ENVIRONMENTAL RIGHTS IN CANADA
By John Swaigen (Ed.)
Toronto: Butterworth's, 1981
447 pp. $54.00

Graham A. MacDonald*

This volume, edited by a staff lawyer of the Canadian Environmental Law Association, is a welcome addition to a rather small shelf of books on the subject of environmental law in Canada. Its value is two-fold: (1) it provides an up-to-date review of environmental law, [stat] legislation and its workings at the federal and provincial levels across Canada, and (2) it deals thematically with a number of important perspectives with which those interested in environmental law issues should be familiar. These thematic perspectives are normally developed in this book with reference to American experience as well as the legal traditions of Canada. The four essays which develop this "comparative" view of things compose Part II of the book, which is entitled "Towards Environmental Rights and Remedies: The Role of the Courts." The papers which are more directly focused on Canadian experience are found in Part III — "Toward Sound Environmental Planning and Government Accountability: The Role of the Administrators." Part I provides us with a brief introduction by the editor in which he establishes a context for "The Emergence of the Public in Environmental Decision Making."

The editor must be praised for the manner in which these essays constitute an unfolding unity: it will pay the reader, no matter how specialized his interests, to read the entire book in the order in which it has been conceived. In Part I, Andrew J. Roman's topic, "Locus Standi: A Cure in Search of a Disease?", is the necessary prelude to the second contribution by Simon Chester, "Class Actions to Protect the Environment: A Real Weapon or another Lawyer's Word Game?" With essay three, a slightly more general level of legal theory is approached, but one which is fundamental to the enterprise of carving out a new environmental legal ethic. Constance Hunt ably reviews the notion of "The Public Trust Doctrine in Canada" (with much U.S. example cited by way of comparison.). The fourth essay, by editor Swaigen and Richard Woods, grows naturally out of Hunt's paper, and tackles the difficult questions surrounding the notion of a "substantive right to environmental protection."

The essays in Part III also define a certain kind of unity by which the issue of "accountability" is first thrown up as a general problem, and then progressively closed in upon. The real difficulties posed by such a notion are then revealed. While comparative information is by no means lacking in these essays, the context is more specifically Canadian. Roger Cotton and Paul Emond address the idea of "Environmental Impact Assessment" in Canada, its present understanding and the limitations to date. This piece can be read profitably in conjunction with Murray Rankin's following essay on "Information and the Environment: The Struggle for Access." The final two essays are more concerned with the description of the processes in place which seek to give substance to environmental impact assessments, and the

final procedures in which we might hope to see the fruits of democratically conceived accountability. In short, how well are we doing? J.F. Costrille and Clifford Lax have as their topic "Environmental Regulation Making in Canada: Towards a More Open Process", while Paul Emond returns to consider the need for reform in his concluding chapter "Accountability and the Environmental Decision Making Process: Some Suggestions For Reform."

In a brief review, it is not possible to go deeply into the complex issues raised by the various authors. Some of the recurring themes focussed upon by the writers will be mentioned here, with some attempt to characterize areas in which some general conclusions are reached.

Roman's paper provides an interesting historical perspective on the question of who is traditionally granted standing in Canada. Environmental law is recognized to have emerged from certain common law and statutory situations. "The common law developed the law of negligence from the law of nuisance — private and public — with different rules of standing for each."[1] Roman suggests that "the law of public nuisance today may be less noteworthy as a useful modern cause of action than as the source of standing rules which have greatly influenced standing in other branches of law." Despite the introduction of certain environmental protection statutes, "the courts continue to have difficulty with environmental problems."[2] The author takes us through a review of standing issues, screening processes, constitutional cases, descriptions of boards, tribunals, and commissions, and an informative discussion of the roles of Provincial Attorneys General. Roman favours the reform of law to eliminate the "interest greater than the general public" test[3] and the reform of the law of public nuisance in order to "make it consistent with the general principles underlying other areas of our law."[4]

The rise of the notion of class actions is held by Simon Chester to be something which springs "from the very nature of an increasingly complex society." Further, he holds that the "adversary system of justice is slowly adapting to deal with group disputes and collective rights."[5] Our traditional model of access to the courts is therefore seen to be inadequate: "A dispute about the wording of a freight contract . . . is qualitatively different from a dispute about whether an injunction should be issued to prevent aerial spraying of crop insecticides near a community."[6] Chester is convinced that "class action procedures are a necessary, even indispensible part of an environmental bill of rights."[7] Readers unfamiliar with recent Quebec legislation will find Chester's discussion of Bill 39,[8] the "loi sur la recours collective"

---

* Research and Project Director, The Crocus Group — heritage planning associates.

