R.I.G.H.T.S TO THE GOOD AND HEALTHY ENVIRONMENT

Oleh Abdulllah, A.P., S.H., LL.M.

1. INTRODUCTION

During the 1960’s, when environmental issues suddenly became popular, legal scholars began to examine the possibility of using common law remedies to combat pollution and to force administrative agencies to be more responsive to environmental concerns. Many commentators concluded that various doctrines of administrative and tort law seriously and unduly handicapped a plaintiff seeking to protect the environment.3 Many also suggested or implied that if freed of these doctrines, litigation would make a major contribution to the improvement of environmental quality.4 Whatever the specific proposal for reform, most commentators seem to have been motivated by the same concern: in pollution cases what common law remedies

there were tended to be granted on the basis of the plaintiff’s property rights, not on the basis of any right he might have to a clean environment. Without some property right or special interest the plaintiff was likely to be deprived of access to the courts. Even with a recognized common law right, when, for example, a plaintiff’s right to water unimpaired in quality conflicted with the factory’s right to pollute it, the latter was almost certain to win. At best, the victim was likely to be compensated by damages and the polluting activity allowed to continue.

In a number of American jurisdictions, governments have responded to these problems by proposing reform. Three of the techniques proposed are: 1) to expand the

public trust doctrine; 2) to enact statutes creating environmental rights, and, in some states, 3) to create new constitutional rights. The Canadian response has been much more limited but there have been a few initiatives that might be interpreted as attempts to establish a right to a healthy environment in Canada.

2. PUBLIC TRUST DOCTRINE

The expansion of the public trust doctrine to expressly create environmental rights was first proposed by Joseph Sax in his book entitled Defending the Environment. He seems to have concluded that people who ask government agencies to refuse to permit development harmful to the environment were treated as "supplicants," or "outsiders." His suggestion was to give them rights. He suggested that every member of the public ought to have rights enforceable by law "equal in dignity and status to those of private property owners." The right be proposed was an adaptation to contemporary environmental problems of the Roman law concept, carried over into British law and, in a modified form, into U.S. law, of the "public trust." The result he described as "a new charter of environmental rights."5


4. Ibid at 64.

5. Ibid at 64.


In ancient Rome, the public trust seems to have involved the common ownership and use by the public of the air, sea and seashore. In ancient Britain, it seems to have been narrowed to a right of public access to fishing and navigation in relation to Crown-owned and privately owned waters and shores. United States law adopted the doctrine from British common law. In the United States, the common law doctrine has been used to enable the public to challenge the uses to which governments may put public lands, to challenge the alienation of public lands to private ownership or use, and to limit the right of private land owners to hinder access to certain lands. If we read most narrowly the doctrine’s coverage it includes the public domain below the water mark on the margins of the sea and the great lakes, the waters over these lands, and the waters within rivers or streams of any consequence. Traditionally public trust law also includes parklands especially if they have been donated to the public for specific purposes. But a much broader interpretation is also possible:

Public Trust problems are found wherever government regulation (cont)


lands under the navigable waters of the Lake, such title is "held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties."10 Moreover:

The trust devolving upon the state for the public, and which can be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transferee of the property. The control of the state for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. The state can no more abdicate its trust over property in which the whole people are interested, so as to leave them entirely under the use and control of private parties, than it can abdicate its powers in the administration of government and the preservation of the peace.11

With this language the Court creates what Professor Joseph L. Sax calls a "model for judicial skepticism", which means whenever a state holds a resource which is freely available for the public use, a court will regard with no small degree of skepticism any governmental conduct limiting that resource to more restrictive uses or subjecting a public use to the self-interests of private parties. This model thus imposes a special burden of justification on a government, state or federal, where such circumstances are brought into question.

The public trust may apply not only to land that belongs to government, but also to land formerly owned by the government which has been disposed to private ownership. This standard was also described in Illinois Central, where the Court said, "so with trusts connected with public property, or property of a special character, like lands under navigable waters, they can not be placed entirely beyond the direction and control of state."12 This "special character" should be viewed as originating from property whenever a major threat to the public interest in the land arises.13 The trust is the assurance to the people that, at any given time, the uses to which any property will be put, must be consistent with the public interest.14

The trust doctrine is most easily applied where the people wish to challenge a government use of government-owned property contrary to the public interest. The citizen may, after having run out of all available administrative remedies, seek a writ of mandamus to force the government to use the property in a way which is consistent with the public interest, namely, with the terms of the trust. The plaintiff must either establish that an abuse of legislative authority has happened, or that the act sought to be enforced is one which the agency is under an affirmative duty to perform. The argument is that the government, as trustee of the natural resources, has breached or is threatening to breach the fiduciary relationship between it and the beneficiaries of the trust, the people. Although relying on a statute would strengthen the plaintiff's position, it is not important; the "trust is in the nature of a common law duty which the government bears as a condition of its lawful authority to govern."15 The burden of proof will be on the public to establish that the challenged government action, presumably valid, is not completely consistent with the public interest in improving and protecting the environment. Every transfer of property by the government to private individuals implicitly includes the obligation that the property is used for purposes not contrary to the public interest. Thus, any private misuse of such property may also, in theory, be the basis for a cause of action. The action, brought by the public as a class, would seek to force the appropriate government agency or officer to impose limitations to preserve the

9 Ibid at 556.
10 Ibid 556 - 57.
11 46 U.S. at 387 (1869) in 1869 the Illinois legislature made a grant, in fee simple, to the Illinois Central Railroad of all the land underlying Lake Michigan for one mile out from the shoreline and extending for one mile in length bordering the city of Chicago. In 1873 the legislature chose to repeal the grant and brought this action to have the original grant declared invalid. The Supreme Court held in favor of the state.
12 Ibid at 452.
13 Ibid at 42.
14 Sax, supra note 8 at 490-91.
15 Prime v. Wisconsin State Land Improvement Co., 92 Wis. 254, 67 N.W. 914 (S.C. 1896)
17 Prime note 11 at 454.
18 547, 67 N.W. at 921.
19 Supra note 16, at 12.
corpus of the trust. Once again, the public would be required to bear a very substantial burden of proof by demonstrating that the limitations sought were clearly necessary to satisfy the demands of the public interest. Plaintiffs would thus be required to overcome the assumption that private property may be used for any reasonable purpose not clearly declared illegal by the government.

