

*the newsletter of the Canadian Environmental Law Association*

## Cela Clients Set Appeal Precedent Under Ontario's Environmental Bill of Rights

*by Rick Lindgren*

In a precedent setting decision, the Ontario Environmental Appeal Board has recently granted CELA clients the right to proceed with a third-party appeal under the *Environmental Bill of Rights* (EBR). The Board's May 24, 1996 decision is the first in which Ontario residents have received leave to appeal a decision of the Ministry of Environment and Energy (MOEE) under the EBR.

Prior to the enactment of the EBR, Ontario residents lacked the statutory right to appeal MOEE decisions to issue "instruments" (i.e. permits, licences, approvals, or orders). Under the EBR's third-party appeal provisions, interested persons can now seek leave to appeal MOEE decisions to issue, amend or revoke certain types of instruments such as landfill approvals, air emission approvals, or director's orders under the *Environmental Protection Act* or *Ontario Water Resources Act*.

In order to obtain leave to appeal under the EBR, residents must satisfy the Board that the impugned MOEE decision is unreasonable and "could result in significant harm to the environment." This leave test has been widely regarded as too restrictive, which may explain the difficulty that some Ontario residents have experienced in trying to obtain leave to appeal under the EBR. To date, over two dozen EBR leave applications have been filed with the Board in relation to a wide range of MOEE instruments. However, no residents had been granted leave to appeal by the Board until its May 24th decision.

The Board's decision focused on a private landfill site that had been inactive since 1978. The site's provisional certificate of approval expired in

1979. In the mid-1980s, the site operator commenced discussions with the MOEE about the possibility of reactivating the approval and reopening the site. In 1990 the MOEE imposed a condition of approval that prohibited the deposit of further waste at the site. In 1995 the MOEE proposed a new condition that required the submission of a final closure plan for the site. In 1996 after receiving submissions on this proposal under the EBR's public notice-and-comment requirements, the MOEE decided to replace the no-waste condition with a condition that permitted the receipt of waste upon the submission of a design and operations report. CELA's clients, who live near the site, then applied for leave to appeal the MOEE's amendment under the EBR.

The Board's decision made four important rulings in favour of CELA's clients:

① **JURISDICTION** The Board ruled that an amendment to a certificate of approval for a waste disposal site was subject to the

*(Cont'd on p. 3)*

### Inside

- CELA clients set appeal precedent under EBR
- Editorial: Breathless in Toronto
- CELA represents groups in PCB hearings
- CONE receives conservation award
- So you want to be an environmental lawyer?
- Briefly
- Books: Our stolen future

## Editorial

## Breathless in Toronto

by Jill Cameron

Clean air in many North American cities is an elusive quantity and in Metro Toronto it's becoming the stuff of history. We have the worst air in Canada. In 1994 GTA Municipalities had 175 total hours of air quality where ozone exceeded 80 ppb (health problems may occur with levels as low as 40 ppb). Pollution Probe estimates that smog kills 380 people per year in Toronto. The smog seeps into Scarborough, Mississauga, Oakville, Whitby and beyond - they are all just as polluted as Metro Toronto. The implications of our hazy skies are enormous. They include:

### Health effects:

Our summer haze is associated with 24% of respiratory hospital admissions in Toronto and there is an increasing prevalence of asthma and mortality from the disease. Associated respiratory problems such as bronchitis (particularly in asthmatic children) have risen and tragically those at either end of the spectrum - children and the elderly - are most severely affected. As noted in Metro's Blue Ribbon Committee Report, exposure to toxics (such as benzene, polycyclic aromatic hydrocarbons, sulphur dioxide, carbon monoxide, nitrogen oxides) can lead to cancer, birth defects, neurological and immune system damage.

### Environmental effects:

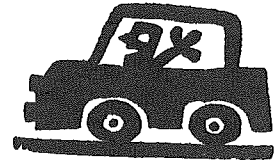
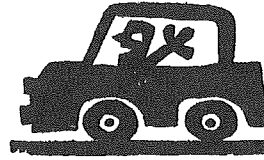
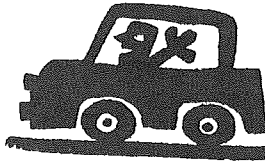
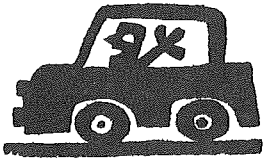
The MOEE estimated in 1990 that smog damaged up to \$70 million worth of crops. Forests, ornamental plants and terrestrial ecosystems all suffer. Materials such as paint and rubber deteriorate faster in smog - rubber tires contain anti-oxidants to protect them from cracking and splitting. Particles also damage limestone buildings (just imagine what they do to our lungs!). Smog contributes to global warming - the GTA has experienced a .7 C warming trend in the last century and higher temperatures lead to increased dangerous ozone levels.

