

## “Are We There Yet?” Reflections on the Success of the Environmental Law Movement in Ontario

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In this short article, the author explores the history of the environmental law movement in Canada and explains how this history has affected many of the environmental laws and trends today. With a focus on Ontario, the author reports back from a round table discussion held in Toronto in early 2008. Some of Canada’s leading environmental lawyers, as well as many of the pioneers of the environmental law movement, reflected at the round table on the extent to which their aspirations for strong, effective environmental laws have been met and how much more remains to be done. While we are not “there” yet, much has been accomplished. More importantly, a new generation of environmental lawyers has taken up the challenge of those early pioneers, and promises to advocate for environmental laws and policies that will ensure a safe and healthy environment for future generations.

Dans ce bref article, l’auteur se penche sur l’histoire du mouvement du droit de l’environnement au Canada et explique comment cette histoire a affecté de nombreuses lois et tendances environnementales actuelles. En mettant l’accent sur le volet ontarien, l’auteur fait rapport d’une table ronde qui s’est tenue à Toronto au début de 2008. Certains des chefs de file des juristes spécialistes des questions d’environnement au Canada, ainsi qu’une grande partie des pionniers du mouvement du droit de l’environnement, se sont penchés, lors de cette occasion, sur la portée selon laquelle leurs aspirations pour des lois environnementales vigoureuses et efficaces ont été satisfaites et sur ce qu’il reste encore à accomplir. Bien que nous n’y soyons pas encore tout à fait « arrivés », énormément de choses ont été accomplies. Plus important encore, une nouvelle génération de juristes spécialistes des questions d’environnement a relevé le défi de ces premiers pionniers, et promet de reprendre le flambeau et de se porter à la défense des lois et des politiques environnementales, ce qui garantira un environnement sécuritaire et sain pour les générations futures.

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I FIRST ENCOUNTERED environmental law in the fall of 1970 at Osgoode Hall Law School. Barry Stuart had joined the faculty that summer and he was offering a new course called "Environmental Law." My classmates and I were attracted to the course for a variety of reasons, but the two most often cited were an abiding interest in "doing good for the environment," and the opportunity to meet, learn from, and work with this extraordinary young professor, about whom we had heard so much. That course persuaded me and many of my classmates of the potential for law to make a difference, particularly in the hands of a group of passionate and committed people. That potential, we soon learned, could be magnified several fold when the committed group was led by someone of Barry Stuart's energy, enthusiasm, vision, and charisma. For me, and many others, 1970 marked the beginning of the environmental law movement in Canada.

After that fall course, I became one of Professor Stuart's followers (and a lifelong friend) and worked on many early projects. Most notably, I worked on the Canadian Environmental Law Association's (CELA) critique of Ontario's first *Environmental Protection Act* (EPA),<sup>1</sup> and then, as co-editor-in-chief of the Osgoode Hall Law Journal, I published an issue of the Journal on environmental law.<sup>2</sup> Later, I studied environmental law as a graduate student at Harvard Law School, and finally began teaching my own version of the environmental law course at Dalhousie University's Faculty of Law, and, subsequently, at Osgoode Hall Law School. My research and teaching interests changed in the early 1990s to dispute resolution (an obvious and logical extension of environmental law, in my view) and I stopped teaching in the field.<sup>3</sup>

The invitation to contribute a short piece to this special issue on Environmental Law provided me with an opportunity to reflect on the early days of the movement and, more specifically, on whether the aspirations of the first wave of environmental lawyers and law teachers have been achieved. And

1. *Environmental Protection Act*, S.O. 1971, c. 86 [EPA].

2. (1972) 10:3 Osgoode Hall L.J.

3. At Osgoode, the field is now handled by an extraordinary, talented group of national and international environmental law scholars, including Stepan Wood, Benjamin Richardson, and Dayna Scott.

so, with my friend David Estrin, the first full-time executive director of CELA, and now a senior partner at Gowling Lafleur Henderson, we convened a round table meeting in Toronto<sup>4</sup> of many of the early environmental lawyers (and others who joined the movement a little later) to reminisce, to remember our hopes for the movement, and to ask "Are We There Yet?" Have we accomplished at least some of what we set out to do in 1970? This short article provides an opportunity to remember the early days of the movement, hear something of what those who attended the round table had hoped to accomplish, and, finally, to try and answer the question, "Are We There Yet?"

The late 60s and early 70s were heady days for environmental law advocacy groups. Optimism about the potential of enlisting the law, the courts, the legislature, and the emerging administrative structures to achieve a better environment ruled the day. But what, really, has the environmental law movement achieved? How much (or little) of the promise has been realized? This is a question addressed by this short retrospective. This paper is divided into two parts. The first examines the aspirations of the environmental law movement, and the legal and legislative changes and tools that it promoted to achieve those goals. The second part reflects on what has been achieved and whether we, at least from the perspective of the round table participants, are "there" yet. This, in turn, prompted some participants to reflect on where the movement has fallen short, and what remains to be done. As for the question, "Are We There Yet?" the answer from the group is "no." Much remains to be done. Fortunately, as I suggest in the conclusion, a new environmental law

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4. The meeting took place on 27 February 2008 at the Toronto offices of Gowling Lafleur Henderson, LLP, and was hosted by Estrin and myself. The participants at the round table were generally representative of the early environmental lawyers. The participants were Clifford Lax, Jack Coop, Dianne Saxe, Elizabeth Sawnson, Jamie Flagal, Alan Levy, Joe Castrilli, Robert Fishlock, Linda McCaffrey, David McRobert, Steve Garrod, Robert Gibson, Rod Northey, John Swaigen, Marcia Valiante, Toby Vigod, Stepan Wood, David Estrin, Paul Emond, Ann Mitchell, and Barry Stuart. The views expressed in this article are those of the author and not of individual members of the round table. While observations from the round table participants are reproduced throughout the article, these should not be attributed to any round table member. Others from that early period who are not listed here include Alistair Lucas, Elizabeth May, Phil Elder, Andrew Thompson, Robert Franson, and Lorne Giroux. Relative latecomers like Stephen Hazell, David Boyd, Stewart Elgie, and Paul Muldoon also played an important role in shaping Canada's environmental laws. This list is by no means exhaustive; the list of those who made important contributions to the environmental law movement is much longer.

