Environment Canada

Environnement Canada

The Legal Framework for Public Participation in Canadian Water Management

C. G. Morley

SOCIAL SCIENCE SERIES NO. 14
(Disponible en français)

INLAND WATERS DIRECTORATE, ONTARIO REGION, WATER PLANNING AND MANAGEMENT BRANCH, BURLINGTON, ONTARIO, 1975.

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PREFACE

This report was funded by the Social Sciences Division of the Inland Waters Directorate, Ontario Region, Environment Canada. The study was undertaken to provide information on the legal basis for public participation in water resources and environmental matters, and to stimulate discussion on this important matter.

The opinions expressed in this report are those held by Professor Morley and, in many instances, are not shared by the Inland Waters Directorate.

ABSTRACT

Public participation in resource management hinges on two critical factors. One is the legal basis for public participation, and the other is the existence of workable mechanisms for public involvement. This report focuses on the former by examining relevant federal and provincial legislation through which the legal basis of public participation might be ascertained. Also, the body of common law is examined for existing legal grounds for public participation.

This report offers evidence in support of the following findings:

(1) The Canadian legal system (comprised of federal and provincial statutes as well as common law) does not guarantee the citizen a right to participate in public and private decisions concerning resource development and management.

(2) In the Canadian legal system, the common law allows the citizen to be heard by the decision-making apparatus that affects him and allows him to make claims for compensation.

(3) In allowing this, the legal system is reactive, since the plaintiff must prove damage. Legal redress can only occur after the fact. As a result, this limited recourse has not proved to be an effective tool for participation.

(4) Where the public is marginally involved (i.e., given the opportunity to present their views to a board or some other authoritative body), this is done in the form of public hearings. Public hearings are structured, one-way forms of communication and do not constitute an adequate forum to assert environmental rights.

(5) In the body of federal and provincial legislation examined, the convening of a public hearing is a discretionary power given to the minister or official, not a requirement.

(6) The exercise of this discretion could intensify political controversy surrounding any one issue because of a lack of formal channels to express legitimate discontent.

(7) The public has very little access to the formation of environmental policy through the conduct of public hearings as structured under the present federal and provincial legislation.

Based on these findings and a fuller discussion of them, the central recommendation of the report is:

> Effective participation in decision-making must be established by legislation that makes such participation a legal right - not a privilege granted merely as a matter of discretion or policy. Such legislation might be modelled on the U.S. National Environmental Policy Act of 1969 and the Michigan Environmental Protection Act of 1970. In any case, such legislation should embody the following principles:
>
> (1) Public policy hearings should be required as part of the process of developing environmental policies.
>
> (2) Public policy discussion should be developed subsequent to public hearings and should be given wide publicity.
>
> (3) Policy guidelines and programs should be the subject of public debate in hearings conducted in the location affected.
>
> (4) Public hearings should be carried out on specific projects involving people who are directly affected by those projects.
>
> (5) Final reports and decisions concerning projects must be reported publicly, outlining not only the substance of the position taken but also the reasons for taking that position. This would allow the public to know what factors were involved in the final decision or position taken.
>
> (6) Specific avenues of appeal must be ensured for the citizen in the decision-making process concerning resource development and management.

RÉSUMÉ

En gestion des ressources, la participation du public s'articule autour de deux éléments critiques: les fondements juridiques de la participation d'une part et l'existence de mécanismes pour l'engagement d'autre part. Axé sur le premier point, le présent rapport examine les lois fédérales et provinciales qui permettent peut-être d'établir les assises juridiques de la participation du public. On y étudie aussi les recueils de droit civil pour déceler les bases juridiques de cette participation.

Ce rapport présente des faits qui conduisent aux conclusions suivantes:

1) L'appareil juridique du Canada (les statuts fédéraux et provinciaux tout comme le droit commun) ne garantit pas au citoyen le droit de participer à la prise de décisions de caractère public ou privé pour l'exploitation et la gestion des ressources.

2) Selon l'appareil juridique du Canada, le droit commun autorise le citoyen à obtenir une audience devant l'organisme preneur de décisions qui le touche, et lui permet de demander une indemnité.

3) L'appareil juridique procède ainsi de la réaction, car le plaignant doit justifier du préjudice. La réparation juridique ne peut que suivre le fait. Il en résulte que ce recours de portée limitée ne constitue pas un bon outil de participation.

4) Là où le public intervient à titre marginal (on lui permet de présenter ses points de vue à un conseil ou à un autre corps détenteur de l'autorité), la participation s'opere sous forme d'audiences publiques. Celles-ci, formes de communication structurées à sens unique, se prêtent mal à la revendication de droits dans le domaine de l'environnement.

5) A l'examen du recueil des lois fédérales et provinciales, il ressort que la tenue d'une audience est laissée à la discrétion du ministre ou des autorités et qu'elle ne constitue pas une obligation.

6) Faute de voies officielles qui permettent d'exprimer un mécontentement légitime, l'exercice de ce pouvoir discrétionnaire risque d'intensifier sur le plan politique la controverse qui entoure tel ou tel problème.

7) Tenues selon les lois fédérales et provinciales d'aujourd'hui, les audiences publiques écartent dans une large mesure le public de l'élaboration d'une politique de l'environnement.

Le rapport renferme la recommandation suivante, qui repose sur les conclusions précédentes et sur leur plus ample discussion:

> Pour obtenir une participation efficace à la prise des décisions, il faut élaborer des lois qui fassent de cette participation un droit légitime, et non un privilège accordé par la simple vertu d'une politique ou d'un pouvoir discrétionnaire. A cette fin, on pourrait s'inspirer du U.S. National Environmental Policy Act of 1969 et du Michigan Environmental Protection Act of 1970. De toute façon, ces lois devraient concrétiser les principes suivants:
>
> 1) Exiger la tenue d'audiences publiques pour l'élaboration des décisions en matière d'environnement.
>
> 2) Organiser, à la suite des audiences publiques, des débats publics faisant l'objet d'une vaste publicité.
>
> 3) Débattre en public les programmes et lignes de conduite lors d'audiences tenues dans la localité intéressée.
>
> 4) Tenir des audiences publiques à propos de projets précis touchant directement les intéressés.
>
> 5) Pour les projets, informer le public des décisions et des rapports définitifs, non seulement en présentant la prise de position dans sa substance, mais aussi en la justifiant. Le public connaîtrait ainsi les facteurs qui ont concouru à la décision définitive ou à la position prise.
>
> 6) Garantir au citoyen des moyens définis d'interjeter appel dans l'élaboration des décisions touchant l'exploitation et la gestion des ressources.

THE LEGAL FRAMEWORK FOR PUBLIC PARTICIPATION

IN

CANADIAN WATER MANAGEMENT

INTRODUCTION

The Canadian legal system is a composite of many things. There are the historical roots of our law and its introduction into Canada. There are the continuity and evolution of both substantive and procedural civil and common law doctrines. There are the constitutionally created and democratically elected assemblies, having inherent in them, the power and authority to affirm, amend, and abrogate our common and civil law rules and traditions, and to articulate new policies, enact new laws, or develop and implement new programs in the perceived best interests of the body politic. There are our administrative and enforcement agencies to which the administration and enforcement of our civil, common, and statutory laws have been delegated. There are our judicial institutions, having the ultimate responsibility to decide whether or not persons before them have acted in a manner inconsistent with the proscriptions or, less commonly, the requirements which have been formally incorporated into, and collectively accepted as, our rules or principles of law. In short, and in a very real sense, the Canadian legal system incorporates, reflects, affirms, and sustains the dominant community aspirations, values, attitudes, and priorities of our economic, social, political, and educational systems, at least insofar as our electoral, political, administrative, and judicial decision-makers perceive what these are or, less frequently, what these ought to be.

In any situation in which more than one individual is involved, the possibility exists of a range of interests. Wherever there is a range of interests, there exists the concurrent possibility of conflict between those interests. A democratically structured political system is one that gives to the legitimate interests of the community a priority over the interests of individuals within that community, assuming that such a priority is necessary. When it is necessary, the ordering of the preferred interests and the response to them will take place within the parameters of the Canadian legal system.

In one sense, Canadian society proceeds from the assumption that, at least within the formalized law, all persons are free to act in whatever manner they choose and to satisfy their personal and individually preferred interest. This basic assumption favouring an unfettered freedom of activity has been qualified. Society has withdrawn some freedoms and restricted others to the degree thought necessary to assure that public and private goals are achieved in an atmosphere of community stability and continuity. But, it has imposed these minimum legal constraints with notable consequences. Within the Canadian legal system, all persons are legally free to act unless there is a law that either proscribes or prescribes specific and definable conduct. This freedom to act can be referred to as a 'right' to act, but subject always to a correlative 'duty'. This duty, which qualifies the right to act, is a duty to refrain from acting in such a manner that one unreasonably interferes with another person's freedom or right of action or unlawfully violates a community standard that has been established by law for the continued stability and well-being of the state.

While it is most common for the law to qualify a person's freedom of action or inaction by prohibiting a certain kind of activity, the law occasionally requires that a person or category of persons do a particular thing which, in the absence of the legal requirement, they would be free to do or not do as they please. Having a positive duty to do something, as opposed to a positive duty to refrain from doing something, existed as common law in special relationship situations, but is more frequently found in statute law. For example, at common law, an administrative agency which is making decisions of a judicial or quasi-judicial character, is required to make such decisions in a manner consistent with the dictates of natural justice. In effect, this means that such decisions can be made only by unbiased persons after all legally recognized and affected interests have been put before the decision-makers. Nevertheless, it continues to be true that, in most instances, community norms, as determined by law, are determined only in part by these specific rules which proscribe or prescribe action. If an activity is neither proscribed nor required, then (and because of the underlying bias within our political, economic, and legal systems that favours freedom of action) all other action or inaction is legal. That is, an act or proposed action is lawful with reference to the system as a whole if there is no law that proscribes it. The failure to act at all or in any particular way is likewise lawful if there is no specific rule of law that requires it.

These characteristics of the Canadian legal system are as important to remember in discussing public participation in decision-making, or the lack thereof, as they are when considering any other activity. If public participation is a community aspiration, then the degree to which, and the procedures whereby that aspiration is being or is capable of being responded to, will be found in three areas of our legal system. First, one must look to the rules of law which are overt in their dictates about how, if at all, the public can or is to be involved in the making of any particular decisions or kinds of decisions. Certain rules of our common law, while not specifically directed towards the participation concept, provide one avenue for participation. Insofar as these rules of law assure an opportunity for individual or collective citizen action to protect or seek the court's protection of a legally recognized interest, they have a general relevance to the frequently heard demands for increased public participation in decision-making. One part of this paper will look to the common law rules and assess their relevance to, their potential for, and their substantive importance in, the reality of today's participation demands.

A second and related area of our legal system which must be considered, if the legal basis for public participation is to be better appreciated, is that of statutory enactments, primarily at the federal and provincial levels. Another part of this paper will review a representative cross-section of the principal federal and provincial environmental management/pollution control legislation to determine the degree to which it envisages and provides for public involvement in the administration of the legislation.

Finally, since our Canadian legal 'system' is a composite of, 'inter alia', common law or statutory rules which prohibit or require the doing of a particular act and the absence of rules which tolerate and make lawful the doing or not doing of certain acts, then public participation in decision-making may lawfully occur as a matter of policy or practice without it being a requirement of any specific law. In the absence of any specific law or legal principle compelling decision-makers at any or all levels of decision-making to involve the public or some segment of it in the process of decision-making, such involvement may or may not occur as a matter of discretion. For example, in the case of a government agency, if the law neither prohibits nor requires that an agency open up any part or all of its decision-making process to the public, it may nevertheless choose to do so. If it does so, the form

or structure of the participation will, for the most part, be equally at the discretion of the agency. But, it must be emphasized and remembered that there are two sides to the exercise of discretion; one is favourable to and would facilitate or encourage public participation; the other is indifferent to and could be exercised so as to exclude the public entirely or to include them in meaningless ways.

One of the realities of the Canadian legal system which must be remembered in any consideration of public participation in decision-making is that the law and the legal system within which the law operates differentiate between the 'desire' of a person to be involved in making a decision and the 'right' of that person to insist upon that involvement. Generally speaking, a citizen with property interests which are or which might be affected by a decision and, to a lesser extent, a citizen whose health or well-being is, or is likely to be, affected by a decision, has a legally recognized right, and can insist upon that right being respected and protected by the person or persons making the decision affecting it. This legally recognized and protected right, however, does not guarantee that the person who is asserting a right will be able to participate in the making of a decision affecting it for any other purpose than being guaranteed some compensation which is 'just', with regard to the kind and degree of effect upon the protectable interests. If, for example, the owner or occupier of property is successful in establishing that another person's activities have decreased the value of his property or otherwise interfered with the enjoyment of it, then the aggrieved party may be compensated for the damage which has been suffered. In some instances, the aggrieved party may even insist that the objectionable activity be stopped absolutely. But, this right is not without its limitations. Those who can assert it must fall within a legally defined category of persons and, in any case, the right tends to be one which is asserted in reaction to a decision, or a series of decisions, which have already been made. This legal principle does not have, as one of its characteristics, the requirements that a person or persons making decisions or carrying on activities which will or which are likely to affect an individual's rights identify and seek out the affected parties before making their decisions or initiating the objectionable activity. In short, this right is not so much the right to be involved in the making of a decision which affects a person or his property, but a right that can be asserted in reaction to an objectionable activity and only after some damage has already been suffered.

