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Alastair R. Lucas

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LEGAL FOUNDATIONS FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING

ALASTAIR R. LUCAS*

INTRODUCTION

Regulatory and management decisions by public resource and environmental agencies require a basis in law. This legal authority may be found in constitutional documents, in legislation, in judge-made law, or in convention based on unwritten constitutional doctrine.¹ Since the scope of consultation by such agencies is an element of the decisionmaking process, rights of members of the public to participate in agency decisions, if these rights are to be enforced, must also have an explicit legal foundation.

This paper will examine the legal case for public participation. The first part will attempt to determine whether, and to what extent, there exist in law substantive rights to participate in typical natural resource and environmental decision processes administered by government departments or agencies. Apart from enforceable legal rights to participate, significant opportunities to participate may exist through government or agency policies based on discretionary statutory powers of various types. Since these opportunities are dependent on the grace or wisdom of particular decisionmakers, the distinction between rights and opportunities to participate is critically important.

The second part will consider whether legal actions, including actions to require public participation, provide in themselves an effective forum for public involvement in environmental decisions. It is possible that a type of participation is available through traditional legal processes in situations where rights or opportunities to participate directly in agency processes are not available.

*Faculty of Law University of British Columbia; Chairman Legal Committee, Canadian Arctic Resources Committee.

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1. This is particularly true in Canada and Great Britain, which have partly unwritten constitutions and no constitutional Bills of Rights. For a summary of the essential differences in Canadian and American constitutional theory and content see Carter, *The National Energy Board of Canada and the American Administrative Procedure Act—A Comparative Study*, 34 Sask. L. Rev. 104, 106-109 (1969).

In both parts emphasis will be on Canadian law. However, reference will also be made to aspects of the participatory process in England and the United States for purposes of comparison. It will be argued that there are few clearly established rights to participate in environmental decisions available to Canadian citizens. To the extent that citizens are permitted opportunities for participation, these are narrow, formal and largely ineffective.

RIGHTS AND OPPORTUNITIES TO PARTICIPATE

Why Involve the Public?

The growing awareness of members of the general public concerning matters likely to affect them, and the consequent desire for additional information and involvement in the resolution of these matters is a phenomenon of the last decade in Canada. Although this heightened public awareness is apparent in a number of areas, many of the best examples involve environmental issues. Numerous controversies in which strong pressure for public involvement was put on government or agency officials have been documented in Canada, England and the United States.²

There is little consensus among social scientists on the reasons for these developments. Nor is there agreement on the role that public participation can or should play in agency decisionmaking. However, for purposes of this paper the following general statement of reasons for public participation developed by a federal task force on environmental impact assessment has been adopted as a useful background for discussion of legal issues. The task force stated four reasons:

1. Affected persons likely to be unrepresented in environmental assessment and decision processes are provided an opportunity to present their views;
2. Members of the public may provide useful additional information to the decisionmaker, especially when values are involved that cannot be easily quantified;
3. Accountability of political and administrative decisionmakers is likely to be reenforced if the process is open to public view. Openness puts pressure on administrators to follow the required procedure in all cases;
4. Public confidence in the reviewers and decisionmakers is enhanced, since citizens can clearly see in every case that all issues have been fully and carefully considered.³

2. Among the best known examples are the Third London Airport controversy in England, the S.S.T. debate and the Grand Canyon dam proposals in the U.S.; and the Skagit Valley flooding, Churchill River diversion, and Spadina Expressway issues in Canada.

3. Report of the Task Force on Environmental Impact Assessment: Policy and Process 8 (1972) [hereinafter cited as Task Force Report].

The latter two reasons are of particular importance. They suggest that one of the chief values of public participation is that it provides a means for scrutinizing environmental decisions. Like other scrutiny techniques, such as administrative review by other governmental agencies⁴ and judicial review in the courts, public involvement and consequent publicity provide a source of pressure to help ensure that both administrators and elected officials act fairly and follow the required procedure in all cases.⁵

Forms of Participation

Participation can take many forms. It is necessary, therefore, to define more particularly what is meant by "participation" and to specify the decisionmaking context in which it will be examined.

The concept of citizen participation is often said to be an integral part of the political system of liberal democratic nations such as Canada, the United States and Great Britain. The ballot box is cited as the most common and basic form of public participation. Through this process, governments are elected whose mandates are theoretically based on the consent of the voting public.⁶ Thus, elected governmental officials are said to be responsible to Parliament, and ultimately to their constituents for resource and environmental management decisions made under their auspices. In Canada and Great Britain where a majority party executive often tightly controls the legislature, this concept of ministerial responsibility is regarded as a hallowed constitutional safeguard.

However, even the most casual observation discloses that elections are rarely fought on issues involving specific alternatives. Particular issues are either submerged in broad, carefully tailored election issues or are simply forgotten because they arose early in a government's term of office.⁷

But, beyond participation through the ballot box, it is difficult to encapsulate the concept of public participation. One governmental working group has observed that:

4. Such as appeals from Director's decisions to the Pollution Control Board, thence to a committee of the Cabinet under § 12 of the British Columbia Pollution Control Act, B.C. Stat. 1967, c. 34, *as amended*; and the Environmental Appeal Board process under Part X of the Ontario Environmental Protection Act, Ont. Stat. 1971, c. 86, *as amended*.

5. See Task Force Report, *supra* note 3; Lucas, *Environmental Impact Assessment, A Legal Perspective*, Proceedings: National Conference on Environmental Impact: Assessment: Philosophy and Methodology 30, 44, Agassiz Centre for Water Studies (Nov. 15-16, 1973).

6. See Head, *The Ideology and Practice of Citizen Participation* in Citizen Participation Canada 14-15 (J. Draper ed. 1972).

7. See Graham, *Reflections on a Planning Failure: Ontario Hydro's Proposed Nanicoke to Pickering Transmission Corridor* 12-14 (Paper presented to the Water Quality Management Decision-Making Seminar, University of Victoria, March 1973).

Making observations about the phenomenon of citizen participation is no easy task. First, it appears to be so varied and to affect so many sectors of our society that it is difficult, if not impossible, for an individual or group of individuals to have experienced its many variations. Second, while we know something about people acting in groups, little empirical research has been done on individual behavior in this area. Then, there is a media bias to contend with—a bias that tends to overemphasize the dramatic and to play down the more mundane side of the phenomenon. Finally, as many social scientists are beginning to admit, there may be no such thing as objective empirical research of a social or even a physical phenomenon; that is, the observer's values and biases may be crucial in determining what is selected and how it is observed and interpreted; and, for this reason, all observations do not so much constitute reality as they do the observer's perceptions or interpretations.⁸

Consequently, most attempts in Canada to characterize public participation have either listed examples or simply assumed the effectiveness and legitimacy of a particular form of participation.⁹ The sparse legal literature that touches the subject of public participation almost uniformly adopts the latter approach. The formal public hearing technique that lawyers find so comfortably familiar is assumed to be the only appropriate form of public participation.¹⁰

A Typical Environmental Decision Process

Apart from the legal literature, articulation of types and processes of public participation has been attempted.¹¹ In this paper no detailed typology will be developed or adapted. Rather, the existence of legal rights or opportunities to participate in whatever form will be considered at successive stages of a typical resource or environmental decision process. The form of participation available is obviously important in assessing effectiveness. However, the question of techniques for participation will not even arise unless a right or opportunity to participate is first identified or established. It is this threshold issue of right or opportunity that is the principal subject of the following review.

8. Citizen Involvement 8 (Working Paper prepared for Ontario Government Committee on Government Productivity, April 1972).

9. See, e.g., Head, *supra* note 6, at 15-25.

10. See Jowell, *The Limits of the Public Hearing as a Tool in Urban Planning*, 21 Ad. L. Rev. 123, 140-43 (1969). An exception in the Canadian literature is Franson & Burns, *Environmental Rights for the Canadian Citizen: A Prescription for Reform*, 12 Alta. L. Rev. 153 (1974).

11. See Arnstein, *A Ladder of Citizen Participation*, J. Amer. Inst. Plan. 216 (1969); Compton, *Community Development Theory and Practice in Citizen Participation: Canada*, *supra* note 6, at 382; Citizen Involvement, *supra* note 8, at 32-43.

The process to be considered is a mixed regulatory and management process based on some type of permit or approval system backed by administrative¹² and quasi-criminal sanctions. Examples of this type of process include those of regional planning bodies, natural resource allocation departments, and pollution control agencies.

Focus will be directed to four stages of this typical environmental decision process. The first is the process by which issues are formulated. The question of who has the right to initiate agency processes is of critical importance. A second stage is the process of marshaling and testing information on any issue before the agency. This may be done wholly or partly through the agency's own staff and may include input from other governmental sources. It may also include participation by private citizens or citizen groups. The third stage is deliberation and formulation of decisions by the agency. The final step is implementation of the decision. This may include development of techniques and strategies for implementation where the decision leaves scope for alternatives. Also included are monitoring implementation actions of the regulated parties and initiating appropriate enforcement measures.

A. Issue Formulation

Under Canadian approval-type environmental management legislation the initiating role is reserved exclusively to the regulated industries and the tribunal or agency itself.

The British Columbia Pollution Control Act,¹³ Alberta Clean Air¹⁴ and Clean Water Acts,¹⁵ Ontario Environmental Protection Act,¹⁶ and federal National Energy Board Act¹⁷ and Fisheries Act¹⁸ can be regarded as typical. Issues are raised for determination by the agency only after an application is filed for authority to undertake some environmentally damaging activity or for approval of some proposed waste disposal system.

