
The Greening of Environmental Law

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Environmental law in Canada has moved through three distinct stages. The first, beginning with the passage of the early environmental protection statutes, is described as symbolic regulation. "Regulation," because these laws did purport to regulate activities that had deleterious effects on the natural environment, and "symbolic" because the level and degree of regulation was largely symbolic. By the mid '70s and early '80s these laws had given way to two complementary developments. The first involved the introduction of environmental assessment (or audit) statutes and procedures; the second involved a strengthening and expanding of the traditional regulatory tools. The clear thrust of this period was preventive or how to anticipate and avoid potential environmental problems before they arose. Neither symbolic regulation nor preventive regulation have been particularly successful in avoiding or remedying pollution problems, however. The approaches either proceed from a wrong premise about the nature of the problem (market or technological failure) or assume that the solution lies in a process that is highly adversarial and hence time-consuming, expensive and unlikely to generate creative solutions to difficult problems. Growing recognition of these deficiencies has led to a third, greener stage of environmental regulation: co-operative problem-solving. The premise behind this approach is that all of society shares the problem of environmental degradation and hence all of society must work together to solve the problem. This new and emerging stage of "regulation" is not without its problems, but it clearly offers the promise of harnessing the creative energies of all sectors of society to build co-operative solutions to environmental problems.

Au Canada, le droit de l'environnement a évolué en trois étapes distinctes. L'adoption des premières lois sur la protection de l'environnement marqua le début de la première étape, qui fut une période de réglementation symbolique. Les lois adoptées durant cette première phase visaient à réglementer des activités ayant une influence nuisible sur l'environnement mais leur contenu réglementaire était, en grande partie, minime et donc « symbolique. » Dès le milieu des années '70 et le début des années '80, ces lois ont cédé leur place à deux développements complémentaires. Le premier entraîna l'introduction de procédures et de lois qui visaient à assurer l'exécution d'études d'impact environnemental; le deuxième se manifesta par un renforcement et un élargissement des outils réglementaires traditionnels. La réglementation environnementale durant cette période a mis l'accent sur la prévention: elle tentait d'anticiper et d'éviter les problèmes environnementaux avant qu'ils ne surviennent. Toutefois, ni la réglementation symbolique, ni la réglementation préventive a vraiment réussi à éviter ou remédier aux problèmes de pollution. Ces approches sont fondées sur de fausses prémisses quant à la nature du problème (imperfection du marché ou lacune technologique) ou présument qu'un processus extrêmement conflictuel, qui est long, cher et peu créatif, produira une solution aux problèmes environnementaux. Une plus grande reconnaissance de ces lacunes a mené à la troisième étape de la réglementation canadienne de l'environnement. Celle-ci est caractérisée par une approche plus « verte » et plus coopérative au règlement des problèmes environnementaux. Cette approche est fondée sur la prémisse que tous les membres de la société font face à la dégradation environnementale et donc que tous doivent travailler ensemble pour résoudre ce problème. Cette nouvelle étape, qui est encore aujourd'hui en voie de développement, présente elle aussi des problèmes, mais elle offre la possibilité que tous les groupes de la société vont se servir de leur énergie et créativité pour formuler des solutions coopératives aux problèmes de l'environnement.

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Introduction

Environmental law has changed dramatically over the last twenty years since modern environmental protection statutes were first enacted in Canada. While the word "greening" is perhaps somewhat over-used, it does, in my view, describe the stages through which environmental law has "progressed" over this period, and the levels of consciousness or frustration through which environmental counsel have moved. This paper has two objectives. The first is to organize the development of environmental law into three stages of consciousness. The labels that best describe each stage are: symbolic regulation; preventive regulation; and mutual or co-operative problem-solving. The second objective is to focus on the third stage, examine the ramifications of a more co-operative approach to solving environmental problems and speculate about the implications of this approach for environmental lawyers.

While there are a variety of ways in which one might trace evolving perceptions of pollution and legal responses to those changing perceptions, I believe that both fit nicely into the three distinct stages noted above. Each stage is characterized by a unique perception or definition of the problem and that in turn has prompted a particular response. Furthermore, each response has encouraged a unique form of participation from the principal actors — the regulatory departments, the corporations and the public interest groups. This paper focuses on the representatives of each actor, the environmental lawyers, and their roles in the environmental protection process. The stages are not mutually exclusive. All three overlap as one set of perceptions and definitions fades into another. Not all jurisdictions have adopted similar approaches to solving environmental problems, although I believe that all are moving slowly or will be forced to move towards the third, “greener,” more enlightened and more effective approach to the issues of pollution and environmental degradation.

I. Stage One: Symbolic Regulation¹

The focus at this point in the regulatory cycle is on the obvious — smokestacks spewing black smoke into the sky, or outfall pipes discharging fibrous sludge into lakes and rivers. Without trying to belittle these early regulatory efforts, this form of regulation follows a predictable pattern. First, the regulation usually responds to either an environmental “catastrophe” such as an Exxon Valdez² or to recent revelations about consumption practices and impending environmental doom. The Club of Rome³ painted an especially vivid picture in 1972 of the environmental nightmare that lay ahead unless governments intervened to curb growth and promote conservation. Notwithstanding the rhetorical outrage of the public and crusading legislators, the regulatory legislation that followed was flawed. It invariably vested enormous discretion in the regulator and thus laid the foundation for a process in which the enthusiasm and zeal of

¹I label this stage “symbolic” because although the legislation purports to prohibit pollution, it does much to sanction and legitimize it. In this way an apprehensive public receives symbolic reassurance that pollution is under control while the regulated “polluters” receive government approval for their activities.

²The Exxon Valdez is the tanker from which more than 10 million litres of black, thick north Slope crude oil spilled into Prince William Sound, Alaska. The oil spill occurred on March 24, 1989 and is the worst oil spill in American history. Exxon Valdez has become synonymous with major maritime oil pollution and is representative of the environmental devastation that can be caused by a simple navigational error.

³The Club of Rome is the name given to a group of business people, officials and academics who met in Rome in the late 1960s to consider the future implications of a course of world action that seemed to threaten the world environment. The group’s report, D.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) and its successor, M.D. Mesarovic & E. Pestel, *Mankind at the Turning Point: the Second Report to the Club of Rome* (New York: Dutton, 1974) generated great interest from the business and academic community.

the optimistic regulator could be converted into the comfortable working relationship of the cynical environmental manager. Dependent on the regulated for information and legitimacy, both the regulator and the regulated had no real option other than to strike a symbiotic balance in which each contributed to the political well being of the other.

A. *Definitions of the Problem*

How a society responds to a problem depends very much on the way in which it defines it. During the first stages of environmental regulation the problem is sometimes described in terms of market failure, sometimes technological failure and sometimes both. The story that best describes pollution as a market failure is told by Garrett Hardin's "The Tragedy of the Commons."⁴ Pollution, according to Hardin, results from the over-utilization of a finite and "common" or "public" resource such as air, water, or in some cases, land. According to Hardin, the problem is not pollution *per se* — indeed, some pollution is to be expected. The problem is that the pollution generated by individuals pursuing their own self-interest in an unregulated market economy always exceeds the carrying or assimilative capacity of the receiving environment. This is due to the fact that there are no countervailing market forces that would limit the level of pollution generated to an "optimal" or "efficient" level.⁵ The market is like a cancer. It facilitates growth and the production of pollution until the growth chokes the "common" resource to death.

