Framework 4.1 – Protecting the Environment

The Gradual Move Toward Environmentalism

Conservation and Preservation

Although technology and industrialization created many benefits in North America, such as employment, mass production of food and consumer goods, and the development of cities, they also had negative effects, including damage to the environment. In the early stages of modernization, these negative effects were not a priority for most people when considered next to their improving quality of life. However, in more recent times with a high percentage of the population enjoying a good standard of living, more people have turned their attention toward environmental issues. Conservation and preservation were the main goals at first; the Canadian national parks system, for example, was launched in 1885 with the **Banff Hot Springs Reserve**, now part of Banff National Park, and the long-standing Sierra Club, parent organization of **Sierra Club Canada,** was founded in San Francisco in 1892, for the purposes of wilderness conservation.

Dealing with Pollution

By the mid-1900's, it became clear that some **industrial waste** was causing environmental damage. The initial plan of attack was **dilution**, which might be considered the 'out of sight-out of mind' approach. This involved methods of hiding waste, such as by dumping the waste products into large bodies of water or incinerating them with the byproducts being sent into the atmosphere. This approach was obviously not ideal and eventually led to noticeable problems, such as the withering of crops, the acidification of lakes, and damage to ecosystems. The link between commercial activities and environmental damage quickly became clear, but governments were reluctant to take any action that might interfere with economic progress. In 1950, for example, the Ontario government passed the **KVP Act** which limited the rights of individuals to sue companies for damage caused by pollution. This legislation was drafted in response to the Supreme Court of Canada decision in McKie v. The KVP Co. Ltd., where a company was ordered to stop polluting a river; the Ontario government was not yet ready to allow the goal of environmental protection to slow economic growth. Widespread activism during the 1960's, combined with evidence of environmental damage such as the effects of the use of the pesticide DDT and fears of the hazards of toxic and nuclear wastes created greater pressure on governments to respond to environmental concerns.

Legislative Action and the Role of Environmental Lobby Groups

The growing public sentiment and organized lobbying regarding environmental protection was often referred to as a "green wave" and eventually led to governments around the world introducing legislation in the late 1960's and early 1970's. In 1971, Ontario passed the **Environmental Protection Act**; many other provinces were quick to follow suit. One organization that played a major role in creating this type of pressure in Canada was the **Canadian Environmental Law Association**, founded in 1970. CELA has been instrumental in protecting the environment and lobbying for environmental law reforms. In general, environmental lobby groups can influence government action either directly by providing information and applying pressure to politicians and their parties or indirectly, at the grassroots level, by organizing campaigns and demonstrations to influence voters.

Sustainable Development

The concept of sustainable development took hold in the 1970's and was adopted and clarified by the United Nations in 1983 with the report from its World Commission on Environment and Development, better known now as the **Brundtland Commission**. The commission released its report, entitled ***Our Common Future***, in 1987. The concept of sustainable development includes the acknowledgement of the link between environmental health and continued economic success, the requirement that the needs of all groups of people from current and future generations must be balanced, and the consideration of potential negative impacts on the environment from commercial activity.

Individual Environmental Rights

Individual citizens have certain rights to take legal action to protect the environment, but they are limited. If the complainant's claim falls within certain categories, then they may sue for **damages** (monetary compensation), or an **injunction** (a court order to stop doing something) under **tort law**. If you took the grade 11 law course, you learned all about tort law, which covers the common law rights and remedies for wrongs committed by an individual person or other legal entity against another. In this respect, torts differ from crimes, which are generally considered to be wrongs against society. There are two broad categories of torts, **unintentional torts** and **intentional torts**.

Action in Response to Unintentional Torts

Unintentional torts are generally referred to as **negligence**, which is defined as acts falling below the standard of care that is expected of a reasonable person; the question to be answered is, "Would a reasonable person have foreseen the risk of harm?" One such tort that is commonly used in cases of environmental damage is the **escape of a dangerous substance**. This typically involves companies that use or create toxic materials, but do not properly contain them. This tort often interferes with the **riparian rights** of others. These are the rights of owners or occupiers of lands that border a body of water not to have the quantity or quality of that water negatively affected by others. One challenge when suing a company for negligence is the defense that they were conducting business in accordance with **industry standards**. Demonstrating this will often convince the court that they had met the standard of care in the circumstances.

