McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 36 1991 *No 3*

Preface

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This is exciting and unique legal scholarship.

One could not have envisaged such a substantial study of legal approaches to environmental problems twenty years ago. This collection of essays reveals the unique interdisciplinary, co-operative and imaginative innovations that fostered the evolution of environmental law into a mature and fundamental discipline in less than two decades.

These essays capture the breadth of environmental law: in geographical focus, from municipal to supranatural; in sources of law, from custom and oral traditions to multilateral treaties; in disciplines from anthropology to zoology.

Three themes emerge from these essays: the profound interconnection of natural phenomena, the importance of interdependent analysis, and the necessity of interdisciplinary solutions. These three salient themes and the breadth of coverage highlight the excitement and uniqueness of the legal scholarship in these essays, and in the evolution and character of environmental law.

Let us briefly examine each lead article to test these observations.

"The Greening of Environmental Law" is a deceptively clear analysis of the three stage evolution of environmental law over the last two decades — from merely symbolic regulation, to preventive regulation, to co-operative problem solving. It is deceptive simply because it makes easy to read what has been frustrating to live through. The challenge for lawyers in the current stage of cooperation is bold and demanding. Only by changing the way decisions are

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made, will we avoid the mistakes of both the process and outcomes of our decision-making structures. To change the way legal decisions are made, lawyers must show a greater mastery of non-traditional legal technique and a greater reliance on non-legal expertise. The author puts this challenge for change as a direct assertion:

> What is needed is a new model that will redirect these energies toward practical solutions to real environmental problems. This model must be based on principles that emphasize interdependence, connectedness, respect and obligation, and co-operative approaches to problem-solving.[1]

No small ambitions here.

Next we have an essay that is genuinely local and personal, one that illustrates individual behaviour and an historic incident of participatory democracy. "Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" analyzes the proposition that private prosecutions play a key role between the *promise* of governments to enforce environmental laws and their *performance*. In fact it emphasizes an inability of governments to achieve compliance with environmental laws solely through current administrative regimes. The essay applauds the instrumental contribution of citizen participation in generating public confidence in government. It does so with a quite fundamental analysis of participatory and representative democracy and the rapid evolution of some new forms of these in Canada over the past 30 years.

The third article, entitled "Sustainability," looks "prior to" the legal framework to the sobering and essential question: Can life continue as we know it? This question presses us beyond conventional intellectual tools to gain a fundamentally new perspective on the meaning and importance of sustainability. This essay is as much about social policy and political economy as it is about rules. It probes sustainability before proposing reforms for a legal universe to support sustainability, in six broad areas: authoritative decision-making mechanisms, provision of economic framework initiatives, proscribing behaviour, regulatory economic methods to influence behaviour, amending citizens' rights, and adjudicating disputes. The author questions whether the law as presently conceived, formulated, and administered can adequately respond to the need to develop a legal framework that fosters the principles of sustainability.

This allows a natural jump to the essay "The Baltic Sea Area and Long-Range Atmospheric Pollution — How Regional Co-operation Fits into the Larger Picture." It traces how international law has evolved to protect the environment. This essay is also timely in demonstrating the capacity for regional co-operation amongst heterogeneous nation states, and the ability to arrange

[1]D.P. Emond, "The Greening of Environmental Law" (1991) 36 McGill L.J. 742 at 759.

"East-West" co-operation even before the end of the Cold War. We have here a most useful set of multilateral precedents for extension to other regional conventions and for much wider applications.

Un lien logique autant que géographique conduit à l'article suivant, « Le droit soviétique de l'environnement ». On ne peut que déplorer avec l'auteur et son analyse des récents développements du système légal environnemental soviétique, les limitations politiques et la fragilité des systèmes législatif et économique. Celles-ci apparaissent inhérentes à une société en état de bouleversement où toutes les fondations sont ébranlées.

"Aboriginal Group Rights and Environmental Protection" constructs a legal base for aboriginal peoples' group rights and roots them in the environment. The essay proposes that the ethical principles underlying aboriginal group rights provide a basis for sustainability in environmental law and for formal recognition of self-governing aboriginal communities. This is a uniquely Canadian essay both in sources and substance, but it plunges us directly into the wider sea of emerging international and constitutional law.

