Private Practitioners' Statutory Remedies for Environmental Pollution: A Canadian Viewpoint

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INTRODUCTION

In Canada, as in the United States, there is a federal system of government. Accordingly, Canadian legislative jurisdiction is divided between the Federal and the ten Provincial governments. As in the United States, the Federal Government has power to legislate on matters of overriding federal concern, pursuant to its constitutive powers.

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1. See generally P. Hogg, Constitutional Law of Canada (1977). The Canadian constitutional system is similar to that of the United States, but its system is more centralized. The Canadian Federal Government has the power to regulate commerce without qualification and retains jurisdiction over banking, marriage and divorce, criminal law and penitentiaries. In the United States, of course, most of the powers just mentioned are generally reserved to the states. Id. at 36. Also, unlike the United States, the Provinces are given only enumerated powers while all residual power is left to the Federal Government. Id. at 35.

2. Can. Const. Act (1867). Pursuant to section 91 thereof, the Federal Parliament has the authority to make laws for the "Peace, Order and good Government of Canada" in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to provincial legislatures. Section 91 continues:

for greater certainty, but not so as to restrict the generality of the foregoing provision, . . . [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or be-
and the laws thus passed are supreme, at least in the event of conflict with provincial law.\textsuperscript{9}

In the United States, Congress has enacted comprehensive statutes which compel, coerce or encourage the states to develop environ-

tween Two Provinces.

17. Weights and Measures.
19. Interest.
20. Legal Tender.
22. Patents of Invention and Discovery.
23. Copyrights.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Id.

Some subjects “expressly excepted” from those assigned exclusively to provincial legislatures and therefore subject to exclusive federal jurisdiction pursuant to the Constitution Act of 1867 are:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Id. § 92(10). Thus, federal legislative power exists over such matters as international pipelines and electric transmission systems.

3. The opening words of section 91 declare that “notwithstanding anything in this Act” the exclusive legislative authority of the Federal Parliament extends to matters coming within the 29 subjects thereafter set out. See supra note 2. Further, the concluding words of section 91 provide that:

[A]ny Matter coming within any of the Classes of Subjects enumerated in [section 91] shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Id. § 91.
mental control programs. Economic, political and legal means are all used to ensure that states meet federally acceptable standards.

There was, however, no similar initiative in Canada. Since the late 1960's, there has been an evolution in Canadian statutory environmental control mechanisms similar to that which has taken place in the United States during the same period. However, the United States federal zeal for inducing action on a more parochial level has not been replicated north of the border.

Without federal guidance each of the ten provinces has developed, according to its own priorities, its own system of statutory measures. These laws and regulations deal with the usual spectrum of environmental concerns such as air, water, noise and pesticide pollution, as well as waste disposal. More specifically, they are designed, in large measure, to deal with the following matters: "(a) the requirement of prior licensing approvals of new sources of potential pollution, and (b) the imposition of abatement requirements for sources of pollution that existed prior to these statutory schemes coming into effect." 


5. For example, under the Clean Air Act Congress has authorized the federal Environmental Protection Agency to exercise substantial influence over state efforts to prevent and control air pollution. Each state must submit plans to the Administrator of the Agency for the implementation, maintenance and enforcement of federal air quality standards. 42 U.S.C. §§ 7410, 7411 (Supp. V 1981). In the event the plan does not meet federal requirements, the Administrator may devise and implement an alternate plan for the state. Id. §§ 7410(c), 7411(d). To induce states to commit funds to these programs, the Administrator is empowered to make grants, in support of state implementation of their plans to control air pollution, contingent on state use of the funds to supplement and, to the extent practicable, increase the level of non-federal funds already committed to such programs. Id. § 7405. As incentive for states to implement and enforce antipollution programs, the Act permits states having federally approved programs to assess non-compliance penalties and make such penalties payable into state, rather than federal, coffers. Id. § 7420(a)(1)(B)(i).

6. For a publication which compiles most Canadian environmental statutes and regulations, both federal and provincial, see R.T. Franson & A.R. Lucas, Canadian Environmental Law (1976).