Normally, the laws discussed here cannot be mobilized to resolve conflicts and to restore the acceptable balance of interests until someone has violated one of the established. This is entirely consistent with the already-identified characteristics of our political, economic, social, and legal systems, which aspire to maximize the freedom of activity of corporations and individuals and, consequently, impose minimum constraints on them. It is equally consistent with another dominant characteristic of our legal system, that which presumes individual responsibility for action and for the consequences of action. With the freedom to act being favoured and with the law assuming that an individual not only knows the law, but will act responsibly and govern his actions according to the dictates of the law, then it is to be expected that the legal system, as presently designed, is more reactive than anticipatory and, for the most part, does not, as a matter of specific rules of law, anticipate the public's involvement in the process of decision-making. It may allow those members of the public with legally recognized and affected interests to take steps, once the consequences of decisions become apparent, to protect or be compensated for the damage of their interests as a matter of specific law.

For example, Manitoba Hydro, a crown corporation, with the cooperation of the federal government, has started to construct, in northern Manitoba, a $3 billion hydro-electric scheme. No one seriously denies that the planning for that major undertaking was done by government and crown corporation officials whose primary concern was generation of inexpensive hydro-electric power. The planning was done without any prior studies of the social, economic, resource, or ecological impacts that that particular project or series of projects is likely to have. Furthermore, the planning for the entire scheme was done with minimum or no consultation with the public. It is fairly obvious now that there will be a substantial amount of damage which will inevitably flow from the project that was not accounted for when the original cost-benefit analysis was done. In spite of the inevitable environmental damages and resource losses, there is no doubt that those who made the decision were acting lawfully. There was, and is, no law which requires those persons who made the relevant decision to identify and evaluate those things which will be lost, and then consult with the public on the desirability of making a particular decision. While many persons, both within and outside of Manitoba, clearly have an interest in how these and other resources are utilized, this interest has not been translated into a legal right, which would require that they be informed and consulted with prior to the making of any

final decisions concerning resource utilization. Even those persons, such as the Indians and Metis living in the community of South Indian Lake, who have interests which are tangible and who will most obviously be affected, had no legal right to be involved in the process that led to the decisions which were made. As a consequence, they have been forced to initiate a legal action in the Manitoba courts, and must now convince that court, not that the scheme is unwise or unsound but that they have legally recognizable personal or property interests which are being, or will inevitably be, adversely affected by this scheme. Therefore, the Metis and Indians feel that they should receive compensation for the damages which they can prove have resulted, or will result, as a consequence of the project.

In some instances, the 'right' damaged is a public right vested in a community at large. In these cases, if any confrontation occurs, on the one side, the state and its enforcement agencies allege the violation of public rights, with the alleged violator on the other side. However (and again using the example of the northern Manitoba hydro-electric scheme), the state itself is both the protector and the violator of the rights, and those persons who object to the activities which are violating the public rights are, for the most part, incapable under our present legal system of doing other than trying to mount such public opposition to this combination of government action and inaction that the government feels it politically wise to reconsider, and perhaps rewrite, its policies. Nevertheless, given a situation where the rights affected are public and the violator is other than the state and its enforcement agencies, then the resulting conflict is categorized as coming within public, as opposed to private or civil law. In both instances, however, if the courts are called upon to adjudicate the dispute, the rules and procedures of our legal system provide that the person who alleges that a law has been broken prove all of those facts which make the act unlawful. In those disputes between the individual and the state, it is normally (but not always) the state which alleges the committing of an offence. In such cases, our legal system requires that the state prove 'beyond a reasonable doubt' that the accused or the person charged has, in fact and in law, done what he ought not to have done, or failed to do what he was legally required to do. In the case of conflict between individuals, it is the plaintiff who is required to prove 'on the balance of probabilities' that the defendant has acted unlawfully or failed to act in a manner consistent with the legally-recognized rights of the individual plaintiff. But, in both

instances, the law normally intercedes after the conflict situation and after the damage has been done.

Now that we have considered some of the dominant characteristics of our legal system, it is important, if the system and the public participation within the system are to be better understood, that we take a brief look at those common law rules of law which are relevant to the general issue of public participation in environmental management/pollution control decision-making.

COMMON LAW RULES

The Doctrine of Riparian Rights

The concepts of 'property' and 'ownership' are fundamental to our legal system, and the common law has traditionally protected the interest of persons owning or lawfully occupying land adjacent to water courses. Such persons are known as riparian proprietors, and the rights which persons within this category can assert before a court of law are well settled.

> "A riparian proprietor is entitled to have the water of the stream on the banks of which his property lies flow down as it has been customed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian is thus entitled to the water of his stream, in its natural flow, without sensible alteration in its character or quality. Any invasion upon this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court." [1]

This classic statement of the doctrine of riparian law clearly establishes that doctrine's relevance to some of our contemporary problems of environmental quality. Insofar as the law prohibits an unreasonable interference with the natural flow of waters, a legal basis exists whereby persons within the category of riparian proprietors can, at common law, take legal action against persons who, without lawful authority, dam, store, impound, or divert waters which, under normal circumstances, would flow past the property of the riparian. Legal action may also be taken against persons, corporate or otherwise, who discharge effluents into a water course and, thereby, impair the quality of the water flowing to any riparian. With few exceptions, but with some qualifications, the doctrine of riparian rights continues in force in most Canadian jurisdictions and provides one of the legal tools available to deal with some of our environmental quality problems. [2] It should be noted that the quantitative and qualitative standards required by this common law rule are exceptionally high. Although this rule does tolerate reasonable use of waters for both extractive and waste assimilative purposes, it

nevertheless remains that the common law exacts a standard with which it is difficult to comply in our modern, industrial, and increasingly complex world.

The standard demanded has been, and continues to be, beyond the reach of most water users. Attempts which have been made to assert this doctrine in the face of a rapidly changing technological society have encouraged governments to qualify, if not eliminate, this private right, to expand the public right to water, and delegate to specially created administrative and enforcement agencies, the responsibility and authority to regulate both their quantitative and qualitative uses. The former Ontario Water Resources Commission was such an agency, and its existence could be traced to the inability of contemporary industrial processes and municipal practices to meet the very high standards demanded by the common law.

In Espanola, Ontario, prior to 1930, the Abitibi Pulp and Paper Co. operated a sulphite mill on the banks of the Spanish River. After the mill closed down, and with the assistance of floodwaters which washed out the river beds, fish returned in large quantities. The area attracted increasing numbers of sports fishermen, and tourist resorts were established. There was no reason to expect that the recreational area along the Spanish River would do other than continue to develop.

In May or June of 1946, the K.V.P. Co. Ltd. re-opened the mill for the purpose of manufacturing kraft paper by the sulphate process. In an average production day, approximately five tons of chemically impregnated fibre was discharged into the river. Soon the water of the river began to give off foul odours. It became unfit for human consumption, both in its raw state and after being boiled. Farm animals refused to drink it, and even milk cows refused to consume it in quantities sufficient to maintain normal milk supplies. People could no longer swim in the river nor bathe in its waters. Fish disappeared; they were either driven out, killed, or prevented from spawning. Formerly-abundant quantities of wild rice, which provided a feeding ground for wild ducks, were destroyed and the ducks disappeared.

Six persons owned property adjacent to the Spanish River and downstream from the K.V.P. Co. Ltd. mill site. They sued the company for damages and an injunction alleging that they, as riparian owners, were entitled to have the Spanish River flow past their property in its natural state. In the Ontario High Court, McRuer C.J.H.C., found in favour

of the plaintiffs, compensated them for damages suffered, and granted an injunction,

> "... restraining the defendant from depositing foreign substances or matter in the Spanish River which alter the character or quality of the water ..." [3]

There was evidence before the courts that the company was important, if not essential, to the economic well-being of the community. But McRuer C.J.H.C. (Chief Justice, High Court) applied the law, and the law provided that, where a plaintiff satisfies the court that he has a right, the defendant has unlawfully interfered with his right, and damages or injury occurred as a consequence of the defendant's interference, then the plaintiff is

> "... entitled as a matter of course to an injunction to prevent the recurrence of that violation ..."

unless there are some special circumstances. Whatever these special circumstances are in Canada, they quite clearly do not include a community's dependence upon an industry, nor the ability of the defendant company to meet the water quality standards required at common law. To hold otherwise, says the law,

> "... would in effect be giving to it [the defendant] a veritable power of expropriation of the common law rights of the riparian owners, without compensation."

However, application of the injunction in this case was suspended for six months to give the defendant time to find an alternative means of disposing of its effluent. Before the six months were out, the defendant has appealed to the Ontario Court of Appeal, which affirmed the decision of the High Court. [4] An appeal was then taken to the Supreme Court of Canada and again the decision was affirmed. [5]

Quite clearly, the company's primary concern was not that damages were awarded, but that an injunction had been granted. This particular judicial remedy threatened the continued industrial operations of the defendant. Apparently, the Ontario legislature was equally concerned. While the appeal to the Supreme Court of Canada was pending, the legislature passed an amendment to the Lakes and Rivers Improvement Act requiring the courts to weigh the economic

and public interest factors when deciding whether or not to grant an injunction. [6] This legislative effort failed to influence the Supreme Court. Finally, the legislature took an extraordinary initiative. It passed a special act dissolving every injunction "heretofore granted" against the K.V.P. Co. Ltd. restraining it from "polluting the waters of the Spanish River". [7]

If we could afford to be concerned with only the restoration and maintenance of water quality, then this common law right and its related remedies would be excellent, but it is obvious that water use problems are too complex to allow for simple solutions. In circumstances such as the one just described, the common law seems incapable of resolving the conflict between competing private rights and the more encompassing public interest. Of course, it is equally arguable that the response taken by the Ontario legislature was not so much an effort in balancing competing interests as it was an exercise in giving priority to one interest or a group interests over others. Obviously, the Ontario initiative was a reaction to an immediate problem. Had greater effort been expended in analyzing, and then designing, alternative approaches to the problem, no doubt a less simplistic response would have been forthcoming.

Two other Ontario cases are equally deserving of attention, in that they further exemplify the application of common law rules and remedies to contemporary water quality problems and the incapacity of these rules and remedies to satisfactorily resolve the conflict inherent in these problems.

In Burgess v. City of Woodstock [8], the plaintiff was an owner of property straddling the Thames River and downstream from the municipality of Woodstock. Adjacent to the plaintiff's property, the river was "... slimy and stinking, with solid matter flowing downstream, and beds or mats of sludge at the bends of the river". The source of this contamination was the sewage disposal plant of the defendant municipality, which inefficiently and inadequately treated its sewage. The consequences of this contamination included the sickening of the plaintiff's cattle, a loss of milk production, aborted calves and damage to both pasture and sod. The story of the defendant municipality was then, and is still today, fairly typical. The plant, which had been constructed some 30 years before the commencement of the action, was intended to provide primary treatment for the sewage from a community of 9,000 people and was, at the time of the action, trying to service a population of some

16,000. It was not that the defendant municipality was merely indifferent. The problem was a combination of indifference and a limit on the funds available to enlarge and modernize the plant.

The court found in favour of the plaintiff and awarded damages for the loss suffered and proved. An injunction was granted restraining the defendant from discharging effluent from the sewage disposal plant into the Thames River. The operation of the injunction was stayed for a period of 18 months to give the defendant municipality time to meet the requirements of the law.

About the same time, Mrs. Stephens was suing the Municipality of the Village of Richmond Hill. The plaintiff, Mrs. Stephens, was the owner and occupier of lands adjacent to the Don River near Toronto. There was testimony to the effect that, prior to the installation of the sewage disposal plant,

> "the stream was ever flowing and sparkling; ... it abounded in fish and watercress; ... it was used by children for swimming; ... it was used for drinking and watering stock; ... its bottom was of gravel and the stream was always clear." [9]

After its construction,

> "the stream ... increased its flow and [was] dirty, the banks [were] overgrown with weeds hitherto unknown, ... dark matter in suspension [was] found in the water at all times, whereas previously only the spring freshet muddied its otherwise sparkling waters ... the water and the surrounding area [smelled] of sewage, ... toilet paper and condoms [were] present, as opposed to their former occurrence; ... the algae in the water [was] grey or yellow instead of their former green state; ... the rocks [were] slimy whereas before they were bright and sparkling; and ... little, if any watercress [appeared]." [10]

Again, there was testimony that the sewage treatment plant was inadequate to meet the demands being made upon it by the municipality it was to serve. Nevertheless, the court was satisfied that the plaintiff's riparian rights had been interfered with and that she was entitled to a remedy. Counsel for the municipality argued in defense that "... 95% of all municipalities which have

similar sewage disposal systems may be put to great expense in improving or changing them." Some members of the Richmond Hill municipal council argued that the "welfare of the people" was more important than the rights of the individual plaintiff. In response to these arguments, Mr. Justice Stewart stated:

> "... I conceive that it is not for the judiciary to permit the doctrine of utilitarianism to be used as a make-weight in the scales of justice. In civil matters, the function of the Court is to determine the rights between the parties. It investigates facts by hearing 'evidence' (as tested by long-settled rules) and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal."
>
> "It is the duty of the state (and of statesmen) to seek the greatest good for the greatest number. To this end, all civilized nations have entrusted much individual independence to their Governments. But, be it ever remembered that no one is above the law. Neither those who govern our affairs, their appointed advisers, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual save within the law. It is for Government to protect the general public by wise and benevolent enactment. It is for me, or so I think, to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement." [11]

The judge thereupon awarded damages to the plaintiff and issued an injunction restraining the defendant municipality from discharging its sewage into the Don River. Once again, the application of the injunction was stayed for a period of time to enable the defendant municipality to find an alternative means of disposing of these municipal wastes. An appeal was taken to the Ontario Court of Appeal, where the Court dismissed the plaintiff's claim for damages, but affirmed the plaintiff's rights to an injunction. [12]

The problem facing these two municipalities was similar to the problem confronting the K.V.P. Company: how to dispose of the wastes generated in the conduct of their daily business. Once again, the Ontario legislature

intervened. In an amendment to the Public Health Act [13], the injunctions restraining the cities of Woodstock and Richmond Hill were dissolved and an attempt was made to place this kind of problem beyond the reaches of the courts and the common law. In the same year, the Ontario Water Resources Commission Act [14] was passed. Initially, it vested in the Commission the responsibility to construct and operate water and sewage disposal systems. Subsequent amendments constituted the Commission as the Ontario agency with responsibility and authority to manage Ontario water resources.