Usually the agency itself also has authority to raise issues for decision on its own initiative. It may, for example, be empowered to order any person or corporation to apply for a permit or approval or for an amendment to an existing permit or approval within a stated

12. *E.g.*, suspension or cancellation of licenses or permits by administrators or agencies.

13. B.C. Stat. 1967, c. 34 *as amended* [hereinafter cited as Pollution Control Act].

14. Alta. Stat. 1971, c. 16.

15. Alta. Stat. 1971, c. 17.

16. Ont. Stat. 1971, c. 86, *as amended* by Ont. Stat. 1972, c. 1, § 64; Ont. Stat. 1972, c. 106 [hereinafter cited as E.P.A.].

17. Can. Rev. Stat. c. N-6 (1970) *as amended*.

18. Can. Rev. Stat. c. F-14 (1970) *as amended* [hereinafter cited as Fisheries Act].

time period.¹⁹ In most cases the agency is also authorized to undertake more general inquiries to develop and articulate performance and effluent standards for natural resource based activities²⁰ or for the quality of receiving environments.²¹

Members of the public have no rights under these statutes to initiate permit issue (or amendment), or standard setting decision processes. Procedures do not exist for forcing investigations by an agency nor even for petitioning the agency to carry out a particular investigation.

Thus, apart from the possibility of favorable exercise of discretion by agencies, no public participation rights exist at the issue formulation stage of typical Canadian environmental decisionmaking processes. Permit or approval applications are carefully prepared by the regulated industries to limit specific issues raised by the application and to define the relevant issues in the most favorable form.²² The issues are narrowed and cast so far as possible in objective and technical terms, rather than value terms. Often this process is not only assisted but required by the legislation and rules governing the agency.²³ To reduce the issue to technical terms is in the interest of the agency. In this way decisions are seen to rest on "hard data" that will better withstand casual public scrutiny.²⁴ Both agency and

19. See, e.g., Pollution Control Act, § 5(1a); E.P.A. § 43; Fisheries Act § 33.1 (Supp. 1, c. 17).

20. E.g., Pollution Control Act, § 14; National Energy Board Act, Can. Rev. Stat. c. N-6, § 11 (1970); Northern Inland Waters Act, Can. Rev. Stat. c. 128, § 15 (Supp. 1 1970).

21. Hearings for this purpose have been held over the past three years by the British Columbia Pollution Control Branch under section 14 of the Pollution Control Act.

22. For documentation of this process under the British Columbia Pollution Control Act, see Lucas & Moore, *The Utah Controversy: A Case Study of Public Participation in Pollution Control*, 13 Nat. Res. J. 36, 46-47, 73 (1973) [hereinafter cited as *The Utah Controversy*]. See also Vincent, *Cornelius Vanderbilt is Alive and Well: D.I.A.N.D. and the Public Interest* 6 (unpublished paper presented to Canadian Political Science Assn. Annual Meeting, March 1974).

23. Application forms such as those prescribed by the British Columbia Pollution Control Branch tend to have this effect. So do deficiency letter processes like that of the National Energy Board in which agency staff make detailed requests for supplementary technical information. This process has no specific basis in the National Energy Board Act, regulations or rules of practice and procedure beyond the basic requirements for information to be submitted by applicants in N.E.B. Pt. VI Regulations § § 4(1) and 5(1); and N.E.B. Rules of Practice and Procedure § 5(3). See Gibbs, MacFarlane & Knowles, *A Review of the National Energy Board Policies and Practices and Recent Hearings*, 9 Alta. L. Rev. 523, 545 (1971).

24. This is apparent in the Utah Controversy pollution control case study. See *supra* note 2, at 72-73. A similar process can be seen in the National Energy Board's handling of policy issues raised by public interest groups, such as submissions by Pollution Probe and the Consumers Association on the subject of social cost at the hearing on a major electric power export application by Ontario Hydro in May of 1973: Interview with George Hunter (counsel for the groups), July 1974. The federal court subsequently agreed with the N.E.B. on this point in refusing leave to appeal. See Consumers Association and Pollution Probe v. Ontario Hydro and National Energy Board, No. 74-A-5 (F.C.A., April 16, 1974).

elected public officials are likely to be protected from public criticism.

This problem is exemplified by pollution control permit systems in which applications are made for approval of particular waste disposal systems supported by detailed plans and engineering specifications.²⁵ Applicants and agencies have consistently interpreted agency jurisdiction to be based on the detailed application submitted, even though applications are often prepared following extensive consultation with agency staff.²⁶ The result is that even where some type of public participation is permitted later at the information stage, submissions and questions on alternative sites, plant processes, or methods of disposal, and sometimes even on alternative equipment or operating techniques have been excluded as irrelevant.²⁷

There is an even more fundamental problem. Single resource statutes administered by separate departments or agencies allow applicants to obtain a succession of minor approvals through low visibility processes. Often financial commitments are made on the strength of these approvals. The cumulative effect is that a major development may be a virtual *fait accompli*, with only minor technical details unresolved, even before applications are made.²⁸

This preemption problem has been attacked in a number of Canadian jurisdictions by legislation conferring authority on some public body or official to inquire into general issues of resource development and use, including site location for certain types of

25. As under the British Columbia Pollution Control Act, *supra* note 21, and *The Utah Controversy*, *supra* note 22.

26. See *The Utah Controversy*, *supra* note 22, at 72. The National Energy Board recently interpreted § 44(a) of the National Energy Board Act as restricting its jurisdiction on gas facilities applications under Part III of the Act to consideration of the availability of the particular gas under contract. The Board therefore refused to permit cross examination by intervenors on the general subject of future gas supply available to Ontario Utilities. The Board's ruling was upheld by the Federal Court in *Union Gas v. Trans Canada Pipelines Limited and National Energy Board*, No. T-2983-74 (F.C.T.D. August 21, 1974), Mahoney, J.

Similarly, in hearings on an application by Interprovincial Pipelines Limited for a certificate of public convenience and necessity in respect of a proposed Sarnia-Montreal extension of the I.P.L. system, counsel for the Committee for an Independent Canada was restricted in attempts to cross examine an I.P.L. witness on cost figures calculated in consideration of alternative routes. See Transcript, hearing order No. OH-1-74, Vol. 1 at 82 (May 14, 1974).

27. See, e.g., *The Utah Controversy*, *supra* note 22, at 60; D. Estrin & J. Swaigen, *Environment on Trial*, 158-59 (1973) regarding waste management hearings under the Ontario E.P.A.

28. See *The Utah Controversy*, *supra* note 22, at 55-67. See also Joint Federal-Provincial Task Force, *A Preliminary Study of the Environmental Impacts of the Proposed James Bay Development Project*, (esp. Introduction) (December 1971); *The Elora Gorge Controversy*, documented in *Environment on Trial*, *supra* note 27, at 288-89.

activities, development of frontier regions, and commencement of minor activities with potentially significant cumulative effects.²⁹

However, while these statutes usually provide for some type of public participation, powers to inquire as well as powers to permit public participation are framed in permissive rather than mandatory terms. Statutes are drafted with discretionary words in the key authorizing sections, and courts, particularly in Canada and England, have shown little propensity to issue injunctions or prerogative writs to require agency action in the absence of clear mandatory language.³⁰ There are no rights to participate, only opportunities that the relevant agency in its discretion may or may not decide to provide.³¹

Thus, at the issue formulation stage citizens are without clearly defined rights to participate. They must approach the agency to request that an opportunity for public participation be allowed. This decision is in the discretion of the agency. If an application has not yet been filed, there is no proceeding before the agency in which to allow participation, even though agency staff are probably negoti-

29. See, e.g., The Environment and Land Use Act, B.C. Stat. 1971, c. 17; The Planning and Development Act, Ont. Stat. 1973, c. 51; The Environment Conservation Act, Alta. Rev. Stat. c. 125 (1970) *as amended*; The Land Commission Act, B.C. Stat. 1973, c. 46.

30. As in *Re Piatocka and Utah Construction and Mining Co.*, [1972] 21 D.L.R.3d 87 (B.C. Sup. Ct. 1971), which was an action to force wider participation in a public hearing on a pollution control permit application. Matkin, *Environmental Policy Formulation: Public Participation and the Role of the Courts*, in *Environmental Abuse and the Canadian Citizen*, a study prepared for the Federal Justice Department (Feb. 1973), states at 56 that, it appears most unlikely that judicial review will provide any relief to individuals and groups seeking a voice in the setting of standards and rule making by the administration. The courts are very reluctant to review an exercise of executive discretion and most pollution control laws rely on executive discretion for the detail of standards. Therefore, reform of the administrative rule making process will have to come through legislative change.

See generally R. Reid, *Administrative Law and Practice* 386-88 (1971). Reid also points out at 45 that a discretion to dispense with a hearing may be overridden by a "common law" rule requiring a hearing. This merely refers to the principles of natural justice which may permit participation by directly affected individuals, as opposed to public interests. See text accompanying note 53, *supra*.

