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Transboundary Pollution and Cross-Border Remedies*

*Michael I. Jeffery, Q.C.**

INTRODUCTION

Pollution neither recognizes nor respects territorial boundaries. With an increasing number of pollution cases in the last decade, there has been a corresponding increase in the concern for remedies to transboundary pollution. Even before a party can step into a courtroom to attempt to prove that he has suffered some injury from pollution, the party must demonstrate a right to litigate by establishing that he has standing and access to a court clothed with the jurisdiction to deal with the plaintiff's claim.

In Canada, liability for environmental pollution may be found in both common and statutory law. In addition, there are numerous international agreements and accords to which Canada is a signatory. At the federal level, the Canadian Environmental Protection Act is the principal regulatory legislation with respect to a broad range of environmental concerns. Moreover, each of the provinces has enacted its own environmental legislation, of which the Ontario Environmental Protection Act is one of the more comprehensive examples.

The purpose of this paper is to examine some of the legal issues involving access, jurisdiction and standing, and to provide the reader with a brief overview of the federal and Ontario environmental legislation which must be considered in the context of transboundary pollution.

BARRIERS TO CROSS-BORDER LITIGATION

Access

Access is concerned with a nonresident's utilization of a foreign jurisdiction's judicial process to vindicate the nonresident's rights. Until recently, most plaintiffs in both the U.S. and Canada who suffered damage from a source of pollution originating outside the jurisdiction in which the damage occurred, faced formidable obstacles in obtaining redress. At issue was the longstanding rule of common law which pre-

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* Parts of this paper are adapted from an earlier paper by this author entitled Participation by Citizens Ex Juris in the Environmental Regulatory Proceedings of Other States - A Right or Privilege?, printed at page 865 of TOWN PLANNING AND LOCAL GOVERNMENT GUIDE (Australia) (The Law Book Co. Ltd., 1984).

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cluded an action for damages for trespass, nuisance or negligent injury to land except in the state where the land was situated. This rule was articulated by Chief Justice Baxter of the New Brunswick Supreme Court, Appeal Division, in the leading Canadian case of Albert v. Fraser Companies Limited,\(^1\) wherein he concluded, after conducting an exhaustive review of the authorities, that "... an action founded on trespass to reality in a foreign country whether the title does or does not come into question cannot be tried here."\(^2\)

In contrast to the English position adopted by the Canadian courts, U.S. authorities have held that their courts have jurisdiction to try an action involving damages to land located in a foreign jurisdiction provided that the cause of that damage occurred within the court's jurisdiction.\(^3\)

The jurisdictional considerations referred to above are based to some extent on the distinctions between actions *in rem* and actions *in personam*. With respect to the latter (i.e., wherein the court acquires jurisdiction over the defendant himself in contrast to jurisdiction over his property), both the U.S. and Canadian courts have accepted jurisdiction, provided that the tort complained of is actionable in both jurisdictions. If it could not be the subject of an action in the jurisdiction where it was committed, the foreign courts will also decline jurisdiction.\(^4\)

This latter principle was enunciated by Justice Willes in *Phillips v. Eyre*, wherein he stated, "Quae accessorium locum obtinent extinguenter cum principales res peremptae sunt."\(^5\) In other words, a right of action, whether it arises from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto.

In order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: first, the wrong must be of such a character that it would have been actionable if committed in England; and second, the act must not have been justifiable by the law of the place where it was committed (*Phillips v. Eyre*). The defense of statutory authority, which will be referred to subsequently, appears to contradict the second part of the rule laid down in *Phillips v. Eyre*.

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3 See Mannville Co. v. City of Worcester, 138 Mass. 89, 138 (1884) (wherein Justice Holmes states that he sees no reason why an act in one state followed by injurious consequences in another state should not be the subject of an action in the state where the original act was committed). See also Randle v. Delaware, 21 F. Cas. 6 (C.C.E.D. Pa. 1849) (No. 12,139); Thayer v. Brooks, 17 Ohio 489 (1848).
5 Phillips v. Eyre, L.R. 6 Q.B. at 28.
The more flexible position of U.S. courts is amply illustrated in the case of *Michie v. Great Lakes Steel Division, National Steel Corp.*, wherein several Canadian residents successfully sued three Michigan corporations in nuisance arising from the discharge of air pollutants from the defendants' plants. It should be noted that the plaintiffs claimed damage to their real property situated in Canada in addition to personal injury. There is little doubt that the Canadian courts would have declined jurisdiction had the facts been reversed.

Where the private citizen is successful in launching an action in the foreign jurisdiction, he is often faced with the defense of statutory authority. In Canada, if properly invoked, this may provide a complete defense.

In most Canadian jurisdictions, many activities which cause pollution in one form or another are permitted by statute, as evidenced by a permit, license, control order, program approval or certificate of approval. The same defense is available to defendants before U.S. courts to a somewhat lesser degree.

The general doctrine of statutory authority was stated by Viscount Dunedin in the leading case of *Manchester v. Farnworth*:

> "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing so authorized."  

There are, however, limitations placed upon the defense and the extent to which it may be involved depends to a large degree upon the specific wording of the applicable statute.

It appears that where the statutory language may be characterized as "discretionary", as opposed to "mandatory", courts have generally held that the statutory power should only be exercised in a manner hav-

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8 So too in other common law jurisdictions such as England, Australia and New Zealand.


11 Id. at 183.

ing regard for any private rights that might be interfered with.\textsuperscript{13} The case of Solloway v. Okanagan Builders Land Developments Ltd.\textsuperscript{14} did not take this approach and the trial judge indicated that as long as permit-holders were within the terms of the conditions of their permit, they would be relieved from liability.