From the description above it can be concluded that the court recognized the public trust as a legitimate interest that gave standing to members of public, apart from any pecuniary or proprietary interest, to challenge government decisions. The public trust seems to be useful as a remedy for citizens against government decisions, and useful actions and the “balance of convenience” test applied on interim injunction applications, creating a doctrine of common property and private trusteeship for air and water seems to have the same result as liberating standing in public nuisance cases.22

Pollution, however, is not the only form of environmental degradation. Other examples include the building of roads through wilderness areas, filling marshes, depopulating non-renewable resources, flooding lands or diverting water courses, and cutting off visual access to sights. None of these activities may happen on government-owned land without government permission. If the government rents its land out to private companies for such activities, the public has little recourse. Sax would probably say that the public trust concept would apply to these situations, permitting the courts to challenge any activity which puts private interest in public lands above general welfare. Again, if the remedy is only a balancing, this might be achieved by improved access to government information, notification of the public concerned, and broader public participation.23

Although Canada’s common law also originated in English common law, the concept of public trust has not developed in Canada as it has in the United States.24 While the public rights of fishing and navigation are established in Canadian law, they have been narrowly interpreted, and do not include the right of access to the shore across private land, nor a right of trawping from a boat under the guise of navigation. Interference with the exercise of the public rights may be categorized as a public nuisance and therefore constitute a cause of action, however, only a member of the public who is able to show that he has suffered special damage compared to other members of the public will be entitled to sue. Although the provinces lack the legislative power to interfere with the public rights, parliament is competent to do so. The only apparent limitation upon the Parliamentary power is that Parliament may not grant proprietary fishing rights where it itself has none.25

There are some cases regarding fishing and navigation which provide a good basis for considering common law and public trust. They may be divided into cases dealing with the private impairment of public rights, and those dealing with government actions that may diminish or violate the public right.

One of the earliest statements concerning the public right is found in Geer v. Baren,26 a trespass action. The plaintiff claimed ownership of a non-tidal inlet, and along with it the right to prevent the defendant from entering the inlet in a skill, placing nets and fishing there. Richards, J. considered the case as one requiring him to decide whether a Crown grant in relation to a navigable river could have the effect of depriving the public of the right of fishing and passing over it. According to the common law rule, a body of water was considered a navigable river if there was a flux and reflux of tide. Richards, J. decided that this definition did not apply to this case and found the inlet in question navigable because of the depth of water in the inlet and its use by boats of considerable size.27

He then stated the applicable rule:

If the focus is on water it is a public navigable river even if it is a private highway and all her Majesty’s subjects of common right may pass over it in boats and fish there in, notwithstanding the grant of the soil by the Crown, for such grant must be taken subject to the public right.28

The Supreme Court of Canada had an opportunity to consider the nature of the public right in an 1883 trespass action: Wood v. Esson.29 Both the plaintiff and the defendant were owners of wharves and water lots in Halifax Harbour. The plaintiff extended his wharf, effectively cutting off the access of the defendant’s boat to his wharf. The defendant removed the obstruction, and as a result was sued in trespass. The plaintiff’s action was dismissed by Ritchie, C.J. on these short grounds:30

There can be no doubt that all Her Majesty’s subjects have a right to use the navigable waters of the Halifax harbour, and no person has any legal right to place in the said harbour, below water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation.

Thus, the defendant had a legal right to government against private ac-

21 Ibid.
22 Ibid.
23 Supra note 7, at 163.
24 Ibid. at 167.
26 Ibid. at 120.
27 Ibid.
28 (1884), 1 S.C.R. 239 (C.A.).
29 Ibid. at 243.
tivities, but it is not clear that it supports actions by private citizens against other private citizens, except perhaps in the narrow circumstances where a private owner restricts access to the water or shore for fishing and navigation. Sax appears to want to expand the subject matter of the quasi-concept, the classes of beneficiaries, and the classes subject to trust duties. The nature and scope of the interest in air, water, and private property that Sax would give the public is also unclear. He seems to be saying that air and water, like land owned by the government, are common property. Any discharge or emission of contaminants into them is, therefore, not merely a matter between the polluter and his neighbour or between polluter and government, but is also an issue between the polluter and all other members of the public. Because air and water are public property, any person is entitled to take legal action to protect them. Sax may mean that the private property owner is also a trustee of the air and water entering and leaving his land, as the government is trustee of lands and waters in the public domain. If so, a less circumscribed way of regulating pollution might be to remove the Attorney General's monopoly on enforcement if public nuisance cases and granting standing to any member of the public. Since the remedy has suggestions, a balancing of interests, seems the same as the "reasonable ness" test which is used in nuisance right to remove the obstruction to
enlarge him to navigate the waters with his steamer and vessels. Strong J. said:

The title to the way did not authorize the plaintiffs to extend their wharf so as to be a public nuisance, which, upon the evidence, such an obstruction of the navigation attributed to, for the Crown can not grant the right so to obstruct navigable waters; nothing short of legislative action can take from anything which belongs navigate the character of a nuisance. 39

The same language is found in the 1885 decision of Quiddy River Born Co. v. Davidson. 40 The plaintiff, a riparian owner, is trial obtained damages and an injunction against the defendant. The defendant was a logging company which had interfered with access to his land from the water by setting up booms and piers in a bay to hold its logs in place. On appeal to the New Brunswick Supreme Court, Allen, C.J. said that ownership of the bed of a river is subject to the public right of navigation. A party exercising his rights must do so "with due regard to the rights of others and in a reasonable manner, and in such a way that he does not do any damage which by reasonable care he might have avoided." 41 Reasonable use of a river for navigation must depend upon the circumstances. For example, when the navigation in question


is the driving of logs, the extent of the right to navigate may depend upon the quantity of lumber in the river at the time, the state of the New Brunswick Supreme Court varied an injunction, granted by the trial judge, against any interference by the log drivers with the riparian owner's rights, to allow a reasonable temporary interruption of access.

