THE LEGAL STANDING OF CANADIAN ENVIRONMENTAL CONTROL ORGANIZATIONS

by

JAMES G. SWITZER
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Department of Law

The University of British Columbia
Vancouver 8, Canada

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ABSTRACT

Environmental control has become a major problem in North America's highly industrialized society. Governments are continually striving to find methods to effectively halt and control environmental degradation. One of the major manifestations of the desperate concern for improved environmental quality has been the emergence of a strong "public interest" environmental control movement in the United States. Canada, on the other hand, has given very little scope to public participation in the environmental decision-making process.

The object of this paper is to determine the extent to which a strong environmental control movement can contribute to higher environmental quality, and to suggest methods to introduce public participation to the Canadian environmental control system.

The advantages and disadvantages of allowing public participation are examined, with the conclusion that a strong environmental control movement with substantial participatory rights is essential to effective and comprehensive environmental control. The conclusion is also reached that the public can most appropriately be represented in the decision process by environmental control organizations.

Evaluation is made of the present Canadian laws governing legal standing of "public interest" groups to participate. The lack of such standing is demonstrated
both by the rigid standing rules of common law, and the failure of Canadian environmental legislation to relax these rules and adapt them to the specific problems encountered in environmental control law.

The American system is considered in detail as an example of relaxed standing with respect to environmental control organizations, and the resultant benefit to environmental control efforts in the jurisdiction.

The Americans have enacted the National Environmental Policy Act which requires that every federal agency develop methods of assessing the environmental consequence of proposed actions and suggest alternatives to those actions. Failure to comply with these requirements constitutes a reviewable breach.

Other American statutes have in effect removed all standing requirements and allow virtually anyone to sue to force compliance with environmental standards and regulations.

It is concluded from the American experience that public participation is generally a desirable phenomenon in environmental control. It is further concluded that Canada can no longer justify its exclusion of public representation and requires legislation designed to implement the concept of "public interest" standing.

To that end, recommendations are made to adopt an enactment similar to the National Environmental Policy Act in Canada and to introduce a system of registration whereby environmental control organizations, once registered, would
be assured of participatory rights at all levels of the Canadian environmental decision-making process.
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INTRODUCTION

Major technological advances have provided mankind with an unprecedented ability to radically alter and in some instances destroy the natural ecological balance of the environment.

The air we must breathe is becoming literally choked with contaminants. Rivers are polluted, and many animal species face extinction. These and many other similar problems have forced us to re-examine our values and objectives with respect to our relationship to the environment.

The result has been a marked increase in concern for environmental issues in a desperate attempt to re-establish that seemingly vanishing compatibility of man with his environment. Although the problem of man relating and adjusting to his environment is age old, its magnitude seems never to have been greater at any time throughout history.

As might be expected with such a comprehensive problem, we have very few established mechanisms and procedures which can be used to deal effectively with environmental issues. There is, in fact, little historical information in this area from which to draw appropriate solutions, and we are forced to develop new methods to deal with novel problems.

These attempts to develop procedures to halt or at least slow down the continuing process of environmental degradation have been varied as those responsible for environmental protection seek to discover a satisfactory formula. Governments at all levels are enacting numerous environmental statutes in an effort both to monitor and to
control environmental deterioration.

Considerable emphasis is being placed on the international potential for environmental problem-solving, as evidenced by the first United Nations Conference on the Human Environment held in Stockholm in June of 1972.

Sustained interest in and concern for environmental issues is manifest in the private sector of society as well. During the past few years, we have witnessed the phenomenal growth of private environmental control organizations. These organizations vary in terms of their specific objectives, but all exhibit a common characteristic. They are composed of concerned citizens with an interest in environmental problems who have banded together to demonstrate that interest through concerted action in an attempt to improve the quality of our environment.

This paper will be devoted to an examination of the role of these organizations in the environmental decision-making process.

It will be demonstrated that these citizen groups have a valid contribution to make to the decision process, and that failure to allow their participation in a meaningful way is a failure to ensure that environmental considerations are given sufficient emphasis in decisions which produce a potentially harmful effect on the environment.

Under existing Canadian law, environmental "public interest" groups have very little opportunity to participate effectively at the various levels of the decision-making process, largely because they lack the necessary legal standing.
to exert their views either at the administrative or judicial level.

This deficiency will be demonstrated in part by an examination of existing Canadian environmental legislation at both the provincial and federal levels. This legislation, with few exceptions, fails to acknowledge that the public has a valid and sincere interest in achieving and maintaining a healthy environment.

It will be shown further that the majority of environmental problems presently are being resolved on the basis of private property rights, largely as a result of the aforementioned legislation and the staunch reluctance of our courts to relax the rigid laws of "standing" and to recognize the public action as a legitimate expression of a general public concern for and interest in a healthy environment.

Both the courts and the legislators in the United States have gone considerably further than their Canadian counterparts in attempts to control environmental degradation.

The American courts, although not accepting as valid all aspects of the public action, have gone to considerable lengths to relax the laws of "public interest" group standing to a point where meaningful group participation through the public action has become a reality. The result has been a marked increase in awareness and understanding of environmental issues, and an additional assurance that environmental consequences form a substantial portion of the considerations which go into the decision-making process.

Various American statutes at both the federal and state
levels will be examined as being representative of a new philosophy and approach to environmental problem-solving. Where possible, the operation of these statutes will be critically evaluated.

Finally, a model will be proposed which will attempt to incorporate the best of the American approach with some rather substantial suggestions for changes in the present Canadian system, in the hope that the Canadian public will have a part in ensuring that the environment will receive adequate consideration in all future decisions at the various levels of government.
CHAPTER 1

THE NEED FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS

A. "Public Participation" Defined.

Public participation can apply equally to an individual citizen exerting his influence in the decision process, or to a "public interest" group representing the collective views of a number of citizens.

The common factor is an interest of a purely public nature, with no attendant claim to ownership of private property on which to base an alleged right to participate in a particular decision.

This distinction is of fundamental importance in any discussion of public participation and public actions. The public can participate in environmental decisions on the basis of two very different kinds of rights.

One is based on a citizen's or group of citizens' public rights to participate in decisions affecting the quality of their environment, by virtue of their interest and stake in the controversy. In the vast majority of cases this is the only type of interest possessed by an environmental control organization which generally will own no private property upon which to base its alleged right to participate.

The second type of interest is one based on the ownership of private property allegedly affected by a particular decision. Since the major focus of this paper is the former, or "public" interest, participation based on private property rights is not of major significance. In addition, there are
well established principles of law protecting a property owner from damage to that property. Whether the owner seeks judicial review of an agency decision, or commences a tort action in nuisance or negligence, remedies do exist in these instances. The extent to which these remedies are inadequate has been examined by A.R. Lucas. Accordingly, this subject will receive only brief attention in Chapter 11.

However, the major emphasis throughout this paper will center on the public action based on a purely public interest.

Although the public action can be undertaken by both individual citizens and by citizens' organizations, there are some very compelling reasons why such participation in the decision process is better suited to the group or organizational concept. These deserve consideration at this point.

The most obvious advantage of organizational participation is the superior ability of a group of citizens to participate effectively both at the public hearing stage and throughout any ensuing litigation.

Environmental lawsuits are often very protracted and expensive, and participants inevitably must call many experts who can testify to, *inter alia*, the ecological, zoological, biological and sociological effects of a particular decision. Competent senior members of the legal profession are required to conduct the environmentalists' case. Considerable basic research in the various relevant areas is a necessary prerequisite to the expert testimony. These are only the major factors of a great number which inevitably make environmental
litigation very expensive. Accordingly, only the very wealthy individual could even contemplate engaging in such litigation. The environmental control group has several distinct advantages in this regard.

Assuming a substantial membership, one obvious source of funds is membership dues. For reasons to be examined in Chapter 11, Canadian environmental control groups have never reached the relative size and power of their American counterparts. Figures released in the United States give some idea of the significant members involved in such organizations in that jurisdiction. Combined membership in the five largest national environmental organizations in the United States - the National Wildlife Federation, the National Audubon Society, the Sierra Club, the Izaak Walton League of America, and the Wilderness Society - jumped by almost 33 per cent over the year ending June 1, 1971, from 1.2 million to 1.6 million. At a hypothetical average yearly membership of ten dollars, these five organizations alone would be capable of producing annual membership revenue of $16 million. Small wonder that one finds numerous examples of litigation where one or more of these organizations has shown itself capable of litigating effectively against both governments and large industries.

Their membership sometimes includes individuals who possess the necessary skills to assume the role of legal counsel or expert witness during the course of the litigation. These services can sometimes be obtained at considerably less cost to the organization than would be the case if a non-
member's services were engaged.

An established and respected organization frequently will be in a position to obtain grants from private foundations and individual donations from concerned citizens who are sympathetic to their efforts.

There can be little doubt that the vast financial resources necessary for effective public participation can be obtained more readily by public interest groups than by private individuals.

An environmental organization has the additional advantage of being in a position to keep informed of potentially controversial proposals affecting the environment, both through established contacts with other organizations and through their particular organizational network. This ability allows for considerable continuity of interest and a developed expertise, neither of which are generally available to an individual seeking to intervene in a particular decision.

Finally, the organization is in a position to represent the interests and desires of a vast number of citizens sharing a similar viewpoint. The importance of this factor must not be underestimated. One of the most frequently raised objections to the concept of public participation centers on the fear that virtually every concerned citizen will seek his day in court, thereby throwing the system into chaos. This fear may be largely without justification, and will be given further consideration in part B of this chapter. Assuming for the moment, however, that some justification exists for
this concern, then the ability of the environmental control group to litigate a major issue on behalf of those citizens who share similar environmental concerns assumes paramount importance.

Because of the obvious advantages of participation and litigation by organizations as opposed to individuals, the major emphasis throughout this paper will be on the role of environmental control organizations in the environmental decision-making process.

B. The Argument for "Public Participation".

There is by no means general agreement that "public participation" in the environmental decision-making process is a desirable goal. For that matter there does not exist general agreement that the public should actively participate in the governmental decision-making process at all, regardless of the subject matter. Accordingly, some attempt must be made to determine whether litigation by the public of environmental issues is a goal worth seeking.

This will involve an examination of the present decision-making process to determine whether environmental issues are being properly considered without public intervention. It will also be necessary to determine the advantages to be gained by allowing public intervention, and whether these advantages outweigh the corresponding disadvantages.

1. Inadequacies in Present Consideration of Environmental Consequences.

In our present production-oriented society, governments
find themselves in a very precarious position with respect to implementing adequate environmental controls and standards. In one breath we adamantly demand of our elected officials that they give adequate consideration to environmental issues. Yet in another we demand greater production, more and better jobs, and a further enhancement of our already affluent lifestyle.

Preservation and restoration of a healthy environment cannot be achieved without considerable cost, both in terms of production and jobs. To our governments goes the task of striking an appropriate balance.

A United States Government report released on March 12, 1972, analysed 12,000 plants in fourteen industries, and estimated the cost of air and water pollution abatement between now and 1976 at about 32.6 billion dollars. The resulting plant closures, the report stated, would cost 50,000 to 125,000 jobs.\(^3\)

Canada is facing similar problems, as evidenced by a statement issued by Environment Minister Jack Davis:

"We will need to go slowly and put jobs ahead of pollution abatement. We will have to be frank about this and admit this to the country."\(^4\)

These problems represent for any government a virtual conflict of interest, since one objective can seemingly be achieved only at the expense of another perhaps equally valid objective.

To complete the perspective, it must be pointed out that provincial governments in Canada suffer equally from conflict-
ing interests which sometimes prevent adequate consideration of environmental issues.

Each province has jurisdiction over property and civil rights within its boundaries, which unquestionably gives it control over environmental protection. Yet as owners of the natural resources within the province, each provincial government has a clear obligation to develop those resources. Resource development can mean undesirable depletion, and inevitably accounts for a substantial portion of the pollution and destruction of the natural environment within a province's boundaries. Each province has both an obligation to protect the environment and an obligation to promote activities causing considerable ecological damage to that environment. A.R. Lucas commented on the problem:

"But is it reasonable to expect a provincial government to vigorously pursue its duties as guardian of the physical environment, when it is at the same time resource owner, and through its lessees andlicensees, resource developer?" 

The very make-up of our various governments suggests obstacles to consistent and adequate consideration of environmental issues. Each government, be it federal or provincial, consists of various departments discharging specific obligations within their statutory jurisdiction. The obligations of one department may be largely incompatible with those of another, and their respective philosophies may differ widely. For instance, the objectives of the minister in charge of mining or forestry may be totally inconsistent
with those of the minister responsible for the environment or fisheries. These discrepancies are often resolved in accordance with the respective size and strength of the departments in conflict, a method of resolution which in many instances precludes an objective assessment of environmental consequences.

Examples abound where environmental considerations in decisions of government agencies seemed of secondary importance. David Anderson, formerly the Federal Liberal Member of Parliament for Saanich-Esquimalt, cites several such examples. Among those cited was the application by Utah Mining and Construction Co. Ltd. for a pollution control permit in the Province of British Columbia. After a public hearing in which only four out of a potential 150 objectors were allowed to participate, the pollution control branch issued a permit to Utah allowing them to dump 9.3 million gallons of copper tailings into Rupert Inlet daily. A detailed case study of this application has been written and provides interesting reading as an example of the extent to which financial and industrial considerations can control and affect government action. Very little attention was paid to substantial environmental objections to the project raised by the public. Suffice it to say that the director of the Pollution Control Branch admitted in an interview prior to the hearing that the project would obviously proceed, and that the only question was what technical disposal requirements would be imposed. The Minister responsible made a similar
admission, stating that the provincial government and its agencies had made commitments to the Company which made the Pollution Control Board's findings as to whether the project should proceed irrelevant one way or another.\textsuperscript{10}

The Utah case is only one example of many where the respective governments fail, for a number of reasons, to give any real consideration to the environmental consequences of their decisions. Clearly the relationship between the company and the government was a factor.

2. The Relationship of Industry to Government.

It has been shown that governments are constantly effecting a balance between environmental protection and increased production. That the environment often suffers as a result of this need to balance is beyond doubt. One of the major reasons for this result is the substantial pressure exerted by industry on governmental and administrative officials.

It has long been recognized that administrative agencies tend to become inextricably bound up in the interests of the industries under their jurisdiction, and in effect become regulated by those they seek to regulate.

Not all writers subscribe to this view,\textsuperscript{11} but the Nader group has produced some very convincing evidence of agency domination by industries in the United States.\textsuperscript{12} In Canada the Utah application appears to be another example of an industry exerting tremendous influence on the decisions not only of an agency but of an entire government. This
phenomenon is particularly disturbing in environmental matters, since most environmental regulation is the responsibility of administrative agencies.

It is not particularly astonishing that agencies should prove overly sympathetic to industry demands. They are forced to deal frequently with the industries being regulated and must of necessity establish a working relationship with those industries. This frequent contact has the obvious result of making the agencies aware of the needs or professed needs of the regulated industries. On the other hand, agencies are only occasionally required to deal with the general public whose interest they purportedly protect. Unfortunately, this phenomenon does little to ensure that environmental consequences will be given adequate consideration by the agency prior to reaching a decision.

The other main source of industry pressure is exerted through lobbying. It is somewhat ironic that the very large industries, which account for a good deal of the present process of environmental degradation, are in the best position to persuade a government to reach a particular decision.

Environmental lobbying is now an accepted phenomenon, particularly in the United States, and has been described as follows:

"The main effort of a lobbyist is getting all the information that supports your proposal to all congressmen who might be persuaded to vote your way. Boeing gets the pro arguments for the SST to Congress. Friends of the Earth, Zero Population Growth, Sierra Club and Environmental Action tell Congress the other side of the story."13
Industry lobbying is not an undesirable phenomenon, provided it is offset in environmental issues by an equally effective environmental lobby.

However, lobbying and agency domination represent powerful tools by industry which must be effectively offset by a strong environmental voice if our legislators and administrative officials are to base their decisions on an assessment of environmental consequences as well as economic and technical consequences of a particular proposal.

3. The Need for a Strong Public Voice.

If we are as concerned about the process of environmental degradation and as determined to control that process as we profess to be, then we must face the necessity of allowing "public interest" organizations substantial participation rights in the environmental decision-making process.

It is simply unrealistic to expect our governments to consistently and adequately consider the environmental consequences of their decisions. Yet it would seem that effective environmental protection will be realized only when this expectation is fulfilled. The present system of half-hearted, hit and miss environmental control is clearly inadequate, and will remain so until such time as our governments make all decisions with an awareness and acceptance of their obligations with respect to environmental quality. It is equally unrealistic to suggest that industries have the interest or ability to effectively ensure that their operations are ecologically unobjectionable.
In fact, industries spend a good deal of time and money convincing various governments that their proposals are ecologically acceptable. It is not without justification in our social structure that the industrial complex operates on the profit motive, an objective which is often at direct odds with environmental control programs. Industries have been of great assistance in cleaning up the environment, largely through the development and installation of pollution control devices. However, these devices are in many instances the result of regulatory requirements, and in no way negate the earlier proposition that we cannot rely on industry to effectively police its own procedures in the absence of adequate mandatory legal requirements that they do so.

As a result, a strong "public interest" movement represents the only identifiable element of society with both the interest and ability to "go to bat" for the environment and to ensure that environmental consequences are given detailed consideration in the decision process.

The United States experience has shown beyond doubt that a strong "public interest" movement produces very distinct advantages in terms of effective environmental control. Environmental issues are much more frequently the subject of public attention. Administrative officials and industry executives are much more responsive to environmental issues when failure to respond can mean a public challenge. Ignorance of environmental issues is no longer condoned, and
most decisions must be made on the basis of environmental as well as economic and technical considerations.

Under a strong "public interest" environmental movement, the Americans are becoming increasingly aware of their environmental obligations, both individually and as a nation.

We are presently being challenged by environmental problems of unprecedented magnitude. No single element of society possesses the entire answer. Accordingly, it seems infinitely wise to take advantage of all available human resources in our attempt to achieve a satisfactory balancing of interests.

Environmental "public interest" organizations clearly represent one such resource, and to prohibit their effective participation in the decision-making process seems inexcusable.

Without the advantage of their expertise and sustained interest in environmental quality, we are in effect foregoing an opportunity of benefitting from the views of the one organized source of information which has as its central objective the protection of our environment.

There seems to remain little doubt that "public participation" in environmental decision-making is a necessary and desirable goal. However, this participation is not without its costs and these deserve examination.

