Everyone's Business:
Canadian and World Trends in Freedom of Information Law Respecting the Environment

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Thank you for your invitation to speak during this Right to Know Week. I am most honoured and pleased to be here today. Let me just note that I am speaking personally and not behalf of the Canadian Association of Journalists or any other organization.

I plan to speak on freedom of information as regards to the environment, and as this is an international panel, I ask you, what other FOI topic could be more internationalist than this? Does water pollution, animal migration or climate change stop at any political border? I considered speaking on global FOI in general terms, but then I thought it more productive at times to focus in depth on one topic at a time. But even environmental FOI is such a broad and fascinating subject that I hope I can do justice to it in the time I have.

The environment is the topic of Chapter 14 of my book *Fallen Behind: Canada's Access to Information Act in the World Context.* It was the most difficult chapter to write, because the topic was the most unfamiliar to me then, and may be to you as well.

Most of the other chapters can leave a reader depressed with the state of FOI, especially regarding the shift to so-called oral government and quasi-governmental bodies exempt from the law. But environmental FOI is a pleasure to discuss, because as I learned more about it, it became the FOI subject that actually gave me the most hope for the future.

Of course, in the environmental FOI field, there will always be some setbacks, but I sense those would be more temporary than longterm. This may be because the public demand for it may, ultimately, be irresistible. In the spirit of the age, environmental protection sometimes leads opinion surveys as the top issue of public concern in Canada.

Much of the public believe that the state and private sector have absolutely no moral right to keep secret the condition of the air we all breathe, the water we all drink, the land we all inhabit. Such issues may be, then, "everyone's business"; so ideally, they would transcend sectoral interests, political parties and ideologies.

The subject of environmental transparency overlaps and intersects with the subjects of every FOI field, such as policy advice, and cabinet records. For several people, indeed, this may be their main or sole FOI topic of interest. Good environmental journalism can hardly be produced without it.

Several nations accord the matter such weight that in their FOI statutes, environmental protection is the only public interest clause that overrides all disclosure exemptions. Some have created separate transparency laws for the environment alone, which include mandatory pro-active publication of records beyond a FOI request-driven regime. Finally, the environment is one of the very few topics for which international treaties on the public's right to know have been forged.

Nonetheless, the campaign for environmental transparency is not complete; in fact, it has just begun.

In Canada, how well do our federal laws allow for transparency on the environment? To begin, how would the release of environmental information ideally be guaranteed in the Canadian *Access to Information Act*?

The general failings of our *ATI Act* in regard to other nations' FOI laws have been detailed at length in my book *Fallen Behind* and in the *World FOI Chart.* For one thing, consider the vital question of the public interest override. In the *ATI Act*, there is just one narrow and discretionary case in which the public interest in environmental protection can override an *ATI* exemption*,* one regarding third party information (Section 20), and it cannot override trade secrets. Yet the FOI laws of 38 other nations have much broader public interest overrides, especially for environmental interests, as do our provinces.

Many global political organizations urge that the override should apply to all the FOI exemptions and be mandatory. One step, clearly, might be to include a strong mandatory public interest override, on the model of British Columbia's FOI statute, Section 25.

By contrast, of 68 nations that have passed FOI laws, I counted 29 with some form of public interest override. Most of these overrides – even in some Commonwealth countries - are stronger than the one found in our *ATI Act*. Eleven nations went further, explicitly mandating environmental transparency in their FOI laws' overrides, although environmental information is implicitly included in the general "information" description of the other nations' FOI overrides as well.

Eastern European nations take the right seriously indeed. In Slovakia, environmental protection can override trade secrets, which might be valuable when, for example, a company will not reveal the toxic chemicals of a formula it has spilled into a lake. In Serbia's FOI law, public authorities must respond to requests in 15 days except where there is a threat to the environment, which mandates a reply within 48 hours. Of course I cannot say how well these sections are being followed in practice, but it is still better that they are on the books than not.

Apart from the *ATI Act*, there are also several environmental information disclosure requirements in other Canadian statutes, such as the *Fisheries Act*, Section 79, and the *Canadian Environmental Protection Act*, Section 44. There are also environmental factors included in the federal whistleblower protection law, but that statute has serious limitations.

There is another problem. The right of all people regardless of their citizenship to make access requests is the accepted international standard, included in the FOI laws of 51 of 68 nations, including that of Canada's parliamentary model, the United Kingdom. But not in Canada's *Access to Information Act*.

Yet in a world ever more integrated and interdependent in the context of the internet age, so many environmental issues that overlap political borders could be a subject for an FOI request to another country. One obvious example would be that of unknown pollutants being expelled into the river of a neighbouring country, with that river then flowing into the FOI applicant's nation, or indeed through several nations. Other subjects might include global warming and climate change, aquaculture and agriculture, animal and plant diseases, the tracking of harmful or endangered animal species, overfishing, and more. Canada's *ATI Act* should be amended to allow anyone in the world to file requests.

Related to, yet distinct from, FOI laws is the matter of constitutional guarantees. More than half of the nations with FOI statutes I considered – that is, 42 out of 68 - explicitly grant the public some right to obtain government information in their Constitutions or Bill of Rights. These include France, Mexico, New Zealand, South Africa, and many Eastern European nations. But Canada does not. It has only been described in court rulings here as a "quasi-constitutional" right.

