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POLLUTION CONTROL IN CANADA: THE REGULATORY APPROACH IN THE 1980s

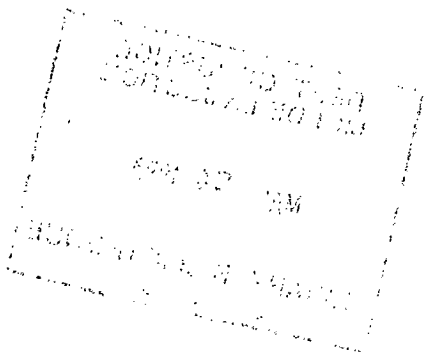
Administrative Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

Kernaghan Webb, LL.B., LL.M.



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Foreword

The story of the conception and development of this study paper is a bit unusual, and may help the reader understand its final form. In 1985, the Law Reform Commission of Canada was reviewing a draft paper prepared by its Protection of Life Project which proposed that a new crime against the environment be added to the *Criminal Code*. Following the Commission's usual procedure, copies of the draft were distributed for comment to the other projects of the Commission, including the Administrative Law Project. Based largely on my experience researching and writing a background paper for the Administrative Law Project of the Commission concerning industrial water pollution control and the federal Environmental Protection Service,* I prepared a memorandum which opposed the proposal for a new crime against the environment. In essence, the position put forward in the memo was that, from a practical standpoint, the addition of a new crime would have little if any positive effect, that a new crime could detrimentally affect regulatory efforts, and that resources would be better spent on reforms intended to improve regulatory pollution control regimes, since these were and are the major components of Canadian governmental efforts to protect the environment.

After considering all comments, the Commission decided to support the proposal for the inclusion of a crime against the environment in the *Criminal Code* (see Working Paper 44, *Crimes Against the Environment* (1985) and Report 31, *Recodifying Criminal Law: Revised and Enlarged Edition* (1988)). However, the President of the Law Reform Commission, Mr. Justice Allen Linden, in the spirit of encouraging intelligent and informed debate on a complicated issue, felt that the position taken in my memorandum did have considerable merit and warranted elaboration and publication as a study paper. During 1986, a draft of the study paper was prepared which, in addition to critiquing the proposed crime against the environment, also attempted to depict the real pollution control process of Canadian governments (namely, the regulatory approach) and the problems associated with it (in fact, in the final version of the paper, the examination of the regulatory approach is presented first, and is intended to inform the subsequent discussion about the need for a crime against the environment).

In 1987, the paper was distributed for comments to federal and provincial environment authorities, environmental associations, academics and other interested individuals and groups (see Appendix A). Many of their comments were incorporated in the final version of the paper. I am indebted to these various individuals and groups

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* K. Webb, *Industrial Water Pollution Control and the Environmental Protection Service* (Background Paper) (Ottawa: Law Reform Commission of Canada, 1983) [unpublished]. I draw substantially on the observations and research contained in this 1983 paper to support conclusions made in the present study. *Industrial Water Pollution Control and the Environmental Protection Service* is available on microfiche at most university law libraries in Canada.

for their helpful suggestions. Thanks is also due to Mr. John Frecker, Commissioner of the Administrative Law Project, for his useful input concerning the crimes against the environment portion of the paper, members of the Administrative Law Project for general comments, the support staff of the Commission for their assistance in putting the paper together and the Commission itself for publishing a paper taking a position different from the one it chose to adopt. The shortcomings, oversights and errors in the work are mine alone.

K.R.W.
Ottawa
July 1988

Introduction

In the late 1950s and early sixties, we became aware of it.[1] Throughout the sixties and seventies, we took some stabs at it. Now, in the second half of the eighties, with the benefit of experience gained over the past two decades, we are beginning to come to grips with it.

Environmental protection has come a long way since Rachel Carson's exposé of the dangers of pesticides, *Silent Spring*, first pricked North America's collective conscience in 1962.[2] At that time, there were no governmental departments of Environment in Canada.[3] There was little legislation devoted exclusively to

1. While the exact date for commencement of the "modern" concern with the environment can be debated, the 1960s are generally considered the beginning of the modern era: see, e.g., J.A. Kennedy, "Foreword to the First Edition" in D. Estrin and J. Swaigen, eds, *Environment on Trial*, 2nd ed. (Toronto: Canadian Environmental Law-Research Foundation, 1978) at p. x; see also, A.R. Thompson, *Environmental Regulation in Canada: An Assessment of the Regulatory Process* (Vancouver: Westwater Research Institute, University of British Columbia, 1980) at 27.

2. See R. Carson, *Silent Spring* (Boston: Houghton, Co., 1962). Commentators point to works such as *Silent Spring* as the spark for a new public environmental awareness: see, e.g., Thompson, *ibid.*

3. Although environmental protection activities were carried out by Canadian federal and provincial governments prior to 1950, it was not until the late fifties, and mainly the sixties and seventies that departments were created *exclusively* to implement government environmental policies. Thus, e.g., aspects of environmental protection were the responsibility of the federal Department of Fisheries and Forests prior to 1970, but it was not until 1970-71 that a separate Department of the Environment was statutorily created. For historical discussion of the federal Department of Fisheries and Forests/Environment evolution, see K. Webb, *Industrial Water Pollution Control and the Environmental Protection Service: A Background Study of the Compliance Initiatives Used by the Federal Government to Control Industrial Water Pollution, Focussing on the Pulp and Paper Sector* (Paper prepared for the Law Reform Commission of Canada, 1983) at 156-162.

environmental protection.[4] Citizen groups such as Pollution Probe, Greenpeace, and the Canadian Environmental Law Association had not yet been created.[5]

Since then, environmental protection has been transformed from a fringe interest of a few "eco-freaks" into a mainstream societal value.[6] Today, pollution is controlled and prohibited through a maze of statutes, regulations and by-laws at the federal, provincial, and municipal level.[7] There are lawyers in Canada who devote their entire

---

4. The 1871 *Sanitary Act* of Manitoba dealt exclusively with water pollution. For the most part, however, older Canadian legislation which addressed environmental protection issues did so as part of a larger statutory scheme concerned with health protection, water or fisheries management (see comments to this effect by H. Mitchell in "A Brief History of Environmental Law" (CELA, January 1977 at 1-2), and by P. Kenniff and L. Giroux in "The Law Relating to the Protection and Quality of the Environment in Quebec" in *Environmental Management and Public Participation*, P. Elder, ed., (Toronto: CELRF, 1975) 213 at 216-217). It took until the late 1950s before "modern" legislation concerned exclusively with environmental protection and pollution *control* was introduced in Canada. See, e.g., the British Columbia *Pollution Control Act, 1956*. In Ontario, the *Ontario Water Resources Commission Act, 1957* ushered in major water quality measures for Ontario. This was followed by the *Air Pollution Control Act, 1958*. Other jurisdictions lagged behind British Columbia and Ontario. For example, it was not until 1971 that Alberta introduced its "comprehensive" pollution control legislation, the *Clean Air Act* and *Clean Water Act*.

5. Pollution Probe was started by University of Toronto students in 1969. Greenpeace began as a Canadian/ American Quaker peace and environment movement in 1969. The Canadian Environmental Law Association was originally established by the Ontario government as a legal aid clinic in 1970.

6. American J. Naisbitt, in *Megatrends* (New York: Warner Books, 1982 at xxvi) notes a shift in environmental coverage by U.S. media in recent years:

   > By 1973 the system showed a crossover and the environmental [news] became, for the first time, a more important preoccupation than civil rights.

   Canadian polls would appear to indicate strong citizen concern for environmental protections: see, for example, R. Plaskin, "Protecting Canada's Environment More Crucial Than Jobs, Poll Says," *The [Toronto] Globe and Mail* (19 November 1986), which reported a poll conducted by Decima Research Ltd. as indicating that, in June 1986, 69% of Canadians were willing to back moves to protect the environment, even if the measures adopted would affect employment. In "Conservationists gaining respect, oil industry says," *The [Toronto] Globe and Mail* (26 June 1986), the technical director of the Canadian Petroleum Association is reported as saying that Canadians have become so conscious of their environment that the petroleum industry can no longer shrug off conservationists as a lunatic fringe. "Those people who used to be dismissed summarily as the granola-crunching hippy crowd are back — and back in three-piece suits."

7. See generally R. Franson and A. Lucas, eds., *Canadian Environmental Law* (Toronto: Butterworths, revised continuously). Examples of key federal legislation include the *Fisheries Act*, ss. 31-33.4; and regulations such as: the *Pulp and Paper Effluent Regulations*; the *Chlor-Alkali Mercury Liquid Effluent Regulations* (among others); the *Clean Air Act*; and the *Environmental Contaminants Act*. Examples of provincial legislation include the Québec *Environmental Quality Act*, and regulations such as: the *Petroleum Refineries-Liquid Effluent Regulations*; the *Pulp and Paper Mills Regulation*; and the *Solid Waste Regulation* (among others). See also notes 48-61, *infra*. Examples of legislation empowering municipalities to control pollution include the Ontario *Municipal Act*, subs. 354(1); and the British Columbia *Municipal Act*, s. 932.

career to environmental cases.[8] Citizen groups have sprouted up across Canada[9] demanding greater protection for the environment.

But while concern for the environment has been a consistent theme running through the sixties, seventies, and eighties, the attitudes, approaches and issues relating to environmental protection have changed. Initially, energies were primarily directed toward increasing public and political awareness of environmental problems: federal and provincial governments responded with the first generation of regulatory pollution control legislation.[10] Then, as government, industry and the public became familiar with this legislation, and as new problems emerged, the cry became not so much "There ought to be a law" as "How is the law being implemented?"[11] and "How can the law and implementation be improved?"

The focus of analysis in this paper is on the implementation of pollution control legislation. As such, it goes beyond description of statutes and regulations to examine how administrative practice, court interpretations and the larger political, economic and social context together determine the "law in action."[12] The position taken in this paper is that our understanding of the pollution control process has improved substantially as time has gone on, permitting us to make more accurate and informed assessments of the strengths and limitations of instruments, actors and institutions

8. See, e.g., environmental lawyers' advertisements contained in *Canadian Environmental Law Reports*, Vol. 14, No. 2, April 1985.

9. Other Canadian environmental groups include S.P.E.C. (Society for the Promotion of Environmental Conservation), West Coast Environmental Law Association, Operation Clean (Niagara), the Société pour vaincre la pollution, the Conservation Council of New Brunswick, Friends of the Earth, and the Fraser River Coalition. The Canadian Environmental Network has over 1400 member groups. Ian Smythe, Technical Director of the Canadian Petroleum Association, estimates there are 160 environmental groups in Western Canada alone, "some of them very small, single-issue organizations, and others quite large and with a broad range of concerns," see "Conservationists gaining respect, oil industry says", *supra*, note 6.

10. For example, federally, the *Fisheries Act* underwent its first major pollution-related amendments in 1960-61 and 1970 (later eclipsed by the 1976-77 amendments), discussed in greater detail below at 11-13. For discussion of provincial legislative evolution, see notes 47-62, *infra*.

11. A. Schnaiberg, in "The Retreat from Political to Technical Environmentalism", A. Brannigan and S. Goldenberg, eds., *Social Responses to Technological Change* (Westport, Conn.: Greenwood Press, 1985) 19, at 23-24, speaks of a shift from political consciousness-raising in the late sixties (which culminated in legislation) to debate about the costs of environmental protection (a more technically oriented debate). It is submitted that what Schnaiberg identifies as a shift to technical environmentalism is roughly synonymous to the new concern with implementation described here. The process of implementing environmental legislation is almost inevitably very technical, as administrators attempt to put broad statutory policies into practice.

12. The "law-in-action" theme and contents of this document draw substantially on research described in Webb, *supra*, note 3; K. Webb, "Environmental Law and its Enforcement — Comment" in P. Finkle and A. Lucas, eds., *Environmental Law in the 1980s: A New Beginning* (Calgary: Canadian Institute of Resources Law, 1982) 197; Law Reform Commission of Canada [hereinafter LRCC], *Policy Implementation, Compliance and Administrative Law* (Working Paper 51) (Ottawa: LRCC, 1986); and K. Webb, "Between the Rocks and Hard Places: Bureaucrats, The Law and Pollution Control," (1987) 14:2 *Alternatives*. See also Thompson, *supra*, note 1; R. Gibson, *Control Orders and Industrial Pollution Abatement in Ontario* (Toronto: Canadian Environmental Law Research Foundation, 1983); M. Rankin and P. Finkle, "The Enforcement of Environmental Law: Taking the Environment Seriously" (1983) 17 U.B.C.L.Rev. 35.

involved in implementation than was ever possible. The paper makes these assessments as a preface to suggestions for legal reform.