“movement” is taking shape, and the prospects for achieving real and lasting success look promising.

A short word on “the movement.” It sprung up, almost simultaneously, across the country in the late 60s and early 70s. Much of the impetus came from the USA and in particular the passage of the *National Environmental Policy Act* (NEPA) in 1969,<sup>5</sup> from the “radical” new environmental protection legislation in Michigan, the 1970 *Michigan Environmental Protection Act* (MEPA)<sup>6</sup> in 1970, and from the prospect of similar legislation being enacted at both the federal and provincial levels across Canada. But the early impetus for the environmental law movement in Canada was more than the prospect of encouraging provincial legislatures and Parliament to pass “me too” legislation. It was also a convergence of visionary thinkers in Ontario (the founding members of CELA), British Columbia (the West Coast Environmental Law Foundation), and Alberta (the Environmental Law Centre), all of whom believed that the law offered extraordinary potential to do good on behalf of the environment. The length of this paper does not permit a review of the contribution of each environmental law association in its respective province. Instead, the paper focuses on one province (Ontario), and while it cannot be used as a proxy for what generally was happening across the country, it has become representative of many of the important new developments in environmental law. And, because the focus is Ontario, the paper will trace the efforts at the provincial level where, after all, much of the constitutional jurisdiction for environmental matters lies, and will provide only passing comment about federal legislation.

## I. FROM ASPIRATIONS TO ADVOCACY

The goals of the environmental law movement of the late 60s and early 70s were encapsulated in the enthusiasm of the early visionaries. At the round table meeting in Toronto, many of those who were associated with CELA, CELRF,<sup>7</sup> and the Alberta-based Environmental Law Centre—in some cases from the late 60s—reflected on what they had imagined the law could do on behalf of the

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5. *National Environmental Policy Act of 1969*, 42 U.S.C. § 4321.

6. *Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. § 324.1701 [MEPA].

7. The Canadian Environmental Law Research Foundation (CELRF) is now called the Canadian Institute for Environmental Law and Policy (CIELAP).

environment. There was no such thing as “environmental law” in those days. It was not taught in law schools;<sup>8</sup> there were no professional associations charged with promoting the practice of environmental law;<sup>9</sup> and there were certainly no firms<sup>10</sup> whose practice was exclusively or even partially restricted to environmental law.<sup>11</sup> Instead, there was optimism that, with enough imagination, a good lawyer (or law student) could cobble together tort, property, and perhaps criminal law to stop, or at least severely curtail, any pollution problems. If that was not enough, then the hope was that strong advocacy would persuade governments to pass effective environmental protection legislation.

The movement’s early focus was on controlling and cleaning up point-source pollution. While the Club of Rome<sup>12</sup> had modeled and predicted the exhaustion of the world’s resources, and Rachel Carson’s *Silent Spring*<sup>13</sup> had warned of the insidious effects of pesticides, the concern of early environmental lawyers was more immediate: prohibiting or limiting toxic emissions, such as lead, from local stacks; and limiting discharges of industrial effluent from outfall pipes or farming practices that were contaminating the land and nearby water sources. Addressing overpopulation, world hunger, and the insidious second- and third-order effects of toxic new chemicals and technologies were largely absent from the movement—although, as one round table participant pointed out, there was a strong underpinning of, and concern for, “social justice.” There were also moments when the new environmental lawyers of the day expressed a bigger vision of the role of the environmental movement. After learning of the US proposal to test nuclear warheads on Amchitka Island, one

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8. One of the first classes was offered in 1970 at Osgoode Hall Law School by Barry D. Stuart, one of the driving forces behind the formation of CELA.
  9. The Environmental Law Section at the Canadian Bar Association was not formed until 1971.
  10. There were, however, firms such as Holden Murdoch that practised “natural resource law” and, as a result, dealt with environmental law issues.
  11. While the focus of this paper is on environmental lawyers, many of the early advocates in Ontario were not lawyers. The role of Don Chant, Peter Middleton, and Tony Barrett through their work at Pollution Probe was integral to the success of CELA and the environmental movement in Ontario.
  12. Donella H. Meadows *et al.*, *Limits to Growth: A Report for the Club of Rome’s Project on the Predicament of Mankind* (New York: Universe Books, 1972).
  13. Rachel Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962).

CELA exchange, as remembered at the Toronto round table, went like this:

“They’re testing nuclear bombs on Amchitka.”

“Where’s that?”

“Alaska, I think.”

“We’ve got to stop this.”

“Agreed.”

“Here’s the plan. You check international law. See if there is some prohibition against this nuclear testing. You look into the World Court. I assume there is one, but I don’t know. Find out where the Court is located and get a copy of its procedures and forms. Let’s meet again next week and plan our next steps.”

Perhaps, not surprisingly, there were no next steps, but it did not dampen the enthusiasm of those first environmental warriors.

No problem was too big, no task too daunting. It was, as one participant said at the Toronto round table, like the wild west in which anything and everything was possible. A year after CELA was founded, a group of environmental law students was dispatched to Sudbury, Ontario with the task of prosecuting Inco as a result of its stack emissions, which were clearly, in their view, a contravention of subsection 14(1) of the new *Environmental Protection Act*<sup>14</sup>, which prohibited the discharge of a contaminant into the natural environment that caused or was likely to cause an adverse affect. The expectation was that Inco would either clean up and control its emissions or be closed within the year! These were heady days in which the group’s optimism had not yet been tempered by the frustrations that would follow.

If the movement had a defining goal, the round table remembered it as having the following elements:

- 1) Advocate for better environmental protection statutes and strong enforcement. As the environmental lawyers pointed out, the recently-passed provincial environmental protection acts of the early 70s were a step in the right direction, but were fundamentally flawed because they conferred far too much administrative discretion on administrators, and generally had the effect of licensing pollution rather than prohibiting it.

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14. *EPA*, *supra* note 1.

