

**THE ROLE OF THE COURTS
FROM AN INDUSTRY PERSPECTIVE**

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INTRODUCTION

I have been asked to speak about the role of the courts from an industry perspective. I must say, for a non-lawyer to address an assembly of jurists, lawyers and law professors on any subject is an act of courage and in all modesty; to talk about the role of the courts is an act of supreme bravery. At the very outset I would like to claim immunity from prosecution.

Protection of the environment has become a battleground over the past several years. Adversarial attitudes have been all too prevalent in government/industry relations on this matter, and in certain respects the nature of regulatory changes has contributed to these attitudes. The public is now familiar with headlines announcing million dollar fines and jail terms for executives. Perhaps some of you in this audience may have delivered the judgments. Unfortunately, such headline cases may have more impact on the general public's perception of the environmental battleground than on the achievement of a better environment. I believe this punitive type of legislative action cannot be shown to have been a significant factor in improving the environment. Reliance on punitive legislation will, at best, achieve minimum standards and at worst, create outright resistance to change.

A number of significant environmental improvements have resulted when government and industry have engaged in focused dialogue about environmental problems, defining those problems, reaching a consensus on realistic goals and then working to achieve those goals. As one example of such consensus, in the 1970's the Federal government brought together representatives from all Provincial governments and from the mining industry across Canada to review the provisions of the *Fisheries Act* relating to water quality standards in Canadian waterways. From that tripartite consultation came an agreement on the use of "best practicable technology", that is, technology which is proven, effective and economic; and harmonized controls on mine water discharges whether discharged into a lake system in Ontario, the ocean in British Columbia or a salmon stream in New Brunswick. By way of contrast, there is no similar agreed standard for discharges to the atmosphere. In Ontario, regulations call for 30-minute limits on ground level concentrations of certain gaseous emissions. However, in major smelting operations, given the inertia of the process flowsheet, such a limit is simply not achievable. As a result, the Kidd Creek smelter in Timmins, Ontario, one of the most modern and tightly controlled smelters in the world, with a sulphur dioxide containment better than 98 per cent, is still unable to comply with the 30-minute requirement. Resistance is inevitable.

Examples such as these clearly indicate the need for an ongoing and realistic program of environmental action based upon government/industry dialogue and consensus. Later in my remarks, I will touch on the deliberations and conclusions of the National Task Force on Environment and Economy in support of this thesis.

I. THE ROLE OF THE COURTS

Although environmental consensus will not be forged in the courtroom, the spirit and intent of that consensus will be reflected by the courts in the administration of the environmental laws of the land. The courts have played a vital role in the area of environmental law in the past and will probably have to play an even larger role in the future, faced with the growing complexity of environmental issues, the proliferation of environmental legislation, and the increasing involvement in the political process by environmental action groups, environmental lawyers, and the general public.

From an industry perspective, one important role of the courts is the protection of responsible corporations from irresponsible harassment. The environmental field has its fair share of crusaders, some of whom are responsible advocates for a clean environment, but some of whom are less responsible and are willing to substitute prejudice for analysis and rhetoric for fact. Ironically, over-zealous crusaders can limit and delay environmental advances by their intervention in reforms which are being actively pursued between government and industry. The recently promulgated *Canadian Environmental Protection Act* may be a case in point. This legislation incorporating all the inputs called for by every interested party has taken about ten years to put together. Unfortunately, after all this effort, the Act is now in a form which may not be acceptable to the provinces which will have to administer it. Under this Act, it appears that any 12 citizens can require the Minister to take action on a specific subject whether or not the Ministry and its expert advisers agree with the need—a very contentious situation. In addition, before it can be implemented provincially, each province will have to reach accord with the Federal government. This will certainly be a time-consuming process and to the extent that those accords differ, Canada will lack consistent legislation on an issue which is not just interprovincial in context, but global.

Canadian corporations generally are sensitive and responsive to environmental issues. The record shows that, over the years, Canadian industrial companies have deployed significant corporate resources in an ongoing effort to develop and employ improved pollution abatement technology. Since the early 1950s, my own company, Inco Limited has been a major producer of sulphuric acid, which is an important chemical reagent, widely used in the production of fertilizers, for example. For many years Inco was the world's largest metallurgical acid producer. This required a substantial capital investment but unfortunately still resulted in a financial loss because there are many competing, low cost sources for acid. Nevertheless, in spite of incurred losses, the company continued to contribute to the cleaning of the environment by developing a useable by-product and eliminating an undesirable waste product. In ways such as this, good corporate citizens establish their environmental credentials.

