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FUTURE DIRECTIONS FOR ENVIRONMENTAL LAW: IMPLEMENTING THE BRUNDTLAND REPORT

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I. INTRODUCTION

In 1986, Environment Canada prepared its first "State of the Environment Report for Canada", which attempts to document the present condition of Canada's natural resources, and to identify patterns of environmental change that may affect these resources in the future.[1] Predictably, the report describes some recent and well-known environmental successes, such as the substantial decline in phosphorus levels in the Great Lakes, the reduction in atmospheric radioactivity concentrations, and the diminished levels of DDT in the environment. However, the report goes on to relate several areas in which the state of the environment is not improving but is actually deteriorating, such as the long range transport of acidic compounds through the atmosphere, the increasing erosion and salinization of farmland, the overharvesting and improper regeneration of forests, and the threats to water quality by improper hazardous waste disposal and the increased use of pesticides and fertilizers.

Thus, despite some progress in the ongoing battle for environmental quality, it is increasingly apparent that many serious environmental problems still exist and remain largely unaddressed by the current state of environmental legislation in Canada. Accordingly, many environmental groups and public officials have proposed a variety of legislative reforms to address these problems. Many of these reforms go far beyond the simple prohibition of particular substances or the piecemeal or ad hoc regulatory responses to environmental disasters that we have experienced to date in Canada. Instead, these initiatives are being proposed as part of an integrated legislative

program that will undoubtedly result in fundamental changes in the way that Canadian citizens, businesses and governments act in relation to the environment.

In the past, many of these reforms have been dismissed as unrealistic proposals concocted by idealistic environmentalists; however, these reforms may now be imminent in light of the federal and provincial governments' endorsement of the 1987 Report of the World Commission on Environment and Development, otherwise known as the Brundtland Report.[2] In fact, Canada's environmental agenda of the 1990's and beyond will be dominated by the challenge of translating the recommendations of the Brundtland Report into firm political and legislative action.

The purpose of this paper, then, is to provide a brief overview of the Brundtland Report, and to describe some of the legislative initiatives that are likely to occur in Canada as a result of the Report. While these reforms may be enacted within the next decade or two, the reader must keep in mind that environmental priorities are in a constant state of flux, particularly as more information is gathered about a particular contaminant or environmental concern. Thus, the implementation of the Brundtland Report may not occur immediately, or may occur in conjunction with other legislative reforms. Nevertheless, Brundtland-based initiatives must occur soon if the long-term sustainability of a healthy Canadian and global environment is to be assured.

In order to appreciate the significance of these initiatives, it is instructive to briefly review the legislative history and present status of environmental law in Canada. The following analysis will also indicate the drawbacks associated with the current statutory regime.

II. LEGISLATIVE HISTORY OF ENVIRONMENTAL LAW

Over the past thirty years, there have been three discernable and often overlapping stages in the evolution of environmental legislation at both provincial and federal levels.[3] During the first stage in the 1950's and 1960's, Canadian legislators enacted statutes that were primarily intended to prohibit the discharge or emission of pollutants into specific media, such as water or air. In Ontario, for example, the Ontario Water Resources Act[4] was originally passed in 1956 to prohibit "the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse...that may impair the quality of the water." Similarly, Ontario's Air Pollution Control Act[5] was passed in 1958 and re-enacted in 1967, and Regulation 15 was enacted thereunder to prohibit the emission of an "air contaminant" that may, inter alia, cause discomfort to persons or damage to property. Media-specific statutes were also enacted by other provinces and the federal government during this time.

While these statutes were well-intentioned and undoubtedly had a deterrent effect on some polluters, their ex post facto approach was generally ineffective in preventing pollution from occurring ab initio. In addition, these statutes failed to recognize the complex cross-media effects of environmental contaminants[6], and did not contain a comprehensive planning mechanism to review the practices and policies that resulted in pollution.

Accordingly, during the second stage of environmental law, legislators in the early 1970's enacted statutes that attempted to take a more comprehensive approach with respect to environmental degradation. In Ontario, for example, the Ministry of the Environment was established to administer the Environmental Protection Act,7 which was passed in 1971 and incorporated elements of the Ontario Waste Management Act,8 and the Air Pollution Control Act, both of which were repealed. Significantly, the EPA contained a general prohibition against the discharge or deposit of "contaminants" into the "natural environment", which is broadly defined as "the air, land and water, or any combination or part thereof, of the Province of Ontario". At the federal level, the Environmental Contaminants Act[9] was passed in 1975 to prohibit the release into the environment of any substance listed in the Act's Schedule in quantities greater than the allowable concentration or under conditions that were not prescribed under the Regulations. Interesting the ECA did not contain a definition of "environment", and until the Act's repeal by the Canadian Environment Protection

Act[10] in 1988, only a handful of substances, such as mirex and CFC's were regulated under the Act.