- 2) Test the limits of the courts and sometimes the patience of the judiciary by bringing novel cases designed to create new causes of action and new environmental remedies, out of a body of law that was never, to be fair, specifically designed to protect the environment.<sup>15</sup> And, while waiting for the courts to embrace these novel causes of action, utilize nuisance, trespass, negligence, and the riparian rights doctrine whenever the opportunity arose.
- 3) Advocate for new types of environmental legislation, including those that could anticipate and avoid problems, rather than legislation whose regulatory mechanisms came into effect only *after* a problem had been identified.
- 4) Empower citizens by giving them:
  - a) the right to a clean environment;
  - b) the right to participate fully in the regulatory process;
  - c) the right to sue on behalf of the environment, rather than simply on their own behalf;
  - d) the financial resources to participate effectively; and
  - e) the knowledge and tools<sup>16</sup> to enforce environmental laws and become advocates for stronger, more effective laws.

This fourth and last goal became encapsulated in the call for an environmental bill of rights. The modus operandi for the environmental lawyers was to build political coalitions, advocate for better laws, and initiate test case litigation. The following examines the movement's successes in furthering the four goals set out above.

#### A. ADVOCATING FOR BETTER ENVIRONMENTAL PROTECTION STATUTES

What role did the movement play in shaping the first wave of provincial environmental protection statutes? The short answer is relatively little. Bills were introduced, a flurry of critical comment from the environmentalists ensued, but relatively little changed. Before looking at the environmental

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15. The common law was, however, designed to protect property rights and hence the "environment" of landowners. See *e.g.* Elizabeth Brubaker, *Property Rights in the Defence of Nature* (London: Earthscan, 1995).

16. CELA's first book was *Environment on Trial*, published by CELRF as a citizen's handbook on how to take legal action on behalf of the environment. David Estrin, *Environment on Trial: A Citizen's Guide to Ontario Environmental Law* (Toronto: CELRF, 1974).

lawyer's attack on the environmental protection legislation that was passed in the early 70s, it is important to remember what had existed prior to the passage of the statutes. The provincial statutes used to control pollution in the 1960s were really focused more on development than pollution control. Take the Ontario Water Resources Commission (OWRC),<sup>17</sup> for example, which was the predecessor to the Ontario Department of the Environment. Its principal purpose was to help municipalities secure sufficient potable water to serve the needs of a growing population.<sup>18</sup> In fact, the *Ontario Water Resources Commission Act* was passed to protect municipalities from private actions by downstream property owners who had successfully enjoined municipalities from discharging inadequately treated sewage into adjacent waterways.<sup>19</sup> Sewage treatment was a secondary goal and pollution control a distant third. At the federal level, the *Fisheries Act*,<sup>20</sup> dating back to the 1860s, was used as a blanket prohibition against the discharge of "deleterious substances" into "waters frequented by fish"—a potentially powerful tool, but infrequently invoked. Public nuisance was an offence in the *Criminal Code*, but this was too blunt an instrument to be of much assistance in controlling pollution. Natural resource development statutes sometimes included anti-pollution provisions, but again, the focus was on resource extraction and development, not pollution control. The typical provincial statute was more likely to sanction pollution than to control it.

The approach advocated by CELA and other environmental law groups represented a change in focus. First, they wanted the act of polluting to become an offence, punishable by large fines and, where appropriate, imprisonment. Second, they believed that the people (at least the residents of the province) should have a legal right to a clean environment, the ability to participate fully in the regulatory

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17. The Commission was launched in 1956 as another great public utility commission. For a good discussion of the history of the Commission, see J.B. Milner, "The Ontario Water Resources Commission Act, 1956" (1957) 12 U.T.L.J. 100.

18. The Commission was created in response to some high profile cases in which residents successfully sued municipalities for injunctive relief from the waste discharge of municipalities. The Commission was charged with the task of improving and regulating municipal sewage treatment facilities so that development could proceed unimpeded by private lawsuits. See *e.g. Stephens v. Richmond Hill (Village)*, [1955] O.R. 806 (H.C.), *aff'd* [1956] O.R. 88 (C.A.) (with variation as to damages).

19. *Ontario Water Resources Commission Act*, S.O. 1957, c. 88.

20. *Fisheries Act*, R.S.C. 1985, c. F-14.

process, and the legal tools (essentially a new legislative cause of action) to enforce that right. These three demands subsequently became characterized as an "environmental bill of rights." And, finally, CELA imagined legislation requiring proponents of new development to assess the potential environmental impacts of that development and to take steps to ensure that either the effects were properly mitigated, or, if that could not be achieved, that the project was refused permission to proceed. CELA and other provincial groups enjoyed some success in pointing out the failings of the first wave of cleanup and waste control statutes, such as the EPA, but CELA failed to achieve its goal of an environmental bill of rights for the citizens of Ontario, and its goal of comprehensive environmental assessment legislation—although both would come later. But first, a comment on CELA's critique of the Ontario *Environmental Protection Act*.

The problems with the provincial EPAs, as CELA and other environmental law groups pointed out, largely stemmed from their regulatory structure.<sup>21</sup> The legislation prohibited pollution (the discharge of a contaminant into the natural environment) but then it created an elaborate scheme to effectively permit or license the very pollution it sought to prohibit, provided the pollution did not exceed certain prescribed limits. This control scheme might have been fine if those limits or standards had been set by a process that gave equal voice to both the polluters and those affected by the pollution (the interested public). That is not what happened. The process, as explained by CELA, was biased in favour of those responsible for the pollution. In many respects this was understandable given the regulatory approach adopted. To be successful, the approach required the regulators (the provincial environmental departments) to have an intimate knowledge of the regulated industry, including the impacts, industrial processes, technology, and the environmental effects of the pollution. With that knowledge, the department could then establish emission levels that fell within the assimilative capacity of the receiving environment and, if necessary, prescribe the specific steps a company must take to achieve those levels. It was the industry, however, that had the most knowledge of the environmental impacts, almost all of the knowledge of what was technically possible, and knowledge of what effect technology would have on emissions. The departments, at least initially, lacked the resources to do independent

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21. See *e.g.* EPA, *supra* note 1; *Clean Air Act*, S.A. 1971, c. 16; *Clean Water Act*, S.A. 1971, c.17; *Pollution Control Act*, 1967, S.B.C 1967, c. 34; and *Environmental Quality Act*, S.Q. 1972, c. 49.

assessments and, therefore, became dependent on the regulated industry for information about the problem and how best to control it.