Hardin explains this phenomenon in terms of the market incentives and disincentives facing each individual generator of pollution. Each unit of pollution creates both costs and benefits. The costs relate principally to the environmental degradation of common environmental resources which are shared by all members of society, or at least by all members of the community into which the pollution is discharged. The benefits of pollution, on the other hand, derive from the reduced production and pollution control costs that flow from untreated waste discharges. These are enjoyed primarily by those associated with the production process — the owners of the process, perhaps the consumers of the product in the form of lower prices, and possibly also the employees in the form of higher wages. The result of this lack of symmetry between environmental benefits and pollution control costs is predictable. Because the "cost" of the pollution is borne more or less equally by all members of the community⁶ and because the "benefits" of lax pollution control practices are concentrated in the hands of the polluter, a rational, profit maximizing producer will *always choose*

⁴(1968) 162 Science 1243.

⁵"Efficiency" is generally understood to mean the point at which the marginal cost of pollution control equals the marginal benefit of a cleaner environment.

⁶I say "more or less" because those who live upwind and/or upstream of the source may temporarily avoid the grossest forms of pollution.

to pollute as much as possible. Only government intervention, according to Hardin, will break the logic of doing that which imposes minimal, because shared, costs on the environment and substantial, because not shared, benefits on the actor.

The story that describes pollution as a technological problem is more complicated. Barry Commoner tackled the question of the relative contribution of technology to increased levels of pollution in his classic work, *The Closing Circle: Confronting the Environmental Crisis*.⁷ He concluded that while population and affluence clearly accounted for some of the increase in pollution, it was almost trivial compared to that brought about by new technologies. He wrote:

the kinds of goods produced to meet these [population] needs have changed drastically. New production technologies have displaced old ones. Soap powder has been displaced by synthetic detergents; natural fibres (cotton and wool) have been displaced by synthetic ones; steel and lumber have been displaced by aluminum, plastics and concrete; ... On the farm, while per capita production has remained about constant, the amount of harvested acreage has decreased; in effect, fertilizer has displaced land. Older methods of insect control have been displaced by synthetic insecticides, such as DDT, and for controlling weeds the cultivator has been displaced by the herbicide spray ... In each of these cases, what has changed drastically is the technology of production rather than over-all output of the economic good.⁸

The problem, according to Commoner, is not the quantity of waste generated, although clearly "too much" is undesirable, but rather the quality of waste generated. Increasingly, the natural is replaced by the synthetic, labour is replaced by technology, and finally, the relatively benign replaced by the persistently toxic.

Each story or definition of the pollution problem evokes its own response and its own solution. When pollution is described as market failure, it generates a call for government intervention and regulatory action to correct the deficiency or failure. Such intervention is usually cloaked in such principles as "the polluter pays" or the need to "internalize all the costs of production." Whatever the principle, the public response is more or less the same — a relatively sophisticated regulatory regime designed to correct the failure by specifying appropriate or optimal discharge levels. The "optimal" level is "found" by engaging in the highly speculative and theoretical task of determining the level of pollution that would be discharged if the polluter was required to pay all the environmental costs of the pollution. I say "speculative" because it is not clear what the costs to the environment really are. Many are long-term, difficult to predict and impossible to quantify. Even short-term quantifiable costs are bound to provoke

⁷London: Jonathan Cape, 1972.

⁸*Ibid.* at 144.

lively debate, if only because it would be both inefficient and "irrational" not to pollute up to the assimilative capacity of the environment.

When pollution is described as a technological problem, legislators' attention turns from correcting market failure to finding appropriate technological fixes. Here the focus is on prescribing the right technology. This is sometimes described as the best available technology (B.A.T.), although it is more often described as the best practicable technology (B.P.T.).⁹ The solution is technical or scientific. Assimilative capacity is a relevant concept, but it no longer dominates. The regulatory legislation is highly discretionary. Environmental quality is generally cast in terms of "objectives," rather than legally enforceable standards. After all, you cannot ask someone to do more than is technologically possible. Nor can you necessarily guarantee that a particular technology will achieve a predetermined result. The focus is on prescribing the appropriate technological fix, rather than on achieving a particular result.

Whether a problem is defined in economic or technical terms is, of course, important for purposes of selecting a solution. But the *specific* description of the problem has a dramatic impact on the "solution." Provincial efforts to find a solution to toxic waste disposal problems provide a classic example of this point. For most jurisdictions, the problem is defined in terms of siting, designing, building and operating a state of the art *disposal* facility. When the problem is described in these terms, the solution is predictable — a Swan Hills¹⁰ in Alberta, or an Ontario Waste Management Corporation (O.W.M.C.) facility at Smithville.¹¹ Both facilities offer the best "proven" toxic waste disposal *technology* available. Both facilities are "adequately" sited from a hydrogeological and land use planning perspective. Both assume some market failure or technological shortcoming in the private sector. In other words, both assume and thus perpetuate the continued existence of the problem. Neither approach, however, attacks what I would describe as the root cause of the problem, namely, a propensity to focus on treating undesirable outputs rather than reorienting society's focus on inputs and production processes.

⁹An even better expression might be the "least worst technology."

¹⁰Swan Hills is a small Alberta community, 125 miles northwest of the City of Edmonton. In the early 1980s, the community volunteered to host a hazardous waste management facility and was subsequently selected by the Alberta government as the site for the facility. The Swan Hills siting exercise is described by A. Armour, "Facility Siting: A No Win Option, Pt. II" (1987) 3:1 C.E.M.N. 1.

¹¹Smithville is a small farming community in southwestern Ontario and has been identified by the Crown corporation as its preferred site for the proposed facility. The proposed site, facility and other aspects of the facility, including whether the facility is needed, are now the subject of a hearing before the joint board, a body established under the *Consolidated Hearings Act*, O.R. 1981, c. 20, to hear matters that relate to land use planning, environmental assessment and expropriation. The Board is comprised of members from the Environmental Assessment Board and the Ontario Municipal Board.

Having committed enormous resources to site and build such a facility, a strong economic and technological incentive develops to structure regulatory policy in such a way that waste is actually created, transported, treated and then disposed of. Completely missing from the analysis — both in terms of the way in which the problem is defined and the way in which potential solutions are canvassed — is any thought that the issues might be defined in terms of how to *avoid* the creation of toxic substances in the first place, or how to recover and reuse the constituent parts of these substances. Even the less radical alternative of combining a reuse and recycling policy with an upgrade or retrofit of an existing toxic waste disposal facility is not examined. By assuming steady growth in the creation of toxic substances and recognizing the difficulty of siting major new toxic waste facilities, the solution is obvious — a state of the art, technically sophisticated, centrally located disposal facility. And, of course, once a community has invested heavily in such a solution, the problem is destined to continue.

B. Process

Because law is generally regarded as a process for regulating conduct, it will come as no surprise that correlations extend between perceptions of problems, definitions of problems, solutions to problems and legal mechanisms or processes for putting those solutions into effect. Thus, if a solution is characterized as regulating discharges of contaminants so as to achieve an economically optimal or acceptable level of pollution, or the installation of suitable technology to achieve an acceptable result, the legal role is to direct, control and prescribe individual activity to that point. This will likely be achieved via permits, licenses and orders, and the regulatory functions enforced through administrative and quasi-judicial sanctions.

The pollution control process is, in my opinion, made up of three quite distinct parts. The first involves defining “optimal” levels of pollution (and hence “optimal” levels of environmental protection). The second attempts to achieve an “optimal” result through specific action. The third part of the process is concerned with enforcing the regulatory actions taken. Dividing the pollution control process into its theoretical parts enables one to identify a policy making part, a policy implementation part and finally a policy enforcement part. Elsewhere I have argued that some processes are better designed to carry out some tasks than other processes and that the failure of environmental regulations is largely explained in terms of the failure to use a process appropriate for the task at hand.¹² It is now possible to summarize this thesis and suggest that the early

¹²D.P. Emond, “Alternative Dispute Resolution: An Overview” in D.P. Emond, ed., *Commercial Dispute Resolution* (Toronto: Canada Law Book, 1989) 1.

failure of environmental regulation stems from two primary factors: the limited way in which the problem was defined and "process misfit."