It has been said that navigable water on privately owned land can not be used by a stranger (whether or not he has the right of navigation in such water) for access to hunt, shoot or fish on such private property. 42 Similarly, where a Crown grant contains the usual reservation of free access to the shore of the land for all vessels, boats and persons, the public has right of access to the shore from the water, not right of access from the land. 43 The public is not allowed up pass over the lands of an adjoining proprietor to reach the shore. Even so, where there is any doubt whether the lands must be crossed to gain access to the shore are public or private, the case of Rhodes v. Fenner 44 demonstrates that the courts tend to favor finding of public rights. This ease involved the interpretation of a Crown grant in the province of Quebec. The defendant, who claimed to have been granted title to the foreshore, fenced the land in question, cutting off public access to the shore of the St. Lawrence River. The plaintiff said that language in the grant to the defendant had the effect of reserving a strip of land as a public beach. In so finding, the Chief Justice of the Supreme Court of Canada said that:

The Crown, as owner of the foreshore, has undoubtedly the right to cut it up and dispose of it as it deemed best; but clearly is to doing a duty to the general public regardless of the special rights of the riparian owners to protect them in the enjoyment or their personal rights of access or notice to run water which the bed and of which they then must necessarily be deprived in consequence thereof, that the beach might be laid out for building lots. It is not to be assumed that Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public. 45

III. SATIATORY ENVIRONMENTAL RIGHTS

Nowadays many states in the United States have statutes permitting private individuals to initiate judicial proceedings to enjoin a public nuisance. Somewhat different approaches have been taken by Michigan's Environmental Protection Act (MEPA) and Minnesota's Environmental Rights Act

41 Ibid at 342.
43 Ibid at 394.
44 Ibid.
45 Ibid at 368.
IV. THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

This act was drafted by Professor Joseph Sax of the University of Michigan as his model for environmental reforms and was the legal embodiment of his theories. The act removed or changed all the common law doctrines that were supposed to have hindered the courts. According to it, an action may be brought for declaratory or injunctive relief against anyone who "has or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein". Under the act, restrictions on standing are abolished. Section 1202(1) is of particular interest for it extends standing to any member of the public to sue both government agencies and other members of the public. It states:


subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

Prior recourse to an administrative agency is necessary only if the court, in unspecified circumstances, deems that this is desirable as section 1204(2) provides:44

44 Ibid section 691.1204(2).

If administrative, hearing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings. If to remitting the court may grant temporary equitable relief where necessary for protection of air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

If "there is involved a standard for pollution or an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof,"45 the court may "de-

 orm the validity, applicability and reasonableness of the standard.
46 If the standard is found to be "deficient", the court may "direct the adoption of a standard approved and specified by the court".47

The defendant may, of course, try to rebut the plaintiff's prima facie case,48 but the only affirmative defense set forth in the Act requires a finding that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.49

The burden of proof is therefore the only traditional doctrinal problem which still remains, and even this is partly a matter of form rather than substance. Although the plaintiff must establish a prima facie case of "pollution, impairment or destruction", he need not establish that the defendant's conduct is unreasonable because that issue is implied under the affirmative defense, on which the defendant has the burden of proof. In nuisance law, by contrast, the tort is defined as "unreasonable interference with the plaintiff's

46 Ibid section 691.1202(2)(a).
48 Ibid section 691.1202(2)(a).
49 Ibid section 691.1202(2)(b).

V. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT

Despite several different provisions, the Minnesota Environmental Rights Act (MERA)50 passed in 1971, contains the principle features of the Michigan Act. Every resident, government, or other entity within the state has standing to sue under MERA.51 The Act authorizes suits to enforce existing environmental standards and requirements,52 suits to enjoin conduct that "materially adversely affects or is likely to materially adversely affect the environment",53 intervention or judicial review of the administrative proceedings that concern environmental matters,54 and suits challenging the adequacy of state environmental standards and ac-

51 Ibid at 581.
52 Minn. Stat. Section 166B 01-13 (1976).
53 Ibid section 166B. 13.01(1).
54 Ibid section 166B. 02(2).
55 Ibid section 166B 02(3).
56 Ibid section 166. 08. 49.
although the plaintiff has the burden of proving environmental harm, the issue of possible justification is an affirmative defense. Unlike MEPA, however, MERA expressly provides that "economic considerations alone shall not constitute a defense hereunder." Therefore, this provision, while still rather unclear, indicates an intent to limit the relative handicap doctrine even more than MEPA had done.

The Minnesota legislature probably was troubled by some of the bill's implications, for the sponsors had to approve several amendments. In contrast to MEPA, compliance with relevant regulations or permits of certain state agencies (including the Pollution Control Agency) is a defense to a MERA suit, but the effect of this amendment is uncertain since another section of the Act entitles the plaintiff to attack the regulation or permit as inadequate. Therefore, the defense of compliance with a regulation may be available only when the regulation itself is considered to be strict enough. The sponsors also agreed to an amendment that limits suits against landowners for conduct on their own land that "can not reasonably be expected to pollute, impair, or destroy any other air, land, or other natural resources located within the state." Again, this agreement seems insubstantial because almost any controversial activity will affect resources beyond the defendant's property. Finally, in response to objections by rural legislators, an exemption was provided for farm related activity, and suits based solely on violations of odor regulation were disallowed.

VI. THE MICHIGAN STUDIES

There have been four studies of litigation under MEPA carried out by Haynes, Sax and Conner, Sax and DiMento, and Stone. These studies, which cover the period from MEPA's enactment on October 1, 1970, to April 15, 1985 were undertaken with several purposes: to provide lawyers with information, to study the development of the law, to provide data for public policy analysis, and to provide a basis for more comprehensive studies in the future.

There are many factors that affect the number of cases brought under MEPA. However, one of the most important factors is the adequacy of the remedies provided by the Act. In the first five years of the Act, the number of cases filed under MEPA was very low. This was due in part to the lack of a private right of action and the absence of a mechanism for obtaining injunctive relief. However, after the passage of the 1975 amendment to MEPA, which provided for a private right of action and a mechanism for obtaining injunctive relief, the number of cases filed under MEPA increased dramatically.

During the first five and one-half year period, from October 1, 1970 to March 1, 1976 MEPA was involved in 120 cases or administrative proceedings. Somewhat surprisingly, permanent environmental groups with more than local concern were plaintiffs or intervenors in only nine cases, local and ad hoc groups were similarly involved in 25 suits. The single most common plaintiff (twelve cases) was the Wayne County Health Department. Public agencies were plaintiffs or intervenors in 43 cases and defendants in 60 cases. The most frequent issue was land use (50 cases), ranging from homeownership development to stream channelization, and (17 cases). During this same five year period, there were 47

---

Successful MEPA suits and 28 unsuccessful ones. Eleven suits were not pursued, and the rest were dropped when the final study was published. As of April 15, 1983, a total of 185 actions involving MEPA had been filed either with the courts or with state administrative agencies.