7. See, e.g., the Alberta Clean Air Act, which requires "construction permits" for the construction of plants for manufacturing petroleum, natural gas, fertilizers and other products, or for the construction of incinerators and sewage systems. Alb. Rev. Stat. C-12, § 3(1) (1980). The Act further provides that the Director of Standards and Approvals has discretion with regard to the granting or the refusal of a permit. Id. § 3(4). Such discretion, however, is limited by the requirement that, in issuing a permit, "the terms, conditions or requirements must not be less stringent than those imposed by the regulations." Id. § 5.

With respect to the abatement of already existing sources of pollution, the Act provides that the Director of Pollution Control may issue a "control order" where emission
The Federal Government has enacted a number of statutory schemes differing from their American counterparts. Some merely duplicate existing provincial statutes. Others address concerns which are expected of a national government—interprovincial and international pollution, ocean dumping, manufacturing standards for equipment that crosses provincial and international boundaries, such as exhaust systems for automobiles and the regulation and manufacture of hazardous products.

The purpose of those laws which duplicate provincial enactments is the establishment of national minimum standards. The apparent federal goal is to prevent development of pollution havens. Such national minimum standards also allow the Provinces, through their own

of a contaminant exceeds the level prescribed by the regulations, or where the contaminant "has an offensive odour" or is or may be harmful to persons or property. In general, the order mandates the reduction of emission down to acceptable levels. Id. § 13. Under § 14, the Minister of the Environment may issue a "stop order" where a person has violated either this Act, or a regulation or order of the Director, or "has contravened a term or condition of a licence," or operates a plant emitting contaminants which present "an immediate danger" to human life or property or both. The order may require that the party responsible "stop any operations or shut down" the plant, "either permanently or for a specified period." Id. § 14.

8. See, e.g., Clean Air Act, ch. 47, 1970-1972 Can. Stat. § 7. This federal Act provides that where the emission of a contaminant into the air presents "a significant danger to the health of persons" or is likely to violate an "international obligation" of Canada with respect to the control of pollution within its boundaries, "the Governor in Council may prescribe national emission standards establishing the maximum quantities, if any, and concentrations of such air contaminant" that may be released into the air.

9. A similar provincial statute, dealing with the protection of all aspects of the environment, is the Ontario Environmental Protection Act. Ont. Rev. Stat. ch. 141 (1980). This provincial enactment provides that a Director may issue a "stop order" to any person responsible for a source of contaminant which constitutes "an immediate danger to human life, the health of any persons, or to property." Id. § 7.


12. See Motor Vehicle Safety Act, Can. Rev. Stat. ch. 26 (Supp. I 1970) ("An Act respecting the use of national safety marks in relation to motor vehicles and to provide for safety standards for certain motor vehicles imported into or exported from Canada or sent or conveyed from one province to another").


14. See supra notes 8 and 9.
legislation, to establish more stringent standards. Thus, it is the Provinces which have the most comprehensive controls.

Consistent with this outline of statutory mechanisms, the Federal Government has minimal personnel devoted to enforcement activities. Indeed, the Federal Government has made agreements with most, if not all Provinces, that provincial regulatory agencies will largely be responsible for enforcement of federal environmental laws. The agreements are entered into when deemed desirable by the Provinces, and requested by the Federal Government.15

THE STATUTORY REGIMES—PRIVATE RIGHTS AND REMEDIES

Of what significance is present legislation in terms of providing remedies to private persons or groups concerned about the proper licensing of new potential pollution sources or the abatement of ongoing problems?

As a preface to answering that question it is necessary to remember that we, in Canada, have the same common law remedies that exist in the United States. Thus, causes of action may exist in tort.16 These actions traditionally may be used by persons who have suffered personal or property injury and who claim damages and injunctions. Such common law remedies are in many cases not adequate to deal with modern environmental problems where the facts are no longer the invasion by A of B’s property, but an invasion by A of everybody’s property.17

THE ESTABLISHMENT OF ENVIRONMENTAL STANDARDS

Treated first will be the adequacy of the process establishing allowable pollution limits. Government has given itself complete discretion as to how and when it will establish such limits and the terms thereof. In Canada, there is no constitutional right for either an affected industry or member of the public to have prior notice of or to participate in the process of setting regulatory standards. This is to be contrasted with the argument, possible in the United States, that such restrictions affect property rights, there must be a right to be

15. These agreements, not officially compiled in any published source, are referred to as “accords.”
16. The tort theories may include negligence, nuisance and strict liability.
heard in the setting of such standards. Rather, in Canada, only if the statute provides for a right of notice and hearing is there a right for the public, including the potentially regulated industry, to comment.