Our governments seem to be taking incremental measures to alleviate the problem. The feds are aiming new pollution regs to cut car emissions between 30% and 60% in 1998 vehicles. At a recent conference (see p. 7) Federal Minister of the Environment Sergio Marchi sidestepped injecting federal money into our under-utilized rail transportation system, claiming that it would require an incredibly high federal investment and funds are short. He was reluctant to promise better fuels and reduce taxes to limit their costs when questioned on the matter. He noted that environmental protection should triumph over jurisdiction, but the issue remains outstanding. He promised to 'exert influence on our neighbours to ensure planned emission reductions,' but his goal is 'to cut American flows of smog creating substances into Canada in half by 2010' - 14 years from now!

The provincial government in Ontario is testing cars for emissions, but the program is obscure, under-promoted and temporary - until the end of this summer. Brenda Elliot would not commit to mandatory testing. The concept of annual emissions checks has been in place in Vancouver since 1992 and has cut their exhaust emissions by 20%. In the U.S., 38 of 50 states test car exhaust systems regularly. There is currently only one vehicle inspector for the whole province of Ontario and the bottom line on mandatory testing seems to be that the government was elected to "get government out of people's faces." Although Mayor Barbara Hall claims that her Council would support anti-idling regulations, she has pointed out that they would require enabling Provincial legislation to enforce them.\* Ms. Elliot blames the problem on wrangling between the ministries - Al Leach's Municipal Affairs was opposed, although her ministry supported the legislation. Stalemate. When asked about increased funding for municipalities to improve public transportation (used in Metro by 22% of us - 54% drive cars) Ms. Elliot deflected the issue by calling for more education and public participation and noted that money was not the only issue.

Excuses, excuses... For those of us living in cities the words are spinning a dirty web. When I go through the ravine at 6 in the morning, I smell cedar trees then solvent fumes emanating from a tiny stream, held in the valley by a blanket of smog. I climb the hill to feel my eyes stung by the exhaust from an idling bus waiting to meet its schedule and I'm outraged by the toll air polluting is taking on every inch of my beautiful and vibrant city. I want to tell all the delivery vans, all the Bell and hydro vehicles, parents idling outside schools, taxis and tour buses to turn off their engines when they're not moving. I'd like to ask all the bumper to bumper commuters forming a steady line from Front Street to Eglinton on every central north/south main street to take the bus. I'd suggest that we return to rail transport and remove the burden of so many huge transport trucks on our highways. We could further this end by relying less on imported goods and support our local economies. We need individual and government

(Cont'd on p.2)



### Editorial (cont'd from p.2)

commitments to save our air and funds to ensure the plans materialize. We need better emission controls and inspections for our vehicles and cleaner fuels. We need less industrial air pollution. We need better public transportation for individuals and cargo to reduce the enormous volume of traffic on our roads. We need to educate people to choose alternatives to their cars: walk, take the metro or take a bike. There's no escaping the fact that it's a dirty subject and when we can cut the air, its time to bring out the knives.

\* The City no longer requires enabling legislation and the issue will come before Council over the summer. The Acting Medical Officer of Health has been asked by the Board of Health to prepare a report on sources of compromises to Air Quality with respect to the respiratory problems of the citizens of Toronto. Anti-idling legislation is within our grasp in Toronto - we'll see if it materializes.

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*Jill Cameron is the editor of the Intervenor.*

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## Footprints.....

Summer is upon us and our offices are filling up with extra hands. We welcome summer students D'Arcy Nordick and Lisa Wong. Felicity Heyworth is helping out in the library and Donna Bigelow has begun her Articling position which will keep her with us for the year.

It's great to see you!



### CELA Clients Set Appeal Precedent (cont'd from p.1)

third-party appeal provisions under the EBR.

② **STANDING** The Board ruled that CELA's clients had a sufficient interest to seek leave to appeal the MOEE decision because of their ongoing involvement in the matter and because of their proximity to the site.