While these second-stage statutes represented an improvement over the first generation of environmental legislation, they were still largely reactive rather than preventative in nature. Moreover, they still failed to establish a comprehensive planning and approvals process designated to identify and abate environmental problems before they arise.

As a result, legislators in the mid- to late 1970's developed statutes or policies intended to assess the potential impacts of proposed undertakings that may adversely affect the environment. This represents the third stage in the evolution of environmental law, and is exemplified by the federal government's non-statutory Environmental Assessment Review Process (EARP) and Ontario's Environmental Assessment Act,[11] which was enacted in 1975. In particular, the EAA represented an important step forward in safeguarding the "environment", which, significantly, was defined in an all-encompassing manner:

> "environment" means
>
> (i) air, land, or water;
>
> (ii) plant and animal life, including man;
>
> (iii) the social, economic and cultural conditions that influence the life of man or a community;

(iv) any building, structure, machine or other device or thing made by man;

(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or

(vi) any part or combination of the foregoing and the inter-relationships between any two or more of them, in or of Ontario.[12]

However, the effectiveness of the EAA has been undermined by the numerous exemptions for large public sector undertakings, the general non-application of the Act to private sector projects, and the absence of a formalized intervenor funding system for public interest intervenors.[13] Thus, a number of authors have properly argued for procedural and substantive reforms of the present environmental assessment process at both the federal and provincial level.[14]

While these three stages of environmental legislation have cumulatively resulted in a moderate degree of environmental protection, there are numerous other environmental problems that remain largely untouched by the current legislative regime. These problems include:

- continued production and emission of compounds causing acid or toxic rain;
- global warming through the "greenhouse effect" caused by, inter alia, the burning of fossil fuels;
- destruction of the earth's protective ozone layerly substances such as chlorofluorocarbons (CFC's);
- widespread desertification of agricultural land;
- rain forest destruction and loss of species and ecosystem diversity;

- production of ever-increasing amounts of hazardous industrial waste;
- accelerated depletion of energy and other natural resources.

Individually and collectively, these problems endanger not only the local environment and public health, but also long-term sustainability of the planet. Taken together, these and other issues will form the substantive focus of the environmental agenda for decades to come, and must be the target of comprehensive legislative reforms by all levels of government within and without Canada.

From the Canadian perspective, the consequences of these problems, such as acid precipitation, are bilateral in nature and require the co-ordinated effects of American and Canadian governments. Other issues, such as ozone depletion, are truly global in terms of both cause and effect, and therefore require the international cooperation of all nations and world organizations. However, until the necessary bilateral and international action is undertaken, Canadian legislators must be prepared to exercise leadership in the development and implementation of the fourth stage of environmental legislation. In short, Canada must think globally, but act locally.

The fourth stage of environmental legislation will entail a truly preventative approach that addresses not only the overt symptoms of the above-noted environmental problems, but also targets the root causes of these problems. The genesis of this approach may be found in previous environmental policy statements such as the 1972

Stockholm Declaration or the 1980 World Conservation Strategy; however, the main impetus and framework for this next legislative stage is found primarily in the Brundtland Report.

Upon its release in 1987, the Brundtland Report was welcomed by environmentalists worldwide as a cogent and compelling restatement of the principles of environmental protection and sustainable resource management. In Canada, the Report was embraced by the National Task Force on Environment and the Economy in a report to the Canadian Council of Resource and Environment Ministers (CCREM). The Task Force Report and its numerous recommendations have been unanimously endorsed by the federal government, the provinces and both territories. Therefore, if and when these recommendations are implemented, the Brundtland Report will have a profound influence on the development of environmental law and policy in Canada for many years to come. However, to properly appreciate the background and nature of the legislative changes that now may be imminent, it is necessary to briefly review the major tenets of the Brundtland Report.