In Canada, governments have attempted to control pollution using two basic methods: coercive ("command-penalty" responses) and non-coercive ("influencing" techniques). To date, coercive responses have been relied on heavily by Canadian governments, particularly the so-called "regulatory"[13] model, which typically consists of a general offence prohibiting harmful emissions outright, unless those emissions are authorized pursuant to the terms and conditions of "agreements"[14] (for example, permits, licences, certificates of authorization, control orders, programme approvals, etc.) or within pre-set legislated standards.[15] Within the coercive category, criminal offences are also available to combat pollution, although these have rarely been used.[16] As well, governments have established a number of non-coercive, influencing initiatives, to supplement the regulatory approach, including incentive and persuasion programmes.[17] Because the regulatory approach has been the centrepiece of government pollution control efforts, it is the primary subject of analysis in this paper, although limited discussion of incentive initiatives is also provided.

Two caveats regarding the scope and depth of analysis of this paper are in order. First, it has a decidedly federal emphasis, reflecting the author's preponderance of research experience in this jurisdiction. However, every effort has been made to supply provincial examples and illustrations whenever available. The paper was widely circulated in draft version to persons working in or familiar with provincial

13. A narrow definition of "regulation" limiting it to rules of government backed by penalties and intended to modify economic behaviour is espoused by many. See, e.g., W.T. Stanbury and G. Lermer, "Regulation and the Redistribution of Income and Wealth" (1983) 26 Can. Pub. Admin. 378 at 380, and Economic Council of Canada, *Responsible Regulation* (Ottawa: Supply and Services Canada, 1979) at 43. Others have suggested a wider definition, encompassing less visible and direct measures, and non-coercive initiatives. See, e.g., R. Macdonald, "Understanding Regulation by Regulation," in I. Bernier and A. Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Research Study presented to the Royal Commission on the Economic Prospects for Canada) (Toronto: University of Toronto Press, 1985) 81 at 82-102. As used here, "regulatory pollution control" legislation will refer to the narrow, Stanbury definition.

14. The word "agreement" is a bit of a misnomer because, in the final analysis, government has the authority to unilaterally impose any conditions it wishes on a discharger, or to refuse any permission to discharge at all. However, the word "agreement" does accurately convey the fact that an attempt is usually made to achieve consensus on the terms and conditions under which the discharge will take place.

15. See, e.g., the *Fisheries Act*, subs. 33(2); the Ontario *Environmental Protection Act*, ss. 5-17; the British Columbia *Waste Management Act*, s. 3; Div. IV of the Québec *Environmental Quality Act*; and the Saskatchewan *Air Pollution Control Regulations*, ss. 3, 4, 6.

16. Three existing *Criminal Code* offences which could be used to address environmental degradation situations are prohibitions of criminal negligence (subs. 202(1)), nuisance (subs. 176(2)) and mischief (s. 387). For application to environmental situations, see above at 71-73; see also P. Good, "Anti-Pollution Legislation and its Enforcement: An Empirical Study" (1971) 6 U.B.C. L. Rev. 271; H. Glasbeek, "Why Corporate Deviance is Not Treated as a Crime — The Need to Make 'Profits' a Dirty Word" (1984) 22 Osgoode Hall L.J. 393, and H. Glasbeek and S. Rowland, "Are Injuring and Killing at Work Crimes?" (1979) 17 Osgoode Hall L.J. 506.

17. See discussion above at 62-63. For more complete discussion of incentives and persuasive techniques used in industrial pollution control, see Webb, *supra*, note 3 at 508-612.

jurisdictions[18] to ensure the accuracy of the observations it contains. Second, the focus of analysis is on *industrial emissions* control; that is, the main subject of discussion is pollution discharges which emanate into the environment as a by-product from the process of manufacturing or refining certain material or substance. Although emissions control continues to be the mainstay of environmental protection, other important areas of pollution control (for example, regulation of the development, production, use, transportation and disposal of hazardous and toxic substances) are only tangentially referred to in this paper. With highly toxic products, escape into the environment in *any* concentration could be extremely hazardous, so that a strictly preventive approach may be the only practicable control method.[19] There is considerable legislative overlap between emissions control and toxic and hazardous substances control, but the different legislative frameworks and enforcement strategies which have begun to evolve to control the development, production, use, transportation and disposal of toxic and hazardous contaminants have yet to be comprehensively examined in the Canadian context.[20] This paper will do no more than flag the need for such examination.

Chapter One puts forth a brief historical examination of the shift in legislative approach to pollution abatement, which began in the 1950s from what was basically a series of total prohibitions of all waste discharges to the "control" regulatory model common today. The causes for this shift in approach, and its implications are also discussed.

How the regulatory model would appear to operate, based on a reading of the legislation, and how it actually operates are often two quite different things. While the legislation is typically framed in language which suggests that pollution control is a straightforward, almost mechanical process (namely, issuing licences, monitoring compliance, detecting transgressions and prosecuting, or suspending licences), in practice, administrators are often negotiating gradual compliance with polluters, and only rarely resorting to formal sanctions.[21] The disparity between law and reality is referred to here as "the implementation gap."

The existence of this gap creates problems for government, industry, courts, and the public. Chapter Two is devoted to an exploration of possible causes of the gap, and what should be done about it. First, two popular misconceptions about the nature of pollution control and the law are presented and discussed as an introduction to the real nature of implementation. An attempt is made to explain why a "cops-and-robbers"

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18. See Appendix A.

19. For this statement of the toxic/environmental contaminant problem, the author is indebted to P. Dauphinee of Environment Canada, Legal Services.

20. To the knowledge of the author, existing published work in this area consists of J. Castrilli, "Control of Toxic Chemicals in Canada: An Analysis of Law and Policy" (1982) 20 Osgoode Hall L.J. 322; D. Estrin, *Handle With Caution* (Toronto: Carswell, 1986).

21. See *supra*, note 12, for other works on this topic. As with the word "agreement," the term "negotiation" is not entirely accurate, because, in the final analysis, government has the authority to unilaterally impose any conditions it wishes on a discharger, or to refuse any permission to discharge at all. However, "negotiation" correctly conveys the notion of give-and-take which frequently occurs as terms and conditions are worked out.

conception of enforcement is largely inappropriate in pollution control contexts, and why unapplied legislation is not necessarily defective.

Second, a number of problems with current legislation are identified and examined, including the tendency for legislators to draft laws in unrealistic language which fails to reflect operational realities, and to provide blunt sanctions, often too drastic, formal and expensive to be used in day-to-day situations. Also discussed is the oft-heard complaint that penalties are not harsh enough.

Third, the role of the courts in pollution control is examined. The difficulties that courts have had in characterizing the pollution offence, as well as problems with the proof process and sentencing are described. Court pronouncements concerning the fairness of the control process are also analyzed. Government officials, for example, cannot rely on courts, as the police do in criminal enforcement, because of the problems which courts have had with the scientifically and technically imprecise and value-laden nature of pollution and the ongoing nature of pollution control.

Fourth, although the implementation gap can in part be explained by inadequacies with legislation and the judicial process, there are also many problems in pollution control which have political, economic, administrative and social origins. Several extra-legal factors which contribute to the implementation gap are identified, including deficiencies associated with the political process, pro-development biases of government, and proclivities of bureaucrats which can interfere with effective implementation.

Pollution control is a dynamic process, constantly evolving as new problems arise and different solutions are attempted. In recognition of this continual evolution, a number of trends are identified and analyzed. Chapter Three focuses on the steadily increasing importance of public participation, the move in some jurisdictions towards more strict enforcement, a perceived attitudinal change on the part of industry, legislative refinements, and the emerging recognition that incentives may be useful to induce abatement from polluters unresponsive to coercive approaches.

It is suggested that examination of these trends reveals a growing maturity by parties involved in pollution control. Against this background, Chapter Four examines the Law Reform Commission of Canada's proposal that there be a new crime against the environment.[22] While appealing at first blush, this proposal is, from a regulatory perspective, not likely to enhance environmental protection. The paper looks at the potential enforcement problems associated with such a proposal. In conclusion this study briefly assesses the state of pollution control as well as the strengths and limitations of the actors, instruments and institutions involved in the process. Suggestions for reform are provided.

Taken together, the analysis presented herein supports the position that significant components of the legal framework for effective pollution control are now in place.

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22. See LRCC, *Crimes Against the Environment* (Working Paper 44) (Ottawa: LRCC, 1985); LRCC, *Recodifying Criminal Law: Revised and Enlarged Edition of Report 30* (Report 31) (Ottawa: LRCC, 1987).

Our understanding of pollution and its control is considerably more sophisticated than it once was. To protect the environment, we now bring to bear a full range of legal instruments, from offences to control orders, insurance, environmental assessments and incentives. Courts are beginning to make innovative use of the sentencing powers provided to them. Industry seems finally to be accepting the fact that pollution control is here to stay. Citizen groups are becoming more expert, outspoken and involved in the process.

This coming to grips occurs none too early, for current and future pollution problems promise to be even more complex than those addressed yesterday. Environmental protection is a moving target: as the first generation pollution problems are addressed, new, more difficult issues have taken their place.[23] Conventional pollution problems such as suspended solids and biochemical oxygen demand loading are no longer in the spotlight as more exotic (and lethal) contaminants such as dioxins and polychlorinated biphenyls (PCBs) become the focus of concern.[24] On the one hand, our ability to detect the existence of contaminants has improved substantially, but the effect of contaminants present in parts per billion and per trillion, on the other hand, is not entirely clear.[25]

In addition, despite progress in some areas, fundamental and perplexing unsolved problems remain such as the difficulties associated with courts, legislatures, and administration addressing scientific, economic, and technical uncertainties and the contradiction of government acting simultaneously as developer and conserver.

The face of pollution control in Canada has changed over the past two decades: it lacks the innocence of the earlier years, but now possesses the first wrinkles of wisdom gained through experience. An attempt is made to articulate some of this experience in the hope that this knowledge can be used to make the pollution control process as fair, effective, and efficient as possible.

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23. For example, R. Gibson, *supra*, note 12, notes at 110 that:
    > Reduction of lead emissions and point of impingement readings has not ended local concerns, but rather, focussed attention on questions about cumulative loadings, the existence of any hazard threshhold level, and the precise degree and nature of risks relative to a complex of variables (age, level of exposure, inhalation versus ingestion, etc.). Similarly, reduction of sulphur dioxide emissions and local fumigation frequencies has been followed by concerns about the wisdom of dilution and dispersion strategies, and about the longer distance cumulative and synergistic effects of such emissions in combination with emissions from other sources.

24. See, e.g., C. Van Strum and P. Merrell, *No Margin of Safety: A Preliminary Report on Dioxin Pollution and the Need for Emergency Action in the Pulp and Paper Industry* (Washington, D.C.: Greenpeace, 1987).

25. See, e.g., *Cape Breton Landowners* v. *Stora Kopparbergs Bergslags Aktiebolag* (1982), 11 C.E.L.R. 141 (N.S.S.C. T.D.) and discussion concerning damages in J. Castrilli and T. Vigod, *Pesticides in Canada: An Examination of Federal Law and Policy* (Study Paper) (Ottawa: LRCC, 1987) at 17-24.

CHAPTER ONE

The Rise of Regulatory "Control" Legislation

In Canada, both federal and provincial governments have the constitutional heads of power upon which pollution control legislation could be based.[26] Since Confederation, federal and provincial legislation has always included at least a minimal core of command-penalty offences which could be used to protect the environment.[27] This early legislation usually adopted a blanket prohibition approach to the pollution problem; for example, subsection 14(2) of the federal *Fisheries Act* of 1868 provided that "[l]ime, chemical substances or drugs, ... or any other deleterious substance, shall not be drawn into water frequented by ... fish ... under a penalty not exceeding one hundred dollars ...." While this kind of extremely broadly written offence represented legislative awareness of pollution, they were hopelessly simplistic, and were only sporadically enforced.[28]

Starting in the 1950s, however, the situation began to change. As public awareness of pollution problems grew, legislatures started to re-appraise their pollution offences, and began supplementing blanket prohibitions with more realistic "control" regimes. In some jurisdictions, the result was new statutes devoted almost entirely to pollution control concerns, such as the British Columbia *Pollution Control Act, 1956*. In others, older legislation was extensively overhauled; for example, subsection 14(2) of the federal *Fisheries Act* of 1868 remained virtually intact and unchanged from its original

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26. This is a gross simplification of a complex issue. For a more comprehensive treatment, see P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972) 10 Osgoode Hall L.J. 647; D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 *U.T. L.J.* 54.

