: A Critical Perspective* (Toronto: Harcourt Brace Jovanovich Canada, Inc., 1989) 173.

<sup>12</sup>This example is provided by Schrecker, "The Political Context and Content of Environmental Law" in T. Caputo, *ibid.*, at 173.

<sup>13</sup>The notion of industry having a *de facto* right to pollute is provided by Trezise, *supra.*, note 3 at 407.

<sup>14</sup>Trezise, *supra.*, note 3 at 407.

as negative externalities; they are "external" in that their costs are not reflected in market transactions between producers and consumers, but are imposed on third parties who need not be compensated for bearing them.<sup>15</sup> According to economic theory, externalities are a form of market failure which require government intervention if these external costs are to be internalized.<sup>16</sup> Positive government involvement is essential in dealing with externalities like pollution. It is widely accepted that government intervention to protect the environment is mandatory if environmental protection is to be achieved.<sup>17</sup> The controls over such behaviour, embodied in environmental law, are an attempt to require industry to internalize these external costs. Yet despite the immense amount of environmental law designed to deal with environmental degradation, the environment continues to be degraded.

Environmental laws, both statutory and at common law, are designed to force polluters to internalize these external costs rather than impose these costs on the public in the form of a degraded and perhaps hazardous environment. However, industry inherently resists environmental regulation by government. Resistance arises from the simple fact that, from the perspective of the profit maximizing firm, environmental protection laws effectively restrict industry's traditional use of the environment, and in the process demand expenditures or investments to reduce pollution. From the perspective of these firms, such expenditures or investments are unproductive, or unprofitable, since they do not result in the production of a marketable good or service. In the absence of government intervention a private firm, faced only with the requirement to account for its "private" costs, will not spend money on pollution control. Thus, in the face of public

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<sup>15</sup>Schrecker, *supra.*, note 11 at 173.

<sup>16</sup>It should be noted that, according to Ronald Coase, in a world of "zero transaction costs", in which information is complete and barriers to free negotiation are absent, competitive prices will convey all the information necessary for making socially optimal decisions. Therefore, in a world of zero transaction costs, no government intervention would be required to curtail pollution since competitive markets would themselves internalize these external costs through the pricing system. However, the pervasiveness of transaction costs renders the pure Coase Theorem inapplicable, thereby necessitating government intervention to provide incentives to ensure the internalization of these external costs. In this regard, see R. H. Coase, "The Problem of Social Cost" (1960) 3 J. L. & Econ. 1.

<sup>17</sup>For example, in his article entitled "Sustainability", P.S. Elder makes reference to remarks made by Professor David Pearce, former economic advisor to the Thatcher government's Environmental Department in the United Kingdom, who in an address to the Tenth International Seminar on Environmental Impact Assessment and Management stated that "[u]nfettered free markets will not solve environmental problems. They will only make them worse." See P.S. Elder, "Sustainability" (1991) 36 McGill L.J. 831 at 845 footnote 51.

demands for stronger environmental protection, industry often asserts that a further imposition of environmental protection requirements will have an adverse effect on their productivity<sup>18</sup> and the economy generally. Moreover, industry often holds a great deal of financial wealth and political power. As a result, industry is in a powerful position to oppose such requirements. In fact it has been shown that it is often in their best interests, in the sense of it being cheaper, to vigorously oppose any additional constraints on their use of our air, water and public lands than to comply willingly. A firm has strong economic motives to resist attempts to force it to internalize these external costs, for example, by spending money on new pollution control technology or better production designs and methods. The combined result of these pressures is that government is often pulled in the direction of economic interests and continued environmental degradation.

Environmental laws and regulations, designed to protect the environment, “amount to a decision to shift some activity away from producing marketable outputs (on the basis of which productivity is measured) toward producing non-market “goods” such as reduced pollution...”<sup>19</sup> Environmental law attempts to impose such a decision, a shift from the production of marketable to non-market goods, into a private firm’s decision-making calculus. Our entire system of environmental protection is designed to internalize the external costs of production and consumption which harm the environment. On a practical level, from the perspective of the firm, the effect of environmental protection laws require it to invest in unproductive expenditures and are thus antithetical the firm’s *raison d’être*. As a consequence, we should continue to expect polluters to resist controls on their behaviour which protect the environment.

From a societal perspective, concern for a healthy and safe environment in which to live, combined with the desire for the goods which industry provides, means that there is apparently an inherent tension between the requirements for environmental quality and the requirements for

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<sup>18</sup>Given that environmental protection laws necessarily requires private firms to make expenditures and investments on non-marketable or unproductive goods, it follows that environmental protection will have an effect on economic output and productivity. Schrecker thus states: “Other things being equal,..., a reduction in measured productivity is exactly what one would expect as the result of such regulation.” Law Reform Commission of Canada, *Political Economy of Environmental Hazards* (Protection of Life Series Study Paper) by T. Schrecker (Ministry of Supply and Services Canada, 1984) at 41.

<sup>19</sup>Schrecker, *ibid.*, at 40.

economic prosperity. Given this seemingly inherent tension, the economic and political power of industry, and the lack of public rights to environmental quality, polluters, and in particular industry, have played and continue to play a critical role in the quality of our air, water and land.

### **3. Institutional Problems**

The most serious institutional problems with the existing environmental law regime are twofold. First, there is a lack of adequate and meaningful public participation in the environmental decision-making processes at all levels of government. Second, there is a lack of access to the courts by the public to protect the environment. As a result of these two deficiencies, the public must continue to depend on government to protect the environment. Moreover, the public has little means to hold the government accountable for its responsibility to protect the environment.

#### **(a) Obstacles to Using Courts to Protect the Environment**

##### **Standing Barrier**

Using the courts to protect the environment has been unsatisfactory for a number of reasons. First, throughout Canada, the courts usually restrict the right to use the courts to those seeking to protect their personal, proprietary or economic interests. The traditional common law causes of action such as private nuisance, negligence, trespass, riparian rights, and *Rylands v. Fletcher*<sup>20</sup> are all grounded on the plaintiff having a legally recognized property right which is being infringed by the actions of another which is causing harm to the environment. However, where an entire community suffers similarly from pollution, individuals do not have the right to bring a public nuisance action in civil courts. In legal terms, the individual lacks standing to sue--neither individuals nor a group can go to court to defend the environment for its own sake. In order to gain standing, these individuals would have to demonstrate that they will suffer some

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<sup>20</sup>*Supra.*, note 6.

harm separate and distinct from the rest of the community. Failing the ability to show special and distinct damages above that suffered by the rest of the community, the concerned public must depend on the government to take some action to redress the harm to the environment. The reason the public must depend on the government to act in such situations is that the courts say that the Attorney General is the only person who can commence an action on behalf of the public generally. Furthermore, it is completely within the absolute discretion of the Attorney General as to whether the public nuisance action should be commenced. Where the Attorney General refuses to commence the action or refuses to lend his name to allow a member of the public to bring a relator action, the public has no recourse available to it to seek redress for harm to the environment or to otherwise protect the environment for its own sake.

### **Causation**

Apart from the standing barrier, the pollution victim, concerned citizen or public interest group faces formidable obstacles in the rules of onus of proof and causation. Even if pollution victims did gain standing, in order to succeed, they still need to prove a direct link between the polluter and the harm. This obstacle is particularly difficult, and often impossible, to overcome since the accumulation of pollutants come from many diverse sources. Moreover, the legal rules of causation with respect to environmental harm place the onus on the pollution victims to overcome the argument presented by the polluter that other sources of the pollutant may be largely to blame for the harm.

However, this obstacle can be fundamentally overcome if each citizen was recognized having a legally enforceable right to environmental quality. If the law recognized each person's right to environmental quality then one would be granted standing on the basis of that right. In addition, each individual would thus have the right to go to court to seek redress for the harm to the environment itself without having to show some harm to themselves. Where the plaintiff is able to prove harm to the environment, above a certain *de minimus* level, then the onus of proof should shift to the one causing harm to the environment to provide justification for their actions. A sensible approach would be to place the onus on the one causing harm to the environment to

demonstrate that there is no alternative to his or her conduct. Several reasons can be offered for this suggestion. First, it has become clear that continued environmental degradation and destruction has long-term and potentially irreparable harmful effects to human survival. Second, those who choose to degrade the environment are often in the best position to determine the potential harm of their actions and alternatives which can decrease the potential for harm. It therefore seem reasonable to place the onus on those who wish to harm the environment to justify their conduct by showing that their choice to degrade the environment is one for which no other course of conduct is available. The legal implication of recognizing the right of each citizen to environmental quality would be to place the burden of proof on the one causing the harm to justify their conduct in an open forum, the courts.

### **Costs**

Finally, even if the first two obstacles do not serve as sufficient forces to dissuade the public to challenge environmentally destructive conduct, the threat of having to pay the polluter's legal costs, should they lose, usually acts as an effective and potent practical barrier to access to the courts to protect the environment for its own sake.

However, these obstacles faced by the public with respect to access to the courts to protect the environment represents only one facet of the problem. In addition to these barriers to effective court action to protect the environment, there are problems with the administrative context which further exacerbate the difficulties faced by the public in their efforts to protect the environment.

### **(b) Obstacles to Using Administrative Tribunals to Protect the Environment**

#### **Pollution Permit Issuance**

Every year, numerous pollution discharge permits and licences are granted to industry, local authorities and individuals in Ontario. However, the public is effectively excluded from the

pollution permit-issuance process. Concerned citizens, even those who live adjacent to the polluter, may not receive adequate notice of the permit application.<sup>21</sup> Even if concerned citizens do find out about an application for a pollution permit there is often little they can do anyway because whether or not a pollution permit is granted and upon what conditions, is typically negotiated between polluter and the government in the absence of input from the public.

### **Limited Public Input into Standard Setting**

In addition to the fact that the public is effectively excluded from the pollution permit-issuance process, the public often has only limited input into the pollution standard-setting process. Pollution standards are set on the basis of scientific evidence. The public has no forum to test the scientific evidence upon which a pollution standard is based. In terms of implementation of a pollution standard once set, the public has no forum to question how best to achieve the goals established in the standard. The public can rarely challenge the adequacy of an existing standard to protect the environment or propose new standards if one does not already exist.

### **Funding**

Even where either government policy or legislation actually calls for a hearing in the permit-issuance or standard-setting processes, the public still faces formidable practical obstacles. The hearing process is generally a long and expensive endeavour. And with the abolition of the *Intervenor Funding Project Act*<sup>22</sup> in early 1996, there is no public funding for concerned citizens or groups to allow for effective and meaningful participation in the permit-issuance or standard-

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<sup>21</sup>In Ontario, the Ministry of Environment and Energy has had a 'policy' of holding a public meeting concerning applications for certificates of approval. Further, there are a few instances where a public hearing is mandated under a statute, such as those applications for approvals for a disposal site or waste management system involving the disposal of liquid industrial waste or hazardous waste or the equivalent of the domestic waste of at least 15,000 persons. See *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 30.

<sup>22</sup>*Intervenor Funding Project Act*, R.S.O. 1990, c. I-13.

setting processes. Thus, concerned citizens and groups lack the resources necessary to gather the evidence and hire the experts needed to allow them to comprehensively prepare their case. The lack of financial resources to adequately prepare their case is particularly acute especially where the polluter is a government agency or a large corporation for whom these costs are negligible. In the case of the government agency proponent, the costs of preparation for and appearances at these hearings are publicly subsidized.

There are important justifications for vesting the public with legal rights to take polluters, including the government, to court and to involve the public in environmental decision-making processes. Vesting the public with these rights can be justified on a number of grounds. These justifications are discussed below.

#### **4. Justifications for Removing the Standing Barrier to Courts and Administrative Tribunals**

The standing rule seeks to limit who may go to court. However, the standing rule is an artificial rule constructed by judges and “remains perhaps the single most troublesome legal barrier for individuals and groups to protect the environment.”<sup>23</sup>

By virtue of our democratic traditions, access to the courts or “standing” should be a basic right when a wrong has been committed. The basic right to access the courts when a wrong has been committed has been guaranteed as a basic democratic right since 1215 in the Magna Carta.<sup>24</sup> Nevertheless, the standing rule qualifies this basic right by making a distinction between “private” wrongs and “public” wrongs. An individual has the right to go to court to seek redress for “private” wrongs.<sup>25</sup> However, the Attorney General is the sole guardian of “public” wrongs, like pollution, which affect the individuals in an entire community in the same way.

However, there are good reasons for abolishing this obstacle. As one commentator has

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<sup>23</sup>P. Muldoon, “The Fight for an Environmental Bill of Rights” (1988) 15:2 *Alternatives* 33 at 35. Also, see generally, D. Estrin and J. Swaigen, *Environment on Trial: A Handbook of Ontario Environmental Law*, 2nd ed., (Toronto: Butterworths, 1978) at 460-462.

<sup>24</sup>D. Estrin and J. Swaigen, *ibid.* at 460.

<sup>25</sup>Injury to one’s health or property.

stated:

The standing barrier is repugnant in today's society because in most environmental cases, the distinction between "public" and "private" wrongs is illusory. Environmental degradation does, in the long term, result in "private" wrongs in some way.<sup>26</sup>

It is widely accepted today that there is as an undeniable link between environmental disruptions and human health.<sup>27</sup> Moreover, perpetuating the distinction between "private" and "public" wrongs creates distorted incentives which seem to encourage environmental harm: "...by perpetuating the distinction between a private and a public wrong, an undesirable signal is sent to polluters--if you are going to pollute, do it big: pollute the whole community."<sup>28</sup>

The standing barrier assumes that government is the sole and sufficient protector of the public interest, and in particular, environmental quality. However, this assumption is suspect. Even the Ontario Law Reform Commission has questioned whether the Attorney General ought to be considered the sole protector of the public interest:

It is important to recall that the early public nuisance cases involved relatively minor interferences, such as obstructing a public highway or blocking the passage of vessels in a river, and it is in this context that the governing principles were articulated. Today, the nature and extent of harm that may constitute a public nuisance might conceivably be of an entirely different order--for example, threatening the destruction of fish in a lake or the pollution of a water supply. The consequences for the public of a failure of the Attorney General to act, whether by bringing proceedings or consenting to a relator action, are potentially much more serious today than in the era when these principles were first developed.<sup>29</sup>

As a result of these findings the Ontario Law Reform Commission recommended that any person

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<sup>26</sup>Muldoon, *supra.*, note 23 at 35.

<sup>27</sup>See for example, T. Colborne, D. Dumanoski & J. Peterson Myers, *Our Stolen Future* (New York: Penguin Books Ltd., 1996) which documents the scientific evidence linking the continued accumulation of a vast array of synthetic chemicals into the ecosystem from industrial and other processes to disruptions in human and animal development and reproduction throughout the world.

<sup>28</sup>Muldoon, *supra.*, note 23 at 35.

<sup>29</sup>Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989) at 40.

should have the right to sue in public nuisance without any personal, proprietary, or pecuniary interest or injury different in kind or degree from that of others. It is thus important to note that the Ontario government adopted this recommendation in the Ontario *EBR*.<sup>30</sup> However, it must be recalled that in order to have standing, the individual still must show some direct economic loss or personal injury, although not different in kind or degree from that suffered by others. Where an individual cannot make such a showing, where the individual seeks redress for harm caused to the environment per se, based, presumably, on the implicit understanding that environmental harm causes harm to persons at some point, they have no standing and thus cannot seek redress for harm to the environment under common law of public nuisance even in the absence of the public nuisance rule.<sup>31</sup>

Governments juggle competing demands and seek out 'politically expedient' and popular solutions. History has demonstrated that governments trade off long-term environmental benefits for short-term economic and political gains. Governments may be reluctant to enforce existing laws or to enact stricter environmental laws because of a lack of sufficient government resources, the risk of jobs being lost, or because of some arrangement previously negotiated with the polluter. In recognition of these facts, one commentator has suggested that "[g]roups and individuals armed with legal rights, therefore, are needed to act as watchdogs for the trees, soils, and the waters of Canada that would otherwise remain unrepresented and unspoken for."<sup>32</sup>

This inequity has received recognition by the courts. There has been some movement by

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<sup>30</sup>Section 103 of the Ontario *EBR* provides:

103(1) No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

<sup>31</sup> Section 84 of the Ontario *EBR* provides a separate and novel cause of action for Ontario residents to seek redress for harm to the environment itself. However, this cause of action is highly circumscribed in that first, it requires that a potential plaintiff has first made an application for an investigation into the alleged contravention and second, it requires that an Act, regulation or instrument be contravened causing "significant harm" to public resources in order for a member of the public to be entitled to seek redress for the harm. Furthermore, the Ontario *EBR* allows for a defence of statutory authorization. Therefore, even with this new cause of action, there is still no reverse onus placed on polluters to justify their environmental harm in court.

<sup>32</sup>Muldoon, *supra.*, note 23 at 35.

the Supreme Court of Canada to create various exceptions to the standing rule in cases challenging the constitutionality of certain laws or activities. Through a series of decisions by the Supreme Court of Canada the courts have recognized a "public interest exception" to the general public nuisance rule for standing. Thus, an individual may seek standing to obtain judicial intervention in a matter on the basis of this "public interest exception" if he or she can establish a genuine concern or interest in a serious matter which is suitable for judicial determination and that there is no other reasonable way for the issue to be raised.<sup>33</sup> Yet, despite the Supreme Court's efforts to provide broader standing, environmental litigants must continue to fight for access to the Canadian judicial process to protect the environment for its own sake.

Elimination of the standing barrier is necessary in order to remedy the power imbalance between the public on the one hand and polluters on the other. "By overcoming the standing barrier, the public gains leverage."<sup>34</sup> When pollution victims, concerned citizens or environmental groups seek a solution to an environmental problem, they usually enter the forum, if at all, with few bargaining chips. In effect "the polluters use [of the environment] can stop the swimmer from using and enjoying a lake, but the swimmer's use cannot stop the polluter from polluting the lake."<sup>35</sup> The realities underlying simple statements like this underscore the weak position held by the public in efforts to curb environmental degradation in all its various manifestations.

However, "[w]ith standing and an array of statutory rights, those defending the environment would gain some clout--the ability to go to a court or tribunal and have the matter settled by an impartial body."<sup>36</sup> Studies which have reviewed the operation of the citizen suit legislation in the United States, such as the *Michigan Environmental Protection Act* have concluded that legislation allowing citizens to sue polluters has in fact stimulated settlement in

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<sup>33</sup>See, *Minister of Finance of Canada v. Finlay*, [1987] 1 W.W.R. 603 (S.C.C.).

<sup>34</sup>Muldoon, *supra.*, note 23 at 35.

<sup>35</sup>J. Krier, quoted in R. Howard, *Poisons in Public Case Studies of Environmental Pollution in Canada* (Toronto: James Lorimer & Company, 1980) at 149-150.

<sup>36</sup>Muldoon, *supra.*, note 23 at 35-36.

a large number of cases.<sup>37</sup>

## **5. Justifications for Involving the Public in Environmental Decision-Making Processes**

### **Fairness**

Environmental decisions often involve the determination of acceptable environmental risks and ultimately the distribution of such risks among the members of society. This is true whether the decision involves setting exposure and emission limits, issuing pollution permits or negotiating abatement and pollution control orders.

As a matter of fairness, those who are required to bear the risks should have a chance to indicate their views on the acceptability of those risks.<sup>38</sup> Because the process of determining acceptable levels of environmental risks is inherently subject to uncertainties and unknowns, the process of determining acceptable levels of environmental risks really involves political or policy decisions, even though they are based on scientific data and opinion. It is not credible to argue against the value-laden nature of the process. Because of the value-laden nature of the process, which inherently involves determining acceptable environmental risks and their distribution, those persons who must bear the ultimate risks associated with those decisions should, as a matter of fairness, be able to test the soundness of the data relied upon and the assumptions used and make clear the environmental and social implications of such decisions.

### **The "Public Interest"**

Public participation in environmental decision-making processes by government can also be justified on the grounds that public resource allocation decisions ought to be made in light of the "public interest". While the ultimate judgment is to be made by a particular government

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<sup>37</sup>D. K. Slone, "The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's" (1985) 12 Ecology L. Q. 271 at 291.

<sup>38</sup>Schrecker, *supra.*, note 18 at 76.

agency or government official, “how better to make a sound determination [as to the allocation of public resources] than by allowing the testing of the information of the proponents?.”<sup>39</sup> After all, “[t]he “public interest” is not one unified, singular point of view.”<sup>40</sup> The “public interest” is comprised of a diverse, sometimes complex, multi-dimensional array of perspectives and interpretations which government alone may not adequately represent. However, “[a]n open, participatory system would assure that these varied perspectives and different points of view are articulated and reviewed”<sup>41</sup> during the decision-making process.

Up until now, public access to environmental decision-makers and the decision-making processes was very limited. Therefore, it can be argued that the environmental decisions which we are living with today do not represent the “public interest” precisely because they were made without effective public input. The soundness of those decisions remains unexamined, however, as the public continues to be impeded from using the courts to challenge those decisions.

Governments have recognized these deficiencies and have responded by enacting what can generally be termed “environmental bills of rights”. However, where such enactments fall short of what has been envisioned by a true “environmental bill of rights” it is not likely that such laws will be sufficient to respond effectively to these concerns. The arguments made against “environmental bills of rights”, to be discussed below, have generally impeded the strength of such enactments. However, the examination of the arguments presented against “environmental bills of rights” reveals that they do not contain sufficient merit and should not be viewed as impediments to a strong “environmental bill of rights”.

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<sup>39</sup>Muldoon, *supra.*, note 23 at 36.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*

## 6. Arguments made by Opponents of Environmental Bills of Rights

### Floodgates Argument

One of the principal arguments made by the opponents of an "environmental bill of rights" is that both the court system and all administrative tribunals would be flooded with frivolous cases. No doubt, with the enactment of such a law "the number of cases and hearings would increase since the primary purpose of this law is to improve accessibility to the judicial and governmental decision-making systems."<sup>42</sup> Nevertheless, the fear of a floodgate of frivolous court actions and administrative hearings is not borne out by reality. When reviewing the experience of other jurisdictions with comparable legislation, such as the states of Michigan and Minnesota, it is evident that the floodgates argument has no merit.

The *Michigan Environmental Protection Act*, for example, was the first state statute in the United States expressly to authorize citizen-initiated environmental lawsuits and administrative reviews. A number of researchers have meticulously studied the *Michigan Environmental Protection Act* since its enactment.<sup>43</sup> With respect to the lawsuits brought under the *Michigan Environmental Protection Act*, these studies have concluded that Michigan courts have not been overwhelmed with cases based on this legislation. For instance, in the period from 1972 to 1983, a total of 185 cases were brought under the *Michigan Environmental Protection Act*. Generally speaking, suits are brought under the Act only about once every two months.<sup>44</sup> Moreover, the studies examining litigation under the *Michigan Environmental Protection Act* concluded that the majority of cases based upon the legislation raised legitimate issues and, thus,

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<sup>42</sup>Muldoon, *supra.*, note 23 at 36.

<sup>43</sup>See, J. Sax and R. L. Conner, "Michigan's Environmental Protection Act of 1970: A Progress Report", (1972) 70 Michigan L. R. 1003; J. Sax and J. F. Dimento, "Environmental Citizen Suits: Three Year's Experience Under the Michigan Environmental Protection Act" (1974) 4 Ecology L. Q. 1; D. K. Slone, "The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's" (1985) 12 Ecology L. Q. 271.

<sup>44</sup> Slone, *supra.*, note 37 at 273.

were worthy of the judicial and administrative resources expended.<sup>45</sup>

As one commentator has articulated, the “problem with the floodgates argument is that it assumes that the cases before the courts and administrative tribunals today have more social merit and thus are more worthy of adjudication than those matters dealing with environmental quality.”<sup>46</sup> This misguided assumption is rooted in the lack of consideration given to environmental impacts to date. However, the mounting evidence of the insidious and potentially irreparable effects of environmental degradation indicates that there is a high degree of social merit to combatting the instances of environmental harm and that these matters cannot be ignored. As one commentator has stated:

If the judicial and administrative systems cannot handle an increased workload of cases worthy of consideration, the solution should be to increase judicial and administrative resources, not perpetuate barriers to these forums.<sup>47</sup>

Even with an “environmental bill of rights”, there are built-in safety mechanisms within Ontario courts and administrative tribunals which make all litigants pause before going to them. In a lawsuit, if the court considers a case to be frivolous, it can order the party bringing the suit to post security for the costs of the lawsuit or the court can strike out the claim. The Canadian rule that unsuccessful litigants pay the legal costs of the winners, in addition to their own, is also an effective deterrent to litigation even when the claim has merit. Moreover, although a court always has the discretion to alter this rule, it seldom does. Finally, the amount of time, money and effort required to prepare effectively for a court action or a board hearing is often prohibitive. Such an undertaking can exhaust even some of the larger environmental groups. For local environmental groups and individuals, the practical and financial demands can make effective participation impossible.

