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Volume 4

Number 3 *Volume 4, Number 3, 1983 (Symposium:  
Acid Rain and International Environmental Law)*

Article 6

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1983

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### Recommended Citation

Mulvaney, J. Neil (1983) "Participation by Ontario in U.S. Administrative and Judicial Proceedings," *NYLS Journal of International and Comparative Law*: Vol. 4 : No. 3 , Article 6.

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# PARTICIPATION BY ONTARIO IN U.S. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

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## I

Transboundary pollution is posing some difficult questions for the law: Do foreign individuals or government agencies have the right to participate in those administrative proceedings where the decision reached can result in transboundary pollution or affect the level thereof? If so, can or should the statutory decisionmakers take into account extraterritorial evidence and consequences in making their decisions? Should principles of international law be considered? Does the foreign party or agency have a right to initiate or intervene in related judicial proceedings?

From a purely scientific perspective, the obvious answer is yes because pollution recognizes no national boundaries. The air mass which passes over Ohio today may be soon over Ontario. The "airshed"<sup>1</sup> is common to much of the United States and Canada. Pollution control must take those transboundary movements into account if it is to be effective. Persons called upon to make decisions affecting domestic air or water quality will require information from other jurisdictions and, ideally, should consider the extraterritorial as well as the domestic consequences of any proposed course of action.

Since 1974 the Scandinavian countries have addressed these problems with a convention based on the principle of giving the same consideration to external impacts as to internal impacts.<sup>2</sup> This provides a clear direction to administrative tribunals to consider the extraterritorial consequences of their actions and to provide open access to the decisionmaking process. Although this method appears to be working well for these countries, alternative solutions are available.

In response to the growing acid rain problem, Ontario, in March of

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1. An airshed is an area of varying size that is dependent on a single air mass and that is uniformly affected by the same sources of air pollution. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 41 (2d ed. 1980).

2. See, e.g., Nordic Convention on the Protection of the Environment, Feb. 19, 1974, reprinted in 13 I.L.M. 591 (1974) and Agreement Concerning Protection of the Sound Oresund from Pollution, Apr. 5, 1974, Denmark-Sweden, 962 U.N.T.S. 199.

1981 commenced a series of interventions in the United States.<sup>3</sup> In order to carry out these initiatives, numerous legal issues had to be addressed.

To understand the context in which these legal issues were raised, we need to know something about the phenomenon of acid deposition. Acid rain<sup>4</sup> has its origin in the emission of sulphur and nitrogen compounds into the atmosphere as a result of man's industrial activities and his use of transportation vehicles. These emissions originate generally from the combustion of fossil fuels, such as coal and oil, from power generating plants, ore smelting, petroleum refining, industrial furnaces and from vehicles of all kinds.<sup>5</sup>

Sulphur and nitrogen compounds are transported by winds and air currents over long distances with chemical transformations occurring en route. These chemical compounds return to the earth in the form of precipitation. Acid rain ultimately affects aquatic life in lakes which have granite or quartzite geology rather than limestone. These lakes have little buffering capacity and are therefore highly sensitive to acidity. This condition exists in Canada's Precambrian shield, including Muskoka and Haliburton lakes.<sup>6</sup>

Three provisions of the United States Clean Air Act<sup>7</sup> require care-

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3. See 11 ENV'T REP. 1937 (1981) (Address by J. Walter Giles, senior assistant minister for the Ontario Ministry of the Environment to the Ohio Scientific Advisory Task Force on Acid Rain and remarks by Edward Piche, director of the Acidic Precipitation in Ontario Study).

4. Acid rain begins with emissions of sulphur and nitrogen oxides, which are then converted into sulphates and nitrates. Acid rain occurs when these sulphates and nitrates are transported over long distances, converted into sulphuric and nitric acids during this transport, and returned to earth in moist form, mostly in raindrops or snowflakes. J. CARROLL, *ACID RAIN: AN ISSUE IN CANADIAN-AMERICAN RELATIONS* 3 (1982). Three elements are necessary for airborne pollutants to exist and form acid rain: (1) an emission source, usually a collection of sources, from a large industrialized area, although single quite large sources are sufficient to create long-range transport problems; (2) the specific meteorological conditions that enable the pollutants to be carried over long distances and provide the necessary time and atmospheric conditions for the transformations to take place; and (3) a region of vulnerability, namely, one with insufficient buffering capacity, i.e., natural protection. *Id.* at 4.