There were other problems as well. Given the uncertainty and lack of knowledge about pollution, it was inevitable that this early legislation would treat pollution control as a "bargaining process" with negotiations usually initiated by the regulatory department with the person responsible for the pollution. Neither the department nor the polluter was able or prepared to implement a credible solution on its own. The regulatory agency lacked the staff and the expertise to fully understand the *science* behind the problem, let alone the solution. The polluter, on the other hand, lacked both the economic incentive to initiate solutions or the public confidence to put a solution into effect. A symbiotic relationship developed between regulator and polluter. The regulators needed, and hence became reliant upon, the industry's knowledge of the problem; industry needed the credibility of an apparently vigorous regulatory regime. Under this symbiotic relationship, there was no room for the potentially disruptive participation from either the general public or affected citizens. The result is symbolic regulation.

C. *The Lawyer's Role*

What has been the role of lawyers during this first stage of environmental regulation? Regulatory counsel have been almost powerless. Legislation cast in general objectives or guidelines is largely unenforceable, at least using traditional legal sanctions. Furthermore, because tough prosecutorial action would clearly threaten the "good working relationship" that was continually emerging between the regulator and the regulated, it was discouraged. Once a good "working relationship" was established, the likelihood of successful prosecution was seriously undermined by the prospect of the court finding that a prosecution, in such circumstances, would amount to an abuse of the legal process.¹³

The result was that very early in the process, regulatory counsel turned to the regulated industry for technical information, estimates of environmental damage, and of course, advice on what was "realistic" as a goal. Assistance was sought and received behind closed doors. Some tough bargaining clearly took place, but most was designed to reconcile the competing objectives of environmental protection and financial feasibility. Accommodation with industry usually meant that environmental objectives were sacrificed on the altar of political

¹³*Abitibi Paper v. R.* (1979), 24 O.R. (2d) 742, 99 D.L.R. (3d) 333 (C.A.). The *Abitibi* case related to a situation in which the company and the Ontario Ministry of the Environment had extensive discussions with regard to the terms of a proposed Ministry-issued control order. Before the discussions resulted in a formal order, the Ministry prosecuted and the court subsequently held that the prosecution was an abuse of process. The case raises the nice question of the extent to which government industry negotiation will subsequently jeopardize the ability of government to use its prosecutorial powers to enforce the provisions of a statute.

and regulatory expediency. Talk may have been tough, but actions were not. The few prosecutions that did take place were usually responsive to sustained public pressure, half-heartedly pursued, and often targeted on the weaker, less politically attuned members of the production sector.

Corporate counsel practised two quite different strategies during this early stage of environmental law. The first has been to “deny, resist and defend” — deny the problem, resist regulation and then vigorously defend prosecutions given the inherent uncertainty of the pollution problem and the ambiguity of most regulatory standards. This strategy has been surprisingly successful, at least from the client’s point of view. By moving regulation into the judicial forum, corporate counsel is also able to exploit the law’s preference for individual rights (usually of the polluter, but sometimes of those dependent on the accused, such as employees) over community rights. Again, judicial safeguards relating to the onus and burden of proof,¹⁴ standing,¹⁵ and the recent development of the due diligence defence¹⁶ have all helped ensure that polluters received the benefit of the doubt.

A second strategy of corporate counsel has been to adopt a more co-operative approach and to negotiate with the regulators. The essence of this approach has been to concede that there is a problem and that some regulation is inevitable and perhaps even preferable. After all, compliance with regulatory standards generally immunizes one from prosecution. Once a problem is admitted, corporate counsel’s role shifts first to defining the parameters of the problem and then to mapping out the components of a potential solution. If the problem is characterized in technical or scientific terms, the “solution” clearly lies in the hands of the experts — generally a group in the employ of the company or more accurately “the industry.” Furthermore, technical solutions are invariably tempered not only by what is practical or feasible, but also by what is fair. Mr. Justice Bergan’s often quoted phrase captures both concepts extremely well: “[solution to] air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health.”¹⁷ Justice Bergan continued:

techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period ... [T]he rate of the research is beyond control of defendant. If ... the whole industry has not found a technical solution a court would be hard put to

¹⁴See, e.g., *Palmer v. N.S.F.I.* (1984), 2 D.L.R. (4th) 397, 12 C.E.L.R. 157 (N.S.S.C.T.D.).

¹⁵For a discussion of the present law, see, Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989).

¹⁶See *R. v. Ellis Don* (1990), [1991] 1 O.R. (3d) 193 (C.A.), Galligan, J.A.

¹⁷*Boomer v. Atlantic Cement* 257 N.E. 2d 870 at 871, 26 N.Y. 2d 219, 309 N.Y. 2d 312 (Ct. App. 1970).

close down this one cement plant if due regard be given to equitable principles (emphasis added).¹⁸

Regulators are persuaded by the “logic” of the cost-benefit analysis, appeals to “fairness,” concern about the economic impact of “close regulation” and the persistent claim that there is no hard “proof” of environmental damage. Courts have merely served to reinforce these tendencies.

If the problem is characterized as economic or market failure, corporate counsel are able to set the regulatory agenda by suggesting that regulatory policy should reflect “optimal levels” of pollution. Optimal is usually defined by adherents of this approach as the point at which the amount of money spent on pollution control (marginal cost or M.C.) equals the benefit received by the environment (marginal benefit or M.B.). Corporate counsel’s contribution to the process has been to characterize their client’s costs as high and the benefits of increased pollution control as low. The result is exaggerated cost figures, and of course inflated claims about lost jobs and business opportunities as a result of these expenses, and trivial estimates of the environmental benefits of more pollution control. This in turn does much to undermine the political and hence administrative resolve to get tough on the problem.

Public interest counsel have been squeezed out of the process. As representative of both a broader, environmental protection concern and “affected”¹⁹ citizens, they have not had a chair at the negotiating table. Attempts to force their way to the table through the courts have failed. What value is there, the courts have asked rhetorically, in public interest participation in the highly technical exercise of negotiating appropriate abatement technology, particularly when the public interest is well represented by government regulators? When public interest counsel have succeeded in winning a seat at the table,²⁰ their contribution has been modest at best. The problem has been defined by others, the agenda has been set by others, and the information and analysis has been controlled by others. Attempts to play a vigorous enforcement role by way of private prosecutions in those jurisdictions where the right has not been fettered by legislation have also been largely unsuccessful. The costs of such actions are high and, although some legislation rewards the private prosecutor with a per-

¹⁸*Ibid.* at 373.

¹⁹“Affected” in the sense that regulation sanctions and legalizes approved pollution, even though the pollution adversely affects the environment and its residents.

²⁰In fact, there tends to be two “tables” — one where the real negotiation takes place and another where public input is solicited. Recently, for example, regulatory departments, notably the Ontario Ministry of the Environment, have formulated guidelines designed to encourage public involvement in the regulatory process. While the guidelines are designed to solicit input, they do not give “the public” a seat at the table where negotiations over the terms of an order or approval take place. See, e.g., Ontario, Ministry of the Environment, *Public Participation in Environmental Standard Setting* (Policy manual no. 16-00-01); Ontario, Ministry of the Environment, *Public Consultation* (Policy manual no. 16-09-01) (February 16, 1989).

centage of the fine levied, the financial incentives are far too modest to make this course of action attractive to all but the most altruistic or principled prosecutor. Finally, courts have done much to discourage the "officious intermeddler" by both questioning the private prosecutors standing and on one occasion awarding costs against a successful private prosecutor.²¹

Furthermore, public attempts to participate in the process by way of civil suits have been equally frustrating. Private litigation tends to be too costly, too risky and generally comes too late in the decision-making process to provide anything other than relatively modest, after the fact damages. When private plaintiffs have successfully overcome restrictive standing and class actions, the results have been disjointed and episodic.