③ **EBR LEAVE TEST** The Board ruled that the MOEE's decision may have been unreasonable and could result in significant harm to the environment for several reasons: (1) there was a discrepancy between the site location described in the certificate of approval and the area where waste had been deposited in the past; (2) a reopened landfill was more likely to create nuisance impacts than a closed landfill; and (3) the site could be reopened under the MOEE's amendment without the issuance of a revised approval containing new terms and conditions.

④ **STANDARD OF PROOF** The Board ruled that during the leave application stage, it was appropriate to assess the applicants' case under a standard of proof that was lower than the usual "balance of probabilities" test.

The Board granted CELA's clients leave to proceed with their appeal to a full hearing before the Board. It is hoped that the Board's decision may assist other Ontario residents in obtaining leave to appeal under the EBR, particularly as other Ministries - notably the Ministry of Natural Resources - prescribe which of their instruments will be subject to EBR requirements respecting public notice, comment and third-party appeal. Indeed, the Board's decision was cited with approval in the second Board decision that granted residents leave to appeal an air emission approval issued in relation to Petro-Canada's proposed expansion of its petroleum refinery in Mississauga.

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*Rick Lindgren is a CELA lawyer.*

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## CELA Represents Groups in PCB Hearings

by Paul Muldoon and Ramani Nadarajah

CELA is representing the environmental groups Great Lakes United (GLU) and Greenpeace, in approval hearings concerning the destruction of PCBs at an industrial site in the Lansdowne and Dovercourt area in the City of Toronto. The proponents are the former owners of the property, General Electric Canada and ELI ECO-LOGIC International, Inc., who own and operate the PCB destruction technology.

In late April the Environmental Assessment Board (EAB) granted the groups party status to assess the approval process technology. Apart from GLU and Greenpeace, two other groups were given party status to evaluate site impacts of the proposal: the Bloor-Junction Residents Coalition Inc. and the GE Task Force.

The hearings are being held under Regulation 352 of the *Environmental Protection Act*. These regulations were enacted in 1986 to deal specifically with mobile incineration of PCBs. The proponent in this case agreed to have the hearing under this regulation even though the proposal does not involve incineration technology.

The case is novel in that this is the first approval hearing for non-incineration technology, and in particular, a chemical reduction process developed by ECO-LOGIC. The technology is designed to vaporize the PCBs. With the injection of hydrogen the PCBs are reduced to methane, acids and other by-products. Many of these by-products are then used as a feedstock to fuel the process.

Demonstrations of the technology have been undertaken in Bay City, Michigan; Canberra, Australia and Hamilton, Ontario. Its first commercial application is now underway at a GM site in St. Catharines, Ontario. The present application is of particular interest since it will be located within an enclosed building, within approximately 100 metres of a residential neighbourhood.

CELA's clients are neither supporting nor opposing the application. Instead, their intervention is intended to assist the Board in understanding the technology better by testing the evidence that supports the application. The two site groups are also taking the same position.

The hearing will be one of the last hearings when the *Intervenor Funding Project Act* is applied, since the *Act* expired at the end of March and has not been renewed. The funding for the hearing is being divided into two phases. Phase I is to deal with funding to develop the final issues list while Phase II is for the remainder of the hearing. CELA's clients received funding at the funding hearing on May 17, 1996. However, the EAB funding panel agreed to fund only one site group, leaving it to the two groups to come to some arrangement as to their respective roles in the hearing. The hearing is scheduled to begin on August 12, 1996.

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*Ramani Nadarajah and Paul Muldoon are CELA lawyers.*

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## CONE Receives Conservation Award

by Rick Lindgren

At a Queen's Park ceremony held in March 1996, the Coalition on the Niagara Escarpment (CONE) was awarded the 1995 Lieutenant Governor's Award for Conservation. This annual award recognizes excellence in environmental protection and resource conservation.

Established in 1978, CONE is a coalition of Ontario's largest conservation and environmental groups (CELA, Federation of Ontario Naturalists, Sierra Club of Eastern Canada, Bruce Trail Association, Streams Ontario, and Bruce Peninsula Environmental Group) and numerous individuals who are dedicated to the protection of the internationally significant Niagara Escarpment. Over the years, CONE board members, staff and volunteers have been actively involved in numerous Niagara Escarpment issues, and they have participated in countless meetings, hearings, workshops and other programs in order to strengthen the Niagara Escarpment protection regime.

CONE's conservation award comes at a critical point, since the provincial government appears poised to substantially downsize and fundamentally restructure the Niagara Escarpment protection regime (see INTERVENOR, Vol. 20, No.6). It is hoped that CONE's award will help focus public and political attention on the urgent need to maintain the current legislative and policy framework that is necessary for the survival of the Niagara Escarpment's unique natural and cultural heritage.