5. Acid rain occurs when sulphur dioxide and nitrogen oxides oxidize and then combine with cloud moisture to form mild solutions of sulphuric and nitric acids. The sulphur dioxide comes from the smokestacks of utility plants or smelters; the nitrogen oxides come primarily from smokestacks and truck exhaust. Utility and industrial plants in the United States produce about 30 million tons annually. Canada's smelters and plants contribute another 5.5 million tons. Kelly, *What We Know*, CANADA TODAY, Feb. 1981, at 2.

6. See HOUSE OF COMMONS, CANADA, REPORT OF THE SUB-COMMITTEE ON ACID RAIN OF THE STANDING COMMITTEE ON FISHERIES AND FORESTRY, STILL WATERS, at 11-13.

7. 42 U.S.C. §§ 7401-7642 (Supp. V 1981).

ful consideration as those provisions are relevant to the issue of acid rain. The first is section 110 which deals with the establishment and amendment of state implementation plans (SIPs).<sup>8</sup> These plans can be highly specific and, at least for most power plants, set a limit in pounds of SO<sub>2</sub><sup>9</sup> per million Btu's. Section 126 of the Act<sup>10</sup> is entitled "Interstate Pollution Abatement." This provision outlines a mechanism which could lead to a revision of SIPs to prevent sources from within a state from significantly contributing to levels of air pollution in excess of the national ambient air quality standards outside the state. Section 115<sup>11</sup> is entitled "International Air Pollution" and deals with ways to revise an SIP in order to prevent or eliminate international pollution that endangers the public health or welfare in a foreign country. In summary, the SIP procedure giving the states a strong role is basic to all three provisions relevant to acid rain. With the exception of section 115, these provisions are all tied to achievement of the national air quality standards set under the Act.

Early in 1981, the Ministry of the Environment, Province of Ontario (the Ministry) learned of eighteen power plants distributed through six states which were seeking to amend the SIPs and relax the level of allowable SO<sub>2</sub> emissions. Many of these proceedings were at an advanced stage, hearings already having been held at the state level. The eighteen plants were not the result of any process of selection. They were simply caught in the administrative net waiting for a decision from the administrator. On March 12, 1981, the Ministry filed with the Environmental Protection Agency (EPA) a submission opposing any SIP relaxations which could lead to increases in allowable emissions from the eighteen plants in question.<sup>12</sup>

One of the issues raised in that document was Ontario's right to be heard in these administrative proceedings.<sup>13</sup> The first legal issue I wish to address is the right of a foreign citizen or government agency to participate in proceedings before a domestic administrative agency. There was no question of further hearings being held. The Ministry was seeking to have its written submissions considered by the EPA

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8. *Id.* § 7410.

9. SO<sub>2</sub> is the chemical formula for sulphur dioxide.

10. 42 U.S.C. § 7426 (Supp. V 1981).

11. *Id.* § 7415.

12. See MINISTRY OF THE ENVIRONMENT, THE PROVINCE OF ONTARIO, A SUBMISSION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OPPOSING RELAXATION OF SO<sub>2</sub> EMISSION UNITS IN STATE IMPLEMENTATION PLANS AND URGING ENFORCEMENT (1981). On March 27, 1981, the Ministry's submissions were expanded to include two plants in the Cleveland area operated by the Cleveland Electric Illuminating Company. *Id.*

13. *Id.*

when it reached its decision concerning the eighteen power plants.

Because current levels of deposits were already too high to protect sensitive lakes over the long term, Ontario stood to be adversely affected by a decision granting the relaxed standards requested. As there was no specific assurance of status provided in the United States Clean Air Act, the Ministry looked elsewhere for relief. The United States Administrative Procedure Act,<sup>14</sup> United States judicial decisions,<sup>15</sup> section 115 of the Clean Air Act<sup>16</sup> and international law were all cited.<sup>17</sup> A section in the Administrative Procedure Act gives the right to "an interested person" to appear before an agency regarding the determination of an issue.<sup>18</sup> The Ministry relied on a judicial decision where the Administrative Procedure Act was held not to be complied with in a matter concerning the approval of an SIP because the administrator failed to take comments from interested parties.<sup>19</sup>