III. THE BRUNDTLAND REPORT: PRINCIPLES OF SUSTAINABILITY

After describing the above-noted environmental problems and emphasizing the inter-dependence and urgency of these matters, the Brundtland Report goes on to identify the principles that are necessary to assure the ecological viability of the planet. While

the Brundtland Commission deliberately refrained from providing a detailed blueprint for legislative action, the Report offers important policy direction for legislators throughout the world.

(a) Sustainable Development

At the core of the Brundtland Report is the Commission's call for "sustainable development", which is defined as the use of environmental resources in a manner that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. Two important principles underlie the sustainable development concept: firstly, that governments act as stewards who hold the world's resources in trust for future generations; and secondly, that governments must recognize the interdependence of the environment and the economy and must integrate environmental and economic decision-making at the highest levels.

(b) Integration of Environment and Economy

The Report correctly notes that the artificial division of environmental and economic responsibilities into separate spheres undermines the ability to anticipate and prevent environmental harm, and underscores the need for a multi-sectoral approach to the environment:

> In the past, responsibility for environmental matters has been placed in environmental ministries and institutions that often had little or no control over destruction caused by agricultural, industrial, urban development, forestry and transportation policies and practices...Thus, our environmental management practices have focused largely upon after-the-fact repair of damage: reforestation, reclaiming, restoring natural habitats and rehabilitating wild lands.

> The ability to anticipate and prevent environmental damage will require that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural and other dimension.[15]

c) Conservation Strategies

If the world's needs are to be met on a sustained basis, the natural resource base must be conserved and enhanced. Thus, in addition to advocating the integration of environmental and economic planning, the Brundtland Report also calls upon governments to develop "conservation strategies" for the management and protection of natural resources. In essence, these strategies will serve as blueprints for the sustainable development of renewable resources, and will help transform nations from "consumer societies" to "conservor societies".

As the Report correctly notes:

> Development patterns must be altered to make them more compatible with the preservation of the extremely valuable biological diversity of the planet...This more strategic approach deals with the problems of species depletion at their sources in development policies, anticipates the obvious results of the more destructive policies, and prevent damage now.[16]

(d) Pollution Standards

The Report goes on to note that "the prevention and reduction of air and water pollution will remain a critical task of resource conservation".[17] However, to ensure that progress in this regard can be objectively determined, the Report points out that governments must establish clear environmental goals and enforce environmental

regulations and standards that give priority to public health concerns.

However, the Report points out that "environmental regulations must move beyond the usual avenue of safety regulations, zoning laws and pollution control enactments":

> Environmental objectives must be built into taxation, prior approval procedures for investment and technology choice, foreign trade incentives, and all components of development.[18]

IV. THE ENVIRONMENTAL AGENDA: SOME SELECTED ISSUES

The legislative and non-legislative initiatives that are necessary to implement the principles of sustainability are numerous and diverse. To a certain extent, some of the recommendations set out in the Brundtland are now being carried out in Canada; for example, in accordance with the Report's call for Round Tables on sustainable development, Ontario is presently in the process of establishing a Round Table on the Environment and Economy which is scheduled to meet in March 1989. This panel will consist of representatives from government, industry and public interest groups, and will, inter alia, develop a provincial sustainable economic development strategy. Similarly, the Ontario government is developing regulatory programs, such as Countdown Acid Rain, MISA (Municipal Industrial Strategy for Abatement) and CAP (Clean Air Program), that are intended to make sustainable development a viable long-term option by protecting ecosystems and safeguarding renewable resources.

Nevertheless, these initiatives represent only a small fraction of the reforms that are needed to fully implement the letter and spirit of the Brundtland Report. It is beyond the scope of this paper to discuss all the legislative changes that will be necessary; instead, the paper will briefly highlight three of the more important legislative initiatives that may now be imminent in the wake of the Brundtland Report. These initiatives include an Environmental Bill of Rights; strengthening the environmental assessment process; and establishing clear environmental goals, standards and incentives.