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<sup>45</sup>Slone, *ibid.*, at 272 and 328.

<sup>46</sup>Muldoon, *supra.*, note 23 at 36.

<sup>47</sup>*Ibid.*

### The Misconception of Private Prosecutions<sup>48</sup>

Another argument made against an environmental bill of rights is that such a law is unnecessary because, under Canadian law, every person has the right to undertake a private prosecution.<sup>49</sup> Presumably, the argument goes, since a citizen can take direct enforcement action against polluters, in the form of a criminal prosecution, there is no further utility to providing citizens with more meaningful and extensive rights against polluters through the enactment of environmental bills of rights.

A private prosecution is based on the historic right of the public to step into the shoes of the government and charge a polluter for violation of an environmental statute. However, private prosecutions are based upon past actions; they punish for what has already happened and cannot prevent future damage. Further, because they are a form of criminal prosecution, the onus is on the prosecuting victims to prove "beyond a reasonable doubt" that the polluters are the ones responsible for the pollution (in contrast to the burden of proof in civil court or in a regulatory setting where the burden is on a "balance of probabilities"). In most environmental cases, that criminal law standard is almost impossible to attain.

Even if one is successful on a private prosecution, the most a court can do is impose a fine. Furthermore, the fine is usually small in comparison to the real environmental injury. One exception to this rule is in Ontario where the court is empowered to order that the polluter prevent further harm resulting from the illegal activity and to restore the natural environment to the condition prior to the offence.<sup>50</sup> Apart from this exception, the monies recovered revert to the general revenues of the government, rather than being allocated to the cost of repairing the

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<sup>48</sup>For a discussion of the disadvantages of private prosecutions of environmental offences as a method of environmental protection see, L.F. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 1990).

<sup>49</sup>See generally, P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L. J. 269.

<sup>50</sup>*Environmental Protection Act*, R.S.O. 1980, c. 141, ss. 146b and 146c.

environmental injuries.<sup>51</sup> As a result, the pollution can continue unabated, and the pollution victims are left without a remedy.

Private prosecutions are reactive rather than preventative and are therefore not advisable as the sole mechanism for ensuring environmental protection. The limitations of such a reactive approach to environmental protection are exacerbated by the fact that extensive environmental damage cannot often be completely remediated. In addition, private prosecutions initiated by a private citizen may be stayed or taken over by the Attorney General should he or she see it fit to do so.<sup>52</sup> Therefore, private prosecutions must not be perceived as substitutes for an environmental bill of rights but as simply one tool, in a complete arsenal of tools, designed to ensure that human actions do not unnecessarily pollute, impair or destroy our environment.

## **7. Dismantling the Barriers Through Environmental Rights<sup>53</sup>**

Pollution victims, public interest groups and concerned citizens are too often impeded from using the courts to protect the air they breathe, the water they drink and the land that sustains them. Furthermore, they are impeded from participating in the decision-making processes that directly affects human and environmental health. The solution is to make effective public participation possible by dismantling the existing barriers. The means proposed to affect this dismantling is through "environmental rights". These "environmental rights" are intended to serve as the basis for the public's participation in environmental decision-making and as the basis to hold government accountable for its environmental protection responsibilities.

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<sup>51</sup>One exception is under the regulations of the *Fisheries Act*, R.S.C. 1970, c. F-14, where one half of the fine levied at the trial can be claimed by the private informant: see *Penalty and Forfeiture Proceeds Regulation*, C.R.C. 1978, c. 827.

<sup>52</sup>*Criminal Code*, R.S.C. 1985, c. C-46, s. 579.

<sup>53</sup>It is important to note that there is an ongoing debate regarding the actual contours of rights to environmental quality. One significant reason offered for the lack of consensus is that "...by contrast with the most basic human rights like freedom of speech or of conscience, there is no historical experience on which to draw to give content to an asserted ecological right. Indeed,...our experience deals more with the conquest and exploitation of nature than with its protection." J. Sax, "The Search for Environmental Rights" (1990) 6 *Journal of Land Use & Environmental Law* 93 at 94. For a discussion of the arguments presented against environmental rights see D. Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora: Canada Law Book, 1990) at 18-20.

## Constitutional Right to Environmental Quality

It has been argued that the first best solution for initiating the dismantling of the existing barriers preventing the public to protect the environment is a constitutionally guaranteed right to environmental quality. It has been said that “[e]nvironmentalists would have entered a new epoch had the fundamental right to environmental quality been entrenched in our Constitution when the *Charter of Rights and Freedoms* was negotiated in 1981. A constitutional guarantee would have given every Canadian the right to a healthy environment which would constrain every federal and provincial governmental action. Every statute, past, present and future would have to conform to protecting this right.”<sup>54</sup>

There were proposals presented to include such a right to environmental quality in the last round of constitutional reforms. However, the reforms did not lead to a constitutional entrenchment of the right to environmental quality. The *Charter of Rights and Freedoms*<sup>55</sup> does not contain an explicit right to environmental quality. Some argue that section 7 of the *Charter*, which guarantees the right “to life, liberty and security of the person,” implicitly includes the right to environmental quality.<sup>56</sup> They argue that a right to environmental quality can and should be interpreted to be included in the right to “life”, that the right to “life” encompasses a right to quality of life and a right to health and should be so interpreted by the courts. However, since

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<sup>54</sup>Muldoon, *supra.*, note 23 at 37.

<sup>55</sup>Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>56</sup>See, for example, the arguments presented in *Manicom et. al. v. County of Oxford and Attorney General for Ontario* (1985), 14 C.E.L.R. 99 (Ont. Div. Ct.). In *Manicom*, the plaintiffs argued that a cabinet decision to site a waste disposal near their properties interfered with their right to “life, liberty and security of the person”. However, the majority of the Ontario Divisional Court found that the plaintiffs’ failure to expressly allege health impacts from the waste disposal meant that they had to base their claim on interference with their use and enjoyment of property. Since, in the opinion of the court, the right to use and enjoyment of property is not protected by section 7 of the *Charter*, the cabinet decision did not infringe any constitutionally protected rights of the plaintiffs.

In terms of the scope of the right to “life” in section 7 of the *Charter* one commentator has concluded as follows:

In light of these and other environmental cases in which the plaintiffs have sought, unsuccessfully, to rely on section 7, it seems likely that the only “environmental right” inherent to that provision may be the right to be free from unreasonable risks to human health. This appears to be the message implicit to Mr. Justice Potts’ dissenting opinion in *Manicom*.

there is no likelihood of a constitutional amendment at this time to include a right to environmental quality and since the courts do not appear inclined to take such a broad interpretation of the right to "life", the next best solution would be the enactment of an "environmental bill of rights" at both the federal and provincial levels of government. It is submitted that even if there was a constitutionally entrenched right to environmental quality, it would not be a substitute for "environmental bill of rights" legislation at both the federal and provincial level. The reason for the further need for environmental bills of rights legislation, even if a constitutional amendment is enacted, is that such a constitutional amendment would not likely articulate more specific rules dealing with such matters as onus of proof and costs which stand as serious impediments to initiating environmental claims seeking to secure protection for the environment per se, in the absence of discernable damage to persons or property.

### **Statutory Environmental Bills of Rights**

An "environmental bill of rights" is considered to be primarily a statutory guarantee of the right of each person to environmental quality and the duty of governments to ensure environmental quality in their role as trustees of all public lands, waters and resources for the benefit of present and future generations. In order to make these notions meaningful, an "environmental bill of rights" would vest each person with two "substantive" legal rights. First, the right to sue in civil courts concerning an activity that is causing or has the potential to cause significant environmental damage without having to show any personal harm.<sup>57</sup> Second, the right to participate in environmental decision-making processes, for example, by allowing any person to request a public hearing to review an application for a pollution permit, to review the appropriateness of an existing environmental standard, or to propose a new environmental standard. Furthermore, such a right, in conjunction with the public trust, would serve as the means through which the public could hold the government accountable for its environmental responsibilities.

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<sup>57</sup>In other words, it is implicit or presumed that harm to the environment will cause harm to persons.

Proposals for “environmental bills of rights” usually define these rights—the right to sue polluters for harm to the environment and the right to participate in environmental decision-making by government—and provide a “shopping list” of procedural mechanisms to overcome the obstacles referred to above.<sup>58</sup> These procedural mechanisms include such elements as shifting the burden of proof onto polluters by imposing a rule that requires polluters and not the public or the government to prove their activity is environmentally safe; rights of access to environmental information through environmental information laws; costs awards and a formal intervenor funding program; environmental class actions; and “whistleblower” laws, which protect employees who report environmental abuses of their employers.

## 8. Substantive Environmental Rights

Proponents of the legal recognition of enforceable individual rights to environmental quality argue that individual citizens need rights in order to allow them to protect the environment. Canadian commentators have consistently noted that despite the proliferation of environmental protection legislation and other institutional changes in the environmental protection regime, there has been little change in the status quo. In 1980, Swaigen and Woods indicated that:

The adjustments to the legal process that have taken place over the past decade have not led to a balancing of environmental concerns against private property rights, or against the discretion of government agencies to make decisions favouring immediate economic benefits over environmental protection.<sup>59</sup>

It is for these reasons that learned scholars and legal commentators have been advocating the recognition of a “substantive right to environmental quality”. A substantive right to environmental quality is a right which

ensures advocates of environmental quality more than a mere right to participate

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<sup>58</sup>See, Estrin and Swaigen, *supra.*, note 23 at 458-479, where the authors provided a comprehensive framework detailing the contents of the basic elements of an environmental bill of rights for Ontario.

<sup>59</sup>J. Swaigen and R. E. Woods, “A Substantive Right to Environmental Quality” in J. Swaigen, ed., *Environmental Rights in Canada*, (Toronto: Butterworths, 1981) 195 at 196.

and entrenches environmental quality in the legal system as a value equivalent to private property rights and a fetter on government discretion to permit environmentally-harmful activities; a right that draws lines and sets limits on how much environmental degradation is permissible.<sup>60</sup>

Critics of the recognition of an enforceable substantive right to environmental quality, vested in each citizen, contend that doing so will ultimately mean that no growth, progress, or development will ever be permitted and that our whole economy will come to a screeching halt.<sup>61</sup> However, this argument is no more than a species of the arguments in favour of maintaining the status quo. For, as Professor Sax indicates in *Defending the Environment*.<sup>62</sup>

Just as a landowner or first homebuilder in a neighborhood may not enjoin all subsequent building just because it would impair his unrestricted view of the scenery outside his livingroom window, the public, as a holder of rights, has no absolute claim against development which will affect that right. The public right to public resources, like private rights, must be subject to the reasonable demands of other users, whether they be factories, power companies, or residential developers.<sup>63</sup>

The impetus for the recognition of a substantive right to environmental quality, is not, as some critics would like to believe, to halt all future human encroachment on the environment of any kind. The proponents of environmental rights are well aware that the demands of modern industrialized society must place demands on the integrity of the environment. Their main concern is that when environmentally significant decisions are made, both by government and by private actors, those decisions do not give sufficient weight to the environmental trade-offs involved. The reason for this tendency is the fact that the law does not recognize citizens as holders of a substantive right to environmental quality and, therefore, does not provide a means for the inclusion of more extensive environmental values other than short-term instrumental ones. In recognition of this tendency, one commentator has stated that “[c]reating public rights merely

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<sup>60</sup>Swaigen and Woods, *ibid.* at 196.

<sup>61</sup>Saxe, *supra.*, note 53 at 20.

<sup>62</sup>Sax, *supra.*, note 9.

<sup>63</sup>*Ibid.* at 162.

establishes that those who wish to destroy the environment must justify the need in a public forum—the Legislature or the courts.”<sup>64</sup> As the discussion in Chapter III regarding the *Michigan Environmental Protection Act* will show, this result is precisely what the provision of a substantive right to environmental quality, based on the public trust, accomplishes.

The public’s lack of rights to protect the environment translates into a lack of power to affect environmental protection. Many equate powerlessness with a lack of rights. Thus Professor Emond states: “Rights define power, and without the power that derives from judicially enforceable rights, the public is not likely to be an effective participant...”<sup>65</sup> The public’s powerlessness is particularly acute in the environmental context. Joseph Sax was one of the first to elucidate the difference between an environmental protection regime in which the public has substantive rights and one characterized by government powers, unchecked discretion and mere procedural rights. In *Defending the Environment*,<sup>66</sup> Sax provided a description indicating the difference between a rights-based regime and one based on other considerations:

The elaborate structure of administration middlemen we have interposed between the citizen and his interest in environmental quality has had another pernicious effect. It has dulled our sensitivity to the claim that citizens, as members of the public, have rights. The citizen who comes to an administrative agency comes essentially as a supplicant, requesting that somehow the public interest be interpreted to protect the environmental values from which he benefits. The citizen who comes to court has quite a different status—he stands as a claimant of rights to which he is entitled.<sup>67</sup>

Thus far neither our courts nor our legislatures have significantly faced up to the implications of public rights. They continue to be fixated on the administrative process as *the* mechanism for identifying and enforcing the public interest. The public remains an outsider, to be tolerated as a recipient of notices and participant at formal hearings, but not as central player. Elaborate schemes are devised for studies by agencies and for coordination among them, but the administrative agency continues to be viewed as the key instrument of decision-making. Even the most sympathetic courts today recoil at the prospect of questioning an agency’s

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<sup>64</sup>Estrin and Swaigen, *supra.*, note 23 at 460.

<sup>65</sup>D. P. Emond, “The Greening of Environmental Law” (1991) 36 McGill L. J. 742 at 762.

<sup>66</sup>*Supra.*, note 9.

<sup>67</sup>Sax, *Ibid.* at 58.

discretion or its supposed expertise about the public interest. The public itself is thought to possess *no* expertise about the public interest.

The consequence of all this, as we shall see, is an incredible tangle of agencies with noble-sounding mandates and small budgets; court decisions which, in their reluctance to question administrative discretion, send cases back for interminable "further studies" or with directions for correcting various little procedural blunders they have made; and proceedings that go on for years--and even decades. And when it is all over, we have, as at the beginning, a decision reflecting the agency's response to *its* political necessities--its insider perspective about the public interest.<sup>68</sup>

An important distinction can thus be drawn between the position of the member of the public as a "supplicant" or as a holder of rights. In drawing an analogy between private and public rights, Sax points out how strange it would be if the owner of private property could not initiate action to enforce her individual property rights, but had to rely on some bureaucrat to vindicate them. Sax points out that an environmental protection regime which views the public as a supplicant is quite different in character from one which considers citizens to be holders of rights and that

...a society which is ready to recognize public rights can no more leave the destiny of those rights in the hands of bureaucrats than it would leave the enforcement of an individual's property rights to some bureaucrat to vindicate when, and if, he determines them to be consistent with the public interest.<sup>69</sup>

This characterization, although directed at the American experience, is analogous to the character of the environmental protection regime in Ontario and underscores the need for substantive environmental rights.

A substantive right to environmental quality will need to "confer more than a right to participate or some requirement of due process or natural justice before environmentally harmful decisions are taken."<sup>70</sup> A substantive right to environmental quality must be one which recognizes that the integrity, quality and health of the natural environment is of utmost importance and which provides for the enforcement of that right, wherever and whenever it is infringed. Thus

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<sup>68</sup>*Ibid.* at 60-61.

<sup>69</sup>Sax, *supra.*, note 9 at 60.

<sup>70</sup>Swaigen and Woods, *supra.*, note 59 at 200.

commentators indicate that a substantive right to environmental quality must “be equivalent to a civil liberty, on the one hand, constraining government actions harmful to the environment, and, on the other, equivalent to a property right, restraining the use of private property in ways that are incompatible with sound ecological management.”<sup>71</sup>

## 9. The Public Trust Doctrine

There is no legally recognized and enforceable right for the public to balance against industry’s *de facto* right to pollute and degrade. There is an absence of legally recognized and defensible rights in the common resources such as air, water and public lands which the public can assert to challenge this destructive behaviour. Government is expected to protect the environment for the public. But, what if government fails to do so? The public needs a legal basis from which to force government to take its environmental responsibilities seriously. In fact, there is a legal basis from which the public can demand that government take its responsibility for protecting the environment seriously. It is the public trust doctrine.

The ancient doctrine known as the public trust provides the legal basis for the obligation of government to place paramount importance on the protection of our collective air, water and public lands from environmental pollution, degradation and destruction. An integral part of the government’s obligation to protect the environment, embodied in the public trust doctrine, is the obligation to foster a policy of environmental protection. Therefore the public trust doctrine necessarily requires that government enact strong environmental protection laws and that the government ensures that such laws are vigorously enforced. Moreover, the environmental obligations imposed on government by the public trust doctrine have always been enforceable by each citizen. The right of each citizen to enforce the public trust obligations on government derives from the public trust doctrine itself. In other words, implicit in the obligations of government to protect the air, waters and public lands is the corresponding right of each citizen to require government fulfil those obligations. A large part of those obligations require that

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<sup>71</sup>*Ibid.*

government ensure that the actions of private parties do not unduly infringe on the quality of the environment. Where government fails to sufficiently protect the public from the environmentally harmful activities of private parties, the public trust doctrine provides the legal basis from which citizens can challenge governments inaction and personally ensure that the environment is being accorded primary importance. Thus, the public trust doctrine is an important legal doctrine for the purposes of ensuring environmental protection as it embodies both the government's primary obligations to protect our environment and each citizen's right to enforce that obligation on government.

**(a) The Public Trust Doctrine: Its Origin, Nature and Scope**

An examination of the historical development of the public trust doctrine is useful as a foundation for understanding the doctrine's present and future role in protecting public resources. The scope and application of the public trust doctrine, as a modern tool for environmental protection, can best be understood by looking closely at the doctrine's historical development.

The public trust doctrine originated in Roman law<sup>72</sup> and later found its way into the English common law.<sup>73</sup> In its inception in ancient Rome, public trust was applied to the navigable waters, primarily the sea.<sup>74</sup> It has been said that the public trust doctrine "was founded upon the

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<sup>72</sup>The origins of the public trust doctrine have been traced to Roman law. The Roman legal foundations for the public trust doctrine have been well documented by American scholars. For example, see J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Michigan L. Rev. 471 at 475; J. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred A. Knopf, 1971) at 164; V. Nanda and W. Ris Jr., "The Public Trust Doctrine: A Viable Approach to International Environmental Protection" (1976) 5 Ecology L.Q. 291 at 297 *et. seq.*; W. Drayton, Jr., "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine" (1970) 79 Yale L. J. 762 at 763; L. R. Jaffee, "State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey" (1971) 25 Rutgers L. Rev. 571 at 576; B. S. Cohen, "The Constitution, The Public Trust Doctrine and the Environment" (1970) Utah L. J. 388 at 389 *et. seq.*

<sup>73</sup>For a good survey of the development of public trust law in England see Jaffee, *ibid.*, at 576-599; C. D. Hunt, "The Public Trust Doctrine in Canada" in J. Swaigen, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 151 at 152-155.

<sup>74</sup>The public trust doctrine found its earliest expression in the work of Justinian. The Institutes of Justinian restated the Roman law: "By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea." THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841).

very sensible idea that certain common properties, such as rivers, the seashore, and the air, were held by government in trusteeship for the unimpeded use of the general public.”<sup>75</sup> Rivers, riverbanks and harbours were considered to be state property, but subject to public rights of navigation and fishing.<sup>76</sup> The state’s title to these interests was considered to be in the nature of a guardian or supervisor, rather than as an owner.<sup>77</sup> Individuals were entitled to oppose construction on the seashore that might interfere with their access to the beach or the sea.<sup>78</sup> Prior to its use in England, the public trust doctrine was employed in the Roman empire to guarantee that perpetual use of common properties was “dedicated to the public.”<sup>79</sup>

The ancient Roman public trust notion focused on common ownership and public use of the air, sea and seashores. However, these broad public rights gradually yielded to private rights with the fall of the Roman empire.<sup>80</sup> Nevertheless, these public rights reappeared later in English law as early English writers, such as Bracton, copied extensively from Roman law, particularly the laws associated with public rights in waterbodies.<sup>81</sup> Thus, the English common law adopted the public trust doctrine through the writings of Bracton. Bracton, quoting Justinian’s rule stated the law of England as follows:

By natural law, these are common to all: running water, the air, the sea and the shores of the sea. No one is forbidden access to the seashore...[A]ll rivers and ports are public. Hence the right of fishing in a port or in rivers is common. By the laws of nations, the use of the banks also is as public as the rivers; therefore all persons are at equal liberty to land their vessels, unload them, and fasten their

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<sup>75</sup>Sax, *supra.*, note 9 at 163-164.

<sup>76</sup>According to Jaffee, *supra.*, note 72 at 576 there was agreement among Roman scholars that no proprietary right could exist in land under the sea or navigable rivers, or as to those waters themselves.

<sup>77</sup>Nanda and Ris, *supra.*, note 72 at 297; Jaffee, *supra.*, note 72 at 576; Hunt, *supra.*, note 72 at 152.

<sup>78</sup>According to Jaffee, “Every citizen possessed an individually assertible right to prevent all construction on the seashore as might interfere with his access to the sea or beach.” Jaffee, *supra.*, note 72 at 576.

<sup>79</sup>Sax, *supra.*, note 9 at 163-164; Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention” (1970), 68 Michigan L. Rev. 471.

<sup>80</sup>Drayton, Jr., *supra.*, note 72 at 764; Nanda and Ris, *supra.*, note 72 at 297.

<sup>81</sup>Drayton, Jr., *supra.*, note 72 at 764; Hunt, *supra.*, note 73 at 152.

cable to the trees upon the banks, as to navigate the river itself.<sup>82</sup>

Prior to the Norman invasion of England in 1066, it seems that control of the seashore and waterbodies was widely dispersed.<sup>83</sup> Princes asserted that the right to fish was their personal property and imposed licencing fees on fishermen.<sup>84</sup> However, in early English common law, the King subsequently asserted his sovereign ownership of all property, including the sea and water resources.<sup>85</sup> The King was deemed to own the lands under navigable waters and “treated the title as private and alienable.”<sup>86</sup> The King then proceeded to grant ownership of the sea and river beds and exclusive rights of fishery.<sup>87</sup> These developments resulted in the erosion of the public rights in fishing and navigation in England. However, the growth of commerce and industry in thirteenth century England necessitated public rights in waterways. This need was satisfied with the advent of the Magna Carta in 1215. The Magna Carta was “the first major statement about these public rights in the English system”<sup>88</sup> and marked a doctrinal shift back in the direction of protecting the public’s interest, particularly with respect to public rights in fishing and navigation.<sup>89</sup> In the process of interpreting the particular rights guaranteed by the Magna Carta, the courts began to speak in terms of particular guaranteed rights, and their interpretations of the rights in the Magna Carta tended to enlarge the concept of the public’s interest in navigable waters.<sup>90</sup>

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<sup>82</sup>2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968).

<sup>83</sup>Drayton, *supra.* note 72 at 764-765; Nanda and Ris, *supra.*, note 72 at 297; Jaffee, *supra.*, note 72 at 580.

<sup>84</sup>Hunt, *supra.*, note 73 at 152; Drayton, Jr., *supra.*, note 72 at 764.

<sup>85</sup>Nanda and Ris, *supra.*, note 72 at 297-298.

<sup>86</sup>Cohen, *supra.*, note 72 at 389.

<sup>87</sup>J. J. Johnson and C. F. Johnson III, “The Mississippi Public Trust Doctrine: Public and Private Rights in the Coastal Zone” (1975) 46 Miss. L. J. 84 at 85.

<sup>88</sup>Hunt, *supra.*, note 73 at 153.

<sup>89</sup>Drayton, Jr., *supra.*, note 72 at 765.