31. An important recent example of public participation in issue formulation is the preliminary hearings held by Commissioner Mr. Justice T. R. Berger in the MacKenzie Valley Pipeline Inquiry. Justice Berger conducted hearings at Yellowknife, Inuvik, Whitehorse and Ottawa in the Spring of 1974 to hear representations as to what specific issues are within the Inquiry Terms of Reference and views on the procedure that should be followed in the main part of the Inquiry. Subsequently, Berger, J., handed down preliminary rulings on these subjects: see *Preliminary Rulings*, July 12, 1974. However, it should be noted that the Berger Commission is essentially an ad hoc body, appointed by Order in Council (P.C. 1974-641) under § 19(h) of the Territorial Lands Act, Can. Rev. Stat. c. T-6 (1970). There is no statutory requirement that any hearings be held on right-of-way applications to the Department of Indian and Northern Affairs, much less that the public be involved in the definition of issues and procedure for hearings.

ating the application with the prospective applicant.³² If the application is filed, participation is still not likely to be permitted because of concern for maintaining proper agency-industry relations. Matters considered confidential will be involved,³³ and deficiency processes to clarify or perfect the application are regarded as technical matters for the agency alone.³⁴

Even if an opportunity to participate is permitted, it is likely to be at the information stage after the application is filed. At this point the issues have already been framed, and citizens are in the position of attempting to interpret and question the fully supported conclusions and recommendations of skilled professionals. It is too late to propose alternative sites or even seriously to question the technology proposed. This problem suggests the need for some type of public participation in planning by public and even private developers prior to application.

In addition, many application procedures could be extended or adapted to allow direct citizen initiation of resource and environmental management decisions. For example, there is no reason in principle why forest or land management legislation could not be adapted to permit citizens to request that particular land be preserved or set aside for nonintensive uses such as recreation.³⁵

In the case of more general issues, such as development of standards or criteria, the public is similarly precluded from taking initiatives. Here issues are shaped by the agency itself, usually in consultation with the affected industry. Participation has been invited in the

32. A good example is the proposed Mackenzie Valley Natural Gas Pipeline. The National Energy Board staff became involved in environmental studies and technical discussion with Canadian Arctic Gas Study Limited and its predecessors more than two years before an application for a certificate of public convenience and necessity was formally filed with the Board. See Workgroup on Canadian Energy Policy, *A Case for Delaying the Mackenzie Valley Natural Gas Pipeline* 94 (June 1974).

33. One concern is that disclosure of details of operating processes and financing may prejudice the applicants' competitive business position. This is a major reason why the Pulp and Paper Effluent Regulations (S.O.R./71-578) under the Fisheries Act, Can. Rev. Stat. c. F-14 (1970) *as amended* do not apply to existing mills until they are specified by Order-in-Council to apply to particular mills listed in a schedule. Time frames and technical means of achieving compliance with the standards are first negotiated directly with each mill. At this writing the schedule is still blank. See Morley, *Pollution as a Crime: The Federal Response*, 5 Man. L.J. 297, 300 (1973).

34. There is usually no specific statutory authority beyond general supporting information requirements for deficiency processes by which the applicant is required, through formal consultative procedures, to supplement or clarify information filed in support of the application. The National Energy Board's deficiency letter process is a good example. See Fisher, *The Role of the National Energy Board in Controlling the Export of Natural Gas from Canada*, 9 Osgoode Hall L.J. 553, 576 (1971); Gibbs, MacFarlane & Knowles, *A Review of the N.E.B. Policies and Practices and Recent Hearings*, *supra* note 23.

35. See generally, Franson, *Legislation to Establish Ecological Reserves for the Preservation of Natural Areas*, 10 Osgoode Hall L.J. 583 (1972).

development of standards by some agencies,³⁶ but the type of standards to be established and the timing and procedure for establishment have been regarded as matters entirely within the discretion of the agency.³⁷

All of this is not to suggest that informal public pressure, either through media or through contact with elected representatives and agency personnel, has no effect. Agencies have bowed to public pressure and commenced investigation of particular environmental problems or undertaken regulation in areas previously ignored.³⁸ However, at present this public pressure must be applied totally outside statutory processes. There are few established procedures available through which agencies can be formally required to take action or even carefully to investigate and determine whether action is warranted on particular issues.³⁹

B. Information Gathering Stage

Some Canadian resource and environmental management statutes provide for public participation on issues arising out of an application already before the agency. This is normally required by the agency and by the elected representatives to whom it is responsible, not as necessary to the democratic process but simply as a means of informing members of the public likely to be affected of the nature of the proposed activity. Participation is also considered one means by which the agency collects information on the issue to be decided, but it is not regarded as an important source of new information by most administrators.⁴⁰ The public is involved largely for the public

36. *E.g.*, by the British Columbia Pollution Control Branch in the development of Industry standards.

37. See Franson & Burns, *supra* note 10, at 154; Ask the People, proceedings of a multidisciplinary workshop on Public Participation in the Environmental Management Decision-Making Process, Appendix B, at 1-3 (G. Morley ed. 1972).

38. *E.g.*, the hearing held on the Utah pollution permit application. See *The Utah Controversy*, *supra* note 22, at 44-45. Other examples include the inclusion of nutrients discharge restrictions as Part III of the Canada Water Act, Can. Rev. Stat. c. 5 (Supp. I 1970) and The Chlor Alkali Mercury Regulations, 106 Canada Gazette Pt. II 436 (No. 7, Apr. 12, 1972). See Morley, *Legal Developments in Canadian Water Management*, 11 W. Ont. L. Rev. 139, 146-47 (1972); Morley, *supra* note 33, at 301, 305. Another example is the Ontario "partial D.D.T. ban" of 1970 following extensive public pressure generated by conservationists, notably Pollution Probe at the University of Toronto. See *Environment on Trial*, *supra* note 27, at 171.

39. One exception is the contaminant damage investigation procedure in § 92 of the Ontario E.P.A. It should be noted however that § 92(2) states that "Upon receipt of a request, the Minister *may* cause an investigation to be made. . . ."

40. Informing the public has been stated by B.C. Pollution Control Branch Officials to be the major objective of hearings on applications, and the reason that few hearings have been held. The amendments to the English Town and Country Planning Act 1972, c. 42, esp. § 3, that replace public hearings on structure plans with "examinations in public" of experts

relations benefit to the agency and the elected representatives to whom it is responsible. Members of the public are informed; to a lesser degree they are consulted and allowed some opportunity to respond to the proposal before the agency. Procedures established are usually consistent with this emphasis on informing rather than consulting and effectively involving the public.⁴¹

A good example is a recent hearing under the Federal Expropriation Act⁴² on the proposed taking of residential properties by the Ministry of Transport for expansion of Vancouver International Airport. During the course of the hearing, MOT officials established an information office at the airport and distributed literature rationalizing the expansion and quoting statistics to calm fears about increased noise and traffic congestion. At the same time, objectors at the hearing were attempting to force the Ministry to disclose technical consultants' reports that would have significantly clarified the nature of the proposed project.⁴³

More basic constraints on the right of the public to participate at the information stage exist. First, very few statutes *require* public participation of any sort. Franson and Burns have recently reported, for example, that a review of 14 federal statutes show that hearings are required in only two cases.⁴⁴ They also indicate that provision for other forms of participation is equally rare.⁴⁵

Second, even where statutory authority is provided for public participation, the power is almost uniformly conferred in discretionary terms.⁴⁶ Examples are abundant. The British Columbia Pollution

with relevant experience, are based in part on the assumption that hearings are not an important source of information for the agency. This is also implicit in Howland, *Principal Requirements for Northern Pipelines*, Proceedings, Canadian Northern Pipeline Research Conference (February 1972). Dr. Robert Howland was then Chairman of the National Energy Board.

41. *E.g.*, § 27 of the Canada Water Act, Can. Rev. Stat. c. 5 (Supp. I 1970), quote at note 48, *supra*, allows the Minister to initiate "public information programs." One of the stated objectives of the long awaited Environment Canada procedure for environmental impact assessment is to:

... provide an arms length system for review, advice and expertise, and for (1) *informing the public*, and (2) *where appropriate*, involving the public in decisionmaking. (Emphasis added).

See Interdepartmental Committee on the Environment, *A Procedure for Implementation of a Federal Environmental Assessment Review and Protection Process* (September, 1974).

42. Can. Rev. Stat. c. 16 (Supp. I 1970).

43. See *Why Ottawa has Shunned Airport hearing*, The Vancouver Sun, Feb. 15, 1973, at 6; *Airport answer-men arriving*, The Vancouver Sun, Feb. 3, 1973, at 23; *Protestors fail in attempt to adjourn hearing on Sea Island expropriation*, The Vancouver Sun, Jan. 1973, at 15.

44. Franson & Burns, *supra* note 10, at 154.

45. *Id.*

46. See *id.* One important consequence is the likelihood that mandatory judicial relief to compel the agency to provide an opportunity for public participation is unlikely. The

Control Act empowers the director to "determine in his sole discretion whether the objection shall be the subject of a hearing."⁴⁷ Section 27 of the Canada Water Act says:

The Minister may, either directly or in cooperation with any government, institution or person, publish or otherwise distribute or arrange for the publication or distribution of such information as he deems necessary to inform the public respecting any aspect of the conservation, development or utilization of the water resources of Canada.⁴⁸

This discretion to permit public participation has not been exercised liberally. With regard to federal statutes, Franson and Burns conclude that "although most agencies have the power to hold hearings, few actually hold them."⁴⁹

Third, if authority for public participation is provided, it is usually in the form of public hearings. Hearings may be appropriate for some issues, particularly where the decisionmaking agency must carry out adjudications involving competing proposals or limited numbers of clearly adverse interests, i.e., where the process is closely analogous to that of a court. However, lawyers' bias and legislative draftmen's mechanical reliance on tested provisions have resulted in formal hearings being prescribed when other forms of participation might be more effective.⁵⁰ An example is a recent hearing held by the Yukon Territorial Water Board on a proposal by the Northern Canada Power Commission to build a hydroelectric facility at Aishihik Lake in the southwestern corner of the Territory. Native people likely to be affected did participate, but they had little prior information about

relevant remedy, the prerogative writ of mandamus, is often said not to lie to compel the exercise of a discretionary power in a particular way, but only to compel an exercise of that power: *Henderson v. Hughes*, [1963] 46 W.W.R. 202 (Man. C.A.); *Poizer v. Ward*, [1971] 4 D.L.R. 316 (Man. C.A.). Matkin's conclusion (*supra* note 30, at 61) regarding mandamus to compel rulemaking is equally applicable to mandamus to require public participation in environmental regulatory proceedings, namely that:

the possibility of prodding administrators into taking action on environmental issues, like cumulative injuries, through mandamus in the courts seems remote.

