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# PARTICIPATION AND THE ENVIRONMENT: A STRATEGY FOR DEMOCRATIZING CANADA'S ENVIRONMENTAL PROTECTION LAWS

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This article is both a conceptual examination of the elements of public participation and how they may be integrated into a useful model of environmental decision-making, and a discussion of administrative law principles and how they may be used innovatively to begin democratizing Canada's environmental protection laws. The first Part of the article examines public participation from a functional perspective and notes the ways in which it may enhance the task of protecting the environment. Part II evaluates the extent to which Canada's environmental laws and its common law tradition of natural justice incorporate participation into the decision-making process. And finally, Part III will explore briefly the implications of restructuring the decision-making process to better utilize the important contribution which a concerned public can make to environmental protection.

## PART I

### A. PARTICIPATION

Participation in decision-making processes is a many-faceted phenomenon. It may be viewed as a means for achieving some desired end or as an end in itself. As a means or process, it may take a number of different forms including, for example, participation through the legislative and adjudicative processes. In each forum, participation has its own special and unique contribution to make to the final decision. As a laudable end, it is most often described in terms of 'giving someone his day in court' or of 'a person's right to be heard' and lawyers are all aware of the beneficial effects that flow from such an exercise, regardless of the outcome. Whatever view one takes of participation, it is important to identify and acknowledge at the outset the inherent conservative bias associated with most forms of participation.

Participation from an interested and concerned public usually means little more than participation from an expanded segment of the middle class. For the most part, participation in any form will tend to favour the *status quo* and oppose change.<sup>1</sup> Increased public participation will certainly generate a larger pro-environment input which will in turn provide a healthy contribution

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<sup>1</sup> Usually the incentive behind participation in any decision is the desire to protect some vested interest. This is true of participation from both the pollutor and the environmentalist.

to the environmental protection debate,<sup>2</sup> but it may also produce unfortunate results if change is needed to correct serious social injustices.<sup>3</sup> This characteristic of increased public participation is expressed particularly well by P. J. Smith in the context of wilderness preservation:

"Public" involvement is elitist, the voice of privilege, of special interest, of special commitment. It is the voice of unique groups, usually small, invariably articulate, who believe that certain values that they hold precious are somehow in jeopardy. . . . Many such groups . . . believe that the Canadian wilderness is threatened with irreparable damage and that something vital to Canada and all its people will be lost if the wilderness is lost . . . Yet there are many Canadians for whom the wilderness is completely inimical, a hostile environment which they prefer to ignore or avoid, or approach only within the limits set by modern highways.<sup>4</sup>

Implicit in this passage is the assumption that increased public participation may tend to encourage strong responses from those who argue for environmental protection, although their values are not necessarily best for or representative of society as a whole.

Participation from a conservative and conservation-minded public is not only environmentally desirable but necessary if we are to stop environmental degradation. But the cry for more participation was not heard until those with a substantial, material stake in society became threatened by the environmental crisis. Legislators, primarily in response to their demands, began restructuring the decision-making process to encourage and permit more input from this vested interest group. By and large the determining factor that triggers participation today is whether or not the potential participant has *property* that will be affected by the decision. Those whose property may be subject to environmental controls and those whose property may be despoiled by environmental degradation often have the right to be heard, while those whose interests transcend a particular thing of material value do not have such a right. And those who have neither property nor the inclination to become involved in legislative reform are forgotten altogether. Thus the conservative bias behind greater public participation is accentuated by the values of the new participants in the decision-making process because those with vested property interests can be expected to resist any change, especially economic and social change, that threatens those interests.

Any increased participation in the decision-making process is, by and large, beneficial. But participation from only one side of the debate may result in one-sided, unrepresentative decisions. Even if participation in the decision-making process is more representative and includes property owners as well

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<sup>2</sup> Conservatism is not only an explicit part of the environmental conservation and protection movement, but essential to it if environmental protection is to be anything more than an empty slogan.

<sup>3</sup> Tougher environmental protection measures and general opposition to societal change and development may mean, for example, more expensive housing, recreational facilities, and consumer goods, which, in turn, may mean inadequate facilities and a loss of jobs for large segments of society.

<sup>4</sup> P. J. Smith, *Public Goals and the Canadian Environment* (1970), 11 *Plan Canada* 4 at 4, 5. To take Smith's example one step further, what environmentalist group is prepared to argue for better public transit to provincial parks, or more low income housing in its neighbourhood.

as non-property owners, some, but only some, of the tendencies toward a biased decision will be overcome.

### 1. *A Rationale for Participation*

It is difficult to develop a rationale for participation divorced from a discussion of the different forms of participation. Participation varies among decision-making processes, and the rationale for participation in the legislative process is very different from that in the adjudicative process.<sup>5</sup> Nevertheless, a general rationale for increased participation in any decision-making process is gaining acceptance.

First, increased public participation may be equated with democratic idealism.<sup>6</sup> This rationale assumes that the democratic process is in need of reform. The electoral system is not a fine enough device to check the actions of elected members. Environmental issues are rarely election issues, and the parliamentary system provides virtually no control over the important decisions of non-elected officers. Participation not only gives legislators and other decision-makers a better sense of societal sentiment and thus provides some check on legislative decision-making; it also gives the public direct access to an ever-expanding and ever-important regulatory bureaucracy. Thus, public participation may be seen as democratizing the legislative and bureaucratic decision-making processes.

Many commentators note that participation increases the likelihood of a proposal being accepted by the public. Professor Lucas emphasizes the point this way:

... not only must pollution be controlled within limits acceptable to the community at large, but agency proceedings must be sufficiently open to ensure that this is clearly seen by the public. In other words, it is essential to the tribunal's success that public confidence and support for its enforcement process be maintained; for this can only be done by readily allowing members of the public to participate in that process.<sup>7</sup>

Acceptability of the decision-making process is also enhanced through participation because as Neil Kotler noted participants:

... come to feel the full weight of either the acceptance or rejection of the majority opinion. They will be less careless in gauging what the majority wishes. They will also become more sensitive to, and accepting of, the average opinion, and come to accept the procedures for differing with and changing this majority opinion.<sup>8</sup>

Individuals, therefore, are more accepting of and responsible for decisions

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<sup>5</sup> This point is developed *infra* at 17 ff.

<sup>6</sup> This point is made by R. McDevitt in the context of land use planning. See R. McDevitt, *Public Participation in the English Land Use Planning System*; Part 1 (1974), 6 *Urban Lawyer* 483 at 497 ff.

<sup>7</sup> A. Lucas, *Legal Techniques for Pollution Control: The Role of the Public* (1971), 6 *U.B.C.L. Rev.* 167 at 186.

<sup>8</sup> N. Kotler, "Working Paper" submitted to the *Ontario Government Committee on Government Productivity* (Toronto: unpublished, 1971). Participation has also been described as a "safety valve allowing interested persons and groups to express their views before policies are announced and implemented . . ." E. Gellhorn, *Public Participation in Administrative Proceedings* (1972), 81 *Yale L.J.* 359 at 361.

that they have helped make. Participation is one of the most effective means of facilitating the orderly implementation of public decisions.

The more participatory forums available, the more likely it is that the goal of political equality will be enhanced by increasing the opportunity for political activity by those groups that traditionally have had little influence on decisions affecting their lives. As more citizens participate and spend more time in political activity "the more remote is the possibility that substantial political power will rest in the hands of the few".<sup>9</sup>

Participation also furthers one's sense of community. Thus:

The inclusion of individuals in decision processes which affect them forces them to take into account the interests of others. Individuals gradually expand their perspectives, first beyond the boundaries of their individual interests, then beyond the interests of their organizations. This offers the hope that everyone could develop the notion of community interest.<sup>10</sup>

So-called dysfunctional characteristics of greater participation are often not as serious as they first appear. For example, three common criticisms of any form of substantial participation<sup>11</sup> point out that it delays putting policy into effect, that the cost of the structures and personnel needed to facilitate participation outweigh the benefits and that irrelevant and unreliable material is often presented.<sup>12</sup> These 'costs', however, are relatively minor when compared with the delays and expenses associated with prolonged opposition to an unacceptable policy. Frederick Thayer makes the point most effectively in the following passage:

While conventional wisdom argues that participation slows down the decision process, adds to the overall cost and design of implementation, and introduces a host of irrelevant factors, participation may do precisely the opposite. Most decision-making studies never examine the cost of overcoming consequences not foreseen in advance. There can be no better way of discovering these unforeseen consequences, long a major problem of administration, than by involving in the decision process those likely to be affected by them. The slower decision can become economical over the long term. Participation, in other words, may be cost-effective through cost-avoidance, something that may be widely accepted in a few years.<sup>13</sup>

By involving the public in the decision-making process at a relatively early stage much of the opposition, protracted litigation and resulting delays that are a part of the North American environmental movement could be avoided.

A more substantial criticism of most modes of public participation states

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<sup>9</sup> This point is made in *Citizen Involvement* a working paper prepared for the Ontario Government Committee on Government Productivity (Toronto: Queen's Printer, 1972) at 23.

<sup>10</sup> F. Thayer, "Participation and Liberal Democratic Government", a working paper prepared for the *Ontario Government Committee on Government Productivity* (Toronto: Queen's Printer, 1971) at 18.

<sup>11</sup> These points are usually made in connection with public hearings. See: W. We Boyer, *Bureaucracy on Trial: Policy Making by Government Agencies* (New York: Bobbs-Merrill Co., 1964) at 78-79.

<sup>12</sup> *Id.*

<sup>13</sup> See, *supra*, note 10 at 19-20.

that the less articulate and less motivated are denied a real opportunity to contribute to the decision. This problem becomes more acute as the participatory structures become more sophisticated. Many, but certainly not all people are sufficiently well motivated to write a letter or telephone a department to register their opposition to or support for a proposal; however, fewer people attend public hearings<sup>14</sup> and almost none seek judicial review of administrative action. As more elaborate procedures are implemented, there is a definite bias in favour of the better-educated, the wealthy and politically aware. This problem can be alleviated somewhat by making participation less formal, by giving persons affected by the proposed decision notification of their right to participate, and by encouraging all potential participants to become involved in the decision-making process.<sup>15</sup>

A third disadvantage of greater public participation arises from the perceived and real disproportionate influence exercised by the new participants at the expense of those who have traditionally made decisions, namely, the legislator, the administrator and the property interests. Any procedure, for example, that affords members of the public access to the decision-maker or, in fact, gives them decision-making responsibility, thereby reducing the influence of those who have been responsible for decisions in the past, not only generates greater opposition from vested interests to further participation but detracts from their innovativeness and ingenuity as well.

This point is succinctly made by W. Wrotsky, the former Planning Commissioner of Metropolitan Toronto, in the context of the bureaucratic backlash to increased public participation in the planning process:

If the elected official [or decision-maker] chooses to listen to or be intimidated by the local faction in contradiction to a public servant, the latter feels not only personally betrayed and rejected but also believes that the good of the total community . . . best guarded by and known to him [has been] surrendered for the benefit of the few.<sup>16</sup>

Unless public participation is truly representative and gives *all* parties an opportunity to participate in a decision, we might face the paradox that more participation at the present time means, as bureaucratic backlash grows, less participation in the future. Rather than circumventing the traditional participants in the decision-making process, one must include them at every stage of the process.

Finally, participation may be rationalized, not in terms of the degree to which it furthers or detracts from some desired end, but as an end in itself. Participation is a worthwhile objective, regardless of whether or not it improves the final decision. In the same way that we pursue political equality

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<sup>14</sup> For example, at a selected number of International Joint Committee public hearings the number of participants ranged from 8 to 29. See: D. Swanson, "Public Perceptions and Resource Planning" in Sewell and Burton (eds.), *Perceptions and Attitudes in Resource Management* (Ottawa: Queen's Printer, 1971) 91 at 93.

<sup>15</sup> The problem of the disproportionate influence of the more articulate, better motivated members of society remains, however.

<sup>16</sup> W. Wrotsky, *The Public Servant and Protest Groups*, (1972) 14 Canadian Public Administration 65 at 71.

as a legitimate societal goal, regardless of the 'inefficiencies' that this entails, participation in decisions that affect one's life must also be seen as a legitimate goal.<sup>17</sup>

## 2. Forms of Participation

The 'why' or the rationale for participation is not seriously doubted; however, the 'what' of participation is frequently ignored. When left undefined, the concept of citizen participation is totally innocuous. It may take a variety of forms, each differing in kind and degree. Rather than classifying participation from an effectiveness or power standpoint<sup>18</sup> this article focuses only on so-called 'effective participation' and classifies each form from the standpoint of the decision-making process that can accommodate that type of participation most usefully. Thus participation ranges from voting in the legislative process, to hearings in the administrative process, to proofs and reasoned argument in the adjudicative process.

To understand participation from this perspective, we must first understand institutional decision-making.<sup>19</sup> Participation arises in the context of a decision or action and is therefore nothing more than a statement about how people contribute to such a result.

Participation, like decision-making, cannot be classified neatly into three or four narrowly defined types. Instead, it must be seen as falling along a continuum with two clearly identifiable types falling at each end of the continuum and an almost infinite number of permutations and combinations of these types falling in between. Each participation-type corresponds to and in fact is a function of each type of institutional decision-making process.

At one end of the continuum is the legislative decision. In this context effective participation is not only related to the casting of the votes, but to each participant's skills of persuasion, which in turn are related to a participant's credibility. The decision-making and participatory process is very much a function of pre-decision bargaining and compromise. In the legislative forum, participants are therefore able to present 'their case' to their colleagues, bargain and negotiate with them for support, and take part in the final decision with an equal vote.

At the other end of the continuum is the judicial or adjudicative decision.

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<sup>17</sup> This final point is made by Churchman in the context of urban planning. He notes "It is contribution [to the decision-making process] which is the goal, because contribution is the full expression of one's individuality. We create problems and attempt to solve them in order to contribute." Churchman, *The Case Against Planning* (1968), Management Decisions.

<sup>18</sup> Most commentators on the subject classify participation from this standpoint. See, for example, S. R. Arnstein, *A Ladder of Citizen Participation*, [1969] *Journal of the American Institute of Planners* 216; G. Bourassa, "Study on Participation and Regional Planning" published by the *Canadian Council on Rural Development* (Ottawa: Queen's Printer, 1969).

<sup>19</sup> The relationship between participation and decision-making is noted by L. Fuller, in *The Morality of Law* (2nd ed., New Haven: Yale University Press, 1969); and P. Weiler in *Two Models of Judicial Decision-Making* (1968), 46 C.B.R. 406.

Participation in this context is characterized by the presentation of proofs and arguments to an impartial decision-maker who must decide on the basis of these presentations in light of rational and pre-established decisional criteria. The participants do not make the decision — they merely provide the facts and arguments on which the decision is made. In this context, effective participation depends not so much on the persuasiveness of the participants, although this is important, but rather on the correctness of a party's claim and his ability to prove that claim. This in turn is related to the ability of the adjudicative process to exclude irrelevant or less relevant information and focus on the claims of the two parties. The essence of adjudication is that it 'heightens the sense of the particular' and anything that detracts from that reduces the usefulness of this form of participation.

Finally, and falling somewhere in between the two extremes, is the regulatory or managerial decision. Participation in this context is not as well-defined as participation in either the legislative or adjudicative processes. The decision tends to be based more on intuition, good judgment or 'just plain getting the job done as best one can'.

Such a decision does not lend itself easily to a particular type of public or individual involvement. In some circumstances, public involvement in the regulatory process may obscure the issues by raising irrelevant concerns and impair the administrator's ability to do his job effectively. In others, it may provide the regulator with much useful information that could not be obtained in any other manner, or act as a check against administrative co-optation, or simply inform an apprehensive public of the validity of the governmental function. Given the diverse functions that may be attributed to participation, it need not take a particular form. Generally, it will follow a public hearing format. However, public hearings vary so much that this does not say much about the particular form of participation. The important point is that because regulatory decisions are based largely on the skill and experience of the regulator, it is impossible to formalize public participation in the process. Participation tends to remain on the periphery of the process rather than form an integral part of it.

Because each form of participation is intimately related to a form of decision-making, it is crucial that a task be recognized for what it really is. To characterize, for example, all tasks as managerial and to dismiss the need for a formal hearing on this basis is an extreme distortion of this analysis and a throwback to the unfruitful administrative law distinction between administrative and (quasi-) judicial functions. Although this point will be explored in more detail in the next Part, it must be noted that highly charged political tasks can best be resolved in a legislative forum, whereas decisions about right and wrong, guilt and innocence are more amenable to resolution in an adjudicative context. It is a conceptually narrow, although quantitatively large number of problems that are best resolved in an administrative manner. They tend to include, for example, the refinement of general policy guidelines and the application of previously defined policy to persons who do not fall within easily identifiable categories.

The multiplicity of forms which participation may take, without any conception of the context in which each form may be used most successfully, has generated considerable rhetoric as to the proper role for participation.



Sloganeering rather than rational discussion has dominated the recent debate between proponents and opponents of increased public participation. Proponents sing the praises of public involvement by pointing to the additional relevant information that the public can provide at a public hearing<sup>20</sup> or the important contribution that concerned members of the public can make through an adjudicative process that is unencumbered by restrictive standing rules.<sup>21</sup> Those who express hostility to the prospect of increased public involvement focus on the potential for delay, and the flood of 'frivolous and vexatious' actions that would inevitably follow more liberal standing rules and they finally conclude by asking rhetorically 'what can a generally un-informed public contribute to technically complex and difficult issues?'

The debate has not been resolved. Neither side is able or prepared to offer a satisfactory standard against which public participation can be evaluated. One suspects that both groups are convinced that the road to victory lies in more of the same rhetoric. And even when public involvement apparently is accepted as a legitimate component of the decision-making process, one suspects that both sides see it primarily in terms of 'tokenism'.

