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Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts

Fifth Institute Conference on Natural Resources Law

In recent years demands on our natural resource base have multiplied and intensified, leading, in numerous instances, to heightened confrontations between potential users of specific resources. While conflicts over resources are not new, recent disputes have taken on a significantly different character than past ones. Accordingly, traditional approaches to conflict resolution in the natural resources sector often fail to provide adequate solutions to today's problems.

The most obvious change in the nature of resource use conflicts is the growth in the number of competing users in recent years. Aboriginal groups, for example, are more and more frequently involved in resource use conflicts, asserting traditional hunting, fishing and trapping rights against industrial, recreational and other uses. A flourishing recreation industry is now competing for space with traditional users. More generally, it is trite to observe that the public at large has taken a significantly greater interest in how resources are used; concern over threatened species and habitat, for example, is no longer limited to a handful of environmentalists, but is now shared by a large segment of the population.

The Fifth Institute Conference on Natural Resources Law was convened in Ottawa from May 9 to 11, 1991 to address some of these issues. Co-sponsored by the Institute and the University of Ottawa Faculty of Law (Common Law Section) the conference drew approximately 120 participants from across Canada and abroad. The purpose of the Conference was to provide a greater understanding of the nature of resource use rights and resource use conflicts, with special emphasis on existing legal, economic and institutional barriers to their resolution and to explore ways in which conflicts have been or might best be addressed, in both the Canadian and international context.

The papers arising from the Conference will be published by the Institute as a volume of essays. However, because of the immediacy of the subject matter and its obvious relevance to other possible law reform initiatives in this area, the Institute has included in this issue of *Resources* a lengthy excerpt from the paper presented at the Conference by The Right Hon. Sir Geoffrey Palmer, dealing with both the development and substance of New Zealand's pathbreaking and comprehensive resource management legislation, of which Sir Geoffrey was the primary architect. Shortly after the Conference, in July, 1991, the legislation was passed by the New Zealand Parliament.

Inside

Pressions à la hausse sur un patrimoine en diminution: la gestion des conflits nés de l'utilisation des ressources

Cinquième conférence de l'ICDR sur le droit des ressources naturelles

Depuis ces dernières années, les demandes qui s'exercent sur notre fonds de ressources naturelles se sont multipliées et sont devenues plus pressantes, ce qui, dans de nombreux cas, a mené à de graves affrontements entre les utilisateurs potentiels de ressources spécifiques. Si les conflits au sujet des ressources ne sont pas nouveaux, les querelles récentes ont par contre pris une tournure bien différente. C'est pour cela que les approches traditionnelles au règlement des conflits dans le secteur des ressources naturelles ne parviennent souvent pas à offrir des solutions adéquates aux problèmes d'aujourd'hui.

Le changement le plus évident dans la nature des conflits nés de l'utilisation des ressources est l'augmentation, ces dernières années, du nombre d'utilisateurs qui se font concurrence. Les groupes autochtones, par exemple, sont de plus en plus fréquemment impliqués dans les conflits nés de l'utilisation des ressources, lorsqu'ils font valoir leurs droits traditionnels de chasse, de pêche et de trappage face à une utilisation à des fins industrielles, récréatives ou autres. Une florissante industrie du loisir se dispute actuellement l'espace avec les utilisateurs traditionnels. De façon générale, le fait de mentionner l'intérêt du grand public pour la façon dont sont utilisées les ressources est devenu une banalité; la préoccupation pour les espèces et les habitats menacés n'est ainsi plus l'apanage d'une poignée d'écologistes, car elle est maintenant partagée par un vaste secteur de la population.

La cinquième conférence de l'ICDR sur le droit des ressources naturelles s'est déroulée du 9 au 11 mai 1991, à Ottawa, dans le but d'explorer certaines de ces questions. Environ 120 personnes du Canada et de l'étranger ont assisté à cette conférence, commanditée par l'ICDR et la Faculté de droit de l'Université d'Ottawa (section common law). L'objectif de la conférence était de fournir une meilleure compréhension de la nature du droit à l'utilisation des ressources et de celle des conflits nés de cette utilisation, tout en mettant l'accent particulièrement sur les obstacles au règlement de ces conflits, aux plans juridique, économique et institutionnel. Elle avait également pour but d'explorer la façon dont les conflits ont été abordés par le passé et pourraient le mieux l'être à l'avenir, à la fois dans le contexte canadien et dans le contexte international.