(a) Environmental Bill of Rights

The Brundtland Report properly notes that "legal regimes are being rapidly out distanced by the accelerating pace and expanding scale of impacts on the environmental base of development."[19] Thus, the Report urges governments to take steps to reformulate their legislation in order to, inter alia, recognize the rights and responsibilities of citizens and states regarding sustainable development, and to strengthen and extend the application of existing laws in support of sustainable development. In particular, the Report states that governments must recognize not only their responsibility in ensuring a viable environment for present and future generations, but they must also recognize certain other environmental rights enjoyed by citizens:

> ...progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the

> right to be consulted and to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.[20]

The Report states that those rights have been recognized in different ways in different countries. For example, some countries have amended their basic laws or constitutions to recognize these environmental rights, while others have considered the passage of a special law or charter that establishes the rights and responsibilities of citizens and the state regarding environmental protection and sustainable development. While the Report refrains from endorsing a specific approach, the Brundtland Commission does emphasize that governments "must take steps to recognize these reciprocal rights and responsibilities."[21]

In Canada, environmentalists have lobbied governments since the early 1970's to promulgate an Environmental Bill of Rights (EBR) that would entrench and expand procedural and substantive rights in the environmental context. Currently, neither the federal or Ontario government have legally recognized the right to clean air, water or land. Moreover, these governments are still not obliged to enforce present environmental laws, and there is a widely held perception that the governments refuse to prosecute polluters in all but the most serious cases. For example, it has been recently reported that since the Canadian Environmental Protection Act was proclaimed in force, over three hundred companies were detected violating the Act,

but only three were charged and the rest were given warnings.[22] This is ironic given that the former Environment Minister, Tom McMillan, frequently called the Act an EBR and promised that CEPA would be the toughest pollution law in the Western Hemisphere.

Accordingly, environmentalists have called for a true EBR that would confer upon Canadian citizens the following rights:

- the right to a clean environment and the preservation of the natural, historic and aesthetic values of the environment for present and future generations;
- the right to participate in the regulation-making and permit-issuing process;
- the right to take polluters to court for actual or apprehended environmental harm, and to take the government to court for non-enforcement of environmental laws;
- the right to adequate intervenor funding and increased access to environmental information.

In addition, the EBR would reform the rules relating to standing, class actions and burden of proof that currently hamper plaintiff in environmental litigation.

In Ontario, members of all three political parties have introduced several private member's bills that would have established a provincial EBR. However, none of these bills progressed much beyond the first or second reading stage. The most recent attempt to enact an EBR is Ruth Grier's Bill 13, which has received second reading and is now before the Standing Committee on Resource Development. There are concerns that this bill might not proceed any further, and there are indications that Mrs. Grier may re-draft and resubmit the bill.

As well, Environment Ontario is reportedly considering the introduction of its own EBR bill.

At the federal level, the NDP proposed in 1987 to introduce a private member's bill that would establish on EBR; however, this bill has yet to materialize. Similarly, the first draft of CEPA contained a lengthy preamble that was hailed by its drafters as an EBR, but it offered no substantive rights to a clean environment, and was shortened in the final version of the Act. Thus, despite pro-EBR rhetoric from politicians at both levels of government, the legislative inertia in this matter has continued to date, and Canadians still do not enjoy a legal and enforceable right to a clean and healthy environment.

The enthusiastic Canadian endorsement of the Brundtland Report, however, may end or at least foreshorten the long period of inaction on a Canadian EBR. While the National Task Force Report to CCREM fails to specifically address the need for an EBR, it is clear that environmentalists will intensify their efforts to secure the passage of an EBR since the political climate may grow increasingly favourable as a result of the Brundtland Report. If enacted, an EBR will have a profound effect on the way in which environmental statutes are enforced, regulations are made, statutory approvals are given, and civil actions are conducted. Thus, it is incumbent upon lawyers involved with environmental law to become informed and involved in the development of a Canadian EBR.

(b) Environmental Assessment

One of the recurring themes of the Brundtland Report focuses on the need to anticipate and prevent harm to the environment before it occurs. Thus, the Report calls upon governments "to ensure that major new policies, projects and technologies contribute to sustainable development."[23] The Report notes that many countries currently require certain major investments be subject to an environmental impact assessment; however, the Report recommends that the scope of environmental assessment be considerably broadened:

> "A broader environment impact assessment should be applied not only to products and projects, but also to policies and programmes, especially major macroeconomic, finance, and sectoral policies that induce significant impacts on the environment.[24]

At the same time, the Report correctly states that there must be greater public participation in decisions that affect the environment, particularly since there is a common public interest in ensuring the long-term sustainability of the environment. In particular, the Report recognizes the value in increasing public participation in the environmental assessment process:

> "Public inquiries and hearings on the development and environmental impacts [of large-scale projects] can help greatly in drawing attention to different points of view. Free access to relevant information and the availability of alternative sources of technical expertise can provide an informed bases for public discussion. When the environmental impact of a proposed project is particularly high, public scrutiny of the case should be mandatory and, wherever feasible, the decision should be subject to prior public approval, perhaps by referendum."[25]