A review of statutes, at both the federal and provincial levels, reveals no consistency with regard to provision of notice and opportunities for comment. Some statutes provide such an opportunity. They include the Federal Clean Air Act and the Federal Environmental Contaminants Act. So too does the Quebec Environment Quality Act provide for public notice. However, most acts, whether provincial or federal, do not provide any such opportunity. Those at the federal level which do not include any requirement of prior notice for proposed regulations or opportunities for comment include the Atomic Energy Control Act, the Fisheries Act, and the Pest Control Products Act. At the provincial level, the situation may be extreme. In Ontario there is no right whatsoever under any environmental statute for public participation in the standard-setting process. The same situation prevails in Alberta.

Even where prior notice of proposed regulations is required, all that is allowed is the submission of written comments. There is no statutory requirement that the agency must respond to such comments, hold hearings with regard to possible objections, or give reasons as to why such comments are not considered relevant.

A Canadian lawyer looking at the standard-setting process in the United States observes, in most instances, a very significant contrast.

18. The fifth amendment of the United States Constitution provides, in pertinent part, that “no person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. This has been interpreted to require notice and a hearing where property rights will be affected by administrative decisions. See Goldberg v. Kelly, 397 U.S. 254 (1970) (consideration of termination of welfare benefits for a given individual requires adequate notice and hearing prior to an administrative determination). See also infra note 28.

19. This paper was written prior to the proclamation of the Constitution Act of 1981, which contains the “Canadian Charter of Rights and Freedom.” While this constitutional charter does not directly address environmental rights, judicial interpretations in the future may, as in the United States, give rise to inferred rights related to the subject matter. See Can. Const. Act pt. I, § 7 (1981).

20. The statutes of two provinces in particular are analysed in this paper: Ontario and Alberta.

The American system generally allows public input prior to the setting of regulatory standards. This allows both the hidden assumptions of the regulators and any of their latent sympathies for the regulated industry to be questioned and exposed prior to the adoption of the legal limits. It also helps ensure that standards are adequate to protect public welfare and can allow for standards to be revised when new technology and new information become available. Further, the United States system allows the courts to review arbitrary and capricious behavior on the part of the regulatory agency in the setting of standards. The courts themselves will often become involved in the merits of the validity of the standard.

In Canada, judicial review in this context is virtually impossible for two reasons. First, courts are not inclined to grant standing to any member of the public, as distinguished from representatives of an affected industry. Second, there are virtually never legislative criteria against which agency actions or inactions may be adjudicated.

The Ontario legislation, by way of example, demonstrates one advantage of this process: flexibility. A recent regulation made under the Ontario Environmental Protection Act for example, was aimed specifi-

28. When federal agencies promulgate regulations they are required to meet the standards of the Administrative Procedure Act, 5 U.S.C. §§ 561-706 (1976), unless Congress has specifically exempted the agencies' actions from meeting them. Administrative rulemaking is generally subject to notice and comment procedures under the Act, which requires printed public notice (usually in the Federal Register) of the proposed agency action and an opportunity for the public to present its opinions on the nature of such action. Id. § 553.

29. Illustrative of the American posture of optimum public involvement, there is in a parallel development, some movement in the United States toward setting up quasi-governmental entities to act as advocates for the public in proceedings before state regulatory agencies dealing with utilities. See The Citizens Utility Board Act, Wis. STAT. ANN. §§ 199.01-199.18 (West Supp. 1983); Barbanel, State Considers Consumer Board, N.Y. Times, Sept. 18, 1983, § 1 at 37, col. 1 (the Public Service Commission agrees to New York Governor Cuomo's request to consider regulations that would help to establish a consumer group to oppose increases in utility rates).

30. See, e.g., Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976); Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973). In the principal cases the court required the Environmental Protection Agency to justify the challenged standard in terms of a court devised, cost-benefit analysis. The factors the court deemed important were notably unmentioned by Congress in the statutory scheme defining the power of the Administrator to promulgate air pollution control standards.


32. The exception is that judicial review is regularly available for procedural irregularities.
cally at one company, Inco Limited, a large nickel producer. The regulation directed the company to reduce its sulphur dioxide emissions by a specific amount within a specific period of time. Inco Limited had no right to know of the proposed regulation prior to its coming into force and no right to any hearing after it had been made. Moreover, because of the lack of statutory criteria restricting the circumstances of such a regulation, Inco Limited would likely be unsuccessful in any judicial review challenge to the regulation after it was promulgated.