For its part, the industry was dependent on government to establish realistic standards. The result was a symbiotic relationship in which governments established standards that tended to reflect the interests of the very group that they had set out to control. Where standards had not been set, government attempted to regulate polluters on a case-by-case basis, often in response to complaints from nearby residents. Again, the regulatory system was biased in favour of those responsible for the problem. In these situations, company specific permits, licenses, or orders were issued, and these permits specified the actions to be taken and the technology to be installed. Failure to comply with the terms of the permit or order exposed the non-complying party to prosecution. The problem was that the permits had to be negotiated with the polluter and, given the department's lack of industry knowledge, at least during the early period of regulation, the negotiated outcome tended, once again, to reflect the interests of the regulated company. And in any case, the subject of the permit (the polluting company) had the right to appeal. On the other hand, the affected public played no role in the regulatory negotiations and, once a permit was issued, was faced with government-sanctioned pollution and no right to appeal the terms of the permit. Providing the company complied with the permit, the affected public now had no right to bring a private prosecution under the Act, and while individuals could sue for civil damages, there was some chance that a court would find that the defendant's activities were authorized by statute.

CELA and other environmental groups were successful in pointing out the flaws of the legislation<sup>22</sup> and the impact that such flawed legislation would have on public and governmental efforts to control pollution. Yet they would have to wait another twenty years in Ontario (and longer elsewhere) before the three goals of an effective regulatory structure,<sup>23</sup> environmental assessment legislation,<sup>24</sup> and an environmental bill of rights<sup>25</sup> were realized. It should also

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22. See Canadian Environmental Law Research Foundation, *Critique of Proposed Environmental Protection Act – Bill 94* (Toronto: CELRF, 1971).

23. Effectiveness largely came in waves, beginning in the late 1980s, with the introduction of liability for corporate officers and directors, followed by dramatically higher corporate fines, designated investigators, and full-time prosecutors.

24. *Environmental Assessment Act*, S.O. 1975, c. 69.

25. *Environmental Bill of Rights*, S.O. 1993, c. 28 [EBR].

be noted, however, that, during this period, sustained advocacy by environmental lawyers led to federal and provincial legislation to control the production, transportation, and discharge of toxins.<sup>26</sup>

#### B. TESTING THE LIMITS OF THE COMMON LAW

The shortcomings of the common law as a sword (as opposed to a reed)<sup>27</sup> in the hands of the environmentalist were glaring. Environmentalists had their action in nuisance,<sup>28</sup> but neither the components of the action nor the judges who adjudicated nuisance claims could make a dent in the pollution problem. Private nuisance required an aggrieved plaintiff who had suffered a loss to the use and/or enjoyment of his or her property. While such a loss seemed relatively straightforward and even easy to prove for most types of point-source pollution, a nuisance action was problematic for at least three reasons. First, it was seldom that a single individual would have suffered sufficient damage to justify an expensive civil suit, no matter how likely a successful result. Second, though the purpose of private nuisance is to remedy an unreasonable interference with the use and enjoyment of another's property, plaintiffs could never count on how a court would apply the reasonableness test. Would it relate to the interference with the plaintiff's land? Or would it be used to excuse the defendant's actions by concluding that a defendant's pollution was reasonable, having regard to the current technology, market conditions, and even the community's dependency on jobs from the defendant's plant? The result was that few prospective plaintiffs dared to sue, for, if they were unsuccessful, they were responsible for the defendant's legal fees. Third, even when a plaintiff was successful, an injunction was not a certainty.<sup>29</sup>

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26. At the federal level, see the *Environmental Contaminants Act*, R.S.C. 1985, c. E-12 and its successor the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), as rep. by *Canadian Environmental Protection Act*, S.C. 1999, c. 33; *Transportation of Dangerous Goods Act*, S.C. 1992, c. 34. Provincially, see legislation focused on toxic substance spills and contaminated site liability.

27. Taken from John P.S. McLaren's article, "The Common Law Nuisance Action and the Environmental Battle – Well-Tempered Swords or Broken Reeds" (1972) 10 *Osgoode Hall L.J.* 505.

28. This was, by far, the most popular cause of action.

29. While there is a presumption in favour of injunctive relief to protect property rights, courts have granted prescriptive easements in favour of polluters over neighbouring lands, and

On the face of it, public nuisance offered more hope, but the early environmental lawyers knew that few plaintiffs could overcome the standing hurdle that earlier courts had imposed. If the fishermen in Placentia Bay, Newfoundland lacked standing to sue a company whose pollution had decimated the fish stocks and effectively ruined their livelihood, then what hope was there for others?<sup>30</sup> What hope was there for a more novel action, such as a suit to enjoin a government and a company who would breach the public trust? If Stone could argue that trees should have standing then surely the public trust doctrine could be used to protect a public resource, such as a provincial park.<sup>31</sup> David Estrin of CELA argued in *Green* that the Ontario parks legislation created a trust relationship in which the park (Sandbanks Provincial Park) was held by the province in trust for the people of Ontario.<sup>32</sup> The province had granted a license to Lake Ontario Cement prior to the establishment of the park, to extract sand from land that was subsequently part of the park. Environmentalists were incensed that the very *raison d'être* of the park (its magnificent sand dunes) could be lost to a nearby cement manufacturer. The court's reaction to a lawsuit that sought to revoke the government's permit to extract the sand was one of incredulity. There was no Canadian precedent for successfully invoking the public trust doctrine, an ancient English concept with seemingly limited application beyond protecting the public right to pass over public roads and canals, and a right to access the foreshore of navigable waters. The action was dismissed with a scolding from Justice Lerner: "if resort to the Courts is to be had, care must be taken that such steps are from a sound base in law, otherwise ill-founded actions for the sake of using the Courts as a vehicle for expounding philosophy are to be discouraged."<sup>33</sup>

Not only were the common law principles not particularly environmentally friendly, but the legal process itself had some distinct disadvantages. First, it is built on the adversarial model, which encourages a defendant to deny

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where injunctions have been granted, legislatures have, in the past, come to the aid of industry by dissolving the injunction. See *McKie v. K.V.P. Co. Ltd.*, [1948] O.R. 398 (H.C.), *aff'd* [1949] 1D.L.R. 39 (C.A.), *aff'd* [1949] S.C.R. 698.