Other cases, however, have maintained the distinction between mandatory and discretionary uses of statutory authority.\textsuperscript{15} In addition, there is case law to support the proposition that even where the authority is characterized as mandatory, the defendant must, nevertheless, show that any damage to the plaintiff in the exercise of this authority was unavoidable and without negligence on the part of the defendant.\textsuperscript{16}

The defenses of statutory authority and abuse of process have become somewhat more refined in light of more recent court decisions, notably \textit{R. v. Canadian International Paper Co.}\textsuperscript{17} and \textit{Re Abitibi Paper Co. Ltd. and The Queen}\textsuperscript{18}. In the former case, the court held that a program approval issued under the Environmental Protection Act is not a defense to prosecution under the Act, unless there has been \textit{full} compliance with the terms of the approval.\textsuperscript{19} The latter case confirmed the existence of the doctrine of abuse of process in a civil context, including prosecution for breaches of provincial offenses, and held that the appellant (Abitibi) "was entitled to believe that it would not be prosecuted if it completed its abatement program within the period of grace."\textsuperscript{20}

\section*{Jurisdiction Conferred by Statute}

Notwithstanding the myriad of legalistic rules and principles relating to the "jurisdiction" of the courts in the transborder context, many of which tend to impede and in some cases completely thwart the right of the private individual to take the appropriate action, particularly in circumstances where the state has failed to adequately protect his interests (at least from the individual's point of view), there has been a noticeable trend in recent years toward removing some of these barriers through statutory reform. This trend has been more prevalent in the United States than in Canada. Some, such as McCaffrey, have offered the opinion that this may be due to the fact that the right in Canada to privately

\textsuperscript{17} 6 O.R.2d 378 (1975) (Ont.).
\textsuperscript{18} 99 D.L.R.3d 333 (1979) (C.A. Ont.).
\textsuperscript{19} \textit{See also} R. v. Ford Motor Co. of Canada Ltd., 12 C.C.C.2d 8 (1973) (Prov. Ct. Ont.).
\textsuperscript{20} 99 D.L.R.3d 333 (1979) (C.A. Ont.).
At the state level in the United States, environmental protection legislation allowing private citizens direct access to the courts, through what are commonly referred to as citizens' suits, has been enacted in several states, including Michigan, Minnesota, Indiana, Florida and Massachusetts. There are also statutory provisions at the federal level, which provide a basis for certain forms of relief at the suit of the private litigant. It became increasingly evident, however, that without substantive reform of the restrictive local action rules, victims of transboundary pollution would continue to be denied access to the courts of the jurisdiction where the pollution originated.

A Joint Committee Report of the Canadian and American Bar Associations in 1979 recommended the formation of a Liaison Committee under the auspices of the National Conference of Commissioners on Uniform State Laws and the Uniform Conference of Canada, with the mandate to provide a means for "the equalization of rights and remedies of citizens in Canada and the U.S.A. affected by pollution emanating from the other jurisdiction." The result was a draft Uniform Transboundary Pollution Reciprocal Access Act, which was subsequently enacted by several American states and Canadian provinces, including Ontario. Since its enactment in Ontario in 1986, there have been no amendments or cases judicially considered.

The purpose of the Act, as stated in the prefatory note which accompanied the draft endorsed by the Joint Committee, is to provide that in the event suit is brought in the province or state where the alleged pollution actually originated, the local law of that state (as distinguished from its whole law including conflicts of laws rule) applies. This means that an alleged polluter sued in the state where the alleged pollution originated is governed by the substantive laws of that jurisdiction. Insofar as the courts of that state are concerned, he has one standard to meet, and he has the opportunity to defend the action on the basis of the substantive and procedural rules with which he is most familiar. If service of process is achieved in the state where the pollution actually caused harm, then that state would be free, within constitutional restraints, to apply either its own law or the law of the state where the alleged pollution originated. That situation is not changed by this Act. Although total uniformity and predictability are not established, an injured party will know when choosing a particular court what law will be applied. The Act is designed to fill a procedural gap, and is not intended to alter substantive laws or standards, or change the ground rules under which

21 McCaffrey, supra note 7, at 58.
22 Uniform Transboundary Pollution Reciprocal Access Act, prefatory note at 5 (draft; approved and recommended for enactment by the Liaison Committee) (on file with author).
individuals, corporations or governments conduct their affairs.\textsuperscript{24}

The ability of nonresidents to use or be bound by Canadian legislation is based upon the English common law, and residents and nonresidents are equally entitled to sue and be sued under the law of the land as long as the requirements of that law have been met. This common law principle is entrenched in the Constitution and the Charter of Rights and Freedoms (the "Charter"). Section 15(1) of the Charter states that "[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based upon race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." This section reinforces the notion that foreign entities have the same rights of access to Canadian courts and Canadian law as Canadian citizens.\textsuperscript{25}

Whether plaintiffs who suffer injury from transboundary pollution can sue in the jurisdiction in which they reside, or in which damages are sustained, depends on whether domestic courts can assert jurisdiction over a polluter located \textit{ex juris}. In Canada, jurisdiction is governed primarily by the Rules of Civil Procedure, which vary from province to province.