The Ministry relied on decisions rendered by United States appellate courts which permitted access by Mexican companies to proceedings before the United States Federal Power Commission.<sup>20</sup> The Mexican companies had asserted that the granting of a certificate authorizing the export of natural gas to Mexico affected them due to their position as a competitor of the company to which the certificate was granted. In each case, the court applied the test of whether the Mexican company could be adversely affected by the administrative procedure in question.<sup>21</sup>

The question of access was argued on the basis of general principles of international law. The Ministry contended that the principle that every state has a duty to prevent its citizens from committing air pollution injury against other states,<sup>22</sup> should be implemented by ap-

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14. 5 U.S.C. §§ 500-576 (1982).

15. See *infra* note 20.

16. 42 U.S.C. § 7415 (Supp. V 1981).

17. See generally Stockholm Declaration on the Human Environment, U.N. Doc. A/Conf. 48/14 (1972); Trail Smelter Case (U.S. v. Can.), 3 U.N. Rep. Int'l Arb. Awards 1905 (1949); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2d. ed. 1973); I. VAN LIER, ACID RAIN AND INTERNATIONAL LAW (1981).

18. 5 U.S.C. § 555(b) (1982).

19. See *Buckeye Power v. E.P.A.*, 481 F.2d 162 (6th Cir. 1973).

20. See *Cia Mexicana de Gas, S.A. v. Federal Power Comm'n*, 167 F.2d 804 (5th Cir. 1948); *Juarez Gas Co., S.A. v. Federal Power Comm'n*, 375 F.2d 595 (D.C. Cir. 1967).

21. *Cia Mexicana de Gas, S.A. v. Federal Power Comm'n*, 167 F.2d at 805-06; *Juarez Gas Co., S.A. v. Federal Power Comm'n*, 375 F.2d at 597.

22. See *Trail Smelter Case (U.S. v. Can.)*, 3 U.N. Rep. Int'l Arb. Awards 1905 (1949). In that decision Canada was held liable for damage done to privately owned farmland in the State of Washington by the operation of a smelter in British Columbia. The decision established the principle that a "State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction. . . ." *Id.* at 1947. See

propriate procedural requirements. Among these requirements should be recognition of the right of access by foreign parties to the administrative proceedings which may directly impact on them.<sup>23</sup>

Ontario's right to comment in the EPA proceedings was not contested. The new Administrator of the EPA acknowledged receipt of the submission. In its July 22, 1981 decision regarding the two plants in Cleveland, Ohio, the EPA responded to Ontario's comments at some length, thereby acknowledging Ontario's right to participate.<sup>24</sup>

A further proceeding in which Ontario sought to participate was conducted pursuant to section 126 (Interstate Pollution Abatement) of the United States Clean Air Act.<sup>25</sup> This provision is intended to provide a remedy for states affected by pollution from other states. It was clear that action under the section could not be initiated by Ontario, nor was the section intended to confer any benefit on areas outside the United States.<sup>26</sup> Ontario had conceded this and did not rely on the section in its opposition to the SIP amendments. However, petitions under section 126 were initiated by New York and Pennsylvania, which cited a number of sources in several midwestern states. The EPA gave notice of public hearings in the Federal Register on May 1, 1981.<sup>27</sup> The notice stated that the "EPA currently has no national ambient air quality standards for acid deposition or sulphates and, therefore, has no authority under Section 126 to regulate emissions solely because of their impacts on acid deposition or sulphates."<sup>28</sup> The EPA, therefore, requested that the parties presenting testimony refrain from basing their arguments on the cause and effects of acid deposition. In May, 1981, attorneys for Ontario filed a request with the EPA that the Agency expand the scope of the hearings on interstate air pollution abatement to include issues regarding international air pollution. In

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also Stockholm Declaration on the Human Environment, Principle 21, U.N. Doc. A/Conf. 48/14 (1972), which states:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. . . .

*Id.*

23. Consistent with this theory, the States of California and Alaska had previously been allowed to intervene in hearings before the National Energy Board of Canada regarding a natural gas pipeline.

24. 46 Fed. Reg. 37,645 (1981).

25. 42 U.S.C. § 7426 (Supp. V 1981).

26. *Id.* (The section refers to "Any state or political subdivision").