From an industry perspective, the court system can and should shield such corporations from unwarranted prosecution. Why do corporations need and deserve this protection? Quite simply because otherwise they are in an untenable position where they must be proactive and reactive at one and the same time on the same issue. No corporation can effectively engage in unguarded and

constructive dialogue with one arm of government while being investigated and prosecuted at the same time by another arm. It is impractical for corporations to function effectively in such a schizophrenic environment. For example, the *Canadian Environmental Protection Act* requires due diligence and encourages the use of corporate auditing of operations to measure compliance with environmental standards. However, the Act offers no protection to the corporation against such audit findings being used in evidence against that corporation. This is a key concern for industry today and one which could delay progress. Environmental lawyers are busily promoting their ability to overcome this problem by the use of lawyer/client privilege. That legal wrinkle may be effective, but it involves the creation of artificial procedures and promotes adversarial attitudes.

Industry does not seek immunity from prosecution where prosecution is warranted—and I am not suggesting that prosecutions are never warranted—but in the event that the courts are brought into play, they should recognize that there are different categories of polluters. In the first place, if there is any validity to the “polluter pays” slogan, it should be recognized that the ultimate polluter is the general public, because industry only exists to the extent that the general public requires and demands its products, so society should always be standing in the dock alongside the corporate accused. That is difficult to arrange, but it should temper the thinking of those who sit in judgment about those who stand in the dock.

Among them will be those industries who have tried and fallen short of achieving the required standards, and in that respect, we need to pay attention to what those standards are. Where we used to measure in parts per million, the advance of technology has allowed measurements in parts per billion and even parts per trillion, so that what was undetectable only a few years ago has become criminal today. But, is the impact really that significant? In the United States, regulated limits on emission standards can be challenged through the court system to establish appropriate levels related to acceptable risks, based on scientific statistical analysis. In Canada, no corresponding legal remedy allows for such a challenge. The concept of acceptable risk is, I believe, reasonable in the context of today’s world, but there should be a basis for challenging regulated limits.

There is no need for, nor virtue in a “pollution-free world” if we can only achieve this by rejecting advances which society has made. Mother Nature has an enormous capacity to cope with some of the extraordinary events which she herself perpetrates. The eruption of Mt. St. Helens in Washington State emitted more sulphur dioxide in one day than Inco’s Sudbury Smelter does in a year. The world survived Krakatoa. Some measure of pollution is acceptable, even normal, in nature. That argument unfortunately does not carry a great deal of weight because you can’t put Mother Nature in the dock. I suggest, however, that the judiciary might well weigh the magnitude of the crime in perspective to its impact on the environment rather than its impact on the letter of the law. I believe that I can enlist a distinguished Canadian jurist in support of this viewpoint, namely Mr. Justice Nathaniel Nemetz, the recently retired Chief Justice of British Columbia. He stated that “the central issue of all judging is to see that justice is done. It is a difficult thing: law and justice are not always consonant terms.” In this respect, the letter of the law may reflect the technical brilliance of our scientists and at the same time demonstrate a lack of common sense.

Many big businesses have been identified over the years as major polluters. They are highly visible, can be monitored and measured and their transgressions identified. Although from time to time they fail, many are making good progress; their efforts should stand them in good stead, and compassion is called for if they are not perfect all the time. Who is?

Then, there is the small business, working with a five-person shop on a job lot contract which keeps it going for a week at the end of which it has generated two cupfuls of refuse, a minor addition to the overall pollution load. These people are too small to be able to afford or to understand the technology required to sanitize or dispose of this waste. Unfortunately, municipal waste systems are frequently the recipients of this, because the industrial infrastructure does not provide them with any other option for waste disposal. These are worried people because they have no place to go. They require help in the shape of provincial waste disposal centres, not fines or prison sentences.

Unfortunately, we still encounter industries lacking any sense of environmental responsibility, which knowingly and persistently pollute and continue to do so. It is regrettable, but it happens, and when you find that pattern, you should throw the book at them. Society doesn't need them and we should do everything that we can to eliminate them.