27. Federally, the 1868 *Fisheries Act* (the full title being *An Act for the Regulation of Fishing and Protection of Fisheries*), s. 14, included offences prohibiting the deposit of deleterious substances into water. Provincially, the Ontario *Public Health Act, 1884*, subs. 69(1), Schedule A, included offences prohibiting the disposal of garbage, excreta, manure or filth unless approved by provincial sanitation officers; the 1871 Manitoba *Sanitary Act*, s. 1, prohibited the deposit of "any stable or barn manure, or any night soil, or any other filthy or impure matter of any kind, along the bank of any river or running stream" and, in s. 2, a similarly worded prohibition for deposits into rivers and streams. For the British Columbia situation, see A. Lucas, "Water Pollution Control Law in British Columbia" (1969) 4 U.B.C. L. Rev. 56. See also references cited *supra*, note 4.

28. See, e.g., J.P.S. McLaren, "The Tribulations of Antoine Ratté: A Case Study of the Environmental Regulation of the Canadian Lumbering Industry in the Nineteenth Century" (1984) 33 U.N.B.L.J. 203.

form until a series of amendments took place, beginning in 1960.[29] These amendments transformed the original subsections 14(2) prohibition (re-numbered as subsection 33(2)) into a heavyweight offence, the centrepiece for an elaborate water-pollution control regime.

The amended subsection 33(2) made it an offence to deposit into water substances deleterious to fish, *unless* the deposits were of a type, in a quantity or concentration and under conditions authorized by regulation.[30] Emission control regulations setting permissible effluent standards were promulgated for several industrial sectors, including the pulp and paper,[31] mining,[32] and petroleum industries.[33] Penalties pursuant to the revamped subsection 33(2) were raised, from a maximum of $2,000 and/or one year imprisonment in 1960-61,[34] to $5,000 in 1970,[35] and $50,000 in 1977.[36] In addition to the drastically increased financial penalties, the amendments gave courts the authority to order polluters to take corrective actions and refrain from committing further offences.[37] Amendments were also included to make the process of proving substances deleterious less complicated.[38]

To enforce this regulatory regime, administrators were given the power to require modifications or close down a polluting operation,[39] and to require disclosure of any plans concerning any activity likely to pollute.[40] Regulated operators could be compelled to conduct tests, install monitoring equipment and report monitoring results.[41] A special corps of pollution inspectors was created.[42] In emergencies, these inspectors were given

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29. For a more comprehensive discussion of the legislative history of subs. 14(2), see Webb, *supra*, note 3 at 71-73.

30. See *Fisheries Act*, subs. 33(4).

31. See the *Pulp and Paper Effluent Regulations*.

32. See the *Metal Mining Liquid Effluent Regulations*.

33. See, e.g., the *Petroleum Refinery Liquid Effluent Regulations*; see also the *Meat and Poultry Products Plant Liquid Effluent Regulations*.

34. The 1960-61 *Fisheries Act*, s. 4. The maximum penalty for a first offence was $1,000 or six months imprisonment or both, with $2,000 or one year imprisonment for subsequent offences.

35. The 1970 *Fisheries Act*, subs. 3(2).

36. The 1976-77 *Fisheries Act*, subs. 7(1). The maximum penalty for a first offence is $50,000, with $100,000 as the maximum for subsequent offences.

37. See *ibid.*, subs. 7(2). An earlier version of this section, see *supra*, note 35, gave courts the power to order polluters to refrain from committing further offences, but did not include a power to order corrective actions.

38. *Supra*, note 35 and note 36, s. 9.

39. See the 1976-77 *Fisheries Act*, s. 8.

40. See *ibid.*, s. 8 (actual subs. 33.1(1)).

41. See *ibid.*, subs. 7(8) (actual subs. 33(14)).

42. See *ibid.*, s. 9 (actual subs. 33.2(2)).

the authority to take or direct corrective action.[43] If the federal government incurred any clean-up costs, polluters were to be liable for the expenses.[44] Polluters were also civilly liable to commercial fishermen for any loss of income caused by pollution.[45]

By the mid-seventies, virtually all federal and provincial jurisdictions had promulgated control regimes similar to that described above with respect to the federal *Fisheries Act*. Thus, for example, in 1972, Quebec passed its *Environmental Quality Act*,[46] which prohibits the discharge of contaminants into the environment in excess of that provided by regulation.[47] Certificates of authorization are now required to operate a polluting activity.[48] Orders can be issued to stop or abate pollution and to install anti-polluting equipment.[49] Where a polluter is found guilty of an offence, the Minister of the Environment can take corrective steps at the expense of the convicted polluter.[50] The New Brunswick *Clean Environment Act*[51] of 1973 and regulations[52] prohibit discharges without the approval of the Minister.[53] Moreover, the Minister is authorized to use control and stop orders to limit, control or curtail pollution.[54] In Saskatchewan, pursuant to the *Air Pollution Control Act*[55] and associated regulations,[56] no person can operate an industrial operation which emits air pollutants without a permit.[57] In addition, the Minister has the authority to order pollution restrictions.[58] Other provincial

43. See *ibid.*, s. 9 (actual subs. 33.2(6)).

44. See *ibid.*, subs. 7(3) (actual subs. 33(10)).

45. See *ibid.*, subs. 7(3) (actual subs. 33(10.1)).

46. This legislation has been extensively amended since its introduction.

47. See the 1972 Québec *Environmental Quality Act*, s. 20.

48. See *ibid.*, s. 22.

49. See *ibid.*, ss. 25-27.

50. See *ibid.*, s. 115. The subsequent amendments to the *Act* have enhanced the powers of the Minister to take action where a person refuses or neglects to do something ordered; particularly in cases of emergencies.

51. This legislation has been extensively amended since its introduction.

52. See, e.g., the New Brunswick *Air Quality Regulations*, the *Pulp and Paper Industry Emission Regulations*, and the *Water Quality Regulations*.

53. For example, see the New Brunswick *Air Quality Regulations*, s. 3; *Pulp and Paper Industry Emission Regulations*, ss. 3-5; *Water Quality Regulations*, s. 3.

54. See *Clean Environment Act*, ss. 5-6.

55. The *Air Pollution Control Act* of Saskatchewan was passed originally in 1965.

56. See *Air Pollution Control Regulations*.

57. See *ibid.*, ss. 3, 4 and 6.

58. See *Air Pollution Control Act*, subs. 5(1).

jurisdictions use slightly different terms to describe their regulatory control structure, but operate in fundamentally the same way.[59]

Underlying the shift from blanket prohibitions to control regimes was a fundamental shift in approach toward government handling of industrial pollution, a shift from simplistic, difficult-to-enforce commandments to more practical restrictions. While not without its share of problems, this shift represented the first indication of government coming to grips with environmental protection in Canada. Perhaps this new approach was no more clearly evident than in the following remarks of the federal Minister of Fisheries when major *Fisheries Act* pollution provision amendments were tabled in the House of Commons in 1970:

> The sections in question [that is, the existing blanket prohibitions] were all too embracing, all too comprehensive.... What we really need in legislation of this kind is not an absolute prohibition on everything thrown into our waters but more precise measurements of what can be thrown into water and still keep it clear, clean and useful to fisheries.... [B]y defining in the regulations the concentrations of the various chemicals which can or cannot be tolerated ... we will have a more precise and useful tool in legislation....[60]

The more "precise and useful" control approach is inherently more interventionist than the simpler prohibition method of earlier years. Government must determine what are acceptable levels of pollutants, what abatement technologies are practicable, what industries can afford, and what the public will tolerate. The control approach is also considerably more flexible than the blanket prohibition method in the sense that standards can be established for each industry sector,[61] for particular regions,[62] and even for individual operations.[63]

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59. For example, the Manitoba *Clean Environment Act* (originally passed in 1968; replaced by the *Environment Act*, S.M. 1987, c. 26, c. E125 of CCSM). Sections 2, 3 and 4 of the 1968 *Act* prohibited air, soil and water pollution respectively, except pursuant to "licences." The 1956 British Columbia *Pollution Control Act*, s. 7, later replaced by the *Waste Management Act*, used a "permit" system. The 1971 Ontario *Environmental Protection Act* uses "control orders," "programme approvals," etc. pursuant to Part IX (now Part X). The Alberta *Clean Air Act* and the Alberta *Clean Water Act* (both originally passed in 1971) use licences, control and stop orders, and permissible effluent discharge regulations. The Prince Edward Island *Environmental Protection Act*, s. 9, prohibits pollution unless approved and s. 6 authorizes use of ministerial orders. The Newfoundland *Department of Environment Act*, s. 24 (replacing the *Department of Provincial Affairs and Environment Act, 1973*, and successor to the *Water Resources and Pollution Control Act, 1966-67* and the *Clean Air, Water and Soil Authority Act*) prohibits pollution subject to regulations, and s. 27 gives the Minister authority to issue orders. The Nova Scotia *Environmental Protection Act*, subs. 23(1) (successor to the *Environmental Pollution Control Act* and the *Environmental Protection Act*) prohibits discharges without a permit, and subs. 26(1) authorizes the Minister to issue orders.

60. See Canada, *House of Commons Debates* (20 April 1970) at 6089.

61. See, e.g., the Ontario *Air Contaminants from Ferrous Foundries* regulations, promulgated pursuant to the Ontario *Environmental Protection Act*.

62. See, e.g., the Saskatchewan *Shoreland Pollution Control Regulations*, promulgated pursuant to the Saskatchewan *Public Health Act*.

63. See, e.g., the *Alice Arm Tailings Deposit Regulations* promulgated pursuant to the federal *Fisheries Act*. The best examples of individualized standards are those reached pursuant to licences, permits, and control orders.

But the increased flexibility is achieved at a cost: increased government involvement in business decision making. From a practical standpoint, the shift from prohibition to control drove pollution abatement decisions underground into the quiet and less visible regulation and licence-negotiating processes of government. Over time, and in response to continued public pressure to do so, aspects of these underground bureaucratic processes have since made their way back to the surface, to be more public,[64] but progress has been slow.

64. For example, see provisions in the new (1987) Manitoba *Environment Act* which commit the government to inform and involve citizens at virtually every stage of the pollution control process. Discussed in greater detail *infra*, note 256.

CHAPTER TWO

Implementation

I. The Implementation Gap

By the mid-seventies, a fairly extensive regulatory pollution control framework was in place. Perhaps the highwater mark in legislative indignation over pollution was achieved in 1970 with the promulgation of the *Canada Water Act*, the preamble of which opens with the following stirring words:

> [P]ollution of the water resources of Canada is a significant and rapidly increasing threat to the health, well-being and prosperity of the people of Canada and to the quality of the Canadian environment at large and as a result it has become a matter of urgent national concern that measures be taken to provide for water quality management in those areas of Canada most critically affected....

And yet, for all the fire and brimstone suggested by environmental legislation, in reality government has generally proceeded in a much quieter, less adversarial manner. In this sense, the *Canada Water Act* is a good point of departure for discussion of implementation of command-penalty environment legislation. What legislation *suggests* government is doing, and what government is *actually* doing have often been two different things. In Canada, some pollution control legislation remains virtually unapplied (the *Canada Water Act* is a good example of this: see discussion below) or is applied differently than one might expect after reading the legislation (see for example the following description of the *Fisheries Act* pollution provisions).

When the *Canada Water Act* was introduced in 1970 it was in many ways "milestone" legislation.[65] The *Act* authorized the federal government to, among other things, enter into co-operative federal-provincial water quality management arrangements, establish "water quality management areas"[66] where "regional management agencies"[67] could levy effluent charges to water users[68] or prosecute persons who

65. So described in R. Franson and A. Lucas, *Canadian Environmental Law Commentary and Case Digests*, vol. 1 (Toronto: Butterworths, 1978) at para. 4.2.2.1.1.

66. See *Canada Clean Water Act*, ss. 4, 8.

67. See *ibid.*, ss. 9, 11.

68. See *ibid.*, subpara. 13(1)(*c*)(iv).

deposited unauthorized wastes.[69] Ultimately, in the case of interjurisdictional waters, the federal government was authorized to act unilaterally to regulate water quality.[70] In fact, at the time of the final revision of this paper, no water quality management areas have been designated and no regional management agencies have been set up.

Unlike the *Canada Water Act*, many of the pollution control provisions of the *Fisheries Act* have been applied. However, after reading the legislation, the provisions have not been applied as often as one might expect, nor in the way one might expect. Federal officials only occasionally resort to the formal sanctions provided in the *Act*. Instead, officials are negotiating informal "compliance agreements" with many polluters, working in conjunction with provincial authorities and relying on formal sanctions only as a last resort.[71]

These gaps in implementation are a major source of problems for government as a whole, individual administrators and judges, polluters and potential polluters, victims of pollution, and members of the general public. Implementation gaps are a problem for government in the sense that non-application can be perceived as heel dragging. They are also a problem for administrators and judges in the sense that these officials must juggle the statutory rules and the often unstated real rules and yet must all the while appear competent and in control. The gaps are no less a problem for polluters, potential polluters, victims of pollution and members of the public, who turn to written legislation for guidance, only to learn that actual administrative practice is quite a different thing.