27. 46 Fed. Reg. 24,602 (1981).

28. *Id.* at 24,603.

that document, Ontario proposed an approach that would allow the review of interstate and international pollution to proceed in an integrated manner. At the opening of the hearings on June 18, 1981, the chairman of the hearing panel stated:

Additionally, we have been requested by the Province of Ontario, to expand the hearing to consider international transport. The Agency has decided not to expand the hearing for this purpose. Ontario, however, will be making a presentation tomorrow trying to provide some additional information that will help the Administrator make the decision on the grounds of the 126 petition filed by New York and Pennsylvania. We will not expand the hearing to cover international transport.<sup>29</sup>

Ontario participated in the hearing, however, with a presentation extending over several hours, led by its Deputy Minister and including testimony from several scientists. The hearing was conducted by a panel of senior EPA personnel, with the questioning of witnesses conducted only by the panel and the chairman.

Within the constraints of the terms of reference, Ontario sought to support the positions of New York and Pennsylvania. At the same time, Ontario sought to persuade the EPA to rethink the current regulatory mechanisms and to take into account multiple sources and the issue of long-range transport in making decisions under the Clean Air Act.<sup>30</sup> Ontario's active participation in the hearing process was not contested.

Ontario has also intervened without contest in the SIP amendment process at the state level, in Indiana, Michigan and New York. In October 1981, the Province participated in a hearing held by the Indiana Air Pollution Control Board concerning a relaxation of the SIP for the Clifty Creek Plant.<sup>31</sup> In June 1982, Ontario participated in hearings by the Michigan Air Pollution Control Commission in opposition to the Detroit Edison request to delay bringing its Monroe Plant into compliance with the State of Michigan "1% or Equivalent Sulphur in Fuel"<sup>32</sup> rule. In December 1981, the Province of Ontario and Canadian individuals and groups made submissions at a legislative public state-

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29. See ENVIRONMENTAL PROTECTION AGENCY, IN RE INTERSTATE AIR POLLUTION ABATEMENT PROCEEDINGS UNDER § 126 OF THE CLEAN AIR ACT, No. A-81-09 (1981).

30. 42 U.S.C. §§ 7401-7642 (Supp V 1981).

31. For similar attempts to revise the Indiana State Implementation Plan (this time before the Environmental Protection Agency by the State of New York), see *In re Proposed Revision to the Indiana State Implementation Plan: Revised Sulfur Dioxide Control Strategy for Vigo County, Indiana* (EPA).

32. MICH. AIR POLLUTION CONTROL COMMISSION GEN. RULES § 401 (1980).

ment hearing at Youngstown, New York, concerning a modification of a state pollutant discharge elimination system (SPDES) permit for a firm discharging into the Niagara River.<sup>33</sup>

The question more difficult than foreign access to American administrative proceedings is whether these proceedings permit or require the EPA to take into account impacts outside the United States in making their decision. This question was raised in the proceedings under section 126 of the Clean Air Act only by Ontario's proposal to expand the scope of the hearings to include transboundary pollution. As shown above, the EPA rejected that motion. Ontario continued to participate in the hearings by providing evidence relevant to the extent that it dealt with or clarified the impacts on New York or Pennsylvania. In the SIP amendment proceedings under section 110 of the Clean Air Act, however, the issue of relevance of impacts on Ontario was more directly confronted.

One United States federal appellate court opinion appeared to open the door somewhat. In *Juaraz Gas Company, S.A. v. Federal Power Commission*<sup>34</sup> the Court of Appeals for the District of Columbia Circuit stated:

We fully agree that it is for the authorities of Mexico, and not the Commission, to determine what franchise rights are to be granted across the border. But it is for the Commission to determine what it should authorize on this side of the border, and this determination depends to some extent on the situation across the border when the matter involves the exportation of gas.<sup>35</sup>

In its submission filed in March 1981, Ontario relied on three arguments to support its view that the EPA should take into account impacts on Ontario and other provinces in determining whether an SIP should be revised under section 110. First, Ontario cited an accord in the nature of a Memorandum of Intent concerning transboundary air pollution signed by Canada and the United States on August 5, 1980.<sup>36</sup>

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33. Ontario's participation in the New York hearing was permitted pursuant to § 753.6 of the New York regulations on the state pollutant discharge elimination system. 6 NYCRR § 753.6 (1980). "Any affected country, or province," or "any person or group of persons" may petition in writing for a public hearing. *Id.* "The commissioner shall hold a hearing if he determines that there is a significant public interest and reason for holding the hearing." *Id.*

34. 375 F.2d 595 (D.C. Cir. 1967).