Few public interest organizations have accepted such a limited role. Instead of legitimizing and giving credibility by participating in a regulatory and enforcement process so heavily stacked against their client's interests, they have turned to law reform. In this arena, public interest counsel have enjoyed some success, although their success rests on the premise of a "rights" oriented process and the appropriateness of judicial dispute resolution. Public interest advocates, therefore, have attempted to redefine and extend legal rights to natural and inanimate objects, to overcome standing rules and to vest more decision-making authority in the courts. For example, environmentalists in Alberta and Ontario have been responsible for successive opposition parties and private members introducing bills that would create an "Environmental Bill of Rights"²² or an "Environmental Magna Carta."²³

Secondly, environmentalists have lobbied governments to "get serious" about setting enforceable standards, expanding liability, and dramatically increasing penalties for those who breach standards. Not only has the concept of enacting an "Environmental Bill of Rights" that would expand the court's power to set standards and resolve disputes caught on in the Northwest Territories²⁴ and Ontario,²⁵ but many of the other demands of environmentalists have also been accepted and incorporated into recent legislative amendments.²⁶

²¹*R. v. Cyanamid Can.* (1981), 11 C.E.L.R. 31 (Ont. Prov. Ct). For a detailed discussion of private prosecutions see L.F. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution* (Alberta: Alberta Law Foundation, 1990).

²²Bill 222, *The Environmental Bill of Rights*, 1st Sess., 19th Leg. Alta., 1979.

²³Bill 185, *The Ontario Environmental Rights Act*, 3rd Sess., 31 Leg. Ont., 1979.

²⁴Bill 17, *The Environmental Rights Act*, 7th Sess., 11th Leg. N.W.T., 1990 (assented to 6 Nov. 1990).

²⁵Bill 12, *An Act Respecting Environmental Rights in Ontario*, 2d Sess., 34th Leg. Ont., 1989.

²⁶Recent amendments to Ontario's *Environmental Protection Act* are a good case in point. *Environmental Protection Act*, R.S.O. 1980, c. 141, as am. S.O. 1990, c. 18; S.O. 1989, c. 30 & S.O. 1988, c. 54 [hereinafter *E.P.A.*].

D. Failures of Symbolic Regulation

The structural problems with these early approaches to pollution control can be summarized in the following way. First, the process is reactive rather than anticipatory. Like the courts, the regulatory mechanisms do not “kick in” until a problem has been identified. By then, most regulation comes too late to solve all but the simplest of problems. Secondly, the process generally lacks legitimacy. By assuming that “the government” speaks for the public; by excluding public interest participation, the process is perceived as being little more than symbolic reassurance for an apprehensive and increasingly cynical public. Environmental regulation has become a convenient phrase to describe a cosy relationship in which industry makes relatively minor reductions in their pollution in return for government approval of their activities. A third problem is that as site specific and technical regulation increases, liability begins to shift from the regulated to the regulator. Ultimately, industry is able to demand that government set the regulatory standards and write the specifications for the pollution control equipment. If those standards are met, the fault then lies with the standard and hence with those who set the standard, not with the polluter. The fourth problem is that the definition of the problem — market and technological failures — destine the regulators to define success in terms of technological fixes and market adjustments. Neither definition, however, addresses the underlying social problems that have led to pollution. Finally, knowledge about the problem is growing in more or less direct proportion to the level of regulatory effort, with the result that the problem is continually being redefined in response to increased regulatory effort. Regulatory solutions — usually expressed in terms of maximum permissible levels of pollutants — are obsolete almost as soon as the standard is announced. Finding a solution is like shooting at a moving target; with the trigger attached to the target. Each new regulatory initiative changes society’s perception of the problem and the solution. The result? A strategy focused on solving yesterday’s problems that is just not working.

II. Stage Two: Preventive Regulation

Both the pollution problem and its perceived causes change as society moves into a second level of environmental consciousness. The problem is no longer described as “gross pollution” — blackened skies and sludge-filled northern lakes — it is now more subtle and insidious, and less obvious. Perhaps the most frightening aspect of this new order of pollution relates to what has come to be described as “exquisite toxics” — odourless, colourless, tasteless and deadly substances, such as dioxins, P.C.B.s and furans. The problem is often described as one of “environmental risk” and surfaces as the deadly toll that is documented in epidemiological studies exposing birth defects, allergies and mutations. Many pollutants are bio-accumulative. Others are relatively harmless

on their own but when released into the environment combine with other toxins to create a deadly synergy.

Another dimension of the problem centres around what has traditionally been called land use planning or resource allocation decisions. At one level, these planning problems are described by the neighbourhood battle cry of "Not in My Backyard" (N.I.M.B.Y.). At another level they are described by the persistent and unrelenting opposition to cutting last stands of old growth forests, to committing last wild rivers to hydro-electric development, or to despoiling significant natural landscape with transmission facilities. Both types of decisions are irreversible, at least in the short to medium term, and both involve long term impacts, with relatively little opportunity to remediate.

A. *Definitions of the Problem*

The paradigms that are used to define and explain these new order problems have changed markedly from the market and technological failure of past models, although strong elements of the earlier models continue to be important. "Environmental risk" and land use disputes challenge earlier beliefs that humans may, indeed perhaps shall, dominate the earth. One of the first to tell this story was L. White in his classic article, "The Historical Roots of our Ecological Crisis."²⁷ More recent versions have been told by L.L.N. Evernden²⁸ and J.A. Livingston.²⁹ The story can be told succinctly through the following passage:

I personally doubt that disastrous ecologic backlash can be avoided simply by applying to our problems more science and more technology. Our science and technology have grown out of Christian attitudes toward man's relation to nature which are almost universally held ... [A]ll the cosmos rotates around our little globe. Despite Darwin, we are *not*, in our hearts, part of the natural process. We are superior to nature, contemptuous of it, willing to use it for our slightest whim ... What we do about ecology depends on our ideas of the man-nature relationship. More science and more technology are not going to get us out of the present ecologic crisis until we find a new religion, or rethink our old one.³⁰

The experience of early, though largely symbolic, regulatory efforts has helped us recognize environmental problems for what they are; problems of conscience and problems that are highly complex, interdependent and polycentric. Neither adjustments to economic incentives or disincentives, nor techno-

²⁷(1967) 155 *Science* 1203.

²⁸*The Natural Alien: Human Kind and Environment* (Toronto: University of Toronto Press, 1985).

²⁹"The Ecological Imperative" in R. Bradley & S. Duguid, eds, *Environmental Ethics*, vol. 2 (Burnaby, B.C.: S.F.U. Publications, 1989) 123.

³⁰*Supra*, note 28 at 1206.

logical fixes will, by themselves, solve the problem. As White says, we need a new religion or at least to rethink our old one.³¹

B. Process

The legislative and policy response to this new definition of pollution is made up of four principal components: (1) increased regulatory activity, including: extending liability for pollution to corporate officers and directors, extending a court's jurisdiction over future activities and clean-up matters and increasing fines and other penalties; (2) new environmental impact assessment legislation; (3) new legislative focusses on clean up and remediation; and (4) private mechanisms by which the parties to a transaction may identify and avoid environmental liability (environmental audits or risk assessments).

This second level response to environmental problems continues to rely heavily, although not exclusively, on an adversarial model of dispute resolution. Thus, modern environmental assessment and remedial legislation is based largely on a competitive or adversarial model of dispute resolution. On the other hand, privately initiated environmental audits and risk assessments rely more on co-operative approaches to identifying and rectifying problems. One feature of the legislative aspect of this preventive approach is that it substantially expands the rights of affected persons, both from a substantive and a process standpoint. Proponents of new activities are now required not only to assess potential environmental impacts of new undertakings, but also to examine the relative impacts of a broad range of alternative technologies and alternatives to a proposed undertaking.