1. J. Swaigen (ed.), *Environmental Rights in Canada*, (1981), at 13.
2. *Ibid.*.
3. *Ibid.*, at 48.
4. *Ibid.*, at 46.
5. *Ibid.*, at 112.
6. *Ibid.*, at 113.
7. *Ibid.*, at 115.
8. June 8, 1978.

interesting, a bill which Chester identifies as one of the most progressive pieces of environmental legislation in Canada.

Two important essays follow, dealing with the notion of "public trust" and of a "substantive environmental right." These essays warrant a close reading for the general success of individual or class actions will in the long term undoubtedly depend very much on what accommodation is made by the prevailing social order with respect to traditional ideas of private property and the right to "develop" land. Will environmental strings of various kinds be attached in the future? Both Hunt and Swaigen/Woods are less than optimistic about the practicality of such devices as environmental constitutional amendments or the extension of classical trust notions to the area of the general public interest. These ideas are not seen to be sufficient in themselves. Rather, more concrete success is likely to result from the development of detailed statutes, embodying certain notions of trust in dedication statements.

The comparison of American case law and experiment with Canadian experience is a strong feature of these papers. The readers will find the analysis of such pioneering pieces of legislation such as the 1970 Michigan *Environmental Protection Act* very informative. At the same time, there are certain areas of the common law which are recognized to be in place which do open the door to the extension of trust doctrines, particularly those features of the common law dealing with fishing rights and navigation. These might provide some of the basis for an extension of the trust idea into the area of general public law, from which an "environmental right" might be generated and eventually recognized. What the character of such an environmental right might be has been suggested by Swaigen and Woods: it is theorized to be something of a hybrid. It would be something like a "civil liberty" constraining government actions, but it would also be like a "property right" restraining the use of private property in ways which are unsound.[9]

In moving to the essays in Part III, the scene shifts to more detailed analysis of the workings of the machinery in place. Chapter Five, "Environmental Impact Assessment" finds Cotton and Emond exploring "the role that environmental assessment might play in an Environmental Bill of Rights."[10] It is asserted that "the dilemma of all environmental assessment regimes is that there is no clarity of purpose other than to protect the environment in some rather vague way."[11] In reviewing the actual nuts and bolts of federal and provincial systems, the authors hold up four standards as a basis of judgement: (1) initiation of reviews, (2) representative nature of the decision makers, (3) public participation, and (4) review of the final decisions.

Recurrent themes in this essay concern the over-abundant discretion in the hands of administrators and the discernment of a paranoia surrounding

9. *Supra*, n. 1, at 203.
10. *Ibid.*, at 245.
11. *Ibid.*, at 247.

the granting of access to the public to information which has been produced at public expense. For example, a Federal Task Force was constituted in the early 1970's to look into the subject of environmental impact policy and procedure in Canada. The author notes that the response of the federal government was "not only to set up a process with little significant public involvement, but to make the Task Force Report itself confidential."[12] Just as serious, is the problem surrounding the discretion exercised at high levels in the bureaucracies or in cabinets, by which the inititiation of environmental impacts are approved. As a rule, projects become "faits accompli" owing to the late or non-existant start-up of assessments. The authors suggest that "a meaningful decision making process invites participation by all interested parties at an early stage, allows complete evaluation by those parties to the best of their ability, (greatly aided by funding provisions) and creates a valid role for them in the decision making process."[13]

Murray Rankin considers in more detail the question of access to information by focusing on the recent history of British Columbia, Ontario and the federal government. The timid and inherently respectful-of-authority side of the Canadian psyche is fully revealed in this essay. For example, the Queen Charlotte Islands Public Advisory Committee, established in 1977, disbanded in 1979 out of frustration at not being able to gain access to information; the Canadian Environmental Law Association was denied access to basic reports on pesticide residue tests; and the list goes on. When some progress was made in B.C. (perhaps in response to the Queen Charlotte debacle) via the *Environment and Land Use Act* (1979), which promised significant umbrella coverage and access to information, the progress was quick to be retarded and the acts powers are "now sadly diffused."[14]