In Ontario, service may be made with or without leave of the court, depending on the facts of each case. Service outside Ontario may be made without leave if the case falls under one of the enumerated subsections of Rule 17.02 of the Ontario Rules of Civil Procedure. The following subsections of Rule 17.02 are of particular significance in the context of transboundary cases:

(g) in respect of a tort committed in Ontario;
(h) in respect of damage sustained in Ontario arising from a tort or breach of contract, wherever committed;
(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario.\textsuperscript{26}

The courts, in some cases, have relied on the Rules of Practice as the basis for asserting jurisdiction over a foreign polluter. For example, the Supreme Court of Canada, in the case of \textit{Moran v. Pyle National (Canada) Ltd.},\textsuperscript{27} held that the forum in which the damage was suffered could exercise jurisdiction over the defendant when a rule of that forum permits service outside the jurisdiction in an action founded on a tort committed within the jurisdiction. Therefore, in a situation in which an extra-provincial company causes damage of an environmental nature in

\textsuperscript{24} Uniform Transboundary Pollution Reciprocal Access Act, \textit{supra} note 23, at prefatory note at 7.

\textsuperscript{25} \textit{See} PAUL R. MULDOON \textit{et al., Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem} 37 (1986).

\textsuperscript{26} ONT. R. CIV. P. 17.02.

\textsuperscript{27} 43 D.L.R.3d 239 (1974) (S.C. Can.).
the province of Ontario, jurisdiction may be asserted by effecting proper service on the offending company located outside Ontario. Moreover, the rule recognizes that the essence of negligence as a tort is to protect against carelessly inflicted injury. Thus, the predominate element is the damage suffered as stated in subsection (h) of the above rule. If the circumstances of the case do not fall under one of the enumerated categories in Rule 17.02, the plaintiff may apply to the court for leave to serve the originating process outside Ontario.28

A number of U.S. states have enacted long-arm statutes enabling the state to acquire in personam jurisdiction over a defendant located ex juris, and any judgment obtained is enforceable within the United States under that country’s full faith and credit rule.

Standing

Even though a court may have jurisdiction over a matter, the plaintiff must establish some judicially recognized wrong or, if a public right has been infringed upon, the individual or organization must demonstrate a direct personal interest in the subject matter of the litigation before the court will recognize the claim and grant standing to the litigant. In Boyce v. Paddington Borough Council,29 the court noted that a litigant in a public interest matter will be granted standing where:

1. the interference with the public right is such that some private right of the plaintiff’s is interfered with simultaneously;
2. no private right is interfered with, but the plaintiff, in respect of his or her public right, suffers special damage from interference with the public right; or
3. the plaintiff has special status under a statute.

An individual litigant in Canada will also be granted standing in situations involving private prosecutions, whereby an individual assumes the traditional role of a government prosecutor with the goal of establishing, beyond a reasonable doubt, that the defendant has committed an offense under a given statute. Personal damages need not be demonstrated.

In the context of environmental law, this would appear to be possible in theory, although the provisions of the Ontario Environmental Protection Act30 raise some serious practical problems in this regard.

Section 24(1) of the Provincial Offences Act31 states:

Any person who, on reasonable and probable grounds believes that one or more persons may have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information.

28 Ont. R. Civ. P. 17.03.
Under Section 1(3) of this Act, the word "offence" is defined to mean an offense under an act of the Legislature, or under a regulation or by-law made under the authority of an act of the Legislature. Furthermore, a "prosecutor" is defined (§ 1(h)) as being the Attorney General, or where the Attorney General does not intervene, the person who issues a certificate or lays an information and includes counsel or agent acting on behalf of either of them. Although private prosecutions have been excluded from the criminal justice system of some countries — notably the U.S., France, Germany and Scotland — they are nevertheless a prominent feature of English common law and as such are recognized in Canada.\(^{32}\)

Justice Wilson, in *R. v. Schwerdt*,\(^{33}\) concluded that with respect to summary conviction offenses, the private prosecutor was heard as of right. In that case, he based his opinion primarily on the different modes of trial set out in the Criminal Code. Although this approach has been criticized by others,\(^{34}\) it has also been recognized to be a necessary exercise in order to ascertain whether the penal statutes have in any way altered or amended the basic English principle that "[e]very private person has exactly the same right to institute any criminal prosecution as the Attorney General or anyone else."\(^{35}\)

The power to privately prosecute in Ontario has been exercised with increasing frequency in areas of law concerned with the protection of the public interest; the ordinary citizen or public interest group has sought to overcome what is often perceived as inaction, or in some cases disregard of the various rights and interests protected by the legislation, by public authorities charged with the enforcement of regulatory statutes. Notwithstanding the position taken by the Canadian and English courts with respect to private prosecutions, the question becomes considerably more difficult in the application of the generally accepted principles relating thereto, in light of specific environmental protection legislation. For example, the Ontario Environmental Protection Act provides for a variety of statutory offenses which relate, in essence, to the protection of the natural environment.

Section 6(1) of the Ontario Environmental Protection Act, under the heading "General Provisions", states:

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\(^{32}\) The U.S. private prosecutors may in many states be employed to assist public prosecutors; however, the ordinary citizen does not have control of the proceeding in the same manner as under English or Canadian law. In Scotland, virtually all prosecutions are conducted through the office of Lord Advocate, and France and Germany allow the citizen only a limited role in initiating prosecution.

\(^{33}\) 27 C.R. 35 (1957) (S.C. B.C.) (involving an application to a judge of the British Columbia Supreme Court for a writ of prohibition to prevent prosecution by a private prosecutor for the indictable offence of perjury).


\(^{35}\) JAMES F. STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 495 (1883). See also Re McMicken, 20 C.C.C. 334, 342 (1912) (C.A. Man.).
No person shall discharge into the natural environment any contaminant, and no person responsible for a source or contaminant shall permit the discharge into the natural environment from the source of contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.

Section 16 of the Act makes it clear that the general provisions of the Act apply, unless otherwise required by the context, to the subject matter of the individual parts of the Act. The individual parts of the Act in turn provide for specific offenses, and Section 186 creates an offense for contravention of any provision of the Act or regulations not otherwise provided for elsewhere. Thus, although it is reasonably clear that a private individual resident in Ontario would have the right to conduct a private prosecution of an offense under this Act, it is nevertheless submitted that this right may not extend to a citizen or government ex juris. The reason lies in the Act's definition of the term "natural environment".