II. Exploring the Gap

A. Misconceptions About Pollution Control

In an effort to clear the deck of any preconceived notions which might impede understanding of the implementation gap, two popular misconceptions about pollution and its control by law are presented and refuted below.

Misconception #1

The administration of pollution control laws is similar to the enforcement of criminal laws. As such, government environment bureaucrats spend most of their time engaging in traditional police enforcement activities such as detecting violations, collecting evidence for prosecutions and initiating them, and licence suspensions.

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69. See *ibid.*, s. 8.

70. See *ibid.*, ss. 9, 11.

71. See, generally, Webb, *supra*, note 3 at 52-429.

Dispelling the Misconception

While surveillance, detection and formal sanctioning are part of their functions, environmental bureaucrats are just as likely to be advising a polluter about a new pollution control technology, explaining how abatement expenditures may be eligible for a tax deduction or grant, or negotiating compliance agreements.[72] Underlying this misconception concerning the nature of pollution control lies a fundamental point: acts causing pollution can rarely be characterized as criminal behaviour. Because of this, the criminal enforcement model has limited application in the regulatory pollution context.[73]

Pollution can usually be divided into two major types: intentional and accidental discharges.[74] Most incidents of pollution can be characterized as accidents rather than acts of wilful harm.[75] Spill pollution is usually a relatively isolated, discrete event, the result of a lack of diligence on the part of company employees (such as turning on the wrong valve, connecting or disconnecting the wrong hose, and not following prescribed procedures), or an unexpected system breakdown (for example, an unusually heavy rainstorm causing a treatment pond to overflow). In contrast, with continuous pollution discharges there may be no discrete activity to be stopped or equipment disruption to be corrected. Instead, the problem may have existed for years and have been tolerated by government:[76] long-term and expensive design and equipment changes are usually required to correct such problems.

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72. For summary discussion of federal activity, see LRCC, *supra*, note 12 at 37-49 and 60-69; for provincial descriptions, see Gibson, *supra*, note 12 at 134-135; and Thompson, *supra*, note 1. The degree of negotiation that takes place varies depending upon the type of "permission" involved, the administrative power of the official, and the jurisdiction.

73. Thompson, *supra*, note 1 at 2-3, comments:
    > A major conclusion of this overview study is that the role of government in relation to the environment can be more effectively analyzed and better solutions to problems can be achieved if the government is identified as a manager as well as a regulator, particularly when dealing with publicly owned natural resources. The role of the regulator is seen as reactive and policeman-like in stance, dependent on legislatively defined standards and rules together with penalties for enforcement to attain environmental goals. In contrast, government in the role of manager is perceived as a co-venturer with the private sector, with its responsibility being to ensure that various public interests are served in the planning and management of natural resource developments.

74. "Intentional" discharges, as used here, refers primarily to the notion of *mens rea*, and extends to encompass the related concepts of criminal negligence and criminal recklessness. "Accidental" discharges refers to a lack of criminal intent, criminal negligence or criminal recklessness.

75. See J. Swaigen and G. Bunt, *Sentencing in Environmental Cases*, (Study Paper) (Ottawa: LRCC, 1985), note at 45:
    > The typical case [that comes before the court] involves an accidental discharge of a small amount of a relatively safe substance, which is cleaned up quickly and involves little or no serious harm to the environment, or to human health.

    However, the cumulative, synergistic, long-term effects of these small discharges can be serious.

76. A good example of official, legislated tolerance is the situation regarding the KVP Pulp and Paper Mill in Ontario, described in P.D. Emond, "Environmental Law and Policy: A Retrospective Examination of the Canadian Experience" in I. Bernier and A. Lajoie, eds., *Consumer Protection, Environmental Law, and Corporate Power* (Toronto: University of Toronto Press, 1985) 89 at 129-134. For examples of tolerance at the administrative level, see case histories of negotiations with the Irving Paper Mill of St. John and Crown Zellerbach in Webb, *supra*, note 3 at 188-191 and 377-393.

In the traditional criminal enforcement situation, the relationship between police and suspects typically begins with police reaction to a complaint or call for help, and ends shortly thereafter with a decision to arrest or not arrest the suspected criminal. Although a certain amount of dialogue does take place in "police-on-the-beat" situations,[77] the relationship between police and suspected criminals is typically kept short because the behaviour in question usually stops as soon as or before police arrive on the scene. Police usually deal with isolated, discrete incidents.

Because pollution problems often cannot be corrected overnight, extended, bargaining-type relationships between government officials and regulatees are often unavoidable. Government officials will usually not resort to formal sanctions if polluters agree to a schedule of improvements and changes which will abate the harmful discharge. Much as lawyers and government officials might feel more comfortable with an arm's-length, "me-talk-you-listen" stance to pollution control, a closer, sleeves-rolled-up relationship may be necessary:

> Although the Ministry prefers to approach an industrial pollution problem by setting out the extent of abatement required and leaving to the company decisions about methods of achieving the abatement targets, the need, in the face of appeal rights, to set compliance targets that can be shown to be reasonable forces Ministry officials either to develop an understanding of technological options or to accept blindly the company's position on these matters.[78]

Working out solutions to pollution problems is frequently an extremely difficult task, given technical, scientific and economic uncertainties which surround the various abatement options, and given the broader socio-political issues underlying these factors, such as pressure from environmental groups, riparian landowners and fishermen for immediate effective control versus demands from company officials, employees who feel their jobs are threatened, local politicians and business people to move slowly and thus maintain the economic viability of the operation.[79]

These same technical, scientific and economic uncertainties, and underlying socio-political issues also render prosecutions difficult.[80] The complex and ongoing nature of many pollution situations and the continuous attention frequently needed so that equipment can be adjusted to meet changing circumstances does not mesh well with

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77. See R. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 62-63.

78. See Gibson, *supra*, note 12 at 90.

79. A classic example of the jobs versus environment conflict has been the negotiation of a new control order for the Kimberly-Clark of Canada Ltd. pulp mill located at Terrace Bay, Ontario, which pitted environmentalists against a company which has been losing money and laying off workers in recent years. See "Confrontation coming in pulp-mill pollution fight" *The [Ottawa] Citizen* (27 November 1986); "Govt blasted for easing pollution order against mill" *The [Ottawa] Citizen* (8 January 1987); "Financial aid to pulp mill could rekindle trade troubles, Ont. treasurer says" *The [Ottawa] Citizen* (21 January 1987); K. Noble, "Pulp mill test of new pollution policy" *The [Toronto] Globe and Mail* (26 January 1987); M. Keating, "Kimberly-Clark told it must cut toxic waste" *The [Toronto] Globe and Mail* (26 January 1987); S. Oziewicz, "Terrace Bay paper mill wins delay on cleanup" *The [Toronto] Globe and Mail* (31 January 1987); A. Cohen, "The Politics of Pollution" *Financial Post* (16 February 1987).

80. See, generally, Webb, *supra*, note 3, chap. V.

the formal rules of procedure and the orientation of the courts to making single, discrete decisions about single, discrete events.[81] Proof of violation can be extremely onerous and expensive.[82] Excessive resort to prosecutions can harden adversarial attitudes, thus destroying co-operative relationships which encourage the free flow of information needed to work out solutions to regulatory problems.[83] Too much emphasis on prosecutions may decrease the likelihood that, in the case of emergencies, government officials would be notified promptly.[84]

The decision whether or not to prosecute depends on many factors, including the behaviour and attitude of the alleged violator, his or her current efforts to correct the problem, the receptiveness of the court toward convictions for offences of this or a similar kind, the strength of the evidence, and the probability of or preference for prosecution by another enforcement authority. To take an example, in the case of *Fisheries Act* prosecutions of pulp and paper firms,[85] a study by the author revealed that federal officials variously considered the following factors: (1) courts often appear

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81. This point is well made by Harrigan C.J., in *R.* v. *Irving Pulp and Paper Ltd. (No. 2)* (1977), 2 F.P.R. 82 (N.B. Prov. Ct), as quoted above at 43. See also, generally, C. Grau, "Whatever Happened to Politics? A Critique of Structuralist and Marxist Accounts of State and Law," in P. Bierne and R. Quinney, eds., *Marxism and Law* (New York: John Wiley and Sons, 1982) 205, where Grau states:

    > Courts recognize narrowly defined legal issues that may bear little resemblance to underlying social issues. Cases are tried only between legal parties with defined legal interests that conflict over narrowly drawn legal issues.

82. Perhaps the most expensive pollution trial in Canada was with respect to Suncor in Alberta in 1983. The prosecution of the oil-sands firm for the release of oil and grease into the Athabasca River is reported to have cost an estimated $2 million, and resulted in a fine of $8,000. See comments of E. Kupchanko, Assistant Deputy Minister of the Alberta Environment Department, as reported in "Prosecuting polluters is effective strategy, ministry lawyer says" *The [Toronto] Globe and Mail* (24 May 1984).

83. K. Hawkins, "Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation" (1983) 5 Law and Policy Quarterly 35 at 47, describes the British environment officials' attitude (in part) as follows:

    > To 'use the big stick' or 'crack the whip' too zealously may well be counter-productive. For a field officer to be too eager or abrasive is to risk encouraging in polluters an unco-operative attitude or even downright hostility.

84. See *ibid.* at 49-50:

    > Forbearance helps generate a sense of trust which enhances the agency's ability to discover pollution and detect rule-breakers. Field staff are fond of pointing out that a polluter who trusts his field officer is willing to alert him on the first sign of trouble and will not seek to play problems down.

    This is not to deny that a lack of will to use prosecution and other enforcement actions may induce "backsliding." See *infra*, note 114.

85. See Webb, *supra*, note 3 at 199-278. The factors which are described here are discussed in greater detail below.

reluctant either to convict industrial polluters or to levy substantial penalties;[86] (2) it is difficult to prove sublethal deleterious effects of effluent (see below at 39-42); (3) the provinces have water pollution legislation of their own in place and by administrative arrangement are usually considered the lead enforcement authorities (see below at 27 and 50-51); (4) rivalries exist among federal institutions as to who should bring the prosecution (see below at 25); (5) many pulp mills are currently receiving federal and provincial funding for mill modernizations which should remedy major water pollution problems (see below at 63-64); and (6) many pulp mills have entered informal "compliance agreements" with the federal government, allowing short-term violations of the legislation in return for commitments to long-term compliance.[87]

Except in obvious cases of flagrant, or recklessly negligent pollution, court action may not hold the same appeal in pollution situations that it does for criminal wrongdoing.[88] A corollary to this general point regarding the inappropriateness of criminal notions of enforcement, is that a large number of prosecutions may not be an accurate indication that government officials are doing a good job, or, conversely, infrequent prosecutions may not indicate a lax government enforcement effort. Put simply, prosecutions are only one method of inducing compliance, and for many circumstances, they may not be the most effective method available.

It should be emphasized that the foregoing discussion is not intended to be taken as an indictment against strong enforcement action. A fair-but-firm enforcement policy (which necessarily includes resort to prosecutions and license suspensions, etc. whenever there is perceived foot dragging on the part of polluters, or flagrant violations of environmental standards) can, when coupled with a concerted negotiatory effort,

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86. See Swaigen and Bunt, *supra*, note 75, at 14-15:
> In fact, the fines in many environmental cases do appear to the public to be a "mere licence fee." There are several reasons for this: 1. Because of difficulties in obtaining the information and getting it before the court, prosecutors are often not in a position to provide evidence of the savings or gain arising from the offence or the offender's wealth. 2. As we have stated, the typical pollution offence brought before the courts and the typical offender bear little resemblance to society's vision of pollution as a global menace and polluters as midnight skulkers. 3. The maximum fines under all but a few statutes are so low that they cannot have any real financial impact on large corporations or reflect the gravity of the worst offences. 4. Large fines may not always be the appropriate means of obtaining general or specific deterrence, but they are often the only sentencing tool available. 5. While there is much broader consensus that prosecution results in deterrence in "instrumental" offences than there is that criminal sanctions are effective in deterring "expressive" ones, little is known about the role of the penalty in contributing to this deterrence, or the kind or degree of penalty that will result in deterrence without being unduly harsh. In these "instrumental" offences, the probability of prosecution and the timing of the charges, trial, and sentencing may play as great or greater a role than the penalty. 6. The public is often unaware of considerations that went into determining the size of the fine, such as expenditures made by the offender to prevent recurrence of the offence or voluntary compensation to victims.