<sup>90</sup>Drayton, Jr., *supra.*, note 72 at 766; Cohen, *supra.*, note 72 at 389.

According to Constance Hunt,<sup>91</sup> by the late eighteenth century, the state of the public trust law in England had developed to the point where navigable waters, whether owned by the sovereign or by private persons, were impressed with a servitude in favour of the public. Regardless of who held legal title to the land under the water, the public had certain rights to the use of the water which the sovereign was supposed to enforce for the benefit of the public. The most ancient and frequently enunciated of these rights was the right of navigation. Two other key aspects of the public trust were the right of fishing and the right of commerce.<sup>92</sup>

In an examination of the Roman and English precedents, Professor Joseph Sax concluded that the public trust doctrine rests upon three related principles: first, that certain interests, such as air and the sea, have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership; secondly, that these interests partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status; and finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.<sup>93</sup> According to Sax, these three principles serve as the historical basis of the public trust doctrine. Thus the public trust doctrine provides a useful way of conceptualizing the government's position and role with respect to public resources, or more specifically, the environment.<sup>94</sup>

The historical context in which the public trust doctrine developed is important for an understanding of modern English law. Reference to some nineteenth century and early twentieth century English cases demonstrate the scope of the public rights under the public trust doctrine

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<sup>91</sup>Hunt, *supra.*, note 73 at 155.

<sup>92</sup>Roman law favoured the theory that the sovereign could not alienate title to the beds under navigable waters at all. English common law, however, permitted the alienation of title but found an implied easement in favour of public rights in the waters regardless of who held title to the subsoil. See Drayton, Jr., *supra.*, note 72 at 768-771, 781 and 783.

<sup>93</sup>Sax, *supra.*, note 9 at 165.

<sup>94</sup>Another way of stating these three principles is as follows: air, water and public lands are of such prime importance to each individual that they should not be made subjects of private ownership. When the air, water and public lands are used by private enterprises, which they must be, the use should be subject to regulations which insure that the welfare of the individual citizen is not being sacrificed for the economic gain of narrow private interests.

which were defined by the courts. The cases illustrate that in England, it appears that the public trust doctrine has been narrowed to rights of public access for fishing and navigation to Crown-owned and privately owned waters and shores.

The case of *Gann v. Free Fishers of Whistable*<sup>95</sup> demonstrates that by the late 1800's public rights of fishing and navigation in tidal waters were not easily overridden. In *Gann*, the plaintiff sued the defendant for the sum of one shilling. Prior to the Magna Carta, Gann's predecessor had been granted title to the seabed and an oyster fishery two miles out from shore. On that basis, Gann claimed he was entitled to levy a fee upon all boats anchoring on his seabed. The House of Lords rejected Gann's claim and, in so doing, affirmed Gann's ownership of the seabed subject to the public right of navigation. In the course of his judgment, the Lord Chancellor enunciated the following long settled principles:

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.<sup>96</sup>

Notwithstanding the well established principle of public rights of navigation and fishing in English common law, the English courts tended to limit its applicability. The following two cases illustrate the limited applicability of the public trust doctrine in English common law.

*Blundell v. Catterall*<sup>97</sup> provides a good illustration of the manner in which the English courts limited the applicability of the principles of public rights of fishing and navigation. The plaintiff in *Blundell* owned the foreshore and the defendant operated a bathing machine on the plaintiff's foreshore. The plaintiff sued the defendant in trespass. In defending the action for

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<sup>95</sup>(1865), 11 H.L. Cas., 192.

<sup>96</sup>*Gann v. Free Fishers of Whistable* (1865), 11 H.L. 192 at 208.

<sup>97</sup>(1821), 106 Eng. Rep. 1190 (K. B. ), 5 B. & Ald. 268.

damages arising from trespass, the defendant claimed that the public had a common right-of-way as an incident to public bathing rights. The majority of the court rejected the defendant's claim holding that public rights relate only to the sustenance of man and not to recreation, and that the common law does not recognize a public right of access to the seashore for the purpose of bathing.

The case of *Lord Fitzhardinge v. Purcell*<sup>98</sup> provides further illustration of the limitation on the public right imposed by the court in *Blundell*. *Lord Fitzhardinge* was also a trespass action in which the plaintiff was the owner of the foreshore. The defendant entered upon the foreshore by boat and by foot with the intention of shooting wild fowl. The defendant defended this action on several grounds, including the assertion of a common law right of all subjects of the King to shoot wild fowl at their pleasure upon the foreshore and in the beds of navigable rivers. In finding for the plaintiff, Parker J. relied on *Blundell* when he stated:

...I have failed to find any suggestion of the existence of such a right in any of the authorities which were cited to me in argument or which I have myself consulted on the point...[T]he public have no rights to the sea itself except rights of fishing and navigation and rights ancillary thereto...It is true that no grant by Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto...It is also true that no such grant can, since Magna Carta, operate to the detriment of the public right of fishing. But subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being so granted. This beneficial ownership of the Crown, or the Crown's grantee, can only I think, be considered to be limited by well known and clearly defined rights on the part of the public. I can find no suggestion in the authorities of any such public right of wild-fowling as suggested, either on the sea itself or in the channels of public navigable rivers.<sup>99</sup>

This statement from Parker J. in *Lord Fitzhardinge* summarizes the evolution of the public trust doctrine at English common law. Regardless whether it is the Crown or a private party who owns the foreshore and the beds beneath them, public rights of navigation and fishing are paramount. However, as the cases of *Blundell* and *Lord Fitzhardinge* illustrate, these public rights are quite

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<sup>98</sup>*Lord Fitzhardinge v. Purcell* [1908] 2 Ch. 139.

<sup>99</sup>*Lord Fitzhardinge v. Purcell* [1908] 2 Ch. 139 at 165-166.

narrow in scope, and do not extend to activities which are recreational in nature, such as bathing and shooting.

### **The Public Trust Doctrine in Canadian Common Law**

In Canada, the public trust doctrine has not evolved very much, in contrast to the development of the public trust doctrine in the United States. The analysis of the nature and scope of the public rights of navigation and fishing in a number of early Canadian cases serve to illustrate the state of the public trust doctrine in Canada. These cases are generally said to fall into two broad categories, those dealing with the impairment of public rights by private parties and those dealing with the violation or lessening of public rights by government.<sup>100</sup>

*Gage v. Bates*<sup>101</sup> provides one of the earliest pronouncements involving public rights. *Gage* concerned an action in trespass. The plaintiff alleged ownership of an inlet, together with the right to preclude the defendant from entering the inlet in a skiff, placing nets and fishing there. Richard J. determined that the issue to be decided was whether a Crown grant in relation to a navigable river could operate so as to deprive the public of the right of fishing and passing over it. Thus, the judge examined the common law to determine whether the inlet in this case was “navigable”. The common law rule was that a body of water was “navigable” if there was a flux and reflux of tide.<sup>102</sup> However, Richard J. determined that this definition was not applicable in the instant case and decided that the inlet was navigable by virtue of the depth of the water and the use of the inlet by boats of considerable size.<sup>103</sup> In the course of his judgment, Richard J. stated the applicable rule:

If the *locus in quo* is a public navigable river, then it is a public highway, and all her Majesty’s subjects of common right may pass over it in boats and fish therein, notwithstanding the grant of the soil by the Crown, for such grant must be taken

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<sup>100</sup>Hunt, *supra.*, note 73 at 164.

<sup>101</sup>*Gage v. Bates* (1858), 7 U.C.C.P. 116.

<sup>102</sup>*Gage v. Bates* (1858), 7 U.C.C.P. 116 at 119.

<sup>103</sup>*Gage v. Bates* (1858), 7 U.C.C.P. 116 at 121.

subject to the public right.<sup>104</sup>

On this basis the court entered a non-suit in the action.

*Wood v. Esson*<sup>105</sup> was an 1883 trespass action in which the nature of the public rights was considered by the Supreme Court of Canada. In *Wood* both the plaintiff and the defendant owned wharves and water lots in the Halifax harbour. The plaintiff had extended his wharf and in so doing prevented the defendant's boats from accessing his own wharf. The defendant removed the obstruction created by the plaintiff's extension and the plaintiff sued in trespass. Ritchie C. J. dismissed the plaintiff's trespass action on the following grounds:

There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of the Halifax harbour, and no person has any legal right to place in said harbour, below low water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation.<sup>106</sup>

As a result, the Supreme Court of Canada found that the defendant had a legal right to remove the obstruction to enable him to navigate the waters with his steamers and vessels, and to bring them to his wharf. In a concurring judgment, Strong J. noted:

The title to the soil did not authorize the plaintiffs to extend their wharf so as to be a public nuisance, which, upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right so to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance.<sup>107</sup>

Similar statements are found in an 1886 decision, *Quiddy River Boom Co. v. Davidson*<sup>108</sup>. The plaintiff was a riparian owner who obtained damages and an injunction against the defendant at trial. The defendant, a logging company, had interfered with access to the plaintiff's land from the water by erecting piers and booms in a bay to hold its logs in place. The defendant appealed

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<sup>104</sup>*Ibid.*

<sup>105</sup>*Wood v. Esson* (1884), 9 S.C.R. 239.

<sup>106</sup>(1884), 9 S.C.R. 239 at 242.

<sup>107</sup>(1884), 9 S.C.R. 239 at 243.

<sup>108</sup>(1886), 25 N.B.R. 580 (C.A.).

to the New Brunswick Supreme Court. In delivering his judgment for the court, Allen C.J. noted that ownership of the bed of a river is subject to the public right of navigation, which is a paramount right in all subjects of the realm.<sup>109</sup> Furthermore, a party exercising his rights "must do so with a due regard to the rights of others, and in a reasonable manner, and in such a way that he does not do any damage which by reasonable care he might have avoided."<sup>110</sup> The court determined that what constitutes reasonable use of a river for navigation depends upon the circumstances. In the circumstances of this case, the New Brunswick Supreme Court determined that the use being made of the river by the logging company was reasonable. Therefore, the court varied the injunction, granted at trial, against any interference by the loggers with the riparian owners' rights, to permit a reasonable temporary interruption of access.

The language of the court in *Quiddy River Boom Co. v. Davidson*<sup>111</sup> reveals an important aspect of the development of the public trust doctrine in Canadian common law. What began as a doctrine delineating the nature of the relationship between the state and the public with respect to public resources, such as the air, water and Crown owned land, has seemed to have been folded into a version of public nuisance. Rather than develop the guardianship or trusteeship notions of early public trust doctrine in Rome and England as an independent doctrine, Canadian courts have tended to view the public trust ideas of public rights in fishing and navigation in a different way. Canadian courts have tended to follow the language in *Quiddy* and have characterized obstructions which interfere with public rights of fishing and navigation as a public nuisance.

In summary, the public rights of fishing and navigation are firmly established in Canadian common law. However, the scope of the public rights of fishing and navigation have been narrowly construed by the courts. Obstructions which may interfere with the exercise of these public rights in fishing and navigation can be characterized as a public nuisance and are actionable. However, this cause of action is limited to a member of the public who is able to show special

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<sup>109</sup>(1886), 25 N.B.R. 580 at 592 (C.A.).

<sup>110</sup>(1886), 25 N.B.R. 580 at 593-594 (C.A.).

<sup>111</sup>(1886), 25 N.B.R. 580 (C.A.).

damage. Failing the ability of a member of the public to show special damage compared with other members of the public resulting from an interference with these public rights, such an action can only be brought by the Attorney General. Thus, the public rights in fishing and navigation have been circumscribed by the imposition of the public nuisance rule.

As the public trust doctrine evolved out of the English common law and into Canadian common law it lost most of its special character and has become nothing more than a species of public nuisance. The notion that the Crown is the trustee of public lands, water, and the air has been overlooked and seemingly abandoned in Canadian common law. Although reference to public rights in fishing and navigation are not uncommon in Canadian cases, there have been no successful attempts to broaden the scope of the public rights in fishing and navigation or to have the Crown characterized as trustee in relation to public rights comparable to what has developed in the United States.

The public trust doctrine was argued in only one reported case in Canada, and was unequivocally rejected by the court.<sup>112</sup> The case of *Green v. Ontario* involved a lease from the government of Ontario to Lake Ontario Cement Limited. In 1968, the Ontario government granted a lease which gave the company the right to proceed with excavation on the leased lands. Two years later, pursuant to the *Provincial Parks Act*,<sup>113</sup> the province established Sandbanks Provincial Park. The park was situated immediately adjacent to the land leased to the company. The plaintiff, Larry Green, asserted that the sand dunes, located both in the park and on the adjoining leased property, were a unique ecological, geological, and recreational resource. Furthermore, Green argued that the sand dunes were protected resources, subject to a public trust. The court rejected this argument choosing instead to ground its analysis of the public trust in classic trust law, and as a result dismissed the case. In terms of the future potential for the development of the public trust doctrine in Ontario it is noteworthy that there are critics of this case who consider the decision to be clearly erroneous.<sup>114</sup>

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<sup>112</sup>*Green v. Ontario* (1973), 2 O.R. 396, 34 D.L.R. (3d) 20.

<sup>113</sup>R.S.O. 1970, c. 371.

<sup>114</sup>For an in depth analysis of this case and an extensive critique of the application of classic trust law to the public trust doctrine see, Hunt, *supra*, note 73 at 174-180.

In contrast with the experience in Canada, the public trust doctrine has found its way into American common law and has been interpreted and expanded to become a formidable and modern environmental protection tool.

### **The Public Trust Doctrine in American Common Law**

In 1892, the United States Supreme Court decided the most famous of American public trust cases, *Illinois Central Railroad v. Illinois*.<sup>115</sup> This case is considered a landmark public trust case and has led the development of a strong public trust doctrine in the United States. In 1869, the Illinois legislature deeded more than 1000 acres of Lake Michigan's coast--now Chicago's central business district--to the railroad. This grant of property was challenged as being contrary to the interests of the people. The Court rejected the railroad's contention that a duly consummated grant of property could not be set aside and held that the challenge was of merit. The Court found that the state held title to the land under the navigable waters of Lake Michigan: and that "...[i]t is a title held in trust for the people of the state that they may enjoy the navigation of the waters...free from obstruction or interference of private parties."<sup>116</sup> The Court determined that such a relinquishing of control over these lands was inconsistent with the exercise of the public trust:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties,...than it can abdicate its police powers in the administration of government and the preservation of the peace.<sup>117</sup>

Public trusts cannot be placed entirely beyond the control of the state and any grant, such as the one made by the Illinois legislature, is necessarily revocable, and "the exercise of the trust by

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<sup>115</sup>146 U.S. 387 (1892).

<sup>116</sup>*Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) at 452.

<sup>117</sup>*Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) at 453.

which the property was held by the state can be resumed at any time.”<sup>118</sup>

The *Illinois Central Railroad* decision is a landmark decision in the field of public trust. The United States Supreme Court unequivocally held that the title to land under navigable waters is held by the state subject to a public trust and cannot be relinquished to a private enterprise at the expense of the people. It is noteworthy that the Court indicated that navigation, fishing and commerce were to be considered legitimate public trust uses.

*Illinois Central Railroad* is the springboard from which the more modern decisions have made use of this ancient doctrine. Several exemplary twentieth century state court decisions, to be discussed below, illustrate the development of the public trust doctrine in the United States following *Illinois Central Railroad*. The public trust decisions at the state court level reveal the judicial adaptation of this ancient doctrine beyond navigation, fishing and commerce to encompass modern environmental concerns. These cases reveal the inherent flexibility in the doctrine and its utility to provide citizens with a basis from which to challenge environmentally unsound environmental decisions by government and private parties who infringe unduly on public trust resources.

For example, in *Borough of Neptune City v. Borough of Avon-by-the-Sea*<sup>119</sup> the New Jersey Supreme Court saw their way to expanding the public trust doctrine beyond the traditional uses. In this case the New Jersey Supreme Court observed that the traditional delineations of public trust uses; navigation, fishing, and commerce, were no longer adequate to meet current needs. Thus the court stated:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be moulded and extended to meet changing conditions and needs of the public it was created to benefit.<sup>120</sup>

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<sup>118</sup>*Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) at 455.

<sup>119</sup>61 N.J. 296, 294 A. 2d 47 (1972).

<sup>120</sup>*Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A. 2d 47 (1972) at 54.

This flexible and expansive approach to the public trust doctrine exemplifies the approach of American courts to the doctrine and serves as the reason for the doctrine's utility to the present challenges of environmental protection. However, even more important is the way in which the state courts have interpreted and developed the public trust doctrine in terms of the government's responsibilities to protect public trust resources.

For example, in *Gould v. Greylock Reservation Commission*,<sup>121</sup> the state of Massachusetts was enjoined from authorizing the lease of lands in a public park for the purpose of allowing a private ski development. The state had enacted a statute which seemed to authorize the intended development. The Massachusetts Supreme Court, however, declared the statute which purported to authorize the construction unlawful. In so doing, the court did not invalidate the enactment on the sole basis that it involved the modification of the use of public trust land. Rather, in invalidating the statute, the court developed a legal rule "which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses."<sup>122</sup> Since the enactment purporting to allow the private ski development did not contain explicit legislative authority recognizing the modification in the use of the park from broad public uses to narrow private interests, the development was prohibited. The environmental implications of the use of this judicial presumption developed under the public trust doctrine, exemplified by the decision in *Gould*, has been to require that government be explicit should it decide to impair the public's rights in public trust resources rather than operating as a complete bar to development. The operation of the presumption in favour of broad public uses merely acts to require that government be cognizant of and explicit about the trade-offs involved when public trust resources are being compromised. By providing a basis for scrutinizing government environmental decision-making in the courts, the public trust doctrine promotes more rational and balanced development decision-making by government and in so doing provides an effective means to hold the government accountable for its environmental responsibilities should it be

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<sup>121</sup>350 Mass. 410, 215 N.E. 2d 114 (1966). For an in depth analysis of the facts and issues of this case, as well as the judicial approach to the protection of the public trust see J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich. L. Rev. 471 at 492-496.

<sup>122</sup>Sax, *ibid.* at 494.

pressured to do otherwise.

## 10. Conclusion

Since both American and Canadian common law originated from English common law and Roman law, it is strange that the public trust doctrine has not developed in our legal system. The American experience with the public trust doctrine at common law shows that the public trust doctrine can be flexible and is capable of expansion beyond fishing and navigation to cover the recognition of a prior public right in all of the environment. The experience with public trust in the United States shows that the public trust doctrine is adaptable to dealing with the most pressing environmental concerns of today. The examination of these state public trust cases reveals the innovative approach taken by these American judges, judicially expanding the public trust uses beyond navigation, fishing and commerce to evolve the public trust doctrine into a formidable and modern environmental protection tool. Furthermore, the judicial development of a presumption in favour of preserving public trust resources has provided citizens with a basis from which to demand that government always be mindful of its environmental protection responsibilities.

Canadian courts have not reached the sophistication of the American courts with respect to the public trust doctrine. Two reasons are offered for this result. The first reason for the impoverished state of the public trust doctrine in Canada is judicial reluctance to broaden the public rights of fishing and navigation to include general public rights in relation to all other resources for which government responsibility exists. The second reason is legislative inertia, particularly in Ontario. The public trust doctrine is not foreign to Canadian common law, but it appears to have been abandoned. According to Constance Hunt, the recognition of the public trust doctrine could have a great impact on the shape of environmental law in Canada:

It could provide the basis of a cause of action for citizens who are concerned about the use or abuse of our nation's resources. It could also assist in dealing with problems of standing that traditionally, in Canadian law, have made access to the courts available only to those persons with a direct property or pecuniary interest in a dispute...a public trust doctrine could have a major impact upon the way in which government agencies responsible for resources carry out their

mandate, by encouraging them to ensure that all options in resource development choices have been well-canvassed. Finally, the existence of such a doctrine could bring resource decision making more fully into the open forum, thus encouraging the country as a whole to pay greater attention to the utilization of our heritage of land and resources.<sup>123</sup>

Given the potential use of the public trust doctrine as a viable environmental protection tool, it is time to resurrect the public trust doctrine. In contrast to the stunted development of the public trust doctrine in English common law and its impoverished state in Canadian common law, the Americans seized upon the public trust doctrine. In the United States, particularly in Michigan, the public trust doctrine has been enshrined in statute and serves as the basis for citizen action to protect the environment in the courts. A survey of the environmental rights enactments in other jurisdictions in Canada and the United States will be considered in the chapter to follow. The examination of the legislation in Michigan shows how the public trust doctrine has served as the basis for citizen rights to environmental protection and acts to ensure government accountability for environmental decision-making.

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<sup>123</sup> Hunt, *supra*, note 73 at 151.

## **CHAPTER III**

### **IMPLEMENTING AN ENVIRONMENTAL BILL OF RIGHTS**

#### **1. Introduction**

Because the current chances for a constitutional amendment guaranteeing a right to environmental quality for every Canadian are non-existent and because of the additional need for environmental rights legislation at both the federal and provincial levels, there have been several initiatives at legislating environmental rights both in Canada and in the United States. This chapter will begin with an examination and assessment of the various "environmental rights" enactments in Canada, specifically in Quebec and the Northwest Territories. The discussion will then turn to the "environmental rights" legislation in the United States with a particular focus on the legislation in Michigan. The examination will reveal that environmental rights are not very developed in Canada. This shortfall not only limits the role Canadian citizens can play in the protection of their environment but also lessens the opportunities to ensure that the government fulfils its duties to protect the environment. In contrast, the environmental rights enactments in the United States, particularly in Michigan, are quite extensive and have empowered their citizens to take an active role in ensuring that both their government and private parties accord greater attention to the environmental implications of their actions.

#### **2. Quebec**

Quebec was the first province to provide statutory based citizen rights to protect the environment. The environmental rights initiative in Quebec has been called a "qualified"

environmental rights bill.<sup>124</sup> Section 19.1 of the Quebec *Environment Quality Act*<sup>125</sup> grants every Quebec resident the following basic right:

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 this Act and the regulations, orders, approvals, and authorizations issued under any section of this Act.

This provision purports to provide a right to environmental quality. However, this right is qualified in that it is only operative to the extent provided by the *EQA* itself. This qualified right means that the standing rule is relaxed only when there are regulatory provisions governing the polluting activity complained of and those provisions are being violated. Therefore, where there is statutory authorization for the activity and the activity is being conducted in conformity with that authorization, sections 19.1 and 19.2 do not apply.<sup>126</sup> Thus, the *EQA* is reactive, rather than proactive environmental protection legislation in that its protections are only operative to the extent that the government of Quebec has legislated on the matter. Where an activity which is causing harm to the environment is not subject to provincial law, the public has no remedy to protect the environment from such harm.

In order to enforce this right, a judge of the Superior Court may grant an injunction to prohibit any act or operation that interferes or might interfere with the exercise of a right conferred by section 19.1.<sup>127</sup> The financial burden imposed on plaintiffs seeking to enjoin environmentally harmful conduct has been considered since section 19.4 limits the maximum security deposit for an interlocutory injunction, required under the *Code of Civil Procedure*,<sup>128</sup> to five hundred dollars.

While section 19.1 is limited in nature, the *EQA* does provide an expedited way for groups

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<sup>124</sup>Muldoon, *supra.*, note 23 at 33 and 37.

<sup>125</sup>*Environment Quality Act*, R.S.Q. 1977, c. Q-2 [hereinafter *EQA*].

<sup>126</sup>*Bechard v. Selenco* (1989), 3 C.E.L.R. (NS) 307 (Quebec C.A.).

<sup>127</sup>*Environment Quality Act*, R.S.Q. 1977, c. Q-2, s. 19.2.

<sup>128</sup>R.S.Q. 1977, c. C-25, articles 999-1051.

and individuals to go to court to enforce the existing environmental laws.<sup>129</sup> This procedure, together with the province's innovative class action laws,<sup>130</sup> vests Quebec's residents with some form of environmental rights that are stronger than most other Canadians enjoy. Nevertheless, the *EQA* still falls short of the rights that would be granted under a more comprehensive environmental bill of rights, like the Northwest Territories *Environmental Rights Act*.<sup>131</sup>

### 3. The Northwest Territories

The Northwest Territories was the first Canadian jurisdiction to enact a comprehensive environmental rights law with the enactment of the Northwest Territories *Environmental Rights Act*.<sup>132</sup> With the enactment of the Northwest Territories *ERA*, the government of the Northwest Territories became the first jurisdiction in Canada to formally enshrine its citizens' rights to a healthy environment in statute. However, this enactment still contains many deficiencies.