47. Pollution Control Act, § 13(4).

48. Can. Rev. Stat. c. 5, § 27 (Supp. I 1970).

49. Franson & Burns, *supra* note 10, at 154.

There has been little action by governments to implement the August 1973 resolution of The Canadian Bar Association that:

any individual or group have the status to object to [every project likely to have a significant environmental impact], and that upon such objection, a mandatory public hearing be held before any government approval or license is granted.

50. See *Ask the People*, *supra* note 36, Appendix A at 2. This problem may underlie John Graham's outright rejection of an adversarial model for participation. See Graham, *supra* note 7, at 20-23.

the proposed project and appeared intimidated by the very formal hearing procedure adopted by the Board.^{5 1}

The Canada Water Act section quoted above is a rare example of a provision that recognizes the need for flexibility in choice of technique for public participation. Despite its discretionary form and possible limitation to public information programs, this section is the basis for the largely successful public participation program under the Canada-B.C. Okanagan Basin Study Agreement.^{5 2}

Fourth, while rights to participate may be available to certain directly affected individuals under the general principles of natural justice, in practice these are of limited importance. This is because rights to natural justice safeguards are largely coextensive with *locus standi* to initiate judicial review of agency decisions.^{5 3} This means that only persons affected significantly in rights or property, and therefore in at least a different degree than the general public, are entitled to natural justice safeguards in the agency process. The doctrine itself thus precludes wide participation by members of the public.

This should not be surprising, since natural justice principles were developed by the courts to protect private interests from arbitrary agency action. They were never intended to provide a vehicle for public participation, and this is confirmed by their definition through the case law. For example, they require only that notice and relevant information be provided to persons likely to be affected directly, not to the public generally. Such persons must be given an opportunity to be heard, but this need not necessarily take the form of an oral hearing, and opportunities to make formal written submissions have sometimes been held to be sufficient.^{5 4} Perhaps the most telling feature of the principles of natural justice is that they have been held to apply only to agency functions that are characterized as judicial or quasi-judicial.^{5 5} They apply only when the issue involves

51. See Yukon Territorial Water Board, Hearing Transcript (esp. May 26, 1972) at Haines Junction, Y.T.

52. See Canada-B.C. Okanagan Basin Study, Annual Report (1973).

53. *I.e.*, if a court characterizes an agency's function as judicial because of its profound effects on the applicant's rights and property (see Reid, *supra* note 30, at 145-45 and cases cited therein), it may already have determined that the applicant is aggrieved and indeed has suffered special damage.

54. See *R. v. Quebec Labour Relations Board, ex parte Komo Construction Inc.*, [1969] 1. D.L.R. 3d 125 (Can. Sup. Ct. 1967); *Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd.* [1969], 1. D.L.R. 3d 417 (Can. Sup. Ct., 1968). It has also been held that an opportunity to make written representations must be given where a hearing is denied under a clear statutory discretion to do so. See *Western Mines Ltd. v. Greater Campbell River Water District* [1967] 58 W.W.R. 705 (B.C. Ct. App.).

55. See Reid, *supra* note 30, ch. 1 at 4.

defined adversary interests in a proceeding that broadly conforms to the judicial model.

Processes that involve questions of policy not directly in issue between adversarial parties have often been held to be administrative,⁵⁶ so that natural justice has no application. Yet it is with major questions of policy that citizens are most interested and concerned, and it is here that the views of citizen participants can be most valuable to decisionmakers.

The situation in the United States appears to be somewhat different. The right of members of the public to intervene in administrative proceedings is now widely recognized. Ernest Gellhorn has said:

Most efforts on behalf of public intervention to date have been focused on establishing a "right" to intervene. This battle has largely been won, except for the question of how far the "right" extends.⁵⁷

The reason is that hearing requirements are common in statutes establishing major resource and environmental decision processes. For example, the Atomic Energy Act requires that a hearing be held on any construction permit application at the request of any person whose interest may be affected by the proceeding, and that the person be allowed to participate in the proceeding.⁵⁸ Statutes of this type are buttressed by Administrative Procedure Act provisions that allow persons adversely affected or aggrieved by agency actions within the meaning of the relevant statute to initiate judicial review proceedings.⁵⁹

Public participation rights at the information collection stage are fairly extensive in Great Britain. The unitary system of government in England means that land use planning matters are fully within the jurisdiction of the national government. Thus urban and regional planning powers provide the basis for many environmental management decisions. The major vehicle for this control is the Town and Country Planning Act⁶⁰ administered by the Department of the Environment.

The Act provides two main opportunities for public participation: in development by local authorities of "structure plans"—conceptual statements of policy and priorities to guide basic development

56. See *Re Brown and Brock and Rentals Administrator* [1945] 3 D.L.R. 324 (Ont. C.A.); *Re Ashby* (1934), Ont. 421 (Ct. App., 1934).

57. Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359, 361 (1972).

58. Atomic Energy Act of 1954, 42 U.S.C. § 2239 (1970).

59. See Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970).

60. Town and Country Planning Act 1971, c. 78.

patterns,⁶¹ and in formulation of "local plans" that show details of allocation and implementation. At the latter stage there is an opportunity for citizens to make representations to the local planning authority. The plan is then submitted to the Minister, who may authorize a hearing officer to hold a local inquiry at which any person who objects to the plan will be permitted to speak.⁶²

It must be noted, however, that English pollution control statutes appear to provide even fewer rights or opportunities for participation than their Canadian counterparts. The main water pollution control legislation provides no right to object to proposed discharges, even to riparian owners likely to be directly affected.⁶³ J. M. McLoughlin has said:

A study of English Pollution Control legislation generally shows that few safeguards for individuals have been incorporated, even where health and property may be materially affected. . . .⁶⁴

C. Deliberation and Decision

Following formal public participation in collecting, clarifying, and testing information, environmental decisionmakers must render a decision on the issues before them. At this stage they must weigh and consider the information presented to them. The process may appear to be similar to that of a court deliberating on a case following the close of a hearing.

In fact, however, the analogy is not apt for Canadian and English environmental agencies. A court must limit its consideration to the record before it. It must not consider matters outside the record, either introduced by parties or outsiders or obtained on its own initiative.⁶⁵ If it does go outside the record, its decision may be overturned on review or appeal.

Canadian and English environmental authorities are not subject to this constraint. They are not limited to the record and, in fact, are

61. See Town and Country Planning Act 1971, c. 78, §§ 6-9, as amended by 1972, c. 42, § 3. However, public rights to participate at the structure plan stage have been substantially diluted by 1972 amendments to the Act. The public hearing has been replaced by an "examination in public" procedure in which a kind of seminar discussion is held by planning officials with selected experts.

62. Town and Country Planning Act, 1971, c. 78, §§ 7-9, as amended by 1972, c. 42, § 3.

63. See Rivers (Prevention of Pollution) Acts, 1951, 14 & 15 Geo. 6, c. 64, and 1961, Arrangement of Sections, 9 and 10 Eliz. 2 c. 50; Clean Rivers (Estuaries and Tidal Waters) Act, 1960, 8 and 9 Eliz. II, c. 54; and Water Act, 1973, c. 37.

64. McLoughlin, *Control of the Pollution of Inland Waters*, 1973 J. Planning & Environmental L. 355, 360.

65. Subject to the doctrine of judicial notice. See National Law Reform Commission, Evidence Study Paper No. 6, Judicial Notice (1973).

often given wide discretion by vague and general guidelines⁶⁶ or the entire absence of guidelines.⁶⁷ Some agencies continue to make decisions on a case-by-case basis without developing specific standards or guidelines.⁶⁸ Others have established technical standards for contaminants and exercise discretionary powers of approval by simply checking off applications against the standards without further consideration of the consequences of the contaminant-producing action.⁶⁹ In either case, decisions may be based wholly or partly on staff or even consultants' advice obtained outside any formal hearing or other public participation process. The courts have generally been reluctant to deprive agencies of informal staff advice obtained outside the hearing process.⁷⁰

The usual agency procedure is a meeting or series of meetings between agency members and staff at which issues are clarified and staff advice tendered. Following agency decisions on basic issues, staff are directed to prepare draft orders or reasons-for-decision for the consideration of agency members.⁷¹ In larger agencies, decision-making is often decentralized, with approvals issued by regional staff with only occasional direction from the agency or superior officials.⁷²

When hearings are held, formal participation by agency staff is extremely unusual.⁷³ It is also unusual for staff or members of one agency or department to make formal submissions in hearings held by another agency if functions and authority overlap.⁷⁴ Interagency consultation normally takes place informally at staff level during all stages of the decision process, including deliberation.

This is to be contrasted with the situation in the U.S., where administrative procedure laws require decisions on the record. Staff

66. *E.g.*, National Energy Board Act, Can. Rev. Stat. § 44; B.C. Pollution Control Act, § 2; Ontario E.P.A. § 14.