These studies conclude that the Michigan Environmental Protection Act has significantly enhanced the individual's legal and administrative opportunities to protect the environment. Sax and Conner asserted that "enough cases have been resolved speedily and intelligently to mark the Act as a success." It is clear that, with an annual rate of approximately 23 cases, the legislation has not led to an outpouring of vexatious litigation or unnecessary delays in approval or construction of proposed developments, as had been asserted by proponents of the Act. They argued that to implement the goal of the Act, which is to shift the focus of environmental problems from the agencies to the courts, would lead to an over-pouring of lawsuits engendering intolerable delays and would impede rational long-range planning and policy formulation based on expert

---

58 Ibid section 114.08.04.
59 Ibid section 116 B. 04.
60 Ibid section 116 B. 03(3).
61 Ibid section 116 B. 10.
in a manner that further complicates the essential difficulties of measuring MEPA’s real impact. More important, even the decisions that are fully described are difficult to evaluate because the authors rarely discuss whether the statistics reflect whether the MEPA count was essential to the result in the case. It seems clear that other causes of action usually or could have been joined with the MEPA count, yet the successful cases are generally treated as indicators of MEPA’s impact, even though no effort is made to demonstrate that they either would not have been brought, or would have been decided differently under more traditional theories.

The criteria used in these studies to evaluate the impact of litigation are far less stringent than those normally applied to administrative achievements. Professor Sax acknowledges that the MEPA cases have not been striking:

Nothing that has occurred under the MEPA has approached the sort of high time-cost litigation with which the legal literature is generally concerned. Indeed, with a few rather tentative exceptions, the MEPA has not been used in a major assault against the biggest sources in the state the auto industry, agriculture, the electric generating utilities, or even the rapidly developing oil and gas or mining operations.

Despite this concession, the articles repeatedly attribute significant results un impressively. For example, after only thirteen cases had been resolved under MEPA, the first of these studies concluded that “enough cases have been resolved specially and intelligently to mark the act as a success.”

Bryden, a commentator who has been critical of the claims to success made for the Act by the first three studies, says:

Nowhere in these studies is a connection between MEPA and any specific large scale improvement in environmental quality demonstrated, and even the general attitudinal claim amounts to little more than bare assertions. . . . The nebulous character of other conclusions make them similarly questionable. The claim that MEPA has been responsible for “institution-building at the local level” is difficult to appraise because the nature and importance of the “institutes” attributable to MEPA are not described. The allegation that MEPA has had an educational impact is standing alone, impossible to evaluate; just about everything perhaps even a family meeting can be called “educational.”

Despite this criticism, standing alone, the Michigan Environmental Protection Act does improve the citizen’s potential access to legal mechanisms. It provides the court with a statutory basis for developing a judicial concept of environmental protection which perhaps could eventually prove equivalent to a substantial right to environmental quality. However, the Michigan studies do not establish that these potentials have been realized. There were only 120 cases in the first five and a half years, and most of these cases did not depend on the act. The subjective conclusions concerning citizen awareness and institution-building may be valid, but they do not demonstrate that the legislation has created a substantive right to environmental quality which could dramatically alter the court’s decisions.

VII. THE MINNESOTA STUDY

The Minnesota study was carried out by Bryden who examined the litigation from the date of enactment of the Minnesota Environmental Rights Act, June 8, 1971, to June 8, 1976. The Act was involved in 26 cases which were resolved by judicial decision or by settlement prior to June 8, 1976. By asking for opinions of the participating attorneys, Bryden took particular care to determine whether the Act was essential to the result in each successful case. As the Michigan studies did, Bryden concluded that the Minnesota Environmental Rights Act... has not resulted in overcrowded court calendars, es-

---

86 Supra note 20 at 214.
87 Supra note 66 at 6.
88 Ibid at 5.
89 Supra note 42, at 180.
90 Ibid.
91 Supra note 66, at 651.
92 Supra note 42, at 190.
93 Ibid.
94 Supra note 68, at 5.
95 Supra note 67, at 1090.
96 Supra note 42, at 181.
97 Ibid at 181.
pecially since... much, if not all, of the litigation probably would have occurred even without the MERA”, that the cases have not presented the court with complex scientific issues beyond its realm of competence, and that there was no evidence of delays in development projects. Regarding the expectations which are normally associated with environmental rights legislation, Bryden says that if:

the fears of Rights Act opponents have largely proved to be unfounded, so have the hopes of its advocates. Of the 26 MERA cases resolved within the study period, fifteen were, or may have been, at least partially successful for the plaintiffs. But, by a fairly generous tally the Rights Act appears to have influenced the outcomes in only about half of these cases, and in only two... is it clear both that the act achieved something and that MERA was essential to that achievement. Reaching all three doubts in favor of MERA’s efficacy, one must still conclude that the direct, immediate effect of MERA litigation on the overall quality of Minnesota’s environment has been in
substantial.

Why have the direct effects of MERA litigation been so few compared to the high expectations held in much of the literature about environmental litigation? According to Bryden, "one good answer would be that not enough suits have been brought. The rather low volume of suits, especially by citizens groups, may be at least partly due to the expense of litigation. As a rule, none of the statewide environmental organizations can afford to pay all the expenses even if in varying degrees the attorneys donate their time. Another possible reason for the scarcity of cases is that many lawyers may still be unfamiliar with this relatively new statute. But increased attorney familiarity will not alleviate the cost problem and therefore the percentage of actions brought by ideologically motivated plaintiffs will probably not rise significantly. A statutory allowance of attorney’s fees might alleviate the financial impediment problem, but if it were applied to defendants as well as plaintiffs it could do more harm than good.

The most obvious explanation which can be drawn from the study is that, despite the abolition of standing requirements, the typical MERA plaintiff, like the typical common law plaintiff, has been an aggrieved property owner, less interested in establishing a principle that in preserving his own residential environment or saving some nearby resource about which he cares. Of course, such motives should not always be ignored, but they do limit the Act’s potential ef
fectiveness in resolving problems that do not directly and severely affect any one party’s economic interest and in establishing broad guidelines that will alter the behavior of non-parties.

Despite his criticisms, Bryden concludes that MERA clearly achieves Sax’s major goal to free the courts from most of the common law restraints, enabling them to articulate and enforce a public right to environmental quality. But it does not yet achieve the more ambitious goal of creating an environmental right, not dependent on property or financial interests, that is equivalent to property rights. Because most of the successful cases were brought by property owners, they pitted one property right against another. It is impossible to determine whether MERA enhanced existing property rights or created an environmental right independent of property interests.