4. Some Potential Drawbacks of "Public Participation".

Since the American system provides an opportunity to determine how "public participation" works in practice, the potential disadvantages need only be raised at this time.
Attempts to draw conclusions as to the effects of these alleged disadvantages will be delayed until the American experience has been evaluated.

Concern is often expressed that the environmental organizations would eventually assume control of the decision process if they receive the right to challenge agency actions and litigate environmental issues. There seems to be little foundation for this argument.

At this point in time, no single element in society exercises more influence in government decisions than industry. Effective lobbies and a close relationship with regulating agencies ensures industries not necessarily that their point of view will prevail, but that it will receive serious consideration.

There seems little reason, then, why those seeking greater environmental protection should not be afforded the same advantages. We do not conclude that industry power should be suspended because of the substantial influence it exerts in the decision process. Nether should we so conclude with respect to public interest in environmental decisions.

Unless we concede that industry is powerless to counter any excessive environmental activity, it would seem that we have a built in check on the excessive exercise of environmental power. Furthermore, it seems a particularly healthy situation to have two very significant forces in society each ensuring that the other acts in a reasonable and
responsible fashion.

Our courts are not powerless to prevent the commencement of frivolous or vexatious actions. It is important to note that environmental organizations would be in no position to succeed in litigation against an agency or industry unless the industry had breached an existing law, regulation, or standard, or the agency acted outside its statutory jurisdiction. If there are environmental consequences flowing from such illegality, there seems no valid reason to prevent an organization from rectifying the illegality by forcing compliance through litigation.

Where no cause of action is shown by the pleadings, the court is always in a position to entertain a motion for dismissal. Actions clearly of a frivolous or vexatious nature are subject to the same fate, although in fairness it must be recognized that this is a very difficult problem for which no simple solution can be suggested.

Furthermore, the experience in the United States does not seem to bear out the contention that everyone will seek his day in court.

There will undoubtedly be instances where the environmentalists' power would be abused. However, this does not seem a sufficient reason to forego the very distinct benefits to be gained from "public participation". Professor Jaffe, legal adviser to the Council on Environmental Quality in the United States, agrees:
"There is a risk, then, of too much opportunity for obstruction. I do not, however, think this is a serious problem. If the environmentalists overplay their hand, they will be checked."14

However, a word of caution is in order. If environmentalists are given strong participatory rights in the decision process, they will be acting in the "public interest" only if those rights are exercised in a responsible fashion. It is no more reasonable for the environmentalists to push environmental protection at all costs than it is for industry to seek to maximize profits at all costs. What we are faced with is a necessity to balance competing interests:

"I reject the proposition that we ought to respect the "balance of nature" or to preserve the environment unless the reason for doing so, express or implied, is the benefit of man."15

The proper question, then, is - what will most benefit man? The resulting decision may not in all instances favor environmental protection, and rightly so.

This issue of balancing interests was examined with respect to the power shortages in the Eastern United States, and attempts by environmental organizations to enjoin the construction of various power generating facilities in remote areas, with the result that power rates increased,

"Ironically, among those who may suffer most are the poor in the cities who have the least opportunity to enjoy the natural environment in distant places where generating facilities and other facilities might be located, but for the protests of the organized environmentalists."16

There is an obvious argument here that the public interest might best be served by increasing the power
facilities, particularly if it can be shown that to do so would prevent increases in power rates. The environmental organizations seeking to prevent construction also have a duty to consider the interests of those who can ill afford power increases, since this segment is included in the "public interest" which they purportedly represent.

On the surface, this example may furnish support for the argument that environmental organizations should not have "standing". The subject of environmental activity in the eastern United States receives further treatment in the final part of Chapter 111, at which time this argument is refuted.

For present purposes, suffice it to say that it was the failure of the Federal Power Commission to comply with their statutory duties to consider alternatives to and the environmental consequences of the proposed facilities that made the challenge by environmentalists possible. Had the Commission properly fulfilled these duties and then decided to construct the proposed facilities, no challenge could have succeeded.

Citizen participation places a great strain on an agency's ability to operate promptly and efficiently in response to what it considers the "public interest" to be.

The Second Annual Report of the Council on Environmental Quality estimates that there are over 3,100 environmental organizations in the United States.\textsuperscript{17} Responses from 2,500 local organizations indicated that at least 231 organizations
considered law enforcement as one of their major activities. The day has long passed, particularly in the United States, when an administrative agency with environmental responsibilities can simply ignore public opinion.

This change in emphasis will ensure in a great many more instances that agencies will act in accordance with existing legal requirements. However, it also emphasizes the need for responsible action on the part of the "public interest" movement in order to prevent a situation where the administrative business of a nation is literally brought to a halt in the name of the environment.

The inherent dangers in a strong citizens' environmental force do not, however, properly lead one to the conclusion that environmental organizations should not be given participatory rights in the decision-making process. Such a conclusion has no more validity than to suggest that industry lobbies be prohibited from further operation because of the substantial power they wield. It is legitimate to conclude, however, that the success and longevity of the public environmental movement will depend largely on the ability of that movement to exercise its powers in a selective and responsible fashion.

To allow the public environmental organizations to represent the "public interest" need not represent an undermining of the democratic process, if the group function is seen in its proper perspective. It is true that a relatively small number of people in the various organizations purport
to represent the general public, while in fact they represent only those members of the public who subscribe to their viewpoint. For instance, not everyone is interested in preserving a wilderness area or a particular species of animal on the endangered list. Many are more concerned with the immediate jobs and increased profits to be available if a particular industry or government proposal is implemented.

However, the "public interest" group does have a valuable role to play. The proper function of these organizations is not to usurp the decision-making function of government, any more than this is industry's proper function. Rather it is to endeavor to ensure, prior to a particular decision being made, that the government agency or department will take cognizance of the environmental consequences and will reach its decision only after considering all the available information.

Viewed in this light, the "public interest" group function does not hinder, and in fact enhances the democratic process, since it enables the responsible officials to become aware of the views of one segment of society which might otherwise never receive expression. The ultimate decision may then reflect a consideration of environmental as well as economic and technical concerns.

In any examination of "public interest" standing, it becomes necessary to decide what types of interest should be required of an organization seeking to establish legal standing. This is an extremely difficult question involving a number of
considerations.

Under what circumstances, if any, should legal standing be conferred on a single individual seeking to represent the public interest? What type of interest should be necessary to establish the legal standing of an environmental organization seeking to intervene in the decision process? Is it necessary to restrict legal standing to those organizations with members resident in the area affected by the proposal? Should these organizations be required to show actual use of the area affected, or is an aesthetic, recreational, or conservational interest in environmental matters a sufficient interest to warrant the conferral of standing?

If it should be determined that conferral of "public interest" standing to individuals is an unnecessary or undesirable relaxation of existing standing requirements, then further issues arise as to the type of organization which should properly have legal standing.

For example, how large must an organization's membership be to warrant a finding that the organization should have legal standing to intervene? How long must a group be in existence before its special interest in the environment should be recognized as sufficient to confer legal standing?

The above represent only the most significant of a number of issues requiring resolution if "public participation" is to become a reality in Canada. Many of these issues have been considered in the context of the American experience, and that
experience suggests some answers. Other issues are as yet unresolved, and no simple answers exist. These may ultimately be resolved only on a trial and error basis.

However, the issues cannot be ignored and must be resolved if public participation is to become a reality in the Canadian environmental decision-making process.

It seems clear, however, that the advantages of "public participation" in terms of improving the quality of our environment so outweigh the attendant disadvantages, that our attention should properly be focused on means of removing the effects of these disadvantages, rather than on excluding the public from raising an effective voice.
Canada has, for the most part, failed to recognize the concept of "public interest" standing. As a result, environmental control organizations have very limited opportunities to participate in the decision-making process. The public action, so much the center of attention in the United States, is virtually unknown in Canada.

No concerted effort has been made in Canada to determine whether the public action could enhance the success of present efforts to control environmental degradation. Nor has any attempt been made to determine whether any good reason exists for preventing environmental organizations from participating in the environmental decision-making process.

Canadian law denies "public interest" standing largely on the basis of historical concepts developed long before anyone recognized the need for a comprehensive effort to halt environmental destruction. Not surprisingly, these historical concepts are not always suitable for resolving issues of general public interest and concern. Be that as it may, the public action has become the major tool of the environmental movement in the United States, and will undoubtedly find its way into Canadian law.

Accordingly, it becomes a matter of necessity to examine the existing Canadian rules of legal standing in an attempt to
determine where deficiencies exist, whether these rules can be justified, and the best method by which to introduce the concept of "public standing" to Canadian environmental law.

It may well be inevitable, and perhaps necessary, that Canada adopts some form of the public action. It seems of paramount importance, however, that the entire concept of public participation should be the subject of careful scrutiny prior to its introduction into Canadian law.

This can best be accomplished by examining three types of public participation in the context of the existing Canadian system.

The first is the public hearing, the second judicial review and the third the representative tort actions. These will be examined to determine the extent to which they are available in Canada as means by which environmental control organizations can exert their influence in resolving environmental controversies.

A. Public Hearings in Canada.

1. The Public Hearing in Proper Perspective.

Public hearings represent one of the major avenues for public expression in environmental issues. For this reason, they represent one method to determine the extent to which the public interest is given representation in the environmental control system.

Definition of the term "public hearing" seems in order at this time. Throughout this paper it will be used to denote the type of hearing at which interested organizations and
individuals are allowed to make representations to the hearing board either verbally or by written submissions. In other words, at a public hearing, the public has more than a mere right to be in attendance.

Frankly, we know very little about the effectiveness of public hearings in terms of changing the direction of a controversy. This question has not been explored in sufficient depth to allow for any definite conclusions, although the entire concept of the public hearing is presently receiving considerable attention in the United States.\(^{19}\)

We do know, however, that it is very significantly connected with the concept of public participation in environmental matters.

Participation at a public hearing produces very distinct psychological benefits in a society which is becoming increasingly impersonal and bureaucratic. Regardless of the effectiveness of public submissions in actually changing the result of a hearing, there is a considerable element of participatory democracy in the very concept of public submissions. Additionally, the hearing board has an opportunity to become better acquainted with prevailing public opinion on environmental issues. Thus while public submissions may prove not to have a direct effect in changing a particular hearing result, the cumulative effect on a hearing board of a number of such submissions over a period of time may be of significantly greater import.

Furthermore, there is considerable merit in placing
controversial issues of environmental consequence in the public forum to allow the public to evaluate the views and performance of its governing officials. In the same way that administrative officials learn a great deal about public opinion through the hearing process, the public learns a great deal about the problems and conflicts facing the government in most complex environmental issues. The public hearing represents the only known method available to facilitate this semi-personal exchange of views. Its frequent use cannot help but produce a greater understanding between those who govern and those who are governed.

However, the most basic argument in support of the open public hearing is its relationship to the general concept of "public interest" participation. While we may generally tend to think of public participation in terms of public interest suits and representative actions, it seems that the most basic and perhaps the most meaningful form of participation is being in a position at the administrative level to assist the decision making process in reaching a satisfactory conclusion on an issue.

The public hearing facilitates an open exchange of views and information at a very early stage of the decision process. In the absence of the public hearing, no opportunity exists for those with conflicting views to confront each other and resolve their differencies in an efficient and orderly manner. It becomes an example where the right hand is unaware of what the left hand is doing. Industry inevitably distrusts any public
opposition to its proposals. The public interest organizations distrust the motives of industry. The result seems to be considerable lack of communication and lack of mutual understanding. The public hearing seems to offer at least a partial solution by which to remove much of this perpetuated mutual ignorance. While public hearings may never bring conflicting parties to actual agreement, they tend to expose respective weaknesses in the positions taken, and submit these positions to public scrutiny.

There seems to be an argument that fairly conducted hearings have the potential to reduce the incidence of environmental litigation. The concept allows the parties to present their respective views at a very early stage in the proceedings. Conversely, the lack of a public hearing or an unfair public hearing leaves those seeking to represent the public interest who were thwarted at the agency level no option but to seek judicial assistance.

Moreover, effective public participation seems unlikely in the absence of some form of public hearing system. Without such a system, there is simply no regular channel of communication through which the general public can either receive or disburse information. An ignorant public is unlikely to be a very effective influence in the decision process.

Unless the agency is required to make relevant information on environmental issues available to interested organizations and to provide an opportunity to react to that information, environmental organizations have great difficulty
becoming sufficiently well informed to make an effective and responsible argument in support of their views on an issue. Organizations which have been effectively excluded from agency proceedings are left at a tremendous disadvantage in any subsequent litigation, assuming for a moment that they could establish the requisite legal standing. Without the background and benefit of having participated in the earlier proceedings, organizations must of necessity operate at a considerable disadvantage at the judicial level.

There would seem to be no question that the public hearing must become an integral component of any system which allots due consideration to the "public interest". The nature and frequency of public hearings within a given system would appear to be a fairly accurate yardstick of the extent to which that system recognizes and gives expression to the "public interest". Canada does not rate very highly in this regard.

2. Canada's Position on the Public Hearing.

Essentially, Canada has simply never recognized in any general way the advantages of the public hearing as a vehicle for expressing the "public interest". This is reflected in the scarcity of adequate public hearing provisions in both federal and provincial environmental legislation. Because of this scarcity of public hearing requirements, there is no need to examine a great number of statutes. Only a few examples will be given, some of which point out the total absence of any public hearing provisions, and others which point out the
inadequacies where provision for public hearings is made.

The environmental statutes of British Columbia, Alberta and Manitoba will be used as examples of provincial legislation. These statutes are not necessarily representative of all provincial environmental legislation. They do have some common characteristics, however, which make them appropriate examples in this context. Each deals specifically with environmental control. Each provides for an administrative tribunal to administer the legislation, and includes within its scope comprehensive jurisdiction over environmental issues. Furthermore, the British Columbia statute comes as close as any to providing a public hearing concept to resolve environmental issues.

Federally, the National Energy Board Act provides a good example of the deficiencies in our present legislation governing environmental public hearings.

The Pollution Control Act, 1967 of British Columbia provides in section 14:

"14. Whenever it appears to the Board or the Director that the proper determination of any matter within its jurisdiction necessitates a public or other inquiry, the Board or Director may hold an inquiry and for that purpose the Chairman of the Board or the Director, as the case may be, has all the powers of and jurisdiction of a Justice of the Peace under the Summary Convictions Act."

The Environment Conservation Act of Alberta provides in section 7(1)(e):

"7.(1) The Authority (The Environment Conservation Authority) (e) may, and when required to do so by an order of the Lieutenant Governor in Council shall, hold
public hearings for the purpose of receiving briefs and submissions on any matter pertaining to environment conservation, and shall report thereon to the Lieutenant Governor in Council;"

Section 12 of the Clean Environment Act\textsuperscript{24} of Manitoba does not contain a specific provision allowing public hearings at all, but may by implication empower the Clean Environment Commission to hold a public hearing:

"12. The commission may investigate any matter respecting the contamination of the environment and in the course of the investigation it may summon witnesses and take evidence."

Clearly at least the Alberta and British Columbia statutes recognize that a public inquiry may have some potential value in certain instances. The Manitoba section is worded in such a way i.e. may summon witnesses, that one would probably be stretching the point to suggest that this provision contemplates a public hearing.

While two of the above acts at least make mention of a public hearing, neither makes it mandatory under any circumstances. Neither do they provide any guidelines as to the type of situations which should properly be the subject of a public hearing. This decision is accordingly left to the administrative authority which may or may not be sufficiently free of political influences to give the public hearing concept a chance. It is interesting to note that not one statute in Canadian law dealing specifically with environmental control makes a public hearing mandatory under any circumstances. In fact the closest we come is the provision in the various provincial municipal acts requiring a public hearing before a zoning change can be made.
Federally, the National Energy Board Act\textsuperscript{25} is a statute with great environmental significance since it confers on the Board jurisdiction over all extra provincial and international oil and gas pipeline construction applications in Canada. Section 20 confers on the Board the right to hold public inquiries on the issue, cancellation, or suspension of export certificates or licences, and on any other matter which it considers it advisable to do so. Section 44 provides the Board with authority to issue certificates for construction and operation of international pipelines and power lines, and outlines some of the major considerations to which the Board is to direct its mind.

These include: the availability of the resource, the existence of markets, the economic feasibility of the project, the financial responsibility of the applicant, and any other public interest which, in the opinion of the Board, may be affected by granting or refusing the permit.

It is interesting to note that although the above list is expressly declared to be general and not exhaustive, there is not one reference in section 44, or in any other section, of the environmental considerations of constructing a pipeline. Despite the reference "and any other public interest", it is submitted that the Board may not have jurisdiction to consider the environmental consequences of a proposed pipeline, since such considerations would not seem to fall within the contemplated scope of the legislation. It seems quite certain in any event that the Act imposes no obligation on the Board to
consider the environmental consequences of a proposal. It is equally clear that the Board may call a public inquiry and refuse to entertain submissions of an environmental nature. Thus it seems quite reasonable to suggest that permission could be obtained from the Board to construct the proposed Mackenzie Valley pipeline through Canada to the United States without a single public hearing on or even a reference to the environmental consequences of such a proposal. In practice this result is unlikely, but it does point out the extent to which some of our present public hearing provisions are totally inadequate for purposes of environmental control.

The Pollution Control Act, 1967, of British Columbia comes as close as any Canadian environmental statute to providing for public hearings in the true sense of the word. Yet it still falls far short of anything approaching the ideal in terms of fairness and equality of opportunity to the "public interest". A brief examination of the problems encountered by those seeking to represent the public interest under its provisions will serve to point out the urgent need for change if the public hearing is to have any real meaning in Canada as a vehicle for public participation.

Basically, the Act provides for a permit system which allows the discharge of effluent or emissions into water or the atmosphere as the case may be under conditions imposed by the Pollution Control Board in the permit itself. The Act makes provision for objections to be filed to a permit application, and provides for a public hearing in the discretion of the
Board. It represents the best attempt to date in Canada to allow objections from members of the public other than those immediately affected by the permit application.

In the case of an application for a permit to discharge or emit a contaminant into the air, an objection may be filed by any person who is resident within five miles of the existing or proposed point of discharge and by any immediately adjoining municipality that may be affected. It is interesting to note that the permit holder and the holder of residential land within five miles may object to the permit as a matter of right. So may a municipality. All the above objections are made to the Director of Pollution Control. However, a person or organization wishing to object in the public interest must submit the objection to the Board which then determines whether the public interest requires that the Director shall also take such an objection into consideration in making his decision. The decision of the Board is stated to be final.

