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Toward the Twenty-First Century: A Canadian Legal Perspective on Resource and Environmental Law

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Abstract

This paper surveys existing and emerging Canadian approaches to environmental and resource management issues, and assesses the strengths and weaknesses of some of our past and current approaches. It considers the challenges posed by the fact that Canada is a federal state as illustrated by jurisdictional competition regarding environmental assessment. The successful utilization of cooperative strategies is considered and examples are given of new problems that need to be addressed. Difficulties faced by governmental, judicial, and administrative bodies are surveyed. Examples are given of emerging legislative strategies. It is concluded that, while much change is apparent, it is far from clear that change is occurring quickly enough to respond effectively to the environmental challenges of the twenty-first century.

Keywords

Environmental law; Canada

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TOWARD THE TWENTY-FIRST CENTURY: A CANADIAN LEGAL PERSPECTIVE ON RESOURCE AND ENVIRONMENTAL LAW[©]

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This paper surveys existing and emerging Canadian approaches to environmental and resource management issues, and assesses the strengths and weaknesses of some of our past and current approaches. It considers the challenges posed by the fact that Canada is a federal state as illustrated by jurisdictional competition regarding environmental assessment. The successful utilization of cooperative strategies is considered and examples are given of new problems that need to be addressed. Difficulties faced by governmental, judicial, and administrative bodies are surveyed. Examples are given of emerging legislative strategies. It is concluded that, while much change is apparent, it is far from clear that change is occurring quickly enough to respond effectively to the environmental challenges of the twenty-first century.

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I. INTRODUCTION

As we move toward the twenty-first century, our governmental, legal, and administrative systems are being challenged as never before to provide creative solutions to pressing problems in environmental and resource management. As will be explored below, it is clear that many of the past approaches are inadequate in several ways. It is also clear that the various stakeholders in the decision-making process (governments, the private sector, and the public at large) are struggling to find more effective and efficient procedures. The growing realization that we face potentially huge costs in remedying the environmental problems we have already created is particularly important at a time when public funds are shrinking in all sectors and the overall state of the Canadian economy is poor. An additional complexity is the increasingly accepted fact that many environmental and resource management issues can only be dealt with at the international level and within the overall context of the economic disparity between developing and developed countries.¹ What is less clear at the moment is whether our efforts to develop new approaches are taking us in the right direction, and, even if they are, whether they are taking us there fast enough.

This paper surveys existing and emerging Canadian approaches to environmental and resource management issues. Drawing upon examples from various parts of the country, it examines the strengths and weaknesses of some of our past and current approaches from a selective point of view. It is broadly organized around the following themes. First, what are the implications of Canadian federalism and how has that affected our ability to manage our natural resources? Second, to what extent are our institutions organized to effectively face the challenges of the twenty-first century? Consideration is given to

¹ Brundtland Commission, *Our Common Future* (New York: Oxford University Press, 1987).

several different types of institutions, including governmental, judicial, and administrative. And third, what legislative trends can be identified as a framework for decision making regarding natural resources and the environment? The conclusions at the end of the paper suggest that, while there are reasons for optimism, there are also reasons for pessimism.

II. ENVIRONMENTAL AND RESOURCE MANAGEMENT IN A FEDERAL STATE: CHALLENGES AND OPPORTUNITIES

It is trite to observe that our Constitution² gives both the provincial and federal governments legislative jurisdiction over natural resources and the environment. The formal and legal dimensions of this fact have been explored elsewhere and will not be dwelt upon here.³ It does need to be stressed, however, that at different times in our history, this division of legislative responsibility has led to disharmony and has greatly complicated our ability to make appropriate and timely decisions.

The well-documented "energy wars" between the federal and provincial governments of the 1970s and early 1980s resulted in extensive litigation; competing and often conflicting legislative requirements for industry; intergovernmental agreements; the establishment of some new or rejuvenated institutions; and a constitutional amendment intended in part to clarify, and in part to alter, the legislative role of the two levels of government.⁴ Although it appeared that the cooperative approach, which characterized the mid-1980s, would finesse many of the earlier problems, cracks have begun to appear in the cooperative facade, especially around matters relating to the environment.

² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act*].

³ P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972) 10 *Osgoode Hall L.J.* 647; D. Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada" (1973) 23 *U.T.L.J.* 54.

⁴ N.D. Bankes, C.D. Hunt & J.O. Saunders, "Energy and Natural Resources: The Canadian Constitutional Framework" in Royal Commission on the Economic Union and Development Prospects for Canada, *Case Studies in the Division of Powers*, vol. 62 (Toronto: University of Toronto Press, 1986) (Research Coordinator: M. Krasnick) 53.

A. *The EIA Jurisdictional Competition*

One of the best current examples of disharmony between federal and provincial governments over the environment concerns environmental impact assessment (EIA). EIA has become a broadly accepted method of predicting the effect of proposed activities and how anticipated damage can be alleviated. All jurisdictions in Canada have EIA processes, although their legal basis and detailed content vary. Since the advent of EIA, it has been obvious that certain activities could have both a federal and a provincial dimension. In some cases, such situations were handled through a joint federal-provincial review. In others, the federal government agreed to let provincial processes carry the day. Although there is no broad consensus about the effectiveness of the joint review processes, for the most part, the joint approach has not generated a great deal of controversy.⁵

This relatively quiescent state of affairs came to an abrupt halt when environmental opposition to two dam projects in western Canada led to a series of court cases that are still underway.⁶ This litigation has elevated to the status of "law" federal guidelines, the Environmental Assessment and Review Process (EARP) Guidelines Order,⁷ which were assumed (and were probably intended by their drafters) to be merely unenforceable policy. One result has been a judicial expansion of the federal role in EIA, even where proposed projects have been approved by provincial governments and are taking place on provincial lands. This has led to a flood of lawsuits throughout the country in which other projects have been challenged on the ground that they have a federal aspect that requires their assessment under the federal Guidelines Order. Notably, a number of these cases involve Aboriginal groups as plaintiffs. *Friends of the Oldman River Society v. Canada (Minister of Transport)*⁸ has since been affirmed by the Supreme Court of Canada.

The uncertain state of affairs caused by the litigation has hastened federal resolve to legislate its EIA procedures and to stake out a firmer area of responsibility relative to provincial governments. This

⁵ M. Ross, "An Evaluation of Joint Environmental Impact Assessments" in M. Ross & J.O. Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992) 322.

⁶ See *Canadian Wildlife Federation Inc. v. Minister of the Environment* (1989), 99 N.R. 72 (F.C.A.) [hereinafter *Canadian Wildlife*]. Some of the cases, however, have been decided since this paper was written.

⁷ S.O.R. 84/467.

⁸ [1992] 1 S.C.R. 3 [hereinafter *Oldman*].

trend is being "bucked" by the provinces, who see a larger federal role as potentially damaging to their ability to make decisions that will economically benefit their constituencies, a capacity of growing importance in the face of shrinking transfer payments from the federal government and a weakening economy. Some industrial interests are also concerned about the expanding federal role which, in their view, may exacerbate problems of overlap and duplication between the two levels of government.