EXEMPTIONS FROM LEGAL REQUIREMENTS

Regulators can also exempt persons from their regulatory standards. In the Canadian system, at least in those jurisdictions where no public notice of proposed regulations is required, there is no right for potentially affected members of the public to be given notice when a regulatory agency proposes to exempt an important pollution source from otherwise applicable requirements. Such exempting regulations are usually made at the request of an industry or government department. The requesting entity makes a secret application to the provincial or federal executive: the Cabinet. There is no requirement in law that any studies be submitted to or considered by the Cabinet prior to the granting of such an exemption.

Recently in Canada, a federal Cabinet order gave an exemption to a multinational American-based mining corporation. The exemption would allow the disposal of certain mine tailings on the ocean floor on the west coast of British Columbia. Disposal was to be at a location considered sensitive by native Indians who rely on the sea resources for their food supply. The mining company's application to the federal Cabinet and the consideration of that application were secret. The exemption became known when it was published, as required, in the Canada Gazette. The Federal Fisheries Act contains a basic prohibition against any activity that may introduce "deleterious substances" into any waters frequented by fish. The exemption order has the effect,

33. Copper Cliff Smelter Complex, Regulation 301 under the Environmental Protection Act, III Ont. Rev. Regs. at 345 (1980).
35. See Alice Arm Tailings Deposit Regulations, authorizing the deposit of "deleterious substances in mill process effluent from the operation of the Kitsault Mine into the waters of Alice Arm, British Columbia." CAN. STAT. O. & REGS. 79-345 (Apr. 10, 1979).
36. The Gazette is Canada's equivalent to the Federal Register.
notwithstanding that definition, of allowing the deposit of specific contaminants by the mining corporation at the location specified. The native people were most upset by this situation after it came to their attention. However, despite their vehement opposition, there was neither a statutory appeal mechanism nor a judicial means for reviewing the validity of such an order.

**Licensing of New Pollution Sources**

Next treated will be licensing of new pollution sources. Here, the general statutory thrust in Canada is to provide no public notice of any application for the licensing of a new pollution source. Accordingly, there is no opportunity for persons who feel themselves affected by such a proposal to participate in the decisionmaking process. This situation prevails at both the federal and provincial levels.

Even if members of the public become aware of an application for a statutorily required license, they have no right to require a hearing. If they learn of the application and make a submission to the agency, the courts might imply a duty of "fairness" on the agency to read and "consider" such a submission. But that is the extent of any judicially implied review.8

The only major exception whereby the public must have an opportunity for involvement in the licensing decision (subject nevertheless to exempting regulations described above which can at the whim of the Cabinet remove such a right), is in the case of the licensing of certain types of waste disposal systems and sites in Ontario.9 There is no such hearing required at the federal level with regard to such important matters as the licensing of atomic energy sources,40 or pest control products. The same situation prevails generally in the other Provinces.41

Ironically, while the general rule is to exclude the public from knowing about and participating in licensing decisions, the applicant, if it is denied a license or given one with conditions not acceptable to it,

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38. See supra note 32.
40. Such is the case, e.g., of the Atomic Energy Control Act, which aims, as stated in the Preamble, "to make provision for the control and supervision of the development, application and use of atomic energy, and to enable Canada to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon. . . ." Can. Rev. Stat. A-19 (1970). The same is also true of the Pest Control Products Act, which aims "to regulate products used for the control of pests and the organic functions of plants and animals." Can. Rev. Stat. ch. P-10 (1970).
usually has an appeal. In the converse situation, however, the public has no appeal.42

REMEDIES FOR ABATEMENT OF ON-GOING POLLUTION

Administrative agencies have been given considerable legal scope under both federal and provincial legislation to order a polluter to clean up emissions that exceed current legal limits. Under the Ontario Environmental Protection Act, such orders are called "stop orders" and "control orders."43 Pursuant to such orders, a polluter may be ordered, inter alia, to stop temporarily or permanently its emissions, to install abatement equipment and to conduct studies. From the public's point of view, however, this is less than satisfactory. The agency is unaccountable in the sense that no member of the public has the ability to compel the agency to use such powers. Additionally, the timing and manner of the use of such powers by the agency is completely discretionary. Since there are no legislative standards as to when such powers are to be used, a court cannot, upon a judicial review application, effectively supervise the agency and its use or non-use of such power. It is clear, for example, that no order in the nature of mandamus could be issued as there is no duty imposed on the agency, but simply a discretion to use such powers.44