It is important to note that these provisions apply to the basic right to file an objection regardless of whether a hearing is actually held. Clearly, the legislation, while recognizing the validity of objections in the public interest, was not intended to equate this type of objection with those based on the traditional private property interest. Those objecting in the public interest have no legal rights under the legislation, and are entirely subject to the whim of the Pollution Control Board. As a matter of interest, this group
would include individuals, all interested environmental organizations, and anyone wishing to present technical or scientific evidence in objection to the permit applied for.

There have been a number of cases arising out of the Act, and each invariably revolved around the public right to participate. While small gains are being made in the courts resulting in greater participation by public interest organizations, the legislation contains a basic fault common in the Canadian jurisdiction. By placing unjustified restrictions on the right to object in the public interest, that right becomes virtually meaningless. This defect can only be cured by amendments which recognize a genuine public interest in environmental issues and effectively discontinue the present tendency to restrict hearing rights to those having a proprietary interest.

Equally damaging to the environmental control movement is the failure in our legislation to provide any guidelines either as to the type of situation which is appropriate for a hearing or the type of procedure to be employed when a hearing is conducted. The unfortunate result of this failure can best be demonstrated by a brief factual examination of the application of Utah Construction and Mining Co. Ltd. for a pollution control permit in British Columbia, one of the few documented cases on the subject. The following factual account is not necessarily representative of problems presently being experienced in other Canadian jurisdictions. Rather it should be viewed as an excellent example of the serious obstacles to
effective public participation which can arise where laws vest wide discretionary powers in the respective conservation authorities.

Utah Construction and Mining Co. Ltd. made an application on October 2, 1969, for a pollution control permit to dump 9.3 million gallons of copper tailings daily into Rupert Inlet. The Pollution Control Branch received some 150 objections to the application. The objectors included a number of individuals and several wildlife and environmental control organizations. After considerable public pressure and lengthy negotiations, a public hearing was held, at which four out of the 150 objectors were allowed to participate. The result of the public hearing has been examined in Chapter 1. The procedure at the hearing is pertinent at this point, however. The four objectors, three individuals and the Pacific Salmon Society, were each allowed one technical advisor and did not have a formal right to counsel. The Utah representative, in stark contrast, was represented by three technical advisors, a senior company official from San Francisco, and two lawyers, including senior counsel.

No matter how one views the situation, it is difficult to see this hearing as an instance of "public participation". By virtue of the very act of including a provision for public hearings, at least some legislators in Canada have sanctioned its use as a tool for environmental control. However, in its present state, its usefulness seems largely fictional.

Kenneth Culp Davis, a recognized American expert in
administrative law, made a statement in one of his books which applies only too well to the present public hearing situation in Canada:

"I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made."30

To give a proper perspective, it must be noted that public hearings have been held in Canada on environmental issues. The Pollution Control Branch in British Columbia has held a number of hearings on major issues of concern, including forestry and mining.31 Public hearings are frequently held on park use, the most notable recent example being the proposed Village Lake Louise development, which was eventually discontinued as a result of adverse reactions from those participating in the hearings.32

Some of our legislation pays lip service to the hearing concept. Many statutes do not even go that far. It seems that a decision is in order. Our legislators must either decide they do not wish to be bothered by the views of the general public, and openly admit this decision, or make the necessary amendments to our existing legislations to provide for public hearings much more frequently and to give the public hearing provisions some meaning by removing the vast discretionary powers in administrative authorities. Simply put, they must decide whether we will, or will not, enjoy the
concept of the public hearing in Canadian environmental law.

B. Judicial Review. The Necessity for Organizations to Establish Locus Standi.

The Canadian legal system has a highly developed system of judicial review. The prerogative writs of certiorari, prohibition and mandamus, have traditionally served as a method of judicial control over the actions of inferior courts and more recently, the actions of administrative tribunals. The declaratory action, although not technically a review procedure, has been used frequently in place of the prerogative writs and accordingly can conveniently be included in this examination. The crucial issue is the extent to which these review procedures are available to those organizations seeking to represent the public interest.

1. The Role of Judicial Review in Environmental Controversies.

Simply put, judicial review is the process whereby a person claiming to be aggrieved or adversely affected by an agency decision applies to a court of competent jurisdiction to have that decision reviewed. The potential of these procedures to an environmental organization which was unsuccessful at the agency level is obvious.

If the agency refused to conduct a public hearing, it may be open to the court to conclude that a hearing should have been held. Where a hearing was conducted, the question of the fairness of that hearing may form a proper basis for
If an organization was excluded from participating, the court may determine that such exclusion was improper and issue appropriate orders to rectify the situation.

Where the agency has a positive obligation to consider the environmental consequences, and fails to do so, that failure may give the court sufficient grounds for quashing any decision reached. Similarly, inadequate consideration of environmental consequences may constitute a reviewable breach.

The choice of the particular remedy depends on the extent of the failure. For instance, where a decision has been improperly made, certiorari may issue to quash that decision. Where the agency has indicated an intention to do a certain thing, which it cannot properly do, prohibition may issue to prevent the illegal action. Where the agency has improperly refused to act in accordance with its statutory requirements, mandamus may issue to compel the agency to act. The declaratory action serves very simply to declare the position of the parties.

However, each of these remedies carries with it a particular set of standing requirements. Only those who can establish the necessary locus standi are entitled to their benefit. Existing standing requirements make these remedies virtually unavailable to environmental control organizations in Canada. Environmental control organizations are simply thwarted at the administrative level. These remedies clearly have the potential to be extremely useful to environmental organizations which have been thwarted at the administrative level.
unable to establish the necessary interest under our present system to enable them to obtain judicial review.

2. The Interest Required.

This question can best be examined in two parts. Each of these remedies is subject to particular standing requirements of common law. These govern to a large extent the availability of the writs. Secondly, it is necessary to examine what effect, if any, existing environmental legislation has on the standing requirements.

Mandamus.

The writ of mandamus would seem to carry the greatest potential to rectify irregularities in environmental issues of any of the remedies presently being considered. A successful application for mandamus in effect forces the agency or inferior tribunal to perform a particular task.

This has special application to environmental law. For example, mandamus could force an agency to conduct a public hearing, or to hear a particular submission. Where the agency has been remiss in assessing environmental consequences, mandamus may well lie to force such assessment. In other words, any improper or unjustifiable failure on the part of an environmental agency to perform a mandatory task could be rectified by mandamus.

However, because of the particular limitations on the availability of mandamus, it is at present one of the least useful of the remedies being considered. Of these limitations, two are deserving of mention in the present context.
The first is the general rule that the applicant for a writ of mandamus must have a specific legal right to have the duty performed. This principle was adopted in Canada as early as 1876, and has prevailed largely unaltered to the present date. Mandamus to compel the City of Toronto to order vaccination was refused, on the ground that the applicant, the Provincial Board of Health, had no specific legal right to enforce performance of the provisions of the Vaccination Act.

The effect of this requirement is clearly to exclude environmental control organizations from using the writ of mandamus, since they claim only an interest of a general public nature and can scarce ever show a specific legal right to have an environmental duty performed.

The second requirement merely increases the futility of organizations seeking to avail themselves of mandamus. Mandamus will only issue where there is a public duty imposed on the administrative agency to perform the task in issue.

Yet few environmental obligations exist in our legislation which would make mandamus operative. Hearings are scarce ever required, with a clear discretion vested in the administrative officials. In the absence of specific mandatory provisions that public hearings must be held, or that assessment must be made of the environmental consequences of a decision, mandamus will clearly not issue for a failure to perform these tasks.

Mandamus could be a very useful environmental remedy,
since it has the potential to force agencies to perform those
tasks made mandatory by the enabling legislation. However,
where the legislation does not impose mandatory duties on the
agency, mandamus becomes irrelevant. The failure of our
legislation to provide such mandatory duties effectively
removes mandamus as a remedy to environmentalists. In any
event, the standing requirements are such that environmental
control organizations would not be in a position to establish
standing even if mandatory duties did exist. Unfortunately,
the one type of organization which is most likely to act as a
watchdog to ensure that agencies are fulfilling their
environmental obligations is excluded from so doing by a
historical concept which seems to have scant justification in
the context of the problems at issue.

Declaration.

The declaratory judgment, although it does nothing more
than declare the position of the parties, is a very valuable
remedy for those seeking to question the actions of an agency.
The lack of accompanying enforcement provisions does not seem
to be crucial, since in most instances where the court declares
an agency action illegal or improper, the agency will comply
with that declaration.

Most jurisdictions provide that the declaration may be
sought without an attendant claim for any other relief such as
damages or an injunction. This is a significant factor in
environmental cases, since the organization challenging the
agency may possess no grounds upon which to seek other relief.
Another significant advantage of the declaration is the fact that it can be brought by ordinary action, thereby avoiding the more stringent time limitations and procedural rules common to the prerogative writs.

The remedy, despite its clear advantages as a method of questioning an agency decision, is for the most part unavailable to "public interest" organizations. The reasons are twofold.

Environmental control organizations purport to act in the public interest. Accordingly, an action by such an organization would of necessity be based on that interest. Yet the court has expressly stated in Cowan v C.B.C.\(^3\) that the Attorney-General, as the custodian of the public interest, was the proper party to bring the action for the injunction and damages sought. Accordingly, the plaintiff, an individual not suffering greater damages than the general public, had no standing to seek the declaration in the public interest. The result of this decision in environmental cases seems to be that only the Attorney-General can seek a declaration on the validity of agency action. This seems a questionable situation in that both the Attorney-General and the agency must be inevitably bound up with the interests of the government they serve. The issue can be resolved into whether we are satisfied with leaving such enforcement procedures to the Attorney-General.

Furthermore, the Supreme Court has historically held the position that the plaintiff in a declaratory action must be
able to establish a special interest in having the declaration made or that it stands in a position of possible jeopardy.\textsuperscript{39} Again, the standing requirements are such that environmental control organizations, representing the public interest, would scarce ever be in a position to demonstrate the necessary interest to successfully seek a declaration. Canadian environmental legislation simply does not vest legal rights in anyone or any organization lacking a proprietary or other tangible interest. Without some vested public interest under the legislation, the declaration, despite its obvious advantages as an agency control, remains an unavailable remedy for those seeking to advance the public interest.

\textbf{Certiorari and Prohibition.}

If our present system of judicial review can be said to be of any assistance to environmental control organizations, that assistance probably lies in the writs of certiorari and prohibition. These writs are very similar in their operation and are distinguishable largely on the basis of the stage of the proceeding at which review is sought. Prohibition is brought to prohibit an agency from acting or deciding improperly. Certiorari, on the other hand, is brought to quash a decision where the agency has already acted or decided improperly.

Because of their similarity, time can be spent most effectively examining the operation of the writ of certiorari since this writ has received the greatest judicial attention to date in environmental matters.
The courts in both the United Kingdom and Canada have adopted a restriction on the availability of certiorari which is of paramount significance to environmental control law. Agency functions have been classified as judicial, quasi-judicial, and administrative. Certiorari will lie in the first two instances, but not in the last:

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." 40

Accordingly, the first hurdle in any certiorari application is to establish that the agency is acting in a judicial or quasi-judicial manner.

One important precedent has been set in this regard in British Columbia. Mr. Justice Wooton, in Re Pollution Control Act, 1967; Re Application of Hooker Chemicals (Nanaimo) Ltd. 41 held that in considering whether a hearing was to be held to consider objections to the permit application, the Director not only had to observe the rules of natural justice, but was also bound to proceed in a judicial manner. In this instance, the Director had made his decision without giving consideration to the evidence filed in support of the objections, and certiorari issued on the application of a commercial fisherman to quash the Director's decision.

Thus the judicial administrative dichotomy is not necessarily a bar to a certiorari application in environmental statutes. However, it may well be in some instances,
depending on the wording in the enabling statute, and each certiorari application must overcome this hurdle.

The question of who has standing to seek certiorari remains. The potential of the writ was made very clear in the dissent of Mr. Justice Norris of the British Columbia Court of Appeal in *R. v Vancouver Zoning Board of Appeal, Ex parte North West Point Grey Home Owners' Association.* Because of the great significance of this decision to public participation through judicial review, a brief statement of the facts is warranted.

The owner of a home in the Point Grey area of Vancouver which was zoned for single family dwellings, sought an exemption from the by-law in order to construct servants' quarters in the basement. The Zoning Board granted the exemption and a homeowner and homeowners' association in the area applied for certiorari to have the Board's decision quashed. The majority held that neither applicant had standing since neither was a person aggrieved by an order of the Board. The association owned no property, and the individual failed to show that her property was affected, either as to amenities or value, by the order. The majority clearly reached their decision on a traditional, property-oriented view of locus standi. The applicants, representing only a public interest in preventing multi-family dwellings, lacked the requisite interest under this interpretation.

It is the dissent of Mr. Justice Norris which represents some small victory for the concept of "public interest"
standing. He clearly found that the applicants were persons aggrieved, even though their interest was purely public in nature. After considering several authorities, he concluded:

"1. Where the application for certiorari is by the Attorney-General as representing the general public, the writ will issue as of course.
2. Where the application is by a person "aggrieved" the writ is issued ex debito justitiae.
3. Where the application is by a person who does not show that he has a special interest, the court has a discretion as to the order. As the discretion must be exercised judicially, where it is apparent that the body against which the order is applied for lacked jurisdiction, the Judge in the exercise of such discretion will order the writ to issue. In such case the Court "will listen to the person who is a stranger", and interferes to point out that some other body has exceeded its jurisdiction whereby some wrong or grievance has been sustained. The applicants here, even putting this case at its lowest, are not in that class."43

Two important points arise from his decision for future environmental agency challenges by way of certiorari. Generally, environmental control organizations can establish no greater interest than was exhibited in this case by the homeowners' association, yet the reasoning of Mr. Justice Norris might well result in a finding of sufficient interest. Furthermore, the organization may still, as strangers, seek the remedy of certiorari despite the absence of a grievance.

After quoting from R. v Surrey Justices (1870) L.R.Q.B. 466, the learned Justice concluded that where the applicant is a member of the public, the issue of the writ is discretionary and will be refused if its issue will do the general public no good. While this discretionary feature by no means negates the potential so evident in this dissent, it must be borne in mind as a possible hurdle.
It is interesting to note that the majority agreed with the propositions advanced in the dissent, but concluded that the applicants would receive no benefit if certiorari issued. They apparently based their decision of no benefit on the ground that no monetary or tangible loss had been established.

However, the dissenting opinion, based not on proprietary or monetary interests, but on a genuine public interest, presents many encouraging possibilities to the concept of "public interest" standing, and may as a result receive further judicial consideration. Unless the position adopted by Mr. Justice Norris gains judicial acceptance, the possibility of environmental control organizations successfully establishing locus standi for judicial review seems remote indeed. Failing such acceptance, public protests will continue to be rejected on the seemingly irrelevant basis of the absence of a proprietary or other tangible interest.


The general rules regarding locus standi have been stated above. However, decisions made by environmental agencies are generally made pursuant to the provisions of relevant legislation. Accordingly, to complete the picture on locus standi, it becomes necessary to determine the extent to which our legislation provides rights not generally available under the common law.

It has been demonstrated earlier that our environmental legislation does not frequently recognize the public interest, while it invariably gives full recognition to those with a
proprietary or other tangibele interest in the controversy.

Examples abound. Under the Pollution Control Act, any person resident within five miles of the proposed or existing discharge may file an objection to the issuance of the permit.\(^{44}\) Similarly, section 16(d) of the Clean Environment Act\(^{45}\) of Manitoba requires that, prior to holding a hearing, the commission shall notify the applicant or licensee whose licence is under consideration, the municipality in which the subject plant is located, and any other persons whom the commission considers should be given notice. Clearly these provisions have the effect of conferring locus standi on certain specified parties.

By implication, those who do not qualify under the enumeration of those entitled to notice have no right to notice and have no legal rights under the legislation. Hence the screening process under the Pollution Control Act, 1967, which gives the Board the power to determine whether a "public interest" objector shall be heard. Our legislation seems to draw a clear line between those who are tangibly interested and those who are not.

This factor assumes great significance to environmental control organizations which can scarce ever demonstrate a proprietary interest which will be affected by a particular proposal. A similar result occurs if a group of scientists or university professors, for example, wished to intervene in a proceeding to object to a proposal. The list is indeed very long of those individuals and organizations which simply do not have any rights under much of our environmental legislation.
Suffice it to say that our present legislation fails to establish any public rights. We continue to resolve environmental issues, a very public matter, on a very private and restricted basis, including in the proceedings only those with a specific and identifiable interest in the outcome.

To some extent the public disadvantage has been modified by liberal judicial interpretation of legislative provisions. The application of Hooker Chemicals, cited earlier, provides one such example.

The applicant, a commercial fisherman, and others, filed objections to a permit application questioning the safety of salmon and shellfish, expressing the concern of waterfront owners, and questioning the safety of swimmers in the water that would be polluted if the permit was granted. The Director of the Pollution Control Branch then advised the objectors that the objections would not be the subject of a hearing. The applicant then sought certiorari to quash that decision. The results were encouraging. Even though section 13(4) of the Act gave the Director the sole discretion to decide whether an objection warranted a hearing, Mr. Justice Wooton concluded:

"Now it must be readily conceded that the holding of a hearing is a matter of some considerable significance and that therefore there must be proper consideration given by the Director to that question before he denies the objectors the right to a public hearing or inquiry."\(^47\)

Mr. Justice Wooton also commented on the Director's discretion:

"Although the Director has been given power to fix his own procedure, such procedure must be, in my
respectful opinion, of such an order as to give at least the semblance of a judicial inquiry into the matter, that is to say something established on the principle audi alteram partem." 48

This decision serves to point out that the legislative intent to exclude "public interest" intervention does not always succeed. It must be remembered, however, that this result was at least partially made possible by the peculiar nature of the Pollution Control Act, 1967, which gives specific, albeit half-hearted, recognition to objections in the public interest.

The British Columbia legislation seems somewhat more cognizant of a "public interest" concept than most Canadian environmental statutes, thereby making generalizations on judicial pronouncements in that province somewhat precarious.