The Report acknowledges that this approach will require changes in the current legal and institutional framework for environmental decision-making. Nevertheless, the Report argues such changes are necessary since it "places the right to use public and private resources in its proper social context ... [by] giving ... communities an effective say over the use of these resources."[26]

These Brundtland recommendations have been strongly endorsed in Canada by the National Task Force Report to CCREM. In particular, the Task Force recommends that governments must assume a leadership role in the integration of environment and economy and increased public participation by:

- requiring cabinet documents and major government economic development documents to demonstrate that they are both economically and environmentally sound;
- taking steps to open environmental, resource and economic development policy making and planning to greater public input;
- streamlining environmental assessment processes, and including environmental assessment in all federal-provincial economic development agreements.[27]

With respect to the Ontario Environmental Assessment Act, environmentalists have long advocated the implementation of various reforms to improve the effectiveness, efficiency and fairness of the Act.[28] These objectives can be achieved in the following ways:

- extending the EAA to private sector;
- tightening the exemption procedure and strengthening the "bump-up" provisions for class environmental assessments;
- formalizing the pre-submission consultation process, and improving pre-hearing "discovery";

- establishing pre-hearing conferences and other scoping procedures;
- developing precise rules and standards delineating the required content of environmental assessments, especially with respect to the treatment of alternatives;
- extending the EAA to certain "plans" (i.e. municipal Waste Management Master Plans) before a particular undertaking is selected by the proponent.

These and other reforms are currently being discussed in Environment Ontario's present EAPIP consultative process. This process is intended to examine the understanding and acceptance of environmental assessment, and to ensure that the program operates in an efficient and effective manner. Although EAPIP may take two to three years to complete, it is quite likely that several of the above-noted reforms will eventually be incorporated in one form or another into the EAA or the regulations thereunder. In fact, some of these initiatives, such as scoping exercises, have already been implemented by the Environmental Assessment Board in cases such as the ongoing Class Environmental Assessment of Crown Timber Management. In light of these developments, and given the Brundtland Report's recommendations with respect to the environmental assessment process, Ontario lawyers should anticipate that the EAA will be significantly expanded, improved and streamlined over the next few years.

The prognosis for environmental assessment reform at the federal level is less optimistic. The federal government's EARP process currently remains on a non-statutory basis, and its deficiencies have been roundly criticized by a number of players and acknowledged by

the government itself.[29] Accordingly, the environmentalists have made a number of recommendations to improve the EARP process; including the following:

- entrenching EARP on a statutory basis and mandating compliance for all projects and undertakings within federal jurisdiction;
- expressly defining and consistently applying the requirements of EARP;
- defining 'environment" broadly, and requiring the proponent to describe all socio-economic, cultural and environmental impacts of the project;
- requiring a thorough consideration of alternatives by the proponent, including the "do nothing" alternative;
- establishing an effective public hearing process that entrenches the rules of natural justice and fairness, and that includes a formalized intervenor funding system.[30]

To date, the new Environment Minister, Lucien Bouchard, has not announced any intentions to reform the federal EARP process, However, he has recently revealed a proposal to establish a Cabinet-level committee to screen and review governmental policies and projects to ensure that they are consistent with environmental sustainability.[31] If properly developed and implemented, this Committee could act as one safeguard against environmentally unsound activities and undertakings. However, this arrangement is not a proper substitute for a formalized and effective environmental assessment process at the federal level. Accordingly, environmentalists will continue to press the federal government to fully implement the Brundtland Report's recommendations respecting environmental assessment. The government may eventually accede to

this pressure, but this appears to be a long-term rather than a short-term reform.

(c) Environmental Standards, Regulations, and Incentives

To date, the battle against environmental degradation and resource depletion has been undermined by the lack of quantifiable governmental objectives, and the proliferation of non-enforceable environmental guidelines. Thus, the Brundtland Report recommends that "national governments should establish clear environmental goals and enforce environmental laws, regulations, incentives and standards ... [that] give priority to public health problems associated with industrial pollution and hazardous wastes."[32] More importantly, the Report states that these regulations and standards must apply to a variety of environmental concerns:

> "The regulations and standards should govern such matters as air and water pollution, waste management, occupational health and safety of workers, energy and resource efficiency of products or processes, and the manufacture, marketing, use, transport, and disposal of toxic substances. This should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms.[33]