"Natural environment" is defined in Section 1(k) as "the air, land and water, or any combination or part thereof, of the Province of Ontario." It could, therefore, be argued with some merit that the natural environment outside Ontario (i.e., the air, land or water situated outside the territorial boundaries of Ontario), although in reality adversely affected by pollution emanating from Ontario, is not the same "natural environment" specifically covered under the Act giving rise to an offense. Accordingly, if the court in Ontario chose to entertain the claim at all, the accused would in all likelihood be acquitted on the grounds that vis-à-vis the foreign complainant, no offense was committed.

In effect, a somewhat similar rationale is employed in the context of whether Canadians can sue in the U.S. under the public trust doctrine:

the "res" of the trust can only be those resources over which a particular state has dominion and control. Therefore, a resident of Canada would presumably not have rights in United States public trust resources under the doctrine, since the Canadian would not be a member of the relevant "public".

COMMON LAW CIVIL ACTIONS AND REMEDIES

Access to the courts for the purpose of obtaining private redress for injuries sustained as a result of transboundary pollution may be more feasible, and indeed more productive, in the context of civil rather than quasi-criminal causes of action. As mentioned previously, the concept of private prosecutions is restricted to use in Canada and is not available to Canadians seeking redress for a statutory offense committed in the U.S. Moreover, the remedy available to the successful private prosecutor is often of little consequence where serious injury to property or health

36 McCaffrey, supra note 8, at 54.
37 In most cases, the accused, upon being convicted of a "statutory offence", faces a fine or the possibility of imprisonment.
has occurred, and the prospect of obtaining adequate compensation (damages) or an end to the injurious conduct (injunctive relief) is usually of more importance to the individual.

To a large extent, many of the common law principles applicable to environmental problems have been replaced by statute; however, several common law causes of action are still available for use by individual citizens or environmentalist to obtain effective redress in limited circumstances. These include private and public nuisance, riparian rights, negligence, trespass and strict liability.

With reference to transboundary pollution, it is suggested that only the common law action of private nuisance would be of any significant practical use to a citizen ex juris, and then only if the serious impediments concerning “locus standi” and jurisdiction mentioned previously can be overcome.

The question of “standing” pervades the law of nuisance because of the rather arbitrary distinction between public and private nuisance, long-sanctioned by the courts in both Canada and the U.S. In both jurisdictions, an action for public nuisance, defined broadly as an unreasonable interference with a right common to the general public at large, must be commenced at the instance of or with the consent of the appropriate public official.

Public officials, however, are often reluctant to step into the breach created by the private individual’s lack of standing, for in many instances the perpetrator of the nuisance fulfills other social or economic objectives of perceived greater importance, thus inhibiting intercession on the part of the state. For example, the government may have actively encouraged a particular industry to locate in an area of high unemployment through tax incentives or outright grants, and would be reluctant to prosecute if such prosecution would in effect undermine the social or economic goal of reducing unemployment.

**Outline of Federal and Ontario Environmental Legislation**

**A. Federal**

Federal environmental legislation is not as prevalent in Canada as it is in the United States. In Canada, the provinces have the primary legislative authority over environmental protection pursuant to s.92 of the Canadian Constitution by virtue of having exclusive legislative jurisdiction over property and civil rights. The federal government does have jurisdiction over areas such as fisheries, transportation, and air quality

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40 In Canada, this usually means the provincial, or on occasion, the federal Attorney General.
which also demand environmental protection and has jurisdiction over treaties or other forms of international agreements or protocols. The implementation of international agreements if it requires enabling legislation must nevertheless respect the division of powers set out in the Constitution.\(^4^1\) In addition, the federal government may seize jurisdiction over areas which might otherwise be within provincial jurisdiction through an override provision in the Constitution which allows the federal government to legislate if an issue is deemed to be of national concern.\(^4^2\) In cases where there may be overlapping jurisdiction the federal legislation will prevail where conflict exists under the doctrine of "paramountcy".

1. Canadian Environmental Protection Act ("CEPA")\(^4^3\)

CEPA was proclaimed in force on June 30, 1988, and is a comprehensive environmental regulatory statute which consolidates, in whole or in part, the provisions of a number of federal Acts, including: the Canadian Water Act, the Clean Air Act, the Department of the Environment Act, the Environmental Contaminants Act, and the Ocean Dumping Control Act. Further regulatory control is exercised at the federal level under numerous other statutes, including: the Fisheries Act, the Pest Control Products Act, the Transportation of Dangerous Goods Act, the Hazardous Products Act, the Hazardous Materials Information Review Act, and the Atomic Energy Control Act.

The objective or purpose of CEPA, as stated in Section 2 of the Act, is the "protection of the environment [which] is essential to the well-being of Canada". CEPA attempts to achieve this objective through preventive and remedial measures, the establishment of environmental quality controls, and the control of toxic substances.

Part I of CEPA establishes a broad range of guidelines, quality control objectives and codes of practice to be followed by both the provincial and the federal governments.

Part II of CEPA concentrates on the regulation of toxic substances. A toxic substance is defined in Section 11 as a substance which, upon entering or possibly entering the environment in a quantity, or under conditions having or that may have an immediate or long term harmful effect on the environment, may constitute a danger to the environment on which human life depends or may constitute a danger in Canada to human life or health. Any person who deals with such substances has a duty to take care and to follow the stipulations outlined in the Act. By implication, this also means that any person dealing with a toxic substance has potential liability exposure.