The same result is not possible where the governing legislation makes no allowance whatever for "public interest" objections. This, unfortunately, must be considered the prevailing situation in Canada. Even the British Columbia act, perhaps the most responsive to the public voice, is far from satisfactory in its present state.

4. Recent Ontario Legislation Affecting Administrative Procedure.

Ontario has recently enacted legislation dealing specifically with administrative procedure. While this legislation has not conferred any new standing rights, it has to a certain extent removed many of the procedural problems which make many of our present administrative proceedings so inadequate.
A detailed examination of these statutes is not warranted at this time, but they deserve mention in the present context to the extent that they contribute in any way to the concept of public participation.

On May 21, 1964, a Royal Commission Inquiry into Civil Rights was initiated by the Province of Ontario to inquire into any matter connected with or affecting the good government of Ontario or the conduct of any part of business thereof or of the administration of justice therein. The Commission produced a massive report covering a wide range of subjects, but those recommendations relevant to Administrative Procedure may be found in summary form in Report No. 1, Volume 3, at page 1255 and following. Largely as a result of these recommendations, the Province of Ontario has enacted several statutes altering existing rules of administrative procedure.

The most significant for present purposes is Bill 54 entitled "An Act to provide a Single Procedure for the Judicial Review of the Exercise or the Failure to Exercise a Statutory Power". This statute has the effect of invoking by Originating Notice the jurisdiction of the Court to review an administrative decision:

s.2(1) On any application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
1. Proceedings by way of application for an order in the nature of mandamus, prohibition, or certiorari.
2. Proceedings by way of an action for a declaration or an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.
This statute effects two many important changes to existing administrative procedure. It provides for one simple procedure to invoke the jurisdiction of the court for judicial review, thereby eliminating the procedural pitfalls so prevalent in the operation of the prerogative writs. Secondly, it allows the applicant to seek review notwithstanding any right of appeal.

While the Act does not remove any of the standing laws which presently restrict "public interest" standing, it makes judicial review a much simpler and more meaningful procedure to those able to establish the necessary legal standing. It may well prove to be the necessary impetus to eliminate many existing rules of standing which seem both irrelevant and unjustifiable.

The second Ontario statute which affects administrative proceedings is Bill 53\textsuperscript{51} entitled "An Act to provide Procedures governing the Exercise of Statutory Powers granted to Tribunals by the Legislature wherein the Rights, Duties or Privileges of Persons are to be decided at or following a Hearing." It is not the intent of this statute to provide new rights to a hearing to those who did not possess such rights prior to its enactment. Rather, it is to provide specific procedural rules which will govern in those cases where a public hearing is being or must be held. Accordingly, its principal value lies in the procedural safeguards which it implements.

Section 10(a), for example, gives a party to proceedings a right to call and examine witnesses and present arguments
and submissions. Section 10(c) provides a right to cross-examine witnesses. Section 9(1) provides that hearings shall be open to the public except where public security or intimate financial or personal matters are being considered.

While these provisions may seem to be of no great import, it must be recognized that none of these very basic procedural safeguards are in any way assured in the absence of specific legislation. This Act would seem to be a first step in a long struggle to reach a situation where all parties to a hearing have an equal opportunity to present their case. As such it has great potential to be of assistance to anyone with a sufficient interest to be accepted as a party to an environmental agency hearing.

Canada's present position on locus standi for judicial review is clearly unacceptable. Few environmental statutes impose any mandatory obligations on agencies to assess the environmental consequences of their decisions. Acts which provide realistic and fair hearing provisions are equally rare. As a result, public participation for the most part simply does not exist in Canada.

At present, the public has a legal right to participate only when the agency so decides. We will have true public participation rights only when the public can advise the agency when it wishes to be involved in the decision process, and can enforce that decision through the judicial process of review if necessary. Surely the time has come when we must recognize environmental quality as the public issue it really
is, and cease to treat it as merely another issue of competing
private property rights.

C. Environmental Control Organizations and Environmental Tort Actions.

Strictly speaking, environmental control organizations, representing only the "public interest", have no proprietary interests upon which to bring a civil suit in nuisance or negligence. Accordingly, the simple answer is that they have no legal standing in the tort area at present.

However, this subject is worthy of brief mention in the context of this paper because environmental control organizations represent one potential representative plaintiff to conduct litigation on behalf of the members of a class seeking damages or an injunction for injury or loss suffered as a result of a tortious act having environmental consequences. The conclusion was reached in Chapter 1 that environmental control organizations stand in a much superior position to individuals with respect to their ability to participate effectively in environmental controversies. Those reasons apply equally to the concept of the representative action for damages.

There are clear and well developed rules of law which allow individuals to sue for injury or loss suffered as a result of a tortious act. Applications of these rules to cases of property loss have enabled individuals to sue successfully for environmental damages. However, there are instances where it is both unrealistic and undesirable to
require that the individual bring suit in his individual capacity. The representative suit has considerable potential in these instances.

Where a number of people suffer the same damage from the same act, suits by individuals merely flood the courts with numerous proceedings of an identical nature, whereas a representative suit has the potential to dispose of the claims of all those affected in one proceeding. This type of action has the added advantage of saving the members of the class a great deal of time, expense and vexation which would be inevitable if each member affected had to commence an action in an individual capacity.

In environmental tort actions, the representative concept assumes a particular significance. The injured party is usually suing either an industry or government as defendant, a considerably awesome task for most individuals. The problem of proof is particularly complex since technical evidence is generally a prerequisite to proving the alleged environmental damage and establishing the defendant's liability for that damage. A.R. Lucas has examined the procedural problems\textsuperscript{53} and concluded that the private tort actions have a number of deficiencies with respect to environmental suits. In the final analysis, to deny the members of a class the right to join forces to conduct the necessary litigation is in many instances tantamount to denying them a remedy.

One of the most effective methods of allowing members of a class to seek a common remedy would be to allow
environmental control organizations to represent the class. This result is very unlikely, however, under present Canadian laws, since representative actions are not freely available. Where they are available, it seems unlikely that environmental control organizations would have the necessary standing to act as representative plaintiffs for the injured class.

Most provinces contain some provisions in their rules of civil procedure to allow a representative action. British Columbia's rules contain the following provision:

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf of, or for the benefit of all persons so interested."54

Ontario has a similar provision which has been the subject of considerable judicial interpretation:

"Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the Court to defend, on behalf of or for the benefit of all."55

A brief examination of the judicial interpretation given this rule demonstrates all too clearly the extent to which its usefulness has been restricted.

In Watch Tower Bible and Tract Society Et al v The Attorney-General for Canada,56 the court had to determine whether the religious or spiritual belief of an individual seeking to represent the society entitled the plaintiff to the benefit of the rule. After citing an earlier decision, the Court concluded:
"This exposition of the principle on which the Rule is based seems to confirm the view that the interests of the persons referred to in the rule must be a material or financial interest or based on some statute, regulation, or order ..."  

The plaintiffs were held not to be entitled to the operation of the rule. This case would seem to have the clear effect of removing any possibility that an environmental control organization would ever receive sufficient status to act as representative plaintiff, since their interest is scarce ever more than aesthetic and recreational, and they receive no legal interest of any sort under our present statutes, regulations and orders.

Two further decisions appear to preclude any possibility that the procedural provision allowing for representative actions will ever have any meaning as an instrument of public control over environmentally tortious actions.

In Preston v Hilton the court concluded that to the extent that the injury affects each one of the class as a member of the public, relief can only be had at the suit of the Attorney-General, and that this rule cannot be avoided by the plaintiffs setting up a claim to represent all those members of the public who are affected by the wrongful act. A similar conclusion was reached in a decision on the equivalent New Brunswick provision. The effect of these provisions seems to be that once a problem becomes significantly public in terms of the number of people it affects, then the only person entitled to bring the action is the Attorney-General as the protector of the public interest. We seem to be back to square
one, in the sense that we must again rely on a very politically conscious government department to take action against a polluter causing great inconvenience and perhaps injury to a substantial portion of the public.

Following Preston v Hilton, a nuisance action is not a proper subject for a representative action, since each person claiming injury beyond that suffered by the general public must bring an action in his individual capacity and establish that special injury.

Again we have a situation where a potentially valuable remedy has been nullified by somewhat artificial restrictions to the point where it is of questionable value. Present restrictions prevent representative actions in most instances concerning environmental torts, since nuisance, the most frequent basis for such actions, is not considered appropriate for the concept. It is unlikely that environmental control organizations will ever be considered appropriate representatives under the present rule, since they lack the necessary interest to qualify. This despite the fact that their special interest makes them the logical and in some instances the only identifiable entity capable of adequately conducting such litigation.

Admittedly there are problems of a very special nature connected with the operation of the representative action. Identifying the members of the class is sometimes very difficult, yet very necessary since the class action is only beneficial if all those affected are represented to preclude the necessity of further litigation. Notice to the class is
always a difficult problem where the class is very large. Where damages are recovered, apportionment among members of the class can become a very complex problem.

However, many of these problems can be overcome by keeping the class action concept within reasonable limits. For instance, where the class includes virtually every member of a province, any damages recovered could be directed to the government to be credited to the citizens' tax load, or to be spent in rectifying the damage complained of. We may wish to restrict the representative action to those instances where the class can be defined sufficiently to allow proper notice and representation of each member's claim.

These problems are clearly very serious considerations and cannot be lightly dismissed. However, what is required is an updating of the laws we already have to adapt them to current problems. If after a close examination it should be concluded in good faith that the environmental class action in tort is not a workable solution, then some other remedy will have to be found. It seems unjustified to continue to restrict the operation of the class action, however, until such examination has been made.
CHAPTER 111

THE AMERICAN APPROACH TO "PUBLIC INTEREST" STANDING

There exists a substantial difference between the American and Canadian approaches to public interest standing. Canadian law has continued to require a proprietary or other tangible interest to establish legal standing to sue. We have seen few legislative changes in the traditional standing requirements. Accordingly, there are extremely few opportunities in Canada to litigate the public interest in environmental matters, and the public environmental control movement has never reached a place of prominence in the environmental decision process.

However, liberal judicial interpretation of the Administrative Procedure Act and various legislative provisions affecting standing, have allowed for the growth of a strong environmental control movement in the United States. Environmental control organizations have been granted the necessary standing to challenge decisions of agencies having jurisdiction over matters affecting the environment. Acts have been passed at both the Federal and State levels which in effect remove all standing requirements and allow anyone to sue to enforce existing environmental standards.

Canada has failed to recognize that the public interest in a healthy environment is deserving of legal protection. This failure is not irreversible, however, and the experience in the United States provides a ready model upon which to pattern public participation in Canada.
Those facets of the American experience which have had a significant effect on standing requirements are deserving of careful scrutiny. Because the American tendency to relax public standing requirements has not been without restrictions, some attempt must be made to determine the extent to which environmental control organizations are now able to establish the necessary standing to litigate environmental issues. Finally, the American experience under relaxed standing rules must be evaluated to determine whether public participation has enhanced significantly the ability of that jurisdiction to control environmental quality.


The American judiciary has accepted, at least in part, the public action as a legitimate and proper method of litigating and protecting the "public interest". Many instances exist where environmental control organizations have successfully established legal standing to challenge an allegedly improper agency action affecting the environment where those organizations claimed a purely aesthetic interest in recreational or conservational values. There is, however, considerable lack of clarity as to the precise type of interest which must be alleged to establish legal standing.

Unfortunately, the most recent decision of The United States Supreme Court in Sierra Club v Morton does little to resolve this uncertainty. In order to understand and assess this now governing decision, it is necessary to examine briefly a number of significant decisions which preceded it.
Historically, American law required a private citizen to show that he had been deprived of a legal right before that citizen would be granted legal standing to seek judicial review of the agency decision. The 1924 decision of Baltimore & O.R.R. v United States\textsuperscript{63} established a significant departure from the traditional approach to legal standing by holding that where the statute giving the agency its powers recognized certain rights in individuals, such rights were entitled to legal protection, and the agency was required to given them due consideration prior to taking any action. Failure to do so constituted a deprivation of a legal right, and gave legal standing to the individual deprived.

F.C.C. v Sanders Bros. Radio Station\textsuperscript{64} effectively removed the requirement that a legal right must be deprived before standing would be conferred. A radio station was given standing to seek review of an agency decision because the statute which allegedly had been violated allowed an appeal from the commission's orders by anyone aggrieved or whose interests were adversely affected.

The court's decision in Abbott Laboratories v Gardner\textsuperscript{65} further extended the Sanders ruling by concluding that the relevant provision of the Administrative Procedure Act\textsuperscript{66} governing the procedure of all Federal agencies, guaranteed a right to judicial review to those aggrieved or adversely affected whether or not the enabling statute so provided. Section 702 provides:

"A person suffering legal wrong because of agency action, or adversely affected or
aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

American courts have consistently followed this decision, with the result that one need not show a right in the statute itself to judicial review. However, it is necessary in each instance to show adversity or grievance as a result of agency action under the statute. Accordingly, whether the right to review is sought on the basis of a provision in the relevant statute, or under the Administrative Procedure Act, the adversity or grievance necessary to establish standing must be found in the rights and interest created by the relevant statute. If the statute clearly does not protect the right or interest claimed, then standing will not be conferred, and no right to judicial review exists. This point becomes extremely significant in environmental matters, since public interest groups can only hope to establish standing to seek review if the right or interest claimed by the group is recognized by the statute under which the agency action is being taken.

The question of "public interest" standing has received considerable attention in the environmental field, where environmental control organizations have frequently sought to establish themselves as proper parties to challenge agency action.

In the Scenic Hudson decision, standing was conferred on the Scenic Hudson Preservation Conference on the basis that the Federal Power Act recognized the public interest in aesthetically desirable recreational and
conservational lands. The court held that the Federal Power Commission should have considered those values in determining whether to grant the subject licences necessary to the construction of the proposed power facilities. On the question of who should be considered aggrieved:

"[T]hose who by their activities and conduct have exhibited a special interest in such [conservational] areas must be held to be included in the class of 'aggrieved parties'."68

While the relevant statute in *Scenic Hudson* contained a specific provision allowing judicial review, the statute under consideration in *Road Review League v Boyd*69 was silent as to judicial review. In the latter decision, the court simply concluded that 'aggrieved' had the same meaning under the Administrative Procedure Act as under the Federal Power Act, and that judicial review was available unless there was a clear congressional intent to the contrary.70

The above decisions were completely in accord with existing law on standing, since both enabling statutes recognized environmental values, thereby allowing a finding that those concerned with environmental values had legal standing to protect them. The statute in *Scenic Hudson* specifically provided for judicial review, while the latter failed to do so, thereby necessitating a conferral of legal standing under the Administrative Procedure Act. Both decisions reflect an unquestionable judicial acceptance of "public interest" standing, since in neither case were the organizations claiming more than a purely public interest in the environment. Surprisingly, the court in *Road Review*
conferred legal standing on the organization despite the fact that it hadn't participated in the administrative proceedings leading to the agency decision.

Since the above decisions both dealt with local organizations, it was reasonable to conclude that in 1967, following the Road Review decision, local environmental control organizations had legal standing to challenge agency decisions affecting the environment.

The first opportunity for the United States Supreme Court to extend this ruling to national organizations came in *Citizens Committee for the Hudson Valley v Volpe.* The court upheld the decision of the Second Circuit, which had extended the Scenic Hudson and Road Review decisions to confer standing on the Sierra Club, a national organization seeking to challenge a decision to issue the permits necessary to construct a proposed expressway. Neither the Citizens Committee nor the Sierra Club alleged that the proposed expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. They simply asserted the interest of the public in the natural resources, scenic beauty, and historical value of the area immediately threatened with drastic alteration, claiming they were aggrieved when the Corps acted adversely to the public interest.

Here the court was once again faced with a pure "public interest" action. After reviewing the Scenic Hudson and Road Review decisions, the Supreme Court adopted
the following statement of the Second Circuit:

"We hold, therefore, that the public interest in environmental resources - an interest created by Statutes affecting the issuance of this permit - is a legally protected interest affording those representatives of the public standing to obtain judicial review of agency action alleged to be in contravention of that public interest."73

As a result of this decision, the plaintiffs must show that the enabling statute provided for judicial review or that the Administrative Procedure Act was applicable. In addition, the court required a showing that those seeking to establish standing were responsible representatives of the public interest. The latter requirement has been criticized in an Administrative Law Note:

"If the public has been wrongly damaged, any individual should have standing to correct such wrong. The holding in Citizens Committee, while not eliminating the possibility of this result, leaves it open."74

Technically, a public wrong should be capable of correction by any interested individual. However, in this instance, the requirement of responsibility would seem to signify nothing more than an attempt by the Court to restrict standing to those organizations which exhibit a serious interest in the controversy. This should surely be a requirement in any instance where an organization seeks to litigate in the public interest, and as such is not in any sense repugnant to the concept of the public action. In any event this decision had the obvious effect of extending "public interest" standing to national conservation groups with broad environmental interests in a variety of areas.
In fact, the Sierra Club had earlier obtained standing in Parker v United States\textsuperscript{75} a 1969 decision in which they were allowed to seek a declaratory judgment that a proposed timber sale from a national forest was unlawful because certain statutory procedures were not met. The Supreme Court decision in Citizens Committee appeared to confirm that national organizations could successfully establish standing in appropriate circumstances.

Two Supreme Court decisions\textsuperscript{76} handed down on the same day provided a two-fold test for standing which has been the governing test to date. Firstly, the plaintiffs must allege injury in fact, and secondly, the injury had to be to an interest arguably within the zone of interests to be protected or regulated by the statute that the agency was allegedly violating. At first glance, this test does not appear to alter substantially the standing rules to be applied to public interest groups. The second requirement merely reiterated the long established rule that the statute must express an intent on the part of Congress to protect the right or interest on which the claim for judicial review is based. It is the first requirement that the plaintiff allege an injury in fact, which has received subsequent judicial construction most unfavourable to the environmental control movement.

The present trend to revert to a more restricted view of standing in environmental cases began in the California Ninth Circuit.\textsuperscript{77} The Sierra Club, adamantly opposed to a
proposed recreational resort to be constructed in the Mineral King Valley in California, sought a declaration and temporary injunction to prevent issuance of the permits necessary to commence construction on the development and access road. The Sierra Club alleged a special interest in the conservation and sound maintenance in the national parks, game refuges, and forests of the country.