This comprehensive regulatory approach is necessary since there are limits to what society can expect industries to undertake voluntarily when they are in competition with other industries. As the Report suggests, these regulations provide an important incentive for industry to make the necessary investment in a waste reduction and pollution abatement equipment. Financial incentives in the form of subsidies can also be used to induce industry to invest in the necessary equipment; the Brundtland Report, however, argues that

subsidies should be avoided as they run counter to the "Polluter Pays Principle" endorsed by many countries. Thus, the Brundtland Report recommends that other forms of financial incentives be used by governments:

> Energy and water pricing policies, for example, can push industries to consume less. Product redesign and technological innovations leading to safer products, more efficient processes, and recycling of raw materials can also be promoted by a more effective, integrated use of economic incentives and disincentives, such as investment tax breaks, low-interest loans, depreciation allowances, pollution or waste charges and non-compliance fees.[34]

Finally, the Brundtland Report focusses on waste management, and expresses particular concern about the generation and disposal of hazardous waste. The Report emphasizes the need for proper waste management planning, and embraces the so-called "3R's" of reduction, reuse and recycling of waste:

> The overriding policy objective must be to reduce the amount of waste generated, and to transform an increasing amount into resources for use and reuse. This will reduce the volume that otherwise must be treated or disposed of through incineration, land disposal, or dumping at sea.[35]

In Canada, environmentalists have often proposed various initiatives that would give effect to these Brundtland recommendations. For example, Canadians presently lack enforceable standards relating to drinking water quality, although certain water quality policies and guidelines for certain substances exist at both the federal and provincial level. Thus, environmental groups have lobbied for the enactment of a Safe Drinking Water Act, largely because current legislation controlling water pollution at source has not been

effective in preventing the continued degradation of Canada's water resources.[36] At a minimum, a Safe Drinking Water Act would:

- establish standards limiting the amount of contaminants in drinking water;
- establish standards for substances that cause odour, appearance or usability of drinking water;
- require public notification when there is a violation of the above-noted standards, or a failure to carry out the prescribed testing;
- ensure public access to water monitoring data kept by public water suppliers;
- establish offences for contaminating private drinking water supplies, and for violations of the above-noted standards.

Environmentalists have also proposed a number of other reforms that would establish standards rather than guidelines:

- national waste management standards relating to the design, construction, operation and closure of landfills, incinerators and physical/chemical treatment plants;
- "zero discharge" effluent standards for all air and water contaminants presently entering the environment.

With respect to goals and incentives, public interest groups have often called for the establishment of discernable objectives and monetary incentives in variety of environmental matters. In the area of waste management, for example, some groups have argued for the enactment of legislation that clearly calls for a substantial reduction in the amount of solid, hazardous and liquid industrial waste now being generated. In Ontario, the Minister of the Environment has responded by committing the government to achieving a 50% reduction in generation municipal solid waste, which presumably

is to be achieved by comprehensive source reduction, reuse and recycling programs. Similarly, public interest groups have frequently called upon the government to enact legislation that would reduce the amount of packaging waste, which now accounts for 30% by weight and 50% by volume of the municipal waste stream. Thus, some environmentalists have proposed legislation that would prohibit non-reusable, non-recyclable or non-biodegradable packaging and containers, while others have proposed bans or large taxes on disposable products. In light of the Brundtland Report's comments on the need for waste reduction, it is likely that provincial and/or federal governments will soon undertake aggressive 3R programs and regulations, particularly in light of the waste management crisis currently faced by municipalities in southern Ontario.

V. THE FREE TRADE DEAL

As described throughout this brief, Canadian governments have clearly committed themselves to the principles of sustainable development set out in the Brundtland Report. The task for these governments is now to translate that commitment into effective legislative and non-legislative initiatives that contribute to the long-term sustainability of the local and global environment.

However, the wild card in this matter is the free trade deal recently signed by the Canadian and American governments. During the last federal election, numerous environmental groups assailed the

deal for its profound and adverse implications for the Canadian environment. In particular, the groups argued that the deal will fundamentally undermine the principles of environmental protection and sustainable resource development as espoused by the Brundtland Report.[37] While it is beyond the scope of this paper to fully present the groups' analysis of the deal, it is instructive to highlight some of the more significant aspects of the deal's potential effect upon the environment:

- Canada's ability to manage resources in a sustainable manner will be constrained by guaranteed American access to a proportionate share of Canadian resources, even in times of shortage;

- Canadian subsidies and financial incentives designed to encourage environmental and resource management objectives are vulnerable to attack as non-tariff barriers to trade; only oil and gas exploration subsidies have been specifically preserved under the deal;

- the commitment to harmonize regulations may result in "lowest common denominator" environmental regulations, and may force Canada to adopt risk/benefit assessment (rather than product safety) in the decision to licence pesticides.