Private Nuisance

A person is committing a private nuisance if he so uses his own property that he causes material injury to the property of another or substantially interferes with another person's use and enjoyment of his property. Activities which cause noxious odours, noise, air or water pollution are activities which are normally capable of being controlled by the common law principle of private nuisance.

In the case of Russell Transport Ltd. et al. v. Ontario Malleable Iron Co. Ltd. [15], the plaintiff brought an action in nuisance for damages and an injunction to restrain the defendant foundry from discharging noxious and corrosive substances into the air. The plaintiff company was a transporter of new vehicles and owned property upon which it stored vehicles that could not be immediately delivered to customers. The defendant company carried on a foundry operation on property nearby. The plaintiff noticed that many of the vehicles on his property suffered damage to their paint and metal surfaces. Evidence was gathered which established that the damage was caused by the interaction of these surfaces and the sulphuric acid, metallic iron, metallic sulphides and other waste by-products characteristic of foundry operations. The court was satisfied that the source of these wastes was, in fact, the defendant's foundry and that the defendant was responsible for the damage suffered by the plaintiff. The court decided that awarding damages only would not be adequate compensation and granted an injunction as well. It was clear to the court that, in the absence of an injunction, the defendant could continue to conduct his operations in a manner inconsistent with the legal rights and proprietary interests of the plaintiff.

Private nuisance actions are not restricted to those instances where property damage only can be

established. In the case of A. J. Brown v. Canada Paper Company [16], the defendant pulp and paper company allowed noxious fumes to be emitted into the air to the detriment of the plaintiff's use and enjoyment of his nearby property. The plaintiff brought an action arguing that the defendant's use of his property was interfering with the plaintiff's enjoyment of his own, and that this constituted a private nuisance. The court found on the evidence that the defendant's operations were the source of noxious fumes, that the plaintiff suffered personal inconvenience and decreased enjoyment of his land. Here, as in other cases, arguments were put forward by counsel for the defendant that the operations of the defendant company were essential to the continued prosperity of the town. Once again, the court replied that such economic arguments were not relevant to a judicial determination of the party's legal rights, although they could be considered in choosing the remedy once a right and an interference with a right was found. The present bias of the law is very forcefully stated by Mr. Justice Idington.

> "The invasion of rights incidental to the ownership of property, or the confiscation thereof, may suit the grasping tendencies of some and incidentally the needs or desires of the majority and any community benefiting thereby; yet such basis or principle of action should be stoutly resisted by our courts, in answer to any such like demands or assertions of social right unless and until due compensation is made by due process of law." [17]

In the end, the plaintiff was successful in establishing that he had a right, that the right was being unlawfully interfered with, and that the defendant was responsible for both the interference and the consequent damage. Damages were awarded, and on balance, the court decided that damages alone would not adequately compensate the plaintiff for the injuries suffered and granted an injunction ordering the defendant company to refrain from further discharging noxious fumes.

A final case which is illustrative of the common law principle of private nuisance is Newman et al. v. Conair Aviation Ltd. et al. [18] The two plaintiffs, a mother and daughter, lived on a small acreage where they grew their own vegetables and flowers and kept horses. One of the defendants was a commercial farmer who hired the second defendant to spray by plane his crop of peas with the potentially dangerous insecticide Cygon 4 E. The plaintiffs

did not know, nor did the law require that the defendant so inform them, of the defendant's planned activities. They discovered what the defendants were doing when, in the course of spraying, some of the insecticide drifted onto the plaintiffs' property, causing the plaintiffs to suffer both fear and nausea. The British Columbia Supreme Court was satisfied that the plaintiffs had legally recognized rights which were unjustifiably interfered with and damaged by the defendants' actions. The two defendants were found equally liable to pay compensation for the damages done.

Negligence

> "Negligence is conduct falling below the standard established for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do in the circumstances." [19]

A person who believes that he has suffered damages to his person or property as a consequence of someone's negligent action, or more rarely, someone's negligent failure to act, may take the alleged offender to court in order to be compensated for the damage done. For example, in Her Majesty the Queen v. Forest Protection Limited [20], the defendant company conducted a D.D.T. spraying operation in northern New Brunswick over an area of approximately 4,000 square miles. The object was to control the infestation of spruce budworms which were destroying substantial timberlands. In the course of this operation, the defendants contaminated the headwaters of a stream which eventually flowed into a hatchery owned by the plaintiff. In addition, a rainfall subsequent to the spraying washed the D.D.T. from the trees and underbrush into the same stream. In both cases, the D.D.T. ended up in the fish hatcheries, and as a consequence, large numbers of the plaintiff's small trout and salmon were poisoned and died. The court considered that the defendant company was negligent in spraying, in that it knew or ought to have known that it was putting the plaintiff's property to risk and possible damage. Since damage to the plaintiff and his property was reasonably foreseeable, the defendant was negligent and liable to pay an amount of money equal to the provable economic loss which the plaintiff had suffered.

In the case of Campbell v. Kingsville [21], the defendant town of Kingsville suffered a typhoid epidemic in

the spring of 1927. Fifty persons contracted the disease, ten of them fatally, and the plaintiff's wife was one of those who died. During the course of the trial, it became apparent that the town of Kingsville had been told by their own and the province of Ontario's public health officials that the community drinking water supplied should be treated. The costs involved were minimal, yet the community procrastinated for several years. As a consequence of their inaction in the face of a positive duty to act, Mrs. Campbell, after drinking from the municipal water system, contracted typhoid fever and died. Mr. Campbell, the plaintiff, succeeded in satisfying the Ontario Supreme Court that, in the circumstances, the defendant had a duty to both the deceased, Mrs. Campbell, and the plaintiff, Mr. Campbell, to install the treatment facilities, and that the failure to install them was a negligent inaction, rendering the defendant liable for the damages suffered as a consequence of that negligent failure to act. The court awarded Mr. Campbell $2,000 for the loss of his wife.

The Doctrine of Rylands v. Fletcher

The common law doctrine known as the doctrine of Rylands v. Fletcher [22] has a relevance to contemporary problems of environmental quality that is more potential than real. The doctrine is easily stated, but its significance for environmental problems is not yet fully understood. Quite simply, the law says that:

> "the occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape and is liable for all of the direct consequences of its escape even if he had been guilty of no negligence." [23]

It appears that the standard of care required is considerably higher in these circumstances than it is in cases of negligence, nuisance and, indeed, even riparian rights. In the case giving rise to the doctrine, the defendant constructed on his property a reservoir for the storage of water. The reservoir burst and the waters escaped from the defendant's land into abandoned underground passages and coal workings, and flooded the property of the plaintiff. The defendant did not know of the tunnels underneath his property, and there was no negligence in the construction of the reservoir. In an action by the plaintiff, the court ruled that the construction of a reservoir was a non-natural use of the defendant's property,

and that the defendant was liable for this use, and the damages attributable to the water's escape. Since that time, the doctrine has been used in a variety of cases, and has provided the legal basis for successful actions to recover damages suffered as a consequence of, for example, vibrations, spraying operations, the escape of noxious fumes, the escape of a racing car, and the spread of a set fire.

Trespass

The common law doctrine of trespass exists to protect one's person and one's property, both real and personal, from being used or otherwise interfered with by another. A person who has been, or is being, physically assaulted or who owns or occupies property onto which other persons insist on coming contrary to the wishes of the owner or occupier, and without other lawful authority, may sue for trespass. Where a person has suffered such a trespass, the courts will safeguard that person from any further such interference and, if damages have been suffered, will order that the responsible person pay a reasonable compensation to the plaintiff. Injunctive relief is also available.

Public Nuisance

Another common law rule which can be and is called upon to assist in the maintenance of environmental quality is that relating to public nuisance. Public nuisance has been defined as:

> "... a violation of a public right, either by direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which it is the duty of a person to do, and the omission to do which results injuriously to the public." [24]

Traditionally, it is the Attorney General who initiates and maintains actions to abate public nuisances. Unless an individual can prove that he personally has suffered damage over and above that suffered by the public at large, then he cannot maintain such an action. Two judicial decisions will exemplify how this doctrine operates and its applicability to environmental problems.

In the Attorney General for the Dominion of Canada v. Ewen & Munn [25], the Attorney General sought an injunction to restrain the defendants from depositing the waste by-products of fish processing in the Fraser River "... to the detriment of navigation and the annoyance of the public". The court found, as a fact, that approximately 4,000 tons of wastes from commercial fish canning operations found their way into the Fraser River each year, and that this very seriously affected the purity of the air and of the water, and was destructive of fish life. The court granted an injunction restraining the defendants from "creating or permitting a nuisance by polluting the water of the river with fish offal or by allowing the same to collect on the foreshore of the river".

One of the severe limitations of the public nuisance doctrine is that the Attorney General cannot be compelled to initiate any action to abate a public nuisance. Consequently, even if a member of the public knows or believes, on reasonable grounds, that a public nuisance is being committed, he can do little more than notify the Attorney General of that fact. If, however, he fits within the category of persons who suffer some 'special damage' to an interest peculiar to him, then he can maintain a public nuisance action and seek, not only an injunction to abate the nuisance but also damages for the injury he has experienced. However, the problems of an individual using the public nuisance doctrine are severe and appear to be effectively insurmountable.

In Hickey et al. v. Electric Reduction Co. of Canada Ltd. [26], it was accepted by the Newfoundland Supreme Court that the defendant company had discharged poisonous materials into the waters of Placentia Bay; that the fish life in the bay and adjacent waters were seriously impaired; that, as a consequence, the plaintiff and other fishermen were deprived of their traditional livelihood; and that the plaintiffs suffered an economic loss. The plaintiff brought the action in public nuisance. He argued that he was a person who had suffered a special damage and that, consequently, he could maintain the action, recover his loss, and be granted an injunction restraining the defendant company from further similar activities. The court found that the defendant company had committed a public nuisance, but that the plaintiff was incapable of maintaining his action, since he failed to meet the legal requirement of establishing an injury over and above that suffered by the public at large.

This decision and the generally accepted understanding of the public nuisance doctrine have considerable implications for the real or potential use of it to deal with environmental quality problems. The most frequent examples that can be cited relate to the impact of activities upon water quality, although the doctrine is equally applicable in those instances where air pollution occurs as a consequence of the activities of persons. But, we are faced with the limitation that either the Attorney General or a person specially injured initiate and maintain the action. Successful individual actions are rare and few Attorneys' General actions have been taken. One of the consequences is that persons such as the swordfish fishermen in the Canadian eastern seaboard, the commercial fishermen in the St. Claire River area, the commercial fishermen in Lake Winnipeg, the owners of resorts in northwestern Ontario, the Indian populations dependent upon fish, and others in similar categories cannot rely upon this particular common law rule for either restraining orders or to recover a provable economic loss. Generally speaking, persons in this category find that they have no right in law which the court can recognize and protect.

Summary

It should be obvious that there are some characteristics common to all the rules of law just discussed. In the first place, these laws tend to be too narrow and incapable of solving today's complex environmental problems. Secondly, such rules become operational only at the instigation of an aggrieved party. This means that, in general, an injury must have been suffered before redress can be sought from the courts. Further, these principles of law presume that a person knows or can ascertain his legal rights; that he can determine when he has suffered some injury or damage to a recognized legal right; that he can identify the person or persons responsible for that injury or damage; that he can afford the time and the money to take the dispute to court should the alleged defendant deny liability; that, once in court, he can prove a right which the court recognizes and will protect; that he can prove that the actions of the defendants unlawfully interfered with that right; and that he can satisfy the court that, on the evidence before it, the defendant's, and not another's, activity interfered with the plaintiff's rights and/or caused the damage suffered. If a person, both prior and subsequent to litigation, fails to prove any one of these points, then he is unlikely to be

successful in getting satisfaction. This means, for example, that persons in whose bodies heavy metals and other poisons are presently accumulating are, in most circumstances, beyond the protection of the law; 'a fortiori' future generations. This particular kind of problem is one which is presently developing without persons being aware of it, without any particular right in law being offended, with tremendous evidentiary obstacles to overcome to establish that any particular defendant is responsible, with considerable obstacles preventing quantifying of damages, and most definitely, without those persons who are present or potential consumers of such damaging substances being able to initiate any kind of legal action intended to minimize or prevent the likelihood of such damages being caused. Since the legal system, like other man-made institutions, traditionally reacts, the individual is powerless to move in anticipation and protect his existing legal rights in advance of their being affected and before he has suffered damage.