B. Cooperative Strategies

While the EIA example demonstrates federal-provincial competition and conflict, both levels of government clearly recognize that the other has a legitimate role to play in environmental and resource management. This has been articulated in the 1990 federal *Green Plan*⁹ with its emphasis on the partnership between the federal, provincial, and territorial governments. Some of the successful Canadian strategies for handling resource and environmental management issues in a federal state deserve mention.

First, long-standing disputes over offshore jurisdiction have been resolved through the passing of parallel legislation at the federal and provincial levels and the establishment of joint regulatory boards.¹⁰ This model has been put into place in two jurisdictions and is being considered in several others. At least a nominal degree of national uniformity has been retained by designing the legislation so that there is a common "core" applicable to all regions, with details varying to reflect local circumstances. Although the resulting legal regime is complex, there appears to be a relatively high degree of satisfaction with the system which, from the viewpoint of industry, has provided a predictable framework within which development decisions can be taken and financial commitments made.¹¹

Second, a recognition that federal standards might be desirable in certain circumstances but could interfere with provincial freedom of action was given expression in the so-called "equivalency" provisions of

⁹ *Canada's Green Plan for a Healthy Environment* (Ottawa: Ministry of Supply and Services Canada, 1990) [hereinafter *Green Plan*].

¹⁰ C.D. Hunt, *The Offshore Petroleum Regimes of Canada and Australia* (Calgary: Canadian Institute of Resources Law, 1989).

¹¹ *Ibid.* at 47-52.

the *Canadian Environmental Protection Act*.¹² Passed in 1988, the *CEPA* exemplifies a new federal environmental activism, which reflects the public's desire for a broader federal role and, arguably, has been justified by the expansive view of federal authority in this area that has emerged as a result of the Supreme Court of Canada's decision in *R v. Crown Zellerbach*.¹³ The equivalency provisions, developed at the suggestion of the provinces, permit provincial standards to replace federal ones provided certain conditions are met.¹⁴ The concept is potentially attractive but has proven difficult to translate into practice. Officials who were to work out the details of this imaginative idea have discovered that the federal view differs significantly from that of the provinces.¹⁵ As a result, the usefulness of the equivalency notion remains in some doubt.

Third, intergovernmental agreements, long an effective lubricant in the Canadian federal system, continue to play an important role in responding to new challenges.¹⁶ Recent agreements relating to forestry management and the clean-up of hazardous waste sites establish mechanisms for cost-sharing and cooperation in research as well as an impetus for uniform legislation. The advent of agreements on environmental standards between neighbouring provinces, designed to ensure that the "pollution safe haven" phenomenon does not occur, is an interesting development. Regional interprovincial agreements are also beginning to emerge. They are intended, among other things, to improve cooperation on such matters as the disposal of hazardous wastes. Agreements between several Canadian jurisdictions have been used to tackle the problem of acid rain-causing emissions, while agreements between a number of jurisdictions both in Canada and the United States have helped to address common concerns such as habitat protection for migratory species. A major success of this approach has undoubtedly been the use of intergovernmental agreements as a management tool for interjurisdictional river basins.¹⁷ Federal-

¹² S.C. 1988, c. 22 [hereinafter *CEPA*].

¹³ [1988] 1 S.C.R. 401. See also A.R. Lucas, "Environmental Protection Under the Peace, Order and Good Government Power—The Crown Zellerbach Case" (1988) 24 *Resources* 3.

¹⁴ A.R. Lucas, "Jurisdictional Disputes: Is 'Equivalency' a Workable Solution?" in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990) 25.

¹⁵ *Ibid.* at 32.

¹⁶ See, for example, J.O. Saunders, *Interjurisdictional Issues in Canadian Water Management* (Calgary: Canadian Institute of Resources Law, 1988); and Hunt, *supra* note 10.

¹⁷ Saunders, *ibid.*

provincial agreements have also been used to delineate the enforcement authority of the two levels of government. Unfortunately, the details of such arrangements are sometimes unknown outside government circles; thus, citizens may launch private prosecutions that contradict the agreed arrangements.¹⁸

Fourth, both new and existing institutions are being used to develop solutions. The Canadian Council of Environment Ministers (CCEM) and its predecessor, the Canadian Council of Resource and Environment Ministers (CREM), have a number of accomplishments to their credit. It appears that, increasingly, the CCEM is being looked to as a locus for the discussion and resolution of interjurisdictional issues. Among the recently stated objectives of the CCEM are the harmonization of environmental legislation, policies, and programmes; the development of national standards to ensure the maintenance of a consistent level of environmental quality across the country; the development of consistent strategies to address emerging issues of national, international, and global importance; and the harmonization of EIA procedures.¹⁹ The National Round Table (discussed below) is an attempt to bring together a variety of perspectives on environmental issues. It is also being used to interact with counterpart organizations at the provincial and territorial level.

Fifth, there are some examples of good federal-provincial coordination in the legislative sphere. For instance, federal and provincial statutes dealing with the transportation of dangerous goods have been designed to create a unified national response and to operate in a cooperative manner.²⁰ Similar initiatives are being pursued in regard to the problem of abandoned hazardous waste sites.

C. *Emerging Challenges*

The above examples illustrate that cooperation can be an effective tool, but it would be misleading to suggest that the existence of

¹⁸ K. Webb, "Between Rocks and Hard Places: Bureaucrats, Law and Pollution Control" in R. Paehlke & D. Torgerson, eds., *Managing Leviathan: Environmental Politics and the Administrative State* (Peterborough, Ont.: Broadview Press, 1990) 201.

¹⁹ *Green Plan*, *supra* note 9.

²⁰ See, for example, *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34; *Transportation of Dangerous Goods Control Act*, S.A. 1982, c. T-6.5; *Dangerous Goods Transportation Act*, R.S.O. 1990, c. D.1; and *Transport of Dangerous Goods Act*, S.B.C. 1985, c. 17.

a federal state will not complicate our ability to respond to the environmental and resource challenges of the twenty-first century.

Among the emerging problems are the following. The growing need to deal with problems at the international level will make it difficult for provincial governments to have the kind of autonomy in resource and environmental planning that they seek. Tremendous differences among the regions with respect to resource endowment, the nature of the economy, and population size (to mention just a few) are bound to mean that national policies will have uneven regional impacts. This is illustrated by the problem of global warming which, so far, has largely caused paralysis among Canadian governments and policy makers. A meeting of Canada's energy ministers in mid-1990, for example, chose to follow the advice of the Task Force²¹ that had been struck to consider, *inter alia*, the prospects for reducing carbon dioxide emissions in Canada by 20 per cent by the year 2005. The Task Force had decided that such a reduction would cause significant economic dislocation and would require a significant change in lifestyle; the Ministers declined to adopt firm targets and instead noted the need for interjurisdictional cooperation.²²

Another problem is that the growing activism of some provincial governments in environmental matters can give rise to unexpected legal and other problems that are a direct result of federalism. For example, in Alberta there has been increased concern about the phenomenon of "orphan wells," namely, oil and gas wells whose owners are unable to carry out proper abandonment procedures due to bankruptcy or insolvency, or whose owners are no longer active in the jurisdiction.²³ Attempts by the Alberta Energy Resources Conservation Board to deal with this problem by ordering a receiver-manager to abandon several potentially dangerous wells have been found to run afoul of the priorities scheme set out under federal bankruptcy laws.²⁴ Another illustration of this kind of problem is that, although jurisdictions such as British Columbia are trying to provide incentives for mining companies to carry out reclamation through the establishment of reclamation funds

²¹ *Report of the Federal/Provincial/Territorial Task Force on Energy and the Environment* (Ottawa: Queen's Printer, 2 April 1990).