\(^4^2\) Commonly referred to as the "peace, order and good government" ("POGG") power.
Cleanup of an environmental spill can result in an enormous cost. The United States has in place the Superfund legislation,\(^{44}\) which is an attempt by the government to transfer the costs incurred in a cleanup from the public to the private sector. The Canadian federal government has not gone as far as the Superfund legislation, but has legislated the means to recover cleanup costs. If a toxic substance or any other substance which is harmful to the environment is released into the air, water or ground, the cleanup associated with such a spill can be recovered.

CEPA makes special provisions for the recovery of cleanup costs. Section 39 of CEPA provides that costs and expenses associated with any interim order or action perceived by the government to have been reasonable and necessary may be recovered. The liability of such costs can fall on any person who owns or has charge of a substance immediately before its initial or likely release into the environment, or causes or contributes to the initial release, or increases the likelihood of the initial release. A person who owns or has charge of such a substance is liable only to the extent of that person's negligence in causing or contributing to the release.\(^{45}\) Such persons are jointly and severally liable so long as an action for cleanup costs is brought in a court of competent jurisdiction within two years from the date on which the events occurred or became evident.

Section 60 of CEPA also authorizes the government to recover the costs and expenses of actions reasonably taken to clean up or control pollution, and these expenses can be recovered from those who have care and control or contribute to the release of the pollutant to the extent of their negligence. Such persons are both jointly and severally liable. CEPA also permits a third party to sue an offender for payment in satisfaction of any loss or damage suffered by that person as a result of the pollution.\(^{46}\)

The authority given under CEPA is primarily one of recouping costs after they have been spent. An order to clean up pollution is available under other federal statutes and may be available under CEPA's general liability section; however, the emphasis is upon recovery of costs rather than ordering the cleanup itself.

If there is a danger that a toxic substance has been or may be released, CEPA stipulates a number of steps which must be taken and further stipulates by whom these steps must be taken. Any person who imports, manufactures, transports, processes or distributes a substance for commercial purposes has a duty to report to the Minister of Environment any information concerning the toxicity of that substance.\(^{47}\) There is an onus upon any person who owns or has charge of the substance, or


\(^{46}\) Id. at § 136. See also STIKEMAN, ELLIOTT, LIABILITY FOR SHIP SOURCE POLLUTION IN CANADA (1991) (on file with author).

causes or contributes to the release or likely release, to report the matter to a federal environmental inspector and to mitigate the damage which may occur.\textsuperscript{48} Again, the liability and duty to report and mitigate is upon any person who owns or who has charge of the substance. If any person, foreign or domestic, does not report and mitigate the damage of the pollution, he will be liable to both the government, for the cleanup costs incurred by it, and to individuals who were affected by the pollution.

Part VII of CEPA specifically outlines the offenses and punishments which can be imposed under the Act. Section 116 of CEPA is a general provision imposing liability upon anyone who contravenes the provisions of the Act. The Act further states that if an offense is committed or continued on more than one day, the person who committed the offense may be convicted for a separate offense for each day that the offense was committed or continued.\textsuperscript{49} This would theoretically enable a fine to be assessed against a polluter for each day the pollutant is entering the environment.

Above and beyond the penalties specifically enumerated in the Act, CEPA authorizes the court to order additional fines to offset any monetary benefits acquired by the offender.\textsuperscript{50} Directors, officers or agents of the corporation who directed, authorized, assented to, acquiesced to or participated in the commission of the offense are parties to and are guilty of the offense and are liable for the punishment provided for the offense, whether or not the corporation has been prosecuted or convicted.\textsuperscript{51} The Act makes it clear that nothing in the Act limits the ability of anyone to pursue any other civil remedy which may apply at common law or under any other federal or provincial statute.\textsuperscript{52}

CEPA lists other types of orders which can be imposed by a court of competent jurisdiction. Section 130 of CEPA allows a court to order anything from a prohibition order, to directing an offender to take action or publish the facts relating to a conviction. Clearly, offenders can be ordered to compensate the Ministry for any cleanup costs and may be ordered to clean up the pollution themselves. These orders can be imposed against either an individual or a corporation.

The enforcement of CEPA has not been as vigorous as one might expect. CEPA was an attempt by the federal government to pull together a patchwork of environmental legislation and to address cross-boundary environmental concerns both nationally and internationally. The constitutional jurisdiction to enforce such legislation, however, has not been clearly established.

Although the preamble of CEPA emphasizes the federal govern-

\textsuperscript{48} Id. at § 57.
\textsuperscript{49} Id. at § 118.
\textsuperscript{50} Id. at § 129.
\textsuperscript{51} Id. at § 122.
\textsuperscript{52} Id. at § 137.
ment's basis for jurisdiction—namely, that protection of the environment is a matter of national concern—this flexible test of jurisdiction has not clearly established that all of the areas outlined in the Act fall into such a category. There is a dearth of case law concerning the jurisdictional issue, and the decisions to date have not been conclusive. However, if there were a serious oil spill or other environmental disaster, it would undoubtedly be in the national interest that it be dealt with by both the federal and provincial governments. In the event that federal resources were needed to assist with the cleanup, it follows that federal legislation could also be used to recover the costs.

2. Other Federal Legislation

Both inland and coastal fisheries are subject to federal jurisdiction and are regulated by the Fisheries Act. The Fisheries Act protects the habitat of fish and prohibits the deposition of deleterious substances into water frequented by fish. Contravention of the Fisheries Act can result in fines up to CAN $1 million on indictment and CAN $300,000 on summary conviction. Liability for cleanup is the responsibility of the person who owns or has carriage, management or control of the deleterious substance. If such persons cause or contribute to the deposit of such substances, they are jointly and severally liable for costs incurred by the federal government for actions taken to prevent or remedy such a deposit. These persons may also be liable for the loss of income incurred by licensed commercial fishermen as a result of the deposit. The liability of such persons is absolute.