87. J.L. Betts, of the federal Environmental Protection Service, Environment Canada, "Regulations and Waste Characterization," *Proceedings of Seminars on Water Pollution Abatement Technology in the Pulp and Paper Industry* (EPS Report) (Ottawa: Supply and Services Canada, 1976) 1.

88. For the federal Environmental Protection Service position, see Webb, *supra*, note 3 at 210. In U.K., Report of the Committee on Safety and Health at Work, Cmnd 5034 (London: H.M.S.O., 1972) at 82-83, the Committee noted that "the traditional concepts of the criminal law" are largely inapplicable in the field of safety and health at work, and suggested that future policy should be to institute proceedings only for offences of a flagrant, wilful or reckless nature.

lead to optimum environmental protection. The purpose of the preceding analysis has been to highlight some important distinctions between traditional criminal enforcement and pollution control administration, to help explain why the popular "police" model or perception of enforcement is in many cases inaccurate and inappropriate in environmental contexts.

Misconception #2

If pollution legislation is not being used, then there must be something wrong either with the legislation, or with the government officials charged with the responsibility of administering it.

Dispelling the Misconception

While undoubtedly there are occasions when legislation remains unapplied because it is unsuitable, or because government officials are, for one reason or another, neglecting their enforcement duties, this need not be the case. Government may decline to apply legislation for political, constitutional or strategical reasons which do not necessarily reflect inherent flaws in the legislation or in its administration.

For example, Part II of the *Canada Water Act*, which was promulgated in 1970, has remained largely unapplied[89] since that time. As was described earlier, the *Canada Water Act* was in many respects milestone legislation, espousing a basin-by-basin management approach to pollution control, authorizing unilateral federal action over interprovincial waters where federal-provincial co-operation could not be obtained, as well as providing for use of effluent discharge fees in addition to penalties for unauthorized waste discharges.

There are a number of possible explanations for the fact that Part II of the *Act* has not been applied. First, from a political standpoint, the *Act*'s implicit threat of unilateral federal action was arguably sufficient to goad provincial action: this rendered its application unnecessary.[90] Second, from a constitutional perspective, the *Act* derives its legislative authority from a relatively untested heading, the "peace, order and good government" power.[91] Because the federal government has other water pollution control legislation which rests on more traditional and accepted[92] constitutional foundations,

89. For more detailed discussion of the *Canada Water Act*, see Webb, *supra*, note 3 at 493-501. The *Canada Water Act* is divided into four parts. Part I is concerned with "comprehensive water resource management," and provides for the establishment of formal federal-provincial consultative arrangements, and for the co-operative development of water resource plans and subsequent implementation. Pursuant to this part, studies have been undertaken, plans developed and implemented dealing primarily with drought and flood control (see Annual Reports for greater detail). Part II is specifically concerned with water *quality* management. Part III of the *Act* establishes a regime for the control in manufacture and importation of nutrients, particularly phosphates. Part IV contains provisions of general application.

90. For example, see Thompson, *supra*, note 1 at 22.

91. See *ibid.*

92. See, e.g., the *Fisheries Act* pollution provisions, based on federal constitutional authority over "Sea Coast and Inland Fisheries," as confirmed by the Supreme Court of Canada in *Fowler* v. *The Queen* (1980), [1980] 2 S.C.R. 213.

federal officials can afford to wait for the most favourable situation to arise before invoking the *Canada Water Act* and thus risking a possible court challenge of its constitutional validity. Finally, there are strategic reasons. Because the *Act* included a number of heretofore untried measures (for example, basin-by-basin management, federal-provincial administration, effluent discharge fees), a delay in implementation has given the federal government time to assess public, government and private sector reaction[93] and to make adjustments if necessary, and has allowed all parties time to get used to the novel concepts contained in the legislation.[94] It could be argued that the *Canada Water Act* waits in the wings for the appropriate time for implementation. It may not be necessary to implement the *Act* at all. Nevertheless, the fact that the *Act* has not been applied to date should not be taken to be a necessary indication that the legislation or its administration are deficient.

Because of the difficulty of conclusively determining the real reasons why a particular piece of legislation remains unapplied, an exploration of possible explanations is necessarily speculative. The purpose of the foregoing discussion of the *Canada Water Act* is not to defend the legislation, nor make a case for its use. Rather, it is to draw the reader's attention to the possibility that legislation might remain unapplied for reasons other than inherent problems with the legislation itself or with those officials responsible for its administration.

B. Problems with Legislation

Although regulatory control legislation is considerably more realistic and practical than the blanket prohibitions it has replaced, it nevertheless still has serious deficiencies which contribute to the implementation gap. Legislation which does not portray accurately or adequately day-to-day pollution control activities, and blunt sanctioning instruments are two legislative problems identified here. As well, the oft-heard cry that penalties attached to regulatory offences are not harsh enough is debated.

(1) Unrealistic Legislative Language

Pollution control legislation is typically drafted in language which suggests that implementation is a straightforward, almost mechanical process, when in fact government officials are attempting to cope with unstated, unresolved scientific, political, technical and economic factors. By not admitting to these operational realities,

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93. This "phasing in" technique has been used with the transportation of dangerous goods legislation, where the act is passed by the legislatures, but then specific provisions are gradually proclaimed in force over time (e.g., see the legislative history of the Alberta *Transportation of Dangerous Goods Control Act*. Similarly, the "phasing in" technique could explain why Part IX of the Ontario *Environmental Protection Act* (the so-called "Spills Bill"), introduced in 1979, was not proclaimed in force until 29 November 1985.

94. For example, the fact that in the 1980s federal and provincial government have been able to agree on transportation of dangerous goods legislation which synchronizes federal-provincial activity on the area may be an indication that the co-operative efforts provided for in the *Canada Water Act* may yet bear fruit.

the legislation provides little guidance to government officials and courts, and can mislead everyone as to the real nature of pollution control.

The pollution provisions of the federal *Fisheries Act* and regulations are a good example of this phenomenon, although similar problems have been noted with provincial legislation.[95] Subsection 33(2) of the *Fisheries Act* forbids the deposit into water of substances deleterious to fish, except where authorized by regulation. If a literal interpretation of this provision were adopted, few industries in Canada could operate. Courts and government officials alike have struggled with the stark nature of the offence.[96] To give an illustration, there is evidence that the two federal departments which share responsibility for administering the *Fisheries Act*[97] — the Department of Fisheries and Oceans (DFO) and Environment Canada (EC) — have developed somewhat different interpretations of what is meant by subsection 33(2).[98] DFO has occasionally engaged in enforcement actions where EC has declined to do so. On the one hand, DFO's more strict interpretation is defensible on a literal reading of the provision; on the other hand, Environment Canada's less prosecution-oriented approach is arguably understandable, given that it is the department which must deal with industrial polluters on a day-to-day basis. A purely confrontational stance would result in minimal co-operation. Both positions have merit. The *Fisheries Act* provides no guidance. In the absence of this guidance, the two departments occasionally enforce the provision differently, leading to a perception that the federal government is speaking out of two sides of its mouth at the same time.[99] The *Fisheries Act* need not be drafted in such stark, simplistic terms: statutory provisions obligating administrators to take prescribed factors into account when making regulatory decisions do exist. For example, the British Columbia *Ministry of Forests Act*, paragraph 4(*c*), requires the provincial Department of Forests officials to consider non-forest resource uses (including, specifically, fisheries) in their planning functions.

Subsection 33.2(6) of the *Fisheries Act* authorizes inspectors to take or direct remedial actions in emergency situations. To date, however, this power has rarely been used. This situation can at least in part be attributed to the fact that in many circumstances resort to formal powers is not necessary to induce co-operation. However, an additional obstacle which might tend to prevent formal use of the power is the lack of regulations outlining how the inspector powers are to be utilized. As a result, the inspectors are given no guidance as to the proper procedures for order invocation, or the circumstances under which orders are to be issued.[100]

Subsection 33.1(1) obligates persons who carry on or propose to carry on operations which are or might result in pollution to supply the Minister with information concerning their operations. The obligation can arise as a result of a request from the

95. See, e.g., Gibson, *supra*, note 12 at ii.

96. See, generally, Webb, *supra*, note 3, chap. V.

97. By administrative arrangement, described in greater detail in Webb, *supra*, note 3 at 156-162.

98. *Ibid.* at 162-171.

99. See, e.g., description of Westin Resources incident, *ibid.* at 163-166.

100. Described in greater detail in *Webb*, *supra*, note 3 at 262-274.

Minister, or without request as prescribed by regulations. (One should note that, to date, no such regulations have been promulgated.) However, this provision has rarely been expressly used.[101] This lack of use is partly explained by the fact that federal officials can often obtain the information they need through provincial officials, or by simply asking for the information. But, should resort to formal powers prove necessary, there are problems associated with their use: any person who carries on any work otherwise than in accordance with any information provided pursuant to a subsection 33.1(1) request is guilty of an offence. The binding effect of this request for information power would tend to ensure minimal co-operation from a polluter. He or she will supply only exactly as requested, and will attempt to keep all plans as modest as possible. The "control order" effect of subsection 33.1(1) seems to create an atmosphere more conducive to constrained rather than constructive negotiation.

The *Pulp and Paper Effluent Regulations* prepared pursuant to the *Fisheries Act* were announced in 1971. The standards set for new, altered or expanded mills took effect in that same year, but a date for application of existing mill standards was not set out in the regulations and so the standards were not legally in force. In 1988, they are still not in force. The majority of Canadian pulp mills fit within the "existing" category. Until a date of application is set, all such mills are legally subject to the unrealistic blanket prohibition against the deposit of all substances deleterious to fish described in subsection 33(2) of the *Fisheries Act*.[102]

Effluent regulations promulgated pursuant to the *Fisheries Act* set nation-wide effluent standards for six industrial sectors.[103] Typically, the sector-wide standards prescribe permissible effluent levels on a per-unit-of-water-discharged basis but do not set overall limits. The standards do not take into account the fact that the environmental impact of a discharge varies depending on the nature of the receiving waters. A slow moving, low volume river is less able to absorb a discharge than an ocean. In practice, government officials tend to devote more attention to those polluters discharging into sensitive ecosystems, but the regulations do not specifically authorize such actions. This leaves the officials open to criticisms of inconsistent treatment.[104]

The *Fisheries Act* makes virtually no reference to the existence of provincial environment authorities, and does not provide for the delegation of enforcement responsibilities, yet in practice the two levels of government often agree to informal administrative arrangements to share responsibilities.[105] Because these arrangements

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101. See *ibid.* at 250-252.

102. According to J. MacLatchy (EPS, Ottawa) the federal government, in practice, tends to take a more strict enforcement line with respect to those polluters subject to specific regulations, as opposed to those subject to the blanket prohibition contained in subs. 33(2).

103. See the *Alice Arm Tailings Deposit Regulations*, the *Chlor-Alkali Mercury Liquid Effluent Regulations*, the *Petroleum Refinery Liquid Effluent Regulations*, the *Meat and Poultry Products Plant Liquid Effluent Regulations*, the *Metal Mining Liquid Effluent Regulations*, the *Potato Processing Liquid Effluents*, the *Pulp and Paper Liquid Effluent Regulations*. In addition, guidelines have been set for a number of industry sectors and sub-sectors.

104. See Webb, *supra*, note 3 at 84-88.

105. *Ibid.* at 174-197.

lack legislative authority, it has been possible for a private citizen to prosecute a polluter despite the fact that both federal and provincial officials had been satisfied with the polluter's abatement progress.[106] New federal and provincial transportation of dangerous goods legislation — which expressly recognizes the existence of both the federal and provincial enforcement presence and provides for delegation of administrative and enforcement responsibilities from one jurisdiction to another — would serve to demonstrate that statutorily co-ordinated federal-provincial responses are feasible.[107]

Legislators have not been entirely successful at creating a legal regime which reflects the give-and-take relationship of the negotiation process and yet is quick, inexpensive and fair at attaining environmental objectives. A formal, legal negotiation process such as the Ontario control order or the British Columbia permit system, is fraught with pitfalls for the unwary. Are the terms of the control order sufficiently clear and precise so that, in the event of violation, enforcement is possible?[108] Will the company, at the end of negotiations, decide to appeal the terms as unreasonable?[109] Will the negotiation process be subsequently challenged by the company or third parties as being unfair?[110]

Because of the unwieldiness of formal legal mechanisms, administrators have frequently been tempted to enter into informal compliance arrangements with polluters.[111] But the dangers here are also great. Informal agreements, although frequently quicker and less expensive, operate in an ambiguous, murky world without clear structure and rules; this can understandably raise the suspicions of those not involved in the negotiations. Because the "real rules of the game" are not set out in advance, the likelihood of uneven application of the law is increased. Moreover, enforcement of informal sanctions can be even more difficult than that associated with formal instruments.[112]

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106. See, e.g., *R. ex. rel. Howe* v. *Cyanamid Canada Inc.* (1981), 3 F.P.R. 151 (discussed in greater detail in *ibid.* at 286-292).