According to the statement of purpose of the Northwest Territories *ERA*, the Act is intended "to provide environmental rights for the people of the Northwest Territories". The preamble of the Northwest Territories *ERA* recognizes the "unique sense of their relationship to the land" of the people of the Northwest Territories, a majority of whom are of Aboriginal ancestry. It also recognizes their right "to a healthy environment" and "to protect the integrity, biological diversity and productivity of the ecosystems in the Northwest Territories".

Three of the definitions in section 1 of the Northwest Territories *ERA* are noteworthy. First, the definition of "contaminant" is very broadly drawn and this is relevant to the application of the Northwest Territories *ERA*. Second, the definition of "environment" is virtually identical

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<sup>129</sup>*Environment Quality Act*, R.S.Q. 1977, c. Q-2, ss. 19.3 to 19.7.

<sup>130</sup>*An Act Respecting the Class Action*, R.S.Q., c. R-2.1, as amended, by S. Q. 1982, c. 37. The Act forms part of the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, articles 999-1051.

<sup>131</sup>*Environmental Rights Act*, S.N.W.T. 1990, c.38.

<sup>132</sup>*Environmental Rights Act*, S.N.W.T. 1990, c.38 [hereinafter Northwest Territories *ERA*].

to that contained in the *Canadian Environmental Protection Act*,<sup>133</sup> except for the insertion of references to “snow and ice”. Section 1 also includes the following definition of the “public trust”:

“public trust” means the collective interest of the people of the Territories in the quality of the environment and the protection of the environment for future generations.

According to one commentator “[t]he impact of the inclusion of the public trust doctrine in the [Northwest Territories *ERA*] is difficult to accurately predict.”<sup>134</sup> Section 6 of the Northwest Territories *ERA*, discussed below, is the only section to incorporate the public trust concept by giving “every person resident in the Territories” the right to protect the environment and the public trust by way of a civil action. It is important to note that the rights granted under other sections of the Northwest Territories *ERA*, such as the right to an investigation, are not triggered by threats to the public trust. Rather they come into play solely as a result of the release of or likely release of a contaminant.

Section 2 of the Northwest Territories *ERA* deals with its application. Subsection 2(2) imposes a major limitation on the Northwest Territories *ERA*'s scope, placing outside its reach “anyone authorized under an Act of the Parliament of Canada to do those things which, but for such Act are in contravention of this Act” (i.e., the Northwest Territories *ERA*).<sup>135</sup> Therefore, any activity that has received federal statutory authorization is immune from the provisions of the Northwest Territories *ERA*. Thus the application of the Northwest Territories *ERA* is significantly limited by subsection 2(2), since most development activity in the Northwest Territories is federally authorized and occurs on federal lands. Territorial legislative competence is also restricted by section 16 of the *Northwest Territories Act*.<sup>136</sup> Aggressive attempts to apply the

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<sup>133</sup>*Canadian Environmental Protection Act*, R.S.C. 1985, c.16 (4th Supp.) [hereinafter *CEPA*].

<sup>134</sup>J. Donihee, “The N.W.T.'s Environmental Bill of Rights” (1991) 6:2 *Environmental Law Centre Newsletter* 1 at 3.

<sup>135</sup>According to Donihee, “Most of the lands in the Northwest Territories (approximately 96%) are owned by the federal Crown. Many provincial-type resource management functions e.g. land and water and minerals management are still federal responsibilities. Most resource development activities in the Northwest Territories therefore require federal permits or licenses. *Ibid.* at 4.

<sup>136</sup>*Northwest Territories Act*. R.S.C. 1985, c. N-27. Specifically, s.16 makes Territorial legislation “subject to” Acts of Parliament.

Northwest Territories *ERA* to federal Crown lands could be met by challenges to the constitutionality of the Act.<sup>137</sup> Subsection 2(3) and (4) bind the government of the Northwest Territories and provide for a form of paramountcy should the Northwest Territories *ERA* conflict with the terms of any other Territorial enactment.

Section 3 provides for a form of access to certain environmental information held by government. "Every person" has the right to apply to "any minister" for "any information" held by the government "concerning the quantity, quality or concentration of any contaminant released or likely to be released into the environment". Furthermore, section 3 gives citizens the right to examine any permit, licence, or order and to obtain access to reports, including tests and analyses, related to releases of contaminants into the environment. Despite these broadly worded access to information provisions, subsection 3(4) provides a minister with a variety of grounds for refusing this access including concerns for matters such as national security, trade secrets, the administration of justice or public policy. An applicant refused access to such information may apply to a Justice of the Supreme Court for an order compelling release of the information. In such an action, the onus of establishing that the information should not be released is on the minister.

The Northwest Territories government does not currently have general "access to information" legislation. The Northwest Territories *ERA*'s limited right to information at least provides some potential for review of Territorial government information related specifically to contaminants released or likely to be released into the environment. However, the government has no legal obligation to provide its citizens with information relating to any other environmental assaults. Thus this provision for access to government information is deficient in that it fails to truly implement what one would expect if citizens had a substantive and legally enforceable right to environmental quality.

Section 4 of the Northwest Territories *ERA* enables "any two persons resident in the Northwest Territories who are not less than 19 years of age" to apply for an investigation with

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<sup>137</sup>Any application of the Northwest Territories *ERA* which impaired or affected federal proprietary interests or legislative authority over Crown land could be subject to constitutional challenge.

respect to the release or likely release of a contaminant into the environment.<sup>138</sup> Section 4 is modelled closely on sections 108 and 109 of *CEPA*. The wording is, however, more open-ended than that provided in *CEPA*. While the *CEPA* investigations can be undertaken when there is an “alleged offence under the Act”, the Northwest Territories *ERA*’s provisions refer to “an alleged or likely release” of a contaminant. The situations which could potentially be subject to investigations under the Northwest Territories *ERA* are therefore more numerous than under *CEPA*. Subsection 4(6), however, allows for the discontinuance of an investigation where the “Minister is of the opinion that the release or likely release does not constitute a threat to the environment”. Where the minister determines that the release of the contaminant does not constitute a threat to the environment, there is no means for a citizen to challenge that decision or the grounds upon which the decision has been based. Therefore, the minister retains unreviewable discretion to determine if and when an investigation is to be undertaken. This situation falls short of what would be expected if citizens had a legally enforceable substantive right to environmental quality and the proper incorporation of the public trust doctrine.

Section 5 of the Northwest Territories *ERA* allows a private prosecution of an offence committed under any statute listed in a schedule to the Act. However, section 5 is merely declaratory of the citizen’s right to bring a private prosecution contained in the general criminal law. The declaration of the right to undertake private prosecutions contained in the Northwest Territories *ERA* may highlight the existence of such opportunities but will not by itself overcome the potential expense and technical difficulties associated with private prosecutions. Nonetheless, subsection 5(2) allows a successful private prosecutor to make an application to a Court, which imposes a monetary penalty as punishment for an offence, to secure a form of fine splitting.<sup>139</sup> In other words, the “costs and expenses incurred in the conduct of the prosecution” are eligible for reimbursement. Therefore, although section 5 does not add to the rights of a private citizen to launch a private prosecution to ensure enforcement of existing environmental laws, it does enhance the utility of this mechanism by defraying some of the costs of the prosecution, should

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<sup>138</sup>This wording prevents corporations and non-residents from applying for investigations.

<sup>139</sup>Fine splitting is possible under federal statutes as well, including the *Fisheries Act*, R.S.C. 1985, c. F-14 and the *Migratory Birds Convention Act*, R.S.C. 1985, c. M-7, see s. 13.

it be successful.

Section 6 makes provision for a cause of action which is quite specific and limited. Section 6 gives "every person resident" in the Northwest Territories the right to protect the environment and the public trust from the release of contaminants by allowing the commencement of a civil action in the Supreme Court against any person who releases any contaminant into the environment. For such actions, subsection 6(2) eliminates the restrictive rules of standing that have evolved at common law and which have limited the usefulness of common law causes of action for redressing environmental problems.<sup>140</sup> However, while the rules of standing have been liberalized, litigants availing themselves of section 6 rights will still have to confront and overcome the other long-standing controls which have evolved at common law to regulate the litigation process. Nothing in the Northwest Territories *ERA*, for example, limits the potential for demands for security for costs and unsuccessful litigants must still accept the risk of having costs awarded against them in the event that their lawsuit is unsuccessful. Furthermore, this cause of action is narrow in that it only applies to instances of environmental contamination, presumably precluding actions designed to prevent or halt impairment or destruction of the environment and the public trust which may occur from activities other than the release of a contaminant. A range of potential remedies is provided by subsections 6(3) and (4) including injunctions, clean up orders and payments for compensation for damages to an individual who suffers a loss. Also possible is an order for payment to the Minister responsible for the environment, for deposit in a special fund, intended to enable the repair of any general environmental damages or for the enhancement of the environment. This final remedy is quite innovative, by including the creation of a fund for purposes of administering and applying any damages for general harm to the environment.<sup>141</sup> Since the focus of environmental protection reforms ought to be the protection and enhancement of the quality of the environment, the appropriate use of these funds should have a positive affect the quality of the environment.

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<sup>140</sup>This idea originates from the Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989).

<sup>141</sup>This idea was canvassed in the Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ministry of the Attorney General, 1990).

Subsection 6(5) provides for defences to a section 6 action. The defences listed include the defence that the release of the contaminant will remain entirely on the defendant's lands, that the release will not materially impair the quality of the environment or that the release of the contaminant is authorized by and in compliance with any law or approval.<sup>142</sup> These defences are impediments to the exercise of a right to environmental quality and the protection of the public trust. The mere fact that the release of the contaminant will remain entirely on the defendant's land or that it is statutorily authorized does not mean that the environment and the public trust will not be harmed by such a release. However, the public is left to rely on government to protect the environment in these instances, in keeping with the traditional pattern of environmental law and policy in Canada. In effect, therefore, those who hold statutory authorization for the release of contaminants into the air, water or land are beyond the reach of concerned citizens who seek to protect the integrity and quality of the environment.

Section 7 of the Northwest Territories *ERA* provides for "whistleblower" protection. This section prohibits the dismissal or disciplining of an employee who has exercised any of the rights granted by the Northwest Territories *ERA*. However, this employee protection is qualified in that the protection does not extend to an employee who proceeds in a manner intended to intimidate, coerce or embarrass his or her employer or any other person. An employer who contravenes this section commits an offence punishable by fine or imprisonment. If an employer is convicted of such an offence, then the judge may order an employee's reinstatement and compensation for lost wages.

Finally, the Northwest Territories *ERA* makes provision for the submission of annual reports by the Minister of the Environment. Once a year, pursuant to section 8, the minister must submit a report to the Legislative Assembly that describes all applications, actions, and prosecutions commenced under the Act.

In contrast to these Canadian "environmental rights" enactments, which fall short of what has been envisioned by a true "environmental bill of rights", the Michigan legislature enacted a law which provides its citizens with substantive rights to environmental quality based on the

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<sup>142</sup>Northwest Territories *ERA*, section 6(5).

public trust doctrine. Moreover, these rights are enforceable in the courts. The law in Michigan better exemplifies what is meant by a true "environmental bill of rights".

#### 4. Michigan

The *Michigan Environmental Protection Act*<sup>143</sup> is one of the best known state laws and has been the subject of intense commentary since its enactment in 1970.<sup>144</sup> Its primary purpose is to facilitate, through the medium of legislation, the creation of an environmental common law by the Michigan courts. *MEPA* was the first state statute to expressly authorize citizen-initiated environmental lawsuits and has become the model for subsequent environmental rights legislation in other states.<sup>145</sup> *MEPA* is the most famous example of an "environmental bill of rights" and sets itself apart from all other "environmental bills of rights" in that it has removed almost all judicial impediments in using the courts to protect the environment in the face of development and has infused environmental decision-making by government and private parties with attention to the public trust.

The primary motivation for the enactment of *MEPA* was the need to provide citizens with enforceable legal rights to protect their environment. The most salient overriding feature of *MEPA* is its broad provisions legislating actual and meaningful public participation in all aspects of environmental decision-making by government and its mechanism for government accountability for environmental decision-making through the incorporation of the public trust

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<sup>143</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979). [hereinafter *MEPA*].

<sup>144</sup>Extensive commentary on the *Michigan Environmental Rights Act* can be found in, J. L. Sax and R. L. Conner, "Michigan's Environmental Protection Act of 1970: A Progress Report" (1972) 70 Mich. L. Rev. 1003; J. L. Sax and J. F. Dimento, "Environmental Citizen Suits: Three Years of Experience Under the Michigan Environmental Protection Act" (1974) 4:1 Ecology L. Q. 1; J. Haynes, "Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law from Citizen Suits" (1976) 53 J. Urb. L. 589; J. Sax, "MEPA-Ten Years Later" (November/December 1980), Michigan Environs 6; and D. K. Slone, "The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's" (1985) 12 Ecology L. Q. 271.

<sup>145</sup>*MEPA* has become the model for environmental rights legislation in at least six other states: Conn. Gen. Stat. Ann. 22a-14-21 (West 1985); Fla. Stat. Ann. 403.412 (West 1986); Ind. Code Ann. 13-6-1-1-6 (Burns 1987); Minn. Stat. Ann. 116B.01-13 (West 1987); N.J. Stat. Ann. 2A:35A-13-15 (West 1987); S. D. Codified Law 34A-10A-1-15 (1986).

doctrine. Therefore, the provisions and operation of *MEPA* will be emphasized here. As an example of an alternative but somewhat weaker approach, key aspects of the environmental rights legislation in Minnesota will be considered. Where the Minnesota legislation differs notably from *MEPA*, these differences will be highlighted. The contrast between these two pieces of legislation will serve to emphasize the benefits of express provision of the public trust doctrine to secure consideration for environmental protection by government and private parties.

Generally, according to its author, *MEPA* has three broad effects with respect to standing, the role of the courts and judicial review.<sup>146</sup> First, *MEPA* gives private citizens the right to initiate or participate in environmental proceedings by specifically recognizing that there is a public trust in the protection of natural resources from pollution, impairment or destruction. Second, *MEPA* expands the role of the courts by permitting plaintiffs to claim environmental damage, through the public trust notion, and thus assert that their right to environmental quality has been violated in the same way that one could traditionally assert violation of a private contract or property right. Third, *MEPA* reduces the previously unfettered discretion of administrative agencies by subjecting them to judicial review on the basis that their decisions may fail to protect natural resources from pollution, impairment or destruction and may thereby infringe the public trust in such resources.

### **Standing**

Section 1202(1) of *MEPA* liberally confers standing to any member of the public to sue both government agencies and other members of the public for declaratory and equitable relief “for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.” Thus section 1202(1) of *MEPA* provides that:

The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political

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<sup>146</sup>See Sax and Conner, *supra.*, note 144 at 1005.

subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.<sup>147</sup>

In addition, *MEPA* authorizes intervention by a “legal entity” in any administrative proceeding whose subject matter has environmental implications and judicial review of the agency decision “on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or natural resources or the public trust therein.”<sup>148</sup> Consequently, these two provisions confer jurisdiction on the courts to entertain actions to protect the environment while conferring broad standing to any member of the public to participate in environmental decision making at both the administrative and the judicial level.

### Defences

Once the plaintiff has made a *prima facie* showing that the defendant has, or is likely to pollute or otherwise damage any of the state’s natural resources, the defendant has two options. The defendant may either rebut the plaintiff’s evidence by submitting “evidence to the contrary” or the defendant may establish by way of an affirmative defence, that “there is no feasible and prudent alternative” to his conduct, *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.”<sup>149</sup> In weighing the relative merits, the court is to apply the standard principles of burden of proof and weight of the evidence generally employed in civil actions.

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<sup>147</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1202(1).

<sup>148</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1205(1).

<sup>149</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1203(1).

### **Disposition Powers of the Court**

In entertaining an action brought under *MEPA*, the court is authorized to choose between alternative means of arriving at a final disposition of the case. The court may try the case directly, taking evidence and making an adjudication on the merits,<sup>150</sup> or the court may appoint a technically qualified master or referee to take testimony and report her findings to the court.<sup>151</sup> Alternatively, the court has the option of remitting the parties to available administrative proceedings for a determination of the legality of the defendant's conduct. If the court chooses not to immediately adjudicate an action, it is required to retain jurisdiction pending completion of the administrative proceedings to which the action was referred for the purpose of determining whether adequate protection from pollution, impairment or destruction has indeed been afforded.<sup>152</sup> Upon completion of such administrative proceedings, the court must adjudicate the impact of the defendant's conduct on the environment in accordance with the Act. In so doing, the court has discretion to order additional evidence be presented to the extent necessary to protect the rights recognized by the Act.<sup>153</sup>

### **Relief Powers of the Court**

Under *MEPA* the court has a number of options available in designing the type of relief which it may grant. Where an administrative agency standard is challenged, the court is authorized to evaluate its validity, applicability and reasonableness and determine whether the standard is deficient.<sup>154</sup> Where the court finds the standard to be deficient, the court is empowered to direct

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<sup>150</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1203(1).

<sup>151</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1203(2).

<sup>152</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1204(2).

<sup>153</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1204(3).

<sup>154</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1202(2)(a).

the adoption of a standard specified and approved by the court.<sup>155</sup> The court has the power to grant permanent equitable relief,<sup>156</sup> or to grant temporary equitable relief, appropriate, for instance, when a case has been remitted to administrative proceedings.<sup>157</sup> Moreover, the court has the further option of imposing conditions on the defendant in order to insure adequate protection of the natural resources of the state.<sup>158</sup> Where there has been intervention in, or judicial review of, administrative proceedings, no conduct shall be authorized or approved which is likely to have the effect of pollution, impairment or destruction of natural resources if there is "a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."<sup>159</sup>

### **Burden of Proof**

*MEPA* alters the burden of proof to the extent that the plaintiff is not required to establish that the defendant's conduct is "unreasonable." The plaintiff need only demonstrate that the defendant's conduct "has or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein..." beyond a de minimus level. The burden then shifts to the defendant to show that his conduct was reasonable by establishing that there was no feasible and prudent alternative to his conduct, *and* that the conduct was "consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."<sup>160</sup>

If a defendant in a pollution case argues that he has acted reasonably by complying with government regulations, the court may review the adequacy of the standard. *MEPA* states that

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<sup>155</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1202(2)(b).

<sup>156</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1204(1).

<sup>157</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1204(2).

<sup>158</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1204(1).

<sup>159</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1205(2).

<sup>160</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1203(1).

where "a standard for pollution or an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof" is involved, the court may determine its validity, applicability and reasonableness. If the court finds that the standard is deficient, it may direct the adoption of a standard approved and specified by the court.<sup>161</sup>

### **Safeguard Against Frivolous Lawsuits**

In order to safeguard defendants from frivolous claims, the court, if it has reasonable ground to doubt the plaintiff's solvency or her ability to pay the costs of a possible adverse judgment, may require a plaintiff to post a surety bond or cash of up to five hundred dollars to insure payment of any cost or judgment which might be rendered against her.<sup>162</sup> Moreover, the court is empowered to apportion costs<sup>163</sup> to the parties if the interests of justice so require. *MEPA* sanctions the court's use of res judicata and collateral estoppel in order to prevent a multiplicity of suits.<sup>164</sup>

### **Relationship of *MEPA* to Existing Environmental Laws**

In an effort to emphasize that such judicial proceedings are not intended to substitute for the established administrative framework, *MEPA* specifically provides that its provisions are supplementary to existing administrative and regulatory procedures.<sup>165</sup> Moreover, the Michigan Supreme Court has held that *MEPA* "does not...merely provide a separate *procedural* route for protection of environmental quality, it also is a source of supplementary *substantive*

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<sup>161</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1202(2).

<sup>162</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1202a.

<sup>163</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1203(3).

<sup>164</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1205(3).

<sup>165</sup>*Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (1979), 691.1206.

environmental law.<sup>166</sup>

Furthermore, there are several important differences between the cause of action under *MEPA* and the common law of public nuisance. These differences has been succinctly summarized by one *MEPA* commentator as follows:

*MEPA* differs from the common law of nuisance in several respects. First, under the common law, the plaintiff must show both that the defendant's conduct is unreasonable and that it substantially interferes with the plaintiff's use and enjoyment of his or her property interests. *MEPA*, on the other hand, protects the environmental rights of all of the state's citizens *in the aggregate*, rather than merely the property rights of each individual. Second, the *MEPA* plaintiff need only establish the threshold likelihood of pollution or impairment, as opposed to actual physical harm or substantial interference with a property interest. Thus, a plaintiff under *MEPA* need not show the certainty of irreparable harm that is required by the nuisance tort. Finally, *MEPA* does not require the reasonableness inquiry and its concomitant examination of the social utility of the defendant's conduct as required under the common law to establish the plaintiff's prima facie nuisance case. Instead, *MEPA* shifts the burden of proof, requiring the defendant to establish the social utility of its conduct as part of its affirmative defence.<sup>167</sup>

The differences between the cause of action under *MEPA* and the common law of nuisance as a preventative means of ensuring environmental protection should not be underestimated. For instance, whereas a plaintiff in a public nuisance action must show that the harm caused to the environment has caused some harm to themselves or their private property in order to obtain relief and thereby secure some protection for the environment, the cause of action under *MEPA* focuses the parties and the court on the harm to the environment itself. As a result, citizens in Michigan are provided with a direct and effective means to protect their environment per se, requiring those who choose to degrade the environment (whether a private party or government) to justify their actions in the courts.

It is interesting to note several amendments which were proposed for *MEPA* during its drafting stage. These proposed amendments were fuelled by the views of those who did not see the necessity of the Act. For instance, the Attorney General of the state of Michigan opposed

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<sup>166</sup>*Michigan State Highway Commission v. Vanderkloot* 392 Mich. 159 at 184, 220 N.W. 2d 416 at 427 (1974) (emphasis added). See also Haynes, *supra.*, note 144 at 602-603.

<sup>167</sup>Slone, *supra.*, note 37 at 323-324.

*MEPA* for three reasons.<sup>168</sup> First, it was argued that the existing environmental laws already provided citizens with a mechanism to file complaints with administrative agencies in an effort to seek compliance with the state's environmental laws. Second, the Michigan Attorney General believed that *MEPA* could lead to disruption of the established and proven methods and procedures of the state administrative agencies and thus would impede administrative efforts in the environmental field. And finally, there was a concern that *MEPA* would encourage frivolous lawsuits.<sup>169</sup> In view of these concerns, the Governor of the state of Michigan recommended several amendments to the proposed Act.<sup>170</sup> These proposed amendments included inserting the word "unreasonable" before the phrase "pollution, impairment or destruction"<sup>171</sup>; inserting the phrase "considering all relevant surrounding circumstances and factors" before the terms "feasible and prudent alternative to the defendant's conduct"; and the deletion of the term "public trust". However, proponents of *MEPA* argued that "an innovative act demands flexibility in its execution and that the courts should at least be allowed the freedom to adopt new and different approaches to individual protection of the environment."<sup>172</sup>

The central motivation for *MEPA* was that administrative agencies dealing with environmental concerns were not responsive to the needs and concerns of the public. Thus, private litigation and the active involvement of the courts in environmental concerns was considered the best means of effecting any significant change in the environmentally significant decisions of administrative agencies. The basis for such extensive citizen involvement is the statutory recognition of the public trust doctrine and the right of each citizen to actively enforce the environmental obligations imposed by this doctrine on government. The citizens of Michigan are also empowered to directly attack environmentally destructive activities of private parties

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<sup>168</sup>See, Note, "Michigan Environmental Protection Act" (Winter 1970) U. Mich. J. L. R. 358 at 362.

<sup>169</sup>There is a built-in safeguard against frivolous lawsuits being brought under *MEPA*; the provision in *MEPA* authorizing the court to require the plaintiff to post a surety bond or cash of up to \$500.

<sup>170</sup>See, *supra.*, note 168 at 363.

<sup>171</sup>See, *ibid.* The author indicates that the argument for the insertion of the word "unreasonable" was primarily a political argument, rather than a legal argument.