Even if the agency decides to use such powers and issues an order to a polluter, further problems from the public point of view arise. Decisions with regard to (a) the length of time given to the company to comply with the order and (b) whether an extension should be granted where no compliance has been attained within the terms of the original order, are completely within the agency's discretion. The determination of whether to issue such an order, its terms and conditions and whether or not to extend such an order are all matters dealt with in

42. Query whether this difference in treatment may offend the Canadian Charter of Rights and Freedom, particularly section 15, effective April, 1985.

43. Section 6 of the Ontario Environmental Protection Act provides that the Director, who is appointed by the Minister of the Environment, id. § 4, "may issue a control order" when the emission of a particular contaminant is found to exceed "the maximum amount, concentration or level prescribed by the regulations" or is in violation of section 13 of this Act or of the regulations. Ont. Rev. Stat. ch. 141, § 6 (1980). Under section 7 of the Act, when the Director has "reasonable and probable grounds" to believe that the level of emission of a contaminant presents "an immediate danger to human life, the health of any persons, or to property, [he] may issue a stop order directed to the person responsible for the source of contaminant." Id. § 7.

44. See id. § 7 ("The Director may . . . ") (emphasis added).
secret. They are unreviewable by a court due to the lack of statutory guidelines in the Act which provide this remedy.\textsuperscript{46} Moreover, assuming the agency determines such a cleanup order should issue, the polluter has an appeal.\textsuperscript{46} The legislation usually provides that the order does not come into effect until and unless the order is confirmed on appeal.\textsuperscript{47} This appeal process may take from one to three years.

Finally, in Ontario, if such an order is issued and confirmed, the polluter is immune from prosecution under the anti-pollution provisions of the statute while the order is outstanding.\textsuperscript{48} The legislative scheme outlined for Ontario is, with little variation, repeated in other provincial and federal environmental statutes.

Thus, in Canada, complete discretion is given to the environmental agency to do nothing, which is compounded by its complete freedom from judicial review. Additionally, the public has no right to participate in the establishment of cleanup timetables or extensions. Does this regime have a parallel in the United States?

American lawyers, I suspect, would not have great difficulty concluding that the American public has a much greater ability to ensure responsiveness in the use of administrative remedies by environmental agencies under American laws than under the Canadian scheme outlined.

\textbf{ENVIRONMENTAL IMPACT ASSESSMENT}

Canada has emulated the United States with regard to the desirability of environmental impact assessment of major projects both in the public and private sectors. However, the desirability of having such assessments has not been matched by the legal requirements for the same.

At the federal level, the concept of environmental impact assessment is merely a governmental policy called the Environmental Assessment & Review Process (EARP). It has not been implemented by statute or even by subordinate legislation such as a regulation or order-in-council. It is merely a directive of the federal Cabinet that a mecha-

\begin{footnotesize}
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\item[45.] See Ontario Environmental Protection Act, Ont. Rev. Stat. ch. 141 (1980).
\item[46.] See id. pt. XI.
\item[47.] Id. § 122, which provides: "No imposition or alteration of terms and conditions, suspension or revocation, refusal to renew or order, except a stop order shall be enforced until final disposition of an appeal, if any, or until the time for taking an appeal against the order has passed."
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nism for environmental impact assessment should exist with regard to projects of the Federal Government.49 This policy is described in general terms and provides no legal rights or obligations. Whether or not an agency follows the policy is not subject to judicial scrutiny and the determination is left entirely to the agency which is the project proponent.

Assuming that the agency determines to adopt the process, the public is theoretically provided an opportunity to comment on and participate in the environmental assessment. However, non-adversarial methods are utilized. The process is thus a very frustrating one for persons convinced that the use of adversarial techniques is best equipped to elicit the full truth.

Most Provinces now have acts which provide, in certain circumstances, for the requirement of environmental impact assessment procedures in regard to any particular project, whether in the public or the private sector.60 In most Provinces, no type of project is subject to such procedures unless the Provincial Government determines to make a particular activity subject to it.61 It is accordingly ad-hoc in its application.