Les exposés qui ont été prononcés dans le cadre de la conférence seront publiés par l'ICDR sous forme d'essais. Toutefois, en raison du caractère immédiat du sujet et de sa pertinence manifeste relativement à d'autres réformes législatives éventuelles dans ce domaine, l'ICDR a décidé de publier dans ce numéro de *Resources* un long extrait de l'exposé présenté par le très honorable Sir Geoffrey Palmer. Cet exposé traitait de l'élaboration et du contenu de la législation néo-zélandaise innovatrice et détaillée relativement à la gestion des ressources, dont Sir Geoffrey a été l'architecte. Cette législation a été adoptée par le Parlement de la Nouvelle-Zélande peu après la conférence, soit en juillet 1991.

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Sustainability - New Zealand's Resource Management Legislation

*by Sir Geoffrey Palmer**

Ever since Garrett Hardin introduced us to "The Tragedy of the Commons" we have known that we are imperiled.[1] Population growth and use of the stocks of the planet's resources created a problem to which there was no technical solution. "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society which believes in the freedom of the commons. Freedom in a commons brings ruin to us all."[2] The problem Hardin poses is how to legislate for temperance. He made the point that prohibitions were easy to legislate but temperance much more difficult. The cure lies in mutual coercion and coercion requires legislation.

The World Commission on Environment and Development (the Brundtland Commission) in its 1987 report entitled "Our Common Future" provided a new analysis of the world's resource and environmental problems which linked two key ideas: economic growth and sustainability.[3] The report did not predict increasing decay, poverty and environmental degradation. "We see instead the possibility for a new era of economic growth, one that must be based on policies which sustain and expand the environmental resource base. And we believe such growth to be absolutely essential to relieve the great poverty that is deepening in much of the developing world."[4] That vision is highly attractive politically even if the contradictions which reside within it are not fully resolved in the document. Indeed, my experience in politics makes me sceptical about the ability to achieve unremitting economic growth for all of the world's people all of the time. It is about time we faced up to the point.

With the environmental side of the Commission's equation it is hard to disagree. Profligacy is out. Thought must be given to the options for future generations who may be involved in developmental decisions taken now. Growth in the world's population is a serious problem. It cannot be sustained by the existing environmental resources. The problems in the view of the Commission could all be encompassed within one overarching principle - the principle of sustainability. It was articulated this way:

> Humanity has the ability to make development sustainable - to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of sustainable development does imply limits - not absolute limits but limitations imposed by the present state of technology and social organisation on environmental resources and by the ability of the biosphere to absorb the effects of human activities.[5]

In the development of the idea of sustainability the Commission asserted that all countries and all types of economies will need to form a consensus on the basic concept of sustainable development and on a broad strategic framework for achieving it. The Commission wrote quite an elegant essay on the idea but certainly stopped short of filling out the operational parameters of how it could work in practice. But the Commission did say that there needed to be a merging of environment and economics in decision making.[6] Indeed the common theme of the strategy for sustainable development "is the need to integrate economic and ecological considerations in decision making."[7]

The principles developed by the Commission were the subject of a drafting exercise by a group of experts on Environmental law.[8] Twenty-two principles were stated in terms of broad legal propositions. The statement includes such matters as the right to an environment adequate for health and well being; the principle of inter-generational equity; the maintenance of ecosystems and biological diversity; the setting and monitoring of environmental standards; obligations to co-operate internationally, to exchange information and to consult; and transboundary obligations.[9] In terms of advancing the specifics of sustainability two of the legal statements stand out, Articles 3 and 7:

> (3) States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve biological diversity, and shall observe the principle of optimum sustainable yield in the use of natural living resources and ecosystems.
>
> (7) States shall ensure that conservation is treated as an integral part of the planning and implementation of development activities and provide assistance to other States, especially to developing countries, in support of environmental protection and sustainable development.

Over the next few years these principles will make themselves

felt in the domestic efforts which are made to change natural resources and environmental law. What may not be appreciated is what a fundamental shift in approach is required by the concept of sustainability. Remaking the law of any state to conform to the idea is an enormous undertaking. Just what is involved, and how difficult it is, can be understood by examining the recent New Zealand experience. There may be some lessons in it for others. Many of those lessons will not emerge until the new legislation is up and running. But the policy formation stage in New Zealand was itself full of fascination and is worthy of study for its own sake.