The Federal District Court conferred standing on the plaintiff Sierra Club and granted the requested temporary injunction. This decision was reversed on appeal to the Ninth Circuit, which concluded that the Sierra Club lacked a sufficient interest in the use to which national parks and forests are put to establish legal standing. Since the Administrative Procedure Act requires more than concern to be aggrieved, the plaintiff's concern over the proposed development was insufficient to constitute an allegation of injury in fact. The Ninth Circuit simply chose to distinguish decisions such as Citizens Committee, Scenic Hudson and Road Review, and did so on grounds ranging from variations in the statutory provisions regarding judicial review, to the fact that in prior instances the Sierra Club had been joined by local organizations made up of local residents, at least some of whom used the disputed areas. Although it is difficult to generalize, the court was quite obviously justifying its refusal to confer standing on the fact that the Sierra Club was not a local organization and accordingly had not established interference with its members' use of the area in question. This point is
extremely significant since it has the effect of restricting or partially restricting group participation to local organizations. After specifically recognizing [Citizens] and [Parker v United States] as prior instances where standing had been conferred on the Sierra Club, the court stated:

"In both of these cases, however, the Sierra Club was joined by local organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined in this action."[79]

This reasoning has the obvious effect of preventing environmentalists from making successful challenges with respect to remote and presently uninhabited areas. The distinctions of these cases has received criticism:

"Furthermore, adoption of a local residenty requirement for standing in environmental cases would bar any challenge to an agency action that affected an uninhabited area such as the Continental Shelf or parts of Alaska."[80]

At very least, this decision ensures that the larger, national organizations, which are in many instances in the best position to present an adequate case, will be forced to enlist the support of local organizations wherever possible.

The Ninth Circuit's reluctance to accept environmental concern as a sufficient interest to confer standing was again in evidence in a subsequent decision, [Alameda Conservation Association v California][81] where the standing of the subject association was at issue. Eight individuals and one local organization sought to establish legal standing to
review an agency decision allowing landfills to the San Francisco Bay area [emphasis mine]. The majority concluded that four of the eight individuals who owned property near the Bay had standing, and that the conservation organization did not. No opinion was expressed by the majority with respect to the remaining four individuals who owned no property near the Bay. The organization was denied standing because "the association does not assert that any of its rights or properties are being infringed or threatened." In direct accord with its earlier decision in Sierra v Hickel, the majority refused to recognize a purely public interest in the state of the environment.

However, the dissenting opinion of two judges gave standing to all eight individuals, on the basis that "the bay area was not the exclusive preserve of those who own property there, and those claiming personal damage should be able to litigate those grievances." Judge Hamley would have conferred standing on the Association as well. After accepting the two-fold test for standing enunciated in Data Processing, he concluded:

"In my opinion these allegations concerning interference with plaintiff's enjoyment of the aesthetic, conservational and recreational values associated with San Francisco Bay amply establish their standing to prosecute this suit." Even the Judge most disposed to the environmentalists' position granted standing in this decision only because the association alleged interference with their enjoyment of the area. The majority, on the other hand, were disposed only to protect 'tangible property' interests.
Following the Hickel and Alameda decisions, two opposing lines of Federal Court decisions were clearly discernable with respect to environmental control organizations and the public action. Scenic Hudson, Road Review, and Citizens, all accepted the public action by environmental organization's as a legitimate vehicle for expression of public interest in the environment. The Ninth Circuit, both in Hickel and Alameda, sought to reverse this trend by reverting to a property and use concept of standing.

It is with this background that Sierra v Hickel (sub nom Sierra v Morton) reached the Supreme Court from the Ninth Circuit. It appeared that the public action by conservation organizations had gained general acceptance in the United States Federal Courts, and that the Ninth Circuit had in effect become out of line with the prevailing trend. If the Supreme Court chose to adopt this view, the Mineral King question gave it an excellent opportunity to gently chastise the Ninth Circuit and to restore acceptance of public actions by environmental organizations.

However, this was not to be the case. In a rather half-hearted fashion, the Supreme Court actually sanctioned the decisions reached in Hickel and Alameda. Seven judges took part in the decision. Four affirmed the Ninth Circuit decision, while three dissented and would have given the Sierra Club standing to sue.

The Sierra Club did not allege that the challenged development would affect the club or its members in their
activities or that they used Mineral King, but maintained that the project would adversely change the area's aesthetics and ecology. The Club sued as a membership corporation with a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country.

The majority opinion, delivered by Mr. Justice Stewart, rested upon the fact that the Sierra Club had failed to allege injury in fact:

"But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." 86

He concluded that the club's failure to allege actual injury to the club or its membership was based on a misunderstanding of the "public action". He conceded that there is no longer a requirement of establishing economic harm, and that the interests capable of protection have been broadened to include injuries which affect aesthetic, conservational and recreational as well as economic values. However, Mr. Justice Stewart distinguished between broadening the type of injury capable of protection and removing the necessity of any injury to the party seeking review. The latter proposition, he suggests, has never been the law.

Clearly the Sierra Club failed because it expressed only concern, and alleged no injury to its membership. For instance, no allegation was made that the membership actually used the disputed area. Neither was it suggested that the club's existence was threatened or even injured if the
development came to pass. The majority recognized the sustained interest of the Sierra Club in environmental matters, but considered pure interest insufficient:

"But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not be allowed to do so." 87

The majority is in very clear terms rejecting the public action in its pure form, since they reject the notion that an individual citizen with a bona fide special interest should be allowed to sue. What is most surprising, however, is their refusal of standing to a large, responsible organization like the Sierra Club because of the resultant danger that small, short-lived organizations would then be free to commence similar litigation. There seem to be several inconsistencies in this conclusion.

Assuming an acceptance of the public action, one would expect that a major function of the court would be to ensure that the group seeking to establish standing had a legitimate interest in the outcome of the litigation. In fact, this function had already been exercised in at least one decision, 88 where the Sixth Circuit refused to follow Scenic Hudson and confer standing on the non-profit organization seeking to intervene because the organization came into existence too recently to have developed a special interest in the area. This seems a much preferable method of preventing unwarranted
litigation than to refuse all organizations standing as the majority suggested in the instant decision.

Unfortunately, the court refused an excellent opportunity to weight the benefits and detriments of the public action. They simply assumed that public participation in the absence of an allegation of actual injury was unacceptable because it opened the courts to potentially excessive litigation. It can scarcely be argued that acceptance of the public action causes some hardships to both the courts and government administration. However, the crucial determination would seem to be whether the extent of environmental degradation has forced us to a position where the resultant hardship is both worthwhile and necessary. The majority simply failed to grapple with this issue.

In any event, the majority decision probably will not reduce the availability of the public action to any great extent. There are several reasons for this conclusion. *Sierra v Morton* was a challenge of a proposed government action which had long been on the planning board. Various interests including those of numerous ski organizations in the area were strongly in favor of the proposed development. The Sierra Club, on the other hand, sought to protect the environmental characteristics of the valley. This was not a situation where the responsible officials were allegedly in violation of any environmental obligations. Rather it was a conflict of interest between large segments of the population which favored the development and large segments which did not. Accordingly, interference by environmentalists
was not as clearly in the public interest as might be anticipated at first glance. Presumably a much different result might have ensued if circumstances indicated that the responsible officials had been in violation of their environmental responsibilities.

Secondly, the majority opinion does not preclude successful intervention in the future by the Sierra Club and other environmental organizations. Where the applicant organization is able to show injury either to the organization or its members, or interference with the organization's use of the disputed area, the requirement of injury in fact would seem to be met. In those instances where a national organization is unable to allege injury, the support of a local organization will cure the standing defect. Only in isolated areas does this decision seem impossible to circumvent.

Finally, only seven judges took part in the decision, three of whom would have conferred standing. A differently constituted court might in the future see fit to restore the virility of the public action. This view gains some support in the very strong dissents of Mr. Justices Douglas and Blackmun.

These dissents show considerably greater awareness of the significant issues at stake. Mr. Justice Douglas, after expending considerable effort to point out the considerable extent to which agencies become regulated by those they seek to regulate, makes a strong argument in favour of hearing out the environmentalists:
"The voice of the inanimate object should not be stilled. That does not mean that the judiciary takes over the managerial functions from the Federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river or a lake) are forever lost or so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard."89

One of the most perceptive statements arising out of the decision is to be found in the dissent of Mr. Justice Blackmun:

"Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not fit and do not prove to be entirely adequate for new issues?"90

He was fully aware that the fate of the Mineral King Valley had probably been decided by the majority opinion without any examination of the merits of the issues raised. He suggested that the Sierra Club be given an opportunity to make the necessary allegations of injury, or, in the alternative, that the laws of standing be relaxed to allow such organizations to be heard.

Despite the strong dissents, the majority opinion now governs the issue of "public interest" standing. Because of the majority's failure to grapple with basic issues, it is extremely difficult to state the present strength of the public action in the United States with any certainty.

This decision will not likely spell the end of the public action. However, it did set up restrictions on its use which seem both arbitrary and unwarranted. While these
restrictions may be a hindrance to participation by environmental organizations, such participation will undoubtedly continue. However, Mr. Justice Blackmun's question remains unanswered to some extent in the United States and to a much greater extent in Canada.

2. **Group Standing in Environmental Class Actions for Damages.**

The United States Federal Rules of Civil Procedure contain in Rule 23 specific procedures for class actions for damages. To the extent that environmental control organizations have standing to represent a class in an action for damages or an injunction, Rule 23 is deserving of mention in the context of this paper.

Judicial review clearly has the advantage over a class action for damages since the former occurs earlier in time, and if successful, has the effect of preventing the offensive operation and resultant damage from occurring. However, it simply is not relevant when an industry or government project is operating on the necessary permits and ostensibly within the law, since no agency decision is being made. Yet that project may be causing great hardships, loss of economic advantages, or health hazards to a large class of people. Where the number of individuals in the class of injured are too numerous or the individual claims are too small to warrant individual litigation of each claim, the class action for damages or an injunction to redress past damages and to prevent further occurrences becomes a very useful remedy.
The various procedural limitations on class actions for damages are too numerous and complex to warrant consideration for the purposes of this paper.\textsuperscript{91} However, a general examination of the potential role of environmental control organizations in this type of litigation is in order.

Existing authorities are clear that groups and associations exhibiting the requisite interest in the litigation have standing to litigate the interests of a class under Rule 23.\textsuperscript{92} Several decisions on environmental issues have adopted this rule\textsuperscript{93} with the result that environmental organizations can now successfully allege standing to litigate, as representative plaintiffs, the interests of a class.

The appropriate standing test must once again be taken from Data Processing\textsuperscript{93a} and Barlow v Collins,\textsuperscript{94} where the court held that the plaintiff must satisfy the "case or controversy" requirement of Article I of the Constitution by having the "personal stake and interest that impart the concrete adverseness required by Article I."\textsuperscript{95} Accordingly, the environmental control organization, when seeking to establish standing to sue as representative plaintiff in a class action for damages, must exhibit a similar interest to that required to establish standing for judicial review.

There are, however, some further complications under Rule 23. The Supreme Court has ruled that plaintiffs in a class action "cannot represent a class of whom they are not
This ruling would appear to prevent environmental control organizations from establishing the necessary interest to sue as representative plaintiffs where neither the organization nor its members are among those suffering the damages upon which the litigation is based. The court has held, however, that the above is only a rule of practice, and may be "outweighted by the need to protect the fundamental rights which would [otherwise] be denied ....".

This reasoning becomes extremely important in environmental class actions, since it allows the organization to establish that fundamental rights are at stake and that it is the only potential plaintiff with the resources and expertise to exert those rights on behalf of the injured class.

If, as suggested earlier, Sierra v Morton has not struck a fatal blow to the entire concept of the public action and "public interest" standing, then the potential in the United States for group litigation of class damage actions is considerable.

Assuming that a particular factual situation is suitable to the class action concept, there are again some compelling reasons to allow environmental control organizations to serve as representative plaintiffs.

Damage actions present some additional burdens to those generally confronting plaintiffs seeking judicial review. In addition to the considerable task of establishing the defendant's liability, each plaintiff must prove his
measure of damages. In many instances, the individuals suffering the damages are incapable of mustering the sustained interest, expertise and financial resources necessary to adequately conduct the litigation. An added burden can be seen in the fact that many such actions involve litigation against large industries or government departments. The individual claims may be so insignificant as to prevent any of the claimants from personally seeking redress. There may be so many small claims that individual litigation is impracticable. Where no individual in the class is sufficiently affected in terms of the amount of damage, the claims may never be litigated even though the aggregate damage is very high.

These represent some of the instances where it is simply not feasible to expect each of the members of a class to seek their own redress. To do so is in many instances tantamount to refusing those individuals a remedy. The necessity of consolidating claims in appropriate circumstances where an identifiable class has suffered common damages has been recognized in Rule 23. There seems no more logical representative plaintiff than the environmental control organization.

The American experience to date with environmental class actions seeking damages or injunctions is insufficient to allow any clear indications of the future of this type of litigation. However, it is available in the United States and serves as yet another example of the American
willingness to adapt old procedures to new situations. It also indicates another area where Canada, by clinging to outmoded traditional concepts, has failed to make available a very useful and necessary remedy.


On January 1, 1970, President Nixon gave formal approval to the National Environmental Policy Act (hereinafter referred to as NEPA), to date the most sweeping and far-reaching legislative attempt to ensure a "fair shake" for the environment. NEPA is most significant in the context of this paper for the extent to which it enhanced the potential of "public interest" standing in the United States. However, it has so much potential as an additional tool of environmental legislation if enacted in Canada that a brief examination of the legislative framework is in order prior to examining its effect on standing.

1. The Legislative Framework.

NEPA is divided into two distinct sections headed Title 1 and Title II.

Title 1 contains a statement of national environmental policy and the action-forcing procedure by which that policy is to be implemented. Section 102(2) contains directives to all Federal agencies outlining the procedures to be used to fulfill their environmental responsibilities. Section 102(2)(c) is the heart of the legislation, requiring
all Federal agencies to file impact statements outlining the environmental consequences of proposed Federal legislation and other major Federal actions and suggesting alternatives where possible. It is this section which substantially increases the possibility of establishing standing to seek judicial review of agency decisions. Accordingly, the operation of section 102(2)(c) will form the center of attention in this examination.

Title 11 brings into existence the Council on Environmental Quality in the Executive Office of the President. The Council has no powers to enforce compliance with NEPA, and exercises functions of an advisory and co-ordinating nature.

NEPA does not seek to prevent pollution or control environmental degradation per se. It does not set standards to be followed or environmental pollution limits. Neither does it provide for any public hearings. It is important to note that the philosophy of the Act is to prevent any Federal agency from taking action which will have environmental consequences without assessing those consequences and examining possible alternatives. Section 102 governs their operations, and failure to proceed in accordance with the requirements of that section leaves the agency open to public challenge by judicial review.

2. Section 102 Procedural Requirements.

Section 102(1) directs that "to the fullest extent possible, the policies, regulations and public laws of the
United States shall be interpreted in accordance with NEPA". It was clearly the intent of Congress that NEPA policy should assume a dominant position in the operations of all Federal laws. What then are the requirements of the Act?

Section 102(2), Subparagraphs (A) to (H) contain directives to all Federal agencies, which in effect require them to discharge several novel obligations in the discharge of their duties. These include: developing an interdisciplinary approach to ensure integrated use of the natural and social sciences in decision-making; identifying and developing methods and procedures which will ensure appropriate consideration of environmental amenities and values as well as economic and technical considerations; preparing an environmental impact statement on legislation and other major Federal actions significantly affecting the quality of the human environment; studying, developing and describing proposed alternatives to recommended courses of action; and making available to states, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment. These directives are all directed to producing a situation in which all decisions are made with a full awareness of environmental consequences.

However, of greatest significance to the environmental control movement is the impact statement requirement. Prior to NEPA, it was extremely difficult to establish that an agency had failed to fulfill its environmental
Responsibilities. For the most part, those responsibilities were undefined and agency officials had few mandatory obligations with respect to environmental assessment. Challenge was extremely difficult. NEPA has now set out specific obligations, and agency failure to meet those obligations clearly leaves the agency open to challenge.

The impact statement procedure can be described very briefly. Section 102(2)(c) sets out those considerations which must be included in an impact statement. These include statements by the responsible official on: the environmental impact of the proposed action; adverse environmental effects which cannot be avoided if the proposal is implemented; alternatives to the proposed action; the relationship between short-term uses of the environment and maintenance and enhancement of long-term productivity; and any irreversible and irretrievable commitments of resources which would be involved if the proposed action should be implemented. The responsible official, after consulting with any other agency having jurisdiction or special expertise, shall prepare the statement and copies shall be made available to the President, the Council, and the public. The statement shall accompany the proposal through the existing agency review processes.

On April 23, 1971, the Council on Environmental Quality issued final guidelines respecting the preparation and distribution of impacts statements. A draft statement is to be prepared, ten copies of which are to be given to the Council, and further copies are to be circulated for comment.
No action is to be taken until 90 days after the draft statement has been circulated. No action is to be taken until 30 days after the final statement has been circulated for comment, although the 30 and 90 day periods may run concurrently where the final statement is ready before the expiration of the 90 day period. Draft statements must be made available to the public unless advanced public disclosure will result in significantly increased costs of procurement to the government.

After the agency makes an initial environmental assessment, it is then empowered to decide whether an impact statement is required. However, a negative decision at this point is subject to challenge by judicial review, although the court will not substitute its view for that of the agency. This is undoubtedly the key to the entire legislation, since it creates an event on which to base an application for judicial review. If no statement is prepared, or if a statement is inadequate, the court may require a statement to be prepared or completed:

"We conclude, then, that section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties. The reviewing courts probably cannot review a substantive decision on its merits under section 102 unless it be shown that the actual balance of costs and benefits that was struck was arbitrary and clearly gave insufficient weight to environmental values."101

The significance of the right to judicial review cannot be overestimated where an adequate impact statement is not filed on a proposed action as potentially destructive
to the environment as an 800 mile oil pipeline.  

One defect in NEPA centers around the failure to provide specifically both the ways and means of ensuring that the public has access to the environmental impact statements as they are prepared. Subparagraph (F) in section 102(2) directs that information be made available to individuals and organizations, but provides no mechanism by which this can be accomplished. However, this defect is cured to a large extent by general laws of the United States ensuring public access to agency information. Generally speaking, the American public should be in a position to determine precisely what actions the agencies are contemplating and the methods they propose to use.