<sup>172</sup>*Supra.*, note 168 at 364.

should the government fail to do so. The result of citizen initiative under *MEPA* has been to prod government into acting to protect the environment and to fulfil its environmental protection responsibilities. The environmental rights afforded by *MEPA* have provided the Michigan government with the incentive to strengthen its environmental protection efforts. The legislation has focused the Michigan government and its administrative agencies on its fiduciary obligation to accord the environment primary concern. *MEPA* has been used by Michigan citizens against government for apparent breaches of its public trust duties and has been used by the Michigan government to bolster its environmental protection efforts by providing the government with a means for resisting the temptation to sacrifice environmental quality in favour of short-term and narrow economic interests. The threat of a suit being brought against government by private citizens has served to provide the Michigan government with a basis from which to resist the temptation to give into efforts by polluters to avoid protecting the environment.

## 5. Minnesota<sup>173</sup>

As indicated, *MEPA* became the model for subsequent environmental rights legislation in a number of other American states. Minnesota followed Michigan's lead with the enactment of the *Minnesota Environmental Rights Act*.<sup>174</sup> *MERA* similarly extends the ability of private individuals and groups to maintain an action to protect the environment by giving standing to:

[a]ny person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within

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<sup>173</sup>The *Minnesota Environmental Rights Act* gives a variety of rights to the residents of Minnesota, including the right to seek judicial review of state agency actions and a citizen suit law that gives the right to sue any person who violates an environmental law or causes harm to the environment. See generally, "Note: The Minnesota Environmental Rights Act" (1972) 56 Minnesota L. Rev. 575.

<sup>174</sup>*Minnesota Environmental Rights Act*, Minn. Stat. Ann. 116B.01-116B.13 (West 1977, Supp. 1985) [hereinafter *MERA*].

the state...<sup>175</sup>

Despite some variation in wording, this provision of *MERA* is comparable to section 1202(1) of *MEPA* in terms of the expansion of standing to sue to protect the environment from pollution, impairment or destruction.

*MERA* authorizes four types of actions through which the environment can be protected. First, *MERA* provides for actions to enforce existing environmental quality standards and regulations.<sup>176</sup> Second, it allows actions to enjoin conduct which materially adversely affects the environment.<sup>177</sup> Third, *MERA* provides for actions involving intervention into administrative proceedings or judicial review of administrative proceedings where the conduct at issue is alleged to have caused pollution.<sup>178</sup> Finally, *MERA* allows for actions challenging the adequacy of existing state environmental quality standards or regulations<sup>179</sup> (i.e., actions against state agencies challenging the adequacy of environmental quality standards and permits issued by them). In each case the plaintiff must initially make out a prima facie showing that his contention has merit. Then, in most cases, the court must remit to the appropriate agency, if any, while still retaining jurisdiction over the case. If the court finally concludes that the plaintiff has discharged her burden of proof and that the defendant has not satisfactorily established a defence under the Act, the court has several options. The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.<sup>180</sup>

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<sup>175</sup>Minn. Stat. 116B.03 (1) . With one minor exception, sections 116B.09(1) and 116B.10(1) of *MERA* also contain this standing provision. The only difference is that, while section 116B.03(1) begins with "any person," those two sections begin with "any natural person." This difference is completely irrelevant, however, because the definition of "person" contained in section 116B.02(2) includes "any natural person."

<sup>176</sup>Minn. Stat. 116B.02(5), 116B.03 (1).

<sup>177</sup>Minn. Stat. 116B.02(5), 116B.03 (1).

<sup>178</sup>Minn. Stat., 116B.09 (1).

<sup>179</sup>Minn. Stat. 116B.10(1).

<sup>180</sup>Minn. Stat. 116B.07.

Several key differences between *MEPA* and *MERA* can be identified. First, although *MEPA* explicitly refers to the public trust doctrine, it is conspicuously absent from *MERA*. In contrast to *MEPA*, the purpose section in *MERA* provides as follows:

**PURPOSE.** The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.<sup>181</sup>

Thus, rather than using the language of public trust, the Minnesota legislature substituted the notion that it is the responsibility of each individual to conduct themselves in such a way so as to protect, preserve and enhance the environment for the benefit of present and future generations. It cannot be denied that the explicit recognition of the responsibility of each individual for environmental protection is useful. However, the use of the public trust doctrine brings into play the fact that primary responsibility for environmental protection should rest with government, and that the public should be given rights to enforce that responsibility. In the absence of the public trust doctrine, government accountability for environmentally harmful decisions is weaker and therefore the public rights provided are suboptimal.

A second key distinction between *MEPA* and *MERA* is that *MERA* includes explicit statements which indicate that "economic considerations alone shall not constitute a defence under the Act"<sup>182</sup> and that "economic considerations alone shall not justify conduct which does or is likely to impair, pollute or destroy the air, water, land, or other natural resources located within the state."<sup>183</sup> It can be argued that statements such as these are necessary due to the

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<sup>181</sup>Minn. Stat. 116B.01.

<sup>182</sup>Minn. Stat. 116B.04.

<sup>183</sup>Minn. Stat. 116B.09 (2).

absence of the public trust doctrine. Implicit in the public trust doctrine is the notion that generally government should not make environmental decisions which transform natural resources from broad public uses to narrow private uses. To the extent that narrow private interests often emphasize economic considerations as justification for environmentally harmful conduct, these statements in *MERA* direct decision makers to have regard to a broader range of considerations in order to justify environmental harm. In a sense, statements like these may appear as alternatives to the use of the public trust doctrine in environmental decision-making. However, the historical roots of the public trust doctrine and its potential for expansion, combined with its legal enforceability makes the doctrine a superior choice to constrain government's behaviour over a mere statement that "economic considerations alone shall not justify conduct" that pollutes, impairs or destroys the environment.

## **6. Conclusion**

The above survey of the environmental rights enactments in Quebec and the Northwest Territories illustrates that environmental rights are not very developed in these Canadian jurisdictions, leaving the public with little power to protect their environment and to hold the government accountable to its fiduciary duty to protect the environment. In contrast, the experience with environmental rights in Michigan, based on the public trust doctrine, has empowered its citizens to be effective participants in environmental protection. Furthermore, the environmental rights enactment in Michigan has provided the Michigan government with the leverage and incentives to ensure that it fulfils its fiduciary obligations to protect the environment.

The next chapter will examine the experience with environmental rights in Ontario and the "environmental rights" provided to the citizens of Ontario to protect their environment under the Ontario *EBR*.

## CHAPTER IV

### ENVIRONMENTAL RIGHTS IN ONTARIO

#### 1. History of Environmental Law in Ontario

Environmental management in Ontario began in 1956 with the creation of the Ontario Water Resources Commission. The OWRC was created to establish, monitor and maintain sewage treatment and water supply plants across Ontario and to ensure that such works conformed to government standards. In 1958 the *Ontario Water Resources Act* was enacted. In 1971, the *Environmental Protection Act* was passed. In 1972, the Ministry of Environment replaced the OWRC and assumed a mandate to protect the natural environment from a broad range of potentially harmful activities, including air emissions and waste disposal sites.

Early environmental regulation was characterized by voluntary abatement of environmentally harmful activity. Typically, government and industry negotiated the parameters of the requisite environmental controls behind closed doors, without any public involvement. At that time “few recognized that the consequences of harm to the environment could be as pervasive and serious as they are now understood to be in the 1990’s.”<sup>184</sup> Consequently, as public attitudes toward environmental harm changed, “the public demanded a greater role in environmental protection, stronger environmental laws, and better enforcement of those laws.”<sup>185</sup> An important aspect of these developments was the growing lack of tolerance for private closed door decision-making between government and industry.

However, despite the important developments made in environmental law since 1956, many fundamental deficiencies remained. Prior to the enactment of the Ontario *EBR*, the broader

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<sup>184</sup>*Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Ministry of the Environment, July 1992) [hereinafter *EBR Task Force Report*] at 6.

<sup>185</sup>*EBR Task Force Report*, *ibid.*, at 5.

issues of public participation in environmental decision-making, government accountability for the environment and effective public access to justice to protect the environment for its own sake were viewed as pervasive fundamental deficiencies which could no longer be ignored.

## 2. Legislative History of Environmental Rights in Ontario

The original conception of an “environmental bill of rights” and its essential components was articulated by David Estrin and John Swaigen in their first edition to *Environment on Trial*<sup>186</sup> in 1974. Over 20 years have passed since then and yet “the pressure to develop such a [law] has had a direct and indirect influence on a whole array of environmental legislation”<sup>187</sup> including standing, environmental impact assessment, access to information, public participation in standard setting, class actions, costs of defending the environment, restrictions on agency discretion and judicial review. However, despite these changes, the ability of members of the public to directly protect their environment was still fundamentally deficient.

## 3. The Ontario Environmental Bill of Rights Task Force

In December 1990 an Advisory Committee on the Ontario Environmental Bill of Rights was established by the then Minister of Environment, Ruth Grier. The Advisory Committee was comprised of 26 organizations and consisted of representatives from all major segments of society including labour, business, agriculture, industry, environmental groups, the First Nations, health and legal advisers, municipalities, and expert staff from various ministries. The Advisory Committee was formed “to examine the basic principles of the Environmental Bill of Rights and to suggest ways that they could be applied in Ontario.”<sup>188</sup> The general public was given an opportunity to provide written submissions to the Advisory Committee on the goals an

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<sup>186</sup>D. Estrin and J. Swaigen, *Environment on Trial* (Toronto: Butterworths, 1974).

<sup>187</sup>P. Muldoon and R. Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery Publications Limited, 1995) at 11.

<sup>188</sup>EBR Task Force Report, *supra.*, note 184 at 1.

environmental bill of rights should accomplish. Over 350 written submissions were received by the Ministry of the Environment and made available to the Advisory Committee. These written submissions were said to have raised important questions requiring further consideration and provided the basis for the realization that there were important choices to be faced in the actual design of the legislation.

Working concurrently with the Advisory Committee was an Interministerial Committee formulated of representatives of the Legal and Policy Branches of various ministries which would potentially be affected by the legislation, including the Ministries of Environment, Natural Resources, Northern Development and Mines, Energy, Agriculture and Food, and Municipal Affairs. This committee considered what impact various drafting options would have on existing legislation, what needs should be addressed by the Ontario *EBR* and potential financial impacts of various principles to be included in the *EBR*.<sup>189</sup> The Advisory Committee completed its work in April 1991.

On October 1, 1991, Ontario's Minister of the Environment, Ruth Grier, announced the next stage in the development of the Ontario *EBR*, the creation of the Task Force on the Environmental Bill of Rights. "The Task Force of the Ontario Environmental Bill of Rights worked between September 1991 and June of 1992 to develop a unanimous consensus<sup>190</sup> on the content of an Environmental Bill of Rights for Ontario."<sup>191</sup> The *EBR* Task Force consisted of the Deputy Minister of the Environment, legal advisors from government and the private sector, representatives of business, and representatives of environmental groups.<sup>192</sup> The Task Force was assigned the responsibility of undertaking a detailed and careful drafting of the provisions of the *EBR*, which had to be interrelated with other existing pieces of provincial legislation, and to

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<sup>189</sup>See D. Saxe, "Development of Ontario's Environmental Bill of Rights" from *National Issues in Environmental Law*, Toronto, November 15, 1991.

<sup>190</sup>It is argued that this mandate for consensus constrained the work of the *EBR* Task Force in fundamental ways.

<sup>191</sup>*EBR* Task Force Report, *supra.*, note 184 at i. According to the *EBR* Task Force Report, the *EBR* Task Force met on 41 occasions during the period from September 1991 to June 1992. See *EBR* Task Force Report, *supra.*, note 182 at 4.

<sup>192</sup>See *EBR* Task Force Report, *supra.*, note 184, Appendix VI.

advise on the financial and legal implications of the EBR.

When the EBR Task Force began its work it was aware of the "environmental bills of rights" that had already been enacted in other jurisdictions such as the Northwest Territories, and the states of Michigan and Minnesota. Since these enactments varied significantly, the EBR Task Force did not use them as a starting point but rather sought to develop legislative protection that met the unique needs of Ontario in its search for an EBR for Ontario.<sup>193</sup>

The Task Force stated that "over the last decade, public concern about the environment has become a top priority as society assesses the harm to the environment that has occurred."<sup>194</sup> However, they indicated that concerned citizens have felt unable to affect "the system" that makes important environmental decisions each day. Not only did concerned citizens feel powerless to act independently of government to protect the environment but also, the Task Force acknowledged "a growing lack of confidence in government to meet...the needs of those who seek to protect the environment."<sup>195</sup>

The EBR Task Force developed Terms of Reference which provided the framework for their deliberations. According to the Terms of Reference of the Task Force on the Ontario Environmental Bill of Rights, the Ontario *EBR* was to recognize and be based upon the following policy objectives and principles:

1. the public's right to a healthy environment;
2. the enforcement of this right through improved access to the courts and/or tribunals, including an enhanced right to sue polluters;
3. increased public participation in environmental decision-making by government;
4. increased government responsibility and accountability for the environment; and
5. greater protection for employees who "blow the whistle" on polluting

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<sup>193</sup>*Ibid.* at i.

<sup>194</sup>*Ibid.*

<sup>195</sup>*Ibid.*

employers.<sup>196</sup>

The mandate of the Task Force was to design an EBR "that delivers the 'tools'<sup>197</sup> that would assist in achieving the principles and objectives"<sup>198</sup> identified in the Task Force's Terms of Reference. The approach taken by the Task Force was to find the specific tools, from the list of available tools, which could achieve the principles and objectives contained in its Terms of Reference.<sup>199</sup>

Beginning in 1979, various Private Members' Bills proposing an environmental bill of rights had been previously introduced into the Ontario Legislature. At the time the Task Force

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<sup>196</sup>EBR Task Force Report, *supra.*, note 184 at 2.

<sup>197</sup>The Task Force Report included a list of 12 tools which could be incorporated into an Environmental Bill of Rights. The list was as follows:

1. There should be a clearly articulated definition of "environment";
2. The creation of a duty of government to protect "public resources";
3. A citizen's right to request an investigation and report which would be shared with the person who requested the investigation and the person investigated;
4. An expanded civil cause of action for environmental harm;
5. A right of standing for environmental claims which goes beyond the recommendations of the Attorney General's Advisory Committee on Standing;
6. A private right to compel government instruments and regulations related to the environment to be made, enforced or set aside;
7. Expanded provisions for judicial review of government action;
8. A public right to participation in the issuance of instruments and the making of regulations, including the right to notice, comment and hearing;
9. Improved public access to information upon which environmental decisions are based;
10. Extension of existing statutory protection for whistle-blowers to other environmental offenses;
11. Encouragement of non-litigious methods of dispute resolution;
12. Exemption of certain types of environmental harm from any ultimate limitation period proposed in the Ministry of the Attorney General consultation draft of the General Limitations Act.

EBR Task Force Report, *supra.*, note 184 at 3.

<sup>198</sup>EBR Task Force Report, *supra.*, note 184 at 3.

<sup>199</sup>As part of its work, the EBR Task Force undertook an examination of those areas of environmental law in Ontario that were in need of reform and which the EBR might address. However, the Task Force's examination of the then present law was to be "measured against the policy objectives...established for recognition and inclusion in the Environmental Bill of Rights". EBR Task Force Report, *supra.*, note 184 at 8. Furthermore, "The Task Force did not seek to identify each and every discrete area of environmental law which may be viewed as deficient by various members of the public." EBR Task Force Report, *supra.*, note 184 at 8. Where specific environmental law reform efforts were already being undertaken by government, the EBR Task Force determined not to duplicate or undermine such efforts.

was considering its work, Bill 12 was the most recent of these Private Members' Bills.<sup>200</sup> The Task Force was aware of these previous Private Members' Bills and determined that although they were considered important, they were not determinative of the direction or content of any Environmental Bill of Rights to be designed by the Task Force.

In terms of the scope of the Ontario *EBR*, the Task Force considered that the overriding objective of the *EBR* was to be the protection of the "natural" environment.<sup>201</sup> As a result, the social and cultural environment were not considered to be relevant matters for inclusion in the Ontario *EBR*.

With respect to the issue concerning the rights to be provided in the *EBR*, a determination had to be made as to whether the *EBR* should provide a substantive right to environmental quality or provide procedural rights enabling the public to act to protect the environment in specified ways.<sup>202</sup>

The Task Force considered the issue of responsibility for the environment and concluded

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<sup>200</sup>*Ontario Environmental Rights Act*, 1989, Private Member's Bill 12, 1989 (34th Leg. 2d Sess.)

<sup>201</sup>Environmental legislation in Ontario presently contains two definitions of "environment". The *Environmental Protection Act* uses a restricted definition of "air, lands and waters" whereas the *Environmental Assessment Act* uses a broad definition of environment which includes the economic, social, cultural, historic and aesthetic aspects of the environment as well as the built environment.

Bill 12, the most recent of the Private Members' Bills to propose an Environmental Bill of Rights included the broad definition of environment. The Ontario *EBR* contains the narrow definition of environment rather than the more inclusive definition. The reason for this choice related to concern that a very wide definition of environment would be over-inclusive and subjective and that the subjective elements of the definition of "environment" could be problematic if used to form the basis of liability. The general view was that a narrower definition of "environment" would be better suited to meet the "ecocentric" focus of the Ontario *EBR* and it was noted that this definition of "environment" would be similar to that adopted by the Northwest Territories in its *ERA*. See D. Saxe, *supra.*, note 189 at 5-6.

<sup>202</sup>See Saxe, *supra.*, note 189 at 6. According to Saxe, environmentalists generally favoured a substantive right to environmental quality whose content and remedies would be determined by the courts in much the same manner as the *Charter of Rights and Freedoms* operates, while those representing business and agriculture generally favoured the provision of specific procedural rights. According to Saxe, representatives of business and agriculture felt that such an approach would provide more certainty. The fact that the Ontario *EBR* does not contain an explicit substantive right to environmental quality, but rather merely tinkers with "procedure" indicates the powerful position these interests continue to exert over environmental concerns in Ontario. The choice made regarding this fundamentally important decision severely weakens the ability of the Ontario *EBR* to implement the principles and objectives it was designed to achieve.

that “the public and the government share responsibility”<sup>203</sup> for protection of the environment. Despite this shared responsibility the Task Force recognized that “the government, by virtue of the role that it plays in regulating life in Ontario, and by virtue of our democratic traditions, must have primary responsibility for protection of the environment and our public resources.”<sup>204</sup>

In terms of the actual design of an environmental bill of rights for Ontario, the Task Force considered the issue of government accountability, namely, “how to provide the public with the means to hold government accountable for the decisions it makes in meeting its primary responsibility for environmental protection.”<sup>205</sup> The inclusion of government accountability mechanisms was expected to improve public confidence in environmental decision-making by government.<sup>206</sup>

The Task Force developed three main methods “for providing the opportunity for

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<sup>203</sup>EBR Task Force Report, *supra.*, note 184 at ii.

<sup>204</sup>*Ibid.*

<sup>205</sup>*Ibid.*

<sup>206</sup>An important issue related to the concern for government accountability for the environment involved the public trust doctrine. According to Saxe, the issue of whether the Ontario *EBR* should include the public trust doctrine was one of the most difficult legal issues faced during the drafting of the law. The comments made by Saxe on this issue are quite puzzling. She states:

The [public trust] doctrine is relatively novel in Canadian jurisprudence and would have the effect of making the Ontario government a trustee of the province's public lands, waters and natural resources. The government could then be considered to be accountable to any citizen in the province for the exercise of a fiduciary obligation to “conserve and maintain” these aspects of the environment.

Saxe, *supra.*, note 189 at 7. She continues by stating that the public trust doctrine is not only novel in Canada but is also uncertain and “has the potential to significantly enlarge government liability or accountability.” Saxe, *supra.*, note 189 at 7. It was felt that this enlarged government liability or accountability resulting from the public trust doctrine “would impair government's ability to govern or paralyse government decision making.” Saxe, *supra.*, note 189 at 7. In any event, there were other “more traditional methods” for achieving the objective of government accountability. It was felt that these “traditional methods” were better suited to achieve the government accountability objective.

Given the statement made by Saxe above regarding the effect of the public trust doctrine to ensure government accountability, combined with the fact that the existence of the public trust doctrine in other jurisdictions has not led to government paralysis, it is highly questionable why this approach was not adopted for inclusion in the Ontario *EBR*. Again, the balance of power did not favour the environmentalists' position. For, as Saxe indicates, “Land use environmental groups have suggested that the [public trust] doctrine was an essential aspect of the Bill if government was to be made more accountable for its decisions affecting the use of natural resources and development.”

In light of the above, there is a strong basis to criticize the approach taken by the EBR Task Force and the provisions of the Ontario *EBR* itself on the issue of government accountability.

government accountability for environmental decision-making".<sup>207</sup> The first method for improving government accountability for environmental decisions was to increase public participation in significant environmental decision-making by government. The second method was to increase access to the justice system to provide the public with a role in protecting the environment and public resources. The third method was to increase protection for employees who report environmental harm in their workplace.<sup>208</sup>

The Task Force believed that the EBR could do much more than increase government accountability for environmental decision-making. In particular, the Task Force believed that the EBR could have an impact on the content of those decisions. In order to achieve this result, the Task Force recommended that "the very purposes of the EBR be integrated in environmental decision making by government."<sup>209</sup> The provision for the Statements of Environmental Values was the means chosen to implement this recommendation.

The Task Force determined that the purposes of the legislation would be to protect, conserve and where reasonable restore the integrity of the natural environment and to provide a sustainable environment for the benefit of present and future generations.<sup>210</sup> These purposes include prevention, reduction and elimination of the use, generation and release of pollutants which threaten the integrity of the environment, as well as the protection and conservation of biological, ecological and genetic diversity.

The Task Force was faced with the challenge of how to integrate these purposes, specific to the Ontario *EBR*, with the existing social, economic and scientific considerations already being used in environmental decision-making by government. The Task Force proposed a three step process designed to achieve this requisite integration. The primary mechanism expected to achieve this result was the Statement of Environmental Values which each ministry making significant environmental decisions would be required to develop in consultation with the public.

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<sup>207</sup>EBR Task Force Report, *supra.*, note 184 at ii.

<sup>208</sup>*Ibid.*

<sup>209</sup>*Ibid.* at iii.

<sup>210</sup>*Ibid.*

The Statements of Environmental Values were to apply the purposes of the Ontario *EBR* to that Ministry's environmental decision-making and to describe how the Ontario *EBR* purposes could be integrated with social, economic and scientific considerations.<sup>211</sup> Once finalized, the Statement of Environmental Values were to be used by the ministry "to shape the development of significant environmental policies, regulations and instruments by that ministry."<sup>212</sup> The Task Force expected that the actual process of developing individual Statements of Environmental Value for each ministry making significant environmental decisions would "create a new attitude within government for environmental decision making--an attitude that mandates a consideration of the purposes of the *EBR*, along with other factors, when making decisions that will affect the environment."<sup>213</sup> However, as will be discussed further in Chapter V, it is questionable whether the development of Statements of Environmental Values will have this desired effect on government environmental decision-making. Actual experience with the finalized Statements of Environmental Values shows them to be weak and vaguely drafted. In this sense, this mechanism has not created a "new attitude" within government with respect to the environment. Furthermore, the Statements of Environmental Values are in the nature of guidelines rather than law. Therefore, the public has no legally enforceable rights with respect to the Statements of Environmental Values. The public has to rely on the Environmental Commissioner to scrutinize both the development and application of the Statements of Environmental Values to all aspects environmental decision-making by government.

With respect to the issue of government accountability for environmental decisions, the Task Force recognized the link between public participation in environmental decision-making and government accountability for these decisions. The Task Force believed that government accountability could be achieved, *inter alia*, by providing the public with an opportunity to participate in the decision-making. The Task Force contemplated that such public participation could be achieved through the inclusion of expanded "due process" or "procedural" rights

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<sup>211</sup>*Ibid.*

<sup>212</sup>*Ibid.*

<sup>213</sup>*EBR* Task Force Report, *supra.*, note 184 at iv.

including notice of the government's intention to make a significant environmental decision, an opportunity to comment on or participate in the making of the decision, and notice of the decision itself once made. An Environmental Registry was determined to be the mechanism through which the public could receive notice of the government's intention to make an environmentally significant decision, be given a specific and timely opportunity to comment on or participate in the decision and where the public could receive notice of the finalized decisions. According to the Task Force "through this process the public will be able to compare a particular Ministry's Statement of Environmental Values with significant environmental decisions as they are actually made. Over time, the public will judge whether a particular government has infused its decision making with the purposes of the EBR."<sup>214</sup>

The Statement of Environmental Values can be viewed as the benchmark against which the public is to evaluate the environmental soundness of significant environmental decisions taken by government. If the Statements of Environmental Values are not drafted properly, which experience shows they were not, then the utility of this mechanism to ensure government accountability is weak at best and at worst effectively non-existent. In contrast to other mechanisms for government accountability, specifically the public trust doctrine, the Statements of Environmental Values are wholly inadequate. However, real government accountability for environmental decision-making is vital, given the seriousness of the environmental problems confronting us and the important and powerful position government holds in dealing with these problems.