The only substantive response by the Canadian government to these and other concerns is to refer to Article 609 of the deal and article XX(b) of GATT. Article 609, however, preserves only an environmental exception for "technical standards", and does not affect other Articles that threaten Canadian energy resources, farmland, forests, pesticide regulation and water. Similarly, Article XX(b) of GATT, drafted in 1940, recognizes only the ability of nations to impose restrictions to protect human animal and plant life; the legislative history of this provision suggests that it was not intended and will

not be used to protect restrictions that safeguard against resource depletion or environmental degradation.

To many environmentalists, it is ironic that the federal government has apparently seen no contradiction in its endorsement of the Brundtland Report and its failure to consider the environment during the negotiations of the deal. In fact, it has been suggested that the deal entrenches the very approaches to development and environment that the Report identifies as being responsible for the present environmental problems.

Since the free trade deal is now in force, the focus will now turn to monitoring the environmental effects of the deal's implementation, and to the ongoing negotiations related to the definition of subsidies. Thus, Ontario lawyers can expect that the free trade will have a profound influence on the future direction of environmental law in Canada, since the deal may serve as a substantial constraint on Canada's ability to implement the recommendations of the Brundtland Report.

VI. CONCLUSION

The Brundtland Report offers important guidance with respect to the need and means to alleviate the planet's threatened future. Specifically, the Report calls upon governments to enact legislative initiatives based on the principles of sustainable resource

management and environmental protection, and concludes that such action is required now in order to assure the long-term security, well-being and survival of the planet.

All Canadian governments have endorsed the Brundtland Report, and are now beginning to develop strategies and legislation that give effect to the sustainable development. Other legislative reforms -- such as establishing an Environmental Bill of Rights, strengthening environmental assessment legislation, and establishing clear environmental goals, standards and incentives -- are only some of the legislative initiatives that will be necessary to make sustainable resource management a reality in Canada. Some of these reforms are already underway, while others may take some time before the necessary political will is mustered to enact the more difficult reforms. However, the free trade deal represents a major stumbling block to these reforms, and it may, in fact, undo some of the environmental progress that has been achieved to date. Nevertheless, when Environment Canada releases its next "State of the Environment Report", one is hopeful that it will document an improvement over the 1986 Report, as Brundtland-based legislative initiatives are implemented through Canada.

END NOTES

1. Environmental Canada, State of the Environment Report (Ottawa, 1986).

2. World Commission on Environment and Environment, Our Common Future (Oxford, 1987).

3. David Estrin, "Annual Survey of Canadian Law, Part 2; Environmental Law", [1975] Ottawa Law Review 397; Toby Vigod "Evaluation of Environmental Law in Ontario and Prospects for Reform" (CELA, 1988).

4. S.O. 1956, c.62; re-en. S.O. 1957, c.88; now R.S.O. 1980, c.361. This prohibition was added to the Act in 1957.

5. S.O. 1958, c.2; re-en. S.O. 1967.

6. For example, contaminants discharged into the air may fall out onto land or water. Installing pollution abatement equipment to remove these contaminants from air emissions may only transfer the environmental hazard from one medium to another, since the sludge or ash resulting from this equipment is often landfilled, thereby posing threats to groundwater quality.

7. S.O. 1971 c.86; now R.S.O. 1980, c.141.

8. S.O. 1970, c.44; R.S.O. 1970, c.491.

9. S.O. 1974-75, c.72.

10. S.C. 1988, c.22.

11. S.O. 1975, c.69; now R.S.O. 1980, c.140.

12. Ibid., s.1(c).

13. The recent passage of the Intervenor Funding Project Act, 1988 (Bill 174) addresses this latter problem by making intervenor funding and cost awards available to public interest intervenors.

14. See, for example, R. Gibson and B. Savan, Environmental Assessment in Ontario (CELRF, 1986); R. Gibson and G. Patterson, "Environmental Assessment in Canada" (CELA, 1984).

15. Supra, note 2, p.39.

16. Ibid., p.157.

17. Ibid., p.59.

18. Ibid., p.219.

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