Most legislatively sanctioned assessment processes enable any person to request a public hearing before a quasi-judicial board; to participate fully in the hearing; and to insist that the matter be disposed of by the board according to the purpose of the statute. This has dramatically shifted the balance of power in favour of the public objector. No longer are proponents able to strike a deal with regulators behind closed doors. If deals are struck, they are generally struck with all affected parties. The most likely scenario though is that a proposed undertaking simply plods forward, labouring under the weight of a detailed, formal hearing destined to examine every potential problem in great detail, without regard to relevance, expense or an efficient deployment of scarce investigative resources. In the end, decisions are made, proposed projects are modified or even abandoned, and the environment is undoubtedly better protected because of such a process. But, as delays and costs rise, there is some concern that the process is attracting far more resources than the environment.

³¹*Ibid.*

One of the most important new developments in this area is the growing popularity of privately initiated and conducted environmental audits or risk assessments. Roger Cotton describes the impetus for the environmental audit in the following terms:

It is clear that these liabilities [increased prosecutorial activity and fines] have acted as an impetus to structure internal organization and transactions in a 'proscriptive,' 'anticipatory,' 'proactive' or 'preventative' manner, as opposed to the reactive approach to environmental problems common in the past.³²

Audits enable a corporation to maximize opportunities for effective corporate planning, set corporate priorities and design corporate strategy.

Some audits are initiated internally and are designed to identify whether a firm is in compliance with existing or potential environmental laws, and whether it is exposed to any liability. More often, however, the audit is performed in response to a demand from one or more parties to a transaction to ensure that the party is not assuming any undue environmental risk. Audits are, therefore, principally transaction driven. Thus, they are now a common feature of transfer of assets; financing, especially if assets are being offered as security; transfer of possession (lease, license, easement); expansion of an existing facility — often the audit is a first step toward an application for environmental approvals of the proposed expansion; and receivership or bankruptcy of a business where a receiver or trustee comes into possession of land or other assets.

The next logical step is to undertake audits as a condition precedent to public share offerings, annual general meetings of public corporations and the launch of a new product.

As a private process, the audit lacks much of the structure and rigour of a formal hearing or even informal negotiations relating to a proposed permit or licence. Audit procedures are, however, becoming regularized as experience grows in this area. Most audits now include the following: explicit top management support for environmental auditing and commitment to follow-up on audit findings; an environmental auditing function independent of audited activities; adequate team staffing and auditor training; explicit audit program objectives, scope, resources and frequency; a process that collects, analyzes, interprets and documents information sufficient to achieve audit objectives; a process that includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions and schedules for implementation; and a process that includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.

³²R. Cotton, "Preventative Lawyering and the Environmental Audit" in D.P. Emond, ed., *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, Ont.: Canada Law Book, 1989) 245 at 247.

As public assessments and private audits evolve, I believe that the logic of preventive regulation and the need for an efficient process will lead to two important refinements. The first involves a convergence of the two processes, so that public assessments will adopt some of the features of the private audit and private audits will expand to mirror many of the attributes of the public assessment.

Society simply cannot afford the "luxury" of committing every undertaking to formal public review, particularly if that review offers either side the ability to require a lengthy public hearing. Activity will simply die under the weight of a process that is inordinately expensive, promises marginally better decisions and delivers uneven results, many of which leave all participants dissatisfied. Measures are urgently needed to streamline the process. Conversely, privately conducted environmental audits lack much-needed legitimacy. No matter how hard a public profile company tries to "do the right thing," if it continues to do it in private, it will never win full public support for its activities. The N.I.M.B.Y. syndrome will ensure that every new initiative, and many well-established practices, will come under continual attack. The result of these two pressures is that public assessment managers are actively exploring ways in which affected parties can resolve their differences away from the adversarial jousting of the public hearing,³³ while private audit managers are examining ways of including all affected parties in the audit process.

The second trend is equally important, although much slower in coming, at least at the public assessment level. Much of the impetus behind both assessments and audits is the desire to anticipate, assess and avoid environmental problems. To this end it makes sense to make decisions about potential impacts and mitigative measures before proceeding. But try as we might, we can never know everything before proceeding. Nor would we want to know everything — the costs are simply too high and the likely benefits too low. It makes sense, therefore, to conduct a more limited assessment or audit of *potential* environmental impacts and a more detailed assessment of *real* or *actual* environmental impacts. This philosophy is reflected in the growing demand that environmental assessment include a monitoring component that involves those who must live with the impacts, namely, affected neighbours. The same philosophy lies behind the standing environmental audit committees of major Canadian corporations. Both recognize the fact that many future impacts are unanticipatable, that con-

³³Both the draft procedures for the Environmental Assessment Board (Ontario), *The Hearing Process: Discussion Papers on Procedural and Legislative Change* (Toronto: Environmental Assessment Board, September 1990) & Bill C-78, *An Act to Establish a Federal Environmental Assessment Process*, 2d Sess., 34th Parl., 1989-90 [hereinafter referred to as Bill C-78] make provisions for the parties to reach agreement, with or without a mediator. (While Bill C-78 died on the order paper, it has been introduced in identical form as Bill C-13, *An Act to Establish a Federal Environmental Assessment Process*, 3d Sess., 34th Parl., 1991).

tinuous vigilance is required and that there are no final answers to environmental problems.

C. The Lawyer's Role

Regulatory counsel's work has changed substantially under this model. No longer are counsel involved in private negotiations with polluters over the terms of a certificate, order or licence. Regulation is now practised according to much more specific, well-defined criteria. Counsel's role now is to assist all parties, proponents and opponents, in understanding and participating more effectively in the assessment and regulatory process.

Corporate counsel's role has evolved into one in which less time is devoted to responding to crises or defending accused polluters. Granted, increased levels of investigative and prosecutorial activity have meant more work for the litigators, but this is a relatively small proportion of the total work involved. Counsel's work is now more creative, acting as the person who orchestrates or oversees a comprehensive review of client activities in the context of an audit, or planning and preparing for an environmental assessment hearing in the context of a new proposal. Counsel is now required to identify and bring together members of a scientific/engineering team, and to co-ordinate, assimilate and analyze the contributions from each member of the team.

The greatest changes have taken place for those who represent environmental and public interest groups. The members of the public are now more or less full participants in any public decision-making process, especially environmental assessment processes. While their client's interests may be different from that of their "opposing friends," the mode of participation is essentially the same. At the hearing, it involves calling evidence, cross-examining witnesses and presenting arguments. Because, however, the process continues to be adversarial and highly confrontational, public interest groups tend to play a critical rather than a creative role. They regard their function as opposing a proponent's plans — exposing weaknesses in its evidence and argument — rather than attempting to facilitate solutions.

D. Failures of Preventive Regulation

While preventive regulation is clearly an improvement over earlier regulatory efforts, this approach continues to suffer from many of the earlier problems. It continues to rely far too heavily on an adjudicative model of dispute resolution: adjudication is used to fashion environmental policy; adjudication is used to put policies, to the extent that they are ever expressed, into effect; and, of course, adjudication, in the form of prosecutions, is used to enforce policy. There is little opportunity for the parties to seek out creative, innovative solutions. In fact, given the uncertainty and unpredictability of the process, the

incentives are all in the opposite direction. Proponents attempt to overwhelm opponents with enormous quantities of largely irrelevant information, and opponents cross-examine witnesses on every conceivable issue. One side hopes to win through exhaustion and attrition; the other, by stumbling across the "fatal flaw" in the proponent's case. The resources consumed in this "charade" are so great that environmental assessments are saved for the "inega project", leaving the vast majority of problems to be dealt with through the less comprehensive, and often ineffectual, approval process.