In Ontario, there is a statute which in its scope and concept is probably the most advanced in the world. The Ontario Environmental Assessment Act59 of 1975 goes much beyond NEPA-type53 statutes.


50. See, e.g., the Quebec Environment Quality Act, which provides that:

[n]o person may undertake any construction, work, activity or operation, or carry out work according to a plan or programme, in the cases provided for by regulation of the Lieutenant-Governor in Council without following the environmental impact assessment and review procedure and obtaining an authorization certificate from the Lieutenant-Governor in Council.


51. Section 31.2 of the Quebec Environment Quality Act provides that:

Every person wishing to undertake the realization of any of the projects contemplated in section 31.1 must file a written notice with the Minister describing the general nature of his project; the Minister, in turn, shall indicate to the proponent of the project the nature, the scope and the extent of the environmental impact assessment statement that he must prepare.

Id. § 31.2.

Section 31.4 provides: “The Minister may, at any time, request the proponent of the project to furnish any information, to study certain matters more thoroughly or to undertake certain research which he considers necessary to fully evaluate the impact of the proposed project on the environment.” Id. § 31.4.


Ontario environmental lawyers view NEPA as basically a requirement for proponents to fill in the blanks of an environmental impact study, and to produce much paper. The agency does not need to do more than address such legal requirements before getting on with the project. The Ontario Environmental Assessment Act, in contrast, has set up an independent Environmental Assessment Board to make two decisions. The first decision is whether or not the environmental assessment required to be prepared under the Act is adequate. The second decision is whether or not the undertaking should be allowed to proceed and, if so, its terms and conditions.

The Ontario Environmental Assessment Act currently applies to everything within the provincial and municipal public sectors unless a specific project or category of projects has been exempted. It is intended that in a few more years the Act will also apply to the private sector. The decision of the Environmental Assessment Board binds the private sector and can bind the Provincial Government (subject to appeal to the provincial Cabinet which may override the Environmental Assessment Board decision).

The Ontario Environmental Assessment Act has a very broad concept of the environment. It includes not only the physical but also the
social, economic and cultural conditions that affect man and a community.\textsuperscript{58} The requirements of an environmental impact assessment are likewise very broad. They include addressing the need for the undertaking, considering alternatives to the undertaking and assessing the impact of such alternatives.\textsuperscript{59}

The Act has procedural safeguards aimed at making environmental impact assessment part of the planning process. It prevents proponents from proceeding past the preliminary planning stages of their projects without submitting and having approved their environmental impact assessment. Thus, no provincially required authorization under any statute or municipally required permit can be issued or granted until and unless an environmental impact assessment has been submitted and approved.\textsuperscript{60} Further, the public is given wide opportunity for involvement in the process. Any member of the public can ask for a public hearing to be held with regard to whether or not the environmental assessment is adequate and whether or not the project ought to be given the requisite approval.\textsuperscript{61}

This glowing description of the Environmental Assessment Act certainly indicates a theoretically excellent piece of legislation. The major problem has been that, to this point in time, virtually no important project has come under it. The provincial Cabinet has a complete

\textsuperscript{58} Section 1 of the Environmental Assessment Act states in pertinent part that:
(c) "environment" means
(i) air, land or water,
(ii) plant and animal life, including man,
(iii) the social, economic and cultural conditions that influence the life of man or a community,
(iv) any building, structure, machine or other device or thing made by man,
(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
(vi) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario.

\textit{Id.} § 1.

\textsuperscript{59} See id. § 5(3).

\textsuperscript{60} Section 5(1) of the Environmental Assessment Act provides in relevant part:
The proponent of an undertaking to which this Act applies shall submit to the Minister an environmental assessment of the undertaking and shall not proceed with the undertaking until,
(a) the environmental assessment has been accepted by the Minister, and
(b) the Minister has given his approval to proceed with the undertaking.

\textit{Id.} § 5(1). Under § 6(1), a proponent who is required to submit an assessment statement, but who has not met the conditions under (a) and (b) above, will be denied any licenses or permits required by the Province of Ontario or any municipality therein, as well as any financial assistance, such as loans, grants or subsidies, which might be available from the Province. \textit{Id.} § 6(1).