Additional government accountability mechanisms developed by the Task Force included the provision of an Application for Review. The Application for Review was intended to deal with three related matters; enforcement of existing environmental laws, the need to review existing laws or the need to enact new ones. Thus, the Application for Review is first a "specific standardized procedure by which [the public] may trigger an investigation by government of suspected environmental harm."<sup>215</sup> In this way, the public has a means of requiring government

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<sup>214</sup>*Ibid.*

<sup>215</sup>*Ibid.*

to enforce the environmental laws already on the books. The second aspect to the Application for Review relates to the adequacy of existing laws and provides the public with "an opportunity to urge government into a review of its existing environmental policies, regulations and instruments."<sup>216</sup> The third aspect of the Application for Review provides the public with "the power to formally request that the government consider the establishment of new policies, regulations or instruments where needed to protect the environment."<sup>217</sup>

The Application for Review needs to be examined in more detail. This mechanism does not provide the public with a right to compel government to do anything. All it is is a right to request that government do something. This aspect of the Ontario *EBR* provides the public with no rights which can compel the government to take any specific action, and therefore it is not to be considered a substantive right. In fact, the Application for Review is best viewed as a "procedural" right. With the Application for Review the public has a formal procedure through which it can let its views be known to government when the government proposes to make a significant environmental decision. However, the Minister responsible for that decision retains complete discretion in deciding what to do in the face of such a request. Furthermore, the decision of the Minister whether to undertake an actual review of breaches of existing environmental laws, the adequacy of those laws or the need for new laws remains completely within the Minister's discretion. If the Minister determines that such a request does not require further action, the public must be satisfied with that determination and does not have recourse to the courts to review the environmental soundness of the Minister's decision.

According to the Task Force, "[p]rotection of the environment by government entails a special responsibility to protect the Province's public resources which the government essentially hold for the benefit of the residents of Ontario."<sup>218</sup> For the purposes of the Ontario *EBR*, public resources include air, public lands and water, including groundwater, as well as plant and animal life associated with them. Although the province's public resources are already given protection

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<sup>216</sup>EBR Task Force Report, *supra.*, note 184 at v.

<sup>217</sup>*Ibid.* at iv.

<sup>218</sup>*Ibid.* at v.

through existing environmental legislation<sup>219</sup> the Task Force recommended that the public (residents of Ontario) be specifically empowered “to protect public resources in the courts when the government does not meet its responsibility.”<sup>220</sup> The Ontario *EBR* includes a procedure which is a condition precedent to the maintenance of a civil action by members of the public to protect public resources. The Task Force took the position that the public should only have recourse to the courts where the government has failed to do its job. Thus, the government needs to be given a chance to fulfil its responsibility to protect the environment. That chance is provided through the procedure of an Application for Investigation.

By using the Application for Investigation, the public can request that the government investigate suspected environmental harm to a public resource. The relevant Minister has a legal duty to consider such requests and respond according to the time frames developed in the Ontario *EBR*. It is only where the government has failed to respond in a timely fashion or has not provided a “reasonable” response that individual residents are able to commence proceedings in the civil courts to obtain an injunction to stop the harm that is occurring or is imminent, and to obtain an order from the court that interested parties negotiate a plan to restore the public resource.<sup>221</sup>

There are two distinct concepts which relate to the issue of government accountability. One is the judicial accountability model, characteristic of the law in Michigan, whereby the courts are relied upon to ensure that government is fulfilling its primary responsibility to protect the environment. The implementation of such a model would require expanding the role of the courts in the effort to protect the environment, providing a means to hold government accountable for its environmental decision and to ensure that government’s decisions are environmentally sound. A second model is what has been termed the political accountability model. The Task Force chose

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<sup>219</sup>See for example, *Environmental Protection Act*, R.S.O. 1990, c. E-19; *Environmental Assessment Act*, R.S.O. 1990, c. E-18; *Ontario Water Resources Act*, R.S.O. 1990, c. O-40; and the *Provincial Parks Act*, R.S.O. 1990, c. P-34.

<sup>220</sup>EBR Task Force Report, *supra.*, note 184 at v.

<sup>221</sup>The Application for Investigation is a prerequisite to bringing an action under the Ontario *EBR* except in circumstances where the delay in waiting for the outcome of an Application for Investigation would lead to significant harm or serious risk of harm to the environment, in which case an action can be commenced without first making an Application for Investigation.

this second model as the “foundation of the proposed Environmental Bill of Rights.”<sup>222</sup> As a result, the Task Force recommended the creation of the Office of the Environmental Commissioner. The Environmental Commissioner is to have the responsibility to oversee the implementation and effectiveness of the Ontario *EBR* and is to report to the Legislature on these and related matters. The Office of the Environmental Commissioner and the reports to the Legislature are expected to provide a degree of political accountability. In other words, if the government fails to fulfil its responsibilities under the Ontario *EBR*, the Environmental Commissioner is expected to make that failure known in her report. When the contents of the report are revealed before the Legislature, it is expected that the government will be “embarrassed” into fulfilling its responsibilities for protecting the environment.<sup>223</sup>

The Task Force concluded that the Ontario *EBR* is to recognize the government's primary responsibility for protection of the environment in Ontario and as a result is to provide the public with the means to hold government accountable for that responsibility. In order to achieve government accountability the Task Force determined that there was a need to incorporate the purposes of the Ontario *EBR* into government environmental decision making; provide specific public participation in environmental decision making; and to increase access to the justice system to protect our environment and public resources.

#### **4. The Deficiencies in Environmental Law and Regulation in Ontario**

The Task Force undertook an examination of the then existing environmental laws and identified several key deficiencies which continued to exist despite the major advances made in environmental protection in Ontario in the last 40 years.

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<sup>222</sup>EBR Task Force Report, *supra.*, note 184 at vi.

<sup>223</sup>The Environmental Commissioner has tabled several special reports to the Legislature since her appointment in June 1995. Her first report related to the appalling inadequacies in the Statements of Environmental Values developed by the various ministries to which the Ontario *EBR* applies. Another report openly criticized the Ontario government for blatantly ignoring the requirements and obligations imposed by the Act, by exempting the proposal to make wholesale regulatory changes from the notice and comment requirements of the Ontario *EBR*. It appears highly unlikely that any embarrassment the reports of the Environmental Commissioner may create will be enough to pressure the government to change its approach to its responsibilities and obligations under the Ontario *EBR*.

**(a) Lack of Adequate Public Participation**

The Task Force acknowledged that the public did not have a uniform, clear and predictable right to participate in the myriad of environmental decisions made by government in Ontario. Two important areas examined included the opportunities for public participation in the enforcement of existing environmental laws and the opportunities for public participation in improving existing environmental laws or the development of new environmental laws.

There are several persuasive arguments in favour of ensuring greater public participation in environmental decision-making by government.<sup>224</sup> The importance of public participation in the environmental context, compared with decision-making in other contexts, is underscored by the fact that the environmentally related decisions ultimately have an affect on everyone in a vital way. The decisions we make with respect to the environment have a profound impact on the choices we will face in the future and the world we will live in. By virtue of its position in our democratic society, government has primary responsibility for environmental protection. However, although government has primary responsibility to protect the environment, the public also has responsibility to ensure environmental protection. However, without the appropriate mechanisms in place to ensure public participation, the public is effectively left out of the environmental decision-making process.

As indicated in the Chapter II, the basic justification for public participation in environmental decision-making is based on the notion that those who must bear the risks should have a say in the matter. In addition, although the protection of the environment is matter of vital public interest, in today's society it is not clear that the government is capable of fairly and effectively representing the public interest. In fact, the public itself should be considered the best vindicator of the public interest. The idea that the government is not capable of adequately representing the public interest in environmental decision-making is based on a recognition that there is not one single public interest but a plurality of public interests and that government alone

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<sup>224</sup>For a discussion of the justifications for enhanced public participation in environmental decision-making by government see text *infra*. at 21-22.

cannot effectively or fairly vindicate them all. Furthermore, this conclusion is based on the recognition that government itself has its own agenda, and is subject to pressure from many competing interests. Most importantly, the government is subject to “capture” by those whom they regulate. Because of these facts, it is argued that the public must be more actively involved in all environmental decision-making processes in order to prevent the emasculation of the public interest in environmental protection in favour of other competing interests which the government is pressured to vindicate. In essence, the government is subject to capture by those whom it regulates. This fact provides an important rationale for providing the public with the means to vindicate the public interest in the protection of the environment. A further argument in favour of public participation is that where decision-makers are made aware of the diversity of views relating to the decision to be made the resulting decisions will be better, or more environmentally balanced.

**(b) Lack of Adequate Access to the Courts**

The Terms of Reference for the Task Force on the Ontario Environmental Bill of Rights expressly provided that the Ontario *EBR* should be based on a number of policy objectives and principles, including: the public’s right to a healthy environment; the enforcement of that right through improved access to the courts and tribunals, including an enhanced right to sue polluters; increased public participation in environmental decision making by government; and increased government responsibility and accountability for the environment.<sup>225</sup>

The Terms of Reference also listed a number of potential tools which could be incorporated into the Ontario *EBR* to achieve these objectives. These tools included an expanded civil cause of action for environmental harm; an expanded right to standing for environmental claims; and expanded provisions for judicial review of government action.<sup>226</sup>

Following a review of these and other options, the Task Force ultimately recommended

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<sup>225</sup>ERR Task Force Report, *supra.*, note 184 at 2.

<sup>226</sup>*Ibid.* at 3.

the inclusion of mechanisms to ensure legal accountability for environmental misconduct. In particular, the Task Force's draft included: a new cause of action to protect public resources; reform of the rules of standing with respect to public nuisances causing environmental harm; and opportunities for judicial review of certain governmental activities.<sup>227</sup> Following extensive public consultation on the draft legislation, the Ontario government enacted the Ontario *EBR*.

## 5. The Legislation

### (a) The Cause of Action: Harm to Public Resources

The Ontario *EBR* creates a new cause of action which permits Ontario residents to sue persons who cause significant harm to public resources in contravention of certain Acts, regulations or instruments. This cause of action may also be used in an anticipatory manner where the significant harm, or the contravention, is imminent but has not yet occurred. The action is to be commenced in the Ontario Court (General Division), and the civil burden of proof is on the plaintiff to prove her or his case on a balance of probabilities.<sup>228</sup> The normal rules of court apply to section 84 actions.<sup>229</sup> In particular, section 84(1) of the Ontario *EBR* provides as follows:

Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.

However, as will be described below, there are conditions precedent and preliminary considerations which must be taken into account before a section 84 action can be commenced

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<sup>227</sup>*Ibid.* at 59-60 and 91-111.

<sup>228</sup>Ontario *EBR*, s. 84(8).

<sup>229</sup>Ontario *EBR*, s. 84(10).

by a public interest plaintiff.<sup>230</sup> These preconditions impede access to the courts to protect the environment as is contemplated by a “true” environmental bill of rights.

### Conditions Precedent and Preliminary Considerations

In order to bring a section 84 action, the plaintiff must be able to prove an actual or imminent contravention of an Act, regulation or instrument prescribed for the purpose of Part V of the Ontario *EBR*. Part V is the section of the Ontario *EBR* containing provisions which permit Ontario residents to submit an Application for Investigation; specifically, applications requesting governmental investigation of contraventions under prescribed Acts, regulations or instruments.<sup>231</sup>

At the present time, eighteen of the most important environmental statutes in Ontario have been prescribed for the purposes of Part V.<sup>232</sup> Once a prescribed statute is subject to Part V of the Ontario *EBR*, any regulations promulgated pursuant to that statute are also prescribed for the purposes of Part V, and contravention of those regulations can be used to trigger a section 84 action.<sup>233</sup>

“Instruments” are defined under the Ontario *EBR* as “any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation.”<sup>234</sup> Instruments are prescribed for the purposes of Part V if they are considered to be Class I, II and III instruments under the Ontario *EBR*.<sup>235</sup> Thus, a section 84 action can be brought where the plaintiff alleges that a defendant has

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<sup>230</sup>This is in addition to the usual factors which would be considered by any plaintiff prior to commencing litigation including such matters as the likelihood of success, cost risk, and judgment proof defendants.

<sup>231</sup>Ontario *EBR*, ss. 74-81.

<sup>232</sup>O. Reg. 73/94, s. 9. It is worth noting that there are other important environmental statutes, such as the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N-2, and the *Planning Act*, R.S.O. 1990, c. P-13, which are conspicuously absent from the list of prescribed Acts found in O. Reg. 73/94.

<sup>233</sup>O. Reg. 73/94, s. 10.

<sup>234</sup>Ontario *EBR*, s. 1(1).

<sup>235</sup>O. Reg. 73/94, s. 11.

contravened a prescribed Act or regulation or the terms and conditions of a Class I, II or III instrument,<sup>236</sup> provided that “significant” harm to a public resource has occurred or will occur. The instruments which have been prescribed for the purposes of Part V of the Ontario *EBR*, together with their classification, are contained in a regulation to the Act.<sup>237</sup>

A section 84 action only applies to a contravention of an Act, regulation or instrument that occurs after the Act, regulation or instrument is prescribed for the purposes of Part V.<sup>238</sup> The intended effect of this provision is to prevent plaintiffs from pursuing a contravention or environmental harm which has occurred years or decades ago. However, in cases where a contemporary contravention has caused further damage to a public resource previously harmed by the defendant, the Ontario *EBR* does not prevent plaintiffs from commencing a section 84 action to enjoin the recent harm and remediate the public resource. In such cases, the court can address the issue of distinguishing between historic harm and recent harm during the development of an appropriate restoration plan. Further, it should be noted that there is a general two year limitation period governing the commencement of the section 84 action.<sup>239</sup>

### **Significant Harm to a Public Resource**

In addition to having the burden of proving that a contravention has occurred or will imminently occur, a plaintiff in a section 84 action must also prove, on a balance of probabilities, that the contravention has caused, or will imminently cause, “significant harm<sup>240</sup> to a public

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<sup>236</sup>Note that many of the prescribed statutes under the Ontario *EBR* make it an offence not to comply with the terms and conditions of licences, permits, orders or certificates of approval. For example, see section 186 of the *Environmental Protection Act*, R.S.O. 1990, c. E-19.

<sup>237</sup>O. Reg. 681/94.

<sup>238</sup>Ontario *EBR*, s. 83.

<sup>239</sup>Ontario *EBR*, s. 102.

<sup>240</sup>“Harm” is broadly defined in section 1 of the Ontario *EBR* as “any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation.”

resource<sup>241</sup> in Ontario.” It should be noted that the Ontario *EBR* does not attempt to define what constitutes a “significant” harm. As is the case in Michigan under *MEPA*, it will be up to the courts to develop a common law threshold as to what constitutes “significant” harm to a public resource.

### Request for Investigation

In general, a section 84 action cannot be commenced unless the plaintiff has first applied for an investigation under Part V of the Ontario *EBR* and the government's response is not reasonable or is not received in a reasonable period of time.<sup>242</sup> It is also significant that the Ontario *EBR* does not define what is “reasonable” with respect to the content or timing of the government response. The Ontario *EBR* leaves it to the courts to make the determination of “reasonableness” on a case by case basis from which it is expected that some common principles or standards will be developed. For instance, pursuant to section 84(3), when assessing whether a government response was received within a “reasonable time” the court is directed to consider the time frames for the response to an Application for Investigation prescribed in sections 77 to

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<sup>241</sup>“Public resource” is broadly defined in s. 82 of the Ontario *EBR* as:

- (a) air,
- (b) water, not including water in a body the bed of which is privately owned and on which there is no public right of navigation,
- (c) unimproved public land
- (d) any parcel of public land that is larger than five hectares and is used for,
  - (i) recreation,
  - (ii) conservation,
  - (iii) resource extraction,
  - (iv) resource management, or
  - (v) a purpose similar to one mentioned in subclauses (i) to (iv), and
- (e) any plant life, animal life, or ecological system associated with any air, water or land described in clauses (a) to (d).

“Public Land” is defined as land owned by the provincial crown, municipalities, and conservation authorities. Note that s. 1 defines land as including “land covered by water” to ensure that wetlands are protected by the Ontario *EBR*.

<sup>242</sup>Ontario *EBR*, s. 84(2). However, s. 84(6) negates the need to take this preliminary step where the delay in requesting an investigation would result in significant harm or serious risk of significant harm to a public resource.

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There is an important policy objective underlying the preliminary step of requiring a prospective plaintiff to make an Application for Investigation and await the outcome of that request prior to commencing an action under section 84. Since the plaintiff is alleging harm to a public resource, the responsible public agency should be notified and be given the opportunity to take appropriate action. The public agency presumably has the mandate, resources, and interest to pursue the matter, in addition to the government's primary obligation to protect the environment. Thus, it is only where the agency refuses to respond to the request, or has responded in an inadequate and unreasonable fashion, that the plaintiff may elect to proceed with the section 84 action.<sup>243</sup>

### **Exception to the Preliminary Step**

In light of the various requirements associated with applying for investigations under Part V of the Ontario *EBR*, there is a likelihood that it may take time for some investigation requests to be prepared, submitted, investigated, and reported or acted upon by government. Because such delay may threaten a public resource that has been or is being harmed by a contravention or continuing contravention, the Task Force recommended that "a resident should not be required to await the outcome of an Application for Investigation prior to instituting proceedings to protect the public resource."<sup>244</sup> Accordingly, the Ontario *EBR* provides that a plaintiff does not have to file an investigation request where the delay involved would result in "significant harm or serious risk of significant harm to a public resource."<sup>245</sup>

Beyond linking "significant harm" to delay, the Ontario *EBR* contains no explicit criteria as to when a plaintiff can rely upon this exception and avoid the prescribed preliminary steps in section 84 litigation. One commentator has provided some insight on the situations which should

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<sup>243</sup>Muldoon and Lindgren, *supra.*, note 187 at 156.

<sup>244</sup>EBR Task Force Report, *supra.* note 184 at 100.

<sup>245</sup>Ontario *EBR*, s. 84(6).

be considered exceptions to the general rule requiring a plaintiff to request an investigation:

It is arguable, however, that when an actual contravention has caused or continues to cause significant harm to a public resource, the public resource is clearly in jeopardy and the plaintiff should be permitted to commence the action immediately (and perhaps seek pretrial or interim relief) rather than wait several months or more for the government to respond. By any objective standard, a situation that can clearly be regarded as an emergency or a serious occurrence should be capable of being brought to court without delay.<sup>246</sup>

The courts will undoubtedly make the determination as to the appropriate contours of this exception on a case-by-case basis, from which some general principles or standards can be expected to develop.

### Class Proceedings

Section 84(7) of the EBR expressly provides that the s.84 may not be brought as a class proceeding under the *Class Proceedings Act*.<sup>247</sup> Commentators have indicated that the "origin of this provision is somewhat unclear, because previous drafts of the EBR did not include this prohibition."<sup>248</sup> Furthermore, the Task Force was of the view that class proceedings reform was an integral part of an environmental bill of rights.<sup>249</sup>

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<sup>246</sup>Muldoon and Lindgren, *supra.*, note 187 at 158. It has also been pointed out that if the plaintiff intends to rely on this exception when bringing a s. 84 action, she or he must ensure that the relevant facts which give rise to the exception are pleaded carefully and forcefully in the statement of claim. This strategical manoeuvre is important, for otherwise, it may inadvertently provide the defendant(s) with the basis to move to strike out the plaintiff's action on the grounds of non-compliance with s. 84(2). Similarly, the failure to give the government any opportunity to act may lead the Attorney General to seek a stay or dismissal of the action under s. 90 of the Ontario *EBR*.

<sup>247</sup>S.O. 1992, c. C-6.

<sup>248</sup>Muldoon and Lindgren, *supra.*, note 187 at 159.

<sup>249</sup>EBR Task Force Report, *supra.*, note 184 at 90.

### Other Proceedings

Section 84(9) of the EBR provides that the new cause of action does not limit any other right to bring or maintain a proceeding. Therefore, with respect to environmental concerns, a plaintiff is still permitted to bring common law actions, such as nuisance, negligence, trespass, and riparian rights. However, in bringing such claims the plaintiff can elect to include a section 84 action as an alternative claim in the statement of claim. This election may be advisable where a plaintiff is interested in obtaining injunctive relief or restoration of the environment rather than damages.

### Practice and Procedure

Given the underlying broad public interest nature of a section 84 action, the Ontario *EBR* provides extensive requirements regarding notice of the action. For instance, since the Ontario *EBR* binds the Crown,<sup>250</sup> it is possible that the Crown may in some cases be a defendant "if it is responsible for the environmental harm to a public resource."<sup>251</sup>

Section 86 of the Ontario *EBR* provides that the statement of claim is to be served on the Attorney General within 10 days of service on the first defendant.<sup>252</sup> The Task Force provided two reasons for this notice requirement. According to the Task Force:

Any action for harm to a public resource commenced by a resident in these circumstances must be served on the Attorney General to first, alert the government to a claim involving public resources and secondly, to acknowledge the allegation that the government has failed to protect the public resource as evidenced through the lack of or inadequate response to the Application for Investigation by that resident.<sup>253</sup>

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<sup>250</sup>Ontario *EBR*, s. 120.

<sup>251</sup>EBR Task Force Report, *supra.*, note 184 at 98.

<sup>252</sup>Ontario *EBR*, s. 86(1).

<sup>253</sup>EBR Task Force Report, *supra.*, note 184 at 98.

Once the Attorney General has been served with the statement of claim, the Attorney General is entitled to present evidence, make submissions, and undertake appeals.<sup>254</sup>

A plaintiff bringing a section 84 action is required to provide public notice of the action. This is accomplished by giving notice to the Environmental Commissioner. The Environmental Commissioner must promptly place notice of the action on the Environmental Registry established under Part II of the Ontario *EBR*.<sup>255</sup> Furthermore, within thirty days after the close of pleadings, the plaintiff is required to bring a motion to obtain directions from the court with respect to public notice of the action.<sup>256</sup> It is worth noting that the court is empowered to order parties other than the plaintiff to give notice or to fund notice of the section 84 action.<sup>257</sup> In addition, the court is empowered to order any party at any stage in the proceeding "to give any notice that the court considers necessary to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the action."<sup>258</sup> Therefore, it is available to the court to vest the cost and responsibility for giving notice of the action upon the defendant(s).

By virtue of the broad public interest nature of a section 84 action,<sup>259</sup> the Ontario *EBR* empowers the court to permit the participation of a diverse range of interests in the action, as parties or otherwise.<sup>260</sup> This provision is expected to enable other persons to participate in the section 84 action. However, the court has the power to limit both the scope and nature of such

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<sup>254</sup>Ontario *EBR*, s. 86(2).

<sup>255</sup>Ontario *EBR*, ss. 87(1) and 87(2).

<sup>256</sup>Ontario *EBR*, s. 87(3).

<sup>257</sup>Ontario *EBR*, ss. 87(5) and 87(6).

<sup>258</sup>Ontario *EBR*, s. 88.

<sup>259</sup>According to the Task Force, a section 84 action is to be considered as an action brought on behalf of all Ontario residents. Therefore, the provision permitting additional persons to participate in the action is expected to ensure that the court has all interested persons before it, particularly since pursuant to section 99(1) a judgment of the court is binding on all past, present and future residents of Ontario. See *EBR Task Force Report, supra.*, note 184 at 98.