30. *Hickey v. Electric Reduction Co.* (1971), 21 D.L.R. (3d) 386 (Nfld. S.C.).

31. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (New York: Avon Books, 1975).

32. *Green v. Ontario* (1972), [1973] 2 O.R. 396 (H.C.) [*Green*].

33. *Ibid.* at para. 30.

responsibility for any environmental harm it may have caused and requires the plaintiff to prove in a civil suit on a balance of probabilities both damages and the causal link between the defendant's acts, the ensuing pollution, and the specific harm suffered by the plaintiff. That may be fine in the obvious cases of highly toxic discharges from a single source, but the moment uncertainty is introduced into the case, which is characteristic of many types of pollution, the burden of proof on the plaintiff becomes almost insurmountable. Indeed, the common law and the courts tend to be biased in favour of the status quo, which is clearly the wrong perspective in cases involving long-standing pollution problems. This is not to say that there were not some important early successes in the courts. *Gauthier v. Naneff* is often cited as a high-water mark of what can happen when a brave judge is met with a compelling plea from a resident to protect a city's (Sudbury's) water supply.<sup>34</sup> The irony of the case is that Gauthier won his injunction against the local Rotary Club's proposal to hold a fundraising speedboat regatta on Ramsay Lake—which was all in the shadow of the largest air polluter in the province. The company ultimately built a super stack and dissipated its own toxic emissions over a far wider area, to the detriment of a much larger population and of countless lakes in northern Ontario and Quebec. Small wins were celebrated, but the bigger problems were well beyond the scope of the common law principles and, it seemed, the institutional and personnel makeup of the courts.

The common law has proven to be relatively ineffective as a tool in the hands of aggrieved property owners,<sup>35</sup> with a few notable exceptions. The courts have, however, been instrumental in changing the decision-making process of company officers and directors. Once the legislature extended liability to corporate officials, and once the courts started fining and sentencing corporate officials for their company's failure to comply with the Act,<sup>36</sup> dramatic changes

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34. *Gauthier v. Naneff*, [1971] 1 O.R. 97 (H.C.).

35. See e.g. *Palmer v. Stora Kopparbergs Bergslags AB* (1983), 60 N.S.R. (2d) 271 (*sub nom.* *Palmer v. Nova Scotia Forest Industries*, 2 D.L.R. (4th) 397) (S.C. (T.D.)).

36. While there are several examples of courts convicting corporate officials under the 1988 amendments to the Ontario *Environmental Protection Act*, *supra* note 1, some recent cases are *R. v. Imperial Precast Corp.* (20 February 2006), Hamilton, LSB# 04-0489 (Ont. Prov. Ct.) (corporate director fined \$6,000); *R. v. Erie Environmental Services Inc.* (21 December 2004), Windsor, LSB# 04-0788 (Ont. Prov. Ct.) (company fined \$50,000); and *R. v. Newman Metal Processing Ltd.* (26 January 2004), St. Catharines, LSB# 02-1333 (Ont. Prov. Ct.) (corporate

started to occur in corporate offices and boardrooms. One participant at the Toronto round table, who was at the forefront of the movement in Alberta, remarked that cases such as *Bata Shoe*<sup>37</sup> have led to “profound changes in corporate decision making.” For responsible corporations, environmental issues are now front and centre, and many of these companies will either stop projects that may contravene the legislation or take the necessary mitigation measures to ensure compliance.

If the common law could not solve the larger, systemic pollution problems, and the early environmental protection statutes were, as CELA argued, a license to pollute, then what was the legal solution? CELA believed that it lay in a broader, more overarching set of legislative reforms: comprehensive environmental assessment legislation and the passage of a strong environmental bill of rights.

### C. ADVOCATING FOR ENVIRONMENTAL ASSESSMENT LEGISLATION

Surely, as CELA and others argued, it would be better to avoid the problem in the first place, rather than continually trying to play catch-up, either through the courts or the regulatory process, once the source of the pollution had been created and licensed. The logic behind environmental assessment legislation was to anticipate and prevent the problem, rather than to experience it and then try to respond to it. So compelling was the argument that the Ontario Ministry of the Environment issued a Green Paper on Environmental Impact Assessment in 1973, and that, in turn, prompted CELA to respond with a White Paper in October of 1973.<sup>38</sup> The White Paper set out CELA’s guiding principles for this brave new initiative (Ontario would become one of the first jurisdictions in the world to pass environmental assessment legislation). The principles from the White Paper are summarized below:

- 1) The assessment must be of the social, as well as of the physical environment, and must apply to both the public and private sectors.
- 2) Public participation must be meaningful, which means the public must:
  - a) have the right to trigger an environmental assessment;
  - b) receive access to all information about proposed projects;

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president fined \$5,000). These cases were provided by Dianne Saxe, a round table participant.

37. *R. v. Bata Industries Ltd.* (1992), 9 O.R. (3d) 329 (Prov. Ct.).

38. Canadian Environmental Law Association, *Principles for Environmental Impact Assessment*, (Toronto: CELA, 1973).

- c) receive public or private funding, when acting "in the public interest"; and
  - d) receive early notice of a proposed project.
- 3) The process must be overseen by an independent, powerful environmental review board.
- 4) The proponent of a project subject to assessment must:
- a) prepare, at its own expense, the assessment document;
  - b) include and consider all impacts from affected persons, outside experts, and government agencies, and, in doing so, discuss in detail feasible alternatives, including the alternative of not proceeding; and
  - c) complete all stages of the assessment and follow the assessment procedure as set out by the Board.