107. See, e.g., *Transportation of Dangerous Goods Act*, s. 25.

108. See *Mid-West By-Products Co.* v. *Clean Environment Commission* (1979), [1979] 6 W.W.R. 46 (Man. Q.B.). See also A. Ackerman and B. Clapp, *Fraser River Task Force Report* (Victoria: Government of British Columbia, 30 July 1980) for a 1980 look at the British Columbia situation, and Gibson, *supra*, note 12 at 58, concerning the Ontario situation in 1983.

109. For example, see description of lead industry challenges to control order standards in C.C. Lax, "The Toronto Lead-smelter Controversy" in W. Lewis, ed., *Ecology versus Politics in Canada* (Toronto: University of Toronto Press, 1979)57. See also description of events surrounding issuance of amended control order to Inco, in Gibson, *supra*, note 12 at 74-78.

110. See *supra*, note 108; see also abuse of process and procedural fairness discussion, below at 43-50.

111. Webb, *supra*, note 3 at chap. V, describes the informal compliance agreements used by the federal government in relation to the pulp and paper industry. See also Gibson, *supra*, note 12 at 134-135 concerning the Ontario situation.

112. See, Webb, *ibid.* at 100-101, 205.

(2) Blunt Sanctions

The two major types of sanctions typically provided in legislation are court based (e.g. prosecutions) and administratively imposed (e.g. licensing actions[113]). Because of their comparatively[114] great expense, length, and high public profile, court actions have usually been reserved for the more serious, substantive violations of environmental standards. In many cases, however, persons charged with polluting offences will plead guilty, thus permitting the Crown to avoid the potentially difficult task of proving that

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113. The phrase "licensing actions," as used here, is a generic term intended to include alterations and restrictions to programme approvals, control orders, permits, compliance schedules and other administrative arrangements.

114. The comparison is with administrative mechanisms. J.Z. Swaigen, in "A Case for Strict Enforcement of Environmental Statutes" in L. Duncan, ed., *Environmental Enforcement* (Edmonton: Environmental Law Centre, 1984) 2 at 5), contends that, except in cases where the persuasive skills of administrators by themselves are sufficient to induce compliance, administrative control methods can also be expensive and lengthy.

> [O]nce it becomes necessary to invoke any kind of formal sanction, it is unlikely that prosecution is any more time-consuming or expensive than other tools available to enforcement agencies. An authority wishing to convince a recalcitrant industry to install pollution abatement equipment or to impose a binding order on such an industry, has to do the same groundwork to justify its demands in an administrative process as it must in preparation for prosecution.

Although it is undoubtedly true that both judicially and administratively imposed sanctions can be time-consuming and expensive, a major distinction between the two approaches is the penal emphasis of court actions. Because the end result of a prosecution is potentially imprisonment or a large fine, the process of determining guilt or innocence beyond a reasonable doubt is a primary focus of attention for all parties concerned. The lab and investigative activities necessary to establish guilt beyond a reasonable doubt to the satisifaction of a court may far exceed the preparatory work necessary to persuade a polluter to agree to a new permit condition. With administrative actions, although government officials must be prepared to defend their actions first to the affected parties and then (on appeal) to the courts, the focus of attention is not so much on the guilt or innocence of the polluter, as on what action the polluter must now take or agree to. In essence, the emphasis of administrative actions is on getting the policy of environmental protection implemented, whereas the emphasis of prosecutions is on punishment. This is not to suggest that the one approach is better than the other. Both have their place. The punitive aspect of prosecutions is intended to lead to compliance of the individual polluter concerned and to other polluters in similar situations. In fact, as Swaigen notes (at 6), a firm but fair prosecution policy will likely enhance the position of government officials in their day-to-day contact with polluters.

It may be that, until judges, prosecutors and federal or provincial departments of Environment staff become more familiar and expert with the many subtle nuances of pollution offences, prosecutions will appear particularly cumbersome, lengthy and expensive. However, once this familiarization process has taken place, the ease of prosecutions will increase. This could be the moral underlying the following quote by E. Anthony, Assistant Deputy Minister, British Columbia Ministry of Environment, on the work of the Fraser River Task Force:

> The prosecutions themselves proved time-consuming, expensive and cumbersome. The task force was disbanded in July, 1980 and the members returned to their homes around the province. As the cases came up, they were brought back to give evidence. The load on the Ministry's lab facilities was significant and impacted heavily on monitoring and inventory programs. The prosecutors were unfamiliar with environmental law and presentations often suffered. The judges had little precedent on which to rely and the sentences or fines were inconsistent (E. Anthony, "The Fraser River Task Force" in L. Duncan, ed., *Environmental Enforcement* (Edmonton: Environmental Law Centre, 1984) 78 at 79).

Note that the lab activities of the British Columbia Ministry of Environment became geared towards the court concerns with determining guilt or innocence, as opposed to the administrative concerns with ongoing compliance.

a violation did take place.[115] Increasingly,[116] legislation is being amended to provide courts with more innovative sentencing options than simply fines or imprisonment, including powers to suspend licenses in default of payment of any fine owed,[117] to order remedial[118] and preventive[119] action and compensation for pollution victims,[120] to require offenders to publicize their offences[121] and pay for the investigative expenses of agencies.[122] Whether or not courts will make use of these additional sentencing options remains to be seen.[123]

Depending on the jurisdiction and the regulatory regime, government officials have a variety of administrative mechanisms available to them. In some cases, an array of inter-dependent control devices are provided in legislation so that, in Ontario for example, a certificate of approval is needed to construct or alter a sewage system,[124] a permit is required to operate the sewage system,[125] and it is only granted when a sewage system meets provincial standards (e.g., a certificate of approval has been granted).[126] Moreover, licences must be issued to persons who are in the business of constructing or altering sewage systems, or storing or disposing sewage from sewage systems.[127] In some cases, a hierarchy of control mechanisms is established, so that, for example, violation of the terms of an Alberta Clean Air license could lead to the

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115. According to Swaigen, *ibid.*, in Ontario, during the period from January 1981 to January 1984, approximately two-thirds of the polluters charged with offences under the Ontario *Environmental Protection Act* and the *Ontario Water Resources Act* pleaded guilty.

116. Three recent examples of legislative innovations in environmental sentencing powers are the December 1986 amendments to the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Pesticides Act* as provided in the *Environment Enforcement Statute Law Amendment Act, 1986*, the 1987 Manitoba *Environment Act*, and the *Canadian Environmental Protection Act*.

117. See, e.g., the Ontario *Environmental Protection Act*, s. 146e.

118. See, e.g., the Manitoba *Environment Act*, para. 33(b), the Ontario *Water Resources Act* (subs. 71(1), and the Ontario *Environmental Protection Act*, s. 146d.

119. See, e.g., the Manitoba *Environment Act*, para. 33(a), the Ontario *Water Resources Act*, subs. 71(1), the Ontario *Environmental Protection Act*, subs. 146d(1).

120. See, e.g., the Manitoba *Environment Act*, para. 36(c), and the *Canadian Environmental Protection Act*, subs. 131(1).

121. See, e.g., the *Canadian Environmental Protection Act*, para. 130(1)(*c*).

122. See, e.g., *ibid.*, para. 130(1)(*g*).

123. On the basis of past experience, a note of guarded pessimism is in order here. A court ordering power to refrain from committing further polluting activities (s. 33(7)) was included in amendments to the federal *Fisheries Act* in 1970 and was further refined and expanded (orders to take measures to prevent the occurrence of further pollution) in 1977 amendments, but has rarely been used. For more detailed discussion concerning this power and its lack of use, see Webb, *supra*, note 3 at 230-234.

124. See the Ontario *Environmental Protection Act*, s. 64.

125. See *ibid.*, s. 67.

126. See *ibid.*, subs. 67(3).

127. See *ibid.*, s. 69.

imposition of an emission control order, a stop order, a prosecution, or both a stop order and a prosecution.[128]

Government officials confronted with a violation of terms of an administrative agreement (e.g., a licence, permit, certificate of approval, etc.) have essentially three possible options available to them: they can re-negotiate the agreement and perhaps put into place a more demanding control mechanism, they can suspend the agreement, or they can launch an enforcement action (e.g., a stop order or a prosecution through the criminal courts, or both). On the one hand, mere re-negotiation of an agreement (even if it leads to more strict controls) might appear to be a rather weak response to non-compliance. On the other hand, suspending an agreement, ordering that a plant stop operations, or prosecuting might appear to be a rather drastic reaction in cases of relatively minor transgressions.

Barton, Franson and Thompson, in a study prepared for the Law Reform Commission of Canada and the Westwater Research Institute, have suggested that use of contracts as pollution control mechanisms might have certain advantages over existing approaches.[129] They point out that contracts are individual arrangements between government and private companies, entered into after negotiations, and that this describes many pollution control situations.[130] The authors contend that it would often be wrong to characterize many breaches of pollution control standards as the committing of criminal wrongs to be penalized. The contract model evades moral condemnation, is enforced through the civil process, and leaves open the possibility of civil damages for breach of contract terms.[131] Barton *et al.* propose that the contract model for pollution control be grafted onto existing regulatory frameworks as an additional administrative approach to pollution control.[132] They admit that the addition of a contract route where criminal sanctions would not apply would likely be controversial, and would require that the contract amendments be "carefully explained to the public."[133]

It may not be necessary to go quite this far. Administratively imposed sanctions for minor and technical infractions could be provided to government officials.[134] As well, although not widely used in Canada, civil damages can be provided for violation

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128. See the Alberta *Clean Air Act*.

129. See B. Barton, R. Franson and A. Thompson, *A Contract Model for Pollution Control* (Vancouver: Westwater Research Center, University of British Columbia, 1984).

130. See *ibid.* at 3.

131. See *ibid.* at 5.

132. See *ibid.* at 35-37.

133. See *ibid.* at 30.

134. See, e.g., the so-called "ticketing" offence regimes, such as those currently provided in the federal *Aeronautics Act*, ss. 6.6-7.2 as am. S.C. 1985, c. 28, s. 1; see also the Ontario *Provincial Offences Act*, esp. Parts I and II.

of licencing terms or regulatory offences.[135] The Administrative Law Project of the Law Reform Commission of Canada is exploring the possibility of a separate court and procedure for regulatory offences, not burdened by criminal preconceptions. In addition, more widespread use of performance bonds could give administrators extra leverage in their dealings with polluters.[136]

(3) The Call for Harsher Penalties

The cry is frequently heard that penalties for breach of regulatory pollution offences are too light, that they are a "licence to pollute,"[137] and therefore must be increased. It is suggested here that in most situations the fines available are more than adequate, and that calls for increased penalties are the knee-jerk reaction of those not familiar with the actual situation.[138] In a 1985 study paper prepared for the Law Reform Commission of Canada, authors Swaigen and Bunt comment:

> If the stereotyped view of pollution offences as deliberate endangerment of public health or mass destruction of the environment were accurate, there would be no question that penalties higher than the statutes call for, or the courts hand out, would be warranted. However, an analysis of the reported and unreported cases over the past decade shows clearly that the vast majority of cases that come before the courts do not fit this stereotype. Most cases do not involve large, powerful corporations, but small businesses, whose ability to pay is limited. The typical case involves an accidental discharge of a small amount of a relatively safe substance, which is cleaned up quickly and involves little or no serious harm to the environment, or to human health.
>
> For the typical case, we cannot conclude that many of the maximum fines available under federal and provincial statutes, or the actual fines being meted out by the courts, are inadequate. In fact, in some cases the maximum fines available (not those actually imposed) may even be excessive to reflect the gravity of the typical case.[139]

Swaigen and Bunt go on to note that "[t]he problems lie in the fact that fines alone are not adequate to deal with certain problems and the exceptional cases...."

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135. See discussion of the American civilly imposed penalty "administrative judge" system, as described in V. Palmer, "The Evolving Role of Administrative Law Judges" (1984) 19 New England L. Rev. 755. See also the new Manitoba *Environment Act*, s. 36. The *Canadian Charter of Rights and Freedoms* [hereinafter *Charter*] and constitutional implications of use of administratively imposed sanctions need to be thoroughly explored. See also LRCC, *supra*, note 12 at 38 and 43.

136. In pollution control contexts, a performance bond could be described as a security which a regulatee provides to an authority as an assurance that the regulatee will carry out certain obligations. If the obligations are fulfilled, the security is returned. If not, the security is expended to carry out the obligations. Provisions authorizing use of performance bonds are included in the *Northern Inland Waters Act*, subs. 11(3) and 26(1); in the Ontario *Environmental Protection Act*, Part X-A; and in the *Department of Environment Act*, s. 38.