35. *Id.* at 598.

36. Memorandum of Intent Between the Government of the United States of America and the Government of Canada Concerning Transboundary Air Pollution, Aug. 5, 1980, T.I.A.S. No. 9856, reprinted in 20 I.L.M. 690 (1981).



Under the terms of the accord, both parties undertook to take certain interim actions pending negotiation of an overall agreement. The connection between the Memorandum of Intent and the administrative proceedings was solidified by the fact that the Memorandum of Intent had been signed for the United States by the then Administrator of the Environmental Protection Agency. The implication was that this official was to carry out statutory duties under the Clean Air Act in a manner consistent with the obligations set out under the Memorandum of Intent, at least to the extent permitted by the statute.

Ontario's second argument was based on international legal principles, particularly those established in the report of the arbitral tribunal in the Trail Smelter arbitration.<sup>37</sup> In that case, a smelter located in Trail, British Columbia was emitting sulphur dioxide that caused damage to areas in the State of Washington. Both the United States and Canada referred the matter to an arbitral tribunal. The decision of that tribunal established the principles governing transboundary air pollution. The principle, which the tribunal indicated was based on decisions of the Supreme Court of the United States,<sup>38</sup> stated that:

[U]nder the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>39</sup>

The invocation of general principles of international law and the commitments set out in the Memorandum of Intent both relied on material outside the four corners of the Clean Air Act. The third argument presented by Ontario was within the scope of the Act itself. It turned on section 115 of the Clean Air Act which deals with international pollution abatement.

That section provides that where the Administrator of the Agency, on the basis of a report from a duly constituted international agency, has reason to believe that any air pollutant emitted in the United States causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country, the Administrator shall give formal notification thereof to the Governor of the state in which such emissions originate.<sup>40</sup> This can result in

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37. 3 U.N. Rep. Int'l Arb. Awards 1905 (1949). See *supra* note 22.

38. *Id.*

39. *Id.*

40. 42 U.S.C. § 7415(a) (Supp. V 1981).

SIP amendments which could eliminate the problem.<sup>41</sup> The benefit of the section, however, extends only to a foreign country which has passed reciprocal legislation conferring the same rights on the United States and its citizens.<sup>42</sup> In January 1981, Douglas M. Costle, then Administrator of the EPA, issued a statement which included the appropriate findings to initiate proceedings under section 115.<sup>43</sup> Relying on a report of the International Joint Commission, a duly constituted international agency, he found that acid deposition results in significant harm in both the United States and Canada and that emission sources in both countries contributed to the problem through the long-range transport of air pollution. The Administrator also concluded that new Canadian legislation enacted in December 1980 provided Canada with ample authority to give the United States essentially the same rights as section 115, therefore fulfilling the requirement of reciprocity.<sup>44</sup>

Ontario, therefore, argued that the allowance of any increased emissions in the relaxation proceedings would be inconsistent with the obligations of the Administrator under section 115.<sup>45</sup> The Ministry took the position that in order to carry out the obligation imposed on section 115, the Administrator must first evaluate in a systematic way, utilizing the best information available, the total impact of the proposed increases on Ontario and other parts of Canada.

The EPA's response to Ontario's position was set out in a ruling published in the Federal Register on July 22, 1981.<sup>46</sup> This ruling concerned two plants operated by the Cleveland Electric Illuminating Company. With respect to Ontario's claim that the Memorandum of Intent<sup>47</sup> places affirmative obligations upon the EPA, the ruling states:<sup>48</sup>

The U.S. has honored the intent of the [Memorandum] by controlling its SO<sub>2</sub> emissions to the extent allowed by the provisions of domestic law. In this rulemaking EPA has concluded that the current emission limits are adequate to protect and maintain the [national ambient air quality standards.] There-

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41. *Id.* § 7415(b).

42. *Id.* § 7415(c).

43. 11 ENV. REP. 1761 (1981). See *infra* notes 50-54 and accompanying text for a discussion of Ontario's reliance on the Costle statement as a basis for intervention under § 110 of the Clean Air Act.