A further failure of the preventive approach is that because it loads up the approval process for new projects with elaborate assessment and hearing requirements, there is a built-in bias in favour of the *status quo*. In one sense, this is environmentally sound. Procedures that slow down the rush toward new activities by requiring a sober second thought cannot help but benefit the environment. On the other hand, to the extent that the process prefers old problems such as leaking toxic waste disposal sites, to new solutions, it imposes an enormous cost on the environment.

Finally, recent amendments to the traditional environmental protection statutes have done much to eliminate the last vestiges of the cozy relationship between the regulator and the regulated. While this is certainly to be applauded, there is now growing concern in corporate Canada that increased prosecutorial activity undermines any incentive to work co-operatively with government and the scientific community to solve environmental problems. Few still seek a "sweet deal" from governments. What responsible corporations now want is recognition that there are no simple solutions to pollution problems and that society's resources should be deployed to find solutions, not fight over alternatives.

III. Stage Three: Co-operative Problem-Solving

Not much has worked very well in the environmental protection field up to this point. Granted there have been some notable successes, but the general consensus seems to be that we are slipping further and further behind. The problem is that the approach has generally been wrong. It has proceeded from an adversarial, competitive, rights-oriented model that was destined to siphon off creative energies in a contest of rights regulated only by the logic of justice and due process. The focus has been on defining rights and fine-tuning the dispute resolution process, rather than on solving environmental problems. 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, obligation, and co-operative approaches to problem-solving.

A number of factors have made this approach possible. First, as we move closer to the precipice of environmental calamity, values are converging. There is no escape from a global warming trend as there once was from air borne particulate matter — move up wind. Secondly, some dramatic recent events have served to remind us of the real costs of fighting over principle and process, rather than solving problems. The now infamous Hagersville tire fire³⁴ offers a classic case in point. Historically, tires have simply been sent to landfills — a perfect example of an “out of sight, out of mind” “solution.” It is also a perfect example of how ill-conceived “solutions” create long-term disposal problems. However, with changing attitudes and the prospect of recycling and reusing tires, a number of tire “dumps” have sprung up across the country. The theory behind such facilities is that it is better to dispose of tires in a manner that permits future recovery as recycling technology creates a market for used tires, than simply to send the tires to a landfill. This is the point in the Hagersville story at which the Ontario Ministry of Environment (M.O.E.) intervened to regulate the tire dump by issuing a control order that specified the way in which the tires should be “stored.” The owner regarded the control order as ill-conceived, expensive to implement and largely ineffective and “appealed” the order to the Environmental Appeal Board. The appeal stayed the implementation of the order. Following a lengthy hearing, the Board imposed even more stringent terms on the owner, and he, in turn, launched a further appeal to the courts. Before this appeal was heard and before the control order, as strengthened and expanded by the Board, was implemented, arsonists started the fire and the rest is history.

The tragedy of the case is not simply the fire, for I expect that the long term impacts of contaminated air, soil and ground water are relatively minor compared to the ecological time bombs oozing out of old liquid hazardous waste dumps. The tragedy is that a resource, the tires, was not in some way recycled and reused. Notwithstanding a special \$5 per tire tax and a \$30 million tire fund, the Ontario Government did virtually nothing to co-operate with industry to convert a potentially lethal resource into a beneficial resource such as new tires or heat.

If Hagersville describes the costs to the environment of the parties not acting co-operatively to solve problems, the recent mediated carbonated soft drink regulations in Ontario is a testament to the benefits of co-operative action. Ontario regulates carbonated soft drink containers under the litter provisions in Part VIII of the *E.P.A.* In response to market demand, the soft drink industry has come under increasing pressure to sell more and more of its product in recyclable cans and plastic P.E.T. bottles, and less and less in returnable, reusable bot-

³⁴Hagersville received widespread notoriety in 1989 when tires stored by Tyre Ring at a site outside Hagersville near Hamilton, Ontario were ignited by arsonists. The twelve million tire dump burned out of control for more than two weeks.

ties. The environmentalists objected to industry's proposed response to these market driven pressures. They believed that more cans meant more litter, more energy and more waste. In an attempt to find a solution that addressed environmental concerns while at the same time meeting public demand and industry needs, the M.O.E. convened a meeting of all representatives in 1985, ostensibly to win support for draft amendments to the soft drink container regulations. It soon became clear, however, that few participants had been consulted about the proposed changes and hence almost none of the participants were prepared to accept them. The solution was to create a small representative group of government, industry and public interest group participants who would attempt to convert some vague general principles into an agreement that would form the basis for new regulations. The result was not perfect. The agreement that emerged after ten weeks of part-time negotiation was ambiguous in places and contradictory in others. It did, however, have the support of the parties. In the end, it became the basis for new regulations, and even more importantly, it became the driving force behind Ontario's blue box program.³⁵

Under the terms of the agreement and the regulations, the soft drink companies may convert from refillable bottles to recyclable cans, plastic P.E.T. and glass bottles in direct proportion to the rate at which these products are recycled. Thus, as recycling performance improves, the industry can reduce the percentage of refillable bottles. The challenge facing industry was how to improve recycling performance — something over which it had virtually no control. The solution involved creating an association, the Ontario Multinaterial Recycling Incorporation (O.M.R.I.), funding it with more than \$20 million of industry money, winning provincial support, and charging the association with the task of introducing a curb-side recycling program. The recycling program has been so successful that the M.O.E. announced in Spring 1990 that it was further reducing the percentage of refillable bottles that the industry is required to offer to the public.³⁶

The lessons from these two recent episodes confirm the premise that lies behind the co-operative model. Competitive, adversarial approaches tend to divert creative energies away from potential solutions. Co-operative, problem-solving approaches, on the other hand, tend to show that all parties have a community of interest in solving environmental problems, and that the public interest groups must play a key role in finding and implementing those solutions.

³⁵D.P. Emond, "Ontario Pop Law Mediation" (1986) 18 *Resolve* 12 [newsletter published by the Conservation Foundation, Washington, D.C.].

³⁶See Press Release, "Ontario Soft Drink Companies Must Meet Refillable Quotas" Environment Minister Ruth Grier, Oct. 15, 1991, N.R. #615/90. Since the election of the N.D.P. government in Ontario, the soft drink regulations have again come under close and critical scrutiny. The new government's policy is to encourage reuse, not recycling and thus we may well see a return to a policy that demands a higher percentage of refillable containers.

The third factor driving this co-operative approach to environmental problem-solving is the growing recognition that we cannot afford the delays, the fights and the stalemates that have become characteristic of the previous two models. The costs of fighting and inaction are simply too high.

A. *Definitions of the Problem*

The definition of pollution has not really changed under this model. It continues to be a combination of gross pollution and environmental risk. What has changed, however, is the approach to solving the problem. Thus, from an earlier preoccupation with correcting market failures and developing technological fixes, to a more recent focus on anticipating and avoiding environmental future problems, the latest approach is one that builds on these earlier initiatives in a more consensual, co-operative problem-solving environment. It proceeds from the premise that we are all "in this mess together" and we are going to have to "solve it together." The "we" includes not only the traditional protagonists, but a much-expanded definition that encompasses everyone — consumers, employees, affected residents and others.

B. *Process*

The process that will extricate us from this dilemma is one that is sometimes described as alternative dispute resolution but is more accurately labelled co-operative or creative problem-solving. It is a multifaceted process. It starts with a basic redistribution of rights, principally through legislative recognition of basic environmental rights. Rights define power, and without the power that derives from judicially enforceable rights, the public is not likely to be an effective participant in any form of co-operative problem-solving. The problem-solving must, therefore, take place in the shadow of the law and the courts.