There are, of course, some problems associated with NEPA's operations. Perhaps the major one is in getting the agencies to comply not only with the letter of the law but with the spirit as well. Unfortunately, failure to provide the Council on Environmental Quality with police powers has resulted in legislation without any real enforcement provisions. Problems of recalcitrance among agencies have arisen. For example, the Department of Transportation would appear to accept the impact statement procedure wholeheartedly:

"The Department of Transportation draft procedure for the implementation of section 102(2)(c) makes the environmental statement, which that section requires, the vehicle for all environmental findings prescribed by any legislation applicable to that Department."

Compare that statement to a decision of counsel for
the Atomic Energy Commission:

"... [C]ounsel for the Atomic Energy Commission has decided that such statements will not be given probative value."105

The problem of enforcing strict compliance is major under the present legislative framework. However, with familiarity may come compliance. If agencies do not do so voluntarily, only slight legislative changes would be required to give the Council on Environmental Quality the necessary police powers over NEPA provisions.

Despite its inadequacies, NEPA has a great many desirable characteristics. It promotes a situation where all Federal agencies must operate in an atmosphere of environmental awareness. Ideally, no future decisions affecting the environment should be made in ignorance of the environmental consequences. The result will be a vast record of environmental information which will undoubtedly be developed much more quickly than if NEPA had not been enacted. Agencies now have a clear mandate to develop environmental expertise and can no longer be excused from their environmental obligations because of professed ignorance. Ideally, the agencies may well become so accustomed to the environmental considerations necessary prior to making a decision that they will fulfill their obligations without the necessity of public supervision. That day has not yet arrived, however, and NEPA provides a situation where judicial review of agency action becomes much easier than was the case prior to its enactment.

The impact statement in effect provides an event upon
which to base an application for judicial review. Prior to NEPA, the Federal agencies had to be concerned with environmental issues only to the extent required by their enabling statutes. Some statutes created no such obligations and were silent on environmental issues. In these instances, an environmental control organization could not succeed on an application for judicial review regardless of the issue of standing, since the agency had no obligation to consider environmental issues, and could not be challenged for not having done so. Under NEPA, it is necessary to show only that NEPA provisions have not been complied with, regardless of the wording of the enabling statute.

NEPA does not deal specifically with standing. In a strictly technical sense it deals exclusively with Federal agency procedure in environmental matters. Yet the effect is to increase considerably those instances in which judicial review by environmental control organizations is possible.

3. NEPA's Effectiveness Examined.

Nearly two years have passed since the Act was passed. Some fifty-eight decisions have been handed down in which one or more NEPA provisions were construed. This figure does not include those cases which have not been the subject of a judgement, or in which the judgement was not reported. It is both interesting and significant that virtually all the above-mentioned decisions were the result of a challenge by environmentalists of an agency's alleged non-compliance with NEPA provisions.

NEPA provisions have been successfully applied by
environmentalists to stall and in some instances prevent agency action until adequate consideration has been given to the environmental consequences of a proposed action. Examples include a proposed pipeline, a proposed highway project, and offshore oil leases. Many more examples could be cited where further assessment of environmental consequences was required as a result of challenges by environmentalists under NEPA provisions. This phenomenon must be considered beneficial until we reach the stage where we can assert that we know enough about the environmental consequences of our actions. It is also important to note in this regard that the environmentalists can only ensure that NEPA has been complied with. They cannot block a proposal once the agency has complied with NEPA provisions, and the agency is then free to proceed with the proposal regardless of the environmental consequences.

The future of our environment may well lie in developing a social conscience in those officials responsible for environmental protection, in order that a comprehensive, co-ordinated approach to the entire problem may be developed. NEPA provides a double impetus designed to achieve this end. On the one hand it forces, at least potentially, every Federal official in the United States Government to give consideration to, and be responsible for, the environmental consequences of his actions. If we ever reach the point where our governing officials and administrators acknowledge and accept with sincerity their public responsibility to protect and enhance the environment, the present environmental
crisis would largely disappear. NEPA has gone a long way to achieving this end. In the meantime, it creates a clear mandate to agency officials to accept their environmental responsibilities and establishes an event upon which to base a public challenge of the decisions of those officials who fail to do so.

C. Additional Legislative Relaxation of American Standing Requirements.

NEPA can be seen as a statute of general application to Federal agency proceedings which does not specifically alter the rules of standing, but substantially enhances the ability of environmental control organizations to seek and obtain judicial review. However, acts have been passed at both state and Federal levels which in effect remove the standing requirements outlined in part A. of this chapter. They specifically allow citizens suits in specified instances to control environmental degradation or to force compliance with existing environmental standards.

In order that the complete picture of "public interest" standing in the United States might be conveyed, examples of this rather novel trend deserve examination.


Section 304 of the 1970 Amendments to the Clean Air Act allows any person to commence a civil action on his own behalf against any person (including the United States and any other government agency or instrumentality of government) who is alleged to be in violation of either an
emission standard or limitation or an order of the Administrator with respect to such standard or limitation.

The district court has jurisdiction without regard to the amount involved or the citizenship of the parties [emphasis mine].

The effect of this provision is to allow universal standing. The lack of citizenship restrictions undoubtedly means a Canadian would have full standing to be heard in a United States Federal District Court.

Congress must be taken to have recognized that everyone has the right to clean air, and to the extent that standards are being violated, should be in a position to enforce that right in a court of law.

2. State Legislation Removing Standing Requirements.

There now exist several States acts which have legislated standing requirements out of existence in environmental matters. For the purposes of this paper it is necessary to describe only two such provisions.

The Michigan Environmental Protection Act of 1970.110

Section 691.1202 provides that virtually any person, government or organization can sue any person, government or organization in the Circuit court having jurisdiction where the alleged violation occurred for declaratory and equitable relief for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

The effect is clearly to remove all standing
requirements and allow any identifiable party or entity to maintain an action against any other identifiable party or entity.

**Chapter 732 of the Laws of Massachusetts.**

This amendment to General Law C.214, defines damage to the environment and provides that the superior court for the county in which damages occur may, upon the petition of not less than ten persons domiciled within the commonwealth, or upon the petition of any political subdivision of the commonwealth, determine the issue in equity in a petition for declaratory relief, and may, before the final determination of the cause, restrain the person causing or about to cause such damage, provided that such damage constitutes a violation of a law the major purpose of which is to prevent or minimize damage to the environment.

While individuals have no standing as individuals, ten people constitute a sufficient number to establish standing. This provision ensures free court access to any environmental control organizations with ten members domiciled within the commonwealth.

3. **State Adoption of NEPA's "Impact Statement" Procedure.**

At least four state legislatures have adopted impact statement procedures similar to those prescribed by NEPA. The importance of these enactments must not be underestimated. All Federal agencies, regardless of the state in which a proposal is being undertaken, must follow impact statement procedure. In those states which adopt the impact statement
procedure, a similar mandate to assess environmental consequences will apply to all state agencies.

The end result is to ensure that every administrative agency, whether Federal or state, will be allowed to take no action of any kind which will have an effect on the environment until the environmental consequences have been assessed.

By adopting the impact statement procedure, state legislatures are filling a most obvious gap, since many activities of state agencies, not subject to NEPA, have very substantial and far-reaching environmental consequences.

As more states adopt this procedure, the possibility of public challenge by environmental control organizations grows ever greater.

D. The Relaxed American Approach to Standing — Is it Working?

The precise limits of participation to which American environmental control organizations are subject are far from clear. However, a liberal interpretation of the Administrative Procedure Act, NEPA and its state counterparts and specific provisions such as the amendments to the Clean Air Act evidence substantial progress in entrenching the concept of "public interest" standing to litigate environmental issues. Despite the limitations arising out of Sierra Club v Morton, environmental control organizations in the United States now have considerable power in the decision process as a result of their much increased
opportunity for intervention. This power is particularly in evidence when one contrasts the American approach to the very stringent standing requirements which govern litigation in Canada.

The major reason for examining the American experience is to glean whatever is potentially useful in Canada. There is no question that the American approach suggests a much less stringent set of standing requirements than the governing rules in Canada. What remains is to determine how the "public interest" standing concept in the United States has worked in practice. For instance, are the results of public participation generally desirable? Has the cost of introducing another power group to the decision process been achieved at a detriment which exceeds the benefit gained? Has the concept produced a deluge of environmental litigation? Has environmental quality control been significantly enhanced by the advent of the public action?

These and other questions deserve at least some attempted answers. Many of the laws discussed earlier are too recent to allow any definite conclusions. Some questions do not admit of ready answers, and will be resolved only on a trial and error basis.

The immediate results are fairly obvious. Increased "public interest" standing has created far greater public awareness of environmental issues. Perhaps the most obvious example is the proposed Trans-Alaska Pipeline. If for a moment one assumes that this proposal had raised no objection from environmentalists, public knowledge of the dangers of
shipping Alaskan oil by tanker down the west coast to Washington would undoubtedly have been very scant. However, a great hue and cry arose from a great number of sources. Environmentalists forced the responsible officials to suggest and explore alternatives. Virtually everyone in Canada and the United States is now aware of the great danger to the Pacific coastline from the inevitable oil spills if the tanker route becomes a reality. For months every edition of most Canadian newspapers had one or more articles on the proposal. Much of this public awareness can be attributed directly to the varied efforts of environmental control organizations to prevent the pipeline and tanker route from becoming a reality. It now appears that it will be constructed, but in the full realization of the possible environmental consequences. If it should prove to be a disaster, those responsible will have no opportunity to claim ignorance and will be fully accountable for their actions. The time is quickly passing when either the general public or those in power can ignore the pressing environmental problems which confront us. A good deal of this awareness must be attributed to a strong environmental control movement.

The increased concern and awareness has also resulted in the development of new methods of evaluating environmental amenities. These methods are increasingly becoming an integral part of the decision-making process. Again, some credit for this phenomenon must go to environmental control organizations which have consistently assumed the role of environmental watchdogs.
The end result is that the United States can be said to have accepted responsibility for the environment in a fairly comprehensive sense. Although environmental degradation will undoubtedly continue at what many consider a dangerous pace, this degradation will no longer be perpetrated because of environmental ignorance.

Proposed projects will be shelved in many instances for ecologically preferable alternatives. Some proposals will be halted permanently because the resultant benefit would not justify the inevitable environmental damage.

Present relaxed standing requirements in the United States have given environmental control organizations considerable power to ensure that the above objectives are being met. It can scarcely be argued that environmental issues receive far greater attention under the watchful eye of strong environmental control organizations than would otherwise be the case. However, these benefits were not gained without some accompanying detriment to the smooth and efficient operation of the decision-making process.

One of the most obvious concerns is the possibility that relaxed standing requirements will result in a deluge of litigation on every imaginable environmental issue. Another is the possibility that environmentalists now possess the power to grind the nation's business to a halt. One example of such concern is the obstruction by environmentalists of proposed power facilities in the Hudson Valley, at a time when New York city is facing the possibility of further power brown-outs. Another is the delay in pipeline plans when the
United States faces a severe energy crisis.

Both questions can be resolved into a single issue - is the increased public environmental activism being allowed at a cost so great as to be unjustified in the "public interest"? One must ask whether the appropriate balance between environmental protection and reasonable progress can be achieved and is being achieved under the American system which allows public participation considerable scope.

The present system has not been operative for a sufficient length of time to allow any definite conclusions to be drawn. NEPA has been the subject of actual litigation for a period of less than two years. Most state acts affecting standing have been enacted subsequent to NEPA, many within the past year. The Supreme Court has had only one opportunity to rule on the legal standing of environmental organizations, and for the most part failed to meet the issues. To date, no one has suggested that the system is capable of final evaluation, and the author will not be so presumptuous as to disagree. However, an interim judgment of the system does not seem out of place. Considerable insight can be gained by defining the issues and examining the opinions of some of those involved in the system, in an attempt to determine what the result is likely to be.

The issues can best be presented by examining two situations where the power of "public interest" environmental control organizations has manifested itself very clearly.

One is the power shortage in the eastern United States which has resulted in power "brown-outs" to various areas in
and around New York City. The Hudson River represents a potential power source to alleviate to some extent the problem of an inadequate power supply. It also represents to environmentalists, vacationers, and people who live along its banks, a source of aesthetic and recreational pleasure. Proposals to build power facilities on the Hudson have been successfully blocked by environmentalists since 1967, when the court ruled, in Scenic Hudson Preservation Conference v F.P.C.\textsuperscript{114} that the Federal Power Commission had failed to consider various alternatives in reaching their decision on the means by which additional power should be supplied to New York City. Possible alternatives included the use of: gas turbines, underground transmission lines, interconnected power from New England and steam generation plants located in Pennsylvania. This example is not being cited to show which, if any, of the alternatives was feasible.

Rather its purpose is to show that environmental control organizations in the United States do in some instances have the power to prevent certain proposals from becoming a reality, despite the insistence by responsible officials that these proposals are necessary to fill a pressing need. There is a clear necessity to balance interests to best suit the situation.

Any rise in the cost of power as a result of environmentalist activity may well create a serious problem for those residents of New York City least able to afford an increase. Ironically, they represent an element of society to whom the recreational, aesthetic and conservational values
of the Hudson provide the least benefit because of their inability to leave the city and enjoy the river environment.

On the other hand, the environmentalists who successfully delayed construction of the Hudson power facilities did not argue that New York City had sufficient power. What they objected to was the commission's decision to construct the facilities without giving adequate consideration to possible alternatives. Had the environmental activity not been allowed, presumably the power facilities would have been constructed on the Hudson with no consideration whatever for other alternatives which might have been capable of providing the necessary power without destroying the aesthetic qualities of parts of the Hudson. This result, applied to other situations on a nationwide basis, would inevitably, and in many instances unnecessarily, destroy the aesthetic, conservational and recreational value of vast areas of the United States.

Similar problems arise in the controversy surrounding the United States proposal to build a Trans-Alaska pipeline from Prudhoe Bay to Valdez, from which point the oil would be shipped by tanker down the West coast to the Cherry Point refinery in Washington.

Few people seem willing to argue that the United States does not require an increased supply of petroleum, or that Alaskan oil should not form part of that increased supply. However, the method of supplying the oil to the continental United States has resulted in a head-on confrontation between environmentalists and the U.S. Department of the Interior
which is responsible for issuing the necessary permits.

The major cause of concern has been the possibility of large oil spills along the tanker route. Environmentalists have successfully delayed the issuance of the permits necessary to commence construction. British Columbia M.P. David Anderson (L.-Esquimalt-Saanich) and the Canadian Wildlife Federation will join the American environmentalists in the struggle as a result of a ruling by the United States Court of Appeals in Washington which allows their participation. 115

NEPA provisions were successfully invoked by the Wilderness Society and other environmentalists to require the Secretary of the Interior to consider alternatives to the proposed pipeline and tanker route. 116 The most significant alternative was a pipeline south through the Mackenzie Valley to the United States, a proposal favoured by the Canadian government. 117

An impact statement of 3,200 pages was prepared showing, in effect, that the Mackenzie Valley route, which requires no accompanying tanker route, presented less ecological danger than the Trans-Alaska pipeline. However, NEPA does not require the responsible Federal official to choose the alternative least ecologically destructive. It only requires consideration of alternatives and environmental consequences before a decision is reached.

Accordingly, on May 12, 1972, the Secretary of the Interior announced the decision of the United States government to build the Trans-Alaskan pipeline as originally proposed. 118
Ultimately, the issue will likely be resolved by the Supreme Court.

Again, as in *Scenic Hudson*, the environmentalists have succeeded in delaying the construction of what is considered by many to be a very urgently needed pipeline. Have they done a disservice to the public interest by placing obstacles in the way of the Secretary of the Interior?

It is submitted that the environmental activity here, as in *Scenic Hudson*, has provided a valuable public service if viewed in its proper perspective.

In neither instance were the environmentalists suggesting that the goods and services to be supplied by the proposed facilities were unnecessary. Their objections centered around the methods chosen to provide these services. It seems significant that the environmentalists succeeded in both instances in challenging the respective decisions not because of the nature of the proposed actions, but because of the respective failures on the part of the responsible officials to adequately consider possible alternatives to the proposed actions. This is particularly astonishing in the pipeline example, since NEPA clearly directed the formulation and description of alternatives, and one can scarcely imagine a proposed major Federal action with greater ecological consequences than an 800 mile pipeline supplemented by a tanker route down the West coast. Yet the Department of the Interior showed little concern for alternatives until forced by the environmentalists to examine other possibilities.

This factor becomes even more incredible when one
realizes that the Mackenzie Valley route presented an obvious alternative with less environmental disruption and the support of the Canadian government.

Undoubtedly there are many who will condemn the environmentalists' tactics as being largely obstructionist in nature. However, it is of paramount importance to note that environmentalists have never had, nor do they now have, the power to actually prevent permanently any proposed government action. They do have the power, however, to ensure that the government department or official is within statutory authority and in compliance with existing requirements. It is only when the responsible official seeks to ignore the NEPA directives or other statutory duties that a "public interest" organization has a foundation upon which to challenge that action. It is significant that in the absence of environmentalist activity, NEPA directives would receive only that compliance which each agency voluntarily undertook, since the present legislative scheme provides no enforcement procedure.

There is no serious doubt that increased power in "public interest" groups has resulted in considerable delay in both agency and court proceedings. However, much of that delay must be credited to the agencies' reluctance to fulfill their statutory environmental obligations, thereby making possible a public challenge. Again the pipeline issue provides an example. The only point decided in the suit by the Wilderness Society was that the Department of the Interior failed to adequately consider alternatives. In
view of the clear mandate in NEPA to consider such alternatives, one wonders whether such failures should be condoned.

In any event, these delays can be eliminated in only two ways. One is to prevent "public interest" groups from pointing out the inadequacies of agency assessment of the environmental consequences and possible alternatives. The second is to continue to allow environmental control organizations to force full compliance. The first method seems to ensure that agencies will continue to circumvent existing environmental obligations when it is convenient, since they would be under no pressure to do otherwise. The second, and more preferable method, is to continue to coerce the agencies to full compliance until such time as they recognize the futility of anything less.

If agencies ever reach that point, then the environmental control organizations would scarce ever succeed in litigation, since there would be no basis for challenge. Until the agencies reach that level of responsibility, continued public pressure seems a necessary ingredient in the environmental decision process.

There are many objections to the extension of standing requirements to include the "public interest". There is a fear that litigation would be undertaken by hordes of litigants. This very fear was expressed by Mr. Justice Stewart in *Sierra Club v Hickel*. This would then result in an unmanageable backlog in the courts. There was also the fear that frivolous and vexatious actions would become common place.
For the most part, these objections have not been borne out in the American experience.