44. 11 ENV. REP. 1761 (1981).

45. 42 U.S.C. § 7415(a) (Supp. V 1981).

46. 46 Fed. Reg. 37,642 (1981).

47. See *supra* note 36.

48. 46 Fed. Reg. 37,642 (1981).

fore it has met its obligations under the [Memorandum] to enforce domestic law.<sup>49</sup>

The EPA, therefore, did not reject the idea that affirmative obligations could be placed upon it by the Memorandum of Intent, but rather, took the position that the intent of the agreement was honored by a ruling which assured meeting the national air quality standards, even though these standards are designed to protect local air quality.

As for Ontario's argument based on the Trail Smelter principle regarding transboundary pollution, the EPA noted that Ontario based its claim upon the cumulative effects of total SO<sub>2</sub> emissions from the Midwestern and Northeastern United States, and not specifically upon emissions from the two plants that were the subject of the ruling. It was noted that Ontario had an opportunity to submit its views on the cumulative interstate effects at the hearing under section 126. This ruling, however, neglected to note that in the section 126 proceedings, Ontario was limited to providing evidence in support of New York and Pennsylvania.

Finally, the EPA determined that Ontario's claim was not appropriately raised in the context of the SIP revision. Its position was that until formal notification is given by the Administrator to states concerned under section 115, the section does not require the EPA to consider transboundary air pollution in approving an SIP revision. Thus, although the arguments presented by Ontario were never formally rejected, EPA decided that the issues concerning international pollution would not be addressed in the proceedings.

## II

The issue of access to the courts by a foreign individual, group or government agency in proceedings involving judicial review of an administrative action will now be addressed. On March 17, 1981, proceedings were initiated by the State of Ohio and two Ohio power companies in the United States Court of Appeals for the District of Columbia.<sup>50</sup> The petitioners asked that the court review and set aside the action of the respondent, the Administrator of the EPA, contained in the January 1981 Costle statement.<sup>51</sup> The proceedings were important to Onta-

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49. *Id.* at 37,645.

50. *Ohio v. E.P.A.*, No. 81-1310 (D.C. Cir. 1981), noted in 4 INT'L ENV'T REP.: CURRENT REP. (BNA) 1075 (1981).

51. This ruling by the Environmental Protection Agency stated that § 115 of the Clean Air Act "may provide for the control of long-range transport of air pollution and that the agency 'may be justified in requiring certain U.S. states to reduce air pollution that contributes to the Canadian acid rain problem.'" 11 ENV. REP. 1761 (1981).

rio because of its reliance on the Costle statement as a basis for its intervention under section 110 of the Clean Air Act. Because of the statement's possible future importance in the acid rain problem and, further, because of its uncertain legal significance, petitioners filed a protective appeal. It appeared that Ontario and EPA took very different views as to the significance of the Costle statement, and it was unclear whether the former Administrator's viewpoint would be vigorously defended by the Agency.

Ontario, therefore, moved for leave to intervene in the proceedings and called upon the Administrator to file a record pursuant to the rules. The grounds for intervention were that Ontario was a party protected and benefited by the Agency action sought to be reviewed and might be greatly prejudiced if the action were voided. It was clear that Ontario had an interest that was not duplicated by any of the other parties.

The State of Ohio promptly filed a document stating that it did not oppose the intervention of the Province of Ontario.<sup>52</sup> The EPA, on the other hand, moved that the court dismiss the petitions because the Costle statement, characterized as a press release, is not a "final Agency action." The EPA also proposed that the court delay ruling on Ontario's motion for leave to intervene until thirty days after the court ruled on the EPA's motion to dismiss the petitions. The EPA was, therefore, silent on its view as to Ontario's status to intervene. Ontario filed a response to the EPA's motion stating that, if granted, the EPA's request would deprive Ontario of a meaningful opportunity to respond to the EPA's motion to dismiss the action. Ontario urged the court to require the EPA to file its record, and requested the court to grant Ontario status as an intervenor as promptly as possible. In the same document, Ontario made it clear that it strongly disagreed with the suggestions made by the EPA that no Agency action of any legal significance had occurred simply because that action was announced by press release rather than by publication in the Federal Register.