## So You Want to be an Environmental Lawyer?

by Michael Wilson

**M**any students ask us at CELA "How can I become an environmental lawyer?" There is no one answer to this question. However, with more universities offering courses and degrees in environmental sciences, studies and law, there are some good, general strategies.

An environmental lawyer requires two key bases of knowledge: the law and the issues. To be an environmental lawyer, you must first and foremost be familiar with environmental laws (both provincial and federal). To be marketable you also need a decent familiarity with environmental issues - both the scientific and the social aspects. The trick lies in deciding how you can best acquire this knowledge. To become any type of lawyer in Ontario, you must be called to the Ontario Bar. There are three steps required to do this, and while completing these three steps, you can focus your energy on directing yourself into environmental law.

### **Step 1: UNDERGRADUATE DEGREE**

You must complete three years of a four-year undergraduate degree (usually all four are required) before you go to law school. Any of the sciences (biology, ecology, environmental sciences, etc.) or environmental studies would give you an excellent background and a core literacy for the type of issues environmental lawyers are exposed to.

It would be beneficial to work or volunteer at environmental organizations. There are also environmental conferences you can attend or perhaps present papers at. Working, volunteering or attending conferences can be done either through the university or through outside organizations or companies.

### **LAW SCHOOL ADMISSION TEST (LSAT)**

You should note that to be accepted to any law school in Canada you must write the LSAT, normally in either September or December of your final undergraduate year.

### **Step 2: LAW SCHOOL**

Law School is a three-year program. There are required courses, a number of highly recommended "core" courses and some electives. Most law schools have at least one Canadian and one International environmental law course - some offer several of each. The University of Victoria, for example, offers a concentration in environmental law, with five environmental law courses: environmental law, coastal and marine law, selected pacific north west issues in environmental law and policy and international environmental law. Before deciding on a law school, look into what electives are offered. You may also attend law school in one province and article or practise in another.

While at law school, I would also recommend you take administrative law and at least one litigation course - private firms and the Ministry of the Environment and Energy (MOEE) like a strong administrative and litigation background. These courses would ideally be supplemented with work or volunteer experience with your law school's legal clinic or the Crown's office.

Some universities, such as York University, also offer joint Masters in Environmental Studies / LLB programs.

### **Step 3: ARTICLING**

Following law school, you must article for approximately 16 months (12 of work and four of courses). Many of the larger law firms have an environmental law or a municipal and environmental law section. It is important to look into which firms have these sections and to make sure they are included in articling students' rotations. For even more specialized articles, a few places (CELA, the MOEE) offer purely environmental law articles.

Although this is by no means the only way to become an environmental lawyer, with increased specialization in law, it is now more difficult to get into environmental law without some background in the area. The types of exposure you get by being involved in these activities will help you, even if you decide environmental law is not for you!

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*Michael Wilson has completed law school and is doing his Articles at CELA.*

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## Briefly

### Supreme Court Upholds Protection of Property with Historical Value

The Supreme Court of Canada recently upheld society's ability to protect property that had significant historical value. By designating a hotel to be of historic significance, the Manitoba Court of Appeal in *Harvard Investments Ltd. v. The City of Winnipeg* [Nov 16, 1995 reported at 129 D.L.R. (4th) 557; 109 W.A.C. 114; 107 Man.R. (2d) 114; Appeal to the Supreme Court dismissed May 17, 1996 S.C.C. Bulletin 1996, p. 884] found that the City of Winnipeg had not expropriated it or injured its value. The hotel ran into financial difficulties, had its first mortgage on the property foreclosed, and was itself acquired by the City in payment of tax arrears. The hotel owners' claim that the city's refusal to remove the historic designation amounted to an expropriation, was dismissed. The Manitoba Court of Appeal found that designating the hotel as historic, was like a zoning or planning regulation. In recognizing the historic value of the hotel, the City did not incur compensatory liability either at common law, or under s.2 of the *Expropriation Act*, S.M. 1970, c. 78 (C.C.S.M., c. E190).

### Ontario Water Use Survey

Oracle Research has released a study of public attitudes towards water use and the environment, commissioned for the Sierra Club. Many people use water filter systems in their homes (40.6%), 49.8% of respondents rated their municipal drinking water as good or very good, 38.3% of respondents felt that the Harris government has not gone far enough to protect the environment, 60% of the people felt that laws designated to regulate the chemicals that can be discharged into the environment are not strict enough and 62% felt that current laws designated to control water pollution in Ontario are not strict enough.