The Canada Shipping Act has also been enacted by the federal government. This Act gives broad powers to authorities to investigate, detain and control ships which may be polluting. The Act governs air pollution, garbage pollution and oil pollution in relation to shipping. A pollution officer has the power to board ships and direct ships to proceed to various ports when there is a reasonable belief that a pollutant is being carried. The government also has power to detain ships they believe have contravened the Act. Cleanup liability lies almost entirely with the owner of the ship and is absolute. The liability extends to the expenses incurred with respect to the pollution damage and the costs of action taken by the government to prevent or remedy the situation.

55 Id. at §§ 35, 36(1)-36(3).
56 STIKEMAN, ELLIOTT, supra note 48, at 20.
58 Section 677 of the Canada Shipping Act states that the owner of a ship is liable for the damage and expenses incurred.
B. Ontario Environmental Regulatory Legislation

The Environmental Protection Act ("EPA")\(^59\) provides the principal regulatory framework for environmental protection in Ontario. It seeks to regulate all aspects of the natural environment, including standard-setting, permits and enforcement, with the exception of water resources, which are regulated by a companion and procedurally interrelated statute: the Ontario Water Resources Act ("OWRA"). Other environmental legislation includes: the Mining Act, the Pesticides Act, the Lakes and Rivers Improvement Act, and the Conservation Authorities Act.

1. Ontario Environmental Protection Act

The general prohibition section of the Ontario EPA provides:

*No person* shall discharge into the natural environment any contaminant, and *no person* responsible for a source of contaminant shall permit the discharge into the natural environment of any contaminant from the source of contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.\(^60\)

In line with this general prohibition, the EPA authorizes the issuance of a variety of administrative orders, including cleanup orders and orders to control, prevent or remedy harm to the natural environment.

Section 7(1) of the EPA authorizes a Director appointed under Section 5 of the Act to issue a control order whenever a contaminant is discharged in the natural environment; that is:

- a contaminant the use of which is prohibited by the regulations,
- in contravention of Section 14 of the Act (causes or is likely to cause an adverse effect), or
- in contravention of the regulations.

a. Control Orders

Where the Director may issue a control order, the order may include one or more of the following requirements:

(i) limit or control the rate of discharge into the natural environment,

(ii) stop the discharge into the natural environment permanently, for a specified period or in the circumstances set out in the order,

(iii) comply with directions related to the manner in which the contaminant may be discharged into the natural environment,

(iv) comply with directions related to procedures to be followed to control or eliminate the discharge,


\(^{60}\) Id. at § 6(1) (emphasis added).
install, replace or alter any equipment or thing designed to control or eliminate the discharge,

monitor and record the discharge and report to the Director,

study and report to the Director on measures to control the discharge, the effects of the discharge into the natural environment and the natural environment into which the contaminant is being or is likely to be discharged,

report to the Director regarding fuel, material and methods of production used or intended to be used and the wastes that will or are likely to be generated.

In June 1990, various sections of the EPA were amended, including Section 7, which broadened the scope of persons who could potentially be found liable and accountable for the cleanup of waste illegally deposited on property. The Section now encompasses present or previous owners of the source of contaminant, present or past occupiers of the source of contaminant, or persons who have or had the charge, management or control of the source of contaminant. This means that not only can existing owners and tenants be ordered to clean up the property, but also every past owner or tenant of contaminated property in Ontario. This potential liability applies regardless of whether that person caused the contamination or was merely an owner or occupant at the time the contamination occurred.

The EPA was also amended to remove any automatic stay of the operation of a control order. An onus now falls upon the person to whom the order is directed to apply for a stay. Regardless of whether an order is subsequently stayed, the Minister or the Director may have the order carried out immediately if the person or persons to whom it is directed refuse or are "unlikely" to comply with the order.

The Minister or Director's initiative in cleaning up a contaminated site does not relieve the person or persons of liability for the costs associated with the cleanup. Once the Minister or Director has identified the person or persons to whom the order was directed, the Minister or Director may issue an order to pay for the costs. An order to pay such costs may be enforced as if it were an order of the court. If the order relates to land, the municipality in which the land is situated will have a lien on the property in the amount of the costs, and those costs will be deemed to be municipal taxes and will have the same priority as municipal taxes.

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61 Id. at § 124.
62 See Canadian Nat'l Railway Co. v. Ontario (Director, Environmental Protection Act), 3 O.R.3d 609 (1991) (Ont.), aff'd, unreported (Feb. 21, 1992) (C.A. Ont.). Note that this case was decided on the wording of the EPA prior to the 1990 Amendments.
64 Id. at §§ 146, 147.
65 Id. at § 150.
66 Id. at § 153.
67 Id. at § 154.
A cleanup order which has the effect of a lien on the property should be a cause for concern for mortgage lenders whose claims may not have priority over cleanup costs. 68

Since the enactment of the 1990 EPA Amendments, the EPA has addressed issues similar to the U.S. Superfund legislation. Both the Superfund legislation and the EPA are concerned with the liability of past owners and operators regarding environmental cleanup and with the imposition of absolute liability (known as strict liability in the U.S.). The EPA, however, goes further than the U.S. Superfund laws in this respect. The EPA is not restricted to the person or persons who actually caused the problems. Any previous owner or occupier of polluted property may be a target, regardless of whether that person contributed to pollution.

b. Stop Orders

The Environment Ministry may also issue stop orders 69 where there is immediate danger. Stop orders require the person or persons responsible to stop whatever is generating pollution. As in the case of control orders, stop orders may be issued to former owners, occupiers or operators.