Furthermore, the proponents of public participation have tended to push for a particular type of participation, regardless of the ability or inability of that type to contribute meaningfully to the resolution of a particular environmental problem. This is especially true among many members of the legal community. Their proposed solution to most problems is to judicialize the decision-making process in which they arise.<sup>22</sup> For example, in the environmental context, lawyers often argue for a judicial resolution to all issues. In this context, participation means not only a person's day in court, but a person's right to have the court decide all environmental disputes on the basis of his and his opponents' representations to that court. Some environmental problems such as liability for environmental damage or the quantum of damages may be resolved satisfactorily by the judiciary and the adjudicative process, and in these cases the contribution of each adversary to the decision will not only be substantial but determinative. Other environmental problems that raise important policy questions cannot be resolved easily in such a forum. To argue that these problems be resolved in an adjudicative context and that concerned members of the public have an unfettered right to participate in such a forum, may be counter-productive to the extent that the court is unable to deal with such a complex, multi-sided, open-ended debate. Conversely, to assert, as legislatures have, that all public participation in the environmental field must be confined to discussion at a 'public meeting' or 'public hearing' may be equally unproductive. What is required, therefore, is to explore first how different environmental problems can best be resolved. Once the appropriate resolution processes are identified, the most

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<sup>20</sup> See, for example, the argument put forward by R. Franson and P. Burns in *Environmental Rights for the Canadian Citizen: A Prescription for Reform* (1974), 12 *Alta. L. Rev.* 153 at 157.

<sup>21</sup> Those in favour of this approach, including the influential Canadian Environmental Law Association, generally look to the *Michigan Environmental Protection Act* as legislation worthy of emulation in Canada. See, *Id.* at 167.

<sup>22</sup> *Id.* at 165.

productive form of participation will follow as a function of that decision-making process.

Once the link between participation and decision-making is identified, the rationale for participation becomes even more compelling, especially from a functional point of view. Participation not only improves the decision-making process, but is in fact the essence of the process. Without the proper form of participation, decisions emanating from the process may not adequately reflect society's best values, may not do justice to those most affected by the decision and may not conform to any reasonable standard of efficiency.

## B. ENVIRONMENTAL DECISION-MAKING

The environmental decision-making process is multi-faceted. Decisions range from those that generally rough out societal goals, to translating broad societal goals into specific policy, to policy implementation and finally to enforcement. Because each type of decision is unique, it requires a decisional process with certain specific institutional characteristics.

The decisional process tends to follow a well-defined hierarchy in which decisions move from the highly political (policy formulation) to the technical (policy implementation) and finally to the judicial (policy enforcement). This hierarchy in turn tends to correspond to the degree of discretion or choice available to the decision-maker at each level in the process. Decisions made at the policy formulation stage are highly discretionary in the sense that the decision-maker is free to choose an appropriate environmental policy from a variety of alternatives. Decisions at the enforcement end of the scale, on the other hand, are less discretionary in the sense that the decisions are made in the context of compliance or non-compliance with predetermined standards and rules.

Implementation decisions tend to be at the high discretion end of the discretion-rule scale; however, they do not fit neatly into one category or another. Because of the sharp contrast between 'policy' and 'judicial' decisions and because both tend to be component parts of the implementation function, it is best to look first at policy formulation and policy enforcement decisions and then to examine the policy implementation part of the decision-making process.

### 1. *Policy Formulation*

The first level decision, policy formulation,<sup>23</sup> is essentially a decision about how broad societal conflicts are to be resolved, which in turn is a function of the weight to be assigned to conflicting social values. These decisions are essentially societal value judgments, or, to use Professor Fuller's phrase "morality of aspiration" decisions.<sup>24</sup> For example, whether open space ad-

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<sup>23</sup> Policy formulation is often described as goal identification.

<sup>24</sup> Professor Fuller describes these decisions as "morality of aspiration" decisions. They are, according to him, concerned with the highest goals of human achievement; "[They have] to do with our efforts to make the best use of our short lives." See Fuller, *The Morality of Law*, *supra*, note 19 at 17.

jaacent to a city should be used as a recreational park an environmental preserve or as an industrial park to stimulate economic development depends primarily on society's desires, not just on the economics of the marketplace. Similarly, the value to be assigned to one-hundred-year old trees situated in the path of a proposed highway depends almost exclusively on their value to the community in the context of the community's desire for trees and more convenient transportation, not on the value assigned to them by highway engineers. In both examples, there is no single right or wrong decision. A 'right' decision is the result of a process that best reflects all values by incorporating all points of view in the decision and giving all interested parties an equal opportunity to influence the outcome.<sup>25</sup>

The one appropriate forum for such decision-making is the legislature. Legislatures are institutionally equipped to determine how the community should allocate its scarce resources when there are a number of competing alternatives, none of which is clearly right or wrong. The legislative process guarantees, as well as can be expected, that all possible societal interests are represented and that all have an equal opportunity to participate indirectly through representative voting in making important societal decisions. If the legislature is ideally the most appropriate body for making such decisions, we must also recognize that it is unrealistic to demand that the legislature make all 'policy' decisions in the environmental protection sphere. First, the legislature can do little more than identify societal problems in broad terms and provide the general parameters of a solution to those problems. Legislatures can, as they have done, recognize that environmental degradation is becoming a serious problem, resolve to reverse the trend, and suggest a mechanism for dealing specifically with that problem, but they cannot go much further than that. They have neither the time, the expertise, nor the tools to do much more than outline in general, sometimes ambiguous language, the essence of a solution to the broadest of societal problems.<sup>26</sup> More specific policy formulation must, therefore, be made in some forum other than the legislature. Secondly, the electoral process is not a precise enough device to ensure that the actions of elected members do in fact conform with the wishes of those they purport to represent. As society becomes more complex and issues more complicated, it becomes more unrealistic to expect legislators to represent satisfactorily their constituents on every particular issue. Thus, while the legislative process generally is best suited to resolve environmental decisions at the policy formulation level, the legislature is not the best institution to do anything more in this regard than merely map out a policy direction for society in the very broadest terms. Much of the policy formulation function must be delegated to a subordinate, mini-legislative body that is better able to

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<sup>25</sup> Because such decisions depend primarily on the value judgments of the decision-maker, the question, "Who decides?" is crucial. Who ultimately should decide policy issues are those who are interested in and affected by the decision, namely, society as a whole.

<sup>26</sup> For example, the *Ontario Environmental Protection Act* S.O. 1971 c. 81 states in section 2 that the purpose of the *Act* is to "preserve and protect the natural environment". The specifics of such a policy are left largely to the discretion of those who must administer the *Act*.

analyze and appreciate the specific details of the problem and better able to implement the details of the solution once they have been formulated.

## 2. Policy Enforcement

The enforcement<sup>27</sup> aspect of the environmental protection task is relatively well-defined. It entails primarily the enforcement of environmental quality standards and guidelines, which in turn encompasses a number of diverse functions including determining whether a particular person is in breach of a standard (deciding questions of guilt or innocence), determining responsibility for pollution problems (deciding questions of duty and obligation), and determining liability for pollution problems (deciding questions of degree).

Determining the degree of compliance with environmental quality standards or the penalty to be assessed for non-compliance is a task particularly well-suited to the adjudicative process. These decisions are, to use Professor Fuller's terminology again, "morality of duty" decisions.<sup>28</sup> They are based on and help establish the 'minimum ground rules' that must be observed if community living is to continue. They "lay down basic rules without which an ordered society directed toward certain specific goals must fail its mark".<sup>29</sup>

Adjudication or arbitration is best suited to enforce and apply these 'ground rules' or, in the context of pollution control, 'environmental quality standards' because the process guarantees that the affected party is given a *fair* opportunity to prove his claim. The rules of procedure are designed to exclude irrelevant evidence. The general qualifications of the decision-maker ("dispassionateness as between individuals . . . a sense of relevance, analytical shrewdness")<sup>30</sup> help ensure an impartial disposition of the case. In fact the whole process is designed to enable the final arbitrator to *focus* exclusively on the merit of the claims of two (or three) contestants. In this sense, the final decision carries great weight because it is the essence of fairness.

Two important points about adjudication and environmental decision-making are worth noting. The decisional process functions best if (1) the parties are limited, preferably to two; and (2) the final decision is made on the basis of decisional criteria that are rational, capable of generalization and known by each side beforehand. Enforcement of environmental protection standards usually involves only two people — one asserting a breach of the standard and the other denying the assertion; or one accusing another of a pollution problem and the other denying it and trying to show his innocence. Not only do these disputes tend to be between two people but it is also preferable that they be limited to these two parties so that the decision-maker is able to focus on the central issue of the dispute, namely, who is right and

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<sup>27</sup> Enforcement is used here, as the text suggests, in its broadest sense and includes more than mere compliance or non-compliance with an administrative decision.

<sup>28</sup> Fuller, *The Morality of Law*, *supra* note 19 at 5.

<sup>29</sup> *Id.*

<sup>30</sup> A. Abel, *Appeals Against Administrative Decisions: In Search of A Basic Policy* (1962), 5 *Can. Pub. Admin.* 65 at 67.

who is wrong. Participation from other parties through some other process such as a public hearing only tends to divert the decision-maker's attention from the central issue and result in a less fair trial for the principal contestants.

Furthermore, the existence of pre-announced criteria on which these decisions are made also makes enforcement problems appropriate for resolution through adjudication. Environmental standards are well-known and accepted, and become, over time, legitimate societal goals. They not only confine the decision-maker's discretion and provide a standard by which to judge the correctness of his decision, they also tell the parties the case that they must make to win. This in turn not only enables the decision-maker to focus on the equities of the parties, but enables society generally to focus on the effectiveness of the enforcement process. Thus, in the same way that the legislative process enhances the quality of morality of aspiration decisions, the adjudicative process enhances the quality of morality of duty decisions.

The converse of the above argument is also true. To the extent that the legislature and the adjudicative institutions are well suited to perform certain functions, they are equally unsuited to perform others. One would not expect a legislature to decide narrow disputes between individuals because the legislative process is not designed to give the participants a fair, impartial hearing. The essence of legislative decision-making is that it is achieved through bargain and compromise among members of the legislature, sometimes on the basis of factors that are peripheral to the particular dispute, and not on the fair and unbiased application of previously determined standards to the proofs and arguments of the parties. Legislatures are neither unbiased nor are they able to focus well on the claims of the participants. Both factors preclude them from performing the enforcement function well.

When one attempts to resolve policy formulation, or morality of aspiration questions in an adjudicative manner, the result is even more unsatisfactory. Because there is no objective, rational basis on which to resolve these disputes, both the participants and the decision-makers are left to flounder, with the dispute ultimately decided on the decision-maker's own conception of what is best. And this, of course, may not necessarily coincide with society's own best interests. Adjudicative bodies, and particularly their rules of procedure, cannot cope well with more than two or three participants. But policy questions, if they are to be decided in society's best interests, must involve all relevant segments of society. The adjudicative process, by excluding many potential participants such as public interest groups from such decisions, ensures that the final decision will be biased in favour of those who do have the 'right' to participate, namely, the regulatory department and the polluters. Yet, even if all relevant interest groups have a right to participate, adjudication does not facilitate the necessary degree of give and take that is needed to arrive at a fair decision. Adjudication imposes a final decision on the participants; there is virtually no room for compromise. This may be acceptable if the parties have some assurance of a fair decision, but when the decision may ultimately reflect nothing more than a decision-maker's own values, it is intolerable. New societal goals must be worked out through negotiation and compromise among all interested parties, not imposed by a decision-maker insulated from societal needs and wants.

### 3. Policy Implementation

Perhaps the most important step in the environmental protection decision-making process is the implementation of legislatively defined environmental protection goals. This may be described generally as the managerial segment of the task. It includes that range of decisions that falls between the legislature's initial statement of concern about the environmental protection problem (goal identification) and its decision to deal with that problem through an administrative structure, and the judicial enforcement of these decisions. In other words, it includes everything from translating general legislative policy into environmental quality guidelines and standards to enforcing (or not enforcing) that policy against affected persons.

Although managerial decisions tend to be highly technical and complex, there is nevertheless an important legislative and adjudicative component to them. The legislative aspects of the decision are primarily those that involve a high degree of discretion. This includes, for example, translating loosely-defined objectives into specific environmental quality guidelines, categorizing pollution problems on the basis of some rational standard, and establishing pollution abatement strategies. While these functions may be primarily an exercise in finding what is technically and economically feasible, they are, like the initial task of setting environmental protection goals for the community, also decisions about what is socially desirable. Once the range of what is feasible is identified, the degree of environmental control demanded from society is very much a policy decision. In this regard, there are no right or wrong answers, only those that best reflect society's overall aspirations. It is important, therefore, that society as a whole at least be a party to these decisions.<sup>31</sup>

The adjudicative part of the implementation task, on the other hand, involves much less discretion. This range of decisions includes primarily the imposition of previously enunciated guidelines and standards on persons and industries on a case by case basis. Although this function entails a highly complex and technical assessment of whether a particular activity or abatement proposal will comply with the prescribed ambient and/or effluent quality standards, it must be done in a forum that guarantees that all affected parties have an opportunity to prove or disprove the acceptability of the activity or proposal. This aspect of the managerial function, therefore, tends to be a straightforward mechanical application of standards to technical information. In this regard, there is a 'right decision' and the process that is most likely to generate such a decision is the adjudicative process because it can focus on the competing claims of the affected parties.

The above analysis seems to suggest that we should dispense with all environmental protection departments and embark on a new program of

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<sup>31</sup> J. Graham recommends such an approach in his article, *Reflections on a Planning Failure: Ontario Hydro's Nanticoke to Pickering Transmission Corridor* (1972), 13 *Plan Canada* 61; but, as Franson & Burns point out in their article *Environmental Rights*, *supra* note 20, there is no guarantee that the members of such a group will ever reach a consensus.

proliferating mini-legislatures and adjudicative bodies. While some environmentalists may happily embrace such an approach, it is an extreme oversimplification of the optimal solution to the problem. There is certainly some scope for citizen councils to deal with the more obvious policy aspects of the managerial task and some opportunity for more active adjudicative tribunals, but the task is, in large part, a managerial one that may not be solved by either the legislative or adjudicative processes.

Although the implementation part of the job is both discretionary (in the sense that the regulatory department is trying to get *the best deal* that it can from the regulated industry or person) and rule-confined (in the sense that the department must apply *the standards* as best it can), the essence of this task is, as noted above, 'getting the job done as best one can'. It demands a great deal from the regulatory personnel and very little from any one particular decision-making process. It tends to be only as effective as the people who administer it. Attempts to judicialize or legislate this part of the environmental protection task are not well-founded. By structuring a process that works best on intuition and hunches, the essence of the process may be lost. Regulators must be left relatively free to bargain or extract the best deal they can from the regulated. All that may be required to accomplish the task is a well-trained department, sensitive to both the pollutor's and environmentalist's concerns,<sup>32</sup> that is determined to implement policy as effectively and fairly as possible.

### C. MODEL FOR PARTICIPATION IN THE ENVIRONMENTAL DECISION-MAKING PROCESS

Understanding the relationship between the environmental protection function, decision-making processes, and participation is crucial to the thesis of this paper, which is, that certain tasks can best be performed by certain institutions which in turn function best with different forms and degrees of participation.<sup>33</sup> In this way, the ideal dispute resolution process is enhanced by the participation fed into it. And of course, to the extent that participation deviates from this ideal, it will impair the effectiveness of the decision-making function by detracting from the advantages that flow from participation.

Any participatory model must, therefore, encompass all three categories discussed above, namely, the nature of the decision, the ideal institution decision-making process, and the form of participation that most enhances that process. It is best presented in chart form.

The balance of this article will now explore the extent to which participation in environmental decision-making conforms to this model and, to the extent that the existing approach falls short of the ideal, explore ways in which current practice can be improved to achieve more satisfactory decisions.

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<sup>32</sup> It is crucial that both points of view are understood by the department.

<sup>33</sup> The primary focus of this study is on provincial and not federal or municipal legislation. Federal legislation has, until recently, not played a significant role in pollution control. The provinces, with jurisdiction over property and civil rights in the Province have taken the lead in this area and therefore, offer the most fruitful area for detailed study.

TASK	DECISION-MAKING PROCESS	FORM OF PARTICIPATION
<i>Policy Formulation</i> Identify broad societal goals and aspirations with re to environmental protection.	Legislative (collegial)	Voting (bargain, negotiate, compromise)
<i>Policy Implementation</i> (a) Translate general policy goals into more specific environmental quality standards, guidelines.	Managerial (Legislative)	Voting with a greater or lesser degree of technical (managerial) input depending on the particular problem.
(b) Reformulate (on a continuing basis) environmental quality standards, guidelines to reflect changing technologies, societal values, etc.	Managerial (legislative-adjudicative)	Voting, bargaining and compromise among the decision-makers. Presenting proofs and arguments to the decision-making institution.
(c) Implement environmental quality standards and guidelines.	Managerial (adjudicative)	Bargaining, compromise, generally getting the job done by whatever legal means available to the departmental staff.
<i>Policy Enforcement</i> Enforce the implementation function.	Adjudicative	Presenting proofs and arguments to an unbiased decision-maker (in light of predetermined criteria and standards).

## PART II

### A. ENVIRONMENTAL DECISION-MAKING IN CANADA

Having put forward the hypothesis that there is an ideal type of decision and an ideal form of participation for any particular issue, let us examine the present approach to environmental protection in the context of this hypothesis. Environmental protection in Canada may be described broadly as environmental management. By and large, the whole task of protecting and preserving the environment is thrust upon the shoulders of fledgling, understaffed, and sometimes inexperienced environment departments. Each department is given approximately the same broad legislative mandate to set appropriate standards for various environmentally damaging activities and to enforce these standards through licensing schemes that are applied to both existing and prospective polluters. How the standards are set and whether they are in fact enforced *vis-à-vis* particular individuals and industries is usually a function of the department's degree of commitment to environmental protection and its independence. Public involvement is generally kept to a minimum. With few exceptions, departments have not achieved the degree of environmental protection demanded by an apprehensive and concerned public. The gap between expectation and achievement has been largely responsible for the growing cry for more public participation. And this cry has usually been for either more of the same ineffective public hearings, or for a more judicial-



ized approach to the problem. No one has attempted to determine the most appropriate form and degree of participation.

### 1. *Environmental Decision-Making in Canada: The Managerial Model*

Canadian provincial environmental legislation is distinguished by three related characteristics: the heavy administrative demands placed upon the regulatory department; the extraordinarily broad powers given to the administrators; and the limited right of individuals and the public to participate in the decision-making process.

The first two characteristics stem from provincial legislatures' commitment to regulate pollution through licensing schemes, and the third marks a conscious legislative effort to keep participation to a minimum. The existence of the first two introduces the potential for distortion of environmental protection goals and makes the lack of effective participation lamentable.