²² *Ibid.*

²³ C.D. Hunt & H. Prus, "Abandonment and Reclamation of Energy Sites and Facilities: Canada" (1992) 10 J.E.R.L. 87.

²⁴ *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil and Gas Ltd.* (1990), 75 Alta. L.R. (2d) 185 (Q.B.).

for future costs, contributions to such funds are not deductible for federal tax purposes.²⁵

A further problem that has, so far, received inadequate attention in Canada is that, in the future, many of the most serious problems will need to be dealt with at the local or municipal level. For instance, the federal *Green Plan* promises the enactment of a new *Drinking Water Safety Act*, in partnership with the provinces.²⁶ Yet much of the burden for implementing such legislation will fall to the local level. It is essential that municipal politicians become involved in similar initiatives in order to avoid a syndrome that is causing concern in the United States. There, Congress has enacted national standards that largely fall on local governments, with no adequate funding provisions for their implementation. Thus, it is encouraging that some of the provincial Round Tables (discussed below) include municipal representatives, and that some municipalities have established their own version of the Round Tables.

Public opinion polls, and the broad public consultations that led up to the federal *Green Plan*, suggest that Canadians are increasingly looking to the federal government to provide leadership and a stronger role in environmental protection.²⁷ However, certain initiatives arising from Canada's recent constitutional crisis are resulting in proposals for greater control over natural resources and the environment at the provincial level. Examples of thrusts in this direction include the Allaire Report²⁸ from Québec, and the Group of 22 report released in June 1991.²⁹ Unfortunately, such proposals tend not to be accompanied by any clear rationale as to why, from a functional point of view, such decentralization is advisable.

As we move toward the twenty-first century, the reality of living in a federal state can provide us with the advantage of a myriad of solutions to common problems from which we can all learn. As stated by a previous federal Environment Minister, the experience thus gained may also prove helpful in our ongoing efforts to find solutions at the

²⁵ J.H. Dick, "British Columbia's Mine Development Review Process—A Decade of Trial and Evolution in Environmental Impact Assessment" (1989) 3 C.J.A.L.P. 45.

²⁶ *Supra* note 9 at 35.

²⁷ *A Report on the Green Plan Consultations* (Ottawa: Government of Canada, 1990) at 1-2.

²⁸ *A Québec Free to Choose: Report of the Québec Liberal Party* (Québec: Constitutional Committee of the Québec Liberal Party, 1991) (Chair: J. Allaire)[hereinafter Allaire Report].

²⁹ *Some practical suggestions for Canada—Report of the Group of 22* (June 1991).

international level.³⁰ At the same time, the tightrope act that federalism seems to require raises a deep concern that too little will be done too late.

III. OUR INSTITUTIONS: ARE THEY UP TO THE TASK?

A. Governmental

The foregoing has suggested that particular challenges in dealing with resource and environmental management flow from the fact that Canada is a federal state. But all levels of government suffer from certain deficiencies that make it difficult to find creative solutions to pressing problems.

A major dilemma is that governments are elected for relatively short periods of time, often too short to put into place the visionary laws, policies, and programmes that are needed. Ironically, this problem can be exacerbated by the increasingly entrenched recognition that stakeholders should be involved in decision making, including the design of new laws. An absence of consultation and public involvement is a guarantee of political difficulty. At the same time, the short time frames, which constrain elected officials, can make it difficult to get on with urgently required solutions. Examples abound.

Ontario's New Democratic government, elected in September 1990, had pledged the enactment of an Environmental Bill of Rights while in opposition.³¹ Late in 1990, a process was embarked upon that involved consultation with representatives of various governmental and non-governmental interests, prior to Cabinet consideration of proposed legislation. Broader public input was also invited. More than ten months later, a concrete proposal had yet to emerge. Similarly, the federal government introduced EIA legislation after several years of unfulfilled promises to do so. The bill was subjected to extensive hearings before a Parliamentary committee and ultimately died on the order paper.³² It has been so widely criticized that its future is unclear,

³⁰ L. Bouchard, Minister of Environment, Address (Symposium "le Saint-Laurent un fleuve a reconquerir" 3 November 1989).

³¹ A.R. Lucas, "Natural Resource Use Conflicts: 'Hard vs. Soft' Rights" in Ross & Saunders, eds., *supra* note 5.

³² Bill C-78, *An Act to Establish a Federal Environmental Assessment Process*, 2d Sess., 34th Parl, 1989-91. See discussion in Ross, *supra* note 5 at 326; and Canada, Parliament, House of Commons, Special Committee to pre-study Bill C-78, *Minutes of Proceedings and Evidence of the*

even though it has been reintroduced in its original form and referred back to the Committee.³³

In Alberta, a government beleaguered by condemnation of its northern forestry policies has introduced new laws intended to overhaul the legal and regulatory system for environmental and natural resource management. Extensive criticism of the proposed Alberta *Environmental Protection and Enhancement Act*,³⁴ during a process of broad public consultation, may be one reason why the new legislation was not passed as anticipated, during the spring 1991 session of the Alberta legislature.

A related problem is that, although governments are elected to govern, they are increasingly under pressure to subject their policies (as well as their project-oriented decisions) to EIA. One often cited example is the federal government's decision to cut back on Via Rail service without considering the environmental impact this transportation policy might have. Similarly, both levels of government implement various agricultural policies without any obvious means of considering the impact of farm subsidies, pesticide use, *etc.*, on the environment. One common criticism of the federal EIA bill is that its application is specifically limited to projects. Although the literature accompanying the original Bill declared the federal government's intention to have it assess its future policies as well, detractors dislike the government's discretion with regard to the assessment of policies, noting that such an approach cuts into what has been accomplished through EARP litigation. Proposed legislation in Alberta has been criticized on similar grounds, while recently released reviews of EIA legislation in both Ontario and Saskatchewan raise related points.

There are many reasons why governments have been reluctant to formally bind themselves to conduct EIAs on their policies. For example, there is uncertainty about the appropriate techniques for subjecting policy to EIA and the limitations upon a government's freedom to act that could result. As a recent study has pointed out, there is no simple recipe to ensure that government effectively integrates environmental

Special Committee to Pre-study Bill C-78, An Act to Establish a Federal Environmental Assessment Process (Ottawa: The Committee, 1990) [hereinafter *Special Committee*].

³³ Bill C-13, *An Act to Establish a Federal Environmental Assessment Process*, 3d Sess., 34th Parl., 1991-92 (assented to 23 June 1992, S.C. 1992, c. 37).