Action in Response to Intentional Torts

Two intentional torts that are often used in environmental cases are **trespass** and **nuisance**. Trespass involves intentional and direct interference with another's land without their express or implied consent. Nuisance is subdivided into claims of private nuisance and public nuisance. **Private Nuisance** involves unreasonable and substantial interference with the use and enjoyment of another person's land. Common examples are noise, air, and water pollution, vibrations, foul smells, soil contamination, and flooding. In private nuisance cases, the courts have to weigh the effects on the complainant against the public good and economic benefit of the conduct in question. It will be much more likely to find the defendant liable if there is actual physical harm or damage or loss of income as opposed to the complainant simply being annoyed or bothered. **Public nuisance** is an interference with a public right, such as the right to fish or the right to navigation in a particular body of water. The challenge for an individual wishing to bring a public nuisance suit is the issue of **standing**, which is the legal right to bring the lawsuit. To establish

standing for public nuisance, the complainant generally needs to demonstrate **extraordinary damages**, above and beyond what other members of the public had sustained. The requirement of standing effectively prevents environmental groups from bringing law suits on their own behalf.

Legislative Authority

The rights and remedies associated with torts are common law, meaning they were developed and are enforced by the courts. As such, they are subject to legislation that may regulate or permit certain types of conduct. This **legislative authority** allows activities to take place that would have otherwise been prohibited by the common law. As you learned earlier in the course, however, there is still the possibility of proving such legislation to be unconstitutional.

The Costs of Going to Court and the Role of Environmental Lobby Groups

Even though individuals have the right to launch law suits in some circumstances for environmental purposes, they may find the potential costs to be discouraging. Legal representation is very expensive, and if they lose they may be ordered to also pay some or all of the legal costs of the defence. Even if they win, they may never receive payment of the judgment; defendants may not have the money and could even declare bankruptcy as a result of the lawsuit. Environmental lobby groups can help individuals overcome these financial barriers either by funding their legal battles or by providing environmental lawyers to work on a *pro bono* basis, which means free of charge or at a significantly reduced cost.

Government Actions

Governments have far greater financial resources than citizens and environmental groups. They also have some degree of control over most industries and own most of the undeveloped land in Canada. Individuals and special-interest groups therefore see environmental protection as a responsibility of government and apply pressure for the passage of legislation to fix the problems that exist or may exist in the future. Governments in Canada responded in an **ad hoc** fashion, resulting in numerous statutes passed at both the provincial and federal level, often creating confusion when determining jurisdiction. Generally, the subject matter of the legislation passed by a level of government will be in line with the constitutional division of powers. For example, federal statutes will deal with issues such as oceans, airports, and Aboriginal lands. Other statutes, such as the federal Income Tax Act, have been amended to incorporate policies that encourage or discourage certain types of behaviour. In Ontario, the most significant pieces of legislation are the Environmental Protection Act, the Environmental Assessment Act, and the Environmental Bill of Rights.

The Environmental Protection Act

Ontario's **Environmental Protection Act** or **EPA** was enacted in 1971 and grants the **Ministry of the Environment** broad powers to "provide for the protection and conservation of the natural environment" by regulating actual and potential sources of **contaminants**. The EPA contains general provisions for **preventing** and **controlling** the discharge of pollutants as well as specific provisions for situations with a high risk of contamination, such as the use of ozone depleting substances or the abandonment of motor vehicles. The Act also contains provisions for the issuance of **permits** for potentially hazardous activities, the **licensing** of businesses that deal with potentially harmful

materials and for **reporting** pollution to the Ministry of the Environment. The EPA is a very powerful piece of legislation with a broad scope. Section 14 states that, "Despite any other provision of this Act or the regulations, **no person** shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an **adverse effect**." This applies to all individuals, private companies, and governments and overrides any other provincial legislation that might permit the discharge of pollutants. If s.14 is breached, an environmental cleanup may be ordered, and the people responsible, including the employees, officers, and directors of companies may be convicted and subject to large fines and imprisonment. Conviction requires proof that the offending action was either **deliberate** or **negligent**, meaning that a person accused may argue that they had taken reasonable care and that preventing the discharge was beyond their control. It is important to note that although the EPA creates the **statutory authority** to deal with environmental problems, it is not aimed at developing long-term solutions or **environmental sustainability**. Another limitation is that any action taken under the EPA is totally at the **discretion** of the Ministry of the Environment; individual citizens cannot invoke its provisions on their own.