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New Zealand's resource use laws, like the laws of most countries, had grown up over the years statute by statute. They bore the marks of the country's history - gold mining, soil erosion due to clearing too much land for pastoral farming, harbour development, zoning laws for urban development, and a whole host of "one-off" regimes for regulating particular problems such as noise, air pollution, petroleum exploration and geothermal energy.[10] A number of observations can be made about this large collection of separate laws. They contained no unifying principle or approach. Permission to do things was usually required but there was no golden thread running through the statutes of the standards to be applied or the outcomes to be achieved. The mechanisms for settling disputes contained no uniformity. The institutional structures for dealing with the issues were almost infinitely various. It would be fair to characterise New Zealand's resource management laws as an uncoordinated, unintegrated hotch potch involving more than fifty statutes passed at different times in response to different problems.

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The Fourth Labour Government was too busy with other issues in its first three-year term (1984 to 1987) to do a great deal of law reform with respect to resources. A report from a leading lawyer on the Town and Country Planning Act was commissioned.[11] The National Development Act 1979 was repealed. But the real work did not begin until after the 1987 election. A number of developments came together making it possible to engage in a massive law reform project.

In 1987 I became Minister for the Environment. The Ministry was a policy department set up in Labour's first term with wide-ranging responsibilities to tender advice on all aspects of environmental policy. One of the old line departments in New Zealand at that time was the Ministry of Works and Development. It had been a prime mover over the years in carrying out construction for the government. It was expert in planning and building dams for the generation of hydro-electricity. It was old and big and good at defending its bureaucratic territory. It was often involved in both building big projects and providing advice and carrying out regulatory functions in relation to the construction industry. Serious internal conflicts of interest had grown up owing to the range of functions performed by the Ministry. The Government decided that the answer to these problems was to abolish it as a department of state. The government was involved in a massive programme of corporatisation and privatisation of government functions, and the Ministry of Works and Development was a casualty of this policy. Its construction and some other functions should go to a commercially oriented state-owned enterprise which would compete on equal terms with firms from the private sector.[12] Some of its functions which were of a non-contestable public nature were transferred to other government departments. The Ministry had contained two divisions dealing with resource law: The Town and Country Planning Division and the Water and Soil Division. These were downsized and their functions transferred to the Ministry for the Environment.

Considerable bureaucratic upheaval was involved in these changes, but at the time they were being processed through the decision-making structures of the government I procured enough money to carry out a properly funded law reform project on New Zealand's resource laws. The reform was driven by the Minister for the Environment and the Ministry for the Environment. Between the time the project began early in 1988 and October 1990 the exercise had cost $5.5. million.[13] I estimate its final cost will be more than $6 million.

With so many different statutes administered by different government departments involved in the review it was necessary to guard against the jealous defence of bureaucratic territory and a plethora of conflicting advice that would bog the project down and prevent it getting anywhere. This was accomplished by devising an unusual decision-making and advisory structure. Rather than form an interdepartmental committee a core group of four

officials was established. The Director of the project came from the Ministry of the Environment, another official from that Ministry had the responsibility for developing and co-ordinating the advice on Maori issues, a Treasury official was involved to provide the economic analysis, and an environmental lawyer in private practice was also part of the core group. When the project was advanced, an experienced parliamentary draftsman in private practice was also retained to draft the bill.

The advantages of this process were substantial. While it did not eliminate end runs by departments going to their own ministers when they lost, it did minimise that behaviour. It also ensured there was a rigorous filter on the advice before it was tendered to ministers for decisions. That had the tendency of making the decision making more orderly.

To make the decisions and supervise the work of the Core Group a special Cabinet Committee was established. The reform of the resource laws was closely allied to a parallel reform effort on the structure of New Zealand's local government. Both topics were dealt with by the same Cabinet Committee which I chaired. Papers were tendered to the Cabinet Committee through the Core Group and ministers asked questions of officials concerning various recommendations. I had a weekly meeting with the core group to discuss progress and my Associate Minister, who later became Minister of Conservation, dealt with a great many of the difficult political issues. The entire project became known in the inevitable acronyms of government as RMLR - Resource Management Law Reform.

The objectives I established for the project at the beginning were:[14]

(1) The Primary goal for Government involvement in resource allocation and management is to produce an enhanced quality of life, both for individuals and the community as a whole, through the allocation and management of natural and physical resources.

(2) Resource Management legislation should have regard to the following, sometimes conflicting objectives:

(a) to distribute rights to resources in a just manner, taking into account the rights of existing rightholders and the obligations of the Crown. The legislation should also give practical effect to the principles of the Treaty of Waitangi;

(b) to ensure that resources provide the greatest benefit to society. This requires that rights to use resources are able to move over time to uses which are valued most highly, and that the least costly way is adopted to achieve this transfer;

(c) to ensure good environmental management (as specified in the World Conservation Strategy) which includes considering issues related to the needs of future generations,the intrinsic value of ecosystems,and sustainability;

(d) to be practical.