³⁴ Bill 53, *Environmental Protection and Enhancement Act*, 3d Sess., 22nd Leg., Alberta, 1991 (assented, S.A. 1992, c. E-13.3) [hereinafter *EPEA*].

matters into its policy-making processes.³⁵ Nevertheless, some suggestions have been made,³⁶ including the following:

1. The establishment of a Parliamentary Commissioner for the Environment, with a mandate similar to that of the Auditor General, to report regularly and publicly on the actions and processes of government in relation to environmental matters;
2. The setting of sustainable development objectives by individual government departments, to be audited by the Parliamentary Commissioner;
3. The employment of new and improved stakeholder consultation techniques to ensure that the value judgements underlying increasingly complex trade-offs in the policy-making process are made more explicit;
4. The integration of environmental factors into Canada's system of national accounts, the use of a system of sustainable development indicators, and the use of "state of the environment" reports: all of these techniques would improve our ability to measure when changes in policy have or have not resulted in success; and
5. The broadening of the skills of government's policy analysts.

Another problem with government institutions is that environmental issues cut across traditional departmental lines. Environment departments were established by all governments in Canada beginning in the early 1970s because of an embryonic recognition of the need to deal with environmental issues. Typically, these departments were the "weak sister," headed by ministers who had little clout in cabinet. Moreover, other departments such as Energy and Finance were able to pursue their goals, often with little recognition of the impact of their policies, programmes, and laws on the environment. In the interdepartmental turf wars, environment departments tended to lose out. This has begun to change, especially with the growing acceptance of principles espoused by the Brundtland Commission and because of some of the ideas put forward by the National Task Force on the Environment and the Economy.³⁷ Now, Ministers of the Environment are often now members of important Cabinet committees

³⁵ Canadian Environmental Research Council, *The Integration of Environmental Considerations into Government Policy* (Report) by F. Bregha, et al. (Ottawa: Minister of Supply and Services Canada, 1990).

³⁶ *Ibid.* at 29-30.

³⁷ Canadian Council of Resource and Environment Ministers, *Report of the National Task Force on Environment and Economy* (Ottawa: The Task Force, 1987) (Chair: G. Lecuyer).

and, increasingly, other departments are being required to develop environmental mission statements. In this regard, provisions found in the *CEPA* that empower governmental agencies and departments to establish environmental guidelines are noteworthy. Nevertheless, it is far from clear that environmental concerns are as fully integrated into processes of governmental decision making as they ought to be. For example; it has been speculated that the federal government's *Green Plan* was so long in gestation because of fierce opposition in Cabinet to many of the ideas being promoted by the then Environment Minister. Canadian legislation relating to resource and environmental management remains fragmented and administered by a myriad of departments, all of which are imbued with their own agendas and values.

One popular strategy to elevate the status of environmental issues has been the establishment of "Round Tables" by all governments. First conceptualized by the National Task Force on the Environment and the Economy, these new institutions were intended to bring together a variety of perspectives, including government, business, and the general public, in order to integrate economic and environmental issues.³⁸ It has been suggested that this approach is built upon the Canadian instinct for consultation and consensus, in contrast to the American desire for adversarial processes.³⁹ Although some of the Round Tables have developed a high public profile and have actively sought to draw the public into their activities, the National Round Table has been criticized for its failure in this regard.⁴⁰ Other emerging concerns about the potential success of Round Tables include the non-involvement of highly placed government actors, and the absence of a close reporting relationship between the chair of a particular Round Table and the head of the relevant government.

There are many other examples of attempts to break down interdepartmental barriers and to engage a variety of actors in discussions and decisions, including, in western Canada, the recently released Prairie Conservation Action Plan. It is too soon to evaluate the success of these new institutions and processes, but it is safe to say that a great deal is being wagered on the outcome of these experiments.

³⁸ *Ibid.* at 10-11.

³⁹ R. Page, "Round Tables in Canada: Evolution and Purpose" (Paper presented to the Joint Round Table Meeting in Winnipeg, April 1990).

⁴⁰ *Ibid.*

B. *Judicial*

The courts have long been involved in what we would now describe as environmental matters, through such common law doctrines as nuisance and trespass, and through other innovations such as the recognition of recreational easements. Commentators have questioned, however, the adequacy of the common law to provide the kinds of solutions we need.⁴¹

Aside from the possible inflexibility of common law doctrines, there are other reasons why the courts may have a limited role. Cases that raise issues of scientific uncertainty may not be adequately resolved through civil litigation because, if science cannot provide the kind of firm answers required by the legal system, the status quo will tend to be favoured.

Two examples illustrate this problem. In *Baker Lake v. Canada (Minister of Indian Affairs and Northern Development)*,⁴² the Inuit of the hamlet of Baker Lake in the Northwest Territories sought to stop mining companies from carrying out exploratory work on lands they traditionally used and occupied, and which they claimed as a result of their unextinguished Aboriginal title. They were concerned that these activities were detrimentally affecting the caribou upon which they relied for food. Based on the scientific evidence before it, the Court was unable to find a causal link between mining exploration and the acknowledged reduction in the size of the caribou herd. As a result, the exploratory activities were permitted to proceed.

Similarly, in a well-publicized Nova Scotia case,⁴³ the Court's inability to find, on a balance of probabilities, that pesticide use was detrimental to the forestry, resulted in the dismissal of the plaintiffs' suit.

In the criminal or quasi-criminal context, the need to prove a charge beyond a reasonable doubt has undoubtedly been one reason why enforcement officers in Canada have tended to rely upon negotiation rather than prosecution.⁴⁴ Better training programmes and the establishment of specialized agencies such as "Envirocops" may improve

⁴¹ P.S. Elder, "Environmental Protection Through the Common Law" (1973) 12 West. Ont. L. Rev. 107.

⁴² [1980] 1 F.C. 518 (T.D.).

⁴³ *Margaree Environmental Assoc. v. Nova Scotia (Minister of the Environment)* (1989), 58 D.L.R. (4th) 544 (S.S.C.A.D.).

⁴⁴ See Review Panel in Environmental Law Enforcement, *An Action Plan for Environmental Law Enforcement in Alberta* (Edmonton: Department of Environment, 1988).

the utility of the criminal law system, particularly given the stiffer penalties and the personal liability of officers and directors that increasingly characterize environmental legislation. Private prosecutions provide another potential avenue, although these give rise to their own problems.⁴⁵ Furthermore, our ability to rely heavily upon criminal law sanctions in the environmental arena is being called into question because of cases that have found the "due diligence" defence contrary to the *Charter of Rights and Freedoms*' presumption of innocence.⁴⁶

Another example of the inadequacies of the court system concerns actions in which injunctions are sought. Often, an injunction will be sought to prevent an environmentally damaging activity from proceeding. While an interim injunction will be granted only in the clearest of cases, a decision to grant a permanent injunction will take into account the balance of convenience between the parties, as well as the question of whether damages will provide an adequate remedy to the injured party.

The judicial preference for damages as a remedy is especially problematic when one considers the increasingly acknowledged fact that environmental values are poorly reflected by traditional economic measures. Moreover, there is some evidence to suggest that the loss of environmental values is more important to people than other unrelated gains (such as monetary compensation).⁴⁷ Until the discipline of economics develops better measures to reflect these realities, the judicial tendency to favour monetary remedies over other remedies will continue to pose difficulties.