Since the mid-1960's, all Canadian provinces have passed comprehensive pollution control and environmental protection statutes.<sup>34</sup> While the degree of sophistication varies from province to province, the regulatory scheme is essentially the same everywhere. The Ontario legislation, enacted in 1971 and amended the following year,<sup>35</sup> is one of the most comprehensive environmental protection acts and therefore provides a useful example of the general way in which pollution is regulated at the provincial level.<sup>36</sup>

The goal of the Ontario Act is, as stated in section 2, to provide for the protection and preservation of the natural environment. While this statement is not particularly helpful in terms of identifying specific goals, it does suggest a general commitment to improve and preserve the quality of the environment.<sup>37</sup> Certainly some accommodation has to be made among all legitimate uses of the environment and section 2, therefore, must have as its goal a less

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<sup>34</sup> *Clean Air Act*, S.A. 1971, c. 16, as amended; *Clean Water Act*, S.A. 1971, c. 17, as amended; *Pollution Control Act*, 1967, S.B.C., c. 34, as amended; *Clean Environment Act*, S.M. 1972, c.76 as amended; *Clean Environment Act*, R.S.N.B. 1973, c. 21; *Environmental Protection Act*, S.N.S. 1973, c-6; *Department of Provincial Affairs and Environment Act*, S.N. 1973, No. 39; *Environmental Protection Act*, S.O. 1971, c. 86, as amended; *Environmental Control Commission Act*, S.P.E.I. 1971, c. 33, as amended; *Environmental Quality Act*, S.Q. 1972, c. 49; *Clean Environment Authority Act*, S.S. 1971, c. 2, as amended. Many important statutes that deal with environmental protection have, for reasons of space, been excluded from the following discussion. Only statutes that regulate pollution on a comprehensive, multi-levelled basis are considered.

<sup>35</sup> S.O. 1971, c. 86, amended by S.O. 1972, cc. 1, 106; S.O. 1973, c. 94; S.O. 1974, cc. 20, 125. Significant deviations from the Ontario approach are noted in other statutes where they occur.

<sup>36</sup> For a similar analysis within the context of the Nova Scotia *Environmental Protection Act*, see P. Edmond, *A Critical Evaluation of the Nova Scotia Environmental Protection Act* (1975), 24 U.N.B.L.J. 69.

<sup>37</sup> This statement is somewhat at odds with the history of the legislation. The forerunner of the Ministry of the Environment, the Ontario Water Resources Commission, was launched in 1956 as "another great public utility commission". One suspects that vestiges of the public utility approach remain with the new Ministry. For a good discussion of the history of the O.W.R.C. see J. Milner, *The Ontario Water Resources Commission Act*, 1956 (1958), 12 U. of T.L.J. 100.

than pristine environment. How much less is to be determined by the Department.

The Act relies almost exclusively on a permit or licensing system involving 'certificates' and 'programs of approval' to ensure compliance with the maximum permissible emission and discharge levels established under the Regulations (section 94(c)). Setting standards under the regulations is crucial to the scheme. Applicants whose activities meet the standards are entitled to approval and a licence; those whose activities do not meet the standards are not. Standards determine not only the ambient air, water and soil quality, but the quality of the effluent discharged into the environment as well. Decisions about appropriate standards, therefore, are policy decisions about how we should best allocate our scarce resources among competing societal uses. They are concerned with the kinds of activities that will be permitted and the kinds that will not; about which interests within the society will be benefitted and which will not; and about the trade-offs that we will be prepared to make and the ones that we will not. Ideally, then, regulatory standards should reflect the society's preference for its environmental future.

Polluting activities are licensed by the appropriate branch director pursuant to departmental standards. Persons who are licensed have departmental sanction for their activities. Those who do not meet the regulatory standard and are not licensed are in breach of section 5 and subject to the penalty provisions of the Act. These offenders may also be regulated through control orders. Once issued, control orders become effective immediately, subject to an appeal under section 79 to the Pollution Control Appeal Board. More serious pollution problems may be dealt with by the Director through stop orders (sections 7 and 12).

Two techniques are available to mitigate the harshness of newly promulgated regulatory standards for existing industries.<sup>38</sup> First, as noted above, both orders are discretionary rather than mandatory. Secondly, control orders may be implemented over an extended period of time through program approvals (sections 10 and 11). To be eligible for such approvals a person must submit a program of pollution abatement to the Director who may then, with the consent of the Minister, refer the program to the Environmental Council<sup>39</sup> for its advice and consideration. The decision to approve the program or not belongs to the Director.

New construction or alterations to existing operations likely to discharge wastes and contaminate the environment must receive a departmental certificate

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<sup>38</sup> Although the costs to society of serious pollution are considerably greater than those emanating from nonconforming uses in the land use planning field, the analogy between the two is not altogether inappropriate. Thus, for the same reason that we tolerate a nonconforming use for the life of the building, it may be reasonable to introduce newly enacted controls over an extended period of time. For a statute that provides for nonconforming uses see *The Planning Act*, R.S.O. 1970, c. 349 s. 35 as amended.

<sup>39</sup> The Council is set up under Part XII (ss. 88-90) of the *Act* and is to consist of seven to eleven persons who are "competent and knowledgeable . . . in matters relating to the natural environment." Its functions are strictly advisory.

of approval before any construction can begin (sections 8 and 9). Like program approvals, the onus is on the applicant to devise a scheme that will meet the statutory standards. The role of the Director and his staff is to evaluate and approve or disapprove submitted plans, not to find an acceptable abatement technique for the applicant.<sup>40</sup> Failure to comply with any of these procedures is a separate offence under section 102 of the Act and may be restrained by an action at the instance of the Minister.

Unlike the standard-setting function, the licensing, or approval task tends to be more adjudicative than policy-oriented. Once the desired environmental quality has been established by these standards, the Director's discretionary powers are limited to a determination of whether or not a technical proposal will meet the predetermined standards.

Superimposed on this elaborate standard-setting and approval system is the general prohibition against certain types of discharges (section 14). It prohibits, for example, the discharge of "any contaminant into the natural environment that causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it". The Act, unfortunately, offers no explanation as to how conflicts between this section and approved activities will be resolved.<sup>41</sup>

## *2. Some Dysfunctional Characteristics of The Managerial Approach*

This licensing scheme creates tremendous burdens on the Ministry of the Environment which must administer it. Licensing demands a high degree of government activism and competence to ensure initial compliance with the law. Licensing standards are predetermined (section 94) and must, therefore, be set at a time when all the necessary information is sometimes not available.

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<sup>40</sup> The distinction between the two roles is not as great as the statute suggests. In practice, they tend to merge. The Director, for example, has wide discretion under section 8(4) to investigate problems and impose "such terms and conditions . . . as he considers necessary" thus implicating him in the solution. Furthermore, close relationships invariably develop among scientists and engineers working toward common goals. The sheer enormity of the technological problems, however, precludes the government staff from playing a substantial developmental role.

<sup>41</sup> Section 102(2) purports to immunize approved activities against prosecution, but section 14 applies "notwithstanding any other provision of the Act or the regulations", thus making an approved breach of section 14 still subject to prosecution under section 102(1). The very existence of section 14 suggests that approvals offer no guarantee against future environmental impairment; that they can become a futile and empty exercise of bureaucratic administrative powers which must be supplemented by a further prohibition against "pollution". One possible explanation for the section is that it is for use against older sources of pollution which have not met the regulatory standard nor agreed to a long term abatement program under a program of approval. Another explanation points out that it is designed to protect individuals and the society against sloppy, overly permissive standards and approvals. A more plausible answer, however, indicates that it is intended to serve as a general stop gap. The causes of pollution are being discovered so quickly and the technology is changing so rapidly that it is physically impossible for any department to respond to these new problems. Section 14, by making it an offence to pollute the environment, does not guarantee that such new pollutants will not go unchecked, but it does give the government and individuals the right to take immediate action through a private prosecution.

More importantly, each existing and potential source of pollution must be individually licensed (sections 8 and 9). This necessitates a huge bureaucratic organization made up of well-equipped and highly skilled staff. Without such a department, there is a tendency to look for help in setting standards and gathering information, and the most obvious place to look is to those who have much of the expertise, namely, those whom the department is purporting to regulate.<sup>42</sup> Once the standards are set under the Ontario scheme, it is very difficult to overcome the bureaucratic inertia needed to change them. The burden of responding quickly and efficiently to new changes in abatement technology is particularly onerous for the department under a licensing scheme. Once licensed, there is no incentive for a person to adopt new processes.<sup>43</sup> Thus changes are only introduced if they are imposed and they are only imposed after a painstaking review of licences by the department, cancellation or suspension of obsolete licences, and the imposition of new ones.<sup>44</sup> Any regulatory department's inability to deal effectively with these burdens will necessarily have unfortunate consequences for the environment.<sup>45</sup>

Another consequence of this type of licence scheme is the extremely broad discretionary power vested in the Director, the Minister and the Lieutenant Governor-in-Council. Regulatory maximums and permissible levels of pollutants, for example, are to be specified by the Cabinet under the general regulation-making authority of section 94. With the exception of section 2, which states that the purpose of the Act is to provide for the protection and preservation of the natural environment, there is absolutely no legislative guidance regarding the kinds of interests that the Cabinet (Department) should take into account when making these important decisions, nor the weight to be assigned to these competing interests — everything falls within its discretion. Once standards are established, the Director has the *option* of issuing stop or control orders under sections 5 and 6, even though contaminant emissions exceed the maximums permitted under the regulations. Although pollution may constitute "an immediate danger to human life, the health of any person or to property", the Director is under no legal *obligation* to order it stopped or abated (sections 7 and 12).

Without any statutory requirement on Ministry officials to alleviate or prohibit environmental degradation, the quality of the environment is left

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<sup>42</sup> This tendency is documented in another context in M. H. Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955).

<sup>43</sup> Licensing is to be compared of course with effluent charges which provide a built-in monetary incentive for persons to incorporate new pollution abatement technologies into their activities.

<sup>44</sup> Not all the burdens are on the bureaucracy, however. The applicant is forced to deal with this large, cumbersome bureaucracy and often suffer the delays and accompanying expense of approvals that become bogged down in the machinery. Furthermore, by being so dependent on government approval, the applicant's freedom is cut down substantially.

<sup>45</sup> For a general critique of both these aspects of Bill 94 as it was presented to the House on first reading. See: *Preliminary Report on Bill 94*, Canadian Environmental Law Research Foundation, (Toronto: 1971). A similar criticism was levelled against Quebec's Bill 34 by the same organization. See: *Comment*. 1 Environmental Law News 15. (1972).

to the integrity of a large, overworked bureaucracy. Ministerial accountability to the legislature provides scant assurance that anything more than the most glaring, politically charged problems will receive its prompt attention. Access to the court, traditionally open to aggrieved citizens who wish to compel officers to perform their public duty under a writ of *mandamus*,<sup>46</sup> is not available because these officers are under no duty to perform anything more than minimal housekeeping functions.<sup>47</sup> To be sure, wide discretionary powers are not only an inevitable function of governmental regulations; they are a necessary ingredient of effective, flexible, bureaucratic control. But the need for some discretionary power must not be satisfied at the expense of all checks and controls.

The consequences of these two characteristics may be summarized as follows: burdens lead to dependence, and discretion leads to vulnerability which, in turn, leads to co-optation. There is nothing inherently wrong with these tendencies.<sup>48</sup> They only become dangerous when they lead to one-sided, unrepresentative and hence dysfunctional results. This is what sometimes seems to be happening in Canada. The bureaucracies, charged with administering the environmental protection schemes, labour under heavy administrative and technical burdens, lack a commitment to clearly enunciated legislative standards, and have, as a result, become dependent on, as well as vulnerable to, the only group with which they come into regular contact — the polluters.<sup>49</sup>

Many writers have noted the general tendency for bureaucracies to become dependent on the one group that knows what it wants and how to get it.<sup>50</sup> The most vociferous and dominant group in any regulator-regulated combination is the regulated industry. Public interests are either equated with the regulateds' interests or are lost in a maze of rhetoric and ambiguity.

The general tendency for the regulator to become dependent on the regulated is accentuated in Canada because the particular regulatory scheme

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<sup>46</sup> The prerogative writs in Ontario have been replaced by an "Application for Judicial Review". See: *The Judicial Review Procedures Act*, 1971, S.O. 1971, c. 48. *Mandamus*, *certiorari* and *prohibition* actions are specifically forbidden by section 12 of the *Prince Edward Island Act*; S.P.E.I. 1971, c. 33.

<sup>47</sup> I am not suggesting that only "minimal housekeeping functions" are in fact performed. Indeed, nothing could be further from the truth. The point, however, is that whether these functions are performed depends on the integrity of the individual and bureaucracy, not on a judicially enforceable statutory obligation.

<sup>48</sup> In fact, one writer has noted the *inevitability* of the co-optation process. M. Edelman, *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1967).

<sup>49</sup> Needless to say, dependence and vulnerability on industry or any other polluting group transforms environmental protection goals into industrial protection goals. By and large, there is no incentive for industry, which must compete in highly competitive world markets, to absorb the cost of cleaning up the environment unless they are forced to do so through strict regulation.

<sup>50</sup> For example, M. Holden, in a perceptive article entitled *Pollution Control as a Bargaining Process* (Ithaca: Cornell University Water Resources Centre, 1966) contends that policy decision about water quality standards are not primarily analytic but rather are designed to accommodate the regulated: "the actual evidence indicates that, while the various parties utilize the analytic confusions, they are moved largely by recognition of the implications of any particular decision for the interests which they have in mind". *Id.* at 18.

forces the bureaucracy to rely unduly on those it purports to control. It must often look to industry for technical expertise when determining standards. Until recently, the only place to turn for help has been the polluter himself. Furthermore, by developing a close relationship with its 'clientele', the bureaucracy neutralizes potential opposition from this powerful group. The public, which might be expected to generate countervailing forces on the bureaucracy, is only able to do so when it feels sufficiently threatened by a particular policy to organize and operate as a pressure group.<sup>51</sup> This seldom happens. Policy is implemented on an incremental case-by-case basis and, unfortunately, a sufficiently large number of people never feel threatened by any particular decision to take any action at all.

The solution to the problem of bureaucratic co-optation by the regulated is to restructure the decision-making and enforcement processes to ensure that all affected and interested persons share equally in the decision-making. This means opening up the process, the advantages of which are articulated by Professor Davis in his book *Discretionary Justice*,<sup>52</sup> and, more importantly, ensuring that "policy" decisions are made in a legislative forum, that "judicial" decisions are made in an adjudicative forum and that "managerial" decisions are made often full consultations with both sides.

#### B. PARTICIPATION AND THE EXISTING DECISION-MAKING STRUCTURE

Standing in stark contrast to the need for participation in the environmental protection decision-making process is the lack of it. Provincial legislators have been singularly insensitive to the need, while the judiciary, tied to an unsympathetic common law, has been both unable and unwilling to rectify the problem.

Participation under the present environmental protection legislation falls into two main categories: objections and hearings. Public objections amount to little more than internal administrative review of departmental policy and decisions.<sup>53</sup> The process is initiated by someone affected by the decision and is conducted entirely within the department. Hearings, on the other hand, may be characterized as external administrative review of departmental decisions in the sense that the hearing procedure is usually conducted by an independent administrative board of commission. Depending on the participants' status, and the nature of the decision under review, the hearing may

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<sup>51</sup> See, for example T. O'Riordan, "Towards a Strategy of Public Involvement" in Sewell and Burton (eds.) *Perceptions and Attitudes*, *supra*, note 14 at 101; P. Selznick, *T.V.A. and the Grass Roots* (New York: Harper & Row Co, 1966).

<sup>52</sup> (Baton Rouge: Louisiana State Univ. Press, 1969) at 98:

The seven instruments that are most useful in the structuring of discretionary powers are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair and formal procedure. Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice. . . . When plans and private parties are prevented from checking arbitrary of unintended departures from them.

<sup>53</sup> Public objections may be further categorized into 'effective' and 'ordinary' objections. See *infra* note 60.

take the form of an informal, multi-partied public hearing or a more formal, adjudicative hearing. Judicial review, of course, may be available to supervise the way and the extent to which persons may participate through both processes.

### 1. *Public Objections*

Any member of the public may object to a particular decision or action of a departmental official; but this is little consolation unless there is some onus on the recipient of the objection to consider it in a fair and impartial manner. One province that has provided members of the public with such a right is British Columbia.<sup>54</sup> This right has recently been considered and expanded in a number of judicial decisions and provides the elements of an interesting model for this type of participation.

Under section 13(2), applicants, permit holders and any person who has "an interest in the land which will be affected by the granting of a permit for sewage or waste material may file an objection with the Director".<sup>55</sup> A similar right exists for residents within a five-mile radius of the point of discharge of air pollutants (section 13(3)).<sup>56</sup> In addition to those who have a 'right of objection', "any other person may object and the [Pollution Control] Board shall determine whether the public interest requires that the Director shall take his objection into consideration in making his decision", (section 13(6)).<sup>57</sup> The absence of an obligation to consider objections in the last two categories suggests that there is a duty to consider objections from the first two, although the extent of that duty is unclear and has been an important issue in two recent pollution cases.

In the first case, *Western Mines Ltd. v. Greater Campbell River Water District*,<sup>58</sup> Davey, J.A., with Branca, J.A. concurring and Tysoe, J.A. dissenting, held that the "right to file objections . . . shows the board is to proceed in a judicial manner, to the extent of allowing the objectors to know

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<sup>54</sup> *Pollution Control Act, 1967*, S.B.C. 1967, c. 34 as amended S.B.C. 1968 c. 38, S.B.C. 1970, c. 36, s. 13.

<sup>55</sup> It is important to note that objections under the *Act* are confined to permit approvals or refusals. There is no formal right to object to the setting of environmental quality standards.

<sup>56</sup> The legislature's distinction between air and water pollution for objection purposes is confusing. The convenience of a geographical limit on those who have a right to object is, of course, attractive from an administrative standpoint; but why is it more appropriate in one case than another. In the same way that rivers carry water pollution many miles downstream, air currents carry air pollution many miles downwind. Furthermore, the subsections distinguish between those who have "an interest in the land" and "a resident". Not only is the difference between the two phrases unclear, the reason for differentiating is uncertain.