The method by which the policy was developed involved massive and prolonged public consultation. The first part of the process involved a basic analysis of the purposes, objectives and priorities for the reform. It asked hard questions such as to what extent, if any, should natural and physical resources be managed through public processes. The approach taken was to think through the issues from scratch and taken nothing for granted.

Throughout the course of the policy generation process the Ministry for the Environment published "Viewfinder", a professionally produced newsletter containing information and discussion about the reform process and providing opportunity for participation in it. Details of the numerous working papers developed were also publicized by this medium, and interested people were given the opportunity to secure these documents; in the life of the project 32 substantial working papers were published.[15] At the beginning a freephone was organised for the public from all over New Zealand to express their views on the content of the reform. Advertisements were placed in newspapers, providing a means to request more information about RMLR. Information kits were widely distributed by this means. Commercials were played on radio drawing attention to the project. The first phase of the process ended in August 1988 with the publication of a discussion paper entitled "Directions for Change."[16]

"Directions for Change" covered the following issues:

- why reform was needed
- what the objectives and purposes of the reform should be
- the role of government
- the form the laws should take (should there be a single Act?)
- the integration of consents (a "one-stop shop" approach)
- Treaty of Waitangi and Maori issues
- the decision making processes, including appeals
- instruments and mechanisms

The paper developed four reform models, and submissions were invited to choose between them. The first involved a single Resource Management Act operated principally by regional

government, although some matters could be delegated to the territorial government. Resource allocation decisions under this approach would then be dealt with by a different act administered by the central government. The second model also envisaged a single act but anticipated territorial local government having direct responsibility for land-related resources management. The third model involved a single act with split functions as in model 2, but with coastal management dealt with centrally by the Department of Conservation and minerals dealt with centrally by the Ministry of Energy. The fourth model envisaged four separate pieces of legislation: water, soil and air resource management administered by regional government; land use and noise management administered by territorial local government; coastal legislation administered by the Department of Conservation and minerals legislation administered by the Ministry of Energy.

Extensive consultation proceeded on this document and public meetings were held all over New Zealand, together with extensive working meetings with interested and affected groups. Seminars were provided for the media. Despite the openness of the process and the extensiveness of the consultation, RMLR never took off as a political issue. It was a holistic reform which concerned matters of considerable complexity, often dealt with by professionals but not familiar to the general public. Planners, lawyers, local government staff, environmentalists, engineers, mining companies, Maori groups, and public servants were the main ones to show an interest. And while that interest was intense and tended to be expert it was limited in extent. RMLR lacked the essential ingredients of political sex appeal. This was no bad thing. Big changes could be made and the defence of adequate notice and public consultation was available and could be relied upon.

In December 1988, after Cabinet consideration, the Government's proposals were published. The paper set out the framework for the new law. My preface stated: "Resource management must protect the needs of future generations by recognising the concept of sustainable development. We need laws to help us to enjoy and use what we have without endangering or compromising quality of life for ourselves or future generations."[17] For a third time submissions from the public were called for. The paper summarised an approach to 25 of the more important issues, and in the course of more than 70 pages indicated how the practical shape of the legislation might appear. A total of 1256 written submissions were received on this paper. A Working Paper was published summarising the submissions.[18] The extensive public consultation did allow the Cabinet Committee to avoid serious political traps which could have emerged in the exercise had the consultation not taken place. Indeed, in no law reform exercise I have been involved with has the consultation and public participation been greater. Even before the bill was introduced a total of 3,500 submissions was received. I have no doubt this project set new levels of public participation in the process of decision making for New Zealand.

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The next step - Phase III- was the legislation itself, and things were getting much harder now. It was difficult to complete all the work. Deadlines had to be put back as the decision-making process ground out the decisions and they were drafted. In my experience this process almost always takes longer than expected, and the process of repairing the bill after preliminary exposure drafts is always difficult and time consuming. The bill was finally introduced into the New Zealand Parliament in December 1989.