Support for the concept of environmental assessment and the approach adopted by CELA was widespread in the environmental law community. At its 55th Annual Meeting in Vancouver in 1973, the Canadian Bar Association passed Keynote Resolution No. 3, which affirmed its support for public participation in the planning and approval of projects that have a significant environmental impact and recommended the following:

- a) every project having a significant environmental impact be preceded by an environmental impact study, paid for by the proponent of the project and that this study and all other information obtained through public funds be made available to the public; and
- b) an individual or groups have the status to object to any such project and that upon such objection, a mandatory public hearing be held before a government approval or license is granted; and
- c) any individual or groups, with the leave of the court, on his or their own behalf or on behalf of the public, have the status before all courts or administrative tribunals to review such projects or enforce any governmental regulations without demonstrating a special interest or damage.<sup>39</sup>

The Ontario environmental assessment legislation, which was passed in 1975,<sup>40</sup> represented a significant step forward. It was a first in Canada, and promised a new approach to decision making for those projects that might have

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39. Canadian Bar Association, Keynote Resolution No. 3, *Public Participation in Environmental Decisions*, 55th Annual Meeting, 1973 reprinted in *ibid.*, 7 at 7-8.

40. *Supra* note 24.

an impact on the environment. The new *Environmental Assessment Act* was described by the Director of the Ontario Environmental Assessment and Approvals Branch in these terms:

[T]he *Environmental Assessment Act* is an important new decision-making tool designed to see that *all* potentially significant effects of proposed undertakings are identified at a stage when alternative solutions, including remedial measures and the alternative of not proceeding, are still available.

... [T]he Act is intended ... to consider also the effects on man, the man-made environment, and on society, including economic factors. That is why the *Environmental Assessment Act* is more than a pollution control statute.<sup>41</sup>

But, as some round table participants noted, there were problems. For one thing, the Act applied automatically to public sector projects, but not to those initiated by the private sector. Granted, there was the ability for the Minister to designate a proposed private undertaking as one requiring assessment (the so-called 'bump-up' provisions), but the decision to designate an undertaking was left to the Minister's discretion—a discretion that would almost never be exercised. Secondly, the Act lacked a coherent policy. Was it simply to be a better information-gathering device, or was it a new way to make decisions about proposed development that may impact the environment? Furthermore, too much discretion was vested in the administering ministry.

Environmental assessment legislation is now in effect in all provinces and territories, and in some land claims agreements. After relying on what it thought was a non-binding environmental assessment and review policy for twenty years, the federal government finally enacted environmental assessment legislation in the early 1990s<sup>42</sup>—largely as a result of *Oldman River*, a case initiated by the Environmental Law Centre.<sup>43</sup>

#### D. ADVOCATING FOR AN ENVIRONMENTAL BILL OF RIGHTS

The second and more sustained environmental legislation advocacy from the environmental law movement demanded what came to be called the

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41. Dennis Caplice, "Ontario's Environmental Assessment Act: What It Is and How It's Going to Work," (Paper presented to the Professional Engineering Association, June 1976) cited in D. Paul Emond, *Environmental Assessment Law in Canada* (Toronto: Emond Montgomery, 1978) at 31-32 [emphasis in original].

42. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (came into force 1995).

43. *Friends of the Oldman River Society v. Canada (Minister of Transportation)*, [1992] 1 S.C.R. 3.

environmental bill of rights.<sup>44</sup> The early environmental lawyers were inspired by the work of Joseph Sax<sup>45</sup> and the legislative initiatives in Michigan. The 1970 MEPA<sup>46</sup> did precisely what environmentalists had expected in Canada—namely, it conferred rights on the public:

- 1) to a healthy environment;
- 2) to participate in environmental decision making;
- 3) to government accountability for activities detrimental to the environment; and
- 4) to access the courts to ensure environmental protection.

The first right is easy to understand, but difficult to operationalize. The thought was that it would become the basis upon which a member of the public could ask courts to enforce the right, but again, how that would play out was unclear. Whatever doubts may have existed, environmental lawyers expected that, over time, the courts would develop a body of healthy environmental jurisprudence. The second and third rights were really designed to balance the governmental decision-making process that had been tilted in favour of pollution by giving the public rights of participation, and then requiring that the government take responsibility for any decisions or activities that could affect the environment. The fourth right provided a clue to how all this would happen, namely, by way of an application to a court to enforce a right.

The MEPA-inspired bill of environmental rights was, as CELA pointed out, the antithesis of Ontario's first *Environmental Protection Act*. That Act, according to CELA, derided every possible public or private right. Specifically, the Act provided the public with:

- 1) no right to participate directly in the Ministry's decision-making process;
- 2) no right to vital information;
- 3) no right to contest decisions made by the Ministry;
- 4) no right to appear before the environmental appeal board;

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44. This was the expression used by Premier W. Davis when the Ontario EPA was passed in 1971. CELA derided the Act by calling it "an environmental bill of goods."

45. Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred Knopf, 1971).

46. *Supra* note 6. For an excellent analysis of the Michigan and Ontario environmental bill of rights legislation, see Joseph F. Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experience" (1998) 9 *Vill. Envtl L.J.* 349.

- 5) no right to invoke the provisions of the Act to control or stop pollution causing damage to their property or health; and
- 6) no right to initiate private actions against the owner/operator of the source of the pollution.

So, advocacy on behalf of an environmental bill of rights took two forms. The first was to criticize the environmental protection legislation of the early 70s as falling well short of conferring the rights demanded (the point noted above); the second was to advocate for the ideal. More than twenty years after the Ontario *Environmental Protection Act*, the result in Ontario was the *Environmental Bill of Rights* (EBR).<sup>47</sup> The ideal was largely captured in the preamble of the EBR, but the implementing provisions failed to live up to its lofty promises.