137. See, e.g., M. Keating, "Tougher Penalties Promised Against Polluting in Ontario" *The [Toronto] Globe and Mail* (27 May 1986).

138. Thompson, *supra*, note 1, notes at 5 that the weaknesses of the current system "will not be cured by enacting more statutes and regulations creating more environmental offences and penalties.... The writing of ... new prohibitions and penalties is often the response of the regulator who lacks the means or knowledge to manage a problem."

139. See *supra*, note 75 at 45.

From late 1986 to the time of final revisions of this paper, there was a flurry of legislative activity in several jurisdictions[140] which will significantly strengthen the penal and sentencing powers available to the courts in those jurisdictions. This new legislation includes higher maximum fines,[141] and in some cases the introduction of minimum fines,[142] different penalties for corporate and individual offenders,[143] the ability to directly convict officials within corporations responsible for offences,[144] jail terms,[145] and the ability to factor into the penalty imposed the profit accrued as a result of the violation.[146] In addition to these increased penalties, courts have been given greater ordering powers (discussed above at 29). Whether the penalties and powers formerly in place were insufficient is a debatable point. What is incontrovertibly evident, however, is that the amendments will provide a clear message to judges, government officials and polluters that legislators in those jurisdictions consider harm to the environment to be a serious problem, worthy of strong action. It remains to be seen whether other jurisdictions will find it necessary to express a similar renewed and invigorated commitment to environmental protection.

To date, courts have rarely imposed the full possible penalties available to them, but there are signs of growing judicial impatience with recalcitrant industrial operators. In a 1983 case, the Northwest Territories Territorial Court put a convicted corporate polluter on probation for a year.[147] In a 1986 case, the Ontario High Court convicted a corporate polluter of contempt of court for continued flagrant violation of discharge

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140. See *supra*, note 116.

141. See, e.g., the potential fines available for breach of s. 51 of the Ontario *Water Resources Act* increased from $200 per day to $25,000 (first offence, corporation or municipality) and $50,000 (subsequent offences, corporation or municipality).

142. See, e.g., the Ontario *Environmental Protection Act*, s. 146a, which provides for a minimum fine of $2,000 for corporations convicted of breaching subs. 13(1) or 119(1) of the *Act*. Some jurisdictions already have minimum fines in their legislation: e.g., Québec *Environmental Quality Act*, s. 106; also, the Prince Edward Island *Environmental Protection Act*, ss. 6 and 9.

143. An example is the Ontario *Environmental Protection Act*, subs. 146a(1), which sets out minimum and maximum fines for corporations convicted of offences set out in subs. 13(1) or 119(1) of the *Act*, while subs. 146a(2) provides for the additional possible punishment of imprisonment for individuals convicted of subs. 13(1) or 119(1). See also the Québec *Environmental Quality Act*, s. 106.

144. Section 147a of the Ontario *Environmental Protection Act* states that officials of a corporation that engages in an activity possibly resulting in pollution has a duty to take all reasonable care to prevent the corporation from causing or permitting pollution, and is guilty of an offence if they do not carry out that duty, regardless of whether or not the corporation has been prosecuted or convicted for the incident of pollution in question.

145. See, e.g., the Manitoba *Environment Act*, subs. 33(1). Certain existing legislation already provided the offence of imprisonment: e.g., the *Oil and Gas Production and Conservation Act*, ss. 19.1 and 49; the *Environmental Contaminants Act*, subs. 8(5); the Alberta *Clean Water Act*, s. 15.

146. See the Manitoba *Environment Act*, para. 36(d).

147. *R.* v. *Panarctic Oils Ltd.* (1983), 3 F.P.R. 429 N.W.T.T.C. Note, however, that in *R.* v. *Algoma Steel* (1977), 1 W.C.B. 118, the Ontario Provincial Court held that probation is not possible for corporations on provincial offences.

standards.[148] Cases such as this illustrate that "where there is a will, there is a way": in many circumstances courts do have the necessary penalties and powers to severely reprimand and control polluters. This having been said, the recent initiatives to strengthen the court's powers in dealing with polluters does reinforce the message of society's abhorrence of environmental harm, and improves the hand of government in its dealings with polluters.

C. Courts, Pollution and Pollution Control

While legislatures, government officials, industry and the public have been struggling to come to grips with pollution control, so have the courts. In some respects, it can be argued that Canadian courts have made progress, such as with the introduction of the strict liability offence, with its better suitability to most pollution incidents. In others, characteristics of the judicial process have not been conducive to effective and efficient resolution of pollution problems, such as the focus of the courts on guilt and innocence, and on discrete and isolated incidents.

Discussion here concentrates on the problems courts have had grappling with the scientific, technically imprecise and value-laden nature of pollution activity, and with the ongoing nature of much pollution control. Pollution does not resemble the typical criminal violation which courts are most familiar with because the activity of polluting often defies reduction to simple legal formulae, and because most prosecuted incidents of pollution cause no substantial or permanent harm to the environment or human health (although the cumulative, synergistic, long-term effects can be serious).[149] Because abatement often cannot be achieved overnight, and frequently necessitates close government-industry co-operation as solutions are worked out, again it does not resemble the typical police-criminal relationships which courts are most familiar with. As a consequence of these factors, prosecutions for pollution offences can be time-consuming, expensive, and yield inconsistent verdicts from one trial to another.[150] In light of this situation, government officials have not been able to rely on courts to the extent that police do in criminal enforcement. It should be reiterated, however, that in many cases polluters will plead guilty, thereby relieving the Crown of the burden of proving that an offence took place.[151] Thus, the following comments describing the problems associated with courts should not be taken as indication that prosecutions should not be undertaken. In fact, there is evidence to indicate that better co-operation follows from prosecution.[152]

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148. *R.* v. *B.E.S.T. Plating Shoppe Ltd.* (1986), 1 C.E.L.R. (N.S.) 85 (Ont. H.C.). Holding of contempt of court against corporate offender upheld by Ontario Court of Appeal: (1987), 1 C.E.L.R. (N.S.) 145. Decision reversed with respect to individual corporate official.

149. See Swaigen and Bunt, *supra*, note 75 at 45.

150. See comment to this effect by the Assistant Deputy Minister of Environment of British Columbia as quoted in *supra*, note 114, but note that these problems may subside with time and experience.

151. According to Swaigen of the Ontario Ministry of Environment, approximately two thirds of polluters plead guilty to pollution offences brought in that province. See *supra*, note 115.

152. See *supra*, pp. 28-29 and note 115.

(1) Courts and the Polluting Activity

(a) *Characterization of the Pollution Offence*

In Canada, prior to the 1970s, courts and legislatures tended to classify offences into essentially two categories: absolute liability and criminal.[153] With absolute liability offences, only proof that the violating act took place is necessary, and a conviction will ensue. The intentions of the accused are not relevant, regardless of whether the offending act was maliciously planned, recklessly negligent, or morally innocent. At the other end of the spectrum, *mens rea* — a "guilty mind" — must be proven before a conviction for a criminal offence is secured.

Regulatory pollution offences do not easily fit into either the absolute liability or criminal categories. Typically, pollution offences are drafted using language which does not clearly indicate whether intention is a necessary element, such as "no person shall deposit, permit to be deposited or cause to be deposited, substances harmful to the environment."[154] Characterization of pollution offences as either criminal or absolute liability often determines whether or not an accused will be convicted. If a court concludes that a pollution offence is criminal, so that *mens rea* must be proven, it can be very difficult to secure convictions, since many acts of pollution are not deliberate (for example, spills) and are perpetrated by corporations (in which case establishing intent for a corporate body can be an extremely onerous task).[155] On the other hand, court characterization of a pollution offence as one of absolute liability means that polluters can be convicted even though they had done everything possible to avoid the discharge. Prior to the Supreme Court of Canada decision in *Sault Ste. Marie*, in 1978, courts in Canada were reaching inconsistent conclusions — some finding *mens rea* to be a necessary element, some finding it unnecessary, some providing defences, some not providing defences.[156]

In *Sault Ste. Marie*, an information was laid against the city that it discharged, or caused to be discharged, or permitted to be discharged or deposited materials into certain waters in contravention of subsection 16(1) (then subsection 32(1)) of the *Ontario Water Resources Act*. The key issue in contention was whether or not the accused municipality was liable for the actions of a private company which it had contracted to dispose of the municipality's garbage. Terms of the contract included a provision requiring the private company to perform the disposal operations to the satisfaction of municipal officials. The guilt or innocence of the accused municipality largely depended upon whether or not the prosecution had to prove the existence of *mens rea*, or some lesser standard. The trial court judge held that subsection 16(1) was an offence which did not require proof of *mens rea*, while the Divisional Court and

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153. See historical discussion of Dickson J., in *R.* v. *City of Sault Ste. Marie* (1978), [1978] 2 S.C.R. 1299 [hereinafter *Sault Ste. Marie*].

154. See, e.g., the federal *Fisheries Act*, subs. 33(2); the *Ontario Water Resources Act*, subs. 16(1).

155. See, e.g., J.C. Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich. L. Rev. 386.

156. See historical discussion by Dickson J., in *Sault Ste. Marie* at 1316-1327.

Court of Appeal had concluded that subsection 16(1) created a *mens rea* offence.[157] At the Supreme Court of Canada, Dickson J. (as he then was) speaking for the court, observed that "public welfare" offences such as subsection 16(1) ...

> lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.[158]

Dickson J. formally recognized the existence of a new category of offence, called strict liability, which lies between the extremes of absolute liability on the one hand and *mens rea* on the other. With strict liability offences ...

> there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.... The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.[159]

In arriving at this conclusion, Dickson J. followed the recommendations of the Law Reform Commission of Canada.[160]

As a result of recognizing this strict liability offence and its defence of all reasonable care, Dickson J. noted that it is not up to the prosecution to prove negligence. Instead, it is open to the accused to prove that all due care has been taken. While the prosecution must prove beyond a reasonable doubt that the accused committed the prohibited act, the accused must only establish on the balance of probabilities that he has a defence of due diligence, or reasonable care.[161] Then, the prosecution must refute the due diligence defence to secure a conviction.

Dickson J. decided that public welfare offences such as those provided in the *Ontario Water Resources Act* would be presumed to be of the strict liability type, unless the statute creating such offences used words clearly indicating *mens rea*, such as "wilfully," "with intent," "knowingly" or "intentionally."[162] In order to distinguish strict from absolute liability offences, Dickson J. suggested that courts should look at the overall regulatory pattern of the legislation, the subject matter of the legislation, the importance of the penalty and the precision of the language used.[163]

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157. See *R.* v. *Sault Ste. Marie* (1976), 70 D.L.R. (3d) 430 (Ont. C.A.).

158. See *Sault Ste. Marie* at 1310.

159. See *ibid.* at 1326.

160. See LRCC, *Our Criminal Law* (Report 3) (Ottawa: Supply and Services Canada, 1976); *The Meaning of Guilt: Strict Liability* (Working Paper 2) (Ottawa: Information Canada, 1974). These documents were cited at 1320 of *Sault Ste. Marie*.

161. See *Sault Ste. Marie* at 1325.

162. See *ibid.* at 1326.

163. See *ibid.*

As is often the case with solutions, the *Sault Ste. Marie* decision corrected one problem only to create a new set of difficulties. On the one hand, the decision eliminated a great deal of confusion about the *mens rea* element, and the nature and content of defences available for most pollution offences. The solution adopted in *Sault Ste. Marie* is arguably both equitable and sensible, since prosecutors need not overcome the often impossible burden of proving intention, while the accused can avoid liability for morally blameless behaviour.

Unfortunately, *Sault Ste. Marie* raised a whole new set of difficulties. The first problem is identifying the offences which should now fit in the strict liability category. Even if most substantive environmental offences can be characterized as "strict liability," what about procedural breaches such as transgressions of licensing requirements in environmental statutes? Some courts have concluded that licensing-requirement transgressions are absolute liability offences, and that a due diligence defence therefore is not appropriate.[164] Suffice it to say that recognizing a middle ground between *mens rea* crimes and absolute liability offences does not solve the characterization problem, it simply adds another choice. To its credit, however, the *Sault Ste. Marie* decision set out what those choices are and supplied criteria for identifying them.

Some commentators have argued that the strongly expressed revulsion of Dickson J. against the punishment of the morally innocent sounded the death knell for absolute liability offences.[165] Dickson J. noted that "absolute liability violates fundamental principles of penal liability."[166] It has been suggested that absolute liability offences also violate principles of fundamental justice protected by section 7 of the *Charter*. Subsequently, the Supreme Court of Canada has concluded that mandatory imprisonment for an absolute liability motor offence violates "fundamental principles of justice"[167] protected by the *Charter*.