### METRO Toronto Clean Air Conference

Both the provincial Minister of the Environment, Brenda Elliot and the federal Minister of Environment, Sergio Marchi, spoke at a recent Metro Toronto Clean Air Summit. The one day seminar highlighted Canada's smoggiest metropolitan area - our dirty air kills an extra 15 people each month in

Metro Toronto. Speakers included Helle Tosine (MOEE), Dr. Ainslie Gray and Dr. Susan Tarlo, Doug Miller from Synergistics Consulting (a polling company) Mark Noantais (Motor Vehicle Manufacturers Association), Joan King (Metro Councillor) and members of the Metro Blue Ribbon Committee (investigating air pollution in Metro - they also issued a report, "Bad Air Alert: It's Killing Us").

Speakers highlighted problems: the Greater Toronto Area has the most number of cars in Ontario - 2.5 out of 5 million; there is an increasing prevalence of and mortality from asthma; studies have linked high ozone with acute respiratory admissions to hospitals; deaths from respiratory disease and heart attacks increase 2-4% on days when smog levels are elevated; up to 50% of our smog comes from the U.S.; and 2/3 of Canadians feel their health is affected by pollution. Sergio Marchi announced upcoming tighter tailpipe emission standards - to reduce by 30% total exhaust hydrocarbons and by 60% the exhaust nitrogen oxide. He noted that his government aims to cut emissions from the U.S. in half by the year 2000. Provincial Environment Minister Brenda Elliot is committed to a healthy Ontario, but was not making any promises beyond continuing a trial project to monitor vehicle emissions over the summer (The Clean Air Inspection Clinic, 5830 Campus Rd in Mississauga - 905-677-7007 will point out any repairs that need to be done to reduce air pollution for free). The Minister admitted that she has not taken public transit since taking office and spoke about "the real costs of driving - fuel, parking" etc. Surely the real costs of driving are to the environment - a curious emission to be made by the Minister. She promised a fall release of her government's air and smog strategy but did mention that in her view too much time has been spent on waste issues and she will concentrate on air and water issues. She would like to see the Greenhouse gas effects remain at 1990 levels by the year 2000. She noted that there won't be a compromise on environmental protection - her government will set the standards and leave how to reach them to the stakeholders. Environmentalists are wondering about those standards....

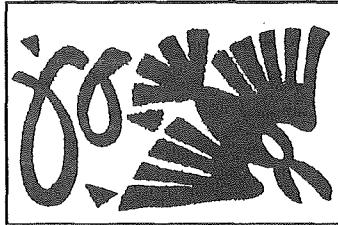
### New York Transit Lawsuit

Americans don't grumble about public transit increases, they go to court! A civil rights lawsuit was filed in New York City last October when the Metro Transportation Authority (MTA) voted to raise New York City subway and bus fares by 25 cents.



The New York Urban League, an interracial, community service organization, brought the complaint against the MTA and the State of New York because a lower level of state funding for city transit violates the 1964 Civil Rights Act. This law says that African-Americans, Hispanics and Asian-Americans - the majority of city transit riders - cannot be "subjected to discrimination in any program or activity receiving Federal financial assistance." City subway and bus riders were to be hit with a 20% fare hike, while suburban commuters would have faced an 8.5% increase.

In November 1995, the Federal District Court judge granted a preliminary injunction to halt the increase. He found that there was a likelihood that the case would succeed on the merits, noting that the MTA had not "provided a business necessity to implement fare increases which would have a disproportionately adverse effect on approximately 60% of the persons who use Transit Authority subways and buses as their primary means of transportation to work." A hearing on the ruling was held before a three-judge panel of the U.S. Court of Appeals for the Second Circuit. They reversed the Judge's decision to grant a preliminary injunction and sent the case back to him for more evidence. The injunction was stayed and the fare hike went into effect. A trial is scheduled for next fall.



## City of Barrie Offers Free Toilets To Conserve Water

**B**arrie Ontario is offering free toilets to its citizens in an attempt to conserve water. The city aims to replace toilets in 15,000 households within three years.

The six-litre toilets use up to three times less water than conventional toilets. The city provides the toilets and takes away the old ones; the householders pay a fixed charge for the plumbers (\$53 for one toilet, \$85 for two and \$112 for three - the maximum allowed). A four-person household would use 200 litres less water a day and recoup the cost of the plumber within a year.