Notwithstanding its silence as to Ontario's status, the EPA entered into negotiations with Ontario resulting in a stipulation, with both parties agreeing that the action brought by the petitioners was not ripe for judicial review and that it should be dismissed by the court without issuance of an opinion. The stipulation was without prejudice

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52. Ontario's status to intervene was opposed by the two electric companies. Their opposition was based not on extra-territoriality, but rather, on the fact that Ontario was not a "person" within the definition of the appropriate rule. See *Ohio v. E.P.A.*, No. 81-1310 (D.C. Cir. 1981), noted in 4 INT'L ENV'T REP.: CURRENT REP. (BNA) 1075 (1981).

as to future proceedings, but for the present case, it became unnecessary for the court to rule on Ontario's motion to intervene.

In October 1981, the court, in a brief order, dismissed the petitions.<sup>53</sup> The court considered both Ontario's motion for leave to intervene and the stipulation entered into by the EPA and Ontario. Under these circumstances, the court denied Ontario's motion to intervene "as moot."<sup>54</sup>

An important case regarding access to the courts is *The Wilderness Society, et al. v. Rogers C.B. Morton, Secretary of the Interior et al.*<sup>55</sup> The case concerned the application of a Canadian citizen and a Canadian environmental organization to intervene in litigation aimed at testing whether the Secretary of the Interior had complied with the procedures of the National Environmental Policy Act<sup>56</sup> prior to deciding whether to issue a permit for the Trans-Alaska pipeline. The court found that the position of the Canadian environmental organization was sufficiently antagonistic to the positions of United States environmental organizations, to require the granting of an application for leave to intervene.<sup>57</sup>

A ruling by the United States District Court for the Western District of New York is of interest in the area of access.<sup>58</sup> The proceedings involved a suit by the EPA and New York against Hooker Chemical and Plastics Corporation with respect to the Hyde Park Landfill. The Canadian Environmental Law Association, acting for Pollution Probe and Operation Clean Niagara, were granted status to file an amicus brief and were permitted to participate in a fact-finding hearing on the issues raised in the brief. In that hearing, counsel for the group was also permitted to cross-examine and call witnesses.

### III

Although the main thrust of this paper is to deal with Canadian experiences before United States administrative tribunals, some thought should be given to the question of reciprocity.

Examples of United States individuals or municipalities seeking to

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53. *Id.*

54. *Id.*

55. 463 F.2d 1261 (D.C. Cir. 1972).

56. 42 U.S.C. §§ 4332-4333 (1982).

57. 463 F.2d at 1262-63.

58. *United States v. Hooker Chemicals and Plastics Corp.*, 540 F. Supp. 1067 (W.D.N.Y. 1982) (this decision pertains to the Hyde Park Landfill). In a related action, the Province of Ontario was permitted to intervene in an environmental lawsuit against Hooker. *United States v. Hooker Chemicals and Plastics Corp.*, Civ. No. 79-988C (W.D.N.Y. Feb. 10, 1984) (order of Judge Curtin pertaining to the S-Area Landfill in Niagara Falls).

participate in Canadian administrative or related judicial proceedings are rare. The intervention of Alaska and California in proceedings before the National Energy Board concerning natural gas pipelines is one example.<sup>59</sup> There is no statutory obstacle to administrative tribunals or courts in Canada and Ontario that take the same approach as has been taken in the United States. The Environmental Appeal Board, which has discretion to specify who are to be parties to a hearing conducted under the Ontario Environmental Protection Act,<sup>60</sup> has never, to this author's knowledge, refused such status to *anyone*. Where a statute does not specifically deal with this question, the general principle is that any person who will be directly affected by the decision of the tribunal is entitled to be a party and should be recognized as such by the tribunal. Tribunals in Ontario exercising a statutory power of decision are generally subject to the Statutory Powers Procedures Act<sup>61</sup> and are given broad discretion to admit evidence relevant to the subject matter of the proceedings whether or not such evidence would be admissible in a court. United States government agencies and citizens are, therefore, in a good position to assert access and consideration of their interests in cases of transboundary pollution on an equal basis with Canadian citizens.

On the question of whether and in what manner international law might be integrated with domestic law, some guidance is given in a 1943 decision of the Supreme Court of Canada.<sup>62</sup> The approach taken by the Court was that certain general principles of international law which had been recognized or adopted by the domestic courts had become a part of the law of Canada and its provinces. The international principle recognized by domestic courts was applied in that case to the law of Ontario by way of statutory construction. This approach leaves it open to Parliament or to the legislatures to oust the application of the general principles if they address the matter clearly and within the scope of their constitutional competence.