This issue received specific judicial comment in

**Scenic Hudson:**

"We see no justification for the commission's fear that our determination will encourage 'literally thousands' to intervene and seek judicial review in future proceedings. We rejected a similar contention in Associated Industries v Ickes, .... noting that 'no such horrendous possibilities' exist. Our experience with public actions confirms the view that the expense and the vexation of legal proceedings is not lightly undertaken."119

**Scenic Hudson** was decided in 1967. The environmental cases decided between 1967 and 1972 (with the exception of those decided by The Ninth Circuit) appeared to accept this line of reasoning. It is extremely difficult to assess what is meant by a "horde of litigants" or a "deluge of litigation". However, there does not seem to be any reason to suggest that the environmentalists have taken undue advantage of the relaxed standing requirements. For example, since NEPA's enactment on January 1, 1970, some fifty-eight judgments have been handed down in which NEPA provisions were construed. If one assumes that no litigation was undertaken for the first six months following its passage into law, then fifty-eight decisions represent an average of just over one-half a judgment per year per state. This can hardly be considered a deluge when one considers the number of ecologically disruptive proposals brought forth during a twelve year period in a nation as large as the United States.

Furthermore, most environmental decisions which did
reach the court concerned major developments which prompted genuine environmental concern. In short, the extension of "public interest" standing does not appear to have resulted either in a horde of litigants or an unusual number of frivolous or vexatious actions.

However, the Supreme Court in Sierra v Morton declined to examine the five year period since Scenic Hudson allowed "public interest" standing, and merely concluded in the abstract that to allow standing on a purely public interest would open wide the floodgates. It is unfortunate indeed that the court missed an excellent opportunity to weight the various factors involved and to make a definitive statement on the future potential for "public interest" standing.

It is necessary to note that the court is not powerless to deal with vexatious or frivolous suits, a factor which the Supreme Court seemed not to consider. In South Hill the court declined to confer standing because the organization had not been in existence long enough to have developed the necessary special interest in the area.

The Ninth Circuit in Alameda expressed concern that the rights of the individuals in the organization were not tendered for litigation, and accordingly each member would be free to relitigate. Where necessary, the courts have solved this problem by granting the defendant's motion that the plaintiffs be required to proceed under Rule 23 as a class action to foreclose the threat of harassment through consecutive lawsuits. The plaintiff environmental control organization then litigated the issues as representative
plaintiff for those claiming to be among the class of injured.

In addition to these specific controls, the court is always in a position to entertain a motion to dismiss where the plaintiff's pleadings disclose no cause of action or are clearly of a frivolous or vexatious nature.

To suggest that the court is powerless to prevent a flood of litigation is simply to ignore both the specific and general powers possessed by all courts to supervise and control the litigation which arises.

The Supreme Court may have been partially justified in their concern over individuals litigating environmental issues. This possibility seems a very private and piecemeal approach to environmental litigation and as such may not be desirable. There may also be good reason to require an organization to demonstrate the necessary special interest since the organization, if given standing, will in effect be representing the public interest.

It is much more difficult to justify their refusal to confer standing in the Sierra Club, however, since it represented a huge membership with a demonstrated and long-standing special interest in environmental matters.

Others in positions of power in the environmental decision process have a considerably more kindly attitude to activities of environmental "public interest" organizations.

The Council on Environmental Quality, a prestigious if not powerful environmental body in the government structure, commented on "public interest" litigation:
"The citizen litigation has not only challenged specific government and private actions which were environmentally undesirable. It has speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation."123

The Council adopted the following resolution of its Legal Advisory Committee:

"Where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with Federal Government policy, as exemplified in the National Environmental Policy Act and in other legislation."124

The above resolution is tantamount to suggesting that the Government is acting improperly by even raising the defense of lack of standing. The Council on Environmental Quality has very little actual power under present NEPA provisions. However, its location in the Executive Office of the President and its capacity as environmental advisor to the President gives it great prestige and influence in environmental matters. No group outside the environmentalist circles has spoken out more strongly in favor of continued activity by environmental organizations. One might go so far as to suggest that further legislation relaxing standing requirements may well be deemed by the Council to be necessary if the public action continues to be emasculated by decisions such as Sierra v Morton. The Council's proximity to the
President makes this a very real possibility. In fact the
Senate is now considering such legislation. It seems clear that "public interest" organizations
have received wide acceptance in the United States
environmental power structure. Some industries and govern­
ment agencies may feel, for what seem to be obvious reasons,
that these organizations have too much obstructionist
power. On the other hand, environmental control organizations
would no doubt appreciate even greater powers to ensure that
environmental consequences are given adequate consideration.

Despite the uncertainty as to the precise limits which
should be placed on environmentalist activity, the concept of
"public interest" standing seems destined to remain an
integral part of the American environmental decision-making
process.

The future of environmental group standing depends
largely on the ability of the various organizations to
continue to participate in a responsible fashion.

To date the expected "bogey man" bringing a flood of
litigation has not arrived. It is unlikely at this point
that he will ever arrive. Most of the issues which have been
litigated are of general concern to the public. There can be
no doubt that the activities of the organized environmentalists
has produced greater sensitivity, awareness and understanding
of environmental issues. There simply do not appear to be
valid arguments to restrict this activity.

One final point deserves mention. We are often
concerned about any activities which delay the fast, efficient
conducted of our personal, local and national business. We seem to define progress as the ability to obtain as much as possible as quickly as possible. We in North America consume at a rate which is incomprehensible to many nations of the world. This attitude has taken a serious toll on our environmental resources, the extent of which has just recently been realized. There may be no alternative but to slow down and reflect on our past while we ponder our future. Perhaps the avid environmentalist is merely a man with greater foresight than we have reason to expect. It seems unlikely we need ever to increase our already luxurious lifestyle at the expense of our environment. The answer depends on our response to the environmental crisis, and the environmentalists have successfully forced us to pause and consider what that response should properly be.

Canada has for the most part failed to take advantage of the views of environmentalists and has lost precious years in the struggle to control environmental degradation. This past failure can be rectified and should be rectified by the necessary legislation, to ensure that the Canadian environment receives maximum protection in our haste to consume.
CHAPTER IV

A PROPOSED FORMULA FOR PUBLIC PARTICIPATION IN CANADA

There can be little doubt that environmental standards could be greatly improved by a strong Canadian environmental control movement. There is equally little doubt that environmental control organizations in Canada will slowly erode the rigid standing laws presently in existence. If we fail to include in our plans for environmental control an adequate vehicle for public expression, this erosion may come about in a very haphazard way through the laborious case method. Regardless of the method by which present standing laws are dispatched, it seems inevitable that they must go. In recognition of this fact, a model will be proposed which will enable the public to express adequately its concern for environmental quality.

The American experience would seem to indicate that fears of resultant chaos following the advent of public participation in environmental matters were largely unfounded. It is both desirable and timely, then, to seek to develop a system which provides for public expression with a minimum of disruption to that system.

Two points assume paramount significance in any consideration of introducing public participation to the Canadian environmental decision process. First, some determination should be made as to the role of a statute similar to the National Environmental Policy Act in the Canadian context. Secondly, if present rules of legal standing are to be relaxed,
some formula is needed to determine what individuals or which environmental control organizations should have legal standing in a given situation. Successful resolution of these points will have considerable bearing on the ultimate efficiency of the public standing concept in Canada.

A. **NEPA in Canada.**

NEPA is easily the most far-reaching environmental statute to date in North America. While it is general in its terms, and sets no environmental standards, it is amazingly comprehensive in its effect on environmental quality. This is largely a result of its application to every agency and department of the government of the jurisdiction in which it is enacted. Equally significant is the fact that NEPA creates a clear event upon which to base a challenge of an agency action.

Every agency under Federal jurisdiction (and those agencies in States where a similar statute has been passed) must make a detailed environmental assessment in each proposed major action which is likely to have environmental consequences. Failure to prepare an adequate environmental impact statement, or an improper decision not to prepare such a statement, subjects the agency decision to judicial review at the instance of any entity having the necessary legal standing. Despite the fact that NEPA does not specifically alter the existing laws of standing, it does clearly create an event upon which to base an application for judicial review when NEPA is not complied with, regardless of the specific wording of the statute from which the agency derives its jurisdiction.
This factor, perhaps more than any other, makes the NEPA concept invaluable in the concept of the Canadian system. Presently, as demonstrated in Chapter 11, Canadian agencies are subject to few mandatory environmental obligations under existing legislation. This despite the fact that an increasing proportion of government business is being transacted by administrative agencies. If the enabling statute fails to recognize the public interest in the environment, or fails to require the agency to consider environmental consequences in arriving at its decisions, then no opportunity exists to take the agency to task for ignoring those factors. A Canadian NEPA has the potential to nullify these deficiencies and to ensure that our administrators develop the ability and interest to remain ever conscious of their enormous environmental responsibilities. Under NEPA, each agency, as a matter of course, must constantly assess the environmental impact of its decisions, since failure to do so automatically constitutes a reviewable breach regardless of the enabling statute.

Essentially, NEPA provides a means of introducing mandatory assessment of environmental consequences of decisions. The effect would be similar to placing such mandatory requirements in each statute having environmental consequences. However, NEPA achieves this result in one simple, comprehensive statute.

There are, of course, a great many other advantages to NEPA which have received detailed consideration earlier in this paper and need only be referred to in passing for present
purposes. No prior statute has exhibited an equal ability to force an entire government to be regularly conscious of its environmental obligations. From the moment of its passage, NEPA became a force to be reckoned with in each and every department and agency under its purview. Even those officials not particularly disposed to environmental awareness could not ignore its requirements. Not surprisingly, reactions to NEPA were varied, and the degree of voluntary compliance seems equally to be lacking in uniformity. Yet in the final analysis, NEPA has proved to be a very influential tool in increasing the degree of routine and willing response to environmental problems among government officials and members of the general public alike.

The benefits of NEPA so obvious in the American experience would be most welcome in Canada. No good reasons exist why a Canadian NEPA could not produce similar environmental control benefits. However, Canada has a very different political structure than the United States, as a result of which NEPA in its American form would likely prove quite ineffective as an instrument of environmental control in Canada. The basic philosophy of the Act seems unassailable in any jurisdiction. However, to achieve the objectives of the Act in Canada, certain changes in its structure seem essential.


In any Canadian version of NEPA, it seems essential that the Council on Environmental Quality be given substantial enforcement provisions to ensure compliance with NEPA provisions. The American Council has no policing power of any sort, and
serves basically co-ordinating and advisory functions. Despite this lack of enforcement power, the American Council's location in the Executive Office of the President gives it a position of prestige and influence which may be of equal or greater significance. It is difficult to imagine any comparable arrangement in Canada at either the federal or provincial level which would provide the Council with sufficient prestige and influence to nullify the absence of any real power under the legislation.

Accordingly, it seems reasonably essential to the effective operation of NEPA in Canada that the Council on Environmental Quality occupies a position relatively free of political influence and possesses specific enforcement powers under the legislation to ensure that government agencies and departments comply strictly with NEPA requirements. Several suggestions can be made to achieve this objective.

Canada's political structure, composed of at least three major parties seeking votes at both federal and provincial levels, would seem to dictate Councils at both levels which were composed of members of varying political views. This would ensure a greater cross section of views among Council members, while ensuring that the federal and provincial councils were not merely rubberstamping the views of the particular party then in power.

Appointees could be from various backgrounds, with each possessing a demonstrated interest in environmental matters and bringing to the Council a particular expertise on matters affecting environmental control. Preferably, appointments
could be made by a vote of the full parliament or legislature on a non-party basis, which would help to ensure that appointments were made on the basis of qualifications and interest in environmental matters rather than on the basis of the political leanings of the potential appointees. A suitable term might be five years, with provision for renewal for a further five years. This would prevent the inevitable staleness which develops in a guaranteed permanent appointment, while allowing the appointees sufficient time to develop special expertise in the affairs of the Council.

The major problem remains that of forming a Council reasonably free of political influence. No easy answer suggests itself, since the legislation necessary to bring NEPA and the Council into existence must of necessity emanate from the governing party. However, assuming some sincerity in the government asked to introduce such legislation, the problem is not insuperable.

One possibility which deserves consideration is a Council organized in a manner similar to the federal Auditor-General's Department. The Auditor-General audits the federal books, and in effect acts as the financial watchdog on public spending. The position is somewhat unique in Canada in that it provides public funds to a department which scrutinizes and often criticizes the spending record of the government. The position is not entirely free of political influence, due in part to the fact that Parliament authorizes the funds to be made available to the Auditor-General to carry out his function. Frequently, the complaint is made that inadequate funding has
made the department less effective than it might otherwise be. However, despite these complaints, no other official can so divorce himself from the workings of parliament and sit back and criticize the actions of that parliament.

This concept might well be adaptable to produce what could predictably be termed an Environmental Council-General, which would file an annual report before full Parliament outlining the extent to which the government has spent, or misspent, our environmental resources. Included in the report would be a statement on the degree to which government agencies, departments and officials complied with NEPA requirements during the preceding period. The Auditor-General's report inevitably embarrasses the government by detailing some incredible financial blunders. Such blunders are bound to be equally frequent in environmental matters, and the above may suggest one method to bring these to the attention of the public.

However, it is not entirely realistic to suggest that it is possible in Canada to establish a Council with sufficient political independence to be substantially effective in improving environmental quality. It is equally unrealistic to suggest that a strong Council could, without outside assistance, ensure that NEPA provisions were substantially complied with. Such outside assistance must come from interested members of the public and environmental control organizations and can most easily be introduced through the concepts of the public hearing.
2. **Public Hearings Under NEPA.**

The American version of NEPA does not make any provision for public hearings, although it does stipulate that an environmental impact statement, if prepared, must accompany the project through each stage of the agency review process. The failure to provide for public hearings under NEPA is perhaps one of its greatest defects, particularly in the context of Canadian environmental control. It seems essential that any enactment in Canada similar to NEPA should include specific provisions for public hearings. The arguments in favour of this step are many.

During a period when courts are having severe problems hearing the many cases awaiting trial, it becomes imperative to prevent as much litigation as possible. The hearing concept has a valid role to play in attaining this objective. Hearings provide an opportunity for interested environmental control organizations to participate in the decision-making process at a very early stage in the proceedings surrounding a proposed project. Although this factor does not in itself prevent litigation, organizations will generally feel less compelled to litigate if their views have received a fair hearing at the administrative level. Without provisions for public hearings, organizations have only one opportunity to participate in the decision process. That of course is through litigation challenging the agency decision.

Public hearings provide one effective method of providing administrative agencies with some expression of the general public opinion on environmental matters. It would
seem essential that agencies which generally purport to be acting in the public interest should have some idea of what the public considers that interest to be.

Of much greater significance is the assistance which public hearings can provide to the effective operation of a statute like NEPA. Environmental impact statements have no real use if they are merely prepared and filed, without forming part of the agency consideration leading to a final decision on the project in question. Considerable problems arise if an agency need only decide not to prepare an impact statement, without the accompanying obligation to publish reasons for that decision. Impact statements must become part of the actual decision process if they are to be effective. Agencies must make their contents available for public scrutiny and challenge. Reasons for failure to produce an impact statement must be subjected to a similar fate. Then and only then will NEPA's provisions have any substantial effect on environmental quality. The public hearing concept provides an instant forum for examining and assessing the probable environmental consequences of a particular proposal as outlined in the accompanying environmental impact statement. Failure to provide such an opportunity has two clear consequences. Firstly, NEPA could be effectively skirted on many occasions by the preparation of an inadequate impact statement or a decision not to prepare a statement. Secondly, environmental control organizations, in the absence of mandatory hearing provisions in which they can participate, have no alternative but to immediately seek a remedy through
Finally, public hearings are a considerable factor in bringing environmentally controversial questions to public attention. In addition to providing some scant form of democratic participation by citizens' environmental organizations, they have the indisputable effect of publicizing the environmental issues which have become an everyday problem.

There are some problems with the hearing concept however. Obvious problems center around the time and expense of full scale public hearings. Massive documentation becomes a problem for all parties. It becomes necessary to give some consideration to limiting the time allotted to each presentation. Not all controversies are suitable to resolution through the hearing concept, necessitating some determination as to when hearings shall be held.

These problems cannot be ignored, since they will inevitably appear where the public hearing concept is widely adopted. However, they can be alleviated to some extent.

One method is to appoint a hearing tribunal which would conduct all public hearings on environmental matters coming within its jurisdiction. Councils on Environmental Quality could appoint members to sit on tribunals in each of the provinces and at the federal level. These tribunals would be empowered to conduct hearings on any matter of environmental import, including the adequacy of environmental impact statements and the propriety of a decision by an agency not to prepare a statement. Coupled with stringent publication
requirements in NEPA with respect to impact statements or decisions not to prepare statements, a hearing procedure as outlined above would be an efficient and useful phenomenon.

If it should prove possible to assemble provincial and federal Councils on Environmental Policy which were environmentally, and not politically, motivated, then the decision as to whether a project warranted a public hearing to ensure full compliance with NEPA could most appropriately lie with this body. Because of the uncertainty of such an arrangement, there would be considerable merit in providing an appeal provision to an appropriate court in the jurisdiction, although such a step should not be lightly taken.

One final point deserves consideration in this context. Any legislation introducing the public hearing concept must of necessity provide some means of determining who shall be allowed to participate in a given situation. Considerations as to reasonable time and expense make this a very important question which admits of no easy answer. However, an attempt will be made in part B of this chapter to propose a formula which will provide one possible answer.

NEPA has a great deal to offer in the Canadian context as an instrument of increased environmental control. The changes suggested above seem essential to its efficient operation in Canada. While NEPA has the potential to greatly enhance our efforts to come to terms with our environment, its enactment without a simultaneous relaxation of our standing rules would greatly lessen its effectiveness. Much of NEPA's success in the United States must be attributed to the standing
rules in existence in that jurisdiction which have allowed various environmental control organizations to force through litigation full compliance with the provisions. Canada does not have such relaxed standing rules, with the result that environmental control organizations have few opportunities to exert any influence in the decision process. NEPA in Canada at both federal and provincial levels with strong Councils on Environmental Quality and broad hearing provisions would produce substantial benefits.