<sup>260</sup>Ontario *EBR*, s. 89(1).

participation through the imposition of terms, including terms as to costs.<sup>261</sup> It is noteworthy that an order enabling additional persons to participate in the section 84 action cannot be made after the court has ordered the parties to negotiate a restoration plan or has made other orders under section 93 of the Ontario *EBR*.<sup>262</sup>

The current right of intervention in court proceedings is found in Rule 12 of the Rules of Civil Procedure. However, the Ontario *EBR* appears to envision a broader right of intervention pursuant to the provision in the Ontario *EBR* permitting additional persons to participate in the section 84 action for the purpose of representing "private and public interests" related to the action. As one commentator has noted, "[i]t remains to be seen whether the court will develop new categories of intervention (for example, non party participant), or whether the court will stick to traditional categories (for example, added party or friend of the court)."<sup>263</sup>

The court has the power to stay or dismiss a section 84 action if the court determines that it is in the "public interest" to do so.<sup>264</sup> The Ontario *EBR* does not provide a definition of the term "public interest". However, the court is directed to have regard for environmental, economic, and social concerns and in so doing, the court may consider whether the issues raised by the action are better resolved by another process or whether there is an adequate government plan to address the public interest issues raised in the action.<sup>265</sup> Although not explicitly provided for in the Ontario *EBR*, it can be presumed that a motion for a stay or dismissal of a section 84 action can be brought by the defendant(s) or the Attorney General at any stage of the proceeding.

Once a section 84 action is commenced, it can only be discontinued or abandoned with the approval of the court, and in so doing, the court is empowered to impose appropriate terms.<sup>266</sup>

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<sup>261</sup>Ontario *EBR*, s. 89(2).

<sup>262</sup>Ontario *EBR*, s. 89(3).

<sup>263</sup>Muldoon and Lindgren, *supra.*, note 187 at 160.

<sup>264</sup>Ontario *EBR*, s. 90(1).

<sup>265</sup>Ontario *EBR*, s. 90(2).

<sup>266</sup>Ontario *EBR*, s. 91(1).

If a section 84 action is settled, any settlement is not binding unless approved by the court.<sup>267</sup> Once a settlement of the action is approved by the court, it binds all past, present and future residents of Ontario.<sup>268</sup> In addition, the court is expressly directed to consider whether public notice should be given when it is considering the dismissal, discontinuance, abandonment or settlement of the action.<sup>269</sup>

### Defences<sup>270</sup>

Defendants in a section 84 action have three specific defences available to them under the Ontario *EBR*.<sup>271</sup> First, a defendant has the option of attempting to satisfy the court that it exercised due diligence in complying with the prescribed Act, regulation or instrument.<sup>272</sup> Second, the defendant can argue that the act or omission alleged to be a contravention is statutorily authorized.<sup>273</sup> Therefore, where the defendant is in compliance with the applicable Act, regulation or instrument, it offers the defendant a complete defence to the action.<sup>274</sup> Third, where the plaintiff alleges that the defendant is in contravention of a prescribed instrument, the defendant can attempt to satisfy the court that it was complying with a reasonable interpretation of the

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<sup>267</sup>Ontario *EBR*, s. 91(2).

<sup>268</sup>Ontario *EBR*, s. 90(3).

<sup>269</sup>Ontario *EBR*, s. 91(4).

<sup>270</sup>For an analysis of these defences see Muldoon and Lindgren, *supra.*, note 187 at 161-163.

<sup>271</sup>Ontario *EBR*, s. 85.

<sup>272</sup>Ontario *EBR*, s. 85(1).

<sup>273</sup>Ontario *EBR*, s. 85(2).

<sup>274</sup>Note that the court is not empowered to question the adequacy of the Act, regulation or instrument to protect the environment, and the court is not empowered to substitute its own standards for those established by government as is the case under *MEPA*.

instrument.<sup>275</sup> Where a defendant is relying on this third defence, the onus is on the defendant to persuade the court that his or her interpretation of the instrument is a reasonable one. Where the court considers the defendant's interpretation of the instrument to be reasonable, the defendant's conduct is not to be taken as a contravention of the instrument.<sup>276</sup> In addition to these specific defences, the Ontario *EBR* does not limit any other defence which otherwise may be available to the defendant.<sup>277</sup>

The choice of defences provided in section 85 of the Ontario *EBR* severely restricts the contribution of this cause of action to environmental protection. This position is strengthened when one considers the alternative defence options which exist in "environmental bills of rights" legislation in other jurisdictions, such as the defences available to a defendant under *MEPA*.

### Remedies

In a section 84 action, the court is empowered to provide a broad range of remedies both prior to and after trial. Prior to trial, a plaintiff may seek a pretrial injunction or a mandatory order. Such pretrial relief may be particularly appropriate where the harm to the public resource is significant, continuing, or possibly irreparable.<sup>278</sup> However, where the plaintiff is seeking interlocutory injunctive relief, the defendant is entitled to request that the court order the plaintiff to provide an undertaking to pay damages in the event that the action is ultimately dismissed at trial. In this regard it is significant to note that the Ontario *EBR* codifies the court's discretion to

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<sup>275</sup>The Task Force articulated the rationale for this defence in its report and supplementary recommendations. According to the Task Force this defence was created to deal with the reality that certain instruments, especially older ones which are still in existence, may not have been drafted concisely or may be technical and vague. As a result, the wording of the instrument may permit more than one reasonable interpretation. See *EBR Task Force Report, supra.*, note 184 at 100-101 and *Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations* (Toronto: Ministry of the Environment, December 1992) at 33.

<sup>276</sup>Ontario *EBR*, s. 85(3).

<sup>277</sup>Ontario *EBR*, s. 85(4).

<sup>278</sup>Muldoon and Lindgren, *supra.*, note 187 at 163. As indicated above, in such pressing cases it may be appropriate for the plaintiff to dispense with the prerequisite of filing an Application for Investigation prior to commencing the s. 84 action.

dispense with this undertaking where the court determines that “special circumstances” exist.<sup>279</sup> “Special circumstances” include whether the action is a test case or whether it raises a novel point of law.<sup>280</sup> In this regard, it has been suggested that “[g]iven the novelty and public interest nature of section 84 actions, EBR plaintiffs should be able to point to sufficient “special circumstances” to dispense with the undertaking to pay damages in appropriate cases.”<sup>281</sup>

After trial, the court has the power to grant several remedies. The court has the power to order an injunction, the negotiation of a restoration plan, declaratory relief, or any other order the court considers appropriate, including an order for costs.<sup>282</sup> However, the court is precluded from awarding damages to the plaintiff.<sup>283</sup> The absence of an award of damages underscores the focus of the Ontario *EBR* on the protection of the environment itself, rather than on compensation for harm to persons or to property resulting from environmental degradation.

An important feature of the remedial powers provided to the court in a section 84 action relates to restoration plans. Under the Ontario *EBR* the court has broad powers respecting the negotiation and content of restoration plans. In order to avoid duplication of effort, section 94 of the Ontario *EBR* provides that the court must not order the parties to negotiate a restoration plan where adequate restoration has already occurred,<sup>284</sup> or where an adequate restoration plan has already been ordered under the law of Ontario<sup>285</sup> or any other jurisdiction.<sup>286</sup> Since the term “adequate” has not been defined under the Ontario *EBR*, the determination of the adequacy of previous or ongoing efforts to restore the natural environment will be resolved by the court on

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<sup>279</sup>In terms of “special circumstances” the Task Force considered the case of *Attorney General of Ontario v. Harry* (1982) 35 O.R. (2d) 240 (H.C.). See EBR Task Force Report, *supra.*, note 184 at 103.

<sup>280</sup>Ontario *EBR*, s. 92.

<sup>281</sup>Muldoon and Lindgren, *supra.*, note 187 at 164.

<sup>282</sup>Ontario *EBR*, s. 93(1).

<sup>283</sup>Ontario *EBR*, s. 93(2).

<sup>284</sup>For example, where the defendant has voluntarily undertaken remedial work.

<sup>285</sup>For example, a cleanup order under the *Environmental Protection Act*.

<sup>286</sup>For example, a restoration order made under the federal *Fisheries Act*.

a case-by-case basis. In this regard it should be noted that "partial restoration or emergency clean up measures previously undertaken by the defendant do not prevent the court from ordering the parties to negotiate a plan for comprehensive, long-term restoration."<sup>287</sup>

In the event that the court determines that a restoration plan is necessary, the court is empowered to order the parties to negotiate a reasonable, practical and ecologically sound plan which provides for the prevention, diminution or elimination of the harm; the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention; and the restoration of all uses, including enjoyment, of the public resource affected by the contravention.<sup>288</sup>

Commentators who have considered the restoration plan remedy have indicated that as a practical matter:

Establishing the need for, and developing the content of, a restoration plan will obviously require close work between counsel and consultants for EBR plaintiffs. In many cases, this is likely to require extensive expert evidence from a variety of disciplines (for example, hydrology, hydrogeology, wildlife biology, forest ecology, or landscape design), depending on the severity of the harm and the nature of the public resource.<sup>289</sup>

The need for expert evidence to prepare an adequate restoration plan is likely to be an expensive proposition. However, since the court is empowered to make orders respecting the costs of negotiating a restoration plan,<sup>290</sup> a plaintiff in a section 84 action should presumably be able to recover the costs of retaining experts for this purpose.

The content of a restoration plan will obviously depend on the specific facts, including the severity of the harm and the nature of the public resource in question. Consequently, a restoration plan may include a variety of provisions including provisions requiring research into and development of pollution prevention or abatement technologies; community, education or health

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<sup>287</sup>Muldoon and Lindgren, *supra.*, note 187 at 164.

<sup>288</sup>Ontario *EBR*, s. 95(2).

<sup>289</sup>Muldoon and Lindgren, *supra.*, note 187 at 166.

<sup>290</sup>Ontario *EBR*, s. 96(b)(i).

programs; or the transfer of property by the defendant so that the property becomes a public resource.<sup>291</sup> However, the court can only include such provisions in a restoration order with the consent of the defendant.<sup>292</sup> In addition, a restoration order may provide for the payment of money by the defendant. However, there are three important limitations superimposed on this court power. First, the money must be payable to the Minister of Finance. Second, the money must be used for general restoration or similar purposes. Third, both the Attorney General and the defendant must consent to the payment.<sup>293</sup> The court also has the power to include provisions to monitor progress under the restoration plan and to supervise its implementation.<sup>294</sup>

In the event that the court orders the parties to negotiate a restoration plan, the court is empowered to make several interim orders in order to minimize the harm (such as an order to undertake short-term remedial work) and other ancillary orders (such as requiring the defendant to prepare an initial draft plan).<sup>295</sup> Where the parties are able to successfully negotiate a restoration plan, such a plan must be approved by the court, and where the court grants its approval the defendant will be ordered to comply with the plan.<sup>296</sup> However, if the parties are not able to agree on an acceptable restoration plan then the court is empowered to develop its own restoration plan with the assistance of court appointed experts.<sup>297</sup> The rationale behind this last provision is to "provide an incentive to the parties to work out an acceptable restoration plan"<sup>298</sup> themselves. Presumably, the parties will be motivated to negotiate in earnest knowing that if negotiations are unsuccessful, the court will step in and do the work for them.

The judgement of the court in the section 84 action is binding on all residents of Ontario

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<sup>291</sup>Ontario *EBR*, s. 95(3).

<sup>292</sup>Ontario *EBR*, s. 95(4).

<sup>293</sup>Ontario *EBR*, s. 95(8).

<sup>294</sup>Ontario *EBR*, s. 95(6).

<sup>295</sup>Ontario *EBR*, s. 96.

<sup>296</sup>Ontario *EBR*, s. 97.

<sup>297</sup>Ontario *EBR*, ss.98(1) and 98(2).

<sup>298</sup>Muldoon and Lindgren, *supra.*, note 187 at 166.

by reason of the doctrines of cause of action estoppel and issue estoppel.<sup>299</sup> However, this provision does not apply where the action has been discontinued, abandoned or dismissed without a decision on the merits of the case.<sup>300</sup>

With respect to the issue of costs, the Ontario *EBR* provides that the normal cost rules apply to a section 84 action,<sup>301</sup> and codifies the court's discretion not to order costs against an unsuccessful plaintiff where "special circumstances" exist, including whether the action is a test case or raises a novel point of law.<sup>302</sup>

The Ontario *EBR* provides for an appeal from an order of the court under the Act. However, section 101 expressly provides that an appeal from an order under the Ontario *EBR* does not operate as a stay of the order. However, the judge hearing the motion for leave to appeal or the appeal itself has the power to stay the order under appeal on terms.<sup>303</sup>

One commentator has made the following prediction regarding this new statutory cause of action under the Ontario *EBR*:

Although environmentalists now have a new *EBR* cause of action to use in Ontario, it is reasonable to expect that environmentalists will continue to carefully and strategically focus their litigation activity on the most appropriate cases, particularly in light of the costs, risks, and time-consuming nature of litigation. Initially, it appears that section 84 plaintiffs will focus on traditional "end-of-pipe" industrial pollution cases where contraventions and environmental damages are sometimes easier to document. However, as plaintiffs and their counsel gain experience with the section 84 action, it is reasonable to expect increasing interest in using the new cause of action in the context of resource management activities.<sup>304</sup>

Compared with the situation which existed prior to the enactment of the Ontario *EBR*, public

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<sup>299</sup>Ontario *EBR*, s. 99(1).

<sup>300</sup>Ontario *EBR*, s. 99(2).

<sup>301</sup>In the normal course, costs follow the event.

<sup>302</sup>Ontario *EBR*, s. 100.

<sup>303</sup>Ontario *EBR*, s. 101.

<sup>304</sup>Muldoon and Lindgren, *supra.*, note 187 at 168.

access to the courts to protect the environment has been enhanced somewhat. However, this new cause of action is procedurally and substantively circumscribed and therefore unduly limits the power of the public to protect the quality of the Ontario environment.

**(b) Public Nuisance Causing Environmental Harm**

The Task Force recognized that provision in the Ontario *EBR* for a new statutory cause of action for harm to a public resource would not be sufficient to deal with situations where persons have suffered private loss or personal injury from a public nuisance which causes harm to the environment. Traditionally, widespread public harm has been actionable only at the instance of the provincial Attorney General, who was presumed to be the sole guardian of the "public interest". Consequently, the courts developed a distinction between "public" and "private" nuisance and have generally held that only those persons who had suffered special or unique damages above that suffered by the community at large could sue in respect of the private loss or personal injury caused by the public nuisance.<sup>305</sup> The operation of this "public nuisance rule" has had the undesirable result that persons seeking recovery of private loss arising from a public nuisance have been denied access to the courts on the grounds that either plaintiffs lacked standing to sue or that they lacked special damages sufficient to set them apart from the rest of the community.<sup>306</sup> In this regard, it should be noted that the Law Reform Commission, in its report on the law of standing described the public nuisance rule as "offensive and incompatible with notions of who ought to have access to the judicial process in the face of widespread harm caused to all, or a significant segment of the community."<sup>307</sup>

The Ontario *EBR* reforms the "public nuisance rule" by expressly providing that where

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<sup>305</sup>It is important to note that, in practice, the distinction between "private" and "public" nuisance has been obscured by the courts. In this regard see B. Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991), in particular, Chapter 3.

<sup>306</sup>See, for example, *Fillion v. New Brunswick International Paper Co.*, [1934] 3 D.L.R. 22 (N.B.C.); *Hickey v. Electric Reduction Co.* (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.); *Green v. The Queen in Right of Ontario*, [1973] O.R. 396 (Ont. H.C.); and *Rosenburg v. Grand River Conservation Authority* (1976), 12 O.R. (2d) 496 (Ont. C.A.).

<sup>307</sup>Ontario Law Reform Commission, *supra.*, note 29 at 2.

direct economic loss or personal injury results from a public nuisance causing environmental harm, the plaintiff shall not be barred from court because the Attorney General has not consented to the action, or because other persons have suffered loss or injury of the same kind or to the same degree as that suffered by the plaintiff. Specifically, section 103 of the Ontario *EBR* provides that:

No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

However, despite this reform of the public nuisance rule, the Ontario *EBR* does not confer wide-open standing to members of the public concerned about public nuisances causing environmental harm. In order to maintain a public nuisance action, a prospective plaintiff is still required to demonstrate direct economic loss or personal injury. In order for a loss to be considered direct, the plaintiff will be required to show that they have suffered some diminution in the use or enjoyment of their property or harm to their person as a result of the environmental assault. If the prospective plaintiff has not suffered such a loss, they will still lack standing to sue in respect of the public nuisance. And, in Ontario, standing must still be pleaded and proven by plaintiffs in public nuisance cases.<sup>308</sup> Consequently, where a concerned citizen lacks direct economic loss or personal injury arising from a public nuisance, they are left to consider the possibility of bringing an action under section 84 to enjoin the public nuisance and restore the public resource harmed by the activity in question.

**(c) Judicial Review under the Ontario *EBR***

In Ontario, the power of the court to entertain an application for judicial review of

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<sup>308</sup>Muldoon and Lindgren, *supra.*, note 187 at 169.

government action is governed by the *Judicial Review Procedure Act*.<sup>309</sup> The basic philosophical approach taken by the Task Force was to view access to the courts as a "last resort". Consequently, the opportunities for judicial review under the Ontario *EBR* are quite circumscribed. Specifically, a resident of Ontario is only entitled to judicial review of the government's compliance with the procedural requirements in Part II of the Ontario *EBR* relating to instruments. Thus section 118(2) of the Ontario *EBR* provides that:

Any person resident in Ontario may make an application for judicial review under the *Judicial Review Procedure Act* on the grounds that a minister or his or her delegate failed in a fundamental way to comply with the requirements of Part II respecting a proposal for an instrument.

In addition, the Ontario *EBR* provides no guidance with respect to what constitutes "fundamental" non-compliance with the requirements of Part II. Presumably, section 118(2) contemplates situations where the relevant Minister has failed to place notice on the Environmental Registry or has failed to provide adequate notice, among other things. An application for judicial review must be brought within 21 days after the Minister provides notice of his or her decision respecting the issuance of an instrument.<sup>310</sup> Therefore, this right to judicial review is of limited utility, since it only functions as a safeguard against breaches of the procedural "due process" requirements relating to public participation under Part II. A plaintiff is not entitled to request that the court review the actual content of the instrument in question. In order to seek such relief, residents of Ontario are limited to the right provided in section 38 to appeal certain instruments to the Environmental Appeal Board.

In keeping with the basic philosophical approach of the Task Force to the Ontario *EBR*; namely, an emphasis on political accountability rather than judicial accountability to ensure compliance with the Ontario *EBR*, the Act contains a broad privative clause which is "intended to immunize most governmental activity under the *EBR* from judicial review."<sup>311</sup> Section 118(1)

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<sup>309</sup>R.S.O. 1990, c. J-1.

<sup>310</sup>Ontario *EBR*, s. 118(3).

<sup>311</sup>Muldoon and Lindgren, *supra.*, note 187 at 171.

provides that:

Except as provided in section 84 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a minister or his or her delegate under this Act shall be reviewable in any court.

## 6. Conclusion

Even with an “environmental bill of rights”, the residents of Ontario do not have a substantive right to environmental quality. What they do have, instead, is the recognition of a role for the public in environmental protection and a whole array of sophisticated and essentially procedural reforms superimposed on a deficient existing regulatory system. Rather than imposing a new set of restraints or more rigour to the environmental decision-making process, the role of the public is mostly peripheral and not able to substantively change the system or the decisions which come out of that system. Furthermore, the Ontario *EBR* lacks provision for the public trust doctrine. This, in turn, severely curtails the legal means available for the citizens of Ontario to hold the government accountable for its responsibility to protect the environment.

The next chapter will provide a critical analysis of the key environmental rights reforms embodied in the Ontario *EBR* specifically related to its provisions with respect to public participation, government accountability and access to the courts, and will prescribe changes intended to deal with these overriding deficiencies in environmental decision-making in Ontario in a more productive, direct, and effective way.

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## CHAPTER V

### **ENVIRONMENTAL RIGHTS, GOVERNMENT ACCOUNTABILITY AND THE ROLE OF THE COURTS UNDER THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS: CRITIQUE AND PROPOSALS FOR REFORM**

#### **1. Introduction**

The discussion in the previous chapter concerned the provisions contained in the Ontario *EBR* relating to public participation in environmental decision-making, government accountability for environmental decision-making, and access to the courts to protect the environment. The survey of these matters resulted in the conclusion that the “environmental rights” provided in the Ontario *EBR* are primarily procedural in nature and lacking in substantive content and force. As a result, the reforms embodied in the Ontario *EBR* appear to fall short of what has been generally expected of a “true” environmental bill of rights. The discussion to follow will consider each of these matters, in turn, and will provide recommendations intended to infuse the Ontario law with more substantive effect.

#### **2. Public Participation**

An essential aspect of the Ontario *EBR* is the establishment of the regime providing minimum rules for public participation in the development and finalization of proposals for new statutes, policies, regulations and environmental approvals. The establishment of the electronic Environmental Registry is the mechanism allowing the Ontario public to be informed of such governmental proposals. In addition, the Ontario *EBR* provides a formalized process for Ontario residents to request that existing laws, policies, regulations, or approvals be reviewed, or that new ones be developed. However, the extent of the public’s rights to participate in the making of such decisions is essentially within the unreviewable discretion of government officials and hinges on

whether the government has determined the decision at issue to be environmentally "significant". Where the government determines that a proposed environmental decision is not "significant", then the public is given no notice of the impending decision and no opportunity to comment or otherwise participate in such environmental decisions.

Due to the lack of a legally recognized substantive entitlement to the protection of our air, waters and public land, the citizens of Ontario continue to lack a legal basis from which to demand a more powerful and active role in environmental protection. In the absence of substantive citizen rights, which serve as the basis for their participation, citizens will not be sufficiently empowered to be equal players in environmental protection. The public's lack of substantive rights to protect their environment translates into a lack of power to affect environmental protection. The ability of the public to be an active and effective participant in the environmental decision-making processes continues to be dependent on the government and its view of what is environmentally "significant". A true "environmental bill of rights", however, would vest each person with the right to live in a healthful environment, and would make polluters and governments accountable should they infringe upon that right. To the extent that the public's participatory rights derive from the exercise of government discretion, rather than from a substantive and enforceable right to environmental quality, the position of the public to participate in environmental decision-making in Ontario is only different in kind, but not in degree from the situation which existed prior to the enactment of the Ontario *EBR*. The implication of this is that individuals, groups, companies and the government are not playing by the same rules.

Rather than its citizens' rights being defined on the basis of procedure and the exercise of discretion, the government of Ontario could recognize its long-term obligations to its citizens to ensure environmental protection, through the enactment of the public trust doctrine. The public trust doctrine can then provide the government with the leverage it needs to resist the incentives, resulting from industry's wealth and political power, to overlook environmental values in its decision-making. All that is lacking, in truth, is the political will to do so. Protection of environment will be more likely once government begins to recognize that it exists to serve the citizenry and not business and that acting "in the public interest" to protect the environment necessarily includes the active and meaningful participation of the public. The more difficult

challenge will be for government to accept its long forgotten fiduciary obligations and expose the deficiencies in environmental decision-making in our courts.

The environmental rights provided in the Ontario *EBR* fall short of the provision of a "substantive" environmental right envisioned by rights proponents. In fact, as indicated in Chapter IV, during the discussions concerning the rights to be provided by the Ontario *EBR*, the drafters expressly considered whether the legislation should provide a substantive right to environmental quality. The alternative, which was ultimately chosen, was to provide a set of procedural rights which could enable the public to protect the environment in quite circumscribed and specified ways. Generally, environmentalists favoured the provision of a substantive right to environmental quality, whose content and remedies would be determined by the courts in much the same manner as the *Canadian Charter of Rights and Freedoms*<sup>312</sup> operates. On the other hand, business groups and the agricultural community rejected the provision of a substantive right to environmental quality, favouring the "certainty which would be provided by specifying the procedural rights with precision."<sup>313</sup> As the law presently stands, where a private actor is acting within the terms and conditions of their government granted approval, they are immune from court action even if that approval is insufficient to protect the environment.<sup>314</sup> The fact that the *EBR* Task Force, which drafted the legislation, was constrained by its need for consensus, combined with the fundamental power imbalance inherent in environmental decision-making in Ontario, has resulted in the Ontario *EBR* being a weak tool for the public to ensure that the merits of environmental concerns

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<sup>312</sup>Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

<sup>313</sup>*Saxe, supra.*, note 189 at 6.