c. Remedial Orders

Where a person causes or permits the discharge of a contaminant into the natural environment so that land, water, property, animal life, plant life or human health or safety is, or is likely to be, injured, damaged or endangered, the Director may order the person to:

(i) repair the injury or damage;
(ii) prevent the injury or damage; or
(iii) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide alternate water supplies. 70

The 1990 Amendments have broadened the categories of damage that can give rise to such an order. The Amendments also allow an order where damage is likely (no actual damage or injury is required), require action to prevent damage or injury, and can require the provision of alternate water supplies.

d. Preventive Measures

A Director may issue a Section 18 order, 71 imposing preventive measures, where he is of the opinion, upon reasonable and probable grounds:

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68 See Panamerica de Bienes & Servicos, S.A. v. Northern Badger Oil & Gas Ltd., unreported (June 12, 1991) (C.A. Alta).
70 Id. at § 17.
71 Id. at § 18.
(i) that the nature of the undertaking or of anything on or in the property is such that if a contaminant is discharged into the natural environment, the contaminant will result or is likely to result in an adverse effect; and

(ii) that the requirements in the order are necessary or advisable to:
   (1) prevent or reduce the risk of the discharge; or
   (2) prevent, decrease or eliminate an adverse effect that is likely to result or will result from the discharge.

The possible contents of such an order are set out in Subsection 18(1), and include the following:

(1) to have available at a particular location equipment, material and personnel specified in the order;
(2) to install or modify devices, equipment and facilities in the manner specified in the order;
(3) to implement procedures specified in the order;
(4) to take all steps necessary so that specified procedures will be implemented if a contaminant is discharged into the natural environment;
(5) to monitor and report to the Director on any discharge into the natural environment; and
(6) to study and report to the Director on measures to control the discharge, the effects of a discharge, and the natural environment in which a contaminant is likely to be discharged.

C. International Agreements

In addition to the federal statutory regime described previously, the federal government has entered into several international accords which encourage and promote environmental protection. Few of them, however, provide for cleanup.

The federal governments of Canada and the United States entered into a protocol agreement some years ago establishing the International Joint Commission for the Great Lakes Region. The primary aim of this protocol is to increase communication and coordination of programs to control and reduce the pollutants in the Great Lakes Area. The Joint Commission has the power to investigate, recommend and monitor the pollutants in the Region. The protocol, however, does not outline any power of enforcement other than to encourage negotiation. If negotiations fail, a court of "competent jurisdiction" is stated to be the measure of last resort.

Canada and the United States have signed the Agreement Between The Government of Canada and The Government of the United States of America on Air Quality (the "Air Quality Accord")72. The Air Quality Accord provides a framework for the participant countries to address transboundary air pollution problems. The Accord is based upon the

principle that each country is responsible for the effects of their domestic air pollution upon the other. The Accord establishes an International Joint Commission on transboundary air pollution which is to conduct public hearings, consult in advance on activities which may cause air pollution, regulate existing air pollution problems, and produce public reports. Any disputes are to be handled through a specified settlement process of negotiation.\(^73\) If negotiation fails, the parties are then to either submit their dispute to the International Joint Commission, in accordance with the Boundary Waters Treaty, or to another agreed upon form of dispute resolution.

Canada also signed the international Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compound or their Transboundary Fluxes\(^74\) in conjunction with the United States and most European countries. This protocol is to support each nation’s objective to curtail volatile organic compound (“VOC”) emissions and to reduce these emissions in particular target areas. Such programs do not have stringent enforcement provisions, as the emphasis in this type of environmental initiative is on prevention, not punishment, and both negotiation and mediation are the preferred methods of dispute resolution.

Two exceptions to the general rule that international agreements are to facilitate international cooperation and prevention of pollution are the International Convention on Civil Liability for Oil Pollution Damage, 1969 (the “CLC”), and the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1971 (the “Fund Convention”), both of which have been ratified by Canada. The main purpose of the CLC is to enable the recovery of compensation from ship owners of oil pollution damage caused by ships. This convention imposes strict liability for damage upon owners of vessels which deposit harmful oil. The Fund Convention was enacted in conjunction with the CLC to compensate for damage which the vessel owner could not afford and to indemnify ship owners for some of the liability they bear pursuant to the CLC. Actions brought under the CLC can only be brought in the country of a contracting state where the damage occurred.\(^75\) The CLC is one of the few international agreement that does provide for the recovery of cleanup costs.

D. Domestic Programs

The federal government has initiated a number of domestic programs. An initiative called the “Green Plan”\(^76\) has been announced with

\(^{73}\) Id. at 683 (Part XIII: Settlement of Disputes).
\(^{74}\) Nov. 18, 1991, 3 I.L.M. 568.
\(^{75}\) STIKEMAN, ELLIOTT, supra note 49, at 6.
\(^{76}\) The Green Plan was initiated in December 1990, and it pledged CAN $3 billion for over 100 projects over five years. The 1991 federal budget spread the CAN $3 billion expenditure over six
considerable fanfare, which, drawing from a pool of approximately CAN $3 billion, allocates monies for environmental programs.

Many of the programs funded by the Green Plan focus on finding ways to clean up the environment, rather than focus on enforcement and liability issues. One such program is the NOx-VOC Management Plan, which was enacted in relation to the International Protocol on VOC.\textsuperscript{77} This plan has been initiated to address the problems associated with ground-level ozone in Canada. There are three stages to the plan; the first of these stage has begun and concentrates on the prevention of emissions from new sources, determines target reductions and provides for various studies.\textsuperscript{78} A second program is the Acid Rain Control Program. This Control Program monitors emissions and ensures that the Air Quality Accord provisions and standards are being met.