\textsuperscript{61} See id. § 7(2).
and arbitrary discretion to exempt anybody and anything from its provisions.\textsuperscript{62} Important matters such as a new nuclear power station near Toronto on Lake Ontario have been exempted from the Environmental Assessment Act by Cabinet order.\textsuperscript{63}

The Ontario Government has given the public in Ontario a showpiece act. To date, however, that authority has chosen to not allow the Act to reach its full potential.

\textbf{THE RIGHT OF PRIVATE PROSECUTION}

The right of private prosecution is a common law concept. It basically provides that any person who has reasonable and probable grounds to believe that an offense has occurred contrary to a provincial or federal statute, regulation or municipal by-law may swear an information before a justice of the peace to that effect and, subject to the discretion of the justice of the peace to issue a summons, have the accused person tried in a criminal court.\textsuperscript{64} The person who commences the proceedings can personally prosecute the case or retain a lawyer to do so on his behalf.\textsuperscript{65} The result of a successful prosecution will be the levy of a fine or possibly the imprisonment of the accused. Any fine levied goes to the state rather than to the individual commencing the proceeding.\textsuperscript{66} Two federal environmental statutes, however, provide that one-half of any fine levied shall be awarded to the private prosecutor as compensation for having taken a successful action.\textsuperscript{67}

Under some statutes, a judge convicting an accused may, in addition to levying a fine, issue an order restraining the offender from carrying on the same activity giving rise to the offense. Breach of such an order is punishable as contempt of court. In Ontario, such a restraining order may be made, in addition to a fine being levied, with regard to a successful prosecution under any municipal by-law (which may include matters such as noise, zoning, nuisance, etc.).\textsuperscript{68}

The right of private prosecution is subject to the overriding super-

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\item \textsuperscript{62} See id. § 29.
\item \textsuperscript{63} Exemptions from the Environmental Assessment Act are published in the EA UPDATE, a periodical available from the Ontario Ministry of Environment, 135 St. Clair Ave. West, Toronto.
\item \textsuperscript{64} C. GRIFFITHS, J. KLEIN & S. VERDUN-JONES, CRIMINAL JUSTICE IN CANADA 124 (1980) [hereinafter CRIMINAL JUSTICE].
\item \textsuperscript{65} Id. at 153; see also P. HOGG, CONSTITUTIONAL LAW OF CANADA 78-79 (1977).
\item \textsuperscript{66} D. ESTRIN & J. SWAIGEN, supra note 48, at 491.
\item \textsuperscript{68} Municipal Act, ONT. REV. STAT. ch. 302, § 326 (1980).
\end{itemize}
vision of the Attorney General of a province or of a Crown Attorney acting on behalf of the Attorney General. These persons can take over or stay the prosecution, if they think it proper to do so.69

There are certain advantages to private prosecutions over civil actions from the point of view of persons who are concerned about environmental matters. The first advantage is that any person who has reasonable and probable grounds to believe an offense has occurred or is occurring may prosecute. No person need be affected personally. In this sense, there is no problem of standing. Secondly, the time between the commencement of proceedings and the time of trial is much shorter than in a civil action. Normally, a trial takes place in a civil proceeding in Ontario approximately two years from the date of its commencement. A private prosecution would likely reach trial within two to four months of the time at which it was commenced.

Another consideration is that although there is no financial reward usually made to private prosecutors for successful prosecution, there is no threat of being subject to high court costs as a result of an unsuccessful prosecution. In Canada the unsuccessful party in a civil action generally must pay attorneys' fees to the losing side. Linked to the concept of private prosecution is the ability of any private citizen to obtain a search warrant from a justice of the peace on the basis of information similar to that needed to launch a prosecution.70 Further, the criminal law concepts of conspiracy, attempt and parties to an offense can all be utilized in regard to private prosecutions.71

Obviously, this concept can be used to embarrass the government agency which has refused to take effective action on its own. The threat by a private citizen to launch a private prosecution will often be enough incentive for the agency to act appropriately. Further, the right

69. See Criminal Justice, supra note 64, at 153.
71. Section 77 of the Provincial Offences Act provides that:
(1) Every person is a party to an offence who,
   (a) actually commits it,
   (b) does or omits to do anything for the purpose of aiding any person to commit it; or
   (c) abets any person committing it.
(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence.