<sup>57</sup> If the Board decides that the Director shall take a section 13(6) objection into consideration, the objector's rights "can be no less than the right of an objector qualified as such under section 13(2)". *Re Hogan and Director of Pollution Control (1972)*, 24 D.L.R. (3d) 363 at 368 per McKay, J. (B.C.S.C.)

<sup>58</sup> (1967), 58 W.W.R. 705 (B.C.C.A.) The court in this case was dealing with a slightly different wording of section 13(b). See: *Pollution Control Act*, R.S.B.C. 1960, c. 289 as amended.

the essentials of the case they have to meet and a reasonable time to support the objections, at least informally, by material and submissions if a hearing is not ordered".<sup>59</sup> "The board", according to Mr. Justice Davey, "confers a right to make an *effective objection* and that means, surely, the right to have the objection considered by the board"<sup>60</sup> This approach was followed three years later in *Re Pollution Control Act, 1967; Re Application of Hooker Chemicals (Nanaimo) Ltd.* by Mr. Justice Wootton:

. . . if the principle laid down by the decision of the *Western Mines* case is to be complied with, then the [Director] must lay down some procedure whereby, before he makes his decision as to a hearing, the objectors may submit their briefs, and whereby they, the objectors, may consider the material the Director has from the applicant for the permit.<sup>61</sup>

This is to be contrasted with objections made to the Director and Board under section 13(6). They do not become 'effective' and therefore subject to the procedure outlined above unless a determination is made by the Board that they shall be considered by the Director.<sup>62</sup> Thus, "the Director is under no duty to consider an 'ineffective objection', or if he elects to do so, as he may, to proceed judicially in so doing".<sup>63</sup> The procedure to be followed by the Board in making its determination under section 13(6) has not been decided by the courts; however, it seems safe to conclude that there is no obligation on the Board to act in a judicial or quasi-judicial manner.<sup>64</sup>

Section 13(4) requires the Director<sup>65</sup> to decide "*in his sole discretion*, whether or not the objection will be the subject of the hearing" (emphasis added). Notwithstanding the seemingly broad unfettered discretionary power conferred on the Director, it has been severely circumscribed by the courts. First, it does not impair an 'effective' objector's right to support informally his objection by materials and submissions,<sup>66</sup> nor does it permit the Board

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<sup>59</sup> *Id.*, at 707.

<sup>60</sup> (Emphasis added). *Id.*, at 708. Davey, J. A. contrasted an "effective objection" with ordinary objections which can be filed by anyone "mechanically, without permission, by letter".

<sup>61</sup> (1970), 75 W.W.R. 354 at 360 (B.C.S.C.) per Wootton, J.

<sup>62</sup> *Piatocka v. Director of Pollution Control, et al.*, [1971] 5 W.W.R. 626 at 632 per Aikins, J. in Chambers (B.C.S.C.).

<sup>63</sup> *Id.*, at 633.

<sup>64</sup> Otherwise, any member of the public, by objecting to the Board, could initiate a quasi formal hearing and subsections 13(2) and (3) which provides for such hearings in certain circumstances would be superfluous. If this is the explanation, however, it is hard to explain why such decisions are made by a statutory tribunal rather than the Director. The tribunal, by its adjudicative nature, is designed primarily to hold hearings, not to pass judgment routinely on what is essentially an administrative matter. Of course, giving the Director power to make the determination might mean valid objections would be routinely rejected.

<sup>65</sup> The Board determines whether a public objection deserves consideration by the Director, while the Director decides whether effective objections deserve a formal hearing.

<sup>66</sup> *Western Mines Ltd. v. Greater Campbell River Water District*, *supra* note 58 at 707, per Davey, J. A. The effective objector qualification was added by Mr. Justice Aikins in *Piatocka v. Director of Pollution Control et al.*, *supra*, note 62.



to withhold the essentials of the case which the objector has to meet.<sup>67</sup> Thus the mere consideration of these objections must be done in a judicial manner. If, after this judicial determination, the Director decides to hold a hearing it must be, according to the court, "a *formal hearing* at which the parties may attend before the board and present their cases".<sup>68</sup>

Permits may only be amended "upon notice to all persons whose rights in the opinion of the Director would be adversely affected and after consideration of any objections" (section 6). By making notice (and presumably objections) contingent on the Director's approval, the 'right' to file objections has been replaced by a privilege that is subject to the discretionary powers of the Director. The failure to extend the right to those covered by subsections 13(2) and (3) is confusing.<sup>69</sup> The consequences to nearby residents may be just as serious in both cases.<sup>70</sup> A more satisfactory procedure would be to guarantee all of those adversely affected a right to object. Objections filed under section 6 are presumably entitled to the same high standard of consideration imposed by the courts on objections from section 13.

Under the close supervision of the courts, 'effective objections' have undergone a remarkable judicialization. They cannot be routinely dismissed by the Director. The most recent case on the subject went so far as to require the Director to supply the objector with copies of all materials supplied to the Director by the applicant and gave the objector a reasonable time to prepare a further submission in support of his objection.<sup>71</sup> Thus by raising effective objections to proposed administrative action many members of the public have judicial assurance that their objections will be considered carefully.

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<sup>67</sup> The Director's procedure was described by Wooton, J. as one that would give "at least the semblance of a judicial enquiry into the matter, that is to say, something established on the principle of *audi alteram partem*". *Re Pollution Control Act, 1967, Re Application of Hooker Chemical (Nanaimo) Ltd.*, *supra* note 61 at 360.

<sup>68</sup> *Western Mines Ltd. v. Greater Campbell River Water District*, *supra* note 58 at 708 (emphasis added). McKay, J. comes to the same conclusion in *Re Hogan and Director of Pollution Control* *supra* note 57 at 368. The learned judge found that the existence of an appeal to the Supreme Court from the order of the Director (section 12(1)(c)) were merely "further support" for this conclusion. This is to be contrasted with the wider public hearing set out in section 14.

<sup>69</sup> One judge attributed the different language in the two sections to "inartistic drafting". See: *Western Mines Ltd. v. Greater Campbell River Water District*, *supra* note 58 at 708 per Davey, J. A. In practice the different expressions may make very little difference. It would not only be administratively more convenient to apply the same criteria in both situations, but would also help dissipate citizen opposition to an amendment if those affected were given an opportunity to contribute to the decision.

<sup>70</sup> One explanation of the different wording focusses on the Director's improved knowledge about the applicant's operation and its effect on the environment. Once a process is fully operational, it is possible to be far more precise about the type and quantity of pollutants emitted and their effect on a particular area and group of people. Thus, the Director is in a better position to determine who is and who is not adversely affected by the pollution and therefore, who should be entitled to file objections. But this advantage is offset by the potential objector's dependency on the Director exercising his discretion in a favourable manner.

<sup>71</sup> *Re Hogan and Director of Pollution Control*, *supra* note 57 at 369, 370 per McKay, J.

The defects of the objection procedure are, however, substantial. There are many anomalies and inconsistencies that seem to defy rational explanation.<sup>72</sup> Furthermore, there is no right to object at the standard-setting stage (section 10(b)).<sup>73</sup> Effective objections are confined to proposed sources of pollution and limited to a narrow group of property owners, the applicant, and those who can convince the Board of the validity of their objections. Even for those who do object, there is no guarantee that valid complaints will influence administrative action. As long as the Director follows the minimum procedural safeguards, he is free, within the confines of the Act, to make whatever decision he pleases. Objections will obviously have some influence on the Director, but they are dependent on his concern for the environment and affected individuals, not on objective, unbiased findings. Coupled with the dangers of administrative co-optation by the polluters discussed above, the right to file an objection may mean very little in terms of the overall effect that it has on the administration of the environment.

## 2. Hearings

Hearings may be divided into two sometimes confusing and often overlapping categories: the public hearing and the adjudicative hearing. Attempts to describe the characteristics of and the proper role for each type of hearing have been sadly lacking in Canadian administrative law. Statutes seldom distinguish between the two. The courts, because of their common law preoccupation with the adjudicative hearing, try to further judicialize the public hearing whenever they are given the opportunity. Most commentators tend to be preoccupied with the adjudicative hearing and either ignore public hearings or suggest ways in which it may be modified to better approximate the adjudicative hearing. Both types of hearings, however, have a distinct role to play in the decision-making process. To fulfil these roles they must function in very different ways. This section attempts, therefore, to describe the present function of hearings and to map out the proper role of each type of hearing in the context of environmental protection.

### a. The Public Hearing

The public hearing is surrounded with an aura of confusion and ambiguity. Its format fluctuates from one jurisdiction to another. Its purposes are unclear and its ultimate role in the decision-making process is obscure. Much of this confusion stems from the fact that the public hearing is expected to be all things for all people. Many of the public who participate in such hearings expect it to function as a decision-making mechanism, those who preside over it sometimes regard it as an information-gathering device or as an instrument of persuasion, and those who authorize the hearing often see it as an easy and effective response to the clamour for more public participa-

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<sup>72</sup> See, the discussion *supra* note 41.

<sup>73</sup> If an applicant met the pre-established control standards, it is difficult to see how the Director could refuse to grant a permit. Thus, if the standards are set too low, the right to object at the application stage may be a highly illusory right.

tion. Needless to say, the public hearing cannot and should not be expected to perform all these functions.

The public hearing has a limited but important role to play in the scheme of environmental protection. This role is directly related to the institutional characteristics of the public hearing and cannot be described accurately until these characteristics are understood. The public hearing is multi-partied, follows a relatively unstructured procedure which is designed to solicit as much information from as many people as possible and is usually conducted before a politically appointed board or commission.<sup>74</sup> Each participant is usually given ample opportunity to make his or her case at the hearing and each is usually given a right to cross-examine the presentations of all other parties. Often the board is required to support its conclusion with a written decision which is made available to the parties and the public generally. Generally, the process is very open-ended. Not only are members of the public encouraged to come and participate at the hearing, but the board is free to come to whatever conclusions seem appropriate in the circumstances. There are no rules or sets of rules which, when applied to the evidence adduced at the hearing, will produce a right decision. Thus, although the public hearing has some of the characteristics of an arbitration board or adjudicative tribunal, it is more like a public or royal commission inquiry.

These characteristics suggest that the public hearing is not well-suited to perform many of the functions often attributed to it. First, it is not a particularly good decision-making body, although hearings are often conducted to decide or recommend public policy and sometimes to arbitrate disputes between two or more parties. Examples of each function are not hard to find in the environmental protection field. The Nova Scotia *Environmental Protection Act* authorizes the Environmental Control Council to enquire into "any matter pertaining to the preservation and protection of the environment" and to "recommend to the Minister policies, planning and programs related to the preservation and protection of the environment".<sup>75</sup>

The Council may also be authorized to hear disputes between the Department of the Environment and persons who apply for departmental plan approvals and permits before abatement standards have been established and promulgated (section 17(2)). Neither decision-making role, however, is well-suited to the public hearing.

The problems of fairly deciding regulator-regulated disputes in this manner are enormous. Because there are no pre-announced standards on which the case is decided, a person whose 'rights' are determined in this manner is seriously disadvantaged because he has no way of knowing the basis upon which the decision-maker intends to decide and hence no way of knowing beforehand the case that he has to make to win. Similarly, to the

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<sup>74</sup> As an example of a typical public hearing procedure, see the *Rules Governing the Practice and Procedure at Hearings Conducted by the Environmental Control Council of Nova Scotia*, (1974), made pursuant to section 18(b) of the *Environmental Protection Act*, S.N.S. 1973, c. 6.

<sup>75</sup> S.N.S. 1973, c. 6, s. 17(1)(d)(a).

extent that the process is thrown open to the public,<sup>76</sup> considerable irrelevant information will be forthcoming and this will detract from the arguments of the real contestants. The public hearing sacrifices the 'sense of the particular' for a 'sense of the general' to the considerable detriment of the aggrieved parties. Furthermore, because the hearing body is appointed politically, it does not necessarily meet the prerequisites of impartiality and objectivity that are usually demanded of a body charged with resolving such disputes. For these reasons, the public hearing is not a particularly useful forum in which to resolve individual disputes.

Nor is the public hearing an appropriate arena in which to make final decisions on public policy issues, although it is a good mechanism for airing policy alternatives and soliciting new suggestions. Because the hearing is multi-partied and the procedure is flexible, all interested persons have an opportunity to make their views known. But the hearing forum does not contain any mechanism that will guarantee a rational policy decision. Functioning as a quasi-adjudicative body in a public policy-making role, the public hearing fails miserably. Jeffrey Jowell, in an excellent article on the public hearing as a tool of urban planning, criticizes the hearing as a decision-making mechanism on three grounds.<sup>77</sup> First, there is no independent arbitrator to whom the briefs of the participants can be presented. The arbitrator is at least a political appointment and sometimes the department head, who owes his allegiance to the environment minister and the government in power. Under these circumstances, there may be a tendency for the decision-maker to defer to the presentations of the department, notwithstanding strong opposition from other participants at the hearing. Secondly, Jowell notes that the public hearing cannot function as an adjudicative body because "decision-making by adjudication must be based on some rule, standard or principle that is generalizable and can be applied to all future like cases."<sup>78</sup> Most decisions about environmental quality cannot be based on any single unambiguous criterion that is rational and generalizable. These decisions are value judgments and there is nothing to ensure that the values of the hearing officers will reflect the public interest in environmental protection matters. Certainly there is no test that will evaluate the correctness of their decision. Like all persons, the decision-makers have their own particular conception of what is best for society, and this does not necessarily coincide with society's own best interests. Finally, adjudication is inappropriate for resolving policy-oriented environmental issues because the issues are 'polycentric' in nature and preclude "meaningful participation by the litigants through proofs and arguments".<sup>79</sup>

The public hearing is not an ideal information-gathering device. Granted it does try to gather information from as many sources as possible but, as

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<sup>76</sup> The Nova Scotia Rules permits virtually any member of the public to participate provided he or she advises the Council one week in advance. Rule 3.

<sup>77</sup> J. Jowell, *The Limits of the Public Hearing as a Tool of Urban Planning* 21 *Admin. Law Review* (1969) 123 at 147 ff.

<sup>78</sup> *Id.*, at 148.

<sup>79</sup> *Id.*

Jowell points out, "it is virtually impossible to determine how representative of the relevant population the views expressed at the hearing are", and "[the hearing] provides no way in which the preferences that are revealed may be ordered".<sup>80</sup> What is generated at a public hearing is a variety of disparate, often self-interested and parochial views, some facts about the environmental ramifications of a problem, and perhaps even some novel, but untested solutions to the problem. There is nothing inherently wrong in hearing such information as long as one remembers that it does not necessarily present a true picture of either the issues or society's views on them. Many persons will not be represented at the hearing and their views will be left unexpressed. Of those at the hearing, the most vocal and the most resourceful (but not necessarily the most representative of society's interests) will tend to have a disproportionate influence. Thus, it is important that the hearing perform a limited information-gathering function, and that the information received not be the only or even the predominant basis upon which the ultimate decision or recommendation is made.

In addition to a limited information-gathering role, the public hearing can fulfill three important functions. First, it increases public participation, and, as noted in Part I, this is a useful function regardless of its contribution to the environmental protection process. Secondly, the public hearing increases the acceptability of a decision by giving all who are affected by the decision an opportunity (albeit a small one) to have some impact on the final decision. By increasing public acceptance of the decision, the public hearing reduces costly and time-consuming delays brought about through prolonged opposition to an unpopular decision. There is a danger, however, that public acceptability will become public co-optation by the most powerful groups at the hearing. When used in this dysfunctional manner as a 'propaganda channel' for a particular interest group, the public hearing becomes little more than a vehicle to mobilize support for or opposition to a particular proposal. Thus, the public hearing may help make final decisions more acceptable, but it may also become little more than a mouthpiece for one or two well-organized participants.

The third function of the public hearing is as an adjunct to the policy-making process. Just as legislators are often unable to determine the most fruitful approach to a particular problem without public inquiries and royal commission investigations, environmental policy-making may also require the assistance of a public hearing. No matter how large the decision-making body is, it will not include all possible interests and points of view. Some mechanism such as the public hearing must be found to ensure that these persons are able to express their views and preferences to the decision-makers. Their views, however, must not be the only basis upon which the ultimate decision is made. There are factors, perhaps determinative factors, that will not necessarily emerge from a public hearing. The decision-makers must be free to base their decision on this information, if they feel that it is more important. Because policy decisions should be made in a legislative context no single presentation can be determinative. The final decision must

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<sup>80</sup> Jowell, *supra* note 77 at 141.

be a blend of compromise and bargaining, which is ultimately reflected in a consensus in favour of a particular policy.

Canadian experience with the public hearing in the environmental protection field is still limited. When it is combined with the Canadian land use planning experience, the track record is generally favourable, although there is room for improvement. The problems in this area tend to be related first to the context in which the hearing arises, and also the functions assigned to it.

The general thrust of the discussion above is that public hearings should be used to perform a maximum of four basic functions: (1) gathering information, (2) increasing participation, (3) increasing acceptability of decisions, and (4) assisting decision-makers to formulate and choose from among different policy alternatives. When public hearings try to do more or less than this, they do not achieve very satisfactory results. This hypothesis could only be tested satisfactorily through a comprehensive review and evaluation of a significantly large number of public hearings, something that is beyond the scope of this article. What is feasible and within the scope of this article is a brief, critical analysis of the first public hearing held under the Nova Scotia *Environmental Protection Act*.<sup>81</sup>

On December 4, 1974, the Executive Committee of the Nova Scotia Environmental Control Council conducted a public hearing with respect to the Anzil Canada Ltd. plant operations at East River, Nova Scotia.<sup>82</sup> Although the hearing was to enquire generally into the plant operations of Anzil and its effect on the environment, it was also to examine "proposals to rectify alleged environmental insults in and about East River (Chester) and review the timetable for implementation."<sup>83</sup>

The history of the Anzil problem is long and complex.<sup>84</sup> The hardboard plant came to Nova Scotia in 1966 and has experienced effluent disposal problems ever since. Prior to the December hearing the company had explored and implemented a number of "remedial measures",<sup>85</sup> none of which achieved a satisfactory effluent quality. Local fishermen and residents blamed virtually all of their environmental problems on Anzil, often with good reason. By 1973-1974 the Company seemed prepared to make a major financial commitment to clean up its effluent. It commissioned a study to determine a satisfactory approach to the problem and on the basis of this study had a local engineering firm develop the specifications for an effluent treatment process. Anzil had submitted these plans to the Department for approval

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<sup>81</sup> S.N.S. 1973, c. 6.