Furthermore, the courts have so far shown little inclination to fashion new solutions to developing environmental problems. One example of this is the ill-fated attempt to develop the "public trust" notion through Canadian jurisprudence in *Green v. Ontario*.⁴⁸ Although the judicial reasoning in that case has been called into question, the case nevertheless exemplifies some of the limitations of the judicial system. In some decisions, moreover, clear conclusions seem to have almost been deliberately avoided. A good illustration of this is *Interprovincial*

⁴⁵ I. Cartwright, "A Private Prosecution in Alberta, A Painful Process" (1990) 1 J.E.L.P. 110.

⁴⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *supra* note 2, s. 11(d). See also E.L. Hughes, "Prosecutions" in E.J. Swanson & E.L. Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990) 119 at 170-172.

⁴⁷ J.L. Knetsch, "Economics, Losses, Fairness and Resource-use Conflicts" in Ross & Saunders, eds., *supra* note 5.

⁴⁸ [1973] 2 O.R. 396 (H.C.).

Co-operatives v. Manitoba,⁴⁹ where the Supreme Court of Canada was called upon to rule on the question of constitutional authority over interprovincial waterways. As many critics have discussed, the resulting lack of jurisdictional clarity may help to explain the federal government's subsequent unwillingness to take a more activist role regarding the management of such waters.⁵⁰

There are innumerable other problems with the judicial system in dealing with these issues. Cost is a major impediment to the use of the courts by all but the wealthiest litigant. Even where lawyers are willing to take on important cases on a *pro bono* basis (as has been increasingly the case), the preparation of expert witnesses, production of documents, conduct of examinations for discovery, and related costs are likely to prove exceedingly burdensome to most potential parties. The time involved in preparing and litigating a case can be enormous, and given the remedies problem discussed above, even a successful lawsuit can turn out to be little more than a Pyrrhic victory. Furthermore, as the *Canadian Wildlife* and *Oldman* cases demonstrate, there are times when the successfully challenged project can be a *fait accompli* by the time the courts deal with the litigation, resulting in some understandable cynicism about the legal system. Many of these deficiencies have been acknowledged by Madame Justice Walsh of the Federal Court, Trial Division, in a recent decision concerning the Kemano Completion Project in British Columbia.⁵¹

Many decisions courts will be increasingly asked to make in the area of resources and environmental management will concern scientific and similar issues and will require the weighing of competing and often ill-defined values. There are serious questions about whether most judges have the background and skill to deal with these sorts of issues. It can be argued, of course, that this is what judges have always done and that their background as skilled "generalists" will stand them in good stead in these new areas, as it has in other matters of complicated litigation. To the extent that this is not the case, however, it is encouraging to note the increased emphasis on judicial education that is permeating the Canadian system. To date, most judicial education programmes have focused on such issues as gender and race neutrality, in an attempt to sensitize judges to the social and economic context of

⁴⁹ [1976] 1 S.C.R. 477.

⁵⁰ See, for example, Saunders, *supra* note 16.

⁵¹ *Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)*; *Save the Bulkley Society v. Canada (Minister of the Environment)* (1992), 6 C.E.L.R. (NS) 265 (F.C.T.D.).

their decisions, particularly in the family and criminal law areas. Some attention has been given to the need for judicial education in other areas, including the environment, although to my knowledge, concrete programmes in this area have not yet been developed. Nevertheless, the fact that the climate for such education is improving is, itself, cause for optimism.

It is also encouraging that the courts are beginning to experiment with other methods of dispute resolution, such as mini-trials. These kinds of procedures occur at an informal level and as a result of specific authority contained in the procedural rules of some jurisdictions. Such forms of dispute resolution are also receiving attention through the work of bodies such as law reform commissions. Again, some would argue that this is not an innovation but rather something that has been going on informally for a long time. Others state that such methods of dispute resolution are inappropriate because they co-opt some of the antagonists and produce decisions that are inadequate from an environmental point of view. Nevertheless, it can be asserted with some confidence that, in certain circumstances, such methods of resolving problems may be an improvement over using the mainstream judicial system.

Whatever the deficiencies of the courts, it is clear that they can play an important role in some cases. As the EARP litigation reveals,⁵² courts can help to force regulators to adhere to their own guidelines and to make their decisions more carefully and transparently. Litigation also helps to raise the profile of certain disputes, which can bring public attention to the fact that many disputes concern issues to which the public ought to contribute. Litigation will often tend to be the last resort for those who dislike a particular government decision, and, occasionally, the threat of litigation will bring parties to the bargaining table to work out a compromise.

An escalating use of litigation has, arguably, had a positive effect on the corporate sector. In order to utilize successfully the due diligence defence, corporations have taken various new steps including the issuance of environmental policies, the establishment of high-level environmental committees, enhanced training for their employees, and the employment of environmental audits. Innovative sentencing techniques (such as requiring corporate directors and officers to issue public apologies for egregious pollution incidents) have undoubtedly helped to alter attitudes. And, as recent empirical data have revealed,⁵³

⁵² *Supra* note 6.

⁵³ D. Saxe, "The Impact of Prosecution of Corporations and Their Officers and Directors Upon Regulatory Compliance by Corporations" (1990) 1 J.E.L.P. 91.

corporations that have received heavy fines for pollution, or whose officers and directors have been prosecuted, tend to spend more money on environmental protection. Thus, greater use of the courts can have indirect benefits.

As discussed below, as legislators begin to pass laws that elevate the status of environmental values and that are based on new notions such as the public trust, sustainable development, and similar themes, the courts will inevitably play a growing role in defining these emerging societal values and in applying them to concrete circumstances.

C. *Administrative*

In some jurisdictions, administrative bodies have, for decades, played an important role in decision making about resource management. For example, the National Energy Board (NEB) and provincial bodies such as public utilities boards, Ontario's Energy Board and Alberta's Energy Resources Conservation Board (ERCB) have long operated with mandates relating to energy exploitation, use, sale, and transportation. In the early 1970s, with the rise of environmental consciousness, such tribunals often lacked the expertise to take into account such broader matters as social and environmental impact. One outcome of this was the 1975 establishment of the Mackenzie Valley Pipeline hearings, headed by Thomas Berger, to consider a range of matters concerning the proposed gas pipeline that, it was felt, went beyond the purview of the NEB.⁵⁴

The influence of the process followed in the Berger hearings has been enormous. Among other things, there has been an elevated appreciation of the importance of public participation in decision making and a gradual acceptance of the use of EIA. In some cases, EIA has been conducted on an *ad hoc* basis, in others it has been handled by newly created bodies such as the Ontario Environmental Assessment Board. Simultaneously, the mandate of other tribunals has been extended to environmental matters. As the decision-making process has grown more complex, there has been some emphasis on the desirability of having "single window" processes to ensure that project proponents have one central point of contact with government.