However, neither a strong Council nor broad hearing provisions will have much effect in themselves unless we incorporate into the legislation specific standing rights which will allow the one effective environmental voice, as represented in environmental control organizations, full expression in the decision process. The balance of this chapter will be devoted to proposing a system of registration of environmental control groups designed to assist in attaining that objective.


Certain very clear objectives must be achieved if relaxation of legal standing is to prove to be a desirable phenomenon. These objectives require clear definition.

Long, unproductive hours are presently expended on legal battles designed to decide nothing more than whether an individual or organization has the necessary legal standing to be recognized as a proper party to an environmental
controversy. Many decisions are made on the basis of lack of standing without ever considering the ecological merits of the situation. It becomes of paramount significance, then, not only to relax the present rigid standing requirements but to provide a clear formula to determine the participants and thereby avoid any further standing controversies. The formula must enable parties to establish their status very early in the controversy.

It is equally important that those who are legally entitled to participate be in a position to do so from the outset of the controversy. Ideally, environmental control organizations should be given the same rights to notice and information as any other party to the controversy. We must seek to get away from asking whether an organization should be allowed to participate. Rather we must ask - which organizations shall be allowed to participate? Public participation, to be truly effective, must be accepted automatically as an integral and valuable facet of each and every environmental controversy.

The problem is to provide a system whereby automatic participation becomes a reality. It is submitted that a system of registration of interested environmental control organizations as registered or licensed participants in the environmental decision process provides an answer both easy to adopt and comprehensive in scope.

Essentially, environmental control organizations would be required to be registered with the appropriate body in order to be entitled to represent the public at hearings or to
litigate in the public interest. Successful registration would give the registered organization legally enforceable participatory rights in the decision process, and would virtually remove the necessity to litigate the standing issue which presently presents so many problems and occupies so much court time.

There are of course, many details to be incorporated into appropriate legislation before a registration scheme as suggested above could become operational. Questions immediately arise. Where would such a scheme most appropriately be placed in our legislation? Which body or department would most effectively administer the registration system? What should the qualifications of an organization be to allow registration? How many organizations should be on the register at any given time? How many organizations should be entitled to participate in a particular controversy? Should participation in environmental controversies be restricted to those holding valid registrations, or are there situations involving environmental damage which should remain outside the system to be handled by interested parties in the traditional manner?

The above represent only the major questions which arise under the proposed system. Frankly, one can only speculate in many instances as to the most appropriate answer, and some of the following suggestions will not prove workable in practice. However, the registration system proposed presents one possible solution to the problems accompanying public participation, and it seems worthwhile to try and suggest ways in which problems can be avoided. The suggestions to follow are not presented as
firm and inflexible guidelines. They should be viewed rather as possible guidelines to assist in making the proposed system of registration both operational and efficient.

1. Where Should the Legislation be Placed?

One obvious possibility would be to enact a separate piece of legislation setting out precise rules and regulations under which registration is to be conducted.

However, the most logical place for such legislation might well be in the Canadian version of NEPA. This Act has such an over-riding effect in environmental matters, since it affects virtually every action having environmental consequences, that it seems a proper complement to a comprehensive registration scheme as proposed.

The advantage of placing registration legislation in NEPA lies in the fact that both the philosophical objectives and methods of enforcement would be found in the same act. If one envisages one federal and ten provincial NEPA's, then inclusion of the registration system under the provisions of each act would provide nearly complete coverage of all environmental issues in both the federal and provincial areas of jurisdiction.

Consideration might also be given to amending the Rules of Court governing court procedure in Canada where such amendment would enhance the efficiency of the registration approach.

2. The Administering Body

Assuming the Canadian equivalents of the Council on Environmental Quality could be given some political independence under both provincial and federal legislation, registration
could most appropriately be part of each Council's jurisdiction. Developed expertise and a demonstrated interest in and familiarity with environmental problems would place the Councils in a very strong position to evaluate requests for registration and to determine an organization's suitability. A politically independent Council could be considerably better informed and more effective in this regard than the courts which are presently called upon to make this determination in the United States.

3. Necessary Qualifications to Register.

This question is extremely difficult, and must be answered in general terms. It seems unduly restrictive to require that an organization in effect prove itself for a certain period of years, or have a certain number of members to qualify for registration. Yet some restrictions seem a practical necessity, since the advantages of representative participation by registered organizations would be lost entirely if virtually every organization with a professed environmental interest were allowed to register.

It does not seem unreasonable to suggest that an organization demonstrate an active and responsible approach to environmental control before it becomes entitled to register. A minimum of three years existence might be a suitable starting point. This approach would effectively remove the necessity of severely restricting the number of organizations given registration privileges at any particular time. Each jurisdiction in Canada has sufficient numbers of organizations at present which could qualify to make this system operative immediately upon
enactment of appropriate legislation.

There does not seem to be any pressing need to limit the number of registered groups at any given time. However, two approaches can be adopted. One is to allow organizations with appropriate credentials to register freely, with a provision in the legislation that the organizations interested in a particular controversy choose one registered organization among those interested to act as the representative spokesman for all organizations. Failing such choice, the body responsible for administering registration would designate the organization which demonstrated an interest most closely aligned to the problem at hand. The second approach would be to limit registration to four or five major organizations in each jurisdiction, leaving to them the option to combine forces or make individual presentations as their individual organizational interests appear. While the second approach would provide for a more varied presentation, the first seems preferable, since it allows more organizations participation rights and provides a more streamlined presentation procedure which is less likely to bring the administrative process to a grinding halt.

It is recognized that the above procedure would in effect prevent many organizations from raising an effective protest if they were unregistered and had views substantially different from those of the organization with participation rights. However, the very purpose of the proposed registration system is to provide strong regular environmental representation in environmental questions without destroying the ability of the administrative system to continue functioning in a responsive
manner. Under the above proposals, organizations would be required to resolve any inter-organizational differences prior to entering the public forum. Cost sharing would be an internal matter among organizations.

The advantages of a system similar to the one proposed above are obvious. Environmental concerns would be heard by the responsible officials as a matter of course. No time would be wasted either at the agency or judicial review level arguing about the right of an organization to be there, since legal standing would be predetermined and no longer would be an issue. All court or agency proceedings would relate to arguments on the merits of the proposal and the adequacy of the accompanying environmental assessment. Considerable time would be saved by having the representative organization represent the collective views of all interested organizations and individuals.

The important point seems to be to have adequate representation of environmental considerations. It does not seem particularly desirable that we adopt the United States system where organizations and individuals often present overlapping arguments with each demonstrating the organization's or individual's particular area of concern. It is anticipated that the registration system suggested is capable of serving the interests of various environmentalists in an adequate manner while placing few undesirable strains on our system of administrative government.

4. Should Individuals be Allowed Standing in Environmental Cases.
If a registration system should be adopted, it must, to be effective, operate in substitution for and in place of whatever traditional participation rights exist. This raises a serious question with respect to individual rights to participate at public hearings, to seek judicial review of agency decisions affecting the environment, and to commence tort actions for personal injury or property damage suffered as a result of an environmental transgression.

Again, it becomes necessary to define the two types of interest under which an individual can seek to exert his influence. One is an interest based solely on an alleged right as a citizen, with no attendant claim of injury to a proprietary or tangible interest, to be a participant in environmental controversies. Clearly, an effective registration system would prevent an individual's participation as a spokesman for the public interest. Individuals, and for that matter, unregistered organizations, would be required to enlist the aid of a registered organization which would act as their representative in agency proceedings and any subsequent litigation. The second type of interest does not fit so well into a registration approach. If an individual suffers injury or damage to personal property, should the registration system apply to exclude his right to seek redress as an individual for injury to person or private rights?

Inevitably, in cases of private loss, the individual is facing as an adversary either a large industrial concern or an arm of government. The odds against success in agency proceedings, judicial review, or tort litigation are heavily
weighted against the individual. A registered environmental control organization, representing the individual, would be in a much better position to effectively present the individual's case than would the individual. Equally important, the representative organization could represent a number of individuals seeking redress for similar injuries as a result of the same event, thereby reducing the possibility of a multiplicity of actions on the same facts. The above represent several good reasons why an individual should be able to call on a registered organization to be its champion in cases of environmental damage. However, there may be equally good reason for retaining the individual's historic right to engage in environmental litigation where there has been personal injury or loss of private property, but this should not remain as the individual's only method of redress. Perhaps the best solution is to leave the option to the individual or individuals affected, but the option should certainly exist.

There does not seem any present justification for continuance of the prohibition against representative actions in Canada. Registered organizations should be given legal standing to represent individuals or classes wishing to commence environmental tort actions for damages. Such standing could be provided for in Canada's equivalent of NEPA. Appropriate amendments can be made to the various Rules of Court in Canada to specifically allow for class actions in a manner similar to Rule 23 of the Federal Rules of Civil Procedure in the United States. These amendments would have to be sufficiently explicit to avoid the restrictive interpretations governing
existing representative action provisions in the rules of court.


Now that Ontario has taken the much needed step to provide a simple, one-step procedure to invoke the court's jurisdiction to review an agency decision, it is not at all unlikely that other provinces will follow suit. This type of legislation seems necessary if "public interest" standing is to operate smoothly and effectively. What is needed is a fast, simple review procedure which allows for efficient resolution of a controversy, without the attendant procedural niceties surrounding the old prerogative writs. The Ontario legislation should produce the desired result.

Suggestions made in this chapter are not represented as being the total or complete answers to Canada's environmental control problems. They refer to only one aspect, that of public input into the environmental decision process. Nor is it suggested that all aspects of the suggested model would prove workable if implemented. However, Canada has too long ignored public protests against environmental degradation. The suggested model represents one vehicle whereby those protests can be brought to bear on the system, with a minimum of disruption to all concerned.
CONCLUSION

Canadians for the most part have had to be content to read about what the public environmental control movement can accomplish in improving environmental quality. Much of this reading material comes from the United States, where standing rules have given citizens a substantive opportunity to influence the direction in which the system is heading. We in Canada have not reached that point, and consequently have missed a very real opportunity to contribute to cleaning up our environment. Those who have exhibited the energy and interest to fight against senseless decisions which ravage the environment have found scant assistance from our present legal structure.

Yet we can scarcely deny that there is room for improvement in our standards of environmental control. Our present standing rules, based largely on the premise of protection of private property rights, have little application to environmental control, a very public matter. We can no longer justify laws which refuse to allow individuals to unite to seek redress for a common environmental wrong. We are prepared to recognize that an individual should have, in certain instances, a method of redress, yet we have failed to allow such individuals to band together to give them a reasonable opportunity of obtaining that redress against large industries and governments. The end result is to make the remedy meaningless in many instances. We prohibit the effective participation of strong, well-financed environmental
control organizations in the environmental decision process because they do not possess the necessary interest to establish legal standing.

Surely the American experience, if it has taught us nothing else, has shown us that citizens' groups have a great deal to offer and should be given the opportunity to make their contribution to the decision process in a dignified and efficient manner. If we are to continue to ignore this very vital force, we must recognize that we do so for no justifiable reason.

Citizens' environmental organizations presently exist in Canada, although their presence is infrequently felt. This paper has outlined one method to effect the necessary changes to make them a viable force. It seems clear that a healthy environment may depend on their participation in the system. That participation can no longer be denied in good conscience.
FOOTNOTES


3 The Vancouver Province, March 25, 1972, "Pollution Fight Costs Jobs".

4 The Vancouver Province, March 24, 1972, "Pollution or Jobs: Davis Tries to Balance Scales".

5 The British North America Act, 1867, 30 & 31 Victoria, C.3, s. 92 (13).

6 Lucas, note 1, 173.


8 A.R. Lucas, "The Utah Controversy: A Case Study of Public Participation in Pollution Control" (unpublished).

9 Cited in Lucas, ibid, 49.

10 Cited in Anderson, note 7, 112.


14 Jaffe, note 11, 237.


17 Ante, note 2, 89.
18 Ante, note 2, 90, Table 5.
The Clean Environment Act, R.S.M. 1970 C. C130.
23 The Environment Conservation Act, R.S.A. 1970 C. 125 s. 7(1)(e).
24 The Clean Environment Act, R.S.M. 1970 C. C130 s. 12.
26 The Pollution Control Act, 1967, S.B.C. 1967 C. 34 s. 13 as amended by the Pollution Control (Amendment) Act, S.B.C. 1968 C. 38 s. 5 and the Pollution Control (Amendment) Act, S.B.C. 1970 C. 36 s. 11.
27 Ibid.
28 See, for example: Re Pollution Control Act, 1967; Re Application of Hooker Chemicals (Nanaimo) Ltd. (1970), 75 W.W.R. 354 (B.C.S.C.), where the court granted certiorari because the director had failed to give consideration to the evidence in support of the objections in reaching his decision not to hold a hearing. This failure was held to be a breach of natural justice. See also: Western Mines Ltd. v Greater Campbell River Water District (1967), 58 W.W.R. 705 (B.C.C.A.), where the court recognized the Board's discretion as to whether an objection warranted a hearing, but held that the Board had the duty to supply to the objector the evidence submitted by the permit applicant and to allow the objector to reply to that evidence by written submission.
29 Lucas, Ante, note 8, provides the factual material for this account.
31 The Vancouver Province, May 19, 1972, 2.
32 The Vancouver Province, September 11, 1972, p. 5.
33 Jennet v Sinclair (1876), 10 N.S.R. 392 (N.S.S.C.).


36 For a discussion of the discretionary aspect of much of our environmental legislation see generally part A of this chapter.

37 See, for example, The Judicature Act, R.S.O. 1960 C. 197 s. 15(2).


40 R. v Electricity Commissioners, [1924] 1 K.B. 171 at 205.


43 Ibid, 339.

44 Ante, note 26.

45 Ante, note 24.

46 Ante, note 28.

47 Ibid, 357.

48 Ibid, 360.


52 See, for example: Halsey v Esso Petroleum Co. Ltd., [1961] 2 All E.R. 145 (Q.B.), an English decision in which the plaintiff landowner succeeded in establishing that the escape of refinery by-products onto his land causing damage was the result of an unnatural use of land by defendants for which they were liable. For further examples see Lucas, ante, note 1, cited in footnote 5, p. 169.
53 Lucas, ante, note 1.
54 British Columbia Supreme Court Rules, Order XVI, Marginal Rule 131.
55 Rules of Civil Procedure, Ontario, Rule 75.
56 [1945] O.W.N. 537 (High Ct.).
57 Ibid, 539.
58 (1920), 48 O.L.R. 172 (Ont. S.C.).
60 R. v The Board of Commissioners of Public Utilities; Ex parte New Brunswick Power Company (1927), 54 N.B.R. (N.B.C.A.), 228.
61 See, for example: Scenic Hudson Preservation Conference v F.P.C. (1965) 354 F. 2d 608 (2d Cir.); and Road Review League v Boyd (1967) 270 F. Supp. 650 (S.D.N.Y.)
63 (1924) 264 U.S. 258.
64 (1940) 308 U.S. 470.
67 Scenic Hudson, ante, note 61.
68 Ibid, 619.
69 Road Review, ante, note 61.
70 Ibid, 661.
72 Ibid, 1239.
73 Ibid, 1241.

1 E.R.C. 1609, 1672-3.

Ibid, 1674.

Details of the methods the court used to distinguish prior cases are noted and criticized in Note entitled: "Concern of Conservationist Group Held Not Sufficient to Confer Standing to Challenge Agency Action", (1971) 71 Col. L. Rev. 172, 177.

Alameda Conservation Association v California (1971) 437 F. 2d 1087; 2 E.R.C. 1175 (9th Cir.).

Ibid, 1177.

Ibid, 1181.

Ibid, 1181-82.

Ante, note 62.

Ibid, 4400.

Ibid, 4401.


Sierra v Morton, ante, note 62.

Ibid, 4406.


See, for example: N.A.A.C.P. v Patty (1958) 159 F. Supp. 503 (E.D. Va.), where a civil rights organization had standing to litigate the interest of the class it represented. See also: Smith v Board of Education (1966) 365 F. 2d 270 (8th Cir.), where a teacher's association was held to have standing to enjoin discriminatory practices in the hiring and assigning of teachers.

See, for example, Crowther v Seaborg (1970) 312 F. Supp. 1205 (D. Colo.), and Environmental Defense Fund, Inc. v Hardin (1970) 428 F. 2d 1093 (C.A.D.C.), where in a proceeding by the Environmental Defense Fund to obtain judicial review of actions of the Secretary of
Agriculture, the court stated at 1097: "Like other consumers, those who consume - however unwillingly - the pesticide residues permitted by the Secretary to accumulate in the environment are persons 'aggrieved by agency action, within the meaning of a relevant statute'. Furthermore, the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem".

93a Data Processing, ante, note 76.

94 Barlow v Collins, ante, note 76.

95 Ibid, 164.

96 Bailey v Patterson (1962) 369 U.S. 31, 32-33, cited in Lamm & Davison, ante, note 91, 73.

97 Barrows v Jackson (1953) U.S. 249, 257.

98 (1972) 40 L.W. 4397 (S.C.).


102 Wilderness Society et al v Hickel (1970) 1 E.R.C. 1335 (D.C.), wherein the court granted a preliminary injunction against issuance of the necessary permits for construction of the Trans-Alaska Pipeline and haulage roads because of the failure of the Secretary of the Interior to adequately examine alternatives to the proposed pipeline.


106 Wilderness Society, ante, note 102.

107 Brooks v Volpe (1972) 3 E.R.C. 1858 (D. Minn.).


Cal. Public Resources Code 55. 21000 et seq.

113 Sierra v Morton, ante, note 98.

114 (1965) 354 F. 2d 608 (2d Cir.).


116 Wilderness Society, ante, note 102.

117 The Vancouver Province, May 12, 1972, p. 1.

118 Ibid.

119 Scenic Hudson, ante, note 61.

120 Ante, note 88.

121 Ante, note 81.


123 Ante, note 2, 155-6.

An amended section 1032, a Bill to permit class action suits on environmental issues has been approved for full Committee action by the Senate Subcommittee on Energy, Natural Resources and the Environment. The Subcommittee Bill would:

1. repeal *Sierra Club v Hickel* which restricted standing to sue unless damage to an individual or individuals could be established,
2. remove some restrictions on judicial review of administrative actions,
3. give any person the right to enforce in court any federally established or approved standards or legislation, and
4. where no federal standards exist, provide a citizen with a right to enjoin the conduct of activity on the basis of reasonable conduct.


The Vancouver Province, March 17, 1972, p. 7.
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