<sup>82</sup> Pursuant to a request from the Minister of the Environment, The Hon. G. Bagnell, made October 11, 1974.

<sup>83</sup> Notice of Public Hearing, dated October 25, 1974.

<sup>84</sup> It is described in detail in the transcripts of the public hearing, on file with Mr. E. L. L. Rowe, Secretary to the Environmental Control Council.

<sup>85</sup> Most of which were required by the government under the "predecessor" to the Department of the Environment, The Nova Scotia Water Authority. See, *The Water Act*, R.S.N.S. 1967 c. 335 as amended.

prior to the hearing. Thus the hearing tended to focus on the adequacy of the Company's proposed pollution abatement program, rather than a general examination of the dimensions of the problem.

Participation at the hearing was limited to "interested persons",<sup>86</sup> but this in effect meant everyone who satisfied the minimal notice requirements.<sup>87</sup> Although the 'dispute' tended to be a three-sided one between the Company, the Department and the two largest environmental protection groups,<sup>88</sup> a considerable number of other persons attended and gave 'evidence' at the hearing. Pursuant to Rule 3(3) every witness has the right to cross-examine every other witness at the hearing (other than his own witnesses). This gave all participants a fair opportunity to make their own views known and to scrutinize the presentations of others through the cross-examination device, but it also made the hearing process relatively time-consuming and cumbersome and generated a good deal of irrelevant information.

As one would expect, each major participant either defended vigorously its record vis-à-vis the problem and/or criticized the performance of those responsible for finding a solution to the problem. Because the environmentalists came to the meeting with counsel, prepared to act as an effective critic of the Company and government's role in the pollution problem, they achieved a great deal at the hearing. A number of suggestions put forward by these groups were specifically included in the Committee's recommendation to the Minister, including a program of water quality monitoring, an oceanographic investigation to determine the propriety of the proposed location of the proposed effluent outfall, an investigation into the necessity of site restoration, and the establishment of a liaison committee between area residents and the Company.<sup>89</sup> Furthermore, the Company, by detailing its dealings with the regulatory Department, was able to demonstrate to the area residents that not all the blame should be directed at it.

Notwithstanding these 'successes' for the participants the experience highlights some of the difficulties inherent in using a public hearing to deal with problems such as the acceptability of a proposed pollution abatement program.

These difficulties can only be explained in terms of what the public hearing was trying to do. Notwithstanding public notices that advertised it as a general examination of the problem, the hearing was primarily an attempt to evaluate the acceptability of the Company's proposal. As such, the enquiry became a three-sided affair with the Company suggesting that the proposal would more than rectify the problem, the environmentalists arguing that this

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<sup>86</sup> *Rules Governing Hearings*, *supra* note 74, Rule 3(1).

<sup>87</sup> *Id.*, Rule 3(2). Thirty-two persons appeared at the hearing as witnesses. The list of witnesses is on file with the Secretary to the Council, Mr. E. L. L. Rowe.

<sup>88</sup> The groups are: The Ecology Action Centre (E.A.C.), and the South Shore Environmental Protection Association (S.S.E.P.A.).

<sup>89</sup> The recommendations are contained in a letter to the Minister from C. A. Campbell, Chairman of the Council, dated January 31, 1975 at pp. 9, 10 and on file with the Secretary to the Council, Mr. E. L. L. Rowe.

would only be the case if certain extra safeguards were built into the plan, and the government protesting that it had had insufficient time to examine the proposal in detail. In spite of the 'quasi-adjudicative' nature of the hearing, it did not facilitate a thorough and comprehensive appraisal of the proposal.

First, the hearing was probably premature. To the extent that the department staff had not had sufficient time to review the plans and improve upon them where they could, one important contribution to the enquiry was missing. Similarly, the environmentalists and area residents, who had the most to lose if an inadequate proposal was approved, were not given an opportunity to examine the plans in detail before the hearing was held. This significantly impaired whatever contributions they might have made as effective critics of the proposal.<sup>90</sup> Furthermore, by embarking upon such a narrow, three-partied dispute in such an unstructured, open-ended, multi-partied manner, it was difficult for the hearing Committee to focus on the claims of the real contestants. Much more would have been accomplished at the hearing if it had been conducted in an adjudicative manner with full disclosure of information beforehand and the participation limited to the three or four relevant parties. Nevertheless, while these problems might have detracted from the general effectiveness of the hearing, the Committee recommendations to the Minister do not suggest that they were insurmountable problems. Clearly, the hearing Committee understood the ramifications of the Company proposals and, primarily on the basis of the evidence presented, made some worthwhile recommendations to the Minister.

On the other hand, to the extent that the public hearing was attempting to determine the dimensions of the problem and to find a mutually acceptable solution it did not accomplish very much. The hearing did gather a certain amount of information about the pollution problem, but there was no guarantee that the information was accurate or comprehensive.<sup>91</sup> The hearing was unable to find an acceptable solution to the area residents' and the Company's problems. It had no way of determining what the two sides wanted, what each was prepared to concede to the other, and what demands were non-negotiable. This suggests that the solution to these problems should be worked out by the parties themselves, either through some negotiation or mediation procedure, or, if the problems are particularly large, with broad policy implications for a substantial number of people, through a representative council or mini-legislature. The Committee implicitly recognized this by recommending to the Minister that a "liaison between area residents and Anzil Canada be established formally to promote understanding of pollution abatement plans."<sup>92</sup>

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<sup>90</sup> The environmental groups were permitted to see the plans three days before the hearing and for a one week period following the hearing.

<sup>91</sup> For example, one presentation consisted of a map that purported to document the extent of the air pollution from the plant, but was drawn solely on the basis of complaints received by the E.A.C., the Halifax based environmental protection organization.

<sup>92</sup> Recommendation 11, *supra* note 89 at p. 10.



Thus, while the hearing Committee was able to make many sound recommendations to the Minister,<sup>93</sup> it was unable to deal with the task assigned to it as effectively as possible. The public hearing should function as an information-gathering mechanism in which the public is provided with a forum in which to express its views and concerns, but it should not be used to determine the acceptability of a particular proposal or to work out an acceptable compromise between Company and residents. Those tasks should be performed by an adjudicative hearing and a representative council, respectively.<sup>94</sup>

#### b. The Adjudicative Hearing

The primary function of the adjudicative hearing is to resolve disputes that arise between two or more parties. Environmental disputes are sometimes resolved in the courtroom in the context of a formal adjudicative hearing; however, this function is being performed more and more often by a growing number of pollution control boards, tribunals and commissions.

The institutional and procedural similarities of board and court hearings demand that the functions performed by the two also be similar. Specialized pollution control boards contain many judicial trappings to ensure a fair, relatively dispassionate resolution of narrow, two- or three-party disputes. Most provincial statutes, for example, require the board to provide the parties to the dispute with proper notice, most give the participants a right to present their case fully and cross-examine the presentations of other participants, and some require the board to give written reasons for its decision.

The differences between boards and courts have not detracted from the board's function as a public arbitrator of environmental disputes. Unlike courts, which are made up of generalists who hear a variety of different kinds of disputes, boards usually have (or acquire over time) a special technical competence in environmental protection matters. Sometimes a specialized or representative bias is required by the enabling legislation. For example, the Nova Scotia *Environmental Protection Act* requires that members of the Environmental Control Council be from eleven generally representative groups including the health profession, the legal profession, the engineering profession, industry, labour, municipalities, conservation or ecology groups, agriculture, university or the academic community, forestry and fisheries.<sup>95</sup> This ensures that board members will not only be more likely to appreciate the complexities of pollution abatement technology and environmental issues,

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<sup>93</sup> The Minister is under no statutory obligation to implement the Committee's recommendations.

<sup>94</sup> The same points could be made with regard to other public hearing processes. For example, The Manitoba *Clean Environment Act*, S.M. 1972, c. 76 as amended requires a hearing by the Commission to determine questions of compliance or non-compliance with the provisions of the *Act* (section 4(6)) and to hold hearings prior to prescribing "limits" for purposes of the *Act* (section 15). One function is better performed by an adjudicative hearing, the other better determined by a representative, policy-oriented group.

<sup>95</sup> S.N.S. 1973, c. 6, s. 9(1)(a).

but be sensitive to the sometimes unique problems of all potential contestants. Unlike courts, boards are less encumbered by a highly rigid code of procedure that owes much of its rationale to historical anomaly. Boards have more scope to get at the root of a problem. Hearsay evidence is invariably admissible, and board members are usually free to investigate aspects of the dispute themselves by making on-site inspections and extensively questioning all those who appear at the hearing.<sup>96</sup> Finally, because boards are not necessarily encumbered by the conservative bias of the judiciary and the common law, they are often better able to develop and implement new legislative policy. Persons are usually appointed to a board because of their commitment to a governmental policy objective or because of their sensitivity to an emerging problem and therefore they should not feel constrained by an unsympathetic common law. This guarantees that board decisions will complement legislative policy in the environmental protection area, rather than frustrate it.

Boards can determine questions of compliance — non-compliance (innocence-guilt) with environmental quality standards, questions of acceptability-non-acceptability of proposed abatement programs in light of environmental quality standards, and questions of degree of responsibility and quantum of damages for pollution problems. All these questions can and should be answered in the context of a hearing that limits participation to interested persons and thus enables the decision-maker to focus on the relevant aspects of the dispute and to resolve the dispute by fairly applying the evidence to a pre-announced, general standard.

The adjudicative hearing runs into trouble when it is required by the legislation to perform tasks that it is ill-equipped to deal with (or when it is not required to perform tasks that it is equipped to deal with), and when it functions without the participation of one or more of the parties to the dispute under consideration. The first problem is simply a restatement of a theme developed elsewhere in this paper, that is, that adjudicative bodies cannot deal satisfactorily with policy questions.<sup>97</sup> The second problem is one of standing. It raises questions of who has standing to invoke the hearing process or, once invoked, who has standing to participate as a full member at the hearing. There may be some minor disputes about what constitutes adequate notice, the right to counsel, the right to obtain relevant information, or the right to have the decision expressed with written reasons, and so on; but generally these questions are of secondary importance and will not be discussed here.

The standing issue is important because it plays such a crucial role in the final disposition of a dispute. For example, if one of the relevant parties to the dispute is unable to participate in its resolution, there is a very real possibility that the decision-maker will have a lopsided view of the dispute and the way in which it should be resolved. Similarly, if a person feels aggrieved by some environmentally damaging activity, but is unable to bring

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<sup>96</sup> See, for example, the provisions of the *Nova Scotia Rules Governing Hearings*, *supra* note 74.

<sup>97</sup> See the discussion *supra* at pp. 17 ff.

the hearing process to bear on the problem, or must depend on some other person to invoke the process, there is a strong possibility that an environmental wrong may not be rectified.

The right to be heard or the right to a hearing may arise either pursuant to a legislative provision to that effect or, where no provision exists, pursuant to the common law rules of natural justice.

### c. Hearings Held Pursuant to the Legislation

Most environmental protection statutes give those "directly affected"<sup>98</sup> by departmental licensing decisions a formal hearing,<sup>99</sup> although many make it dependent on departmental or ministerial consent.<sup>100</sup> But they do not give other, equally affected persons<sup>101</sup> similar rights to a hearing. The result is a one-sided procedure that ensures that participation will be limited to one narrowly defined segment of those affected. Again, the provisions in the Ontario *Environmental Protection Act* are generally representative of this approach and therefore will be used as a model.

Under the Ontario Act, the applicant, licensee, certificate holder (subsections 78(1) and (2)) or persons to whom an order (control and stop orders, sections 70 and 74) is directed (section 79(1)) may appeal an adverse decision of the Director to the Pollution Control Appeal Board.<sup>102</sup> To launch an appeal, the aggrieved applicant must serve notice to that effect on the Director and the Board within fifteen days after receiving notice of the Director's decision. Hearings before the Board are *de novo* and the Board has wide powers to confirm, alter or revoke the order, refusal or requirement that is the subject matter of the hearing (section 81(1)). The Board must follow essentially judicial procedures including providing proper notice, guaranteeing the right to present evidence and to cross-examine witnesses, and delivering a written decision with reasons.<sup>103</sup> A party to the hearing may, within thirty days of the decision, appeal to the County Court on a question of law or to the Minister on any other matter.

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<sup>98</sup> The phrase "directly affected" is used interchangeably with "aggrieved person" and means the individual against whom the order applies. See: *Buxton v. Minister of Housing and Local Government*, [1960] 3 W.L.R. 866, (C.A.); *In re Sidebotham* (1880), 14 Ch.D. 458.

<sup>99</sup> See, for example, *The Ontario Environmental Protection Act* S.O. 1971 c. 86, as amended, Part X (ss. 78-81).

<sup>100</sup> See: *The British Columbia Pollution Control Act, 1967*, S.B.C. 1967, c. 34 as amended, s. 13(4).

<sup>101</sup> Included in this category of people are those who live, work or spend their leisure time in areas surrounding the pollution source and therefore have an important stake in ensuring that at least the statutory standards are imposed on the applicant.

<sup>102</sup> Decisions of the Cabinet on maximum permissible amounts of contaminant in the ambient environment and on emission or discharge standards (section 94(b),(d)) are insulated from formal challenge and not subject to a hearing.

<sup>103</sup> This procedure is set out in Ontario in the *Statutory Powers Procedures Act, 1971*, S.O. 1971, c. 47. Where it is not guaranteed by statute, the courts will imply such a procedure. See: *Western Mines Ltd. v. Greater Campbell River Water District*, *supra* note 58.

'Aggrieved' members of the affected community who feel that they would be directly affected by either the initial departmental decision or by the Board's disposition of the appeal have no formal right to demand a hearing or be a party to the hearing. The Board may include them as parties, but that is discretionary.<sup>104</sup> Thus, not only are affected members of the public unable to bring matters before the hearing board; once a dispute is before the Board, they have no guarantee that they will be allowed to participate in it. While the decision to give a disappointed applicant an elaborate hearing and appeal procedure is sensible, the failure to offer similar rights to aggrieved members of the public places a heavy bias in favour of the pollutor. Appeals will be taken only if the Director adopts a tough, pro-environment posture and refuses an application or attaches environmentally protective conditions to the approval. Every case that comes before the Board will be for purposes of gaining relief from the Director's decision; none will be to enforce a higher standard of pollution abatement on the applicant. Decisions of the Board will tend either to confirm the Director's decision or modify it in favour of the applicant. Furthermore, unless those who will be adversely affected by a modified decision are named as parties to the hearing, the only person who can appeal an environmentally damaging decision of the Board to the Minister is the Director. The incentive for him to do this may not be particularly great, especially if he is not the one who has to live next to the applicant's approved operation. And finally, to the extent that appeals, and particularly those to the courts, involve considerable delay, the imposition of higher environmentally protective standards will be delayed accordingly.

In one important sense the British Columbia legislation goes one step further than the Ontario Act. Effective objections filed under subsections 13(2), (3) and (6) of the British Columbia Act may be the subject of a hearing (section 13(4)). The decision to hold the hearing is, unfortunately, within the sole discretion of the Director. Nevertheless, the section is an improvement because many persons adversely affected by a decision of the Director have a right to object and objections from any member of the public may be determined by the Board to be effective.<sup>105</sup> Thus, not only does the applicant have an opportunity to initiate a hearing (subject to Director approval), but other individuals, more sympathetic to environmental protection have a similar opportunity. Furthermore, if the Director decides to hold a hearing, the applicant and all effective objectors are entitled to be notified of the time and place of the hearing and to be heard. No matter how the hearing is initiated, all effective objectors are parties to the hearing and are afforded equal rights before the Board.

Where there is some ambiguity about who has a legislative right to a hearing or to be a party to a hearing, the hearing boards have tended to inter-

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<sup>104</sup> Under section 5 of the *Statutory Powers Procedures Act*, the parties to the proceeding shall be "the persons specified as parties . . . or, if not so specified, persons entitled by law to be parties to the proceeding". This suggests that once a statute specifies who shall be parties, all others, including those who might be parties under the common law, are excluded.

<sup>105</sup> See the discussion *supra* pp. 41 ff.

pret the legislation broadly. Illustrations from the land use planning field<sup>106</sup> in Nova Scotia illustrate this point particularly well.

Under section 38(4) of the Nova Scotia *Planning Act*<sup>107</sup> any 'interested person' may appeal a rezoning decision to the provincial Planning Appeal Board. Appeals brought to the Board almost invariably raise the question of whether the appellant or the intervenor<sup>108</sup> is an interested person within the meaning of the Act and thus whether he has standing before the Board. The question was first raised in the *Lord Nelson Hotel* case.<sup>109</sup> In that appeal, the Lord Nelson Hotel challenged Halifax City Council's decision to rezone the subject property thereby permitting Centennial Properties Limited to construct a second hotel in the vicinity.

Before the Board, the City argued that 'interested person' was the equivalent of 'aggrieved person' and thus the Hotel lacked standing to bring the action. The Board, in rejecting the City's argument, stated that:

... 'interested person' is a much broader and more flexible term than 'aggrieved party'. The Oxford Universal Dictionary defines the word 'interested' as 1. concerned, affected; having a share or interest in something. 2. self-seeking, self-interested (the opposite of disinterested). 3. characterized by a feeling of concern, sympathy, or curiosity. An 'aggrieved party' on the other hand is defined in Black's Law Dictionary 4th ed., page 87, as one whose legal right is invalidated by an act complained of or whose pecuniary interest is directly affected by a decree or judgment.<sup>110</sup>

In subsequent decisions the Board has consistently used this formula to grant appellant-standing. The mere appearance at City Council meetings or the presentation of briefs to City Council on the subject matter seems sufficient to give a person the status to appeal Council's decision. In fact, the Board has never used the standing issue to deny an appeal.

There is some indication that the courts are also prepared to accept a relatively liberal interpretation of 'interested person'.<sup>111</sup> In the case arising out of the Lord Nelson appeal, the Nova Scotia Supreme Court agreed with the Board's ultimate finding; however, it did not explicitly accept its reasons for such a result.<sup>112</sup> The case was ultimately decided in the Hotel's favour because

<sup>106</sup> There is insufficient data regarding experiences before environmental protection boards to confine our discussion to environmental law. The obvious similarities between the two areas make this discussion appropriate.