Moreover, eight of these 42 nations – all non-Commonwealth – explicitly mention environmental information, though it is also implicitly included within the general definition of "information" in others' constitutions. These eight nations are Albania, Argentina, Belarus, Latvia, Moldova, Montenegro, Slovakia, and Ukraine. For example, the Ukrainian constitution reads, in Article 50:

> Everyone is guaranteed the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information. No one shall make such information secret.

Imagine reading such a principle in the Canadian *Charter of Rights and Freedoms*. We have heard on a panel here this week MP Paul Szabo announce that he plans to introduce a private member's bill to guarantee a public right to information in our Canadian Constitution. One wishes him luck.

It is no surprise that such guarantees are most numerous in Eastern and Central Europe, regions wishing to repair the environmental devastation that was partly facilitated by the secrecy of former authoritarian regimes. But why would the general principle also not be relevant elsewhere, including Canada?

Abroad, there have been many other national gestures towards environmental transparency, some which could be discussed apart from FOI laws.

For example, the United Kingdom, Canada's parliamentary model, passed a set of *Environmental Information Regulations* in 2004. This contains many exemplary features worth replicating, such a very broad definition of environmental information, a clause that agencies must "progressively make the information available to the public by electronic means which are easily accessible," a 20 day time limit, and strict penalties for those who obstruct or destroy records.

Estonia's *Environmental Register Act* contains a valuable level of detail, requiring the collection in a database of information on pollution, radioactive waste, genetically modified organisms, natural environmental factors, permits and other materials.

Finally, let us now move from the comparative study of domestic FOI statutes into the realm of international law.

A European Parliament resolution led to a Council Directive that went into effect in 1993. This created a right of access to environmental information in every member state of the European Union.

Member states must ensure that public authorities make environmental information held by or for them available to any applicant, whether a natural or a legal person, on request and without the applicant having to state an interest, within a month, for free or low cost.

The states must ensure that all information held by the public authorities relating to imminent threats to human health or the environment is *immediately* distributed to the public likely to be affected.

After the EU Directive, the Aarhus treaty sets the new standard for environmental transparency. The *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, usually known as the *Aarhus Convention*, was signed in 1998 in the Danish city of Aarhus. It has been ratified by 40 primarily European and Central Asian countries, the United Kingdom, and the European Community. Member states are explicitly welcomed to surpass the EU and Aarhus standards.

The *Convention* has a unique Compliance Review Mechanism, which allows members of the public to relate their concerns about a party's compliance directly to a committee of international legal experts empowered to examine the merits of the case. As of May 2007, 18 communications from the public had been lodged with the Convention's Compliance Committee.

These treaties have not been relegated to "paper tiger" status; a genuine political will for their enforcement is evident. In July 2005, for instance, the European Commission announced that it was taking legal action against seven countries for failing to implement the 2003 EU Directive. In a separate case, Germany's *Environmental Information Act* was found several times by the European Court of Justice to be inadequate under the 1990 EU Directive.

Summarizing the role of the Arhus treaty overall, the United Nations' then-Secretary-General Kofi Annan declared:

> Although regional in scope, the significance of the *Aarhus Convention* is global. It is by far the most impressive elaboration of principle 10 of the *Rio Declaration*, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.

To conform to the Aarhus treaty, many European countries passed separate environmental disclosure statutes – some incorporating the treaty's provisions verbatim - in addition to their general FOI laws. Several other countries attempt to fulfill their Aarhus disclosure obligations through their national FOI statutes.

Portugal is an example of a member state which added an innovative touch to its legislation by establishing a special body to consider disputes arising from refusals to provide access to environmental information. This would be rather like having an information commissioner here but just for the environment.

It will likely not be long before the prospect is raised about introducing an equivalent of an Aarhus treaty in North America, perhaps later expanded to all the Americas. In Europe, natural environment is less abundant and so taken far less for granted than in Canada, hence such a campaign here might be a more onerous task.

Yes, the context is different, but the principles are similar, and some may assert that they also require application in the Canadian context, perhaps in modified forms. As the theory goes, if international trade agreements should be able to override national environmental protections, as many investors urge, why should the same principle not apply for the positive purpose of environmental transparency? Global environmental journalism would be greatly enabled and enhanced as a result.

On occasion, environmental transparency can also be regarded as a basic human right in law. The European Court of Human Rights ruled in the 1998 case of *Guerra vs Italy* that governments had an obligation to inform citizens of risks from a chemical factory under Article 8 – that is, protecting privacy and family life - of the *European Convention on Human Rights*, which Italy had failed to do.

In summary, besides reforming the *ATI Act*, Canadian parliamentarians could exercise political imagination and might consider adopting – even in modified versions - several of the more proactive environmental transparency concepts from other nations' FOI statutes, constitutional guarantees, and international agreements, for the Canadian context. This is not a call to change environmental practices, *per se*, only to be more transparent about them.

Principle 10 of the *Declaration of the U.N. Conference on Environment and Development* presented at Rio de Janeiro in 1992, was endorsed by Canada. It reads: "At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes."

Some believe Canada has a moral obligation to follow the spirit, if not the letter, of the Aarhus Convention's and Rio Declaration's prescriptions on environmental transparency.

I noted at the start of this speech how hopeful I was on the future of environmental FOI. Indeed I am. To the federal parliament and bureaucracy several of these concepts may appear excessive, as innovations often do at first. Such ideas are seeds that could take years to sprout; yet it seems likely that in time, inevitably, Canadians will accept no less.

Thank you, merci.

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