If the common law is to play much of a role in providing citizens access to decision-makers or permitting the citizens to participate in any way in the decision-making process, then it is primarily these aforementioned five common law principles that will be used. Litigation on the basis of these principles will not provide the extensive kind of participation which many people feel is necessary, but it is nonetheless a legal tool which is available, and in the opinion of some could be useful.

> "Litigation, then, provides an additional source of leverage in making environmental decision-making operate rationally, thoughtfully, and with a sense of responsiveness to the entire range of citizen concerns. Courts alone cannot, and will not, do the job that is needed. But, courts can help to open the doors to a far more limber governmental process. The more leverage citizens have, the more responsive and responsible their officials and fellow citizens will be." [27]

Other legal writers have some reservations about the efficacy of litigation. In a recent article, Professor Jurgensmeyer says:

> "It is incontestable that damage judgements and injunctions granted on the basis of actions framed in terms of nuisance, trespass, negligence or strict liability (or some combination or variation

> of them) have been, and still are, having important control consequences as far as pollution and other ecological harmful activities are concerned in the United States and some other common law countries. The key to their popularity lies in the avenue they offer to ecologically conscious private citizens or groups. The concept of private and group litigation in the area has become so popular that it is being touted as 'the answer', at least for the foreseeable future, to the environmental crisis." [28]

And, after considering Professor Sax's statement in support of litigation, Professor Jurgensmeyer goes on to say:

> "The argument is appealing - and perhaps even convincing. But, two considerations at least deserve more attention. First, in championing the role of private litigation, even for the short term, are we not risking an unnecessary deviation from, and camouflaging of, the only ultimate answer to the ecology crisis - government regulation of resource allocation and development." [29]

While Professor Jurgenmeyer's reservations about litigation are valid, they do not discount the validity of litigation as a form of public participation or as a way of allowing the public to supervise or look over the shoulder of government departments and agencies with the responsibility for environmental management or pollution control decisions.

Other environmental lawyers have more severe reservations about the ability of the common law to play a meaningful role in the environmental area generally and in the demands for public participation specifically. Professor Elder of the University of Calgary has said in a recent article:

> "... the very structure and basis of the common law and its socio-economic philosophy of the sanctity of individual rights makes it inherently unsuitable to shape creative response to social change. It can respond conservatively, which has been an important role upon occasion, but there are too many limitations for it to be used on a broad front. The requirement of a private property interest, expert witnesses, funds, time,

determination and organization, all resting on individual decisions; the problems of proof; the limitations of res judicata; the fact that, in Canada, one cannot sue in a representative capacity for nuisance; the possibility of a war of attrition being waged by a wealthy defendant who deducts the legal fees from income as a business expense; and the enormous number of law suits which would be necessary if private citizens were to assume the responsibility for the public good from which governments have abdicated; all of these facts remove the potential of the common law. In short, the environmental law suit is part of a charade of existing institutions, all of which are failing us. The answer, it appears to me, is to undertake their radical redesign." [30]

Similar sentiments have been expressed by V. J. Yannacone, an American attorney who has considerable experience in litigating environmental issues in the United States, on behalf of concerned citizens' groups and individuals. Although Mr. Yannacone has more faith in the ability of the legal system and existing environmental laws than does Professor Elder, he likewise acknowledges the need for sound laws which are enforceable at the initiative of concerned citizens and citizens' interest groups.

At a recent convention, Mr. Yannacone said:

"There is, of course, no need to remind you, ... that law is the framework of civilization and the ordering program for society; that our adversary system of litigation is the civilized alternative to bloody revolution; and that, so long as the door to the court house remains open, the door to the streets can remain closed." [31]

If, in fact, as has been suggested, our laws require a 'radical redesign' in order to keep the doors to the court houses open and the doors to the streets closed, it is highly unlikely that any substantial change will come about as a consequence of initiatives by Canadian judges. For the most part, Canadian judges are considered to be 'black letter lawyers' in their approach to the interpretation and administration of Canadian laws. They take the rules given to them in judicial precedent, and legislative enactments of government, or both, and apply the law as it reads to a problem which someone else has brought

before them. Many Canadian judges would undoubtedly agree that:

> "the essential attribute of law is to conserve, to jam new conditions into old boxes, whether they will fit or not; not to change, readjust or cure."

A recent Ontario High Court decision offers an all too common example. Section (2) of the Provincial Parks Act of Ontario provides that:

> "All provincial parks are dedicated to the people of the province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations." [32]

The Sandbanks Provincial Park in Ontario was established as a park within the meaning of the Parks Act and contained within the park boundaries, as well as adjacent thereto, some sand dunes considered by some to be a unique ecological, geological and recreational resource. A legal action was commenced by Larry Green of Toronto's Pollution Probe, on his own behalf, and on behalf of all of the people of the province of Ontario now living, and on behalf of future generations. Mr. Green was concerned that a lease arrangement between the Ontario provincial government and Lake Ontario Cement Ltd. would cause the destruction of many of those sand dunes which gave Sandbanks Provincial Park its unique character. The judge concluded that Mr. Green had no status to maintain the action, that the concern of Mr. Green was not a recognized cause of action, and said that, in his opinion, the entire proceedings were vexatious and frivolous. As a result, the case was dismissed, and Mr. Green was held liable to pay the costs of all parties involved.

There is little reason to doubt that the conclusions of the judge were consistent with established legal principles. It is equally true that, had the judge so desired, a landmark legal case could have been decided, and Mr. Green could have been given the standing before the court that he desired. But, this would have required an initiative by the judge which is uncommon to the Canadian judiciary. Many of our judges see their role as being the interpreters and the administrators of law, not the makers of law. If a law is wrong and out of tune with the

requirements of contemporary society, it appears that most Canadian judges consider it to be the responsibility of the elected legislative assembly to write a law more consistent with the new requirements. If persons such as Mr. Green are ever to be allowed either to participate in environmental or resource management decisions or to challenge such decisions, then their right to do so will have to come from our legislatures. Once that is done, the courts will be there to decide whether, in any particular case, the new rights have been respected, and they will impose whatever sanctions the law prescribes if a violation has occurred.

Unless there is a radical change, the common law will not lead us into the new order which we may require or which we may desire. The legal system, however, does provide us with a framework within which one can freely debate the need for change and articulate the kind of change needed. It gives to one considerable freedom of activity to mobilize public opinion in numbers, volume, or both; to impress upon our legislators (that is those persons with the primary and ultimate responsibilities for changes in our law) that there is a need for change; to sensitize the law-makers to the demands of the public, and thereby move them, sometimes quickly, sometimes slowly, to incorporate these public demands, first into legislation and then into administrative action. Traditional theory is that, by following this procedure within the system of law, one can bring about legal reform. Traditionally, law more or less tolerates pressures for change, and then responds to the change. The result is that changed values may bring about changed laws rather than law bringing about a change in values.

Whatever the values, law and, in particular, specific laws are means to an end and not ends. They are tools which can be used, however, their success assumes that certain conditions are present. It assumes that the public knows the ends that it wants; that the public is capable of articulating these ends; that the legislators understand the public's demands; that the legislators will sincerely and honestly respond to these demands; that the policy developed to meet these demands is sensitively and intelligently conceived; that the policy is effectively translated into legislation; and that the legislation, once written, is enforced, administered, and interpreted in such a way that the achieving of the desired ends will be facilitated.

As has been suggested, the common law rules, while not inflexible, are unlikely to undergo, in the courts, the 'radical redesign' which is essential if they are ever to

support an extended definition of public participation in decision-making. If participation of any kind is to become a characteristic of the Canadian political scene, then certainly, the quickest and, very possibly, the only effective way of bringing this about is through the enactment of new laws reflecting this desired objective. It is only through specific laws that participation can become a legal right with the courts, if only to support the assertion of these rights. The only alternative to this way of opening up our decision-making process to the public is through the radical redesign of political and bureaucratic attitudes and institutions so that the redesigned ones reflect the philosophy of, and the commitment to, public participation as an integral part of decision-making. Such changes in the values and attitudes of the decision-makers and in the designs of our institutions within which they function would guarantee a receptivity to public input not now apparent. One consequence of the change would be that the right to participate would not require the definition and support of any particular legal rule. In the meantime, legislated rules are, and will continue to be necessary. The degree to which these rules presently provide for public participation in decision-making will be considered next.

THE LEGISLATIVE BASIS FOR

PUBLIC PARTICIPATION IN CANADA

British Columbia

British Columbia has enacted a variety of legislation intended to preserve or enhance the quality of the B.C. environment. The Environment Land Use Act of 1971 [33] established an Environment and Land Use Committee whose membership includes "a chairman and such other members of the Executive Council as the Lieutenant-Governor in Council may appoint". This committee may develop programs to foster and increase public concern and awareness of the environment; assure the proper balancing of land use and resource development with environmental protection; and inquire into and study matters relating to the environment or land use. If the committee decides to undertake any one of these activities (and it has an unfettered discretion in making this decision), it may (an equally unfettered discretion) hold public inquiries. Clearly, the public may be involved in the work of this committee, but cannot insist that it be heard.

The Land Commission Act [34] of British Columbia establishes a Commission to, 'inter alia', assure the preservation of agricultural lands, green belts, urban land banks, and park and recreation lands. The Act requires that a land reserve plan be developed for each regional district by regional boards or, failing that, by the Commission itself. Before any plan can be finally approved for submission to the Lieutenant-Governor in Council, public hearings must be held. Hearings before approval of the land reserve plan are mandatory and, presumably, a failure to hold hearings would be fatal to the plan itself. However, the Act does not require that the public be in any other way involved in any other part of the Commission's activities. For example, the Commission is free to make any or all of its regulations, which are the substance of the Act's operations, without any external consultation.

The objects of the Green Belt Protection Fund Act [35] and the Ecological Reserves Act [36] are inherent in their titles. No public role is provided for in the green belt legislation while the Ecological Reserve Act says that the minister "... may appoint any person or persons to advise him". Of course, he cannot be compelled to appoint anyone and, even if he does, he is free to ignore any or all advice.

Clearly, the most relevant B.C. legislation is the Pollution Control Act of 1967 [37]. Passed first in 1956, as a means of dealing with water pollution, it initially covered only the southeast portion of the province. In 1967, there were amendments which put the whole of the province under the Act and, in 1970, it was further amended to include air pollution.

The Act is administered by two agencies: one is the Pollution Control Board; the other is the Pollution Control Branch. The branch is the more operationally active of the two. The Act prohibits, with few exceptions, the discharge of any waste into or on air, land, or water, without a permit. Applications for permits are submitted to the Director of the Pollution Control Branch, and are advertised in the local press. The application is reviewed by agencies in the Departments of Agriculture, Health, and Recreation and Conservation, as well as by the Water Rights Branch, all of whom make their recommendations to the Director. Where the application is for discharge of waste onto land or into waters, persons with an interest in the land or who are holders of a permit or license under the Water Act, and who claim that their interests will be affected, may object to the Director, and must do so within the time specified in the regulations. The Director "in his sole discretion" may decide whether or not to hold a public hearing. If he declines to do so, the objecting member of the public is without recourse. He or she has no 'right' to a hearing.

This unfettered discretion to hold or not hold hearings exists in two other areas. The Act recognizes that persons other than those with the specified interest may have objections to an application which has been made. These 'other' persons may file an objection with the Board. If the Board decides that the Director of the Pollution Control Branch should consider the objection in making his decision on the application, they can direct him to do so. However, the Board's decision is final, and the manner of such consideration by the Director is not specified.

A third type of hearing is that which may be held at the discretion of the Board Director if "... the proper determination of any matter within its jurisdiction necessitates a public or other inquiry". Hearings under this provision have been held with the apparent objective being to develop pollution control programs for the forest products industry, the mining, mine-milling and smeltering industry, the petro-chemical industry, the food processing and related industries, and for municipal waste discharges.

If the Director, in fact, holds a hearing on an application for a discharge permit, the Act requires only that the objector be notified of the time and place of the hearing, and of the eventual decision. While the B.C. courts have been instrumental in assuring that objectors have access to at least some of the relevant information (for example, some of the information which accompanied the permit application), and that any hearing held give to all objections a fair and judicial consideration, the Board has a record of providing highly structured, technically-oriented hearings and, frequently, in places of least convenience to the public. It appears that the Board itself has little commitment to the principle, let alone to the substance, of public participation in the making of its decisions.