<sup>107</sup> S.N.S. 1969 c. 16 as amended S.N.S. 1970 c. 87, 1970-71 c. 71, 1973 c. 68.

<sup>108</sup> The Board also gives interested persons a right to intervene on behalf of one of the parties.

<sup>109</sup> [1972] Nova Scotia Planning Appeal Board Decisions 25.

<sup>110</sup> *Id.* at 29.

<sup>111</sup> For example, see *Ruffman v. City of Halifax*, [1973] Nova Scotia Planning Appeal Board Decisions 171, where the appellant did not own any land in the City. His "interestedness" related only to his general concerns about the future of the city.

<sup>112</sup> At trial, the court overturned the Board's decision on the standing issue. See: *Lord Nelson Hotel Ltd. v. City of Halifax* (1973), 4 N.S.R. (2d) 775 (N.S.S.C.T.D.). At appeal, the Board's decision was restored. See: *Lord Nelson Hotel Ltd. v. City of Halifax* (1973), 33 D.L.R. (3d) 98 (N.S.S.C. App.D.).

Council was acting judicially in rezoning the subject lands and because the appellant's attack was on Council's jurisdiction.<sup>113</sup> The degree of interest required to support such an attack was never decided. Mr. Justice Jones did note that the appellant's interests were 'materially affected' by Council's disposition of the case, but what this means is not clear. What, for example, qualifies as an interest? Must it be a proprietary interest or need it only be a general interest in the well-being of the city? And what amounts to 'material affection'? Does it have something to do with the Hotel's position as a potential competitor of the proposed hotel, or is it related to some adverse effect a large building may have on the adjacent lands of the appellant?

Some of these questions were answered by the Supreme Court of Canada in the *Dasken* case.<sup>114</sup> That case developed out of a dispute between a local home owner's association, l'Association des Propriétaires des Jardins Taché Inc., an area resident, Mme Brossard, and a private developer, Les Entreprises Dasken Inc., over the proper interpretation to be given to a City of Hull zoning by-law. The Association and Mme Brossard argued that the by-law prohibited housing development, and sought a declaration to declare certain building permits void and an injunction ordering the respondent to cease operations and return the site to its original condition. The Company challenged both appellants on the ground that they lacked standing. The Court of Appeal decision denying standing to the Association<sup>115</sup> was upheld by the Supreme Court of Canada, but was rejected with regard to Mme Brossard.<sup>116</sup> Mr. Justice Pigeon, who wrote the majority decision for the Supreme Court, addressed himself to the nature of the interest required to maintain the action and concluded that: "The interest which plaintiff has in preserving the single-family residential character of the zone appears to me sufficient to justify her suit."<sup>117</sup> The absence of any pecuniary loss was irrelevant.<sup>118</sup> 'Materially affected' therefore seems to mean either a pecuniary loss to nearby property owners (the *Lord Nelson Hotel* case) or character loss to the neighbourhood in which one lives (the *Dasken* case) and 'Interested person' includes all persons who may be affected by a decision, not just the owners of the subject and adjacent properties.

The *Lord Nelson Hotel* and *Dasken* decisions still leave one important group of people unprotected by the hearing and judicial process. Both cases

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<sup>113</sup> The court, in its decision, seemed determined to use the discretionary aspect of the prerogative orders to loosen up the standing requirements in such cases. *Id.*

<sup>114</sup> *L'Association des Propriétaires des Jardins Tache Inc. et al. v. Les Entreprises Dasken Inc. et al.* (1971), 26 D.L.R. (3d) 79 (S.C.C.).

<sup>115</sup> *L'Association des Propriétaires des Jardins Tache Inc. et al. v. Les Entreprises Dasken Inc. et al.* [1971] Que. C.A. xxviii.

<sup>116</sup> The Supreme Court of Canada's relaxation of the *locus standi* rules in two recent decisions suggests that the courts will adopt a liberal interpretation of the "interested person" requirement in constitutional matters, and this in turn may lead to a more liberal interpretation of the phrase generally. See: *Thorsen v. Attorney-General Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeill* (1975), 5 N.R. 43.

<sup>117</sup> *Les Entreprises Dasken Inc.*, *supra* note 114 at 90.

<sup>118</sup> *Id.*

focused on the plaintiff's *proprietary interest* in the subject area. But what about those who merely rent or work in the area? Did they also have a right to be heard, or a right to challenge the hearing body's decision in court? Implicit in both decisions is the suggestion that it is the ownership of property, not concern for the community, that gives the right to challenge planning decisions. Such a rationale has come under strong attack recently. J. P. W. B. McAuslan, writing in the *Modern Law Review* argues that:

This [planning decision] is in fact a direct transfer from the common law of nuisance, where only a neighbour who owns or occupies land may bring a suit against another who is alleged to be causing damage to the plaintiff's land or seriously disturbing his enjoyment of it, yet planning has evolved in part because concepts of nuisance were inadequate to deal with urban development.<sup>119</sup>

To continue to equate, therefore, 'interested person' with an interested property owner is an overly restrictive approach to the problem of who should be entitled to a hearing.

#### d. Hearings Held Pursuant to the Rules of Natural Justice

The common law, and specifically the rules of natural justice,<sup>120</sup> may be used in some circumstances to pry open certain aspects of the environment hearing process to some members of the public.<sup>121</sup> While the rule was designed initially to protect particular individuals directly affected by administrative action, such as the applicant or licensee, and not to permit those 'indirectly' affected<sup>122</sup> by the decision to have their say, it may nevertheless be possible to extend the scope of the rule to include many more people than are presently entitled to a hearing under the legislation. But before approaching the more speculative task of where the *audi alteram partem* doctrine might take us with imaginative arguments and a sympathetic judiciary, we must first deal with the very difficult task of reconciling what appears to be a confusing and often conflicting morass of case-law on the subject.

The situations in which the courts will imply a duty on a board or tribunal to act 'judicially' and hence observe the rules of natural justice have never been clearly defined. It has fluctuated widely from those in which any official "decides anything"<sup>123</sup> to a very narrowly defined category of judicial and quasi-judicial decisions.<sup>124</sup> Between these two extremes the rule has been applied where the interest to be protected by the hearing procedure

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<sup>119</sup> J.P.W.B. McAuslan, *Planning Laws Contribution to the Problems of an Urban Society*, 37 *Modern Law Review* (1974) 134 at 137.

<sup>120</sup> The part of the rule that we are concerned with is embodied in the Latin expression *audi alteram partem*, "no one is to be condemned, punished or deprived of his property in any judicial proceeding unless he has had an opportunity to be heard". Broom, *A Selection of Legal Maxims*, (9th ed., 1937) at 78.

<sup>121</sup> Provided, of course, a hearing has not been specifically excluded by the legislature.

<sup>122</sup> Indirect only in the sense that the administrative order is not directed specifically at them.

<sup>123</sup> *Board of Education v. Rice*, [1911] A.C. 179 at 182 per Lord Loreburn, L.C.

<sup>124</sup> *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66 at 79, per Lord Radcliffe.

ranged from "deprivation of property or contractual advantages in proceedings of an adjudicative character",<sup>125</sup> to the "revocation or suspension of a licence",<sup>126</sup> to "rights of person or property".<sup>127</sup> The only thing that can be said for certain about the right is that:

There are . . . no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal was acting, the subject matter that is being dealt with, and so forth.<sup>128</sup>

Where courts have seen fit to recognize the existence of the right to a hearing in a particular case, they generally regard any diminution of the right as a matter of "grave public concern".<sup>129</sup> Thus, once the right is established, the courts will vigorously uphold it. The difficulty is establishing that any right exists in the first place.

A good starting point for unravelling the law on this subject is *Cooper v. The Board of Works for the Wandsworth District*,<sup>130</sup> the leading case in a long line of house demolition and condemnation cases. The facts are as follows. Cooper, in contravention of a statute requiring prospective builders to notify the defendant Board of their intention to build, began to build his house. Seizing this opportunity to settle a long-standing dispute with Cooper, the Board, without any warning to Cooper and without affording him an opportunity to explain his actions, adopted a literal interpretation of the powers conferred on it by the statute and demolished the plaintiff's half constructed house. Cooper sued the Board on the basis that notwithstanding the extremely wide powers conferred on the Board, they were subject to the qualification that Cooper was entitled to be heard before such drastic action was taken against him.

Erle, C. J., speaking for the court, accepted the plaintiff's argument. He based his decision on three criteria: the "enormous consequences" of the Board's decision to Cooper; the probability that a hearing might have added significantly to the Board's understanding of the case; and the unlikelihood of "any harm that would happen to the district Board from hearing the party

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<sup>125</sup> *Re Bradley et al. and Ottawa Professional Firefighters Assoc. et al.* (1967), 63 D.L.R. (2d) 376 at 382 per Laskin, J.A.

<sup>126</sup> *Re Halliwell and Welfare Institutions Board* (1965), 56 D.L.R. (2d) 754 at 758 per Munroe, J.; *Klymchuk v. Cowan* (1964), 45 D.L.R. (2d) 587 at 598 per Smith, J. For an opposite holding see: *Thorpe v. Village Motor Hotel* (1969), 70 W.W.R. 316.

<sup>127</sup> *Maxwell on Statutes*, (5th ed.) 589 quoted in several 'hearing' cases. See: *Lee Wing v. Peterson Chang*, [1954] 4 D.L.R. 821 at 825 per McNiven, J.A. The Privy Council used the expression "concerned with the determination of people's rights or obligations" in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134 at 149.

<sup>128</sup> *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at 118 per Tucker, L.J. followed in *R. v. Senate of the University of Aston, Ex parte Raffey and Another*, [1969] 2 All E.R. 964 at 976 per Blain, J.

<sup>129</sup> *Re Toronto Newspaper Guild and Globe Printing Co.*, [1952] O.R. 345 aff'd [1953] 2 S.C.R. 18, followed in *In Re Poffenroth Application* (1954), 13 W.W.R. (N.S.) 617 at 621 per Egbert, J.

<sup>130</sup> (1863), 14 C.B. (N.S.) 180.



before they subjected him to a loss so serious". These last two points suggest a pragmatic, functional approach to the problem that weighs the extra paper work, time and inconvenience of a hearing to the Board against the advantage of an increased understanding of the issues for both parties and fairness to the aggrieved housebuilder.<sup>131</sup>

Chief Justice Erle's three-pronged attack on the lack of a hearing in this type of situation has continued in varying degrees.<sup>132</sup> One of the most important pronouncements by the Supreme Court of Canada on this issue came in a 1957 decision, *Board of Health for Salt Fleet Township v. Knapman*.<sup>133</sup> The Board of Health, in a move reminiscent of the Wandsworth Board's action in the *Cooper* case, tried to evict the respondent Knapman from a condemned building without giving him any opportunity to be heard. Mr. Justice Cartwright, with Tachereau, Locke and Abbott, JJ. concurring, affirmed the lower court's decision to overturn the Board's decision. The learned judge, after noting the gravity of the Board's decision to Knapman, concluded:

It would, I think, require the plainest words to enable us to impute to the legislature the contention to confer upon the local Board the power to forcibly eject the occupants of the building for *certain specified causes* without giving such occupants an opportunity to know which of such causes was alleged to exist or to make answer to the allegation.<sup>134</sup>

Thus the Supreme Court added a fourth prerequisite for an adjudicative hearing, namely, that the decision-maker (the Board) meet pre-established criteria, 'certain specified causes', before taking action. This last point was developed particularly well by Mr. Justice Gale in the Ontario Court of Appeal decision on the case in his comparison of administrative and judicial decisions. Administrative decisions, he argued, are capricious, expedient, unfettered and guided by extraneous considerations whereas judicial or quasi-judicial decisions are governed by 'certain conditions' and a "moral responsibility" to conduct oneself in a judicial manner.<sup>135</sup> The underlying assumption here is that when an individual has met the first three grounds and can adduce evidence and present reasoned arguments which can be applied by a decision-maker to predetermined standards, that individual should have a right to participate at a formal hearing. When, however, the decision is policy-oriented and it is impossible to categorize the basis upon which the decision will be made into relatively fixed criteria, then an individual does not have a judicially protected right to participate in the decision.

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<sup>131</sup> They also suggest that as the costs of one particular type of hearing increase, alternative, lesser types of hearings which would preserve the advantages of participation at less cost might be appropriate.

<sup>132</sup> See, for example, *Hall v. Manchester Corporation* (1915), 84 L.J. Ch. 732 at 741 per Lord Parker; *City of Ottawa v. Wherha* (1963), 40 D.L.R. (2d) 949.

<sup>133</sup> [1957] 6 D.L.R. (2d) 81.

<sup>134</sup> *Id.*, at 82 (emphasis added). For an equally strong assertion of the right to a hearing in an analogous situation, see: *L'Alliance des Professeurs Catholique de Montreal v. Labour Relations Board*, [1953] 2 S.C.R. 140 at 154 per Rinfret, C.J.C.

<sup>135</sup> [1954] O.R. 360 at 370.

Support for this approach also comes from the important House of Lords decision in *Ridge v. Baldwin*.<sup>136</sup> The appellant Ridge was dismissed from his post as chief constable by the local Watch Committee pursuant to the relevant statute on the grounds that Ridge had either negligently discharged his duty or was otherwise unfit to be a constable. The appellant argued that because the Committee had failed to give him a hearing before his dismissal, it had violated the rules of natural justice and the dismissal was therefore void. The House of Lords acceded to the appellant's argument and reaffirmed the principles developed in the *Cooper* case. The case fits the *Cooper-Knapman* mould perfectly: the decision would have enormous consequences for Ridge; in dismissing him, the Committee was bound by relatively fixed statutory standards; and finally, Ridge could contribute significantly to the Committee's proper evaluation of his case.

These three important cases point to four general standards that determine whether or not a hearing is required: the gravity of the decision to the affected individual (usually expressed in terms of affecting some 'right'); the existence of predetermined, fixed standards which are binding on the decision-maker; the likelihood of a significant contribution from the participant; and the costs of the hearing in terms of the delays and expense weighed against the advantages of one to the decision-maker and the participants. All four criteria are closely related to one another and the existence of one usually means the existence of the others. Predetermined standards are an indication that affected individuals have some 'right' or stake in the proper administration and application of those standards. Furthermore, the existence of the first two criteria not only increases the need for participation but also makes it possible for the participant to prepare arguments and adduce evidence in light of these standards that will be useful to the decision-maker who is bound by these decisional criteria.

The path to this result is not free of distorting and anomalous influences that tend to detract from its effectiveness. First, the requirement that some 'right' of the plaintiffs be affected by the decision has been held to be merely a prerequisite to a further requirement on the board or tribunal to 'act judicially'. Lord Hewart, C.J. formulated the expanded test this way:

In order that a body may satisfy the requirement to observe the rules of natural justice it is not enough that it should have the legal authority to determine questions affecting the rights of subjects, there must be super added to that characteristic the further characteristic that the body has the duty to act judicially.<sup>137</sup>

Thus, merely affecting someone's rights, even in a substantial or extra-ordinary way is not enough: there must be this "super added duty" on the decision-maker. Lord Hewart never defines the elements of this extra duty which appears both circular and arbitrary. However, it has gained fairly wide

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<sup>136</sup> [1963] 2 All E.R. 66.

<sup>137</sup> *The King v. Legislative Committee of the Church Assembly, Ex parte Haynes — Smith*, [1928] 1 K.B. 411 at 415 per Lord Hewart, C.J. This phrase has been quoted and followed extensively. See: *Nakkuda Ali v. Jayuratne, supra*, note 124; *Calgary Power Ltd. and Halmrast v. Copithorne*, [1959] S.C.R. 24.

acceptance in Canada and has been used to deny a property owner a hearing before his land was expropriated,<sup>138</sup> an immigrant a hearing over the question of citizenship<sup>139</sup> and a developer a hearing regarding an application for a development permit.<sup>140</sup> This particular problem has theoretically been overcome by Lord Reid's specific rejection of Lord Hewart's statements and those cases that relied on it to deny an otherwise qualified individual the right to be heard.<sup>141</sup> Nevertheless, judicial anomalies do not die as easily or as quickly as one might expect and hope.<sup>142</sup>

The *Cooper-Knapman* approach, with its focus on 'fixed, pre-established standards', has led generally to a sometimes spurious distinction between judicial and administrative functions. Following D. N. Gordon's early description of the two functions,<sup>143</sup> the courts have found a convenient basis upon which they can protect pre-existing legal 'rights', which can be identified in terms of fixed standards, while restricting new situations in which the rights will be implied.

Beginning with the Ontario Court of Appeal's formulation of Gordon's judicial-administrative distinction in *Re Ashby*<sup>144</sup> and ending with the Supreme Court of Canada's overly restrictive application of it in *Calgary Power Limited and Halmrast v. Copithorne*,<sup>145</sup> the right to be heard has been limited to certain very specific situations. Following *Ashby*, courts, in determining whether the function of the tribunal is judicial or quasi-judicial rather than

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<sup>138</sup> *Calgary Power v. Copithorne*, *supra* note 137.

<sup>139</sup> *Dowhopoluk v. Martin* (1972), 23 D.L.R. (3d) 42.

<sup>140</sup> *Legau v. Calgary Municipal Planning Commission*, [1972] 5 W.W.R. 609. Mr. Justice Riley concluded his decision by noting at p. 616 "The mere fact that the exercise of statutory authority has the effect of extinguishing or modifying private rights of one person in favour of another does not make that function judicial or quasi-judicial".

<sup>141</sup> *Ridge v. Baldwin*, *supra* note 136.

<sup>142</sup> See, for example, the restrictive application of the "right" test in *Lenard John Howarth v. National Parole Board* (Oct. 11, 1974) unreported and the subsequent criticism of the decision in *Comment* 53 Can. Bar Rev. (1975) 92.

<sup>143</sup> See D. N. Gordon, "Administrative Tribunals and the Courts" (1933), 49 Law Q. Rev. 94 at 110, where he noted that "[A]cting judicially a tribunal has very little power to consult its own wishes in theory, whatever it may do in practice; because it professes to be bound by a fixed and settled objective standard. A tribunal exercising 'administrative' functions, when within its proper province and observing any procedural formalities prescribed, must inevitably be guided by its own wishes, because it has no fixed standard to follow, but only policy and expediency; and these are what it makes them. Its standards are purely subjective; so in the last analysis it follows its own will." Thus judicial decisions "ascertain legal rights and liabilities", while administrative decisions "create them".