The principal approach to resolving environmental problems must be negotiation. Roger Fisher and William Ury, in their book *Getting to Yes*,³⁷ emphasize that co-operative problem-solving or "win/win" solutions demand a principled approach to negotiation. By this they mean negotiation that separates the people and personalities from the problem at hand; focuses on interests, not on positions; invents options for mutual gain; and employs objective criteria.³⁸

³⁷Boston: Houghton Mifflin, 1981. While there is much about this approach that is attractive, it fails to adequately account for either the unprincipled negotiator or for what may be described as "distributional bargaining." See J.J. White, "The Pros and Cons of 'Getting to Yes'" (1984) 34 J. Legal Educ. 115 and T.C. Schelling, *The Strategy of Conflict* (New York: Oxford University Press, 1960).

³⁸Fisher & Ury, *ibid.*

Because not all negotiations can generate agreement, the process must also include mechanisms to enable the parties to employ the assistance of a facilitator or mediator.

Howard Raiffa, in his book *The Art of Negotiation*,³⁹ succinctly outlines the potential contribution of a mediator or neutral third party establishing a constructive ambience for negotiation; collecting and judiciously communicating selected confidential material; helping parties clarify their values; deflating unreasonable claims and loosening commitments; seeking joint gains; keeping negotiations going and articulating a rationale for the agreement.⁴⁰

This process is multifaceted. It recognizes a policy or rule-making component, a rule-implementation component, and an enforcement dimension. It recognizes that no one process is appropriate for all tasks. Nor is it a process that naively suggests that the public can be a full participant in solving environmental problems without a fundamental redistribution of rights. It recognizes an important role for the process designer. Just as adjudication will not solve all problems, so too negotiation and mediation cannot be expected to solve all problems. The trick is to know when and how to use each process and then to sell that approach to the parties.

C. *The Lawyer's Role*

Lawyers associated with environment ministries and departments are having difficulty with the somewhat reduced roles that this approach implies for them. Empowering the parties to fashion their own solutions comes largely at the expense of departmental power. No longer is the department's role to prescribe permissible standards or required technology. No longer is the department able to negotiate regulatory standards with the affected industry. The task now is facilitative rather than prescriptive. Departments are increasingly being called upon to manage the process, to provide the infrastructure for principled negotiation and to ensure that solutions meet minimum standards of environmental protection. Many departmental lawyers still cling to the old ways of private deals, vigorous prosecution and competitive participation at administrative hearings. Their role is clearly evolving, however, from one that imposes "solutions" to one that facilitates co-operative problem-solving among the parties. Indeed, often the solution is to delegate power to the parties.

Many government lawyers and policy-makers are not very comfortable with this new role. Surely, they argue, it is better to resist all but a "perfect solution" — something which by definition does not exist — than to agree to something that may, as knowledge increases, be found to involve some level of risk

³⁹Cambridge, Mass.: Belknap Press, 1982.

⁴⁰*Ibid.*

and hence public unacceptability. The problem is that while we wait for the perfect reuse strategy or waste disposal solution, problems and risks continue to mount. Also, the problem is that there are no perfect solutions. Time and experience will always expose some weaknesses in even the best conceived solutions. The solution is not to seek perfection, but to recognize that all we can do is our best, that this will never be good enough in the long term, and that we must continually talk about what more can and must be done.

There is, however, a creative role for departmental lawyers. This group has responsibility to manage the process, to ensure that all parties that have something to contribute are able to participate, to ensure that decision-making proceeds from a sound factual and scientific basis and to ensure that solutions are consistent with public policy. Generally, this will mean that government must be a party to the negotiations as well as process managers.

Corporate counsel generally fall into two categories. The first is made up of those who resent the fact that "the public" is playing a larger role in the process, especially if their client is required to fund public participation. This group is somewhat suspicious of any process that denies the preeminence of adjudicative dispute resolution, and is generally apprehensive about the impact of these new approaches on its own bottom line. John Willms captured these concerns very nicely when he wrote:

It is naive to expect the legal profession to unreservedly embrace environmental mediation. Firstly, lawyers don't unreservedly embrace anything that is without precedent. Environmental and planning disputes have sufficient novelty to titillate and alarm the most adventuresome practitioner. ... One reason a lawyer believes that mediation cannot possibly occur without prejudice to the client's position is that mediation forces a fairly direct and frank exchange of information and opinion before the hearing, in a setting that is beyond the lawyer's control. Lawyers have a direct and inevitable conflict of interest when mediation is proposed. Loss of control and an expanded role for the client may well reduce a lawyer's involvement, and time is the lawyer's sole market commodity. ... [T]he lawyer is loathe to be displaced from a traditional and lucrative activity — the conduct of lengthy and litigious actions.⁴¹

The second type of lawyer accepts the role of environmental consultant/solicitor and seeks to assist the client in a variety of "new" ways including: identifying and correcting areas of potential liability; developing contingency plans and employee training programs; retaining and working with environmental scientists and engineers to solve environmental problems and implement new solutions; identifying (or creating) relevant public interest groups and establishing round table negotiations on matters of public concern; and assisting clients to put the environment first in corporate planning decisions.

⁴¹"Environmental Mediation and the Lawyer" (1986) 1:3 C.E.M.N. 3 at 4.

The skills needed for this new role are the skills of all good corporate counsel — identifying and analyzing problems and potential solutions, negotiation and communication skills. As one moves from an adversarial approach to dispute resolution, to a co-operative approach to problem-solving, perspectives change. Whereas formerly success was measured in terms of defeating an adversary, now it is measured in terms of the extent to which counsel can solve her/his adversary's problems. Corporate counsel must also be sensitive to public opinion and the politics of pollution control. Thus, an appropriate role for counsel is to track trends in public attitudes toward the environment, and to anticipate and help shape new legislative initiatives.

Public interest counsel, like their corporate and government counterparts, are having some difficulty adjusting to their new role. Simple opposition to new proposals is becoming less and less credible. There is a time to be sceptical, and there is a time to vigorously oppose ill-conceived and environmentally unsound proposals. But there is also a time to participate in more creative, problem-solving exercises.

There are a number of reasons why public interest groups are reluctant to participate in environmental problem-solving. First, groups that lack the resources, broadly defined, to participate effectively in consensus-seeking processes are reluctant to add credibility to the process by being part of it. What is surprising, however, is that inadequate resources tend to characterize public participation in all processes, not just negotiation. A lack of resources seldom precludes public participation in a public hearing. A further explanation, therefore, may be that negotiation demands certain creative, problem-solving skills that tend to be much more time consuming and resource intensive than, for example, the cross-examination of a key proponent witness. Furthermore, intervenors can usually expect some participant funding or a cost award at a public hearing. No comparable funding is available for negotiations.

A second reason why interest groups and counsel are reluctant to participate in environmental negotiations results from the ambivalence a potential negotiator often feels about negotiations, particularly as compared with participation in some other process. This reluctance stems from a number of factors. Although few public representatives have had any formal training as negotiators, they are expected by their constituents or clients to achieve an optimal result at the negotiating table. Furthermore, the very thing that makes negotiation an attractive alternative to other pollution control processes, namely, the ability to have a major influence on the final result, makes negotiation unattractive to the inexperienced or insecure. The potential and often real power conferred on the negotiator creates enormous expectations and hence enormous pressures. With a public hearing, an unacceptable decision can always be blamed on an insensitive, ill-informed or ignorant panel. With government regulation the department and minister must accept responsibility for the result.