In light of the decision under MEPA and, MERA and all the evidence produced in the Michigan and Minnesota studies, one conclusion can be drawn. Although the American courts have sometimes shown that they may have capacity to interpret environmental rights legislation as equivalent to a substantive right, the litigation has not shown that they will exercise this capacity. The legislation has given the citizen standing and has given some right to environmental quality, the exact nature of which has not been defined by the courts, but it is no clear that the courts will recognize these rights as substantive in the same sense that they recognize substantive property rights.

Furthermore, other expectations often associated with environmental rights legislation have not been fulfilled. Cases have been few, and most of them have involved plaintiffs’ property interests and the plaintiff’s standing and remedy did not therefore depend on the environmental legislation. However, if there has been a gap between performance and expectations, it may be caused more by an excess of expectations that by a failure in performance. It is unreasonable to hope that the legislative creation of an environmental right will be the best remedy to the problem of environmental litigation. Although the benefits in regard to standing are not to be denied, the courts must be given a legislative counterweight to set against traditional rights. But this does not mean that they will utilize or develop this legislative tool or that they will even interpret the legislation as a ‘substantive right’.

102 ibid at 210.
103 ibid.
104 ibid.
105 supra note 42 at 215.
106 ibid.
107 ibid.
108 ibid.
109 ibid.
110 ibid at 174.
111 ibid.
112 supra note 20, at 220.
113 ibid.
114 ibid.
enforce legislation is often a govern-
ment agency which, naturally
enough, is sensitive to the existing
political climate and can often avoid
its responsibilities because of the
very wide discretion habitually
granted to it by environmental
statutes. 119 Therefore something more
is needed to bring vitality into the
legislative process and into the
enactments resulting therefrom.
One possible answer lies in the
establishment of some form of a
constitutional right to a clean en-
vironment.

VIII. CONSTITUTIONAL ENVIRONMENTS RIGHTS

In addition to specific statutory
enactments, a number of American
states have included environmental
provisions in their constitutions.
This constitutional approach pro-
vides two major advantages. By in-
cluding environmental provisions in
a state constitution rather than in an
ordinary statute, the provisions are
given the highest possible authority.
A constitution expresses the fun-
damental assumptions of a people.
Consequently, this fundamental ap-
proach should strengthen pro-envi-
ronmental arguments at all levels
within the state jurisdiction. 120 The
second benefit is that constitutional
provisions are normally more dif-
ficult to repeal or amend than

115 Supra note 42, at 217.
116 Stevenson, C.P., "A New Perspective
on Environmental Rights After The Charter" (1983), 21 Osgoode Hall Law Journal, 396, at
394.
117 ibid at 395
118 ibid at 396.

121 ibid.
122 ibid.
123 Supra note 125 at 396.
124 Supra note 3 at 200.

119 ibid.
120 Supra note 20 at 221.

125 Supra note 115 at 391
126 ibid.
127 ibid.

g uidelines. 121 Constitutional provi-
sions may be said to reflect the
underlying values of society, be-
cause constitutions recognize or
establish fundamental rights which
require judicial application, inter-
pretation and protection. Constitu-
tions also erect the political frame-
work within which society is to be
regulated. 122

However, constitutional pro-
visions expressing noble sentiments
about the right of the people to a de-
cent environment have double func-
tions. If the provisions are self ex-
citing, that is, they become opera-
tive and act as an independent basis
for judicial action without the need
for further implementing legisla-
tion, they expand the public's en-
vironmental rights. If they are mere-
ly statements of policy, encouraging
further legislation to implement
these policies, it is arguable that
they do not expand the rights of the
citizen, but they do narrow the
powers of the government. 123

To the extent that a constitu-
tion recognizes fundamental rights,
it, initially at least, has primarily an
indirect effect; 124 it gives such
rights greater moral authority than
those not recognized and simul-
taneously ensures that they receive
more widespread respect and ap-
preciation. Thus the prime value of
recognizing a constitutional right to
a clean environment would be to
analyze the further development of
the environmental ethic. 125 Once a
right becomes entrenched in a writ-
ten constitution, it is given recog-
nition in the ultimate law of the
state, there is a positive feedback in
that the value which society places
on that particular right is substan-
tially increased. One of the most im-
portant features of a constitutional
right to a clean environment is to
some similar right, must be to play
this educational role.

Although constitutional rights
do represent a society's fundamen-
tal values, this does not mean that
those values are necessary apparent
on the face of that society. The in-
stitutions of state may sometimes
have to lead society in search of per-
cived higher values and ideals. 126
Similarly, if a constitutional right to
a clean environment existed, it
would serve to support a greater
public appreciation of the environ-
ment and to ensure fuller realization
of both the present and potential
threats to the environment and, ulti-
mately, to society itself. This in turn
would lead to a greater level of en-
vironmental awareness in the legis-
latures and would, therefore, serve
to stimulate legislative reforms. 127

A number of other legal conse-
to enable the courts to develop a wider definition of nuisance or perhaps to shift the burden of proof in environmental litigation.

Sax argues that a constitutional environmental right is "sentimentalism". 133 Thus, while he accepts that:

"Constitutional recognition of the right to a decent environment would be a token of our good intentions and help to set before us a goal toward which our society ought to aspire," 134 he suggests that such a declaration is no substitute for the "nitty gritty" of hard and fast rules established by legislation. 135 However, as has already been argued, it is not contended that one should substitute for the other, but rather that they should work in double harness with one complementing the other. Sax also argues that such a constitutional right would have no substantive effect, because it lacks the content that surrounds constitutional provisions like those governing free speech or the free exercise of religion, which, for all their uncertainty, incorporate specific historical experience that infuse meaning based on a common understanding within the community. 136 However, given the commitment to conservation and protection of the environment, of which Sax himself approves, there is little reason why a constitutional environmental right should not be adopted and developed as the United States court once had to do with all other constitutional provisions. The constitutional environmental right is not being proposed as an effective tool for all our environmental ailments but rather as a necessary backdrop against which other measures can be seen in proper relief. Sax's argument has also been made by Swaigen and Woods who suggest that because of the breadth and abstraction of such a concept, it is possible that a right, although expressed in terms indicative of a "substantive" interpretation, will not dictate a particular result in specific cases. 137

At present in the United States at least sixteen states have broad constitutional provisions dealing with the maintenance of the environment as a whole. 138 Of these sixteen, eleven merely have statements of policy or non-enforceable suggestions that further legislation will be passed. 139 In some cases, these provisions have acted as a policy basis for subsequent environmental protection legislation. For example, Article 2, section 7 of the Florida constitution:

132 Supra note 20, at 223.
133 Ibid. 122.
136 Supra note 20, at 223.
137 Ibid.
Other state constitutions have been amended to include stronger statements, in an attempt to create rights. In some cases, however, whether these provisions are "self-executing", that is, whether they are enforceable in the absence of further legislation, is questionable. Harrel has said that "Citizens have constitutionally protected rights to a decent environment in Illinois, Massachusetts, Pennsylvania, Rhode Island and Texas."143 With respect to Massachusetts, Pennsylvania, Rhode Island and Texas, this statement is open to dispute. There has been no judicial interpretation of the constitutional amendments in these states.144 They contain language that may be read to mean that they are not self-executing. Therefore, it is possible that the courts will relegate them to the realm of policy statements. Moreover, even if they are held to be self-executing, whether or not the courts would interpret these purported rights to environmental quality as being equivalent to property rights, or as requiring anything more than consideration of environmental factors before proceeding with environmentally harmful activities is questionable.145 Only in Illinois and Pennsylvania are there constitutional provisions which seem to be self-executing and which have been subject to some judicial interpretation.

Section 1. Public policy—legislative responsibility
The public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

Section 2. Rights of individuals
Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulations as the General Assembly may provide by law.

Section 1 of Article 11 not only contains a policy statement and legislative directive but places a corresponding duty upon the state and upon the individual to provide and maintain a healthful environment. As mentioned above, a general policy statement does not create any rights or obligations. It has been argued, however, that the duty aspect of Article 11 could form the basis for an environmental suit.140 This issue has not been litigated.

Section 2, however, declares that each person has an enforceable right to a healthful environment, subject to any reasonable limitations and regulations that the state may impose. This section has been the subject of some litigation.

In Scattering Fork Drainage District v. Caplin,147 the court dismissed a action based on Article 11 for an injunction to prevent construction along a river. In its decision, the court said that the suit was not supported by factual evidence and that one commentator has since concluded that the decision was not thought to be based on any "general unwillingness to apply Illinois environmental provisions".148 In Parson v. Walker,149 an action was brought to enjoin university trustees from permitting the construction of a reservoir. The court held that Article 11 gives every citizen standing to bring an action without need to show special injury or damages as required in common law nuisance actions. However, although the court understood that Article 11 creates a cause of action, it dismissed the case for the reason that the suit was premature. Therefore, the case was actually decided on non-Article 11 grounds.

In Tri-Country Landfill Company v. Illinois Pollution Control Board,150 a landfill company charged with violation of an Illinois environmental statute tried to challenge a decision of the state Pollution Control Board which found the company guilty of causing waste pollution. The company argued that the Board was stopped from proceeding because the landfill had been authorized by the Board's predecessor. By citing Article 11 of the Illinois Constitution, the court held that the defense of estoppel was inappropriate since it would deny the public's constitutional right to a healthful environment.

The courts' attitude toward the citizen's right to a healthful environment is certain difficult to discern from these cases. In the Tri-Country and Scattering Fork cases, actions were brought by governmental agencies rather than by citizens, and in the case, although the courts recognized the right of a citizen to bring an action under Article 11, the action was dismissed as premature. Consequently, the courts have not yet considered the merits of a citizen suit.151 Moreover, in its wording, the scope of the Illinois provision could prove to be relatively narrow. It remains to be seen whether a "healthful environment" refers only to an environment promoting human health, or also to the health of flora and fauna and the maintenance of ecological balance, it will be interesting to see whether the contribution of aesthetic, spiritual, and other non-material value to "health" can be recognized.152 However, Swigaen and Woods con-

143 supra note 138, at 812.
144 supra note 20, at 233.
145 ibid.
148 supra note 138, at 814.
151 supra note 138, at 815.
152 supra note 20, at 224.
would be charged to enter and to see
the battlefield from the top of the
tower, and would learn about the
battle from an audio-visual presen-
tation. The state argued that the
tower would interfere with the site
amenagement and harm the scenic, historic and
aesthetic values of the environment.
It brought as witnesses famous archi-
tects, historians, theologians, edu-
cators and state and federal parks
administrations, who testified that
the tower would interfere with the
recreational use of the battle site.
The developer brought experts
who provided the tower's financial
benefit to the community, its archi-
tectural appropriateness, and the
educational value of proposed
audio-visual aids. The Court of
Common Pleas denied the injunc-
tion because the anticipated injury
was subjective and amorphous and
the state had failed to establish by
"clear and convincing evidence" that
any harm would result from the
project. On appeal to the Common-
wealth Court of Pennsylvania, the
court refused to review what it con-
sidered to be a finding of fact by the
trial judge. A majority of the appeal
court ruled that the constitutional
amenagement was self-executing and
creating a new cause of action, although one dissented on this point and a
second said it was unnecessary
to decide this point.

On a further appeal to the Penn-
sylvania Supreme Court, the merits
of the case were subordinated to the
question of whether the provision
had any legal effect. Two Justices
said that the section was not self-
executeable. They considered it was
too vague a statement to be basis for
expanding the government's power
over private property without sta-
tutory standards and procedures:
"If we were to sustain the Con-
monwealth's position that the
amenagement was self-executing, a
property owner would know and
would have no way, short of ex-
pensive litigation, of finding out
what he could do with his property.
Accordingly supplemental
legislation will be required to define
the values which the amenagement
seeks to protect can be fairly regu-
late to protect those values."157
The other two Justices said that
"the Commonwealth, even prior to
the recent adoption of Article 1, sec-
tion 27, possessed the inherent
power to protect and preserve for its
citizens the natural and historic re-
sources now enumerated in section
27, but they entertained serious re-
ervations as to the propriety of
granting the requested relief in the
absence of appropriate and ar-
sculated substantive and procedural
standards."158 The Chief Justice
and one fellow judge disagreed.
They would have granted the in-
junction against the tower which
they described as a "monstrosity" which
did violence to the natural scenic, historic and aesthetic
values of Gettysburg. They accused