The Green Plan also funds research with respect to the reduction of sulphur dioxide emissions.\textsuperscript{79} Another program under the auspices of the Green Plan is a program to develop and commercialize cleanup technology.\textsuperscript{80}

\textbf{E. Environmental Assessment}

This paper has dealt primarily with compliance issues (i.e., the consequences of causing or permitting contaminants to be discharged into the environment in violation of permissible limits, and, in the case of directors and officers of corporations, falling below the acceptable standard of care as determined by the courts). Of equal importance to business and industry, however, is the other side of environmental regulation and control: the approvals or permitting process.

In Canada, the approvals process for undertakings with environmental impacts, whether within federal or provincial jurisdiction or both, will with increasing frequency involve some degree of environmental impact assessment ("EIA"). Every province in Canada now has some form of EIA, with Ontario recognized as having one of the most structured, as
well as onerous, regimes in the world.\textsuperscript{81}

The Ontario Environmental Assessment Act\textsuperscript{82} has an extremely broad definition of "environment", which includes the natural or biophysical environment as well as the economic, social and cultural conditions that influence man. The Act applies to all undertakings in the public sector as well as to any private sector undertaking so designated by the government of the day. As a matter of policy, since 1987, all landfills, incinerators and energy from waste facilities, whether undertaken by the public or private sectors, will be subject to the Act.

In preparing an environmental assessment ("EA"), often referred to as an "environmental impact statement" in other jurisdictions, the proponent will be required to assess both alternatives to the proposed undertaking and alternative methods of carrying out the proposed undertaking in the context of the definition of "environment" set out in this Act.

Ontario remains the only jurisdiction in Canada wherein the tribunal required in specified circumstances to hold a public hearing renders a "decision" on both the acceptability of the EA and the approval to proceed with the undertaking. As a result of this distinction, the hearing itself is structured, adversarial in nature and may be characterized as quasi-judicial. In contrast, tribunals or hearing panels in other jurisdictions make recommendations in a report to a Minister or other government official who in turn renders the "decision" on the particular undertaking.

Since April 1, 1990, Ontario has provided intervenors with a statutory right to intervenor funding paid. This trial funding program has recently been extended for an additional four year period.\textsuperscript{83}

At the federal level, the government is in the process of enacting the Canadian Environmental Assessment Act ("CEAA"),\textsuperscript{84} after the federal courts held in two separate cases from Alberta and Saskatchewan, involving the construction of dams, that the federal Environmental Assessment Review Process ("EARP") Guidelines Order required mandatory assessment at the federal level of projects to which the federal EARP applied.\textsuperscript{85}

\textsuperscript{81} See Michael I. Jeffery, Environmental Approvals in Canada (1989).
\textsuperscript{82} R.S.O., ch. C-18 (1990) (Ont.), as amended.
\textsuperscript{83} Intervenor Funding Project Act, R.S.O., ch. I-13 (1990), as amended.
\textsuperscript{84} Bill C-13, 34th Par. 38-39 Eliz. II, 2d Sess. (1989-90).
\textsuperscript{85} The Oldman River and Rafferty Alameda cases actually involved a series of cases decided by the Federal Court of Canada (Trial and Appeal Divisions). The Oldman River case went on to the Supreme Court of Canada, and a decision was rendered on January 23, 1992. Some of the relevant citations follow:


Since the Canadian Wildlife Fed'n decision on April 10, 1989, four decisions have been rendered by the Federal Court regarding the environmental assessment of the Rafferty Alameda dam projects in Saskatchewan.
The new CEAA places the federal EARP on a firm statutory base and promotes the concept of sustainable development. The Act will incorporate the use of both comprehensive study lists and exclusionary lists covering generic classes of projects which are likely or unlikely to have significant environmental effects. In addition, the Act provides for panel reviews at the discretion of the Minister of Environment and also provides the Minister with the option of referring the project to mediation.

Because of the overlapping nature of federal and provincial jurisdiction in environmental concerns, the CEAA specifically provides for joint federal/provincial panel reviews, although any such joint reviews must meet the same requirements at federal panel reviews. Following the Ontario example, the Minister has been given the power of establishing a participant funding program to facilitate the participation of the public in mediation and public panel reviews. The decision-making power, however, still resides with the government, and there may yet be some difficulties experienced in trying to combine the very different hearing processes followed by Ontario and the federal government in the context of a joint panel review of a project also subject to the Ontario Environmental Assessment Act.

CONCLUDING COMMENTS

Legal impediments which may have existed in the past with respect to the recovery of damages and cleanup costs from cross-border environmental pollution are being removed gradually by many jurisdictions in what may be characterized as a more focussed attempt to prevent or curtail polluting activities and to ensure that those responsible bear the costs (in real terms) associated therewith.

In recent years, there has been a recognition by the global community at large that any hope of success in the ongoing battle to preserve what is left of a once pristine environment depends upon increased cooperation among the nations and states of both developed and developing countries. This cooperation includes the right of unrestricted access by non-residents to the court system having jurisdiction over the party responsible for the polluting activity, and an effort by all jurisdictions to both enact and enforce more stringent environmental standards.

The goal of achieving a measure of sustainable development in accordance with the principles outlined in the Brundtland Report has now assumed an unprecedented degree of urgency, and the survival of future generations is more than ever dependant upon our ingenuity and collective resolve.

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Friends of the Oldman River Society v. Canada (Minister of Transport and Minister of Fisheries and Oceans), 1 F.C. 251 (T.D. 1990) (Can.), rev'd, 2 F.C. 18 (1990) (Can.).