<sup>144</sup> [1939] 3 D.L.R. 565 at 568 per Masten, J.A.

<sup>145</sup> *Supra*, note 127. The case has been followed extensively although not universally in Canada. See: *Legau v. Calgary Municipal Planning Commission*, *supra*, note 140, *Dowhopoluk v. Martin*, *supra*, note 139; *Dobson et ux. v. Edmonton et al.* (1959), 27 W.W.R. 495. *Howarth v. National Parole Board*, *supra* note 142. One court has confined the holding in *Calgary Power v. Copithorne*, to "purely administrative" functions. See: *Hamer v. Etobicoke Board of Education* (1966), 60 D.L.R. (2d) 210 at 213 per Stewart, J.

merely administrative, examine the extent to which the tribunal's power is circumscribed by predetermined standards.<sup>146</sup>

If no standards exist or if they leave considerable room for the implementation of the tribunal's own view as to general policy<sup>147</sup> or to follow the dictates of expediency,<sup>148</sup> no hearing is required. Thus, where statutory standards bind the decision-maker to a specific result if certain facts exist and to a conclusion that the decision is judicial, means that the rules of natural justice apply and those affected have the right to a hearing; while no standards means that the decision can be characterised as merely administrative, the rules do not apply and those affected have no right to be heard.<sup>149</sup> The advantage of this approach for the judiciary is that it is simplistic, relatively easy to apply to particular fact situations, and probably conforms to our conceptions of the institutional capabilities of an adjudicative type hearing. One serious problem with it, however, has been the frequency with which many courts apparently have lost sight of the rationale behind the distinction and merely used it as a crutch to cover up some intuitive reasoning process. Powers are characterized as judicial or administrative without any reference to the reasons for such a characterization,<sup>150</sup> and yet the results which flow from this initial decision are crucial — judicial powers are subject to the rules of natural justice, administrative powers are not.

Furthermore, the functional, cost-benefit analysis suggested by Chief Justice Erle in the *Cooper* case seems to have been forgotten by modern courts. The Canadian judiciary seems unaware of the benefits that might

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<sup>146</sup> Thus, in *Re Brown and Brock and Rentals Administrator*, [1945] 3 D.L.R. 323 the Ontario Court of Appeal looked for "limitations" on the exercise of the Board's power and "standards by which it is to be guided". Finding none, it concluded the Board "is a law unto itself. It may determine its own policy and expediency is its only guide. That is an administrative power, not a judicial power . . ." (p.334). In *Re Shanoff v. Glanzer*, [1949] 1 D.L.R. 414 the court found "fixed objective standards" and "clearly laid down principles", indicating that the administrator declares "rights and liabilities conferred and imposed by law" (pp. 420-1) and therefore, the power was judicial.

<sup>147</sup> See: *Dobson et ux. v. Edmonton et al.*, *supra*, note 145; *Posluns v. Toronto Stock Exchange and Gardner* (1964), 46 D.L.R. (2d) 210 at 628 per Gale, J.; *Thorpe v. Village Motor Hotel*, *supra*, note 126 at 319 per Culliton, C.J.S.

<sup>148</sup> See: *Board of Moosomin School Unit No. 9 v. Gordon MacMurchy and Attorney General for Saskatchewan*, [1972] 3 W.W.R. 380 at 387 per Sirois, J.; *Trustees of Estevan Collegiate Institute* (1970), 75 W.W.R. 368 at 371 per Culliton, C.J.S.

<sup>149</sup> This approach is very similar to Professor Davis' distinction between adjudicative and legislative facts. See: Davis, *Administrative Law Treatise* (1959) 413.

<sup>150</sup> The former Chief Justice of the Ontario High Court described the problem in the following manner:

In some cases courts attempted to classify power as either judicial, quasi-judicial or administrative for the purpose of deciding whether from such classification the rules of natural justice did or did not apply to their exercise. The distinction between a quasi-judicial and administrative or purely administrative power in this context depends on whether or not the rules of natural justice apply to its exercise. Its classification therefore depends on whether the rules should be applied. The reasoning is therefore circular and confusing.

McRuer, *Royal Commission Enquiry into Civil Rights* (Vol. 1 Toronto: Ontario Government Bookstore, 1968), 139.

accrue to both the decision-making process and the participants from the participation of the applicant and other interested and substantially affected members of the public at a hearing.<sup>151</sup> This is particularly true in the environmental decision-making process.

The major difficulty with the *Cooper-Knapman* approach is not the approach itself, but rather the courts' inability to see the approach in the context of the participation-decision-making model outlined above. In applying the rules of natural justice the courts are concerned generally that adjudicative decisions be made in an adjudicative context and this means giving an affected party a formal right to be heard. Adjudicative issues are usually two-sided with the regulatory department or board on one side and the regulated on the other. The affected public is usually concerned in such an extenuated, indirect way that it is impossible to permit such a diffuse body to participate without destroying the essence of the decision-making process. But the adjudicative aspects of environmental decision-making are usually three-sided with the regulated on one side, the members of the public who will be *directly affected* by regulation, or the lack of it, on the other side, and the regulator falling somewhere in between. If the process is seen in this way, it becomes imperative that all three affected parties be given equal rights to participate in the hearing. By excluding one important point of view, the final decision will tend to be biased in favour of a party that is given a full opportunity to participate at the hearing.

A second major difficulty with this approach is the courts' reluctance to recognize and classify new societal interests as legally protected rights. This reluctance is a function of the inherent circularity of the courts' reasoning. Courts tend to assume that an interest does not qualify as a 'right' unless the courts are prepared to recognize it as such and afford it the status of a right by attaching procedural guarantees to it. However, whether the courts are prepared to recognize an interest as a right depends primarily upon whether it has received such recognition in the past. Thus, an interest is only a right if it is a right. The courts seem unable to develop an objective, sensitive rationale for providing judicial protection to new interests. Ironically, the solution to this dilemma lies within the very approach that has spawned the judicial road blocks that have prevented its implementation.

The *Cooper-Knapman* approach suggests that a hearing is required if the board's decision may have 'enormous consequences' to an individual or individuals and if the board is required to decide the case in light of fixed, predetermined standards. Because boards are not bound by their earlier decisions, these standards, when they exist, are almost invariably legislative ones.<sup>152</sup>

The existence of standards increases an individual's stake in the administrative action, and hence increases the consequences of the action to

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<sup>151</sup> See, for example, *Heinemans v. Adventure Charcoal Enterprises Ltd.*, (1972), 1 *Envir. Law News* 4.

<sup>152</sup> They may also be established by the board under a general rule-making power.

him. In other words, the existence of such standards gives persons a right to something or a right to have others refrain from doing something. It is these 'rights' that require judicial protection to ensure that affected individuals have a chance to participate in the decision.

Once environmental quality standards are established and an issue arises that turns on the way in which the standards are interpreted or whether or not they apply to a particular activity, persons who will be affected by the disposition of the case should have a right to be heard. However, there are very few environmental quality standards in Canada. Most provincial departments have little more than a legislative mandate to develop them. Without a public commitment to a specific level of environmental protection, an affected person's demand to be heard becomes less compelling. In such circumstances, the administrative action has a high policy component in it and does not lend itself to resolution through adjudication. Nevertheless there are some situations in which the 'right' to a hearing should arise independent of any standard or guideline. For example, if the interest affected by the administrative decision is of great importance and significance to an affected individual and hence to society as a whole, the arguments in favour of enshrining such interests as judicially protected rights increase.

Whether a statutory standard exists or not, the argument in favour of creating a new legal right is enhanced by a simple cost-benefit analysis of the problem. What are the costs of declaring an interest a right and requiring a hearing — a flood of new hearings, costly delays, irrelevant information, a general decrease in administrative efficiency? What are the advantages — fairness to the affected parties, increased acceptability of the final disposition of the case, new and relevant information, a general increase in administrative efficiency? If the costs outweigh the benefits, the hearing does not, on balance, serve any useful purpose. In most situations, however, the costs of a hearing are relatively minor when compared with the advantages. Given the important stake which nearby residents have in the final decision to license or not to license a potential pollution problem, there is a strong likelihood that their contribution to the hearing will not only be useful, but crucial to the proper determination of the case. The administrative costs of conducting the hearing and postponing the decision need not be great. There are numerous examples of fair, but streamlined hearing procedures.<sup>153</sup>

Partly because of the judicially recognized distortions that have crept into the *Cooper-Knapman* approach and partly because of the inherent unfairness that follows from its application, courts have begun to search for a better answer to the questions of who, and under what circumstances, is a person entitled to a hearing. The starting point for this new approach to the hearing question lies in two nineteenth century United Kingdom decisions.<sup>154</sup> Both decisions dealt with the exercise of administrative powers and yet both

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<sup>153</sup> An interesting model is the *California Coastal Zone Conservation Act of 1972*, Cal. Pub. Res. Code 27001-27650 and discussed in Franklin, *Saving the Coast* (1974) 4 Gold. Gate L. Rev. 307.

<sup>154</sup> *Sharp v. Wakefield*, [1891] A.C. 173; *Spackman v. Plumstead Board of Works* (1885), 10 A.C. 229.

judges insisted on a standard of honesty, impartiality and fairness in the exercise of those powers. In the first case, *Spackman v. Plumstead Board of Works*, the Earl of Selborne admitted that the decision-maker was "not a judge in the proper sense of the word," but nevertheless, "he must give the parties [affected by his decision] an opportunity of being heard before him and stating their case".<sup>155</sup> Lord Halsbury's famous statement in *Sharp v. Wakefield* also helped set the tenor for this new approach:

A minister in the exercise of his discretion must act according to the rules of reason and justice, not according to private opinion . . . according to law, and not to humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.<sup>156</sup>

'Fairness' is slowly becoming the new basis upon which courts will require a hearing. One of the most important examples of this new judicial philosophy is the House of Lords' decision in *Wiseman v. Borneman*.<sup>157</sup> Although the case dealt with the question of whether the tax department had a *prima facie* case to proceed against a taxpayer and would therefore not normally qualify as one in which a hearing was required under the rules of natural justice, Lord Wilberforce ordered a hearing because the existing procedure was unfair to the taxpayer:

I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a *prima facie* case for taking action. [In every case] it is necessary to look to the procedure in its setting and ask the question whether it operates unfairly to the taxpayer to a point where the courts must supply the legislative omission.<sup>158</sup>

This statement has been followed recently in both the United Kingdom<sup>159</sup> and Canada,<sup>160</sup> and is an indication that the 'fairness approach' has gained a certain degree of credibility and acceptance.

Before fairness can become the sole basis upon which hearings are required, the anomalous vestiges of the *Cooper-Knapman* approach must be swept aside. Unless, for example, the somewhat artificial way of distinguishing between judicial-administrative functions, and right-privilege is either rejected or rationalized, the problems of this approach will continue to distort judicial conceptions of fairness. Lord Denning in the *Re Pergamon Press* case has taken an important step in this direction by specifically rejecting the distinction between judicial and administrative functions. After noting the consequences of a particular report to the company, the Master of the

<sup>155</sup> *Id.*, at 240.

<sup>156</sup> *Supra*, note 154 at 179. This phrase has been cited with approval by a number of Canadian courts. For a recent example of this see: *Re Powell and Windsor Police Commission* (1968), 70 D.L.R. (2d) 178 at 182 per Stark, J. (Ontario High Court).

<sup>157</sup> [1969] 3 All E.R. 27; 3 W.L.R. 706. This case is discussed in *Note* (1970), 86 L.Q. Rev. 7.

<sup>158</sup> *Id.*, at 718.

<sup>159</sup> *Regina v. Gaming Board for Great Britain, Ex parte Benaim and Kharda*, [1970] 2 W.L.R. 1009; *In re Pergamon Press Ltd.*, [1970] 3 W.L.R. 792; *Brun v. Amalgamated Engineering Union*, [1971] 1 All E.R. 1148.

<sup>160</sup> *Western Realty Project Ltd. v. City of Edmonton et al.*, [1974] 5 W.W.R. 131.

Rolls concluded, "I am clearly of the opinion that the inspectors must act fairly, even though they are not judicial or quasi-judicial but only administrative".<sup>161</sup> This concern for fairness, regardless of the nature of the decision has recently received support in an Ontario Supreme Court decision.<sup>162</sup> The decision was again 'administrative', but notwithstanding this fact Mr. Justice Pennell felt that the "vital importance" of the decision to the applicant demanded that "the person designate and the Board must act fairly in accordance with the principles of proper justice".<sup>163</sup> This new approach is now, to use Lord Denning's words, "well settled". "It does not matter whether [a tribunal's] functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard".<sup>164</sup> Judicial preoccupation with the consequences of the decision and the need for fairness has prompted two commentators to note that the principles of natural justice have been considerably expanded so that we may now speak of the general duty to act fairly.<sup>165</sup>

Accompanying this expanded right to be heard is a second, equally important development. To accommodate more participation, courts have relaxed the procedural rules surrounding the right to be heard. It is not essential that the affected party be given a formal, court-like proceeding; instead, all that is required is "fair play in action".<sup>166</sup> Thus a person must be afforded a reasonable opportunity to answer allegations against him, but this can, depending on the circumstances, be "handled expeditiously and in a summary manner",<sup>167</sup> and range from written submissions<sup>168</sup> to formal hearings. The important point, however, is that the courts will "refrain from imposing a [rigid] code of procedure upon an entity which the law has sought to make master of its own procedure".<sup>169</sup> The judiciary will only interfere if the pro-

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<sup>161</sup> *Supra*, note 159 at 797.

<sup>162</sup> *Ex parte Beauchamp*, [1970] 3 O.R. 607. The case dealt with a parole revocation by the National Parole Board. It should be contrasted, however, with the Ontario Court of Appeal's decision in *Re Zedrevac and the Town of Brampton*, [1973] 3 O.R. 498 per Kelly J.A., discussed *infra* at p. 87.

<sup>163</sup> *Ex parte Beauchamp*, *id.* at 611. In *Re Imperial Tobacco Co. and Imperial Sales Co.*, [1939] 3 D.L.R. 750. Mr. Justice Hogg of the Ontario High Court noted at p. 757 that "although the Commissioner in carrying out his duties acted as an administrative body and not a judicial body, he was bound to act judicially in the sense that he was obliged to act fairly and impartially, or, in other words, to act according to the dictates of what has sometimes been termed, natural justice".

<sup>164</sup> *Brun v. Amalgamated Engineering Union*, *supra*, note 159.

<sup>165</sup> See: Foulkes, *Introduction to Administrative Law*, (3rd, ed., London: Butterworth's, 1972), 1, 6; Christie, *Nature of the Lawyer's Role in the Administrative Process*, *Law Society of Upper Canada Lecture Series* (1971), 1. The Howarth decision, *supra* note 142, would seem to suggest, however, that it is not as well settled in Canada as many had hoped.

<sup>166</sup> *Wiseman v. Borneman*, *supra*, note 157 at 778 per Lord Morris.

<sup>167</sup> *Klymchuk v. Cowan*, *supra*, note 126 at 600 per Smith, J.

<sup>168</sup> See: *County of Strathcona No. 200 Chemcell Ltd. v. MacLab Enterprises Ltd. and Provincial Planning Board and City of Edmonton*, [1971] 3 W.W.R. 461.

<sup>169</sup> *Regina v. Quebec Labour Relations Board, Ex parte Komo Construction Inc.* (1969), 1 D.L.R. (3d), 125 at 127 per Pigeon, J.



cedures are not just and fair in the particular situation. This approach has been made more palatable for the courts by the recognition that merely requiring a hearing need not detract from the policy component of the decision. A hearing is required to give those directly affected by the decision a right to be heard, not to generate a record on which to decide the case. Thus, the decision-maker's ultimate discretion in deciding the case remains unfettered by the hearing. When viewed in this context, the hearing is designed only to air the judicial aspects of the decision, that is, to examine the extent to which the issues under examination affect the 'rights' of the participants. Overriding policy considerations may ultimately require the decision-maker to decide the case on some basis other than a fair resolution of the conflicting 'rights' and interests of the parties.<sup>170</sup>

Judicial acceptance of the principles of fair play and honesty in the administrative process and a commitment to a more liberal analysis of the issues have set the stage for the recognition of an expanded right to a hearing in which *all* directly affected persons may have a right to be heard. While developments in this area are not particularly encouraging, there is at least one bright spot that offers limited hope for change, namely, the urban planning law field.

The seminal case in this area is the Supreme Court of Canada's decision in *Wiswell v. Metropolitan Corporation of Greater Winnipeg*.<sup>171</sup> The case centered around the City Council's alleged failure to provide a local rate-payers association, the Crescentwood Homeowners Association, with notice and an opportunity to be heard on the issue of a proposed zoning amendment. If the amendment were passed, it would permit its proponent, Dr. Ginsberg, to construct a high rise apartment building which, according to the residents, would adversely affect their own rights as property holders in the district. Although the Council knew of the Association's continuing interest in and concern over the matter, it passed the amendment without directly notifying the Association during a summer meeting when most members of the Association were out of town.

While the Council's apparently underhanded approach was undoubtedly partly responsible for the Court's determination to find some sort of solution for the homeowners, the Court had no apparent trouble in offering a legal basis for overturning the Council's action. Mr. Justice Guy, writing a dissenting opinion at the Court of Appeal level<sup>172</sup> which formed the basis of the majority decision of the Supreme Court, relied on three early Ontario Court of Appeal cases<sup>173</sup> to support the 'aggrieved residents'. Only the two earliest

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<sup>170</sup> See: *Re Cloverdale Shopping Centre Ltd. et al. and Township of Etobicoke et al.* (1966), 57 D.L.R. (2d) 206 at 217 per Aylesworth, J.A.

<sup>171</sup> (1965), 51 D.L.R. (2d) 754; rev'd. (1964), 45 D.L.R. (2d) 34 (Manitoba Court of Appeal).

<sup>172</sup> The majority decision at the Court of Appeal, delivered by Freedman, J.A., held that the Council should have given the Association notice and an opportunity to be heard, but that the failure to do so merely made the by-law voidable.