The bill was massive - 314 pages. As befitted a project of this complexity the bill was accompanied by an unusually detailed explanatory note and an extensive kit of information. A specially enlarged Select Committee of Parliament was set up to hear submissions on it. The bill was written in plain English and attempted to eschew the complexity and prolixity which often accompanies legal drafting. The bill set out to rectify a number of problems:

- there was no consistent set of resource management objectives
- there were arbitrary differences in management of land, air and water
- there were too many agencies involved with overlapping responsibilities and insufficient accountability
- consent procedures were unnecessarily costly and there were undue delays
- pollution laws were ad hoc and did not recognise the physical connections between land, air and water
- in some respects there was insufficient flexibility and too much prescription, with a focus on activities and not end results
- Maori interests and the Treaty of Waitangi were frequently overlooked
- monitoring of existing law was uneven and enforcement difficult.

The Explanatory note to the Resource Management Bill said this about its purposes:

> The objective of this Bill is to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources. This bill integrates existing laws by bringing together the management of land, including land subdivision,water and soil, minerals and energy resources, the coast, air, and pollution control including noise control. It sets out the rights and responsibilities of individuals, and territorial, regional and central government. The central concept of sustainable management in this bill encompasses the themes of use, development and protection. The bill sets up a system of policy and plan preparation and administration which allows the balancing of a wide range of interests and values. The bill allows the needs of the present generation to be met without compromising the ability of future generations to meet their own needs.[19]

The Select Committee was inundated with submissions from the public and interest groups; more than 1,400 were received. Many of them were heard and the hearings took months. The bill was not reported back to the House by the Select Committee until August 1990, with a general election due in October. There simply was not time to pass the bill before Parliament stopped in September prior to the election. But the bill was well advanced; the Select Committee had made extensive amendments to it as a result of submissions. The bill was read a second time and had entered the Committee of the Whole before Parliament went into recess.

In the general election the Labour Government was defeated and the National Party formed the government. The new Minister for the Environment was a supporter of the general thrust of the RMLR project. He quickly appointed a group of five people, chosen for their expertise, to review the bill and make recommendations relating to it as the National Party's election platform had promised.

This group published a 62-page discussion paper and received 160 submissions.[20] The group's 186 page review was published in February 1991, and concluded that "In general terms, the changes are regarded as worthwhile although a number of areas have been identified for amendment."[21] Quite a number of detailed drafting amendments were recommended, together with some policy changes. The report was basically a vote of confidence in the bill, and this is hardly surprising given the extensive process by which the policy was developed. There can be few views on the questions involved which remain uncanvassed in New Zealand. The development of policy through an open textured process of public consultation can provide robust proposals which will survive not only because they have been thought through but also because interested groups and experts see their advantages and constitute a body of opinion in favour of the changes.

On 2 May 1991 the Government announced its decisions on the Resource Management Bill in more than 30 pages of press release and explanatory material. On 9 May the Minister introduced into the House of Representatives a supplementary order paper containing the government's proposed amendments to the bill. The supplementary order paper was debated and referred to a parliamentary select committee for submissions. The Select Committee heard submissions and produced a lengthy report making recommendations. A new Supplementary Order Paper was produced incorporating the recommendations. After quite a short debate the bill was finally enacted in the first week of July 1991. It has a commencement date of 1 October 1991.

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The most critical feature of the Resource Management Bill lies in the provisions describing its purposes and principles. This part sets the standards upon which the entire integrated decision-making system must rest. The key concept is sustainability. In providing an underlying philosophy of sustainable management the New Zealand legislation breaks new ground. As developed in the reform process, sustainable management is a broad concept which reflects aspects of use, development and protection. It is upon this aspect that the National Party Government's review concentrated.

The structure of the bill as introduced was not greatly altered by the Select Committee in relation to the purpose of sustainable management. As reported back from the Select Committee clause 4 provided:

4 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
(2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their own needs and includes the following considerations:

(a) The maintenance and enhancement of the quality of the environment, including the life supporting capacity of the environment and its intrinsic values:
(b) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and opportunities of people and communities:
(c) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable:
(d) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:
(e) The use or development of non-renewable natural and physical resources in a way that sees an orderly and practical transition to adequate substitutes including renewable resources:
(f) The exercise of kaitiakitanga which includes an ethic of stewardship."

This definition had been based on extensive work by the Core Group, including a published paper entitled "Ecological Principles for Resource Management."[22] Clause 4 was followed in the bill (as introduced) by clause 5, which established a number of principles to be observed by those exercising functions and powers under the bill. These included such matters as maintenance and enhancement of the quality of the environment, the effects of activity on ecosystems, and the economic, cultural and social well being of people and communities. The relationship between clauses 4 and 5 had become a matter of some debate and the Review Committee established by the National Government was invited particularly to examine it. They found a number of difficulties:[23]

- the problem of applying the purposes and principles in practice
- the failure of the purpose and principles clauses to recognise the built environment
- a lack of balance between preservation principles and reasonable opportunities for economic growth and development
- the failure to indicate priorities as between the various matters to be taken into account
- the uncertainty of the relationship between clauses 4 and 5
- the absence of a positive planning obligation.