Naturally, the task of the legal profession is to regulate, enforce, defend or safeguard rights. In environmental law, this may be one of the growth areas of our time. Nevertheless, from an industry perspective, where the environmental offence is relatively minor or isolated, and where the offender has not demonstrated wilful disregard of responsibility, prosecutors should be slow to bring charges against, and courts should be slow to convict responsible corporations or their officers, employees and directors for sometimes inevitable breaches of environmental legislation. The strength of the court system is its independence and we believe that the courts must continue to resist pressure "to make an example" of a corporation or to pillory its officers, directors and employees. I say this, not because I think that corporations and their employees are above the laws of the land, but because those corporations and their employees inevitably will be forced to assume a negative, defensive posture in the face of attack, a posture which will inhibit cooperative action by industry and delay environmental progress.

From an industry perspective, it is frustrating to have to deploy valuable corporate resources in responding to prosecutions which are based on rather minor or technical breaches of legislation. It would be facile to say that industry can avoid such frustration by avoiding such breaches. The fact is that minor contraventions are inevitable, no matter how careful the corporation or how sophisticated the control mechanisms. In almost all such cases, prosecutions are unnecessary. This sort of breach will be corrected, because the offending corporation is self-governing and has its own corporate standards—not because it is going to be prosecuted.

II. THE NATIONAL TASK FORCE ON ENVIRONMENT AND ECONOMY

The legal profession is well aware of the synergy which can result from a partnership structure. Partnerships are based on mutual trust and respect, and cannot long survive if the partners become adversaries. However, I am optimistic that an era of even greater government/industry cooperation is dawning and I base that optimism partly on the work of the National Task Force on Environment and Economy (the Task Force) to which I alluded earlier.

The Task Force was Canada's initial response to the *Report of the World Commission on Environment and Development* chaired by Madame Brundtland, the Prime Minister of Norway. Established in 1983 by the United Nations to propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond, the Brundtland Commission developed a new and challenging concept: "The environment is where we all live, and development is what we all do in attempting to improve our lot within that abode. The two are inseparable."

Following the visit of the Brundtland Commission to Canada in 1986, the Canadian Council of Resource and Environment Ministers established the Task Force and charged it "to initiate dialogue on environment/economy integration, to recommend actions and to report back in September, 1987". The Task Force, on which I served as Vice-Chair, was a real expression of consensus among interested Canadian constituents. Its membership consisted of seven environmental ministers, seven representatives from industry, a representative of the Ecology Action Centre in Halifax, Nova Scotia and the Vice-President for Research of the University of British Columbia.

The potential for conflict within the group was vast. Relations between Ottawa and the provinces do not always run smoothly. Some of the bureaucrats in the various ministries who had not been invited to the party regarded it with suspicion. Industry, and in particular the companies represented, had been known to contribute to the environmental pollution problem, and some of the executives wondered whether they weren't being asked to legitimize a new pressure group tactic that might ultimately harm their interests. The environmentalists weren't exactly used to sitting down with people they regarded as the problem, nor was the academic member accustomed to this sort of setting. It was a challenging experience in group dynamics.

A. Philosophy

Like the Brundtland Commission, we felt the need initially to establish common ground. We moved beyond the Club of Rome's "limits to growth" philosophy to the view that in order to attain sustainable economic growth (an essential if the world is to attack poverty, the real villain causing much of the ecological damage in the Third World), we must have decisive political action to manage and conserve environmental resources. By the same token, to succeed in conserving the environment, we must have sustainable economic growth. That is to say, as we enter the 21st century, there has to be an integral relationship between economic development and environmental conservation, otherwise the world inhabited by our children and grandchildren will be either bleak or impoverished, possibly both.

As this formula suggests, our decision was to look forward. We do not want to forget the errors of the past, and we are determined not to repeat them. We need to put the history of environmental degradation behind us and recognize that regulations are in place to deal with those problems; then we can move beyond "react and cure" methods which are necessarily adversarial to "anticipate and prevent" systems which are cooperative and constructive.