Rankin takes us through a consideration of such topics as "common law barriers to information access", the doctrine of "crown privilege", and the notion of a "balancing test" which could be employed to break down some of the traditions of cabinet secrecy. It is Rankin's view that if progress is to be made, federal legislation is vital in making all pertinent information available and this might be achieved by means of a federal freedom of information statute: "the FOIA should constitute a complete code of information disclosure of general applicability throughout the public service. Compliance with the requirements of a federal FOIA should ordinarily be stipulated as a term of federal-provincial . . . agreements . . . ."[15]

Costrille and Lax in their discussion of "Environmental Regulation Making" set themselves the task of reviewing and evaluating the "environmental standard setting and regulation making process with respect to existing and prospective opportunities for public involvement." A number of foreign jurisdictions are surveyed from the standpoint of the appropriateness of the extension of government intervention on behalf of the environment. This essay is to some extent then an exploration in political

12. *Ibid.*, at 267.
13. *Ibid.*, at 270.
14. *Ibid.*, at 288.
15. *Ibid.*, at 322.

philosophy and counterpoised against the general argument is the position of those who have argued that "the complexity of modern society frequently makes it neither feasible nor desirable for the legislature or Parliament to translate broad public policies and concerns into rules specific enough to deal with all situations."[16] Discretionary power at levels below the political has been the near-universal response to this dilemma: "Most delegations of regulation making authority under federal statutes are discretionary in nature" and "With very few exceptions the enabling statutes do not authorize, let alone require, outside scrutiny, consultation or hearings for members of the public who may be interested or affected by potential regulations before they become law."[17]

In their study of other jurisdictions, the 1946 U.S. *Administrative Procedure Act* is held up to be one of the best models, although it is not without its difficulties. The well-known love of Americans for lobbying can succeed in altering final decisions after the public participation procedures have been concluded with respect to a particular issue. Ironically for Canadians, the workings of the International Joint Commission are more sophisticated in terms of public access than what Canadians sanction at home in domestic practice. The authors conclude: "standards have normally been promulgated or amended only in response to an existing environmental hazard rather than in anticipation of preventing such contamination from occuring."[18]

Emond in the final essay on accountability, asks: "How can decision making be structured to maximize public responsiveness?"[19] In his view "environmental protection regulation in Canada does not work very well" and he identifies at the provincial level four "pathological features": (1) the absence or ineffectiveness of policy-making, (2) regulatory design which leads to unfettered or unchecked discretion, (3) enforcement which is sporadic, and (4) follow-up review on the process or results which is weak or non-existent. Indeed, "environmental regulation in Canada is structurally unsound and this defect precludes any real accountability by government."[20] Emond points to the overwhelming dependence of the regulators upon the regulated for input to their assessment processes. He suggests the exploration of various market-oriented schemes of regulation in which inefficient polluters would be weeded out.[21] While a wide ranging shake-up of the entire way in which environmental impact assessment and abatement is carried out might be desirable, Emond also feels it is an unlikely emergence, and therefore urges some fundamental tinkering with existing arrangements.[22] In order to resolve the tension between the desire to make governments more accountable and the desire to involve the public more directly, Emond suggests the idea of an Environmental Board or Court.

16. *Ibid.*, at 336.
17. *Ibid.*, at 338.
18. *Ibid.*, at 375.
19. *Ibid.*, at 406.
20. *Ibid.*, at 409.
21. *Ibid.*, at 421.
22. *Ibid.*, at 422.

This innovation would have its problems. It would be important to distinguish between aspects of accountability; those which are "policy components, adjudicative features and intuitive or managerial aspects."[23]

The several authors have pointed repeatedly to confused accountability and information access as major defects in the Canadian scene. Too many decisions are in too few hands, while those who are identifiable as groups, representative perhaps of some undeniable public interest are denied access to due procedure. No panaceas are offered here, but the wealth of specific suggestions made throughout this book will make it an invaluable source for all of those interested in the emergence of a new common law of the environment.