67. *E.g.*, under the Northern Inland Waters Act, Can. Rev. Stat. c. 28 (Supp. I 1970) and the National Energy Board Act.

68. *E.g.*, The National Energy Board; the Ontario Air Management Branch approvals section.

69. *E.g.*, The Alberta Department of the Environment under the Clean Air Regulations, Alta. Reg. 10/73.

70. *See, e.g.*, The Queen v. Board of Broadcast Governors *ex parte* Swift Current Telecasting Co. Ltd. [1962] 33 D.L.R. 2d 449 (Ont. Ct. App.); Johnson and Company (Builders) Ltd. v. Minister of Health, [1947] 2 All. E.R. 395 (Ct. App.).

71. This is essentially the procedure followed by the National Energy Board.

72. *E.g.*, The British Columbia Pollution Control Branch and the Ontario Air Management Branch.

73. Staff of the National Energy Board and B.C. Pollution Control Branch do not present evidence, but act as advisors to agency counsel in hearings.

74. This practice may be increasing however. For example, Environment Canada presented briefs at both the Aishihik Yukon Territorial Water Board Hearing (*supra* note 51) and the Alberta Environment Conservation Authority surface mining hearings in 1972.

review of applications takes place prior to hearings, and staff members make formal submissions at hearings. The judicial model is followed very closely.⁷⁵

Thus, in Canada the deliberation and decision stage is entirely the province of the agency, unconstrained by any requirement to make decisions on the record or by any requirement that public participation be permitted. However, there are several public participation techniques that are relevant or that can be adapted to this stage.

One is simply to ensure that agency membership represents as many interests as possible. This has rarely been attempted in Canada. Appointments are usually by Cabinet Order-In-Council so that even public service commission criteria need not be followed.⁷⁶ In practice merit, i.e., experience and technical qualification, has normally been the main factor. Little attempt is made to ensure that tribunal members represent a range of interests, disciplines, backgrounds, or career experiences.⁷⁷ There are a few notable exceptions, such as British Columbia's Land Commission⁷⁸ and Ontario's Niagara Escarpment Planning and Development Commission.⁷⁹ Still, expertise is the dominant factor, and the best training ground is the regulated industries or activities themselves. Thus it is likely that only one range of interests will be represented by tribunal members.

It may be important to note that such interest advocacy as does exist in Canadian agencies probably enjoys freer expression than in the United States because of the less judicial nature of Canadian environmental decision processes. There is less pressure to suppress interest bias in attempts to render impartial judgment on each issue.

Another possible technique is the representative advisory committee. There are a number of Canadian environmental advisory commit-

75. See Like, *Multi-Media Confrontation—The Environmentalists Strategy for a "No-Win" Agency Proceeding*, 1 Ecology L.Q. 495 (1971).

76. See, e.g., Pollution Control Act, § 3; National Energy Board Act, Can. Rev. Stat. § 3 (1970).

77. The Directors of the Ontario Air Management Branch and the British Columbia Pollution Control Branch are both engineers. So are large percentages of their staffs. Three members of the National Energy Board are former Board Engineers. Of the eight NEB members five are engineers and three are economists or specialists in economic policy; all have previous related government or industry experience.

78. The Commission includes a planner and a noted plant ecologist with conservation group affiliations. See B.C. Stat. 1973, c. 46.

79. The Niagara Escarpment Planning and Development Act, Ont. Stat. 1973, c. 52, established a 17-member regional commission with representatives from a range of interests to provide advice to the Minister on development of a master plan for the area. Section 5(1) of the Act specifically provides that nine members of the Commission be appointed as "representatives of the public at large" and one of the remaining eight be appointed from a list submitted by the council of each county or region within the Niagara Escarpment Planning Area.

tees comprised of representatives of a range of interests. However, their effectiveness has been limited for several reasons. First, committees of this type have typically not been given a formal role in decisionmaking. They are asked for advice by the decisionmaker whenever he considers it desirable. Ministers' advisory committees such as those appointed by the Federal and Alberta Ministers of the Environment are good examples.⁸⁰ Another problem is that decisionmakers have tended to regard advisory committees as relevant only to policy formulation—in effect, sounding boards for departmental ideas, usually ideas at very early stages of consideration.⁸¹

Perhaps the only examples of advisory committees that are closely involved with either policy or decisionmaking are certain *ad hoc* industry-government committees, such as those that have developed regulations under the Federal Fisheries Act⁸² and committees concerned with relatively minor and noncontroversial issues, such as establishment and management of limited area ecological reserves.⁸³ When major issues have been referred to representative advisory committees, the committees' recommendations have often been ignored.⁸⁴

Apart from limited success in noncontroversial areas and occasional success in stimulating agency action through criticism and comment in the media,⁸⁵ the representative advisory committee has

80. See Elder, *The Participatory Environment in Alberta*, 37 (unpublished report prepared for Canadian Environmental Law Research Foundation 1973); Canadian Environmental Advisory Council, Terms of References (1972). The Federal Environment Minister also has separate Advisory Councils on Fisheries and Forestry.

81. This has been a complaint voiced by some members of the Canadian Environment Advisory Council, *id.*

82. See Morley, *supra* note 33, at 310.

83. See Franson, *Legislation to Establish Ecological Reserves for the Protection of Natural Areas*, *supra* note 35, at 596-98; Franson, *The Ecological Reserves Act of British Columbia—A Model for Canada*, 1 *Nature Canada* 29 (1972).

84. See G. Beakust & P. Usher, *Land Regulation in the Canadian North*, 20, 28-33 (1973), regarding the "Conservation Group" selected by the Department of Indian and Northern Affairs to advise on the drafting of the Territorial Land Use Regulations; the collapse of the Greater Vancouver Regional District "Liveable Region" public participation program after participants concluded that their policy recommendations were being ignored by the G.V.R.D. Board. See *Planners Shut You Out Because They Fear You*, *The Vancouver Sun*, Nov. 14, 1974, at 6. See also, Elder, *supra* note 80, at 37, regarding the ignoring of citizen advisory committee advice on location of a major dam by the Alberta Environment Minister. The recommendations on public participation of the Environment Canada Advisory Council in its report on Environmental Impact Assessment were largely ignored by the Minister in the establishment of the federal environmental assessment procedure. See *supra* note 40.

85. See Elder, *supra* note 80, at 43, citing criticism by the Alberta Environment Conservation Authority's Public Advisory Committee of environmental implications of the Syncrude Athabasca Tar Sands Development.

shown little promise as a technique for achieving effective public involvement at the deliberation and decision stage of environmental decisions. In any event, this device should not be regarded as a substitute for broader public participation at earlier stages. There is some evidence that it may be used by agencies or officials as a kind of buffer to absorb or defuse public criticism.⁸⁶

D. Implementation and Enforcement

Some agency decisions are self-executing in the sense that no further action is required by the agency before the authorized activity commences. Often, however, orders are phased; a general authorization is granted, followed by specific final orders after satisfactory completion of various stages of the authorized activity.⁸⁷ Orders may also contain detailed conditions that must be monitored during construction or operation of the approved undertaking or activity.⁸⁸

Canadian agencies have, almost without exception, allowed no public participation following approval-in-principle orders. Final orders and amending orders are issued routinely, subject only to required information being furnished and satisfactory staff review.⁸⁹ Conditional orders are often monitored by agency staff. However, under extensive point-by-point control systems, such as the waste control permit system in British Columbia and the air contaminant discharge approval system in Ontario, effective monitoring by small staffs is impossible, and approvals are conditioned so that the permittee must monitor himself, subject to spot checks by the agency.⁹⁰ There has been little inclination to follow the lead of some

86. See Elder, *supra* note 80, at 37; Environment on Trial, *supra* note 27, at 200-201, with reference to advisory committees appointed under the Ontario Provincial Parks Act.

87. For example, the B.C. Pollution Control Branch has issued conditioned provisional orders initially such as Provisional Permit No. 359-P granted to Utah Construction and Mining Company, January 20, 1971. See *The Utah Controversy*, *supra* note 22, at 64-65.

88. An example is Pollution Control Permit No. P.E.-1240, and Letter of Transmittal issued to Rayonier Canada Ltd. for its sulphite pulp mill at Port Alice, B.C., March 30, 1973. This permit contained a time limit for completion of authorized works; requirements for approval of plans and specifications; and detailed standards for suspended solids and BOD₅. A second, more stringent set of specific standards for solids, BOD₅, and toxicity were required to be reached within a specified time period. Instructions for monitoring and submission of reports were contained in the letter of transmittal. An appeal against the terms of the permit taken by the Company under section 12 of the Pollution Control Act was disallowed by a committee of the British Columbia Cabinet in an order issued January 11, 1973.

89. E.g., National Energy Board routine orders (including crossing orders, leave to open, etc.) are based entirely on staff recommendations. There is normally no discussion of these at all at formal Board meetings except to note the numbers of each type.

90. E.g., the Letter of Transmittal with B.C. Pollution Control Permit No. P.E.-1240 (see *supra* note 88) required that "The attached monitoring program . . . shall be carried out by the Permittee and results submitted monthly to the Director." In addition, a report containing tabulated data of all sampling and tests carried out by the permittee was to be submitted yearly.