<sup>173</sup> *Re Hodgins v. City of Toronto* (1863, 23 O.A.R. 80; *Re Howard and City of Toronto, Re Sweet and City of Toronto*, [1928] 1 D.L.R. 932; *Petman v. City of Toronto* (1897), 24 O.A.R. 53.

decisions, however, touch on the *Wiswell* issue; the third one, *Re Howard*, struck down an allegedly *ultra vires* by-law on the basis that it was not in the public interest, not because council had failed to give interested parties an opportunity to be heard.<sup>174</sup> The other two cases are more on point. In the *Hodgins* case Mr. Justice Burton stated a two-part rationale for requiring a hearing. "When a person's property is to be affected by anything analogous to a judicial proceeding" he argued, the property owner "is entitled to be heard".<sup>175</sup> If we accept Gordon's definition of a judicial action, the *Hodgins* test is really no different than the one enunciated in the *Cooper-Knapman* decisions. The decision must adversely affect some interest of the complainant and be judicial, that is, be based on a 'fixed and settled objective standard'. When this test is applied to the plaintiff Association's position, however, it raises a number of questions.

There is little doubt that homeowners adjacent to a proposed apartment building may be adversely affected through increased traffic congestion, noise, overcrowded facilities, and even the aesthetics of the building, but as long as such effects do not amount to a legal nuisance and do not infringe upon some legally recognized right, the courts have refused to interfere with the way in which such decisions are made. Buildings that comply with the applicable zoning by-laws are, by statute, entitled to building permits, and the courts have refused to interfere with the way in which such decisions are made.<sup>176</sup> The same buildings are also by law acceptable land uses and therefore cannot be characterized as a nuisance. And persons who choose to live in large urban areas not only have no 'right' to quiet, traffic-free neighbourhoods; they are normally expected, as the city develops, to accept more and more of the inconveniences of big city living. The comparisons between the *Wiswell* case and the *Hodgins* situation are striking. The Court in the *Hodgins* case was concerned about the imposition of a new tax on a small, identifiable group of property owners. The tax imposed a direct monetary burden on each owner. In the past the courts have been quick to recognize the important difference between an indirect effect on property values in a loosely defined area and the direct effect of a public improvement tax on identifiable properties.<sup>177</sup> Given the marked differences between the two situations, it is difficult to see how the holding in the *Hodgins* case compelled the court to a similar result in *Wiswell*.

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<sup>174</sup> Masten, J.A. did note that Council should conduct its proceedings "in a judicial manner with fairness to all parties concerned". *Id.*, at 99.

<sup>175</sup> *Re Hodgins v. City of Toronto*, *supra*, note 173 at 85. This compares with the United States Supreme Court holding in *Londoner v. Denver*, 210 U.S. 373 (1908) ". . . But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceeding, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard . . ."

<sup>176</sup> Contrast this with the court's concern over the way in which planning decisions affect property owners who wish to develop their property. See especially Mr. Justice Porter's comments in *Goldbar Developments v. City of Edmonton* (1969), 7 D.L.R. (3d) 630 at 631.

<sup>177</sup> See the discussion *supra* at pp. 68 ff.

The cases become even more difficult to reconcile when one focuses on the decision-making process. The imposition of the tax in the *Hodgins* case was a 'judicial' action. In that case Council was required to decide the issue on the basis of a clearly enunciated standard which fettered its discretion and enabled the affected residents to speak intelligently to the issue. However one may characterize the dispute in the *Wiswell* situation, Council's action must be regarded primarily as an administrative or policy decision. Zoning amendments are not based on pre-announced standards that fetter council's discretion, but rather on Council's conception of the best interests of the city. One might have expected, therefore, that the court would follow its decision in the *Calgary Power* case and refuse to grant affected persons a hearing. Its refusal to do so offers new hopes for an expanded right to be heard.

The apparent lack of any sound Canadian authority for the Supreme Court's decision in *Wiswell* suggests that the court may be prepared to decide such cases on some basis other than those enunciated in the *Hodgins* and *Sweet* decisions. The specific basis for future decisions however is difficult to discern. Certainly the court seems to have committed itself to enforcing its own brand of 'fair play in action'; however, Mr. Justice Hall's majority judgment limits fair play to a few relatively narrowly defined situations. In rejecting the city's arguments that it was performing a legislative function, and therefore was under no duty to give the affected Association a hearing, Mr. Justice Hall relied extensively on the rationale in Mr. Justice Guy's dissenting opinion in the Court of Appeal:

It is not open to the Metro Council to rely on the argument that this was a legislative by-law for the good of the community, in the public interest, in good faith and initiated by Metro Council itself in an attempt to "better the lot" of the inhabitants of the metropolitan area as a whole . . . The by-law was passed in the interest of one person directly and would only indirectly benefit the metropolitan area as a whole.<sup>178</sup>

The most important factors in the case, therefore, were the specificity of the proposed by-law<sup>179</sup> and the limited, identifiable interests that would be affected by its fate. The dispute was confined essentially to two parties, Dr. Ginsberg and the Homeowners Association, and, as such, the court concluded that Council's resolution of it was quasi-judicial.<sup>180</sup> This conclusion was reinforced by the fact that the by-law amendment was initiated by a private person, Dr. Ginsberg, for his own interests rather than by the City Council for the benefit of the city. Thus, whenever Council considers amending a by-law that will have a limited affect in the sense that it will benefit one group and adversely affect another, both parties must be given an opportunity to be heard.

Before leaving *Wiswell* two final points deserve comment.

The lack of any general, pre-announced criteria on which to decide the dispute was not a factor in the decision. What seems to have made the dispute partly

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<sup>178</sup> *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, *supra*, note 171 at 765, 766.

<sup>179</sup> Mr. Justice Freedman emphasized the same point in a similar way at pp. 350, 351 of the Court of Appeal judgement.

<sup>180</sup> The Court relied on Lord Reid's statement in *Ridge v. Baldwin*, *supra* note 136 for this conclusion.

judicial and hence required a hearing was not the existence of 'fixed and settled objective standards' or even the potential effect of the decision on nearby residents, but rather the two-party nature of the dispute and the relative *importance of the outcome to the two parties*. Although Council must ultimately decide all zoning amendments on the basis of the best interests of the municipality, the arguments of the two contestants are the most important ingredients in such local disputes and as such, both groups should be given an equal opportunity to influence the outcome.

Equally important to the outcome of the case is a functional, cost-benefit analysis of hearings that never surfaces in the judgment of the court, although it seems to be an implicit part of the Supreme Court's decision. By focusing on the importance of both the effect of the decision on the members of the Association and the two-party nature of the dispute, the court suggests that the Association has an important contribution to make to Council's decision. As an affected party, it is likely to present responsible, informative arguments that demonstrate the extent to which the amendment would jeopardize its neighbourhood and why, on balance, this is not in the best interests of the city. Its contribution is further enhanced by the fact that the dispute does not have widespread, spillover effects that would involve other segments of the city, thus making the dispute multi-partied and diluting the importance of the Association's contribution. Finally, the 'cost' of giving the Association a hearing are not particularly great. It is not especially inconvenient for Council to hear one more presentation. Given the relative ease with which the Association could have been heard and the importance of its comments to the final disposition of the case, the court's decision is functionally sound.

The *Wiswell* decision has not fared as well as one might have hoped. Initially it seemed to herald a new era in administrative decision-making; however, its scope has been confined considerably in recent years. Judicial reluctance to accept the full force of *Wiswell* is most evident in Ontario, where the Court of Appeal has refused to grant a hearing before Council to an affected person if he or she has a right to be heard before a final approving authority. The leading case is *Re Zadrevac and the Town of Brampton*.<sup>181</sup> The facts of the case were almost identical to the *Wiswell* situation. The case concerned an application by a private developer to amend the official plan and the zoning by-laws to permit development of a parcel of land. The application was opposed by a group of potentially affected residents. The residents were not given an opportunity to voice their opposition to the proposed amendments before Council, and sought to overturn Council's decision in the courts.

Zadrevac and his neighbours were successful at trial. Writing the majority decision, the Chief Justice argued that "where action is taken by the municipal council of a municipality to alter conditions in it, that such action must be taken by a council acting in a judicial manner". Even when those who oppose Council's action have a right to be heard before a final approving body, there are distinct advantages in stating their case before council. In a judgment delivered a year before the *Zadrevac* decision, Mr. Justice Wells elaborated:

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<sup>181</sup> *Supra*, note 162. The Divisional Court decision is reported at [1972] 3 O.R. 514; 28 D.L.R. (3d) 641.

Such a process may well result in a modification of the municipal scheme which would not otherwise have been made and it is this opportunity that the ratepayers in Brampton have been deprived of.<sup>182</sup>

Notwithstanding the logic of these arguments the Court of Appeal in *Zadrevac* upheld Council's refusal to grant *Zadrevac* a hearing. The Court ignored Pennell C.J.'s decision in the *Anzil* case and concluded that the legislation, by giving residents the right to be heard before the Ontario Municipal Board, must have absolved Council of its duty to act judicially in such matters. The Divisional Court reached a similar conclusion with regard to hearings before planning boards. In *Re Florence Nightingale Home and Scarborough Planning Board*, the court held that although the Board's failure to give the Home a hearing before rezoning its lands was regrettable and morally dubious, it must be content with whatever 'rights' it had before Council.<sup>183</sup> The combination of no hearing before either the Board or Council means that a person's only recourse is to initiate the expensive and rather onerous process of appealing to the Ontario Municipal Board.

However lamentable the *Zadrevac* decision may be, it does not present an insurmountable obstacle in the environmental protection sphere. Many pollution control boards have the final approving authority, subject to appeal to either the County Court on a question of law or the Minister on a question of fact. Thus, if a person can establish a right to a hearing, it will be at the pollution control board level. The difficult task is to use the *Wiswell* decision to guarantee 'affected residents' a right to a hearing before decisions about the environment and pollution control are made.

As noted above, environmental decision-making is a multi-faceted task. It involves setting ambient standards, effluent and emission standards, applying these standards to existing and prospective polluters, negotiating and enforcing pollution abatement agreements and so on. Setting standards, like passing or amending zoning by-laws, is an administrative or legislative function. Decisions are based on pre-existing or evolving policy, not on fixed, pre-determined standards. Applying and enforcing environmental quality standards, on the other hand, is almost identical to enforcing zoning by-laws. Theoretically, the function is mechanical: either a person has or has not complied with the present standard. One function, therefore, is a legislative or administrative task, the other is judicial.

In terms of this hierarchy of decision-making the *Wiswell* case decided that certain narrowly circumscribed policy functions demand participation from both affected parties. By doing so, it distinguished between the broad, multi-sided, policy dispute and the more confined, two-party policy dispute. Neither the multi-partied nor the two-partied policy dispute lends itself to judicial resolution; however, the deliberations leading up to a final decision may demand equal participation from the affected parties if the dispute is two-sided and can be characterized loosely as a *lis*.

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<sup>182</sup> *Re Anzil Construction Ltd. et al. and the Township of West Gevillimbury*, [1971] 2 O.R. 713 at 716.

<sup>183</sup> (1972), 32 D.L.R. (3d) 17 (Ontario Divisional Court).

When we analogize this reasoning to the environmental protection field it seems clear that a number of decisions may require initial input from affected area residents. If an existing or prospective pollutor applies to the regulatory department for an amended environmental quality standard to permit it to operate, then area residents, if they can show that they may be adversely affected by such a decision, should have a right to be heard. Similarly, if no standard exists and a person applies for permission to operate an existing or potential source of pollution, affected residents again should have a right to be heard. No such right would exist, however, if the regulatory agency, on its own initiative, decided to develop industry-wide standards. That issue is similar to the broad, multi-sided, hearing requirement.

The applicant's right to be heard at a formal licensing hearing, whether provided for by statute or not, is well-established. The right of other affected individuals to be heard at such a hearing is still in the formative stages of development. Two arguments can be used to secure such a right to a hearing; one relies on the *Cooper-Knapman* approach, the other an emerging judicial acceptance of the fairness principle.

To win a hearing under the *Cooper-Knapman* approach, the aggrieved party must meet all four criteria developed *infra*. The last three, namely, the existence of predetermined standards, the possibility of a substantial contribution to the hearing, and the chance that the advantages of the contribution will outweigh the disadvantages are all relatively easy to meet, especially if we rely on the policy arguments developed in Part I of the paper. The first criterion, having a legally recognized right affected by the decision, is more difficult to meet. Individuals do not as yet have such a right to a clean environment; however, as noted in Part I there are good reasons for recognizing such a right.<sup>184</sup>

The court's new emphasis on some general conception of fairness, rather than rigid criteria, offers some hope of success. A sympathetic application of the fairness doctrine may mean fairness to *all* affected parties, not just the applicant. The importance of departmental and board decisions to the interests of these parties is apparent, and it is essential therefore that the law be applied to them fairly and equally. Whether this means a right to a hearing, however, is still a matter for judicial determination.

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<sup>184</sup> One may also argue that to the extent that departmental licences and permits immunize the pollutor from successful civil action by area residents and thereby diminish the legal rights of those potential plaintiffs (to receive some relief from the courts), the licensing decision has affected their legal "rights". The success of this argument hinges on the existence of a number of important variables, including a valid cause of action, a judicial determination that the approval constitutes statutory authorization and finally a determination that the authorization is mandatory and not merely permissive. If each of these conditions is met, then those denied potential success in court might argue that the decision to approve a particular source of pollution adversely affects a legal right and therefore, they should be given an opportunity to be heard. The uncertainty of the approach and the inherent disadvantages of it make it a far fetched and unlikely technique for securing a hearing. Such an argument might be made pursuant to an immunizing statutory provision such as *The Ontario Water Resources Commission Act*, R.S.O. 1970 c. 332, s. 35 as amended.

### C. AN EVALUATION OF PARTICIPATION IN THE ENVIRONMENTAL PROTECTION PROCESS

In Part II of this article, the existing environmental decision-making process has been characterized as 'managerial', and demonstrates some of the potential problems that may arise with such a heavy reliance on a single approach to such a complex task. Rather than delegating all aspects of environmental protection to an understaffed and sometimes inexperienced regulatory department, we must redesign the decision-making process to utilize the inherent advantages of other forms of decision-making and this in turn means utilizing the advantages of other forms of participation.

A combination of the legislature's<sup>185</sup> heavy reliance on the environmental management approach to all aspects of the problem and a generally unsympathetic common law has resulted in limiting participation to only one side of the dispute, as is the case with the adjudicative hearing, or encouraging it to solve problems that it is unsuited to deal with, as in the case of the public hearing. Furthermore, the legislation does not utilize the inherent advantages of representative environmental councils to determine environmental policy.<sup>186</sup> Some of these problems may be overcome through judicial reform and a more sympathetic application of the principles of natural justice to *all* affected persons, but by and large the solution must come from the provincial legislatures.

Any real 'evaluation' of the analysis presented above must wait for a thorough review of environmental protection practices in Canada. The arguments presented here tend to be highly speculative and are intended more as a model for future analysis of the area, rather than as a definitive statement of all that ails the environmental protection process. They are intended to provoke further analyses of the question; how can we better design the environmental decision-making process and thus ensure an optimum degree of participation in these decisions? This, of course, presupposes that there are serious problems with the present approach. Again, only a full-scale analysis of the existing and potential state of the environment can determine this; however, the potential for problems outlined above suggests that there is considerable room for improvement in the area.

## PART III

### A STRATEGY FOR DEMOCRATIZING CANADA'S ENVIRONMENTAL PROTECTION LAWS

If we are to democratize Canada's environmental protection laws and make participation in the decision-making process meaningful, we must begin by determining the dimensions of the task and this will in turn lead

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<sup>185</sup> As expressed in the provincial environmental protection acts, *supra* note 34.

<sup>186</sup> The Nova Scotia Environmental Control Council came close to fulfilling this role in the first draft of the *Act*, but this was subsequently changed. See: Emond, *The Nova Scotia Environmental Protection Act*, *supra*, note 36.

us to some conclusions about how we can best deal with it. This article attempts to do much of the conceptual work in this area. It divides environmental protection into three parts: policy formulation, policy implementation and enforcement. Each task can best be performed by a particular decision-making structure. Policy decisions, for example, are best made by legislative bodies, while enforcement is a function that is well-suited to an adjudicative body. Policy implementation combines elements of both policy-making and enforcement and adds a third, management. The most appropriate decision-making structure for such a task is not as well-defined as it is for the other two, and thus we should be prepared to delegate a good deal of the job to our environmental managers, the regulatory departments, and let them experiment with their own solutions.

Having divided the task of decision-making structures into three component parts, it follows that the appropriate kind and degree of participation will be a function of each. Thus, participation at the policy formulation level should be through representation on policy councils or 'legislatures' with decisions being made by way of a vote. Participation at the enforcement level should only be made by those directly affected by the enforcement or lack of enforcement and should therefore be done through the presentation of reasoned proofs and arguments at an adjudicative hearing. Finally, participation at the implementation level should be confined to advisory 'public hearings', unless of course the implementation problem is better characterized as one of policy formulation or enforcement. The public hearing may also be a useful device for councils to seek out and explore policy alternatives before they make their final decision.

Restructuring the decision-making and participatory processes along these lines is primarily a matter of legislative reform. It requires the provincial legislators to re-examine the ways in which they are presently dealing with the environment and to experiment with new forms of environmental decision-making and participation. This will only be forthcoming if a concerned public persuades provincial legislators to redraft their respective environmental protection acts along the lines generally suggested in this article.

In the meantime, the legal community can play an important supporting role. Many of the existing problems could be overcome if interested and affected members of the public were given an equal opportunity to participate in adjudicative hearings. At present, often only the pollutor and the regulatory department have a right to participate, and this, without a countervailing input from those affected by the decision, may lead to less environmental protection than we deserve. In this general area, many innovative arguments may be available to secure a hearing. Some are discussed in Part II of this paper, others no doubt will surface as lawyers rely more heavily on administrative law and natural justice principles to secure 'justice' for affected members of the public.

While participation may be a worthy end in itself, a far worthier end is to provide the kind of participation that will truly enhance the decision-making process. What remains to do now is to determine empirically the validity of this analysis of the problem and then to explore specific ways of implementing the strategy for participation outlined in this article.