We had to talk about what was meant by conservation, a concept that to industrialists sounds suspiciously like a shutdown. The position that the Task Force ultimately took was that a conservation strategy was a set of principles for development designed to ensure that the consumption of resources today will neither deny future generations the prospect of maintaining or improving their standard of living nor deny those less fortunate today in the undeveloped world the opportunity to improve their lot. Long-term economic growth depends upon a healthy environment, and maintenance of a healthy environment requires continued development. The two are inseparable.

B. Recommendations

From philosophy the Task Force moved on to concrete recommendations dealing with governmental actions, industry commitments, reward/penalty systems, implementation mechanisms, and educational tools. I don't intend to quote each of the forty recommendations, but the report is only 18 pages long and I recommend you find a copy and read it. One measure of its quality may be the fact that 200 copies were stolen on the day of its release. That may be the first time on record that anyone found a government report interesting enough to steal!

In the governmental area we recommended that integration of environment and economy should be a regular agenda item at Canada's First Ministers' Conferences, no less important than tax reform or free trade. Major government economic development projects should be required to demonstrate that they are both economically and environmentally sustainable. Formal mechanisms

should be established to hold Development Ministers accountable for the environmental soundness of their projects and Environmental Ministers accountable for the economic impact of their proposals. Government funding should be conditional on the meeting of environmental standards.

On the industry side, the Business Council on National Issues, the Canadian Chamber of Commerce and other industry associations should establish environment/economy task forces. The industry associations should endorse, support and promote environmental assessment and encourage individual companies to adopt clear environmental policies, including annual reviews for the corporate Boards of Directors. Companies should behave outside Canada as they are required to behave inside it.

We need improvements in analytical methodologies. Cost benefit analysis based on traditional discounted cash flow rate of return on investment calculations (DCF) does not work in relation to the environment. A DCF renders insignificant benefits arising more than five or six years out, a simple function of interest rates, but environmental impact goes on for generations. Nevertheless, DCFs are a fact of business life. In a free enterprise world, we compete for investment capital and unless we provide returns that satisfy, we don't get it. Environmentalists should recognize this and whether or not it is distasteful, accept the fact that industry is bottom line driven. We need carrots as well as sticks, incentives as well as regulations. Given the enormous public interest in Canada in environmental quality and the regularly established willingness to contribute towards environmental cleanup, it is perfectly feasible for governments to introduce fiscal policy changes to create incentives for environmental only projects. Given such incentives, industry will soon develop the type of projects that are needed, because the outcome will reflect through to the bottom line.

We need to upgrade environmental education at the elementary and junior high school levels and include courses on environmental economics at high school and at college undergraduate levels.

We need an ongoing mechanism to pursue these objectives and the Task Force proposed a series of provincial and national roundtables to be appointed by First Ministers. Since the Task Force reported a year ago, there has been a great deal of discussion, debate and speech-making of this type to a wide variety of audiences. While this does not substitute for concrete action, given the very different nature of some of the concepts being promoted, I believe there was a real need for this period of education and consciousness-raising. The follow-up mechanism to the Task Force, the roundtables, are now beginning to appear. They are in existence in Quebec and Nova Scotia. Manitoba has announced its intention to proceed, Ontario is well on the way and the National Roundtable is probably only being delayed by the current political events. I am optimistic that the recommendations of the Task Force will become national policy.*

Conspicuous by its absence in all of these recommendations is any reference to added legislation. The Task Force did not see the law or the courts as the way to address environmental improvement. Rather, we saw an opportunity to encourage healthy, self-interested cooperation.

CONCLUSION

We have an opportunity today and I hope that we will grasp it, because if we miss this chance it may not surface again for another decade and that would be a decade of adversarial, punitive legislation. None of us can afford that, least of all our children.

***POSTSCRIPT**

Roundtables now exist nationally and in every province and the territories. The composition, objective and rate of progress vary from one to another.

ENDNOTES

- *R.S.C. 1985, c. F-14*
- R.S.C. 1985 (4th Supp.) c. 16.
- *Report of the National Task Force on Environment and Economy* (Ottawa: Queen's Printer, 1987).
- *UN Report of the World Commission on Environmental and Development* (Oxford University Press, 1987).
- The Federal Minister together with Ministers from Ontario, Quebec, Manitoba, Nova Scotia, Alberta and the Yukon.
- Alcan, The Canadian Chamber, Dow, The Canadian Petroleum Association, Inco, Noranda and Ontario Waste Management.