The preamble of the EBR affirms the “inherent value of the environment,” recognizes that Ontarians “have a right to a healthful environment,” and states that Ontarians have a common goal of protecting, conserving, and restoring the natural environment “for the benefit of present and future generations.” It further provides that “the people should have the means to ensure that [the goal] is achieved in an effective, timely, open and fair manner.”<sup>48</sup> The purposes of the EBR are set out in s. 2(1) and are:

- a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
- b) to provide sustainability of the environment by the means provided in this Act; and
- c) to protect the right to a healthful environment by the means provided by this Act.<sup>49</sup>

Rick Lindgren of CELA summarized the legislative intent of the EBR as follows:

- to ensure meaningful public participation in environmental decision-making;
- to enhance government accountability for environmental decision-making; and
- to ensure that government decision-making results in the protection, conservation and restoration of the environment.<sup>50</sup>

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47. *EBR*, *supra* note 25.

48. *Ibid.* (Preamble).

49. *Ibid.*, s. 2(1).

50. Richard D. Lindgren, *The Environmental Bill of Rights Turns 10 Years-Old: Congratulations or Condolences?* (Toronto: CELA, 2004) at 5.

These lofty goals were reiterated by the Minister when he introduced the bill in the Ontario Legislature:

[The EBR] is built on the principle that everyone must be given the power to make a difference, to help protect the environment in the province . . . . [It] will give people unprecedented rights to act on their commitment to protect the environment in Ontario.<sup>51</sup>

How close has the EBR come to achieving the ideal? That depends on who you ask. Some of those who helped give birth to the legislation think it has come very close.<sup>52</sup> Others, such as the environmental law advocacy groups and the round table participants, are not so sure. Many of those at the round table agreed that the EBR has worked reasonably well in terms of meeting its procedural objectives—there is better notice of impending decisions, there is more public participation—but it has not worked particularly well in meeting its substantive objectives. Indeed the EBR might be a classic case in which a much improved decision-making process has not translated into similar improvements in the substantive outcomes of that process.

While this paper does not permit a detailed critique of the EBR, some of the problems with it as noted by some of the round table participants are as follows:

- 1) The Statements of Environmental Values (SEVs)<sup>53</sup> have not played the role in shaping or guiding ministry planning that was contemplated for them.
- 2) The Registry<sup>54</sup> does not provide sufficient background information to enable the public to make well informed comments.
- 3) The right to sue for public nuisance<sup>55</sup> has not enabled the public to sue, unless they can show direct personal harm.

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51. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 35 (27 September 1993) at 1000 (Hon. Bud Wildman, Minister of the Environment and Energy).

52. See Michael Cochrane, Presentation (Presented at the EBR Reform Workshop, "Looking Back: Ten Years of the EBR," 16 June 2004), where he is quoted as stating: "In my view [the EBR] has exceeded every single expectation in the last ten years. It is an untouchable piece of legislation and promises even more in the decades ahead." Mr. Cochrane is a Toronto-based lawyer who facilitated the discussions among business, environmental, and community groups that led to a draft EBR bill.

53. *EBR*, *supra* note 25, ss. 7-11.

54. The system of providing electronic notification of upcoming decisions. *Ibid.*, ss. 5-6.

55. *Ibid.*, s. 103.

- 4) While the right to sue for harm to a public resource was intended to serve as a last resort and was not expected to receive widespread use, it is too complex, too cumbersome, and too burdened with onerous preconditions and procedural hurdles to be of any real value to the public.
- 5) The leave to appeal (LTA) provisions<sup>56</sup> of the EBR were described by some at the round table as problematic: a difficult process with “insane” time restrictions, and too high a threshold for leave to appeal that is not “citizen friendly.”
- 6) Perhaps most significantly, the lofty goals set out in the preamble have not been incorporated into the substantive provisions of the EBR.

## II. WHAT HAS BEEN ACHIEVED AND “ARE WE THERE YET?”

As to whether we are there yet, there are two “theres.” One is the “there” that environmental lawyers sought in terms of new and improved environmental protection and conservation laws; the second is the “there” or the result that environmental lawyers had imagined they could achieve in terms of a better, cleaner, more sustainable environment—the substantive improvements to the environment that would flow from the laws that were enacted. We have made some progress on the first goal, as many at the round table were quick to point out. As for the second, the problems of pollution and environmental degradation have proven to be far more complex than was first imagined, and hence more difficult to fix. In fact, it may be fair to say that the legal tools promoted by the environmental lawyers in the 70s and 80s were simply not up to the task that lay ahead. Perhaps we could not have imagined in the late 60s and early 70s “the worrisome effects of growing populations, increasing consumption, and invasive technologies.”<sup>57</sup> Nor could we have imagined the scale or complexity of the problems. Looking back, the pollution from a pulp and paper plant seemed relatively straight forward, especially when compared with the problems of ozone layer depletion, global climate change, biodiversity loss, hydrological system disruption, trace chemical contamination, and now, zoonoses (transfer of disease from animals to humans). What laws are going to solve these problems?

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56. The ability to appeal the Director’s decision. *Ibid.*, s. 38-48.

57. See Paul Muldoon *et al.*, *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery, 2008).

#### A. ARE THE ENVIRONMENTAL LAWS "THERE" YET?

As for the early demands for better environmental legislation, we are at least partly there. The list of what has been accomplished is impressive. Under all environmental protection acts pollution is a crime (a provincial or federal offence). Command and control instruments are in place (although enforcement continues to be problematic).<sup>58</sup> Environmental assessment and planning legislation has been in place across Canada for more than thirty years (although not as long at the federal level) and has required the public sector, at least, to make environmental assessment and planning a part of its decision-making process.<sup>59</sup> And some provinces have environmental bill of rights legislation, even if it is not quite what was envisioned by the early environmental law advocates. Finally, as one participant suggested, a more recent focus on toxins has led to an impressive array of federal and provincial controls.

So we are almost "there," or at least we could be there with some relatively modest improvements to the laws. The problem is that having achieved much of what was aspired to, the environmental problems persist. One environmental lawyer at the Toronto round table analogized the situation to a football game in which "the progress we made on the field was offset by the fact that the goal posts kept moving further into the end zone." He claimed that "we're really no closer to a solution today than we were twenty five years ago." Fixing existing laws will certainly help us get "there." The question that remains is whether the law is enough.