With negotiations, however, the result is acceptable to the parties and hence any criticism must be borne by the negotiators. It takes a strong, persuasive person with a solid mandate to compromise a group's opening position in return for a final agreement. Most would prefer a process in which blame can be apportioned to someone other than those accountable to the concerned group.

The organizational structure required for effective negotiation is often inconsistent with the organizational design of the public interest group. Effective negotiation demands the ability and authority to act quickly and decisively on a broad range of issues. This is normally characteristic of a hierarchically structured organization in which the negotiator is a key member of the executive and enjoys the confidence of the group. Public interest groups, however, tend to shun such hierarchical structures because they are thought to be inconsistent with the objectives of the group. As the organization responds to the participatory, non-hierarchical demands of the membership, its ability to negotiate effectively decreases. As the organizational structure tries to adjust to facilitate effective negotiations, negotiators become increasingly detached and isolated from the membership and this, in turn, discourages potential negotiators from participating.

Parties, especially opponents of development, traditionally and persistently overestimate the effectiveness of alternatives to negotiation, particularly public hearings and/or litigation. This may inhibit the parties from ever sitting down together. More often it will mean that over time and after intensive negotiations, the negotiator's position will soften as more is learned about the other side's needs. There is, of course, no corresponding softening of the group's perspective or expectations. The result is a growing gap between the negotiator and the client expectations.

There are two final reasons why the public is reluctant to negotiate. First, negotiation suggests, indeed demands, *compromise*. For many environmentalists, there is no compromise. For them, it is better to lose a principled fight than to have to concede anything to win agreement. Second, most negotiators naturally, although perhaps irrationally, tend to engage in competitive or value-claiming tactics rather than co-operative or value-creating tactics.⁴² Because the co-operative negotiator is more vulnerable than her competitive counterpart, and because the temptation to attempt to exploit the vulnerable is almost irresistible, co-operative behaviour is soon discouraged and all parties soon "hunker

⁴²This concept is developed in D.A. Lax & J.K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York: Free Press, 1979). Value-creating describes the process by which parties identify options for resolving a dispute, some of which include ways in which the issues are broadened and in this sense the amount to be "won" in a resolution is increased. Value-claiming tactics describe the ways in which parties attempt to appropriate the increased value to themselves.

down," become self-protective, uncreative and even destructive, competitive or distributional negotiators. The result is usually a breakdown in negotiations.

The obstacles to public interest participation can be addressed in a variety of ways. First, government and proponents must be prepared to commit more resources to public participation in the process. This might include better access to government information and expertise or it might include financial assistance to enable the group to acquire its own information. Second, subsidies that are characteristic of traditional dispute resolution processes, including the cost of the hearing room and decision-makers salaries, should also be extended to alternative or more consensual decision-making processes. Training programs would also do much to boost the confidence of the public interest negotiator.

D. Problems and Prospects for Co-operative Problem-Solving

Any call for a new co-operative approach to solving environmental problems must address several problems or concerns. Stephen Goldberg, Eric Green and Frank Sander ask:

Is there a danger that mediation, with its emphasis on accommodation and compromise, will deter large-scale structural changes in political and societal institutions, that only court adjudication can accomplish, and that it will thus serve the interests of the powerful against the disadvantaged?⁴³

Terry Ison expresses similar scepticism about the ability of negotiation to do anything more than sanction existing problems.⁴⁴

A second concern might be expressed in terms of the relationship between process and result. Is it correct to assume, for example, that environmental disputes can be resolved through a focus on dispute resolution process(es)? Is the attempt to find a better process misplaced? At some point, one is bound to become sceptical about the ability of seemingly "fair" processes to sanction and legitimize "wrong" results.

Related to the general question about the role of process in solving more specific environmental problems is the question about the role of negotiation and co-operative problem-solving. Negotiation presupposes compromise. And yet, as environmental issues are increasingly defined in terms of values and ethics — neither of which may be susceptible to compromise — there is some doubt about just how far negotiation can respond to the value demands of environmentalists.

⁴³*Dispute Resolution* (Boston: Little, Brown, 1985).

⁴⁴Book Review of *A Contract Model for Pollution Control* (1985) 63 Can. Bar Rev. 859.

Third, as has already been noted above, this approach to dispute resolution presupposes a group of practitioners with a different orientation from those who practice in the judicial system. As L.L. Riskin points out:

The philosophical map employed by most practising lawyers and law teachers, and displayed to the law students ... differs radically from that which a mediator must use. What appears on this map is determined largely by the powers of two assumptions about matters that lawyers handle: (1) that disputants are adversaries — *i.e.* if one wins the other must lose — and (2) that disputes may be resolved through application, by a third party of some general rule of law. These assumptions, plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit from a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it.⁴⁵

The result of the lawyer's orientation and the litigation paradigm on which it is based is that "lawyers tend not to recognize mediation as a viable means of reaching a solution; and worse, they regard the kinds of unique solutions that mediation can produce as threatening to the best interests of their clients."⁴⁶ Until lawyers accept a legitimate role for a co-operative approach to problem-solving, environmental regulation will not move forward to generate the creative, innovative solutions we so urgently need.

Notwithstanding these challenges, the prospects for this co-operative approach to solving environmental problems are very exciting indeed. Government, however, must take a far more creative and pro-active role in terms of facilitating such an approach to resolving environmental disputes — perhaps to the point of legislatively mandating negotiation and mediation.⁴⁷

Conclusion

By and large, this paper has focused on *process*. It has attempted to describe the correlation between a problem — or more precisely the way in which a problem is defined — and the process or processes for resolving that problem. Thus, regulation — initially symbolic regulation — describes a process response to the problem of market and technological failure. Similarly, environmental assessments and environmental audits are processes for anticipating irreversible environmental problems. Finally, negotiation and co-operative problem-solving are ways of addressing and solving highly complex, interdependent, multi-party environmental problems. The first two processes are largely, but not exclusively, adversarial in nature and assume that solutions will emerge from a clash of rights — that is, the right to participate in economic activity versus the right to a clean environment. The third, however, follows

⁴⁵"Mediation and Lawyers" (1982) 43 Ohio St. L.J. 29 at 43-44.

⁴⁶*Ibid.* at 44.

⁴⁷See the proposed mediation provisions included in Bill C-78.

from the apparently novel premise that we are all in this mess together — that we are all part of the problem and thus we must all be part of the solution.

What is the role of law in all of this? Clearly, the plethora of new statutes and regulations *suggests* a key role. Laws, however, do not solve problems. Indeed, it sometimes seems that environmental problems are growing at more or less the same rate as new laws are being passed. Laws create a complex of rights, obligations, liabilities, incentives and disincentives — a *framework* within which parties can or cannot solve problems. What environmental laws must now do is: (1) recognize the legitimacy of negotiation, mediation and other innovative means of problem-solving; (2) establish a regime of rights and obligations that ensures that all parties are able to participate effectively in the process; and (3) recognize the limits of co-operative problem-solving. Criminal pollution is not a matter that is, in my view, susceptible of negotiation. It should be prohibited and the prohibition enforced through appropriate sanctions.

Opportunities in the future will exist for persons with two quite distinct skills. The first set of skills relate to process *design* and *management*. If the challenge is to find new ways to redirect society's creative energies toward co-operative problem-solving, we will need people to design processes that focus our attention on solutions rather than on discrediting opponents. The challenge, therefore, is to accommodate diverse interests in round table discussions and consensus building, to facilitate independent fact finding, to help parties to appreciate the legitimacy of other interests, and to build confidence through skills training.

The second set of skills relates to strategic planning, particularly in the corporate field, and especially on behalf of those who refuse to put the environment first. Without environmentally sound strategic planning, corporations are destined to become mired in a morass of public opposition and government prosecution, unable to initiate new activities and ultimately, unable to even continue existing activities.