After nearly two decades of experience with these matters, a number of points are beginning to emerge. First, some of the processes

⁵⁴ *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada, 1977) (Commissioner: T.R. Berger).

that have existed at a non-legislated or informal policy level are now being legislated. Examples include the federal EIA process, EIA in Alberta conducted outside the context of the ERCB, and the Mine Development Review Process in British Columbia.⁵⁵ As mentioned earlier, the move to legislate EIA at the federal level may be explained in part by the citizen-initiated lawsuits that have, in effect, legislated a process previously thought to have no legal effect. This increasing formalization at the federal level has been paralleled by the provinces. Provincial governments feel that possible federal intrusion into provincial authority over resource management can be kept at bay through the establishment of formal, legislated procedures at the provincial level.⁵⁶ Another reason for this reaction at both levels is pressure from the public for more transparent, less discretionary processes. Whether the move toward greater formalization will prove to be a good thing remains to be seen.

Second, our lengthy experience with EIA is beginning to suggest a need for new directions. In this context, it is interesting to note the experience of Ontario, where EIA has been conducted for several years by the quasi-judicial Environmental Assessment Board established pursuant to legislation.⁵⁷ While there seems to have been a relatively broad degree of satisfaction with the outcome, the changing focus of issues has caused the Ontario government to embark upon a major review of its EIA processes.⁵⁸ One observer of the Ontario system has recognized the need to move toward a new stage, characterized by a more comprehensive and integrated regime for environmental planning and decision making, covering both new and existing undertakings.⁵⁹ Among other things, this "third" generation of environmental assessment would accomplish the following:

1. Cover cumulative and global concerns as well as the more immediate implications of individual activities.
2. Maintain attention to large scale issues while empowering the public to participate effectively in decision making.
3. Ensure efficiency.
4. Recognize areas of ignorance and uncertainty.

⁵⁵ Dick, *supra* note 25.

⁵⁶ Ross, *supra* note 5 at 323-24.

⁵⁷ *Environmental Assessment Act*, R.S.O. 1990, c. E.18.

⁵⁸ *Toward Improving the Environmental Assessment Program in Ontario* (Toronto: Ministry of the Environment, 1990).

⁵⁹ *Ibid.*

5. Gather information on ecosystems and their vulnerabilities.
6. Clarify the implications of sustainability and determine what the acceptable standards ought to be.
7. Integrate planning, assessment, and regulatory requirements for all activities, including policies, plans, and programmes, as well as existing and new projects.

Third, as the processes for public involvement in administrative decision making have become more elaborate, common, and formalized, we have also had to address seriously some important implications. One is that, if the public is to participate in a meaningful way, there must be a scheme for funding that involvement, and the process itself must be designed to ensure that the necessary information is available to those who need it in an understandable form. These implications have been problematic for agencies and for project proponents, both from the point of view of cost and from the point of view of "managing" the process. As to costs, agencies in a number of jurisdictions (including the Alberta ERCB and the Ontario Environmental Assessment Board) have developed programmes for intervener funding that have gone some way toward facilitating public involvement. While the federal government's EIA bill does not itself provide for intervener funding, the literature accompanying the original Bill stated that this is an integral part of the proposed scheme.⁶⁰ Alberta's proposed *EPEA* has been criticized because it lacks these kinds of arrangements.

Another implication of public involvement is that decisions that were once made quickly often take much longer now. Concerns about efficiency and effectiveness have led to interest in such concepts as mediation and negotiation in the administrative context. Views vary about the appropriateness of this, and our experience is still quite limited. It is noteworthy, however, that references to mediation and other forms of dispute resolution are beginning to appear in some recent legislation. Many of these factors, together, suggest that in the future:

[t]he decision-making system will have to be more open, even to the extent that this results in the open disagreements and the messy, uneven planning procedures so disliked by many government and corporate people. Efficiency in the economic, technical and bureaucratic sense probably will not be well served by involving all major parties from the earliest stage in an interactive and evolving search for solutions.⁶¹

⁶⁰ *Special Committee*, *supra* note 32.

⁶¹ J.G. Nelson, "Canada's Wildlands: Three Traditions in Conflict from a Sustainable Development Perspective" in Ross & Saunders, eds., *supra* note 5, 48 at 64.

Increasingly, there has been an emphasis on the need to move away from the "command-penalty" approach in environmental and resource management and toward greater use of incentives, both financial and otherwise. The tax system is one mechanism for providing incentives, and is already doing so in at least a limited way through, for example, its encouragement of cogeneration projects.⁶² A more innovative approach in Canada is the federal government's establishment of the Environmental Choice Program. This involves the development of a federal government-owned ECOLOGO; the establishment of product-specific guidelines; and the licensing of private manufacturers, distributors, and retailers to use the logo on products that comply with the guidelines.⁶³ The program can be broadly seen as an attempt by the government to use the market to pursue public policy objectives. It raises, however, a series of novel legal questions, including whether notions of procedural fairness apply or ought to apply to incentive programmes.

IV. LEGISLATION

As discussed above, there is considerable doubt about the extent to which Canadian courts are likely to fashion new twists on common law doctrines in order to meet the resource and environmental management challenges of the twenty-first century. As a result, many of the necessary legal solutions will likely emerge from the legislative process.

Recent commentators have identified certain trends in our environmental legislation. It has been argued, for example, that we are seeing the emergence of a second generation of environmental laws.⁶⁴ The first generation, passed in the early 1970s, was primarily concerned with the control of waste and was characterized by the development of permit procedures and standards for waste management. The second generation of laws is more focused upon the control of persistent toxic

⁶² J.T. Brett, "Cogeneration: An Overview" (1992) 30 Alta. L. Rev. 255.

⁶³ D. Cohen, "Procedural Fairness and Incentive Programmes: Reflections on the Environmental Choice Program" (Paper presented at The Power of the Purse: Financial Incentive as Regulatory Instruments symposium held by the Law Reform Commission of Canada, The Faculty of Law, University of Calgary, and the Canadian Institute of Resources Law, 12-13 October 1990).

⁶⁴ A.R. Lucas, "The New Environmental Law" in R.L. Watts & D.M. Brown, eds., *Canada: The State of the Federation* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989) 167.

substances and recognizes a need for flexibility, given that new scientific information is constantly developing. These laws are also more likely to recognize, in some ways, the fact that environmental problems do not respect boundaries. Thus, for example, the *CEPA* has been drafted with at least some recognition of the international nature of these matters. Enforcement techniques are both more sophisticated and varied. Other legislative trends include increased responsibility for reclamation of disturbed sites; mandatory spill reporting; increased penalties and fines for offences; direct responsibility for environmental liabilities upon officers, directors, and employees; and expanded liability reaching out to embrace a range of parties, including former landowners, agents, receivers, and trustees.⁶⁵

Another view is that we are moving away from an era of "hard" natural resources rights toward one of "softer" public-oriented rights.⁶⁶ This would suggest that the traditional sanctity that has been accorded to private property rights may gradually give way to a broader public interest in a clean and healthy environment. One example of this may be found in the oil and gas context. Traditionally, regulatory agencies such as the ERCB have had as one mandate, the equitable sharing of ownership rights in common oil and gas pools, through such techniques as spacing and pooling. Technological advances have led to the utilization of "horizontal drilling," which enables the more efficient draining of a common pool with less surface disturbance due to the drilling of fewer wells.⁶⁷ While this technology is costly, it can be seen as an environmental improvement upon conventional vertical drilling. However, it also raises new equity problems between owners of a common pool because a single horizontal well can drain a much larger area than a vertical well can, and may also do so more quickly. This development may force both legislators and regulators to take a serious look at their traditional views about the protection of private property rights in light of the arguably beneficial public effects of this technology.