#### B. IS THE ENVIRONMENT "THERE" YET?

As for whether the environment is "there" yet, no one at the round table really knew, although the strong sense was "no." Global warming, the growing loss of biodiversity, the reluctance to embrace sustainable practices, and the resulting (and growing) carbon footprint of individuals and communities on the planet all suggest that we are not there yet. But the Great Lakes are cleaner today, resource extraction practices are more environmentally friendly (with the exception of the oil sands), and the environmental perspective is firmly

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58. A number of round table participants noted that the biggest gains in controlling pollution over the last forty years have come from vigorous enforcement of command and control legislation.

59. This legislation, combined with growing sophistication of public interest groups, has brought about much of the balance sought by the early environmental lawyers.

embedded in the thinking and decisions of most public and private bodies. However, the chilling warning that Fabricant issued in 1971 continues to ring true:

[T]astes are bound to deteriorate further in the long years ahead. For the values of future generations will be molded by the world into which they are born ... . Our descendants will set environmental standards that we would view as intolerable. ... If pollution is permitted to worsen over the centuries and eons, we can nevertheless assume that life will adapt itself. "Living systems are systems that reproduce" ... [and] are also systems "that mutate, and that reproduce their mutations" ... even in a cesspool. But we cannot be certain that human life would adapt and survive.<sup>60</sup>

The risk is that failure to meet our aspirations may cause us to settle for far less than we are capable of achieving.

As I anticipated at the outset, the round table confirmed that much remains to be done. Will we be "there" anytime soon? Were the task left to the early pioneers, I suspect the answer would be no. Their proposed approach to environmental problems has sent us some distance down the road to a solution, but it may not be sufficient to get us "there." As one participant remarked, "we need a new dream."<sup>61</sup> Before we get to the new dream, there is still some unfinished business. Here is a list from the round table of what remains to be done from the "to do" list developed in the 70s, which was designed to take us closer to the environmental quality imagined almost forty years ago:

- 1) Do not abandon or even weaken regulation. The command and control approach, when accompanied by tough standards, sufficient resources, and vigorous enforcement has served us well. In fact, lapses in regulation have sometimes led to eco-tragedies, like Walkerton.
- 2) Extend and strengthen impact assessment legislation to include technology assessments and chemical assessments (including products containing chemicals). In conjunction with this move, some argued for the wholesale adoption of the precautionary principle, in which the default is to take precaution, unless the proponent can demonstrate

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60. Solomon Fabricant, "Economic Growth and the Problem of Environmental Pollution" in Kenneth E. Boulding *et al.*, *Economics of Pollution* (New York: New York University Press, 1971) 139 at 148-49.

61. Some of the early pioneers like Elizabeth May had a dream and have now converted their dream into political rather than legal action. Elizabeth May is currently the leader of the Green Party of Canada.

that the proposed action does not pose unreasonable risk to health or to the environment.

- 3) Fully implement the EBR concept by including such important rights as intervener funding.
- 4) Extend the rights concept to the *Charter*<sup>62</sup> by amending the *Charter* to include a constitutional right to environmental quality.

What might the new dream look like? Who will dream it and who will implement it? The round table discussion ranged from the modest to the more dramatic, and perhaps typical of an older group, did not reference many of the new developments in environmental law policy. The more modest aspects of the dream will involve utilizing market and other instruments to reinforce the goals of environmental regulation. Charges and economic penalties, performance bonds, insurance, and tax credits might also be implemented to induce investors, producers, and consumers to adopt environmentally sustainable practices.<sup>63</sup> Eco-labelling would give consumers the information they need to make wise environmental choices. Education in schools is creating heightened awareness among future consumers of the importance of making the right environmental choices. Ultimately, as some participants noted, success will require societies to change their focus from damage reduction (something that much of the world has not yet embraced) to positive contributions to the environment. We need mechanisms that will encourage countries to compete to be the most sustainable (something that is starting to happen in Europe), rather than to be the most cost-effective or efficient, or to generate the highest gross domestic product (GDP).

A more dramatic solution is one that looks to social and spiritual change rather than economic and legal instruments. This imagines a completely different mindset in which conservation, minimal impact, precaution, and sustainability are addressed prior to undertaking development. Who will lead this new movement? The next generation of environmental lawyers will play a part, but this is not a single-discipline task. They will partner with economists,

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62. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11.

63. One can only hope that high oil prices will lead to the change in consumer behaviour that some at the round table had predicted when prices spiked in the early 70s.

political scientists, sociologists, educators, and even religious leaders to bring about a change in perspective.

What coalition of environmental advocates will realize a new dream? Who are the new pioneers of the next environmental movement? First, it is the law students. Notwithstanding some misgivings at the Toronto round table about the level of passion among current law students, most agreed that today's students are just as passionate, just as focused, and just as well taught and led as their predecessors. And today's students are happy to stand on the shoulders of those who have gone before them,<sup>64</sup> learn from their experience, build on their successes, and look for new opportunities to advocate for stronger, more effective environmental laws. They may not be as loud or as wildly optimistic as their predecessors, but a broad-based coalition of lawyers, scientists, and others who have embraced, or are embracing, an ethic of environmentally responsible behaviour may be more effective. From buying locally grown food to embracing sustainable technologies and practices, to reducing one's carbon footprint, people are looking for ways to reduce their impact on the planet. But much more still needs to be done. Crises, such as a spike in oil prices or concern over global warming, tend to provoke politicians to act in ways that have little regard for the environment, as the West's current infatuation for bio-fuels has demonstrated. The drive for "cheap everything" has fuelled consumerism and pushed production into jurisdictions that have shown little regard for environmental concerns, all in the name of greater quantities of less-expensive stuff. Add to the current wave of consumerism the potentially toxic effects of new technologies and new compounds—many of which are not fully understood and none of which are properly regulated in some jurisdictions—and we have a recipe for more environmental and public health disasters. It has to stop. The environmental lawyers and the laws cannot do it on their own. We do, indeed, need a culture that embraces the ethic of care and respect, and that falls well beyond the scope, but certainly not the imagination, of today's new environmental law warriors.

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64. Two recent graduates attended the round table and offered their perspective on this topic as a final contribution to the discussion.