However, if recent public statements are more than rhetoric, substantial changes can be expected in British Columbia. As stated by one government official:

> "the change of government in British Columbia just over a year ago has caused a considerable upheaval of environmental philosophies and attendant administration. As the 'dust' has not yet really settled, the information ... is fairly limited ... especially in dealing with citizen participation." [38]

Nevertheless, the philosophy seems to be unfolding quite rapidly. In a press release, the Honourable Robert Williams, Chairman of the government's Environmental and Land Use Committee, announced the establishment of an inter-disciplinary secretariat which will be the principal environmental and land use advisory body to the Environment and Land Use Committee. In that press release, Mr. Williams said:

> "Initial focus of the work will be on broad resource management and land use allocation plans, tackling the province region by region in conjunction with the regional districts and municipalities. Land capability and other inventory data will be used heavily, along with an appreciation of each region's social and historical patterns, economic capabilities, and aspirations for the future. It is recognized that citizen and business groups have a great deal of information about their regions, and there will be opportunity for these groups to provide input into the process."

"It may well be that this approach will open up a whole new era in decision-making in this province." [39]

Since the time of that statement, several studies have been initiated in British Columbia, and it appears that, in each case, an integral part of the study was the holding of public meetings which would permit interested members of the public to make their views and opinions known to those who are conducting the study, in order that the eventual recommendations to the Environment and Land Use Committee will reflect, not only the expertise and values of those who are conducting the study, but the opinions and preferences of the British Columbia public.

Alberta

The Clean Air [40] and Water Acts [41] of Alberta are that province's principal legislative control mechanisms for air and water quality preservation and enhancement. Both Acts prohibit the discharge of air and water contaminants in excess of amounts prescribed by regulation. If a particular contaminant has not had a standard set in regulatory form, then, at least under these Acts and in respect of the unregulated contaminant, no offence can be committed. The other control mechanism is the prohibition of construction, alteration, etc. of specified kinds of works unless the responsible government agency has reviewed and approved the plans and specifications of the proposed activity. While these two Acts appear of paramount importance in Alberta's air and water management decision-making, neither Act guarantees that the public be actively involved. Contaminants can be regulated, standards can be determined, and construction can be licensed completely independently of any public participation in these particular decision-making processes. Nevertheless, the government of Alberta insists that it

"... considers public participation an important input into all resource decisions not just water ... A more ... widely used mechanism for public input ... has been to have [Alberta's] Environment Conservation Authority hold public hearings to which all segments of the public are invited to make representation." [42]

The Environment Conservation Authority was originally established by the Social Credit government in 1970, as a kind of environmental ombudsman reporting to the Lieutenant-Governor in Council. Its original mandate included, 'inter alia', a continuing review of policies on, and the right to enquire into, matters relevant to environment conservation. In carrying out its responsibilities, the authority could, on its own initiative or by order of the Lieutenant-Governor in Council, hold public hearings on any matters coming within its terms of reference. Its terms of reference were, and continue to be, very broad. They include the conservation, management, and utilization of natural resources, the prevention and control of the pollution of natural resources, the control of noise levels resulting from commercial or industrial operations, and the preservation of natural resources for their aesthetic value. [43] A number of hearings have, in fact, been held by the Conservation Authority and, while no one considers them to be perfect, they have, as a matter of practice, allowed interested bodies within the province of Alberta to make representation to the authority on matters of public concern.

The authority has established a fairly standard procedure for the holding of its hearings. It begins by determining and publicizing its terms of reference. Next, "in order to assist the public in making presentations, the authority prepares background papers relevant to the subject matter to be inquired into, and then makes copies of these papers available at information centres at Public Libraries throughout the province". [44] "The availability of this material [is] widely publicized in the media, as is [our] desire to have people participate in the hearings." [45] Submissions are invited. The hearings are held. As soon as possible after the hearings, the transcript is prepared, the evidence evaluated, and the proceedings, summary, report, and recommendation are ready for publication. Upon tabling of the report by the Minister of the Environment, all volumes are made available to the public -- the report and summary of volumes at no cost. The only independent voice on the efficacy of these hearings that could be located has concluded that, at least in the case of hearings into surface mining in Alberta, the hearings:

> "have been satisfying for participants, who were heard fairly and fully and who also learned about other perspectives ... The process, then, appears to have shown (or helped to create) a consensus, and to have given government confidence that it was moving in the desired direction. As well, the

> apparent opportunity for input into the final legislation [the Land Surface Conservation Reclamation Act] may have had a psychologically inhibiting effect on later protests by non-participants. In other words, potential protesters are educated, given a forum, and perhaps partly co-opted into the decision-making process, while government, having tested the waters, can take action which appears both vigorous and popular. The public interest, it is submitted, is the winner in this process." [46]

The recently established Energy Resources Conservation Board provides for public participation as an integral part of its procedures. Generally, anyone who wishes to exploit energy resources in the province must apply for, and be granted, a permit by the Board. The Board is required by the Act [47] to publish notices of the application, and if a member of the public objects and the objection is not a frivolous one, the Board must take all precautions to assure that the interests of the objecter are fairly and equitably considered in any decision which the Board eventually makes. While the Board does not have to hold a hearing, the provisions of the Act try to assure that those with reasonable objections will be able to put their interests to the Board.

Apart from the hearing provisions in the Act which established the Environment Conservation Authority and the developing procedures of the Energy Resources Conservation Board, the role of the Alberta public in environmental management/pollution control decision-making in Alberta is not well established in law. Nevertheless, it has been assured that

> "As a general rule, Alberta's water resources management staff hold public hearings or public information meetings on projects which they plan to undertake. On larger projects ... we might structure an advisory group consisting of interested parties. ... In addition to the information meetings or public hearings mentioned ... I have also taken the position that we will be managing water on a basin basis and that all major projects like dams will only be undertaken by the authority of a special act of the legislature. It is through the combination of all of these mechanisms, including the involvement of the elected representatives, that we end up with meaningful public participation." [48]

Saskatchewan

Saskatchewan has recently established a Department of the Environment which has the overriding responsibility for enhancing and protecting the quality of Saskatchewan's environment. As originally passed, the Act [49] was silent on the role of the public, but some 1973 amendments now make it possible for the minister of the environment in Saskatchewan to "inquire into or hold public hearings with respect to the management, use, or protection of the environment". Apart from this one provision, which is discretionary, there is nothing in the Act that provides for or recognizes a right to public participation in the making of any of the decisions which are to be made by that Department and its agencies.

The Department has the administrative responsibility for a variety of Saskatchewan legislation which is concerned with air pollution control and water management. However, the Air Pollution Control Act [50] makes no provision for public participation in decisions made within the framework of that Act, and the water oriented statutes are equally silent on the role of the public. One can quickly conclude that, as a matter of law, the public has no right to be involved in the making of any environmental management/pollution control decisions in Saskatchewan. However, as a matter of practice, it appears that the Saskatchewan government is quite committed to a consultative process, at least in the case of large-scale resource-utilization decisions. For example, the Saskatchewan government has given notice to the public that it intends to make some decisions on how the Churchill River could best be used to meet the needs and aspirations of the people of Saskatchewan. It recognizes that, on the one hand, the river could be developed for hydro and irrigation purposes, while on the other, it could be left in a natural state as a wilderness area. In order to assist it in making decisions on how this particular water resource could best be utilized, the government has undertaken a Churchill River Basin Study which will take approximately two years to complete, and will cost in the vicinity of 2 1/2 million dollars. It is clear from the literature which has been made public that the government wants the people of that province to come forward with their opinions as to how the Churchill River could best be used. Before any specific project is suggested, there will be public meetings held throughout the province. Also, information bulletins will be sent out from time to time. And, when all the information has been collected and organized, public hearings will be held in many parts of Saskatchewan to give

interested people a chance to say what they think about the proposed projects. Furthermore, to facilitate the public participation program, a person with experience in the public participation field has been hired and given the express responsibility to encourage and facilitate public participation in the whole of this particular decision-making process. Clearly, such a process will only be as good as the people who are involved in it, but there is no reason now to doubt the validity of the Saskatchewan government's desire to maximize citizen input. Of course, the process is not one that is required by law, and should it prove to be inadequate or should it prove to be merely an exercise which co-opts and then ignores criticism, there is nothing which disgruntled members of the public can do as a matter of law. Their only recourse is to vote against the Saskatchewan government in the next election.

Manitoba

Manitoba legislation is more generous in its provision for public participation in decision-making. The Water Commission Act [51] establishes the Manitoba Water Commission which may "study projects, problems, and schemes relating in any way to water", but only if they have been referred to the Commission by the Minister responsible for the administration of the Act. The Act envisages the holding of public hearings on matters which have been referred to the Commission, and it is quite specific that all parties before the Commission may be represented by counsel, may call witnesses, submit evidence, and present arguments. However, one obvious weakness is that the Minister, by refusing to refer any matter to the Commission, can guarantee that no public inquiry or public hearings are held. Furthermore, the Minister can, in any reference that he makes to the Commission, pretty well determine the kind of hearing which is held. For example, when the Manitoba Water Commission in 1972 attempted to hold a public inquiry into the government's proposed diversion of the Churchill River, the responsible minister intervened and denied the Commission the right to hold such hearings. It was the position of the provincial government that diversion of the river was already government policy, and that, if the Commission were to hold any hearings at all, they could be nothing other than public meetings to inform the public of the government's decisions.

The only other legislation that has any significance for public participation in environmental

management/pollution control decision-making in Manitoba is the Clean Environment Act. [52]

This Act establishes a Clean Environment Commission and vests in that Commission the primary responsibility for regulating the activities of persons when those activities are likely to adversely affect the air, water, or land environments in Manitoba. Persons carrying on activities or contemplating activities which could adversely affect the environment must apply to the Commission for a permit. When an application is received, the Commission is required by law to advertise the application. Public hearings must be held if any one interested person informs the Commission that he or she would like to be heard regarding the application before it. In this respect, Manitoba legislation is probably the most generous in Canada, apart from the Federal Northern Inland Waters Act. It is equally generous in its definition of interested persons, in that anyone who claims to be interested would seem to satisfy the requirements of the Act.

By and large, the Commission's activities are directed towards the control of pollution generating activities, and the law guarantees that the public will have an opportunity of being involved in the process that leads up to the Commission making a decision as to whether or not the contemplated activity of the applicant should be allowed and, if so, under what conditions.

There are, in the Clean Environment Act, other provisions for public hearings. The Act provides that the Commission may, "unless otherwise directed by the minister", investigate any matter respecting the environment. Public hearings may be held at the discretion of the Commission as part of their investigative process, however, it should be noted that, while the initiative for such investigations may be taken by the Commission, the minister may deny the Commission the right to investigate any matter. As a matter of practice, that is what happens where issues are in any way controversial. For example, local citizen groups in Manitoba requested that the Clean Environment Commission hold an inquiry into the proposed Churchill River Diversion, a matter which quite clearly had implications for the quality of Manitoba environment. The responsible minister was quite specific in his directions to the Clean Environment Commission that they not undertake such an investigation and, therefore, any possibilities of public hearings into this matter were ruled out. The public at large was advised that they must confine their participatory role to voting at election time.

The final public participation mechanism which exists in Manitoba that need be commented upon is the Environmental Advisory Council. The approximately 100 members who sit on this Council assure a good geographical and philosophical cross-section. However, although created by the government, it has little in the way of financial or administrative support for its operation. In any case, it is, as its name suggests, an Advisory Council, and as with most advisory groups, the minister is free to ignore or selectively use any advice which is given.

In a recent study of the Manitoba Water Commission, the Clean Environment Commission and the Environmental Advisory Council, the author concluded, that the Council provided a valuable, but limited, form of citizen participation; that the Water Commission provided an equally valuable, but also limited, form of public participation (for example, it is effectively dependent upon the whim of the responsible minister), while the Clean Environment Act, with the Commission it created, "presents a coherent and consistent framework for public involvement". [53]

Ontario

The Environmental Protection Act [54] of Ontario, while not altogether silent on the role of the public, clearly reflects the belief that the government agencies and departments are capable of making environmental management/pollution control decisions in the public's best interest, without the public necessarily being involved. While there are various provisions; for example, in the Waste Management part of that statute, for compulsory public hearings on applications related to waste disposal sites for liquid industrial or hazardous wastes, and discretionary public hearings on applications for the approval of waste management systems and waste disposal sites, the Act effectively denies that the public has any role to play in making those decisions made within the framework of the Act. For example, there is extensive discretion vested in the responsible minister and his administrative agencies to negotiate with polluters a program intended to lead to the achievement of certain environmental quality objectives. However, these environmental quality objectives can be determined independently of any consultation with the public. Any final negotiated compliance agreement between the polluter and the regulating agency is done in camera and without any public hearings or without otherwise involving interested members of the community. The citizen has no

legal basis to insist upon being involved and cannot, within that framework of the Act, as a matter of legal right, intervene and attempt to influence the agency-polluter agreement. The absence of a role for the public in the decision-making process is one of the most notable things about the Ontario legislation, and it has been said about it that:

> "It would be hard to find anywhere in North America a comparable pollution control statute which imposes such a complete denial of individual rights as the present Environmental Protection Act." [55]

The Act's critics further say that, while the trend in most environmental law throughout North America shows an increasing concern for encouraging and facilitating citizen participation in the decision-making process, that trend is in no meaningful way reflected in the Ontario environmental legislation. The fact that the Act also, 'inter alia', establishes an Environmental Hearing Board in no way meets these criticisms. Like the Manitoba Water Commission, the Board cannot be compelled by individual citizens to hold hearings, but does so primarily at the request of the Ontario Minister of the Environment. While it assures that the Minister may defuse public pressure around a particular environmental issue by referring the matter to the Board, the public at large, if it wants the Board to inquire into any matter at all, can secure an inquiry only by exerting such political pressure that the Minister, in his discretion, concludes that it is wiser than not to hold a hearing. The citizen has no legal right to force a public inquiry or hearing into any matter. This is particularly ironic since the government, when it introduced this Act intended to protect the natural environment, stated as follows:

> "Mr. Speaker, the two bills that have just been introduced constitute an environmental bill of rights for the people of our province. They assure our people, including our children, a high standard of air, soil and water quality and that we shall have within our province the legislative authority to prevent abuse of our natural environment." [56]

Quebec

Quebec's recently assented-to Environment Quality Act [57] is a comprehensive statute which has as its object:

> "... to grant to one minister responsibility for elaborating and implementing the policy for the protection of the environment, to establish an Advisory Council on the Environment and to assign powers of supervision and control over the quality of the environment to the Director of Environment Protection services." [58]

The Act is comprehensive in that it prohibits the contamination of the air, water, and land, in excess of regulated amounts; provides for permits or certificates for persons whose activities are likely to change the quality of the environment; and confers on an administrative agency the power, upon the happening of certain conditions, to issue stop orders to those who are contaminating the environment. Further, the Act has special provisions regulating:

> "... water quality and the management of waste water, depollution of the atmosphere, waste management, the sanitary conditions of public buildings and places, and protection against radiation and other energy vectors, as well as provisions respecting noise." [59]

This incredible concentration of powers and responsibilities is given to the Minister and his delegates with minimal provision for any public role in the administration of the Act. Great reliance is placed upon government agencies and experts, who are free to function without any public consultation in the discharge of any of their activities. The one exception to this discouraging (from a public participation point of view) legislation is the provision which requires the establishment of an Advisory Council on the Environment. While membership is not limited to the public, presumably it could include, at the discretion of the Lieutenant-Governor in Council, public representatives among its chairman and ten appointed members. However, the powers of the Council are limited to advising the Minister on matters he refers to it, although it may undertake to study any question pertaining to the quality of the environment and may (a discretion which, as always, could be negatively exercised) receive and hear petitions and suggestions of individuals or groups on any

question contemplated by the Act. Should the Council undertake any study, it is to report its results to the Minister who, in turn, must make the report public. Also, the statute requires the publication of an Annual Report which likewise is a public document.

While the provision for such a Council is meritorious, it suffers, as do all such councils, from severe and obvious limitations. The government has unfettered control in the selection of council members. Once appointed and, if an independent spirit moves it, the Council can initiate its own studies, however, it would very likely avoid doing so if government objections were registered. In any case, the Council could be kept busy dealing with matters referred to it by the Minister, should its independence get too much for the government to tolerate. Of course, the public cannot compel the Council to study any matter, nor is it given any 'right' to appear before the Council on any matter the Council may study. It is difficult to feel secure that Councils such as this one will, in any way, give the public a meaningful role to play, yet, it is all that the Quebec Act contemplates.

Nova Scotia

The recently assented-to Environmental Protection Act [60] of Nova Scotia has as its purpose "... the preservation and protection of the environment". Environment is defined as meaning the air, land, and water, or a combination thereof. To achieve its purpose, a Department of the Environment has been established to assist the Minister in the exercise of his powers. These powers include the development, coordination, and enforcement of policies, plans, and programs; the coordination of the work of other departments and agencies in any matter relating to environmental preservation and enhancement; investigation, regulation, and research; information dissemination and other similar matters. In short, the Act provides a comprehensive approach to at least air, water, and land pollution problems, but relies upon agencies who are not, in any way, required to involve the public in the Act's administration.

The notable exception to the "closed agency approach" is the establishment of an Environmental Control Council of twelve to fifteen members, eleven of whom must represent specified interests. For example, there must be at least one representative of "conservation and ecology

groups". A person becomes a member, however, only if appointed to the Council by the Lieutenant-Governor in Council. Once constituted, the Council is empowered to recommend environmental protection and preservation policies, plans, and programs to the Minister; review the environmental impact of other departmental and agency activities; recommend regulations and standards and "inquire into and report to the Minister upon any matter pertaining to the preservation and protection of the environment". In addition to this last-mentioned power to inquire into matters at its own initiative (not that of the Minister nor of the public), the Council may be authorized by the Minister to hold hearings on environmental matters referred to it by the Minister. The public role in all this, apart from its possible representation on the Council, is the mere possibility of being involved in the Council's inquiries or its hearings. The Act does not require the Council to inquire into any matter, nor to hear any specified groups if they do inquire, although it is difficult to imagine that, at least in the case of issues known to be politically controversial, the Council would be anything other than fair in selecting the interests to be represented before it. The point, however, is not what it would likely do as a matter of practice, but what it cannot be compelled to do as a matter of law. Here, as in the majority of the Canadian environmental management pollution control legislation, the public role is passive. Neither the public nor any member of it can, as a matter of legal right, force any particular hearing nor demand any particular kind of involvement in the decision-making process. In a recent speech by The Honourable Mr. Bagnall, Minister of the Environment for Nova Scotia, the Minister said:

> "An Environmental Control Council composed of fifteen Nova Scotia citizens representing all areas of the province and mainly with professional backgrounds will lend their expertise to the new department by recommending policy, examining environmental orders, making recommendations to the Minister and gathering public opinion." [61]

It is fairly obvious, from that statement and from the provisions of the Act itself, that the public's role, if it is to have one, is entirely dependent upon the government's or its agency's willingness to involve them at any stage of the decision-making process.

New Brunswick

New Brunswick's Clean Environment Act [62] likewise emphasizes unfettered ministerial and agency discretion in environmental management/pollution control decision-making. The avenues for public participation in the making of decisions is restricted to making contact with an Environmental Council consisting of five members who may be appointed by the Lieutenant-Governor in Council. The only constraint on who is to be appointed is that they must not be members of the legislature, nor federal or provincial civil servants. The Council is to study and report on matters referred to it by the Lieutenant-Governor in Council, investigate matters approved by the Minister and receive submissions. Clearly, this is one of the weakest such councils established in Canada, surpassed only by its counterparts in Prince Edward Island and Newfoundland. Nevertheless, this Council "... is officially present as a group which permits the public to make suggestions to the department". [63]

Prince Edward Island

The Environmental Control Commission Act [64] of Prince Edward Island establishes an Environmental Control Commission of not less than eleven persons, seven of whom are to be members of specified government departments. The balance may consist of "such other persons as the Lieutenant-Governor in Council" may appoint. The Commission may investigate causes of pollution, prepare plans to mitigate or eliminate pollution and generally do whatever a government pollution control agency can and must do to protect the air, land, or water environments. In the discharge of its duties, it may hold public inquiries, but clearly cannot be compelled to do so by any member of the public. In effect, the public is precluded from any legally constituted and supported role in Prince Edward Island's environmental management decision-making. The only qualification of this is a provision which says that the Lieutenant-Governor in Council may appoint an Environmental Advisory Council to advise the commission. This Council is to have a maximum of fifteen members, including representation from several provincial departments, as well as such groups as the Prince Edward Island Fish and Game Association. The balance, if appointed at all, are appointable without guidelines. Clearly, the Council's role is passive and only by an incredible stretch of the imagination, combined with blind faith and a naive belief in

the infallibility of agencies, could one presume this to be a place where public participation demands are being, or will be, met.

Newfoundland

Newfoundland's Clean Air, Water, and Soil Authority Act [65] of 1970 is similar to the governing Prince Edward Island legislation. An authority is established to administer the Act, and the Lieutenant-Governor in Council may establish Advisory Commissions on environmental quality. Of the three weak and potentially ineffectual commissions contemplated in New Brunswick, Prince Edward Island and Newfoundland, this is probably the weakest. The only thing they have in common is the absence of any serious commitment to the involvement of the public in the discharge of the duties that are assigned to them.

Federal Government

At the federal government level, legislative support for public participation in environmental management decision-making became a reality only during, and subsequent to, 1970. Legislatively speaking, 1970 was a good year for the Canadian environment as a whole. But, even here, the tremendous burst in legislative activity was only in part accompanied by provisions for public participation. The Canada Water Act [66] provides that, where initiatives are taken to create water quality management agencies for designated water management areas, such an agency may, in the discharge of its duties and the exercise of its responsibilities, "take into account views expressed to it at public hearings and otherwise by persons likely to have an interest therein". While some form of public involvement in making relevant decisions is clearly contemplated, the reference to such involvement is little more than a passing one, and the wording of the Act is ambiguous. One possible interpretation is that the agency may involve the public; another is that the agency must involve the public, but has a discretion whether or not this involvement is, in any way, to influence the decisions eventually made.

The Canada Water Act provides for another possible kind of public involvement. Under Section 26 of the Act, the responsible minister (and, in this case, it is the Minister of the Environment) may establish advisory

committees if he considers them desirable, and may appoint to these committees such persons as he desires. Here, also, there is no requirement for public participation. There is merely the discretionary power given to the minister, without any indication as to how, if at all, that discretion is to be exercised. In any case, he can appoint who he pleases, for whatever reason he pleases. Also, such committees are only advisory, and the minister is under no obligation whatsoever to be, in any way, influenced by, or act upon, the advice given to him. An Environmental Advisory Council has been established by the Minister of the Environment, but most of its activity to date seems to have been directed towards organizing itself.

The Clean Air Act is the federal government's legislated answer to Canada's air pollution problems. [67] This Act does not contemplate any compulsory citizen participation in the making of any environmental quality decisions under it. It doesn't even go as far as the Canada Water Act and provide for the establishment of advisory committees. The closest it comes to dealing with the question of citizen participation is in Section 3 (3), which provides that the minister may cooperate with others, including persons, in carrying out his responsibilities under the Act.

The Northern Inland Waters Act is the only federal enactment that manifests any federal government commitment to participation by the public in the making of environmental management decisions. [68] Under that Act, water boards are created for both the Yukon and Northwest Territories. Provision is made for the licencing of activities within designated water management areas. These licences can be issued only after an application for a licence has been made and publicity has been given to that application. These applications are made to the responsible Water Board, and that Board is required by the Act to give notice that a public hearing will be held in respect of any application made. A public hearing can be avoided only if two conditions are satisfied: first, the applicant must consent in writing to the disposition of the matter without a public hearing; and second, the board must not receive notice that any person intends to appear and make representation in respect of the application. If the applicant insists upon a public hearing, or if any person notifies the Board that he intends to make a representation, or if both conditions are present, then the Act requires that a public hearing be held. The provisions of this Act are quite liberal in their requirement for holding of public hearings, and in identifying the person or persons who can

be heard. The Water Boards have, characteristically, a relatively unfettered discretion to make rules respecting their sittings and the procedure for making representations. The Act does not deal specifically with the constraints upon the Board in the structuring of its public hearings, and the only constraints would be the common law requirements that the hearings be by persons without bias, fair, and otherwise consistent with the rules of natural justice.

There is a provision in the National Energy Board Act for the holding of public hearings called as part of the Board's decision whether or not it should issue a certificate of "public convenience and necessity". [69] While there is a requirement for the holding of public hearings, the statute is silent on the procedure which is to be followed, and is equally silent respecting the environmental and social impact issues which must be considered by the Board. This means that, since the Board can determine its own procedure and is not required by statute to consider such things as the social and environmental impact implications of, for example, a pipeline for which an applicant requires its certificate, there is no guarantee that the broader issues will be considered by the Board in deciding whether or not to grant the certificate. That the Energy Board Act should be silent on, for example, the water quality, broader environmental, and the social impact issues is not surprising, for that Act was enacted before environmental quality and related issues became a significant public issue, and before the increasing demands by the public that they be given the right to involve themselves in the making of decisions related to such issues.

Only passing reference need to be made to the Public Inquiries Act [70]. Under this Act, the federal government can hold public inquiries of any kind and could, if it so desired, hold public inquiries on environmental quality and environmental management issues. Whether or not such inquiries are held is entirely at the discretion of the politicians in whom we have vested the responsibility for administering that and many of our statutes. There is no legal basis for compelling governments to initiate and hold inquiries under this legislation, even if a citizen or citizens' group decided that an inquiry could meaningfully deal with one or other of the environmental issues presently of concern to Canadians. Further, one would not normally have a <u>right</u> to appear before any inquiry that is held.

In spite of the fact that the National Parks Act [71] does not require any form of public participation, a

program of public hearings was initiated, as a matter of policy, in 1968.

"The actual hearings were started in 1970 and to date hearings have been held on provisional master plans for nine national parks, plus the Lake Louise area. Approximately 3,000 people have attended the hearings, and we have received about 2,700 briefs and submissions. Frankly, the amount of interest in the hearings has far exceeded our most optimistic expectations.

Our procedure, briefly, is as follows:

1. Publication and distribution of a provisional master plan for a park, followed by a waiting period of approximately 60 days for study and preparation of briefs.

2. The public hearing at which briefs can be presented orally by any interested individual or organization. Written briefs can also be submitted before, during or within 30 days after the hearing.

3. Analysis of submissions; study by a task force or special working groups and, finally, publication of a report in which the Minister announces the decisions resulting from the hearing, including changes in the provisional master plans....