Environmental Assessment Act

The **Environmental Assessment Act** (**EAA**), introduced in 1975, creates a very expensive, complex, and time-consuming assessment process that, in practice, is only applied to certain types of **major projects** that have the potential for significant environmental impacts, such as dams, highways, power plants, and landfill sites. Because of the expense involved, some types of projects, such as municipal roads, sewage, and water works projects, are not assessed on a site-by-site basis. Instead, the Ministry of the Environment (MOE) establishes general requirements that must be followed. This means that some potential environmental problems at specific sites might not be addressed during the assessment process. The assessment process requires the gathering of a great deal of scientific data related to the current situation at the proposed site and the potential effects of the proposed activity. This data, along with alternative plans, submissions regarding the economic benefits of the activity, and submissions from the public are weighed by the MOE, which will make the final decision. In comparison with the Environmental Protection Act, the EAA does include the stated purpose of promoting **environmental sustainability**. In addition, the EAA does provide for individuals or special-interest groups to participate in the assessment process. This right has been criticized, though, as being limited due to expense and complexity; some of those who might be granted standing to participate might not have the means to participate fully. The EAA does recognize this and provides assistance in the form of a structure to assist in the gathering of information about environmental impacts, and in some cases the government has provided funding to support individuals or groups wishing to take part in the process.

Environmental Bill of Rights

In 1993, Ontario introduced the **Environmental Bill of Rights** (**EBR**). The legislation represented a new approach by framing environmental protection in terms of basic human rights. It created a framework whereby the public would be notified, primarily with postings to a website, of Ontario government actions that might have environmental impacts, such as the granting of a license or a permit to conduct a potentially harmful activity. Concerned citizens have the right to request a **review** of the government action or of any pre-existing policy, statute, regulation, license, or permit. The legislation also created the position of **Environmental Commissioner**, which is responsible for investigating environmental violations and reporting directly to the Ontario legislature. The

Environmental Commissioner is independent of the Ministry of the Environment and is therefore able to report freely on its conduct. In practice, the EBR has resulted in few investigations or lawsuits. Increased access to the courts for individual citizens is one thing, but paying for it is another. Another obstacle to the effectiveness of the EBR is the subsequent passage of the Ontario **Savings and Restructuring Act** in 1996. One aspect of this legislation was the downloading of much of the decision making regarding environmental issues from the province to the municipalities which are not subject to the EBR.

Conservatism Tames the Green Wave

In 1995, Mike Harris and the Progressive Conservative party were elected to power in Ontario on their "Common Sense Revolution" platform. Their primary goal was deficit reduction through cuts to government spending. One specific change was the **shifting of responsibility** for compliance with environmental standards from the government to the agencies and companies that were the potential polluters; they were put in charge of monitoring themselves. Hundreds of **inspectors were laid off** from the Ministry of the Environment, and the number of **investigations** conducted in response to incidents and concerns plunged. The PC government justified these budget cuts by claiming that many of the lost jobs were redundant and that strict enforcement of environmental regulations was bad for the economy.

The Walkerton E. Coli Outbreak

In the spring of 2000, the chlorinator used to purify water in one of the wells at the water utility at Walkerton, Ontario started breaking down. Soon after, floodwater carrying E. coli bacteria from animal manure contaminated the water in the well and entered the town's water supply. At least seven people died as a result of the contamination. The tragedy led to a judicial inquiry which then found that one major cause was the fact that monitoring of water quality had been downloaded to the municipal water utilities. In Walkerton's case, instead of government inspectors doing the job, the monitoring was being handled by two brothers, Stan and Frank Koebel, who were found to be untrained, negligent, and guilty of covering up problems with the water supply. The report of the judicial inquiry included recommendations that the government resume a greater role in the monitoring of municipal water supplies.

The Government's Role as Proactive or Reactive

There are two main challenges to a government trying to actively control environmental management through legislation. Firstly, legislated restrictions or directives are generally unchanging or slow to change and may become dated, inadequate, or inappropriate. Secondly, it is very expensive. Government cutbacks, such as those by the Progressive Conservatives in Ontario, led to the creation of more policies of **voluntary compliance** with environmental regulations and **self-regulation** for industries, farmers, and developers. Governments argue that these **voluntary and non-regulatory initiatives (VNRI's)** can effectively protect the environment by encouraging cooperation and engendering a sense of responsibility as corporations take greater ownership of their environmental policies. The real difference in this approach was a shift in the government's role from being proactive to being reactive. In other words, the government's responsibilities shifted from preventing environmental damage toward fixing the damage

and punishing those responsible. One expected result of this type of shift is that a greater amount of pollution and environmental damage actually takes place. Many therefore argue that there needs to be a shift back toward the proactive approach where positive incentives would be provided to encourage behaviours that will avoid excessive damage in the first place. This push toward **sustainable development** includes policies that make people pay the real cost of engaging in polluting activities, such as a "gas-guzzling vehicle tax", policies that subsidize desirable practices, such as using clean energy like solar or wind power, policies that create deposit-refund programs for recycling, and policies that charge non-compliance fees to companies that exceed allowable discharge levels, which is quicker and less expensive than initiating legal prosecutions.