Against this backdrop, it is possible to point to a number of noteworthy trends in legislative developments. These include a movement toward the consolidation of environmental laws, a growing emphasis upon such concepts as "sustainable development" and the

⁶⁵ S.R. Miller & K.S. MacFarlane, "Environmental Risk Allocation in the Asset Rationalization Process" (1992) 30 *Alta. L. Rev.* 94.

⁶⁶ Lucas, *supra* note 31.

⁶⁷ R.A. Lehodey & R.E. Pelzer, "Horizontal Drilling—Regulatory and Contractual Implications" (1992) 30 *Alta. L. Rev.* 272.

“public trust,” and a change in the processes through which resource and environmental management laws are designed.

A. *The Consolidation of Laws*

Traditional resource and environmental statutes in Canada have been sectorally-based. Thus, most jurisdictions have separate statutes to authorize the granting of different kinds of resource development rights (such as forestry, mineral, oil and gas, *etc.*). Increased concern about the environment in the late 1960s and early 1970s resulted in separate statutes dealing with the protection of such resources as air and water. Increasingly, regulatory agencies have attempted to meld these streams of statutes together in an attempt to ensure that resource development occurs in as benign a fashion as possible. The use of EIAs has been one method of trying to accomplish this.

It is becoming increasingly obvious that the sectoral approach is no longer adequate. Aside from the fact that, in some jurisdictions, little attention has been paid to the environmental effects of certain types of resource development (such as forestry in Alberta), this legislative approach has proven deficient on a number of other grounds. It has fostered competition between different branches of government and made coordination and planning difficult, if not impossible. In some cases, it has resulted in conflicts between the holders of rights granted under different statutes. It makes no provision for the fact that the impact of human activity tends to be cumulative, and it fails to recognize that “everything is connected to everything else.” In addition, depending upon how the legislation is structured, it can place too much emphasis on development values and not enough on other values.

Recently, a number of statutes have been passed that attempt to pull together existing laws into a more cohesive framework.⁶⁸ So far, the consolidatory approach in Canada—unlike that in some other jurisdictions, such as New Zealand⁶⁹—has been restricted to environmental statutes and has not included a more cohesive approach to general resource use and planning. Along with a rationalization of existing environmental laws, these new statutes typically include other innovations. Three recent examples illustrate this trend.

⁶⁸ See, for example, *CEPA*, *supra* note 12; Alberta *EPEA*, *supra* note 34; and *Environment Act*, S.Y. 1991, c. 5.

⁶⁹ Right Hon. Sir G. Palmer, “Sustainability—New Zealand’s Resource Management Legislation” in Ross & Saunders, eds., *supra* note 5.

The first is the *CEPA*,⁷⁰ passed by the federal government in 1988. Although it pulled together a number of existing statutes concerning clean air and water, it did not result in a complete consolidation of federal environmental statutes. Some important federal laws with an environmental thrust, such as the *Fisheries Act*⁷¹ and the *Pest Control Products Act*,⁷² remain outside its parameters. It also introduced a new regulatory system for toxins, although implementation of this scheme has been extremely slow. The *CEPA*'s other noteworthy features include protection for whistle-blowers, a procedure for citizen-initiated complaints and inquiries, an access to information provision, and the right for a citizen to seek an injunction in certain cases. Like many of the other "modern" environmental statutes, it also contains new enforcement mechanisms, including a ministerial emergency order, civil rights of action, and quasi-criminal offences. Penalties are stiff and can be levied against corporate directors as well as against offenders themselves. The *CEPA* was accompanied by an Enforcement and Compliance Policy, which sets out the government's approach to enforcement.

A similar approach has been adopted by the Government of Alberta with its proposed *EPEA*.⁷³ This also consolidates some nine existing environmental statutes; provides for mandatory EIA in a number of situations not covered by previous EIA arrangements; increases fines and penalties, also making them applicable to corporate officers and directors; enables new, legislated, drinking water quality standards; and contains statutory requirements for waste reduction and recycling.

A third example is the *Environment Act (EA)*⁷⁴ introduced by the Yukon Government in late 1990. Divided into two main parts, the first states the environmental rights of Yukon citizens; provides a legal framework for partnerships with communities, First Nations, other governments, public interest groups, and businesses; and allows for incentives to help achieve the goals of the Act. It also outlines a formal legislative mandate for both the Yukon Conservation Strategy and the Yukon Council on the Economy and the Environment; requires regular "state of the environment" reporting and auditing of the government's work to protect the environment; entrenches in legislation the

⁷⁰ *Supra* note 12.

⁷¹ R.S.C. 1985, c. F-14.

⁷² R.S.C. 1985, c. P-10.

⁷³ *Supra* note 34.

⁷⁴ *Supra* note 68.

authorities and roles of the people who will administer the *Act*; and provides a strong mandate for public education. The second section deals with such matters as waste management, special waste, pesticides, and spills; examines the air, land, and water resources; and defines permits, dispute resolution measures, project review procedures, regulations, and enforcement procedures and penalties. The Yukon legislation is particularly interesting because it, perhaps, goes further than any other statute in Canada in trying to integrate evolving relations between mainstream society and Aboriginal groups into the basic legislative arrangements. In this respect, it may provide something of a model for other jurisdictions.

B. *Evolving Concepts of the Public Trust and Sustainable Development*

For more than a decade, environmental activists in Canada have advocated the need for an "environmental bill of rights."⁷⁵ With the exception of Québec,⁷⁶ this has been a concept that has found little favour with Canadian legislators until recently.

Some of the legislation referred to above, such as the *CEPA* and the Yukon *EA*, contain provisions that move partly toward the notion of an environmental bill of rights. In 1990, the government of Northwest Territories passed the *Environmental Rights Act*⁷⁷ which articulates, *inter alia*, the notion of a "public trust" in the environment; this was a significant development. The limited constitutional authority of the N.W.T. government considerably limits, in practice, the application of the act, a point specifically acknowledged by section 2(2). Nevertheless, as an indicator of what may lie ahead, it is noteworthy. Section 1 defines the "public trust" as "the collective interest of the people of the Territories in the quality of the environment and the protection of the environment for future generations" and, section 6 grants every resident of the Territories the right to launch an action in order to protect the environment and the public trust from contamination. This right of action arises even though the plaintiff may lack a greater or different right, harm, or interest than any other person, or pecuniary or

⁷⁵ J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Canadian Environmental Law Research Foundation, 1981).

⁷⁶ See *A Report on the Green Plan Consultations*, *supra* note 27 at 22; and M. Belanger, "L'utilité juridique d'une charte des droits à un environnement de qualité" in Ross & Saunders, eds., *supra* note 5, 389.