While not accepting all these criticisms the Review Committee was of the view that sustainable management should remain the cornerstone of the bill.[24] But the Committee was not attracted to the broad concept developed by the Brundtland Commission, which included social inequities and global redistribution of wealth. The Group did recommend a second purpose which would reflect the intention of the bill to place less emphasis on existing statutory requirements and move instead to control adverse effects of activities on the environment. The aim was to secure a high standard of environmental outcomes while at the same time encouraging the use of alternative methods to achieve the goals.

The Review Committee approached the matter by referring to the simple purpose of promoting the sustainable management of natural and physical resources. This would be followed by a definition of sustainable management which refers to managing the use, development and protection of natural and physical resources in a way which will provide for current social, economic and cultural wellbeing, as well as health and safety. The definition would be subject to two parameters in the view of the Committee: the need to safeguard the ability of future generations to meet their needs, and the need to avoid, remedy or mitigate any adverse effects of activities on the environment.

The Review Group's recommended draft of clause 4 was:[25]

4 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
(2) In this Act, "sustainable management" means managing the use, development and protection of natural and physical resources in a way or at a rate which enables people and communities to provide for their health and safety, and their social, economic and cultural wellbeing while-
(a) Safeguarding, to the extent reasonably foreseeable, the ability of future generations to meet their needs in relation to natural and physical resources; and
(b) Avoiding, remedying or mitigating any adverse effects of activities on the environment.

There follows a new clause 5A which sets out matters of national importance which should be recognised, and then clause 5 which states principles which all persons exercising functions and powers under the act shall have particular regard to. A number of the factors mentioned in the previous version of clause 4 are included here.

These tests were designed to address a whole range of resource management decisions - town and country planning, the granting of water rights, subdivision of land, resource consents, coastline decisions. The review recommended, and the government accepted, that a separate Crown Minerals Bill would govern minerals. That will be accomplished by splitting the

minerals provisions out of the bill at the third reading stage. Sustainability will not apply to decisions about the use of minerals. The Review Committee recommended, however, that minerals activity will still require consents under the Resource Management Bill. This recommendation was combined with a retention of the landowner veto over access to privately owned land, which would have ensured that mining is subject to a more level playing field than the preferred position it occupied under the previous law.[26] In its supplementary order paper the Government has not accepted this recommendation in full. It has instead provided that a refusal of access by the landowner can be over-ridden by the Government issuing an order-in-council. In practice, however, this change may not amount to much. The political costs of interfering with the rights of landowners in New Zealand are high and the power is likely to be exercised very sparingly indeed. The overall balance of the bill is not much affected: the bill as introduced allowed the Planning Tribunal to over-ride a landowner's refusal.

The purpose and principles clauses were the focus of further adjustment in the Government supplementary order paper and many submissions to the Select Committee considering it. As it was finally enacted the purpose clause is as follows:

4 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
(2) In this Act, "sustainable management" means managing the use, and development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while —
(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

How this brave new world of sustainability will work in practice remains to be seen. How far the decisions will bite in favour of future generations and against immediate exploitation will be the key issue. In this respect the new formulation has weakened sustainability a little. Nonetheless how the various tests play out against each other will be a fascinating legal exercise with substantial economic consequences. There is no doubt that the result will be a new legal baseline which is friendlier to the environment and offer some protection for those who are to come after us.

The ultimate arbiter will be the Planning Tribunal, which is a court. It will have the benefit of decisions from local and regional government. It will be able to draw upon policy statements and management plans constructed under the legislation and required by it. Questions of law can go on appeal to the High Court.[27] It should also be noted that the Planning Tribunal can ask for a dispute to be mediated or conciliated at any time before or during a hearing.

It might be argued that questions of this sort cannot be made justiciable; that the Planning Judges and their assessors are being handed a task with such sweeping social and political consequences that it is impossible. Certainly it is ambitious. But there are a number of reasons to think the exercise will succeed. The first is that the Planning Tribunal and the courts in New Zealand have built up a degree of expertise and sensitivity in dealing with issues of considerable breadth under the existing town and country planning legislation.[28] The extension should not trouble them unduly. Secondly, the regime of decision making underneath the Tribunal provides for policy input of a political character through national policy statements on "matters of national significance that are relevant to achieving the purpose of this Act."[29] The Review Committee recommended that they be renamed "statements of Government policy." There should be a prescribed process of public inquiry before they are issued and they should be issued by order-in-council. All this has been accepted by the Government. Thirdly, there is sufficient flexibility in the approach of the legislation to avoid detailed prescription in favour of securing optimal outcomes.