In this area, a great deal can often be accomplished by a clear statement of policy. In a 1982 submission to the New York Department of Environmental Conservation on the draft permit for the City of Niagara Falls Wastewater Treatment Plant, Ontario dealt with New York's position in Ontario. The document pointed out that there was no statutory obstacle to the participation of the United States government, state governments, or citizens in administrative proceedings in

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59. See *supra* note 23.

60. 3 ONT. REV. STAT. c. 141 (1980).

61. 8 ONT. REV. STAT. c. 484 (1980).

62. 1943 S.C.R. 208.

the Province of Ontario where the outcome of such proceedings could impact on their environment.<sup>63</sup> The document further stated that: "In addition, the policy of the Ontario Ministry of the Environment is that national and state agencies and citizens of the United States are to be accorded the same opportunities as the residents of Ontario to participate in regulatory proceedings affecting their interests in matters of transboundary pollution."<sup>64</sup> In the Niagara River context, it is the policy of the Province of Ontario to notify the Department of Environmental Conservation in New York State of the filing of applications for approvals which may affect the quality of water of the Niagara River and to invite New York's written comments. With respect to orders issued to existing sources, it is the policy of Ontario to notify the New York State Department of Environmental Conservation of its intention to issue new orders or to amend or revoke existing orders with respect to sources of pollution which may affect the quality of water of the Niagara River, and again, to invite New York's comment.

These issues have been addressed by the American and Canadian Bar Associations and have resulted in resolutions adopted by each Association in August 1979.<sup>65</sup> The conclusion reached was that these issues should be addressed by a treaty "on a regime of equal access and remedy in cases of transfrontier pollution."<sup>66</sup> Although the main thrust of the draft treaty dealt with equal access and remedies for individuals who suffered damages resulting from transfrontier pollution, it also assured the right to take part in all administrative and judicial procedures existing within the country of origin. While the proposed treaty deals less clearly with the role of governmental participation in administrative or judicial procedures, article 3(b) does make provision for reciprocity in that: "When the law of a Party or a political subdivision thereof permits a public authority to participate in administrative or judicial procedures in order to safeguard general environmental interests, that Party shall provide competent public authorities of the exposed Country with equivalent access to such procedures."<sup>67</sup>

The matter was then taken up jointly by the National Conference of Commissioners on Uniform State Laws and the Uniform Law Con-

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63. The Response of the Ministry of the Environment, Province of Ontario, on the Draft Permit for the City of Niagara Falls Wastewater Treatment Plant (Feb. 26, 1982).

64. *Id.* at 18.

65. Item 104A, 1979 ABA REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES 1-9 (Aug. 14-15, 1979) (resolution adopted by the Canadian and American Bar Associations and draft treaty on a regime of equal access and remedy in cases of transfrontier pollution).

66. *Id.* at 7.

67. *Id.* at 8.

ference of Canada. A Committee formed by the two groups decided that removing the obstacles to litigation could be done more effectively through the enactment of uniform state and provincial laws than through a treaty. The Committee drafted a Uniform Transboundary Pollution Reciprocal Access Act.<sup>68</sup> They envisioned that a club of jurisdictions would adopt the legislation.<sup>69</sup> If enacted by states of the United States or Provinces of Canada, the Act could be applied in international, interstate and interprovincial pollution actions. The Act appears to do a good job of removing the technical obstacles to access to the courts in civil cases where the action is based on injury or threatened injury to property or person in a reciprocating jurisdiction. It is less clear whether the Act resolves the question of access to administrative tribunals or the more difficult question of whether such tribunals would be authorized or required to take into account extra-territorial impacts and consequences of their decision.

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68. Uniform Transboundary Pollution Reciprocal Access Act, 9A U.L.A. 332-37 (Supp. 1984).

69. Such legislation has been passed in Montana and New Jersey and introduced in the Province of Ontario. For further discussion of the draft Act, see Smith, *Acid Rain: Transnational Perspectives*, 4 N.Y.L. SCH. J. INT'L & COMP. LAW 459 n.302 (1983).