<sup>314</sup>In particular, s. 84 of the Ontario *EBR* provides as follows:

*Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful. (emphasis added)*

However, it should be noted that a citizen of Ontario can challenge the adequacy of a statutory authorization though the making of an Application for Review under sections 61-73 of the Ontario *EBR*.

are considered in our courts of law.

### 3. Government Accountability

It has been stated that a primary goal of the Ontario *EBR* is the enhancement of government accountability in environmental decision-making.<sup>315</sup> The two primary mechanisms in the Ontario *EBR* which are intended to further this goal are the requirement for prescribed ministries to develop and consider Statements of Environmental Values,<sup>316</sup> and the establishment of the Office of the Environmental Commissioner.<sup>317</sup>

In dealing with the concern for government accountability, the drafters faced the issue of whether the Ontario *EBR* should include the public trust doctrine or some other mechanism for ensuring government accountability. The effect of the recognition of the public trust doctrine would be to legally recognize the government as the trustee of the province's air, water, public lands and other natural resources for the benefit of present and future generations. As a consequence of that fiduciary obligation, the government would be expected to preserve and protect the province's natural resources. Each citizen, as beneficiary of the trust, would be given certain rights to hold the government legally accountable for that fiduciary obligation. Thus, any member of the public would have standing in court to challenge government action or inaction that impaired those trust resources.

Concern over whether to include the public trust doctrine in the Ontario *EBR* focused on the doctrine's relative novelty in Canadian jurisprudence and thus its apparent uncertainty. Opponents of the doctrine speculated that the doctrine "would impair government's ability to govern or paralyze government decision-making."<sup>318</sup> However, a closer look at reality would have revealed such speculation to be unfounded. The public trust doctrine has been a fixture in

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<sup>315</sup>Muldoon and Lindgren, *supra.*, note 187 at 121.

<sup>316</sup>Ontario *EBR*, ss.7-11.

<sup>317</sup>Ontario *EBR*, Part III.

<sup>318</sup>See Saxe, *supra.*, note 189 at 7.

American common law since the 1800's and has served as the basis for citizen rights in citizen-suit legislation, such as the *Michigan Environmental Protection Act*, since the 1970's.<sup>319</sup> Furthermore, the notions of a public trust doctrine are not new in Canada. There has been discussion on the doctrine in the literature<sup>320</sup> and in addition, interestingly, it has been implied in several government environmental initiatives, such the Green Plan, and the National Task Force on Environment and Economy. For example, the Green Plan states that "The Governments are the trustees of the environment on behalf of the people."<sup>321</sup> Furthermore, the Report of the National Task Force on Environment and Economy states that "Governments act as trustees of the resources we will pass on to future generations."<sup>322</sup> In addition, the September 1991 constitutional reform proposals suggest the public trust doctrine in the statement that "the land itself, vast and beautiful, is a rich inheritance held in trust for future generations."<sup>323</sup> Thus, there is evidence that our politicians are aware of the public trust notion. Unfortunately, the public trust doctrine continues to be more a matter of rhetoric than reality. The question which remains, therefore, is when will government put its words into action by legislating their environmental responsibilities and obligations through the public trust doctrine?

The account of the long history of the recognition of the public trust doctrine in the United States reveals that the doctrine has not impaired that government's ability to govern nor has it paralyzed its decision-making. What it has done is elevated environmental protection to a paramount and inalienable government obligation, and has made both government and industry more mindful of the environmental consequences of their actions. These effects are a direct and an indirect result of citizen action in the courts and the administrative process to enforce public trust obligations under the *Michigan Environmental Protection Act*. It is submitted that the

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<sup>319</sup>Note that *MEPA* has served as the model for citizen suit legislation in at least six other states.

<sup>320</sup>See Hunt, *supra.*, note 73.

<sup>321</sup>See Canada, *Canada's Green Plan* (Ottawa: Ministry of Supply and Services, 1990) at 17.

<sup>322</sup>See *Report of the National Task Force on Environment and Economy* (Winnipeg: Canadian Council of Resource and Environment Ministers, 1987) at 6.

<sup>323</sup>See, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services, 1991) at v.

potential strength and usefulness of the public trust doctrine to ensure government accountability and its potential to change the status quo in environmental decision-making in Ontario, rather than the doctrine's novelty, was the main reason it was rejected for inclusion in the Ontario *EBR*.

The alternative government accountability mechanism, the Statements of Environmental Values, is a weak and inadequate substitute for the public trust doctrine as a means to hold government accountable for its environmental decisions. The Statements of Environmental Values have become little more than poorly drafted "guidelines"<sup>324</sup> or "directives"<sup>325</sup> and, in any event, they are not legally enforceable. The Statements of Environmental Values do not appear to impose any legal duty on the government to act in any particular manner, nor are they specifically related to the protection of our natural resources. Instead, ministries are merely required by the Ontario *EBR* to establish a decision-making process that ensures that the purposes of the Ontario *EBR* are applied. In contrast, the public trust doctrine establishes a unequivocal legal duty on government to act in a fiduciary manner toward the protection of our air, water and public lands. Moreover, the public trust doctrine is directly enforceable in the courts. In contrast, the Statements of Environmental Values are "enforced" through what have been termed the "political accountability tools" provided by the Ontario *EBR*, such as reports of the Environmental Commissioner. Finally, the public trust doctrine, which has been subject to extensive judicial development in American courts, includes quite specific notions about the nature, scope and extent of the environmental protection obligations imposed on government. In contrast, however, the Statements of Environmental Values are quite vague in terms of government's environmental protection obligations and thus appear even more uncertain than the public trust doctrine.

The Office of the Environmental Commissioner was created to provide the primary means of "political accountability" for the government's environmental obligations under the Ontario *EBR*. The rationale for creating the Office of the Environmental Commissioner was explained by the chair of the Environmental Bill of Rights Task Force as follows:

If public participation was intended to produce a better environmental decision, what if the opportunities for public participation did not materialize or dwindled

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<sup>324</sup>Muldoon and Lindgren, *supra.*, note 187 at 122.

<sup>325</sup>*Ibid.*

over time? An environmental bill of rights would be of little use in environmental protection if government, over time and possibly under financial pressure, found more and more reasons to not comply with the standard of participation. It would take a quantum leap in faith in government to assume that one government or a succession of governments could maintain willingly a high standard of compliance with such a piece of legislation. A method was therefore needed to act as a "watchdog" to ensure that judicial accountability was replaced with a form of political accountability for the environmental decisions made by government.<sup>326</sup>

The Environmental Commissioner has taken her office seriously. She has tabled several reports in the Legislature since her appointment, including several special reports which chastised the Ontario government for shirking its obligations regarding notice of environmentally significant decisions under the Ontario *EBR*. However, despite the public announcement of the Ontario government's environmental protection follies, it does not appear that such embarrassment can, standing alone, prod the government to take its environmental responsibilities seriously. As will be further developed below, the use of a judicial accountability model with its emphasis on the courts, is more well suited to the task of ensuring government accountability for environmental decision-making than any other of our institutions. Even if the courts are not the most ideal forum for resolving environmental protection controversies, the courts have an important and essential role to play in environmental protection. The fact is that the courts' role in environmental protection has been largely peripheral to date. As a result, the courts in Ontario have tended to focus more on jurisdictional and procedural issues than on the merits of an environmental case. This, in turn, has continued to hamper efforts to protect the Ontario environment.

#### **4. Implications for the Role of the Courts in Environmental Protection**

Commentators have indicated that the general philosophy underlying the Ontario *EBR* was to minimize the role of the courts, viewing the courts as a "last resort". In providing the rationale

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<sup>326</sup>M. Cochrane, "Overview of the Environmental Bill of Rights: Environmental Decision Making--Joint Responsibility, Public Participation and Political Accountability," in *The Environmental Bill of Rights: Practical Implications*, a workshop sponsored by the Canadian Bar Association--Ontario and the Law Society of Upper Canada, June 10, 1994.

for the political accountability emphasis of the government accountability mechanisms under the Ontario *EBR*, Michael Cochrane stated:

The Task Force speculated that *if* better environmental decisions were proposed by government and *if* the public had better opportunities to participate in the making of environmental decisions with government, *then* better environmental decisions would be made and there would be less need to have recourse to the courts for judicial accountability. It was not thought at any time there would be no role for the courts in environmental protection, but it was hoped that the courts would be seen as a forum of last resort.<sup>327</sup>

This peripheral role for the courts in environmental protection, envisioned by the Ontario *EBR*, is one of the adverse implications attributable to the lack of a substantive right and the absence of the public trust doctrine. Thus, due to the lack of rights to environmental quality and the absence of the public trust doctrine, the citizens of Ontario continue to be denied the opportunity for their courts to play an integral part in environmental protection--through the development of a common law of environmental quality.<sup>328</sup>

Nevertheless, the public trust doctrine and a substantive right to environmental quality are arguably supported by the spirit of the legislation itself, especially when one considers the implications of the cause of action under the Ontario *EBR*. Specifically, under the section 84 action, there is no opportunity for a plaintiff to receive an award of damages should their lawsuit be successful. The absence of an award of damages reveals that the Ontario *EBR* is not about buying off pollution victims through an award of damages. Rather, the thrust of the cause of action is to preserve and protect the natural environment for the benefit of present and future generations. Furthermore, a citizen's rights of action under the Ontario *EBR* are not simply rights to be informed about significant environmental decision making. Rather, the citizens' rights of action are primarily designed to ensure that government is held to its responsibilities for protecting the environment. The rights to engage the court under the Ontario *EBR* are not about neighbours and damages, they are about getting at government as a fiduciary of the public trust. An essential element of that fiduciary obligation and the citizen rights of action is to ensure that

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<sup>327</sup>Cochrane, *ibid.* at 6.

<sup>328</sup>For a discussion of the experience of the operation of the *Michigan Environmental Protection Act* and its role for the courts to develop a common law of environmental quality see Chapter III above.

the government is not tempted to trade-off environmental quality in the short term for the promise of jobs. Therefore, the implications of the cause of action under section 84 of the Ontario *EBR* supports the position that regardless of the government's political stripes, it must ensure that the environment is accorded the attention and consideration that it deserves. Moreover, the rights of action can be said to imply that the government always be mindful and respectful of its fiduciary obligation to protect the environment for the benefit of both present and future generations. To the extent that these implications can be overlooked or ignored, the Ontario *EBR* should be viewed as a political promise which has gone unfulfilled. The Ontario *EBR* is bogged down by procedure, thereby emasculating its potential to substantively improve environmental protection in Ontario.

Even with the new cause of action for harm to a public resource in section 84 and the removal of the public nuisance rule to public nuisance actions in section 103, the citizens of Ontario have not been sufficiently empowered to control environmental harm and therefore, they lack the means to alter the pattern of environmental decision-making which has heretofore epitomized environmental protection in this province. For instance, Brubaker has made the following comment with respect to the causes of action in sections 84 and 103 of the Ontario *EBR*:

Ontario's Environmental Bill of Rights,..., relaxed public nuisance standing restrictions in the province and introduced harm to a public resource as a new cause of action. However, the bill included the government's favourite escape clause: it empowered the court, after considering economic and social concerns, to dismiss an action if doing so would be in the public interest. The government thus ensured that short-term job creation would remain a valid excuse for destroying the province's resources.<sup>329</sup>

Therefore, the rights to sue provided by the Ontario *EBR* are weaker than the rights which could be accorded to the citizen's of Ontario through the recognition of the public trust doctrine and a substantive right to environmental quality. Compounding this weakness is that the citizens of Ontario are thereby deprived of any development of a common law of environmental quality. Insufficient use of our courts as an essential component of our environmental protection regime

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<sup>329</sup>Brubaker, *supra.*, note 7 at 147.

effectively stifles evolutionary changes to the common law to deal with the consequences of our environmental myopia and removes the participation of the public and the judiciary from protecting the environment.

Given the widespread and insidious nature of environmental degradation and the immense challenge to curtail its damaging long-term effects, it is quite unfortunate that the expertise of the courts has not been more extensively employed, as would be the case had the public trust doctrine been enacted. The following judicial statement is quite revealing in this regard:

Are there no lessons to be learned from the pollution and virtual destruction of Lake Erie as an ecosystem? The crippling of Lake Ontario? Is it not abundantly clear to all that to prevent dumping now will prevent the destruction of the environment and undoubtedly prevent the expenditure of multimillions of dollars in the future as new generations have to pay to clean up for today's mistakes?...In my view, the destruction of any ecosystem or environment is a gradual process, effected by cumulative acts--a death by a thousand cuts, as it were.<sup>330</sup>

These sentiments, expressed by a Canadian judge, indicate that, at least, one judge comprehends the challenge faced by the consequences of environmental pollution, impairment and destruction. In addition, these sentiments express an understanding that environmental degradation is a somewhat slow and cumulative process which has long-term repercussions. As a result, seemingly insignificant environmental impacts of discrete decisions can result in immense environmental harm when such decisions are viewed together. The existence of this "nibbling phenomenon" suggests that only a long-term approach to environmental concerns is relevant. The effects of this "nibbling phenomenon" can be curtailed provided that citizens are empowered with rights to keep check on the disparate yet significant environmental decisions of government. It is submitted that the absence of substantive environmental rights and the absence of the public trust doctrine has circumscribed and limited the role envisioned for our courts in environmental protection. This, in turn, removes the realization of the advantages which can be derived from environmental litigation, including the development of a common law of environmental quality.<sup>331</sup>

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<sup>330</sup>*R. v. Panarctic Oils Limited* (1983), 3 F.P.R., Bourassa Terr. Ct. J. (sentencing).

<sup>331</sup>It is necessary to confront the argument that use of the courts to protect the environment is also subject to a form of "nibbling" in that use of the courts to protect the environment results in incremental rather than co-ordinated action. The argument being made here is not that environmental protection will result directly through the courts. Rather,

There are several important functions to the use of the courts to protect the environment.<sup>332</sup> However, the realization of these functions is hampered by the limited role envisioned for the courts under the Ontario *EBR*. The first general function of environmental litigation is that of prevention and compensation. This function has been the traditional role of the courts. Environmental litigation is useful to provide injured parties with a means to sue for damages in the case of harm to one's proprietary, personal or economic interests. In addition, environmental litigation can operate preventatively through injunctive remedies. The second function of environmental litigation can be said to be one of overseeing and mobilizing the public interest. It is argued that litigation provides a forum to alert the public to particular issues and to mobilize the energies of various constituencies to addressing those issues. Furthermore, environmental litigation can serve as an aid in setting the political agenda for legislative reform by highlighting legislative deficiencies. Finally, environmental litigation serves as a "lever" for greater access to governmental decision-making processes,<sup>333</sup> providing a forum where citizen views can be voiced, recorded and considered. In light of the important functions to be served by environmental litigation, and the advantages for environmental decision-making to be gained from such litigation, it is unfortunate that the Ontario *EBR* envisioned the role of the courts as simply a forum of "last resort" rather than an integral part of environmental protection, particularly through the use of the courts by the public to ensure that the government is fulfilling its public trust obligations.

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the use of the courts by the public, to have the courts consider the merits of environmental decisions and to enforce government's environmental protection responsibilities, will indirectly affect a more co-ordinated approach to environmental protection by ensuring that government attends to its public trust obligations. Citizen use of the courts is presented here as a means to monitor government action to protect the environment not a substitute for necessary government action to protect the environment. The threat that a member of the public can take the government to court for failing to fulfil its environmental responsibilities can be expected to ultimately lead to less court action as government begins to take its public trust obligations seriously.

<sup>332</sup>The discussion to follow is derived from P. Muldoon, *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto: Carswell, 1986) at 9-10.

<sup>333</sup>Sax, *supra.*, note 9 at 114.

## 5. Conclusion: The "Patchwork Quilt"

The Ontario *EBR* has some important deficiencies which cannot be ignored, removing the enactment from what has been considered to be the essential nature of an "environmental bill of rights". With the Ontario *EBR*, citizens of Ontario have been granted an new array of procedural due process rights and a highly circumscribed cause of action to seek protection for the environment. The Ontario *EBR* lacks express recognition of the public trust doctrine and provision for a substantive environmental right. Moreover, the citizens of Ontario cannot access the courts as the holders of rights to environmental quality which are worthy of judicial enforcement. As a result, Ontarians will continue to watch their government sacrifice their environment for the promise of short-term economic "gain" while the government pays "lip service" to the demands of environmental protection.

As we approach the millennium, the challenge to protect the environment will be the most daunting and at the same time the most vital task society must face. It will be necessary that we deploy all of the means we have at our disposal in order to ensure that the environment is sufficiently protected. We will need to use each of our institutions and must ensure that they are equipped for the task of ensuring that our environment is protected. Furthermore, our laws will need to reflect the realities of the natural world and will need to be structured and used to combat the infinitely harmful ways which human behaviour impacts upon it. The pervasiveness of environmental degradation and destruction caused by human behaviour should signal that government alone, with its diminishing resources, cannot adequately deal with these problems on its own. Each individual has a vital stake in the quality of the environment and a duty to ensure that it is not unnecessarily impaired. Individual citizens must therefore be recognized as having a legally enforceable right to environmental quality which is enforceable against those who choose to impair the environment and which can be used to ensure that our government is held to its fiduciary duty to protect our common air, water and public lands for present and future generations. We all must face the challenge of ensuring that our home is not degraded. However, without legally recognized and enforceable rights vested in each person to protect the quality and integrity of the environment, it is highly questionable whether that challenge will be met. The

importance of the health of our environment for our collective physical, psychological and economic health means that we cannot abdicate our responsibilities to meet that challenge. It is incumbent on government to recognize that by preventing all members of the public from playing their part in environmental protection, government is thereby abdicating its responsibility to its citizens to protect one of the most vital aspects of the public interest, the environment.

It can scarcely be denied that the traditional perception of our relationship to our environment is in need of change. Furthermore, law alone cannot transform the perception of our relationship to our environment from control and domination to care and respect.<sup>334</sup> Nonetheless, the law can have an important role to play in assisting such a transformation. After all, the law is a human construct and as such ought to be capable of evolving with the necessities of the day, including the need to elevate environmental protection as a fundamental value in decision-making. The environmental law reform efforts embodied in the Ontario *EBR* can be viewed as the most recent attempt to accord greater consideration for the environment in environmental decision-making, and thus greater protection for the environment.

The purpose of this thesis has been to critically analyse the Ontario *EBR*. The critique has focused on the deficiencies in its provision of citizen "environmental rights", the mechanisms it provides for government accountability for environmental decision-making and environmental protection and the implications of these matters for the role of the courts in environmental protection in Ontario. These deficiencies in the Ontario law express a great deal about the relationship of the citizens of Ontario to their government, their fellow citizens and their environment. But more significantly, the Ontario *EBR* expresses our government's intentions regarding the environment's protection. As an expression of government's intention with respect

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<sup>334</sup>Proposals for a new environmental ethic have been extensively debated in the literature. See, for example, Law and Ecological Ethics Symposium, (1984) 22 Osgoode Hall L. J. comprising the following articles:

- P.S. Elder, "Legal Rights for Nature--The Wrong Answer to the Right(s) Question", 285-295;  
 Mark Sagoff, "Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce", 297-307;  
 John Livingston, "Rightness or Rights?" 309-321;  
 D. Paul Emond, "Co-operation in Nature: A New Foundation for Environmental Law", 323-348

For a discussion of the argument that an environmental ethic is an indispensable precondition to effectual reforms to the environmental law regime see, C. Giagnocavo & H. Goldstein, "Law Reform or World Re-Form: The Problem of Environmental Rights" (1990) 35 McGill L. J. 345.

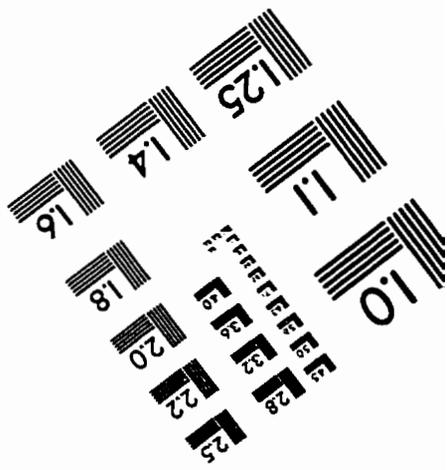
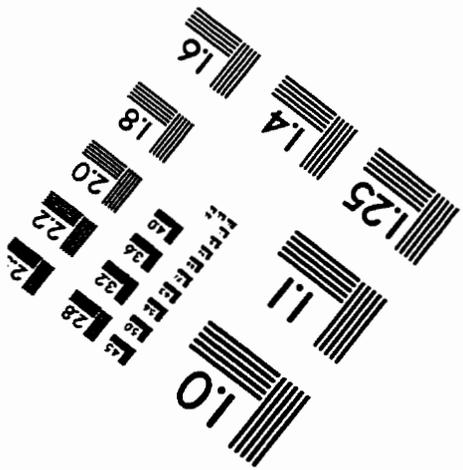
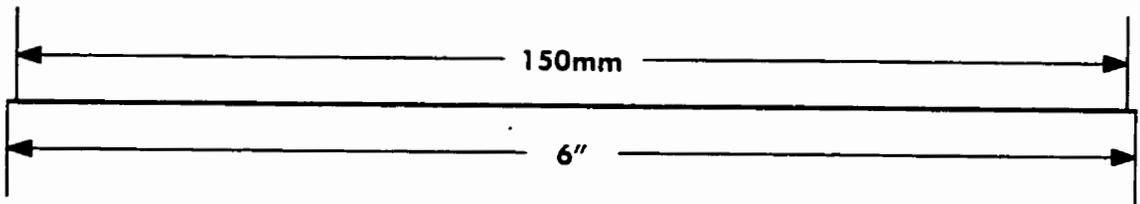
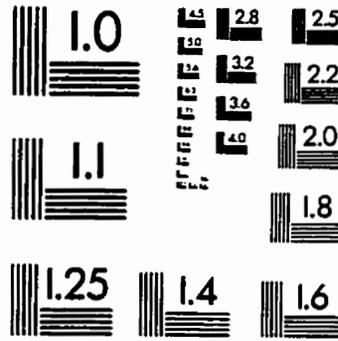
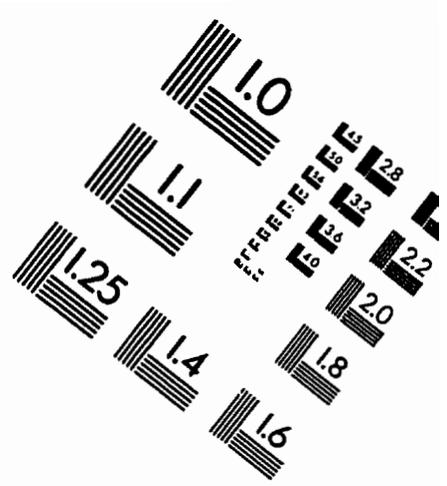
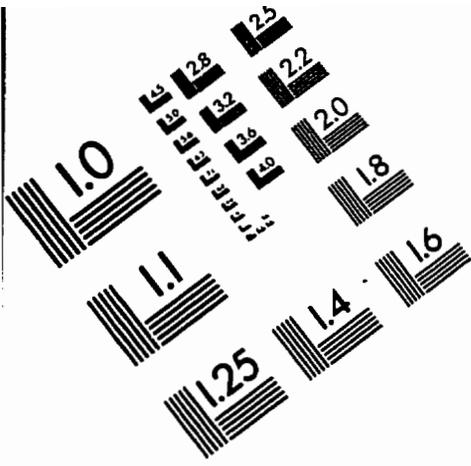
to protection of our environment, the Ontario *EBR* is better characterized as a “patchwork quilt of symbolic gestures” than an “environmental bill of rights”, as it provides the citizens of Ontario with little recourse should our government choose to give little more than lip service to the demands of environmental protection.<sup>335</sup>

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<sup>335</sup>Unfortunately for our environment and for ourselves, the saga of government-industry relations in environmental protection have not been altered by the enactment of the Ontario *EBR*. Even in 1996, the Ontario government is still ignoring the public and listening only to industry while making “sweeping changes” in environmental protection laws. See, “Warning Sounded on Environment” *The Toronto Star* (11 October 1996) A12, discussing the contents of a special report of the Environmental Commissioner.

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