153 ibid a. 234-225.
154 4 Pa.Commons. 312, A. D. 986, aff'd

155 Pa 311 A. 2d 590 at 595, 595.
156 ibid.
157 supra note 153, at 239.
158 supra note 20, at 226.

159 A conclusion can be drawn from this
case, namely, that there is
tremendous judicial resistance to rec-
ognition of a substantive right to
environmental quality, even when it
is incorporated in strong language
explicitly declaring the existence of
the right and of a corresponding pa-
ublic trust; there is also equally pas-
sionate support. The courts have
deed not made any consensus on whe-
ther such a provision is self ex-
ecuting or merely a policy statement
requiring further legislation. The
courts have been unable to agree on
whether such broad provisions are
clear enough to allow for implementa-
tion in the absence of further leg-
islation. They have held that, to
succeed, the state must bring upon
not only a preponderance of evi-
dence, but clear and convincing
evidence. In this regard, "clear and
convinced" is taken to mean more
than the proof on a balance of prob-
abilities required in ordinary civil
actions, but less than the proof be-
ond a reasonable doubt required in
criminal cases.
executing. On appeal, however, this question was raised again. The Pennsylvania Supreme Court ruled this time that it was not necessary to explore the "difficult terrain" of whether section 27 was self-executing in a case in which the citizen's right to use public property was involved. The court did not doubt that the amendment created a public trust of public natural resources, and asked the government to conserve and maintain them for the benefit of all the people. The court said that this trust was operative without any implementing legislation and seemed to say that a remedy might be available to the public without the need to establish a violation of any specific statute. The court said that the question of whether section 27 was self-executing may be of paramount importance when the government "as trustee" seeks to prevent the otherwise legal use of private property. 163

Unfortunately the court did not mention the possibility that private citizens might seek to enforce section 27 against other private citizens, and the case is not helpful in determining whether the amendment would be self-executing in such circumstances. But Hurrel has concluded that Pennsylvania's environmental rights provisions...grant the rights to the people and

Payne v. Kussab 160 did little to settle the uncertainty as to whether section 27 could stand on its own, but did clarify its effect. Concerned citizens sought an injunction to prevent the state from widening portions of two city streets. The widening required the loss of approximately half an acre of park land in an area of historic interest, and the elimination of some trees and pedestrian walkways. Rejecting the argument that section 27 was "absolute" in the sense of prohibiting all environmental damage, the Commonwealth Court stated that:

It becomes difficult to imagine any activity in the vicinity of an historic town common that would not offend the interpretation of Article I, Section 27 which plaintiffs urge on us. We hold that section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affording a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development. 161

The court dismissed the complaint on the ground that although section 27 creates a public trust, the government in exercising the trust must balance its duty to provide for adequate traffic control against its duty to protect the environment. 162

The Commonwealth Court also ruled that the amendment was self-

effect to the state as trustee of the environment. Such language does not support individual enforcement of the right; rather, the state is granted standing to bring suit under a public trust theory. 164

In this case the court also showed that in view of the object of section 27 it is to achieve a "balancing of environmental and social concerns" which is "realistic". To do this, the court adopted the following three part test to determine whether environmental danger is outweighed by the benefits of development: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived there from that to proceed further would be an abuse of discretion. 165

Two other judgments concluded that Gettysburg and Payne determined that section 27 is self-executing. In Commonwealth Department of Environmental Resources v. Commonwealth Public Utilities Commission, 166 the state DER challenged a decision of the

161 Id. at 94.
162 Id.
163 Id.
164 Supra note 130 at 815.
165 Supra note 155.

One of the most difficult matters of this case involves the issue of standing. On application by the landowner, the Environmental Hearing Board vacated the permit which had been issued by the Department of Environmental Resources and sent the issue back to the Department for further consideration. On appeal to the Commonwealth Court, the state argued that the landowners should not have been heard by the Board because they were not "persons aggrieved" and therefore were not entitled to challenge the permit under the Pennsylvania Administrative Agency law. The Board had rejected this argument on the basis of section 27.

Despite this ruling and considerable comment showing that a prima facie case of section 27 was to expand the citizen's right to standing, the court did not adopt this reasoning. Instead, it concluded that the landowners were qualified under the existing "person aggrieved" standard because the proposed sewer would cross their property, which was "likely...to be adversely affected by any alteration or pollution which might result." Furthermore, the court went on to state that as far as an administrative appeals are concerned, the "person aggrieved" test is the only standard to be applied. By applying this traditional test to determine standing rather than giving effect to section 27, the court doubted the ability of the amendment to expand citizen's rights. This restrictive standing test was later applied when the issue arose concerning whether or not a conservation group had the right to challenge actions by state DEC that would adversely affect two state parks.

These cases do not indicate the effectiveness of the right provided in section 27 against the rights of either government or private owners. In most of the cases, members of the public sued the government or sewage agencies sued another. In none of them did private citizens sue a private owner alone. It remains to be seen, therefore, whether the amendment will permit this or whether any individual right established by the amendment must be enforced by government or behalf of the citizen. Not the standing of citizens to oppose government agencies clearly established on the basis of the amendment. Although standing of the plaintiff to challenge a government Department was assumed in Payne, it was questioned in later cases and was granted only on the basis of the traditional "aggrieved person" test. Therefore, whether private citizens would have standing to sue either government or other private citizens in an action on the basis of section 27 alone remains in doubt, as does the force of any substantive right. The cases reviewed only establish that government agencies must take into account certain environmental considerations and follow certain procedures before taking action which will damage the environment, and the onus is on those objecting to an activity or prove that its harm will outweigh its benefit.

To date, where the right granted to the public by section 27 has clashed with government powers and private rights, the latter have prevailed. The courts have treated what initially appears to be a substantive right as only a form of right. The right to a clean environment has been treated as a right to procedures. At best, this right is to be balanced against other stronger rights, and, at worst, it is only a right to ensure that government agencies do not act arbitrarily in making decisions that are harmful to the environment. As Pearson and Martin have concluded, out-of-court actions that the Amendment is new in force but can only be successfully invoked with evidence present and credible evidence. Payne adds to these burdens the imposition of a standard by which to assess activity in light of the amendment, which she standard

---

169 342 A. 2d at 475.
170 342 A. 2d at 475.

IX. ATTEMPTS TO ESTABLISH ENVIRONMENTAL RIGHTS IN CANADA

There is no single jurisdiction in Canada that has enacted an operative provision similar to Article L, section 27 of the Pennsylvania Constitution which purports to establish a right to environmental quality enforceable by individual members of the public. But the concept has gained recognition from the opposition parties of the provinces of Alberta and Ontario and has been incorporated in the environmental legislation of Quebec. In 1978, Robert Clarke, Leader of the Opposition in the Alberta Legislative Assembly, introduced a private member's Bill entitled "The Envir..."
The preamble to this Bill states in part:

Whereas it is recognized in Alberta as a fundamental principle and a matter of public policy that the residents of the province have the right to enjoy a clean environment, the loss or impairment of which is a loss or impairment of an interest that should have legal recognition; and whereas it is finding that this right should be affirmed by the legislature of Alberta as an interest that should be protected by the provisions of this Act.