U.S. agencies in engaging private consultants to design and administer implementation and monitoring programs.⁹¹

If the agency declines to enforce statutory prohibitions or conditions in permits, there is little scope for action by members of the public. Self-monitoring by permit holders makes it difficult in practice for individuals and public interest groups to obtain monitoring data. If the agency has this information, it may be reluctant to divulge it to protect its good relations with industry.⁹² If it does not have the data, it will not be enthusiastic about getting it for the same reason and is likely to suggest that citizens contact the industry directly.⁹³ Some agencies simply regard monitoring data as confidential.⁹⁴

Another problem already mentioned is that of discretionary legislation. Canadian courts have been reluctant to grant orders requiring agency enforcement action in the absence of mandatory statutory language and clearly established refusal or neglect to act.⁹⁵ Some statutes contain provisions requiring consent of the Attorney-General to initiate a prosecution, and consent has not been freely given.⁹⁶ Even in the absence of consent requirements, courts have been cool to prosecutions initiated by private citizens after agency or law enforcement authorities have refused to prosecute.⁹⁷ The potential offered by private prosecutions is discussed below.

91. Such as the contract awarded by the U.S. Department of the Interior to private consultants to monitor implementation of environmental-social contract stipulations for the Alaska Oil Pipeline: interview with E. Skinnarland, Terminus Ltd., Aug. 14, 1974.

92. See Morley, *supra* note 33.

93. In British Columbia it was common practice to refer many requests for information directly to applicants or permit holders. This was consistent with an information policy that regarded even the permits themselves as restricted documents. See Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, 6 U.B.C. L. Rev. 167, 188 (1971). The Pollution Control Branch has recently adopted an open file policy. See Franson & Lucas, *Environmental Decision-Making in British Columbia* 14, unpublished report prepared for Canadian Environmental Law Research Foundation (1974). But this may not solve the problem, where, for example, data reporting by self-monitoring permittees is required (as under permit P.E.-1240, *supra* note 88) only on a yearly basis.

94. *E.g.*, The Territorial Water Boards under the Northern Inland Waters Act, Can. Rev. Stat. c. 28 (Supp. 1, 1971). There is even some question as to whether the water use permits themselves are regarded as confidential: see letter from W. MacLeod to J. Zaharko, Legal Services, Department of Indian and Northern Affairs, Aug. 29, 1974; G. Beakhus & P. Usher, *supra* note 84, at 97.

95. See *Henderson v. Hughes*, [1963] 46 W.W.R. 202 (Man. Ct. App.); *Re Copeland and Anderson*, [1972] 3 O.R. 248; *Matkin*, *supra* note 30, at 56-60; *Reid*, *Administrative Law and Practice* 386-88 (1971).

96. See *Environment on Trial*, *supra* note 27, at 155, citing *Pits and Quarries Control Act*, Ont. Stat. 1971, c. 96, § 18(2). Consent to prosecute is also required under the *Alberta Clean Water Act*, Alta. Stat. 1971, c. 17, § 9.1.

97. See *R. v. Walske Ready-Mix Concrete Ltd.*, unreported, heard Feb. 3 and April 22, at Haney, B.C. (Nicholson, Prov. J.); *R. ex. rel. McCarthy v. Adventure Charcoal Enterprises Ltd.*, 1 Can. Environmental L. News 1 (1972) (Ont. Prov. Ct.). In the latter case costs were

Complaints can, of course, be made to the agency. But Canadian and English statutes rarely contain formal complaint procedures, so that consideration of complaints is entirely a matter of grace. There are no provisions such as that in the U.S. Administrative Procedure Act,⁹⁸ under which persons or groups may petition an agency and attempt to establish the necessity for a hearing.

LEGAL ACTIONS AS VEHICLES FOR PUBLIC PARTICIPATION

Objectives of Environmental Litigation

The basic purpose of private civil actions and judicial review actions is to vindicate private property rights that are infringed or threatened by some other person, corporation, or public authority. The object of criminal or quasi-criminal prosecutions is to punish unlawful activity and establish a deterrent through penal or monetary sanctions.

Environmental issues have been raised in both civil and criminal proceedings. However, the objectives of the initiators of many of these environmental actions have not been conventional. Their primary concerns have not been protection of private economic interests or imposition of sanctions. Rather, the actions have been viewed as a means of generating political pressure for changes that may remedy basic environmental problems.⁹⁹ Success by citizens and interest groups in legal actions of this type has provided leverage to force administrators and politicians to make legislative or policy changes on matters affecting the quality of the natural and human environments.¹⁰⁰ In the case of well-publicized and ably-conducted actions, even losses have resulted in effective pressure on the responsible elected or appointed officials.¹⁰¹ It is the process that is im-

actually awarded against the private prosecutor following a *successful* prosecution under the Ontario E.P.A.

98. 5 U.S.C. § 553(e) (1970).

99. See Franson & Burns, *supra* note 10, at 156, 169; Environment on Trial, *supra* note 27, at 266-67.

100. See *The Utah Controversy*, *supra* note 22, at 54-55, 74.

101. Perhaps the best example is the James Bay hydroelectric development litigation. An injunction action was brought by affected Indians and other inhabitants of the region against the Quebec Crown Corporation, the developer. Following a lengthy trial, at which extensive evidence was introduced as to historical and present native land use and occupancy, an interim injunction was granted. See *Le Chef Max Gros Louis v. La Societe De Development De La Baie James*, [1974] R.P. 28 (C.S.). The injunction was subsequently suspended by the Court of Appeal (Nov. 22, 1974, No. 09-000890-72; Tremblay, Turgeon and Casey J.J.A.), and this was upheld by the Supreme Court of Canada: *Kanatewat v. James Bay Dev. Corp.*, [1974] 1 N.R. 557; 41 D.L.R. 3d 1 (S.C.C.). However, notwithstanding this reversal, the litigation provided significant leverage for the native groups in compensation and land claims negotiations that followed.

Another example of effective use of the judicial forum for representations on an issue of

portant, not the result. The courtroom becomes a forum in which members of the public can raise substantive issues through direct evidence, cross-examination and argument, even though such opportunity may have been denied by the agency during its decision process.

The impact of well-publicized legal proceedings, win or lose, on agency and politicians can be considerable in Canada, as well as in England and the United States.¹⁰² The question is, to what extent is this forum available to public interest litigants and how effective is the opportunity for public participation thus provided?

Effectiveness of Courtroom Participation

In Canada the answer appears to be that the courts normally cannot be expected to provide an adequate forum for public participation. There are a number of basic problems.

A. Standing for Judicial Review

The principles upon which litigants are accorded *locus standi* in Canadian courts are narrow and technical. To get into court the plaintiff must establish that he is a person aggrieved in the sense that he has suffered special or peculiar damage beyond that suffered in common with the rest of the public.¹⁰³ Until recently, apart from

wide public importance is *Re Paulette's Application to file a Caveat*, [1973] 6 W.W.R. 97 (N.W.T.S.C.). The case involved a reference to the court by the Territorial Registrar of Titles after 16 chiefs representing Indian Bands in the Territories sought to file a caveat under the Land Titles Act, Can. Rev. Stat. c. L-4, § 154(1)(b) (1970), claiming an interest in some 400,000 square miles of land based on aboriginal title. Morrow, J., heard evidence as to historical use and occupancy and native understanding of the effect of treaties dating from the early part of the century. His Lordship held court in native communities in the area of the claim, often sitting outdoors, and sometimes attending at the homes of old people to take evidence. (*See* 119 et seq.). It was held that there was sufficient basis upon which to file a caveat. A prohibition application by the Crown challenging Morrow, J.'s jurisdiction to hear this evidence was dismissed by the Federal Court: *Atty. Gen'l. of Canada v. Morrow, J.*, [1973] 6 W.W.R. 150 (F.C.T.D.).

102. This idea appears to underlie much of Professor Sax's writing. *See, e.g.*, J. Sax, *Defending the Environment: A Strategy for Citizen Action*, foreword (1971). For a similar view of participation in agency proceedings *see* Like, *supra* note 76. In *Franson & Lucas, supra* note 93, at 15-20, it is suggested that there is evidence that the appeal procedure under the British Columbia Pollution Control Act is being used as a vehicle for public participation.

103. *See R. v. Vancouver Zoning Board of Appeal; ex parte N.W. Point Grey Homeowners' Association*, [1966] 60 D.L.R. 2d 331 (B.C.A.A.); *Cowan v. C.B.C.*, [1966] 56 D.L.R. 2d 515 (Ont. Ct. App.) *Smith v. Atty. Gen'l. of Ontario*, [1924] S.C.R., 331; *Green v. The Queen*, [1973] 2 O.R. 396; [1973] 2 Can. Environmental L. News 1 (Ont. H.C.). It should be noted that in most prerogative writ applications (there is some question about mandamus), the court has a discretion to allow standing. *See R. v. Vancouver Zoning Board of Appeal; ex parte N.W. Point Grey Homeowners Association, supra* at 339-43; and *Re Surrey By-law 1954 No. 1291*, [1957] 6 D.L.R. 2d 768, 769 (B.C. Sup. Ct.). Unfortunately

several cases which establish taxpayer standing to challenge the constitutionality of certain statutes,¹⁰⁴ the old *locus standi* principles developed in the context of public nuisance actions appeared to be the law.¹⁰⁵