There are probably many factors behind the degree of success which we have realized with our public hearings. Three points come to mind, and they may be of interest to you:

a) The provisional master plans serve as a 'target' for the public. I suspect that we would drastically reduce the number of briefs if we simply asked for suggestions, rather than providing a preliminary plan for criticism.

b) The hearing process is very informal. There is no limitation on the individuals or organizations who participate, and those who are reluctant to speak in public can submit written briefs. There is no cross-examination as such during the hearing, and everything is

done to encourage the average person to participate.

c) Following the hearing, definite action is taken by the Department on the various recommendations, and all those who participate are advised of the decisions." [72]

DISCUSSION

It is easy to conclude that there is no legislation in Canada at either the federal or provincial level which, if it commits itself to citizen participation at all, provides for other than two kinds of participation. One kind of participation is in the form of advisory committees, which tend to have the following common characteristics. First of all, the minister to whom these committees are responsible generally has the discretion as to whether or not such a committee should be established. If the minister exercises his discretion and establishes a committee, then he has, for the most part, an unfettered discretion to decide who will sit on it. Finally, such committees tend to be advisory only, and the minister is not required to listen to, nor to be influenced by, any advice given.

The other typical statutory reference to public participation is one which either requires or otherwise creates the opportunity for the holding of public hearings. Where public hearings are held, they tend to have restricted terms of reference and, for the most part, are directed towards the regulation of activities with the view to assuring compliance with the law and the achievement of an identified standard of environmental quality. In some instances, an agency is statutorily required to hold hearings as a condition precedent to its making a decision. In other instances, these public hearings are held at the discretion of an agency which has been given an environmental management/pollution control decision-making responsibility. And, of course, wherever there is a discretion, whether it be vested in the responsible minister or the responsible administrative agency, there is, generally speaking, nothing that the citizen, in his capacity as a citizen, can do to compel the exercise of that discretion. Where the holding of a public hearing is compulsory, how the hearing is designed is at the discretion of the agency which will hold that hearing, and there is little that a citizen can do to require that an agency structure its hearings in any particular way, at any particular time, or in any particular place. It is, for example, entirely possible that an agency can require the submission of briefs as a condition precedent to one's speaking at a hearing; or limit the time available for a presentation; or prohibit the cross-examination of persons testifying by other persons, etc., etc. And, of course, no legislation specifies that the public shall have guaranteed access to the necessary information, guaranteed access to the necessary expertise, or guaranteed access to essential

funding. Without these and other such guarantees, there is a real danger that even those hearings that are required to be held will be unsatisfactory, from an effective and meaningful public participation point of view.

In identifying the typical kinds of public participation presently provided for by Canadian law and legally required, the kinds of hearings one can reasonably expect are identified by implication. No law requires that the public be involved in the determination of the broad policies relevant to environmental quality generally and resource management specifically. For example, nothing in the law requires that the federal government go to any member of the public before it grants a resource exploration permit or licence. On this one issue, while there is a legal requirement that there be hearings on an application for a certificate of public convenience and necessity before, for example, the MacKenzie Valley pipeline can be built, the issues before the National Energy Board on such an application will quite clearly not be issues of northern development and resource exploration, and shall only incidentally be related to the social and environmental impact of the proposed pipeline. And, again on this one issue, while a variety of interested persons will, no doubt, speak to the certificate application, the Board may, in its discretion, decide not to hear some persons, not to hear certain information, and may, in its discretion, decide to hold its hearings at places which necessarily restrict accessibility to the hearing. In any case, those interested persons who will be or who will want to be arguing with an environmental perspective are presently preparing their positions without any guaranteed access to information respecting the pipeline, without guaranteed access to experts, are few in numbers (albeit dedicated), and have very limited funds. Because the decision as to whether or not there should be a pipeline has been preceded by so many other decisions leading up to the application, tremendous pressures already exist in favor of the granting of the certificate. Even if the most liberal of hearings is held, these other, yet highly relevant, decisions have already been made, and to that extent also, effective public participation is not possible. And, of course, there is no legal requirement that the public be involved in the making of all relevant decisions. Its involvement is in only that decision to grant or withhold the certificate of public necessity and convenience.

These same characteristics exist elsewhere. In British Columbia, for example, it appears that many of the major decisions which precede the application for a

pollution permit are made without any requirement that the public be involved. A recent article has well documented a case showing similar characteristics. In this case, a hearing by the British Columbia Pollution Control Branch on the application of Utah Construction and Mining Company for a pollution permit took place 14 months after the original permit application.

> "During this period, the Company invested nearly $30,000,000 in clearing the site, constructing ocean loading facilities, and making a substantial start on the main mill buildings. In addition, the company had obtained approval of a reclamation plan from the Mines Branch as required by the Mines Regulation Act; a water licence to divert water for mill purposes from a nearby river from the Comptroller of Water Rights (whose branch is in the same department as the Pollution Control Branch); and a high voltage power service from the Crown Corporation, B.C. Hydro and Power Authority. Presumably, an approval was also obtained for construction of the wharf facilities from the Federal Department of Transport under the Navigable Waters Protection Act." [73]

In none of this part of the process were public hearings held, nor was there any requirement that public hearings be held. The public had no legal, no enforceable right to be consulted and participate, yet clearly each decision that was made in each stage leading up to the eventual pollution permit application was a decision which was very relevant to environmental quality and resource management concerns, and all of these decisions were legally made without recourse to the public.

These two examples (and certainly many more could be cited) point out that even the requirement for public hearings may be entirely inadequate because the larger number of highly relevant decisions may have already been made.

In spite of all these shortcomings in the public hearings process, provisions for hearings ought to be encouraged.

> "Such a process has both information feed-out and information feed-back consequences. Those who ultimately make the decisions will have before them a greater range of facts and identified interests

than they would otherwise consider. Undoubtedly, the making of a particular decision would become a more difficult task. However, once made, if honestly made, the decision would be guaranteed greater public support since, in the model being discussed, the public is to be involved in reaching that decision. At the same time, the public itself would become more aware of the truly complex nature of the problem which has to be managed or resolved, as well as of the law or laws available for this purpose. Too few people really appreciate how inter-related and complex many of our problems are. Not enough people understand the limits of a common law system which, by and large, reacts to, not in anticipation of, a problem. There is a need for more people who are sensitive to the futility of legislation that prohibits activities which, having a momentum of their own, are effectively incurable by man, in at least the short term. Even in the case of some of the simplest pollution problems, there is frequently little or nothing that can be done to stop an existing activity which offends us unless we are willing to close down the guilty factory, enjoin a municipality or require each of them to install expensive effluent treatment technology. To prohibit or strictly regulate according to law and thereby precipitate predictable and frequently unavoidable consequences or to tolerate violations of the law because of these same consequences is a decision which some administrative agencies face every day. It is not a decision they can nor should exclusively be required to make." [74]

Apart from the educational consequences and the identification for the decision-makers of the range of interests and community values to be weighed, public participation ministers to an often forgotten and overlooked agency ailment.

"The reason that public participation in pollution control administration may be necessary is that regulatory agencies generally have displayed a number of disturbing tendencies. ... They may become enmeshed in the bureacratic web created by the particular system of administration. They may tend to acquiesce in the elevation of permits or effluent fee receipts to the status of vested property interests. They may, as in several of the

major United States regulatory agencies, tend, as a result of prolonged contact through the regulatory process, to adopt the values and the biases of the industries thought to be regulated. An accord may then be reached and maintained through agency officials moving to the industry side. They may fail to strongly enforce their legislation, perhaps on the basis of policy directives from the Minister; but more likely simply through inertia and fear of generating political heat. The point is that the agency itself requires supervision and it cannot be expected to police itself. Nor can we expect the legislature to exercise continuing control over the agency, since it was to avoid this continuing responsibility that the agency was created in the first place." [75]

Another noted environmental law scholar in Canada is of the same opinion.

> "Examined from this lawyer's perspective, protection of the environment is seen as an interest that is entitled to representation in the administrative process, as much as from the economist's perspective [that] environmental protection is an interest that must be accounted for in the market place. The new insight for the lawyer is that this interest is now being recognized as an interest of individual citizens and groups of citizens, and not merely as the concern of resource users and governments. ... The argument is that the protection of the public interest exclusively by government agencies, departments, and officials is no longer adequate. This inadequacy signifies the tendency of government bureaucracies to become narrow and partisan in discharge of their responsibilities, and to lose sight of broader public goals and aspirations. The argument is that a mines department becomes a captive of the mining interests, an oil and gas conservation board of the oil and gas interests, and a food and drug directorate of the food processing and chemical interests." [76]

This concern is not peculiar to Canadian lawyers. In a recent article, a noted political scientist stated:

> "Studies of individual and organizational behaviour have demonstrated that the alternative policies in the programs that an individual or group considers relevant, depends upon the experience and interest of the individual or group; therefore, an administrative agency dominated by individuals trained in a particular profession or influenced primarily by one interest group (such as the petroleum industry) will tend not to view as relevant, alternative programs that would be considered desirable by an agency dominated by another profession or another interest group." [77]

While there seems to be general agreement that the admittedly needed administrative agency may become the captive of the person or persons it is to regulate and, as a consequence, the public's best interest will not necessarily be served, there is no consensus as to how this danger can best be avoided. It is hard not to be sympathetic to one non-lawyer's sentiments that too much law involves too many lawyers and thereby encourages an undesirable adversary process. In commenting on such processes, he said:

> "They are costly, time consuming, cumbersome, and often discriminate against the many interests which cannot afford the time or money to participate. In addition, the use of experts and reliance on procedures can be inhibiting to many people. Moreover, the adversary nature of the process encourages the participants to assume the role of the tough-minded lawyer probing the weaknesses in his opponent's arguments rather than to be fully responsible individuals who can recognize and be sensitive and sympathetic to the values and the perceptions of others. The inevitable results of such role playing is to create tensions and anxieties not only between us but within us as well." [78]

However, this opinion is more admirable than it is understanding of some of the realities of the social-political-legal-economic systems in which we live. Without the legal guarantees, one must rely on the goodwill of the decision-makers, and this has not, so far, proven to be a common commodity. As a consequence, there is a considerable body of literature calling for the establishment of legal rights which will guarantee that the public will be able to participate in making decisions. One writer, in calling for

a greater public role in supervising the agency's decision-making, suggested that:

> "This supervisory function could be achieved through political and legal activities initiated by concerned individuals and groups. To adequately perform this function, it is essential that they be accorded access to the enforcement process at two levels; first, to administrative proceedings conducted by pollution control agencies such as investigatory hearings or considerations of permit or effluent fee applications; and second, to the ordinary courts through public actions directly against polluters, or against the agency itself to force investigation or invocation of enforcement machinery." [79]

The same author, while recognizing that there have been rapid changes in federal and provincial legislation and administrative structures, nevertheless concluded that:

> "The need for public pressure on provincial environmental control administration and on polluters themselves, through private civil actions therefore continues unabated. But locus standi remains the gap to be bridged; and until this is done, either by legislation or judicial innovation, public spirited citizens will continue to find legal avenues of effective participation in environmental control decisions substantially closed." [80]

Another jurisprudential writer who recognizes the weaknesses in the public's right to be involved suggests needed changes.

> "... what the lawyer foresees are established procedures whereby a citizen who has a substantive environmental interest in any proposed government decision or action affecting the environment will have an effective opportunity to present his reasons and arguments for or against the proposal for consideration by those who will be deciding or acting. The ingredients of the procedure must include liberal definition of those citizens who can show a substantive environmental interest, full disclosure of all relevant data, government cooperation and assistance in carrying out

necessary investigations and tests, the opportunity to present the case at the appropriate decision-making level and in the appropriate time and sequence, the opportunity to see and, if desired, rebut proposing arguments, and the means of knowing what decision has been made. Such procedural requirements can be further elaborated, and are subject to the caveat that pragmatism and flexibility in the administrative process require that they be tailored to fit each decision-making role." [81]

Finally, one of Canada's most environmentally aware and active politicians is one of the opinion that:

"The Canadian experience has not yet made adequate room for the consideration of the environmental concerns of individual citizens and citizens within apostrophe organizations in the decision-making process. What is needed is legislation requiring the publication of reports on which government decisions are likely to be based, and requiring public hearings on such reports prior to any decision at cabinet level as to whether the project should proceed. In short, we need legislation similar to the U.S. National Environmental Policy Act, 1969." [82]

The author goes on and says:

"Such a law and such a procedure, which would afford realistic participation by the public prior to ministerial decision-making, would go far in giving the interest of citizens or citizens' groups an opportunity to participate in decision-making in the vitally important area of ecological management." [83]

Another writer, commenting on the National Environmental Policy Act, 1969, as a legislated framework for increasing public participation, concluded that:

"This one piece of legislation has revolutionized the federal administrative decision-making process in the United States. No longer can administrative agencies assume that they can easily escape public scrutiny of their activities. With the right of

both present and future generations to quality environment guaranteed by law, combined with the right of access to that information upon which decisions are being made, the public now has both the standing to challenge such decisions and some of the information which it needs to make that challenge more effective. It is to be emphasized, however, that the public does not have the right to negate decisions of an administrative tribunal which are made according to the requirements of the law. What the legislation does is provide a recognized legal basis for interested persons or groups to challenge both the decision and the agency making the decision on the grounds that the requirements of the law, as set out above, have not been adequately met or have not been met at all." [84]

In the same article, the author comments on the Michigan Environmental Protection Act of 1970 [85], which declares that the public at large has an interest in:

"... the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." [86]

This is the law which is frequently referred to as an Environmental Bill of Rights. It, like the National Environmental Policy Act, could be considered as a possible model for Canada. It too provides a vehicle for extending to the public an opportunity for playing a greater role and assuming a greater responsibility in the decision-making process. This is so because:

"That Act turns this recognized interest into a legal right and individuals may now initiate a legal action with a view to securing this protection. The individual need not wait on governments and administrative agencies. In addition, a person may challenge both governments and administrative agencies if that person has reasonable doubt that a decision made by them is in the best interests of the quality of the air, water, or other natural resources, or believes a decision to be inconsistent with the public trust therein." [87]

RECOMMENDATIONS

The range and kinds of decisions that have to be made concerning environmental quality make it difficult, if not impossible, to develop any one law or any one structure for public participation in the making of those decisions. However, a process different from the one we now have for decision-making ought to be considered. The following recommendations reflect this writer's perception of different kinds of relevant decision-making exercises and suggest one possible process.