There is some irony in the fact that New Zealand, a relatively rich country in terms of resources, and with a small population, will be one of the first countries to adopt sustainability as the key to its resource management laws. It could not have occurred but for the way in which the reform exercise was put together. The fact that the reform was able to survive a change of government is a significant event: bi-partisan commitment will help the changes to endure. Despite the vigour of party politics in New Zealand, sometimes quite big changes can secure this sort of support.

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New Zealand is now at the conclusion of a massive effort to reform its resource management law. The result is major change with the replacement of some 75 statutes. Both main political parties have been involved in the changes and the result is likely to enjoy broadly bi-partisan support. No doubt there will be a number of unexpected results in the initial stages of the operation of the new resource management programme, but it is certainly a scheme which is likely to attract much overseas interest.

** Sir Geoffrey Palmer is Professor of Law, Victoria University of Wellington. From 1984-1989 he was Deputy Prime Minister, Attorney-General and Minister of Justice of New Zealand, from 1987-1990 he served as Minister for the Environment and from 1989-1990 as Prime Minister.*

Notes

1. Hardin, The Tragedy of the Commons, 162 Science 1243 (1968) (reprinted in Economics, Ecology and Ethics 100 (H. Daly ed. 1973)).
2. *Id.* at 104.
3. World Commission on Environment and Development, Our Common Future, (1987).
4. *Id.* at 1.
5. *Id.* at 8.
6. *Id.* at 62.
7. *Id.*
8. *Id.* at Annexe 1.
9. *Id.*
10. New Zealand Parliament, Resource Management Bill 1989, as reported by the Select Committee 1990, 4th schedule.
11. Review of the Town and Country Planning Act 1977, by A Hearn, Q.C., Department of Trade and Industry, Wellington 1987.
12. *See generally*, Purpose, Performance and Profit: Redefining the Public Sector, (Studies in Public Administration no. 32) (M. Clark & E. Sinclair, eds. 1986)p; and M. Palmer, *The State-Owned Enterprise Act 1986: Accountability?* 18. V.U.W.L.R. 169 (1988).
13. G. Palmer, Environmental Politics - A Greenprint for New Zealand 91 (1990).
14. *Id.*, at 91-92.
15. *E.g.* Fundamental Issues in Resource Management (Resource Management Law Reform Working Paper No. 1, July 1988) and Public Submissions in Response to *People, Environment and Decision Making* (Resource Management Law Reform Working Paper No. 32, April 1989). Included in the topics dealt with by these working papers were: Analysis of Existing Statutes; the treaty of Waitangi; Implementing the Sustainability Objective; Coastal Legislation; Geothermal energy; Maori Value Systems and Perspectives; Enforcement and Compliance Issues; National Policy Matters; Public Participation; Compensation; Objectives; Users-Group Working Papers; Town and Country Planning Legislation and Procedures; the Role of Local and Regional Government; the Management of Pollution and Hazardous Substances; the Clean Air Act; the Petroleum Act; the Mining Act; Waitangi Tribal Findings; the Various Roles of the Crown; the Role of Information in Resource Management; Natural Hazards; Decision-making Processes and Structures; Public Participation in Policy Formation and Development Consents; Impact Assessment in Resource Management; Resource Management Disputes (Part A - The Role of the Courts and Tribunals; Part B - Mediation).
16. Directions for Change: A Discussion Paper (Resource Management Law Reform, August 1988).
17. People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform (Resource Management Law Reform, December 1988) at 3.
18. Public Submissions in Response to *People, Environment and Decision Making*, *supra* note 17.
19. New Zealand Parliament, Resource Management Bill 1989, explanatory note at i.
20. Discussion Paper on the Resource Management Bill: Prepared by the Review Group, (December 1990).
21. Report of the Review Group on the Resource Management Bill (February 11, 1991) at 2.
22. Karen Cronin, Ecological Principles for Resource Management, (July 1988). In addition, working papers nos. 10, 24 and 25 dealt with sustainability.
23. Report of the Review Group on the Resource Management Bill, *supra* note 24 at 5.
24. *Id.* at 6.
25. *Id.* at 145-46.
26. *Id.* at 72.
27. New Zealand Parliament, Resource Management Bill, cl. 334.
28. Town and Country Planning Act 1977; Water and Soil Conservation Act 1967; Soil Conservation and Rivers Control Act 1941.
29. New Zealand Parliament, Resource Management Bill, cl. 41.