The recent decision of the Manitoba Court of Appeal in *Stein v. The City of Winnipeg*¹⁰⁶ may have changed the situation considerably. Stein brought an action to restrain the city from proceeding with a program of spraying trees and shrubs on city property with the insecticide methoxychlor. The Chambers Judge denied the plaintiff's application for an interim injunction, even though it was clear that the city had failed to comply with Section 653(1) of the City of Winnipeg Act.¹⁰⁷ This section requires the executive policy committee of the council to conduct an environmental impact review of "every proposal for the undertaking by the City of a public work

this discretion is seldom exercised. In two recent federal court prerogative writ cases involving the National Energy Board, the court assumed that any party granted standing by the Board under a discretionary power had standing before the court. See *Atty. Gen'l. of Manitoba v. National Energy Board and Dow Chemical Ltd.*, No. T-2669-74 (F.C.T.D. Aug. 9, 1974), Cattenach, J.; and *Union Gas Ltd. v. National Energy Board*, No. T-2983-74 (F.C.T.D. Aug. 21, 1974), Mahoney, J. However, Cattenach, J., did assume that a party must have an interest beyond that of the public generally. In a preliminary order his Lordship denied standing to the president of a small independent oil company appearing in person because he had not participated in the N.E.D. hearing and because it was difficult for the court to see what he could add to submissions of counsel for the other parties (July 18, 1974). However, at the same hearing standing was granted to the Attorney General of British Columbia, who had not been represented at the N.E.B. hearing. See *Estey, Public Nuisance and Standing to Sue*, 10 Osgoode Hall L.J. 569 (1972); Franson & Burns, *supra* note 10, at 154. Another potential basis for participation by citizens or public interest groups is intervention in ongoing actions that raise issues of general public concern. An example is the recent intervention by several civil liberties and women's groups in the Supreme Court of Canada appeal of *R. v. Morgentaler*, an abortion prosecution. See "Civil Liberties, Women's Groups Will Fight Abortion Conviction," *The Toronto Globe and Mail*, Sept. 4, 1974, at 2. It should be noted that such interventions are by leave of the court and upon such terms and conditions as the court may determine. See *Rules of the Supreme Court of Canada*, 1945, R. 60, *as amended* (effective July 2, 1970). For intervention by an environmentalist of a planning appeal under a broadly similar power in a provincial statute, see *Re Cleveland Holdings Ltd.*, 3 *Can. Environmental L. News* (1974). Apart from statute, intervention as *amicus curiae* is solely in the discretion of the court. See *Clelland v. Godon and Conway*, [1962] 38 W.W.R. 372 (Man. Q.B.).

104. See *Thorson v. Atty. Gen'l of Canada*, [1974] 1 N.R. 225; *MacNeil v. Atty. Gen'l. of Nova Scotia*, No. 03925 (N.S. Sup. Ct. Apr. 30, 1974), Hart, J.: *Aff'd*. S.H. No. 03925 (N.S. Ct. App. July 19, 1974), MacKeegan, C.J.N.S., and Coffin and Macdonald, J.J.A..

105. Despite some evidence of discontent in the profession, part of the Canadian Bar Association's 1973 Resolution on Public Participation in Environmental Decisions, see *supra* note 48, stated that:

any individual or group on its own behalf or in behalf of the public have the status before all courts or administrative tribunals to review [projects] or enforce any government regulations without demonstrating a special interest or damage.

106. Unreported, Manitoba Court of Appeal (June 10, 1974), Freedman, C.J.M.; Monnin and Matas, J.A.A.

107. *Man. Stat.* 1971, c. 105.

which may significantly affect the quality of the human environment.”

On appeal, the issue of *locus standi* arose, and the court held that Stein had standing, notwithstanding that there was no evidence of “special and peculiar” damage. There was no constitutional challenge, but Matas, J. A., held that by analogy to the *Thorson* case,¹⁰⁸ it must be possible for a citizen to enforce the statutory requirement in Section 653(1). He referred to other sections of the City of Winnipeg Act that demonstrated an “express intention to involve citizen participation in municipal government” and concluded that:

Section 653 has created an obligation to review the environmental impact of any proposal for a public work which may significantly affect the quality of human environment. If that section is not to be considered as a mere pious declaration there must be inferred a correlative right, on the part of the resident, in a proper case, to have a question arising out of the sections adjudicated by the court.¹⁰⁹

Stein offers promise for removal of the standing barrier that has confronted most environmental litigants. Several aspects of the case may, however, limit its impact. The statute contained an environmental impact assessment requirement stated in mandatory terms. Like most municipal acts, it also included other provisions for well-established forms of public participation, such as community advisory committees and zoning hearings. In addition, the provision was unusual, in that it was clearly patterned after Section 102(1)(c) of the U.S. National Environmental Policy Act,¹¹⁰ which owes its effectiveness largely to citizen enforcement through legal actions. The court was thus able to quote a number of the leading NEPA authorities with approval.

It may also be significant that Stein was a property owner, and it was admitted that spray applied to the city's boulevard trees would inevitably drift into nearby private property. It was also established that the insecticide to be used was potentially toxic to susceptible humans, including the plaintiff. Thus, it might have been possible for Stein to establish a likelihood of actual damage, sufficient to satisfy even traditional *locus standi* requirements.

Finally, it is significant that after granting Stein standing the majority of the court denied the interlocutory injunction because he failed to carry the burden of proof under balance of convenience test.

108. *Thorson v. Atty. Gen'l. of Canada* [1974] 1 N.R. 225.

109. Unreported, Manitoba Court of Appeals (June 10, 1974).

110. 42 U.S.C. § 4332(2)(c) (1970).

B. Scope of Review

Another basic problem of the judicial forum is illustrated by the case of *Green v. The Queen*.¹¹¹ Under well-established principles of judicial review, courts confine review of decisions by environmental agencies to essentially procedural and jurisdictional issues. To enter the merits would be to usurp the function of the agency, especially where the agency is given discretionary power by statute.

In *Green* the plaintiff, who owned no land in the area, sought an injunction to prevent sand removal outside a provincial park which threatened the recreational value of the park. The court was primarily concerned with whether there had been compliance with the provisions of the Ontario Provincial Parks Act. Lerner, J. rejected the possibility of a public trust, based upon the declaration in the Act that "all Provincial Parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the Provincial Parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations."¹¹² If he had found such a trust, he could have considered whether sand removal violated the trust.¹¹³

There is no Canadian equivalent to recent United States legislation that permits actions by any person to enjoin damage to public resources.¹¹⁴ Nor have there been promising developments or revivals of appropriate common law doctrines such as the public trust, as has occurred in the United States.¹¹⁵ Finally, there are no general statutory requirements to assess the environmental impact of proposed actions that could provide a basis for judicial review, as the NEPA impact statement requirements have in the U.S.¹¹⁶

C. Access to Information

Another problem is access to agency information by litigants. Often factual information necessary to assess the viability of legal

111. [1973] 2 O.R. 396; [1973] 2 Can. Environmental L. News 1 (Ont. H.C.).

112. Provincial Parks Act, Ont. Rev. Stat. 1970, c. 371, § 2.

113. *Green v. The Queen*, [1973] 2 O.R. 396; [1973] 2 Can. Environmental L. News 1 (Ont. H.C.).

114. The pioneering statute of this type is the Michigan Environmental Protection Act, 1970, Mich. Comp. Laws Ann. §§ 691.1201-691.1207 (Supp. 1972). For a report on effectiveness see Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich. L. Rev. 1003 (1972).

115. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

116. See J. Macdonald & J. Conway, *Environmental Litigation* 160-74 (1972); F. Anderson, *N.E.P.A. in the Courts* (1973). Section 653 of The City of Winnipeg Act which was the basis of the action in the *Stein* case, *supra* text accompanying notes 106-110, has apparently been repealed upon the recommendation of the Greater Winnipeg Council. See Note, 3 Can. Environmental L. News 134 (1974).

action or properly to frame the action is withheld by agencies as confidential. The Vancouver Airport expropriation hearings, referred to above, provide a good example.¹¹⁷ The technical reports necessary for the Sea Island residents fully to understand the impacts of the proposed airport expansion were disclosed by the Ministry of Transport only after the citizens pressed hard in the hearings and the media took up the cry. It is perhaps ironic that the legal relief ultimately sought was time to review and digest the quantities of technical material that were eventually disclosed.¹¹⁸ An even more graphic example is the refusal by the Department of Indian and Northern Affairs, administrators of the territorial land use regulations, to disclose the terms of land use permits so that affected native people could assess whether Arctic petroleum operators were in breach of the permit terms.¹¹⁹

Confidentiality has a proper role in the parliamentary process.¹²⁰ Indeed, confidentiality undoubtedly has a role in maintenance of efficient administrative processes. However, it is difficult to justify failure by environmental agencies and departments to disclose such documents as factual staff and consultants' reports and permits or approvals containing detailed conditions under which regulated industries must operate.

Franson and Burns conclude that there is too much secrecy in Canadian government, with the result that:

countless factual documents are languishing in public offices because public servants have no authority to release them and fear that if they do, their careers will be harmed; and two, that this secrecy frustrates and angers the very public servants caught in its trap, impairing their usefulness to all of us.¹²¹

They recommend that legislation be enacted to establish the right of Canadian citizens to obtain information from agency or departmental files. At present there is no Canadian legislation of this type, not even of the presumption of openness variety, similar to the U.S. Freedom of Information Act.¹²² In fact, public service oaths of office clearly make the basic presumption in Canada one of nondisclosure. However, Franson and Burns also warn that care should be taken in drafting such legislation to avoid including exempt classes

117. *Supra* note 43.

118. *See* Grauer v. The Queen and Isador Wolfe [1973] F.C. 355 (T.D.).

119. *See* G. Beakhus & P. Usher, *supra* note 84, at 97.

120. Franson & Burns, *supra* note 10, at 163.

121. *Id.* at 164 and materials cited at n. 48. *See also* Franson, *Government Secrecy in Canada*, 2 *Nature Canada* 31 (No. 2, 1973).