Under section 78 of the Act, a person who gives counsel or procures a party to commit an offence, will be himself a party to the offence committed by the party he counselled or procured. Id. at 78. See also Criminal Code, Can. Rev. Stat. ch. C-34 (1970).
of private prosecution also ensures that government agencies do not act solely under political motivation.

**The Remedy of Injunction for Breach of Statute**

Another remedy which must not be discounted is the civil injunction to restrain the breach of statute. This may, however, be less than satisfactory.

Generally, the rule is that no person has standing to ask a civil court for an injunction with regard to a breach of statute or a public nuisance. That right is reserved for the Attorney General. Exceptions have, however, been made. The Ontario Municipal Act, wherein any ratepayer may institute a civil action to obtain an interlocutory or permanent injunction to restrain the breach of a municipal by-law, has widespread application.

That exception aside, there is no general concept of allowing a person to obtain an injunction to restrain, for example, a breach of provincial statute such as the Environmental Assessment Act. Further, there is no concept, as is present in Michigan's Environmental Protection Act for a civil court to issue an injunction based on a statutory right to a healthy, clean environment.

The only recognition in Canada of a concept similar to that of the Michigan bill is in recently enacted Quebec legislation. The Quebec Environment Quality Act provides that "[e]very person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act".

This Act provides that a judge of the Quebec Superior Court may

74. The Ontario Municipal Act provides:
Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.
grant an injunction to prohibit any act or operation which interferes or might interfere with the exercises of a right conferred by the Act. An application for such an injunction may be made by any natural person domiciled in Quebec and frequenting a place or the immediate vicinity of a place in respect of which a contravention is alleged. Further, the Act facilitates applications for an interlocutory injunction by providing that security for such an injunction shall not exceed $500.00. Again, it will be noted that there is no equivalent provision in the statutes of any other province or at the federal level.

Of course, insofar as a particular problem affects a private person or his property, the concept of private nuisance may be invoked. The usual remedies may be obtained, provided, of course, that the plaintiff can (a) afford his own lawyer and the disbursements involved, and (b) take the risk of having to pay attorney's fees to the defendant in the event that the plaintiff is unsuccessful.

**FREEDOM OF INFORMATION**

Both at the federal and provincial levels, the concept of statutory rights to freedom of information has been given much attention by legislative committees and policymakers. However, no effective legislation presently exists either at the provincial or federal level in Canada which manifests a commitment to turning this concept into reality. Accordingly, it is very difficult for private citizens to obtain information which environmental regulatory agencies possess and which they are determined to keep from the public.

Indeed, Canadian lawyers involved in litigation over pesticides sold in Canada but manufactured in the United States have had to resort to the United States Freedom of Information Act to obtain useful background material on the pesticides in question.

78. *Id.* § 19.2.
79. *Id.* § 19.3.
80. The Canadian legal system places a great premium on the device of costs. It is, therefore, not surprising that rules have been enacted to provide that in certain circumstances a defendant will be assured of partial or full payment of his costs in the event that he is successful at trial. For example, Rule 373 of the Ontario Rules of Civil Procedure sets out circumstances in which a plaintiff may be required to post security for costs before he may proceed with his action. See G. WATSON & N. WILLIAMS, CANADIAN CIVIL PROCEDURE 2-38 (1977).
CONCLUSIONS

A review of the comments set out above indicate that in Canada we are some distance from having truly effective environmental laws and remedies. A comprehensive regime providing effective remedies would include the following:

1. A substantive right to a healthy and attractive environment.
2. The provision of standing for any person to obtain an injunction in a civil court to prevent a breach of federal or provincial statute.
3. The provision of funding for public hearings—when they are held—with regard to environmental impact assessment and the setting of regulatory standards.
4. Statutory rights of access to information.
5. A right for the public to participate in the setting of environmental standards.
6. The shifting of the burden of proof to the polluter.
7. The provision of legislative guidelines against which environmental agency action (or lack thereof) could be reviewed by the courts. 83

Until such reforms are achieved, the Canadian private practitioner will have to be innovative. He must inform his client that the law truly allows for the private citizen to take effective legal action for the protection of the environment only in limited circumstances. He can also suggest that an examination of the environmental regulatory regime in the United States will provide a model for many of the needed reforms.

83. See D. Estrin & J. Swaigen, supra note 48, at 457-85, where the authors set out a preferred "Environmental Bill of Rights" and the arguments for their preferences.