Institute Publications

Security of Title in Canadian Water Rights, by Alastair R. Lucas. 1990. 102 pages. $22.00.

The Legal Challenge of Sustainable Development, Essays from the Fourth Institute Conference on Natural Resources Law, Ottawa, Ontario, edited by J. Owen Saunders. 1989. 404 pages. $75.00.

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The International Legal Context of Petroleum Operations in Arctic Waters, by Ian Townsend Gault. 1983. 76 pages. $9.00.

Canadian Electricity Exports: Legal and Regulatory Constraints, by Alastair R. Lucas and J. Owen Saunders. 1983. 42 pages. $9.50.

Acid Precipitation in North America: The Case for Transboundary Cooperation, by Douglas M. Johnston and Peter Finkle. 1983. 75 pages. $10.00.

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Outside Publications

Trading Canada's Natural Resources, Essays from the Third Banff Conference on Natural Resources Law, edited by J. Owen Saunders. (Carswell Legal Publications,1987). 367 pages (hardcover). $75.00.

Managing Natural Resources in a Federal State, Essays from the Second Banff Conference on Natural Resources Law, edited by J. Owen Saunders. (Carswell Legal Publications, 1986). 336 pages (hardcover). $70.00.

Both these books are available from: Carswell Legal Publications, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7 or toll-free 1-800-387-5164.

The *Canada Energy Law Services* are two regularly updated looseleaf services which act as guides to the regulation of energy development in Canada, particularly in the Federal and Alberta spheres. For each tribunal considered there is a commentary, a collection of legislation, and a digest of board decisions and applicable judicial cases. It is available from: Richard De Boo Publishers, 81 Curlew Drive, Don Mills, Ontario, M3A 3P7. For more information you can call toll-free 1-800-387-0142 (Ontario and Quebec) or 1-800-268-7625 (other provinces, including area code 807).

Institute News

• Owen Saunders acted as chair and commentator of a session on transboundary environmental issues at a conference on US-Canada-Mexico relations held at The University of Calgary in May.

• Owen Saunders presented a paper in June on "The Mexico Factor in North American Free Trade: A Canadian Perspective" at a seminar in Montreal on The Future of International Energy Markets sponsored by the International Bar Association's Section on Energy and Natural Resources Law.

• Owen Saunders presented a paper in Saskatoon on principles and approaches to interjurisdictional water management at Waterscapes '91, an international conference on water management for a sustainable environment held in June.

• In August Owen Saunders will be speaking on international trade and the environment at the Annual Meeting of the Canadian Bar Association to be held in Calgary.

• Monique Ross presented a paper on *Perspectives on Joint Environmental Impact Assessments* at the World Environment Conference held April 8, 1991 in Calgary.

• The Institute is currently employing three student research assistants. They are University of Calgary law students Ingrid Liepa, Scott Paul and Jane Sidnell.

Recent Visitors

Donna Tingley, Executive Director, Environmental Law Centre, Edmonton

Nguyen Duc Lien, Interim Mekong Committee, Bangkok, Thailand

Recent Seminar

In April, 1991, the Institute presented a seminar by Professor Adrian Bradbrook, the 1991 holder of the Chair of Natural Resources Law on "New Sources of Energy for Electricity Generation -Legal Issues". The seminar provided an overview for the legal profession and professionals in other disciplines as to the present and future application of the law to renewable energy resources, energy conservation and small power production. The seminar attracted approximately 40 participants from the Calgary legal community.

New Research Associate

Steven Kennett will be joining the Institute as a Research Associate in January, 1992. Mr. Kennett has a B.A. (Hon.) in Politics and Economics from Queen's University, an M.Phil. in Politics from Oxford University, an LL.B from the University of Toronto and an LL.M from Queen's University, where his thesis topic was a constitutional analysis of Canadian interjurisdictional water management. He is a member of the Ontario Bar and was previously counsel with the Ministry of the Attorney General in Ontario. He is currently studying in France at the Centre International d'Etudes Françaises, Université Lumière in Lyon. Mr. Kennett's research interests are in the areas of natural resource and environmental law and policy. Mr. Kennett fills the position held for eight years by Barry Barton. Mr. Barton left the Institute in July, 1991 to take up a teaching position at the University of Waikato law school in Hamilton, New Zealand.

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