122. 5 U.S.C. § 552 (1970).

that may lead to abuses such as those that have been documented in the United States.^{1 2 3}

D. Tort Actions

Tort actions directly against resource users offer the apparent advantage of easier access to substantive issues. Courts are not obliged to limit themselves to a procedural review of agency decisions.^{1 2 4} The nature of the action requires that the defendants' resource use and the alleged damage to the plaintiff or his property be fully considered. However, such actions have proven largely ineffectual,^{1 2 5} mainly because of the public nuisance doctrine and its "special or peculiar damage" requirement for *locus standi*. Another constraint on tort actions has been cost. Legal fees and major disbursements, such as transcript costs, may be substantial. In addition, full discovery procedures and lengthy trials require the attendance of large numbers of expensive scientific experts for long periods of time.^{1 2 6}

E. Cost

The cost constraint is important in all types of legal actions. Judicial review proceedings tend to be less expensive than tort actions, since the former are based mainly on affidavit evidence, and there is usually no pretrial discovery. However, even judicial review costs can be an unmanageable burden for public interest groups or individuals. It must be remembered that in Canada and England, unlike the United States, costs of the action, based on a scheduled tariff, are usually awarded against the unsuccessful party. Thus, in a losing action a public interest group can expect to bear not only its own legal costs, but the taxed costs of the other parties as well.^{1 2 7}

In addition, Canadian environmental groups are small and very poorly funded by comparison with United States groups such as the Sierra Club and the Wilderness Society. Public interest law firms are practically nonexistent. The only major legal group in the environmental field is the Canadian Environmental Law Association (CELA). This group has brought some important actions, but chronic

123. See Franson & Burns, *supra* note 10, at 164 and literature cited at n. 48.

124. Though agency approvals may permit defendants to raise a defense of statutory authority, Canadian courts have tended to restrict the scope of this defense. See McLaren, *The Common Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?* 10 Osgoode Hall L.J. 505, 545-46 (1972).

125. See Franson & Burns, *supra* note 10, at 155.

126. See Fraser & Anthony, *Litigating Environmental Issues* in Ask the People, *supra* note 37, at 98.

127. See Environment on Trial, *supra* note 27, at 256-57.

shortage of funds has forced careful selection of issues with a view to cost and has precluded public interest actions on the scale of those brought in the United States by organizations such as the Environmental Defense Fund. Only recently have efforts to obtain legal aid for environmental litigants met with some success.^{1 2 8}

F. Procedure

Further constraints include procedural restrictions, such as the rigidly structured format for presentation of evidence and the legal rules of evidence. To the extent that the latter establish rather narrow criteria for relevance, severely restrict opinion evidence^{1 2 9} and purport to exclude hearsay altogether, citizens are likely to find the proceedings confusing and intimidating. Full consideration of environmental issues is also hindered by the tendency of Canadian courts to limit the admission of background social, economic, and technical data and to restrict policy arguments based on such material.^{1 3 0} The value of the proceeding as a forum for public participation is diminished accordingly.

G. Private Prosecutions

In only one area does Canadian law appear to offer a potentially useful technique for public participation through the judicial process that is generally unavailable to citizens in the United States^{1 3 1} and England.^{1 3 2} This is the private prosecution.

Prosecutions for summary conviction offenses, which include all important offenses under provincial and federal environmental statutes, may be initiated by private citizens.^{1 3 3} This can be done

128. See *id.* at 262-66; and report of successful legal aid application by a Toronto ratepayers group opposing a rezoning application in 2 Can. Environmental L. News 169-70 (1973).

129. In a recent pollution prosecution, *R. v. Cherokee Disposals and Construction Ltd.*, [1973] 3 O.R. 599 (Ont. Prov. Ct.), the court showed great flexibility in accepting opinion evidence of non-expert witnesses as to condition of water. See Note, 2 Can. Environmental L. News 160 (1973); and *R. v. Sheridan*, [1973] 2 O.R. 192 (Ont. D.C.).

130. For example, in *Re Piatocka and Utah Construction Mining Co.*, [1971] 21 D.L.R. 3d 87 (B.C. Sup. Ct.), the plaintiff was not permitted to introduce evidence as to site expenditures made by Utah Construction and Mining Company prior to application for the pollution control permit.

131. In the United States, the private prosecutor has no role at all. See Burns, *Private Prosecutions in Canada: The Law and a Proposal for Change*, 21 McGill L.J. 30 (1975); B. Grossman, *The Prosecutor* 13-14 (1969).

132. The rights of private prosecutors in England appear to be limited by a greater range of statutory consent requirements than exist in Canada. See Burns, *supra* note 131, at 271-73; J. McLoughlin, *supra* note 64, at 361.

133. See *Environment on Trial*, *supra* note 27, at 121, 327-338; Burns, *supra* note 131, at 287-93; S. Berner, in *Private Prosecutions and Environmental Control Legislation: A Study* (1972), concluded that private citizens have extensive rights to initiate private prosecutions under federal environmental statutes.

even though the agency or law enforcement officers decline to proceed. Once the information is laid and the process issued, the citizen-informant may prosecute the matter himself unless it is taken over by a Crown prosecutor.¹³⁴ These rights have been confirmed in a number of cases, many of which have been prosecuted by the Canadian Environmental Law Association.¹³⁵

Potential constraints on this type of proceeding include the possibility of a consent requirement in the statute, which is rare,¹³⁶ the somewhat theoretical discretion of a Justice of the Peace to refuse to issue a summons,¹³⁷ and the possibility that the Attorney General will exercise his right to enter a stay of proceedings and shoulder the political consequences of such action.¹³⁸

Media impact can be very effective in private prosecutions because of the criminal nature of the proceeding. Another important advantage is that costs are minimized, especially if the services of public interest lawyers are obtained. In the event of a dismissal, there is no obligation to pay the defendant's costs.¹³⁹ Perhaps the only major problem is one already discussed—access to monitoring data necessary to lay the charge that may be in the possession of the agency or the industry.¹⁴⁰

H. Judges

Finally, there is a fundamental problem faced by Canadian and English environmental litigants that may never be fully remedied. Judges tend to be conservative. There is little of the U.S. tradition of judicial legislation, little sense of a dynamic policy role for the courts.¹⁴¹ Canadian and English judges tend, partly as a result of

134. *Environment on Trial*, *supra* note 27, at 333.

135. *E.g.*, *R. ex rel. McCarthy v. Adventure Charcoal Enterprises Ltd.*, 1 Can. Environmental L. News 1 (Ont. Prov. Ct. 1972); *R. v. Cherokee Disposals and Construction Ltd.*, [1973] 3 O.R. 599 (Ont. Prov. Ct.); *R. ex rel. Rayner v. Lake Ontario Cement Ltd.*, 2 Can. Environmental L. News 8 (1973).

136. It is apparently less rare in England. *See McLoughlin, Control of the Pollution of Inland Waters*, *supra* note 64, at 357.

137. *See Environment on Trial*, *supra* note 27, at 330 for tactics including tips on "shopping" for cooperative J.P.'s.

138. *See Burns*, *supra* note 131, at 283-85.

139. *See Environment on Trial*, *supra* note 27, at 257.

140. *See* text accompanying notes 101-102.

141. *See Thompson, The Last Bottle of Chianti and a Soft Boiled Egg*, Proceedings of Canadian Law and the Environment Workshop No. 1, Oct. 7 and 8, 1971. There are numerous case examples in the environmental field. In a British Columbia private prosecution, *R. v. Walske Ready-Mix Concrete*, unreported, heard Feb. 3 and Apr. 22, at Haney, B.C., counsel for the informant simply could not convince the court that the consent of the Director of Pollution Control is clearly not necessary to initiate a prosecution under the Pollution Control Act. The charge was dismissed from the bench on the ground that the private prosecutor lacked "standing." In *R. ex rel. McCarthy v. Adventure Charcoal*

their education and experience and partly as a result of deep-rooted judicial tradition, to formulate issues in conceptual legal terms. They are often not unmindful of the policy considerations involved in any issue but continue to protest that they must never be seen to legislate. Thus, while courts do in fact make policy, they do not do it overtly, and little discussion of the underlying issues is permitted in the course of proceedings or is expressed in judgments.

CONCLUSION

A selective review of Canadian federal and provincial environmental legislation and a full review of case law suggests that citizens' rights to participate in decisions by resource and environmental-management agencies are not extensive. There is also evidence that agencies with discretion to permit opportunities for public participation are generally either not doing so effectively or not doing so at all. In particular, participation has been extremely limited at the important issue formulation stage of agency decision processes. There are also few rights or opportunities to participate in implementation and enforcement of agency decisions.

A number of constraints, including lack of access to information, restrictive formal procedures, narrow scope of review and substantial cost, limit the effectiveness of public participation through legal actions. However, private prosecutions appear to offer potential for citizen participation in enforcement through the courts. There is also a substantial basis in the *Stein* case for breaking down the *locus standi* rule that has proven a major obstacle to use of legal actions in the courts as vehicles for public participation.

Enterprises Ltd., 1 Can. Environmental L. News 1 (Ont. Prov. Ct. 1972) Judge A. A. McLean convicted the charcoal plant, imposed a \$500 fine, and assessed costs against the private prosecutor remarking that the prosecution was "irresponsible and frivolous." Fortunately, the Ontario Court of Appeal subsequently reversed the cost award: 1 Can. Environmental L. News 5 (1972). See also Environment on Trial, *supra* note 27, at 27-28. For a more optimistic view of American judicial disposition, see J. Sax, Defending the Environment 149-53 (1971).