Recommendation 1

There is no legal requirement that the public be involved in the formulation of policy and the development of policy guidelines relevant to resource management and environmental quality. Involvement of the citizens at this level of abstraction could be provided if the commitment to involve were there. PUBLIC POLICY HEARINGS could and should be required as part of the process of developing broad-brush environmental policies and providing policy guidelines. For example, public hearings for these purposes could be held to obtain extensive community input into the general and not unrelated issues of northern development, population, energy, resource ownership, national goals, etc.

Recommendation 2

Subsequent to the holding of public hearings on these or similar kinds of issues, the government or its administrative agencies could develop GREEN PAPERS which, once again, could be the subject of hearings or, at the very least, would be given wide publicity and distribution, with an invitation to people generally to comment and criticize. This two-way flow of information and ideas could lead eventually to a policy statement which could continue to be dynamic and flexible, at least until such time as a decision is made to develop programs which fall within the policy area.

Recommendation 3

These PROGRAMS would flow from the broad policy, would conform to the policy guidelines, and would be more definable and particular than the policies and policy

guidelines referred to above. Preparation of at least preliminary social and environmental impact assessments should be an integral part of program development. One characteristic of a program would be its regional scale. Another is that it would contemplate some kind of development activity; for example, a Federal Department of Regional Economic Expansion Program. It would be the responsibility of governments or government agencies to prepare these programs within the policy framework provided. Community consultation would be encouraged, if not required. But, it would be clearly understood that programs, once prepared, would be the subject of public debate, and would be susceptible to change as a consequence of this debate. This public debate could take the form of the holding of hearings on the programs in affected areas and, thereby, provide an opportunity for input from interested and/or affected persons. These hearings should be well and truly publicized and the impact assessments or statements should be available to the interested public a reasonable length of time before holding the hearings. In some instances, governments may want to consider fully supporting those persons who, for whatever reason, are against the program which is being proposed. In all cases, persons should have, as a matter of legal right, freedom of access to all information collected for the purposes of the program development. There should also be guaranteed assistance in the interpretation of information, guaranteed access to relevant expertise, guaranteed funding, and a reasonable time within which to prepare for effective participation.

Recommendation 4

PROJECTS would flow from these programs. Projects differ from programs in that they are more definitive than programs, and are more specific and limited in locality. They may be of varying degrees of magnitude. For example, the decision to construct or authorize the construction of a pipeline, airport, pulp mill or oil refinery would fall within this category. Once again, there could be provisions for hearings regarding the desirability of the project itself. The public involvement at this stage should be guaranteed, but who this public is could be more restrictively defined than above; e.g., limited to persons in the area within which the project will be developed. The hearings into project applications would provide an opportunity to raise and consider a variety of issues relevant to the project. They should not, and would not, consider only the pollution discharge standards, although

this could be considered, but as part of a more comprehensive deliberation.

Recommendation 5

At every level of decision-making, all decisions made must be made in such a manner that they are subject to public scrutiny. This may mean that REPORTS or DECISIONS which are made as a consequence of public hearings or other public participation exercises must contain reasons for reporting or deciding a particular way. The giving of written reasons would assist in making apparent the degree to which the public participation was meaningful and influenced the final report of decision. These reports and written decisions must also be public documents.

Recommendation 6

Whenever decisions have been made, there must be an AVENUE OF APPEAL from that decision. There are at least two reasons why appeals should be allowed. One is that the decision, in spite of public participation, may still be a wrong one and persons who allege so should have an opportunity to substantiate their allegation. Furthermore, a decision which was right at one point in time, and for one set of circumstances, may not be right with the passage of time and the emergence of a new set of circumstances. Where a once right decision is now obviously wrong, some avenue should be open so that persons seeking change can command a forum within which their, and other, relevant arguments can be heard. It is entirely conceivable that such initiatives be available and be utilized to deal with issues of policy, policy guidelines, programs or specific projects.

CONCLUSION

The following quotation will conclude this report:

"The argument for public participation in environmental decision-making is not a new one. Having laws spelling out the rights of the public to be involved would be new. In those laws presently providing for public participation, such participation is so loosely defined that it is, at best, sincere tokenism. Yet, it is fundamental to any democratic system that a person be given a right to participate in making at least those decisions which affect his life. No decisions affect his life more than do those related to environmental quality. If the public is ever to understand the complexity of environmental problems and, specifically, the interrelationship of pollution and other social problems; if the administrative agencies are ever to be successful in the discharge of those responsibilities which are increasingly being delegated to them; if the interests of both present and future generations are to be respected; then the responsibility for the making of decisions must be shared. The public must have a right to participate in the making of those decisions. Furthermore, that right must be guaranteed and meaningfully defined by the law.

The challenge now is twofold. First, there must be a commitment to guaranteeing these required rights. Second, there must be effort spent in defining these rights so that exercise of them will be meaningful. If this means that the public must be guaranteed access to information, then have the law guarantee it. If it requires that the public have access to expertise and funds, then have the law provide it. If it requires that the decision-making process be opened up to public scrutiny, then have the law open it up. If it requires that decisions be susceptible to legal challenge, then the law must provide a legal basis for it." [88]

FOOTNOTES

1. John Young and Co. v. The Bankier Distillery Co. et al. (1893) A. C. 691, p. 698.

2. See, for example, The Churchill Diversion, by I. A. McDougall, published by Policy and Planning Directorate, Environment Canada, September, 1971. Beginning at p. 39. This paper comments on the status of the riparian rights doctrine in the various Canadian jurisdictions.

3. McKie et al. v. The K.V.P. Co. Ltd. (1948) 3 D.L.R. 201.

4. McKie et al. v. The K.V.P. Co. Ltd. (1948) O.W.N. 812.

5. McKie et al. v. The K.V.P. Co. Ltd. (1949) S.C.R. 698.

6. Lakes and Rivers Improvement Act, Ont. Stat. 1949, c. 48, s. 6.

7. K.V.P. Co. Ltd. Act, 1950, Ont. Stat. 1950, c. 33.

8. Burgess v. City of Woodstock (1955) 4 D.L.R. 615.

9. Stephens v. Village of Richmond Hill (1955) 4 D.L.R. 572, p. 574.

10. Ibid., p. 575.

11. Supra, footnote 9, at p. 578-79.

12. Stephens v. Village of Richmond Hill (1956) O.R. 88.

13. Ont. Stat. 1956, c. 71, s. 6(1).

14. Ont. Stat. 1956, c. 62.

15. Russell Transport Ltd. v. Ontario Malleable Iron Ltd. (1952) 4 D.L.R. 719.

16. Brown v. Canada Paper Co. (1922) 63 S.C.R. 243.

17. Ibid., p. 248.

18. Newman et al. v. Conair Aviation Ltd. et al. (1972) 33 D.L.R. (3d) 474.

19. The Law of Torts, 3rd ed., J. G. Fleming, Carswell Co. Ltd. 1965, p. 111.

20. The Queen v. Forest Protection Ltd. (1961) Ex. C.R. 263.

21. Campbell v. Kingsville (1929) 4 D.L.R. 772.

22. Rylands v. Fletcher (1868) L.R. 3 E & I App. 330.

23. Salmond on Torts, 14th ed., p. 441.

24. Supra, footnote 19.

25. A. G. for Canada v. Ewen & Munn (1893) 3 B.C.R. 468.

26. Hickey et al. v. Electric Reduction Co. of Canada Ltd. (1972) 21 D.L.R. (3d) 368.

27. Defending the Environment, J. L. Sax, Alfred A. Knopf, New York, 1971, p. 115.

28. Common Law Remedies and Protection of the Environment, J. C. Jurgensmeyer, U.B.C. Law Review, Vol. 6, No. 1, June, 1971, p. 215, quote at p. 233.

29. Ibid., p. 236.

30. Environmental Protection Through the Common Law, P. S. Elder, Western Ontario Law Review, 1973, p. 107.

31. Environmental Litigation, V. J. Yannacone Jr., Proceedings of the Section of Insurance, Negligence and Compensation Law, A.B.A. 1971.

32. Green v. The Queen in Right of Ontario et al. (1973) 34 D.L.R. (3d) 21.

33. Environment and Land Use Act, S.B.C. 1971, c. 17.

34. Land Commission Act, S.B.C. 1972/73, c. 46.

35. Green Belt Protection Fund Act, S.B.C. 1972, c. 24.

36. Ecological Reserves Act, S.B.C. 1971, c. 16.

37. Pollution Control Act, 1967, S.B.C. 1967, c. 34.

38. Letter from R. A. V. Jenkins of the B.C. Department of Lands, Forests and Water Resources, Oct. 12, 1973.

39. See Environment and Land Use Committee press release of May 4, 1973.

40. S.A. 1971, c. 16.

41. S.A. 1971, c. 17.

42. Letter from W. J. Yurko, Alberta's Minister for the Environment, dated July 10, 1973.

43. R.S.A. 1970, c. 125.

44. Supra, footnote 42.

45. Supra, footnote 42.

46. The Participatory Environment in Alberta, P. S. Elder, unpublished.

47. Energy Resources Conservation Act, S.A. 1971, c. 30.

48. Supra, footnote 42.

49. Department of the Environment Act, S.S. 1972, c. 31.

50. The Air Pollution Control Act, R.S.S. 1965, c. 267.

51. Water Commission Act, R.S.M. 1970, c. W50.

52. Clean Environment Act, S.M. 1972, c. C130.

53. Environmental Management and Public Participation in Manitoba, C. Booy, unpublished.

54. Environmental Protection Act, 1971, as amended S.O. 1971, c. 86.

55. The Need for Public Participation in Environmental Planning, by the Canadian Environmental Law Research Foundation, unpublished.

56. Legislature of Ontario Debates, Fourth Session of the Twenty-eighth Legislature, No. 83, Wednesday, June 30, 1971, p. 3455.

57. Environment Quality Act, S.Q. 1972, c. 49.

58. See Eco/Log, Vol. II, Quebec 10.273-10.274, explanatory note at p. 25.

59. Ibid.

60. Environmental Protection Act, S.N.S. 1973, c. 6.

61. Statement by the Honourable C. M. Bagnell, N.S. Minister of the Environment, May 14, 1973.

62. Clean Environment Act, S.N.B. 1971, c. 3.

63. Letter from G. W. N. Cockburn, Minister, Fisheries and Environment, New Brunswick, dated July 16, 1973.

64. Environmental Control Commission Act, P.E.I.A. 1971, c. 33.

65. Clean Air, Water and Soil Authority Act, S.N. 1970, No. 81.

66. Canada Water Act, R.S.C. 1970, 1st Supp., c. 5.

67. Clean Air Act, Stat. Can. 1970-71-72, c. 47.

68. Northern Inland Waters Act, R.S.C. 1970, 1st Supp., c. 28.

69. National Energy Board Act, R.S.C. 1970, Vol. V, c. N-6.

70. Public Inquiries Act, R.S.C. 1970, Vol. IV, c. I-13.

71. National Parks Act, R.S.C. 1970, Vol. V, c. N-13.

72. Letter from J. M. Gordon, Senior A.D.M., Parks Canada, dated August 28, 1973.

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74. Public Participation: A Right to Decide, C. G. Morley, The Allocative Conflicts in Water-Resource Management, published by the Agassiz Center for Water Studies, University of Manitoba, 1974.

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76. Legal Responses to Pollution Problems - Their Strengths and Weaknesses, A. R. Thompson, Natural Resources Journal, Vol. 12, April 1972, No. 2.

77. Institutional Arrangements for Dealing with the Environmental Effects of Energy Production and Use, I. K. Fox, 1972, unpublished paper.

78. Reflections on a Planning Failure: Ontario Hydro's Proposed Nanticoke to Pickering Transmission Corridor, J. Graham, unpublished paper, March 1973.

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80. Ibid., p. 191.

81. Supra, footnote 76, p. 240.

82. Government and the Environment: A Need for Public Participation, D. Anderson, U.B.C. Law Review, Vol. 6, No. 1, June 1971, p. 111.

83. Ibid., p. 114.

84. Supra, footnote 74, p. 14.

85. Mich. Comp. Law, Amendment 691, 1201 et seq. as amended.

86. Ibid., s. (2).

87. Supra, footnote 74, p. 14.

88. Supra, footnote 74, p. 16.