Barrie draws its water from an underground aquifer and with its growth rate, it will eventually need to tap into Lake Simcoe. Switching toilets will delay

expansion of the sewage treatment plant and a plant to pump water from Lake Simcoe.

(Adapted from the *CWWA Bulletin*, Vol. 10, No.4 May 1996)

### And...

- The Ontario Environmental Commissioner has completed her Annual Report for 1994-5, entitled "Opening the Doors to Better Environmental Decision Making." For a copy, call 1-800-701-6454.

- The American Institute of Architects has issued an **Environmental Resource Guide**. It includes details on the environmental aspects of building materials, case studies and materials reports on lifecycles of 20 categories of building materials. For a copy, call (212) 850-6000.

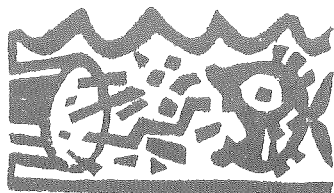
- The Royal Architectural Institute of Canada and the Green Building Information Council have set up a web site. There's information on green buildings and links to related web sites. URL: <http://greenbuilding.ca>

- The Pesticides Action League is distributing copies of the brochure "Pesticides and Children" from the Physicians For Social Responsibility. For a copy, contact them at 31 Ballyronan Rd. North York, Ont. M3B 1V2.

- The Canadian Environmental Assessment Agency invites public comment on draft procedures for the panel review process under the Canadian Environmental Assessment Act. Written comments will be accepted until August 16. For a copy of the procedures, call (819) 997-2223 or <http://www.ceaa.gc.ca> and send written comments to Jim Clarke, CEAA, 200 Sacre-Coeur Blvd. 14th Fl. Hull, Quebec K1A 0H3.

- The Canadian Institute is sponsoring a conference on *Directors' and Officers' Liability* on September 17 and 18 at the Crown Plaza Toronto Centre, 225 Front St. W. For more information, call 416-927-7936.

## Books



### Our Stolen Future

by Theo Colborn, Dianne Dumanoski, John Peterson Myers. Penguin Books, New York, 1996. 306 pages.

reviewed by Michael Wilson

At this very moment, I am certain, Rachel Carson's ghost is looking down on Theo Colborn, asking, "Do you realize what you have gotten yourself into?" As Carson did in *Silent Spring*, Theo Colborn is bringing controversial scientific debate to the public, asking us to be aware and forcing us to make informed decisions. Similar to *Silent Spring*, the result is shockingly eye-opening. After the publication of *Silent Spring*, both the scientific and the industrial community brought their wrath down upon Rachel Carson because of her approach and her findings; *Our Stolen Future* seems destined to become equally controversial and important.

In *Our Stolen Future*, Theo Colborn pulls together a wide range of scientific evidence to show the effect synthetic chemicals are having on our endocrine system, with terrifying results. For example, she shows how synthetic hormones have resulted in a wide spectrum of birth defects and fertility problems

in both humans and animals. In other parts of the book, she discusses studies that link exposure to PCBs and furans to impairment of normal sexual functioning and mental abilities.

What makes this book unique is the audience to which it is aimed. Colborn, with the help of journalist Dianne Dumanoski and fellow scientist John Peterson Myers, has created a work for the general population, rather than one limited to the scientific community. The authors do an excellent job at first explaining the science and then describing the experiments and findings. As a result, the reader does not feel as though he or she is merely being told what to believe, as so many environmental books seem prone to do.

My one criticism of the book is that I sometimes felt that Colborn was drawing some of her conclusions without much to back them up. At a couple of points, she would present one study and draw from it what seemed to be more conclusions than could be justified. I was very disappointed with this, as it seems to give ammunition to discredit other, better based conclusions made in the book.

I am hesitant, however, to end this review on a critical note, as I found *Our Stolen Future* to be one of the most important and thought provoking books I have read in a very long time. *Our Stolen Future* is truly a scientific book for "the rest of us." It leaves the reader informed, angry and demanding action. I'll bet this is exactly what Theo Colborn had in mind.

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*Michael Wilson is completing his Articles at CELA.*

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The INTERVENOR is published bi-monthly by the Canadian Environmental Law Association (CELA). CELA, part of the Ontario Legal Aid Clinic system, was established in 1970 to provide legal assistance on environmental matters. CELA also offers legal education, advocates law reform, publishes staff briefs and submissions, has a research library and is affiliated with many environmental groups. Opinions expressed in the INTERVENOR may not be shared by CELA.

Artwork by Doug Guildford ISSN 0820-43588.

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