"Environmental Impact Assessment in the Canadian Federal System" brings Canadian lawyers onto familiar and oft-tilled turf — the discussion of federal-provincial powers. This essay provides a current analysis of the constitutional foundation for involvement by the federal government in wide ranging applications of environmental impact assessments. It reviews the most recent cases in federal government policy and regulatory initiatives as well as American and Australian experiences. The review of governmental powers and the pressure for devolution arising from the failure of Meech Lake, will ensure that this essay's findings will be carefully examined.

« La portée de la nouvelle loi dite du 'pollueur-payeur' » nous amène sur un terrain législatif et géographique familier — le développement au Québec du principe de « tort » à l'aide d'une comparaison détaillée avec le système législatif fédéral des États-Unis. Cet article démontre avec minutie l'évolution sociale du principe du « pollueur-payeur » et ses limitations en tant qu'arme principale dans l'arsenal de la protection environnementale.

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Readers of these essays and the accompanying comments and reviews will know that simplistic solutions will not suffice for current environmental problems. These essays, in depicting the unique characteristics inherent in the evolution of environmental law, provide the basis for encouragement as scholars and practitioners from all disciplines must now create a legal framework that fosters the principles of sustainability.

The Brundtland Commission, in its landmark report *Our Common Future*,[2] issued a critical challenge to the present generation to meet its needs without compromising the ability of future generations to meet theirs. The response from the legal community to this challenge must be to follow the pioneering work that forged the current body of environmental law. As these essays so clearly illustrate, this pioneering work demands extensive interdisciplinary co-operation, innovative and imaginative solutions, and an underlying appreciation of the interconnection and interdependence of all natural as well as socio-economic systems.

A legal framework for sustainability must be derived from a recognition that the health of our economic and social order is directly related to the health of our environment.

The evolution of a legal system that champions sustainability must be driven by the primary fiduciary duty imposed upon each generation to ensure the environment is protected for future generations. Simply put, we do not receive our environment as beneficiaries but as trustees.

To move towards sustainability, environmental considerations of biodiversity, conservation and optimal use of natural resources must be integrated into decision-making processes at all levels of human activity, individual and collective, and crystallized in our novel expressions of the rule of law.

One of Canada's responses to the *Brundtland Report* challenge has been the creation of "round tables" which are designed to serve as catalysts for a new order of integrated decision-making. The federal government, each of the ten provincial governments and the two territorial governments, and increasingly municipal and regional governments across Canada, have created round tables. These bring together many diverse interests (cabinet ministers, business, environmental and other non-governmental groups, scientists, educators) with direct stakes in environmental, social, and economic objectives and provide a forum for traditionally competing interests to find common ground for sustainable development.

The round tables are examples of the co-operative problem-solving stage of evolution prescribed in the essays authored by Professors Emond and Elder in this special issue. They attempt to emulate the imaginative and broad interconnected approaches elaborated in this special issue of the McGill Law Journal.

Several concluding observations arise from this brief review of environmental law in Canada. First, continuous critical appraisal of the adequacy of the

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[2]World Commission on Environment and Development (WCED), *Our Common Future* (Oxford: Oxford University Press, 1987) [hereinafter *Brundtland Report*].

legal system is essential, not simply to protect the physical environment but to realize sustainability.

Secondly, the integration of environmental protection and economic development will bring law, science, political economy, business administration, and political science together in unique and challenging ways. It requires a broad range of new techniques, often mixing private property and public interest rights and responsibilities, incentives and disincentives, sanctions and rewards, conventional and co-operative rule making and traditional and alternative dispute resolution.

Thirdly, we must fix our attention on sustainability within a global context in our quest for justice and not limit ourselves to the rearrangement of rules implementing conservation strategies.

Finally, as the parameters and content of environmental law and sustainable development become both more comprehensive and better understood, there will be an increasing need for the type of scholarship shown in this issue. Critical thinking built on transdisciplinary knowledge will mould the innovative legal frameworks necessary to meet the challenges posed by sustainability. Empirical research, testing doctrine against scientific and social reality, will have new prominence and impact. What a good start is made in the pages which follow.