The preamble, however, does not provide for any rights in addition to its substantive provision and it is only a statement of purpose and an aid to interpretation of the other provisions of the Act. Nevertheless, the Bill contains substantive provisions including a grant of standing to commence civil actions to protect the environment against pollution, provisions dealing with the burden of proof in civil actions, and a right to certain government information, but does not grant a right to environmental quality.

In November 1979, Stuart Smith, Leader of Ontario's official opposition introduced to the Ontario Legislature a private member's Bill. The Bill, entitled "The Ontario Environmental Rights Act, 1979," stated in section 2 that:

177 The Environmental Bill of Rights, Bill 22, 1979 (35th Legislature, 1st session).
178 The Ontario Environmental Rights Act, 1979, Bill 355, 1979 (35th Legislature, 3rd session).

179 supra note 20, at 207.
180 The Environmental Magna Carta Act, 1980, Bill (31 at Legislature, 4th session).
181 supra note 20 at 206.
183 Line 15-27 of s. 4 of the Charter (s.4, Bill C-60).

...ended in June 1980. Amendments to Quebec's Environmental Quality Act adopted by the provincial National Assembly in 1978 also made reference to environmental rights. The amendments provide that:

184 supra note 20 at 207.
185 CELA also recommended modifying section 96 which dealt directly with regional disparities. CELA wanted to introduce an additional section, which would have established a general government policy of protecting environmental quality and in particular would have required environmental impact assessment, the prohibition of pollution havens resulting from disparity of provincial environmental legislation and the introduction of effective public participation. The aim of CELA's proposed amendments was clearly to establish a substantive constitutional right to a clean environment. The constitution of any state reflects its fundamental values, priorities and commitments and it is suggested here that the constitution:

would not ignore the environment of Canada and the health of Canadians in its preoccupation with one issue: the political threat of separation of Quebec. These recommendations were not adopted by the committee but recently other voices have been raised in favour of adding the preserv-
tion of natural resources and the maintenance of ecological stability to the constitutional reform agenda.¹⁹³

Although Bill C-60 was never enacted, it is significant and unfortunate that the committee totally ignored CELA’s representation. However, this fact does go someway to explain the absence of renewed efforts to entrenched environmental rights in the Canadian Constitution when the Charter was drafted. It might be argued that perhaps some more positive efforts by environmental groups might have been expected in 1981, given the successful intervention of women’s groups and supporters of native rights which resulted in the addition of section 25 (native rights clause) and section 28 (sexual equality clause) to the constitution.¹⁹⁴ However, this is to argue with hindsight and also to presuppose a public concern with environmental issues comparable to the issues of sexual equality and native rights.¹⁹⁵

The problem environmentalists have is determining whether public awareness and demand is a prerequisite to establishing a constitutional environmental right or whether it is legitimate to aspire to such a right in order to promote public awareness and establish an environmental ethic. It is suggested that the latter course is preferable. If the public were to be asked whether they supported the ideas of conservation, environmental protection and controlled resource management, undoubtedly the vast majority would readily give their assent. What is needed is a conduit through which to channel these latent aspirations into active participation and involvement in environmental issues.¹⁹⁶

The problem is not so much one of lack of support as a failure to be mobilized. A constitutional right to a reasonably clean environment would be a particularly appropriate vehicle because environmental degradation is a matter of immediate concern directly affecting every Canadian, irrespective of wealth, religion, race or politics.¹⁹⁷ However, it is clear that, for the time being at least, constitutional amendment is an unlikely mechanism by which to achieve recognition of such a right.¹⁹⁸

X. ENVIRONMENTAL RIGHTS IN INDONESIA

In Indonesia, environmental rights have both a constitutional and a statutory basis. The Constitution of 1945 lays forth a policy statement relating to the waters and the use of resources which read “Land and water” and the resources required therein are controlled by the state and utilized for the maximum welfare of the people.¹⁹⁹ The words “land and water” were later expanded by Act 5 of 1960 to include air.²⁰⁰ Under the Act the state’s right to control authorizes it to: (a) to regulate the allocation, use, provision, and sustenance of the resources; and (b) to determine and regulate legal relations between persons and legal actions pertaining to the resources.²⁰¹ The provisions of these laws, with a few changes, were later incorporated into article 10 of the Environmental Management Act (EMA), which provides that:

1. Natural resources are controlled by the state and utilized for the maximum welfare of the people.
2. The utilization of man-made resources which affect the livelihood of the general public shall be regulated by the state for the maximum welfare of the people.
3. The right to control and regulate by the state, as stated in paragraph (1) and paragraph (2) of this Article, authorize the state:
   a) to regulate the allocation, development, use, reuse, recycling, provision, management and supervision of resources as stated in paragraph (1) and (2) of this article.

¹⁹⁴ Ibid.
¹⁹⁵ Supra note 135, at 409.
¹⁹⁶ Ibid.
¹⁹⁷ Ibid.
¹⁹⁸ Ibid.
¹⁹⁹ The Constitution, 1945, article 10 (3).
²⁰⁰ The Agrarian Act No. 5 of 1960, article 1 (2).
²⁰¹ Ibid article 2 (a)(b)(c).

²⁰² EMA 1982, article 10 (1)(2)(3).
The affirmation defense, on which the defendant has the burden of proof. To this extent the act explicitly applies strict liability and shifts the burden of proof to the defendant. The steps taken by Michigan and Minnesota should be taken into account by legislators in Indonesia in drafting regulation to implement environmental rights. Principles of strict liability and the shifting of the burden of proof could probably be included in the further regulation. But one thing that has to be realized is that the doctrine of strict liability actually has limited value to those who seek environmental protection, since relief in strict liability is on one to one basis, is usually limited to monetary damage and involves the difficult problem of proving causation. The problems of proving causation and securing total relief are specially troublesome when there are multiple causes of a single harm. This situation is created by the fact that many forms of injury have causes other than pollution, and it is often difficult or impossible to establish which among possible causes is responsible for the illness in a given individual.

204 Ibid article 5, 1(2).
206 Ibid.
207 Ibid.