⁷⁷ S.N.W.T. 1990, c. 38.

proprietary interest. In addition, the Act provides for access to information, citizen-initiated investigations, private prosecutions, whistle-blower protection, and an annual report by the Minister on the operation of the Act.

While in opposition, the New Democratic Party (NDP) of Ontario had long advocated the need for an environmental bill of rights. After being elected in the fall of 1990, the NDP's Environment Minister launched a process, which should lead to the development of such legislation. As mentioned earlier, its shape is unknown because the process of developing the new legislation is still underway. If and when such legislation comes forward, however, it is likely to be extremely significant in national terms, given Ontario's major role in the country.

In addition to emerging legislative statements about the "public trust," Canadian law and policy is increasingly recognizing the notion of "sustainable development," that is, the use of resources by the present generation in such a way so as to not impair the choices of future generations. Most, if not all, governments in Canada (not to mention corporate and other sectors), have paid lip service at least to the sustainable development idea, popularized by the Brundtland Commission. In Canada, the notion of sustainable development appears to have found its first formal recognition in land claim agreements developed in the Yukon in 1989.

Since then, the idea has surfaced in various statutes including the federal *Department of Forestry Act*,⁷⁸ which defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."⁷⁹ This legislation obliges the Minister, in exercising his or her powers and performing his or her duties and functions, to have regard to the integrated management and sustainable development of Canada's forest resources. As already mentioned, the definition of "public trust" in the N.W.T. *Environmental Rights Act*⁸⁰ also contains a futuristic thrust. Moreover, the preamble to the federal government's Bill C-13, *An Act to Establish a Federal Environmental Assessment Process*, notes that one purpose of EIAs is to integrate environmental factors into planning and decision-making processes in a manner

⁷⁸ S.C. 1989, c. 27.

⁷⁹ *Ibid.* at s. 2.

⁸⁰ *Supra* note 77.

ensuring that present needs are met without compromising the ability to meet the needs of future generations.⁸¹

While the long-term legal implications of these statutory recognitions of "sustainable development" and the "public trust" are unpredictable, their mention in legislation will eventually give the courts a role to play in defining these concepts. Over time, these trends could prove extremely significant in elevating environmental values to a new height.

C. *The Process of Developing Environmental and Resource Management Law and Policy*

It is clear that there has been a significant shift in the way we approach the development of our laws and policy. Specifically, legislators and others have begun to realize that the public feels it has a large stake in the environment and expects to play a role in the shaping of new laws and policy.

A number of examples illustrate this new reality. The *CEPA* was passed following a lengthy period of public consultation and criticism, and was significantly altered as a result. The federal *Green Plan* was finalized after an expensive and complicated national consultation process. As mentioned earlier, the federal EIA Bill C-13, has been the subject of considerable public input through the Parliamentary committee hearing process. There are also similar examples at the provincial level. As noted previously, Ontario proposes to develop an Environmental Bill of Rights. A relatively small group of stakeholders (including environmental, municipal, governmental, and private sector interests) have met over a period of several months to explore and discuss the various themes that might be reflected in such legislation. It is anticipated that, following advice from this group, Cabinet will decide how it wishes to proceed with possible legislation. In Alberta, a five-stage process has been followed by the Alberta government in developing its new environmental legislation, particularly the *EPEA*.⁸² Among other things, this has included the creation of a broadly based review body to hold hearings around the province on the proposed bill and to report back to the Minister with a series of recommendations for improving the draft.

⁸¹ *Supra* note 33.

⁸² *Supra* note 34.

Such processes of public consultation would have been virtually unheard of even a decade ago. Today in the environmental arena, the absence of these processes seems to be becoming the exception rather than the rule. It can certainly be argued that the resulting legislation will not only be better understood by the various stakeholders, but it may even be more broadly accepted. Moreover, the process itself is clearly beneficial as it brings together groups and individuals with different viewpoints, and promotes an understanding of various perspectives. Hopefully, this will raise our overall knowledge about, and commitment to, resource and environmental planning and management.

V. CONCLUSIONS

Clearly, we are in a period of important change in Canada with respect to the management of our resources. The imperative for change has been articulated in an international context in a way that has captured public attention. This has occurred at the same time pressing environmental problems have emerged at the local or regional level, and has resulted in widespread public attention to issues which were largely ignored in the past. Public demands for action have influenced a shift in the approach of corporations, legislators, civil servants, administrators, and the judiciary.

We are witnessing an era of tremendous activity as our systems attempt to respond to new imperatives and to reflect changing values and attitudes. New institutions such as the Round Tables have been established and others, such as the CCEM, have been rejuvenated. Administrative agencies have expanded their approaches to resource management and have tried to integrate environmental considerations into their decision making. New laws are being developed, which attempt to give a higher priority to environmental concerns and may, eventually, raise environmental considerations to a higher level than even private property rights. Increasing attention is being paid to the international dimensions of resource and environmental management. The corporate sector is responding to this altered environment by establishing new committees, conducting environmental audits, and developing new policies.

At the same time, real change is occurring very slowly. We are still experiencing major problems coordinating law and policy due to our federal structure. The environment has emerged as a new arena where constitutional battles can be waged. The increased emphasis on public consultation and involvement seems, at times, to impede our ability to

act quickly. As the economic outlook worsens, hard choices will have to be made about the best way to spend scarce public funds, yet we lack appropriate mechanisms to make such choices. We still tend to approach resource use decisions on a sectoral basis and have failed, so far, to develop reliable ways of predicting the impact of one sectoral activity upon others. Our approach to monitoring is haphazard and our assessment procedures reflect poorly (if indeed at all) the reality of the cumulative impact. We have yet to understand how to predict the impact of policies or how to translate our experience of assessing the impact of projects into the policy arena. Major problems continue to impede the effective use of the courts by stakeholders. Legislative and regulatory lag persists.

As we struggle to understand and respond to these challenges, a number of tensions can be identified. First, the recent constitutional crisis is resulting in calls from some quarters to further decentralize governmental authority over natural resources and the environment. This seems to fly in the face of the recognized need for coordinated action at an international level, and the increasing emphasis upon the desirability of an ecosystem approach, rather than a political boundary approach. Second, the gravity of many of the problems that need to be solved suggest that quick action is essential. On the other hand, it is increasingly recognized that various stakeholders should be involved in the design of new solutions, and this requisite consultation can take considerable time. Third, decreasing public and private resources are leading to an emphasis upon the need for "efficiency" and "effectiveness" in our decision-making procedures. In contrast, a lack of reliable scientific information upon which to base decisions and the involvement of broad stakeholder groups inevitably mean slower and messier processes in deciding what course of action should be taken. Fourth, public demands for a clean and healthy environment are escalating at a time when available resources are shrinking. One positive result may be that members of the public will increasingly take the responsibility for action upon themselves and look less to cash-strapped governments to provide all the answers.

The popularization of the sustainable development concept in Canada has greatly raised our consciousness about the care that is needed in approaching the management of our natural resources. Unfortunately, however, we still have a long way to go before our laws and institutions will be capable of responding in a timely way to the environmental challenges of the twenty-first century.