In addition to the difficulties with characterization, the *Sault Ste. Marie* decision created a second major problem in establishing a due diligence defence. If the introduction of the strict liability offence improved the likelihood of conviction by eliminating the need for proof of *mens rea*, at the same time it decreased that likelihood with the recognition of the due diligence defence. Just what will be an acceptable defence of due diligence? "Uncertainty in the law is the unwelcome product of *Sault Ste. Marie*," remarked one commentator.[168] It may be easy to create a "paper" due

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164. E.g., *R.* v. *Canadian International Paper Company* (1983), 12 C.E.L.R. 121 (Co. Ct Ont.).

165. See M.J. Conklin, "Strict Liability: The Doctrine in Sault Ste. Marie — Judicial Creativity Gone Sour?" (1982) 3:5 Crown Coun. Rev. 9 at 12.

166. See *Sault Ste. Marie* at 1311.

167. *Re B.C. Motor Vehicle Act* (1985), [1985] 2 S.C.R. 486. Still, some environmental offences have been recently held to be of absolute liability: for example, construction or alteration of equipment so that a contaminant may be emitted without first obtaining a certificate of approval, contrary to s. 8(1) of the Ontario *Environmental Protection Act*, has been held to be an offence of absolute liability to which a due diligence defence is not available: *R.* v. *Canadian Pacific Ltd.* (1983) 12 C.E.L.R. 101 (Ont. Prov. Ct).

168. See Conklin, *supra*, note 165.

diligence defence. This could be done by indicating that, for example, instructions were provided to employees so that spills would not occur. But will courts accept this? One court, in a rigorous application of the defence, concluded as follows:

> What [the accused] must do is create a proper system, and for that it is knowledgeable of what should be done, but I think it is quite insufficient to say, 'We hire and train carefully.' In this case, in my view, due diligence has not been shown. I think that is what the trial judge meant when he said: "... 'reasonable precautions' must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout."[169]

At the other extreme, evidence of government action, inaction, or acquiescence has been accepted as a relevant consideration by courts in a due diligence defence:

> In my respectful opinion, the *appellant took all reasonable care* in the circumstances and in these circumstances two things must be noted, namely, *that the delays [were] created by the government* and that there were unusual rains both of which could not have been reasonably anticipated or foreseen by the appellant.[170] (Emphasis added)

Government negotiating practices can in effect now be subject to the glare of court scrutiny in the course of a pollution prosecution. Depending upon how consistent government negotiations are, and how complete are the administrators' records of these negotiations, this can work for or against a due diligence defence. It could work *against* a due diligence in the sense that a thorough and consistent effort by government officials, as reflected by administrators' records, would help to defeat an accused's due diligence defence.

Clearly, there is a heavy onus on government officials not only to provide evidence that pollution has taken place, but also to establish that the preventative system at the accused's operation is insufficient:

> Pollution inspectors trained to take samples of toxic materials and trace a pollution trail to its source, will now also have to establish who gave the orders that led to the pollution, who carried them out, what supervision was provided, how the equipment was maintained, and many other matters....[171]

In effect, this has forced government to adopt more complete and rigorous investigatory tactics,[172] although in theory government should have always been carrying out thorough investigations of this nature so that the prosecutor could better speak to sentence.[173] The due diligence defence has also lead to more lengthy and expensive trials.[174] Undoubtedly, the accused is in a position to dazzle the court with a

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169. *R.* v. *Gulf of Georgia Towing Co.* (1979), [1979] 3 W.W.R. 84 at 88 (B.C.C.A.).

170. *R.* v. *Byron Creek Collieries Ltd.* (1979), 8 C.E.L.R. 31 at 39 (B.C. Co. Ct).

171. See Swaigen, "Procedure in Environmental Regulation," in Finkle and Lucas, eds., *supra*, note 12 at 94-95.

172. M. Jeffery, "Environmental Enforcement and Regulation in the 1980's: *Regina* v. *Sault Ste. Marie* Revisited" (1984) 10 Queen's L.J. 43 at 68.

173. This point was made by Franson, Franson and Lucas in *Environmental Standards* (Edmonton: Environment Council of Alberta, 1982) at 192.

174. See Anthony, *supra*, note 114 at 79 and Jeffery, *supra*, note 172 at 66-69.

defence highlighting its expensive and thorough environmental control systems while prosecutors must largely react, defend government actions or inactions, and hope to dispel the favourable impression left in the court by the accused's testimony. Still, evidence to date indicates that conviction rates have not decreased since the *Sault Ste. Marie* case.[175]

As time goes on, it is becoming apparent that what the courts intended to be a middle ground between two extremes has actually rendered resort to the "heavier" criminal extreme largely unnecessary. Like crimes, strict liability pollution laws can attract heavy fines[176] and even imprisonment.[177] Generally, they are treated seriously by courts[178] and regulatees[179] and possess significant negative societal stigma.[180] Strict liability offences can be used to address both intentional and negligent pollution activity equally well, and yet the strict liability offence avoids the difficult task of proving the existence of *mens rea*. Finally, Dickson J.'s characterization of pollution offences as civil and public welfare in nature rather than criminal (but still requiring proof beyond a reasonable doubt) may also support procedural innovations in sentencing which are not possible with criminal offences. Swaigen and Bunt elaborate on this point:

> Thus, for example, while in criminal cases the Crown must disclose its case but the accused may maintain absolute silence and search warrants are needed to obtain evidence, in civil matters mutual discovery and production of documents are considered unexceptionable. Similarly, the differences may justify reversals of onus in evidentiary matters that would be unacceptable in criminal cases. For example, recognizing that the complexity of corporate structure, business arrangements and pollution control systems make it impossible for the Crown to prove negligence, the Supreme Court has shifted the onus of proving reasonable care to the defendant. The same fact (that the corporation is generally the only one that has the means of proving its size and wealth, profits realized by the offence, and the costs and benefits of compliance with the statute), might support changes in sentencing procedure such as: (a) a shift in the onus of proof of ability to pay, or illegal gain, to the defendant; (b) discovery by the Crown; or (c) a separate trial of the quantum issue before a different court official than the trial judge (similar to the use of a master in civil proceedings).
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> The characterization of public welfare offences as civil might also provide additional support to the use of the sentencing process to provide compensation or restitution to victims. The force of arguments that the criminal courts are "not a collection agency" is

175. *Ibid.*

176. See, e.g., the *Fisheries Act* with fines of up to $100,000 for repeat offences (subs. 33(5)).

177. See, e.g., the *Oil and Gas Production and Conservation Act*, ss. 19 and 49, the *Environmental Contaminants Act*, s. 8, the *Transportation of Dangerous Goods Act*, s. 6.

178. See, e.g., *R.* v. *United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. 43 (Y.T. Terr. Ct); *R.* v. *Panarctic Oils Ltd.*, *supra*, note 147.

179. Ontario Ministry of Environment officials estimate that 80% to 90% of the companies they work with undertake clean up programmes which are completely voluntary: P. Ohlendorf, "Waste Not Want Not" (August 1986) *Report on Business Magazine* 42 at 46.

180. Neil Mulvaney, Director of Legal Services for the Ontario Ministry of Environment, stated: "I have the feeling that most industries prefer to avoid prosecutions for a number of reasons and a fine is just one of them." As reported in Ontario, Standing Committee on Resources Development, *Final Report on Acidic Precipitation, Abatement of Emissions From the International Nickel Company Operations at Sudbury, Pollution Control in the Pulp and Paper Industry, and Pollution Abatement at the Reed Paper Mill in Dryden* (October 1979) at 67.

blunted by the characterization of these offences as "civil," since in the traditional sense of the word, civil action implies in addition to a system of righting wrongs, a method of providing redress through injunctions and damages.[181]

In short, the middle ground forged by the Supreme Court of Canada in *Sault Ste. Marie* has changed the face of environmental protection in Canada, forcing changes in government practices and court interpretations and making pollution offences more appropriate to corporate behaviour. It would appear that more developments arising from the decision may await us in the years ahead.

(b) *The Proof Process*

The difference between conviction and acquittal in pollution prosecutions is often the Crown's ability (or lack thereof) to prove that a deposit or emission qualifies as pollution as defined in legislation or regulations. This can be an extremely difficult task. To illustrate, consider court interpretation of the federal *Fisheries Act*, wherein water pollution is described as "deleterious substances" deposited into water frequented by fish. "Deleterious substance" is defined in subsection 33(11) of the *Act* as:

> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
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> (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, and without limiting the generality of the foregoing includes
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> (c) any substance or class of substances prescribed pursuant to paragraph (12)(a),
>
> (d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (12)(b), and
>
> (e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (12)(c);

In effect, then, water pollution is defined in terms of harm to "fish" (and man's use of it), and "fish habitat." Both of these terms have been statutorily defined in expansive terms so that essentially all forms of marine life are included.[182]

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181. See Swaigen and Bunt, *supra*, note 75. In this excerpt, the authors did not distinguish between summary and indictable criminal offences. It should be noted that the time and extent of Crown disclosure before the actual trial differs depending on the type of offence concerned: there is no preliminary hearing in summary conviction offences.

182. See *Fisheries Act*, s. 2: "'fish' includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals; and subs. 31(5): "'fish habitat' means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

Courts have wrestled with the definition of "deleterious substance" on numerous occasions. The varied and at times conflicting decisions which have resulted suggest that defining pollution in legal terms has not been an easy task for the legislators or the courts. First note that, stripped to its essentials, the definition of "deleterious substance" provided by subsection 33(11) is fundamentally circular:

> "deleterious substance" means any substance that, if added to any water [renders it] deleterious to fish....

The problem remains, what is "deleterious"? As Judge Seaton stated in *R.* v. *MacMillan Bloedel (Alberni) Ltd.*,[183] "I must agree with the Provincial Court judge that a definition section that uses the word defined is awkward."

And there are other definitional ambiguities which have contributed to prosecutorial and judicial uncertainty. Courts have reached conflicting conclusions on whether or not the Crown must prove that a substance is deleterious *in the receiving water in question.* The problem originates with the subsection 33(11) phrase "'deleterious substance' means any substance that, if added to *any* water...." In *R.* v. *Imperial Oil Enterprises Ltd.*,[184] Kimball J. of the Nova Scotia Magistrate's Court stipulated that the Crown must demonstrate that the water *into which the deposit is made* is rendered deleterious. Taking a contrary view, the British Columbia Court of Appeal has ruled that it is not necessary to ascertain whether the receiving water itself is rendered deleterious, as long as the substance is proven deleterious in *any* water.[185] While it appears more sensible that a prosecutor prove a substance deleterious in the receiving water in question, the "*any* water" interpretation is supportable by a strict reading of subsection 33(11). Until the subsection 33(11) definition is clarified, courts, prosecutors, and accused persons will remain uncertain as to which interpretation is correct.

Even where there is a documented fish kill, proof beyond a reasonable doubt that a substance is deleterious may not be straightforward. The Crown must still establish, to the satisfaction of the court, a connection between the particular discharge in question and the fish kill.[186] The situation is even more difficult when there are no obvious fish kills. A substance can be deleterious to fish without being immediately lethal. Instead of documented fish kills, prosecutors must contend with more nebulous indicia of harm such as "reduced fertility," and "shortened lifespan."[187]

The process of proving a substance deleterious to fish can be lengthy, technical, and expensive, requiring laboratory test results, and the testimony of experts. Courts expect the same high standard of professionalism in obtaining, transferring, analyzing, storing, and producing evidence for pollution offences as they do for narcotics

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183. (1979), 2 F.P.R. 182 at 184-185 (B.C.C.A.).

184. (1978), 2 F.P.R. 155 (N.S. Mag. Ct).

185. See *supra*, note 183.

186. See, e.g., *R.* v. *Reichhold Chemicals (Canada) Ltd.* (1969), 1 F.P.R. II at 1 where, despite the evidence of a fish kill, the accused was acquitted due to technical evidentiary problems.

187. An excellent summary of some of the known sub-lethal deleterious effects to salmon is contained in an article by Dr. T. Reimchen, "Mud in Your Stream of Vision" (Spring 1980) *All Alone Stone* 7-14.

offences.[188] Because there is no scientifically accepted definition of pollution, laboratory tests and expert testimony can often be challenged.[189]

Subsection 33.2(11) of the *Fisheries Act* authorizes the minister to designate "analysts" who are to provide courts with "certificates" of substance analysis. The certificates are admissible in evidence, "in the absence of any evidence to the contrary," as proof of the statements contained therein. However, the certificate route only appears to expedite proceedings when the party against whom the evidence is produced does not wish to challenge the certificate or its contents.[190] To date, no subsection 33.2(11) certificates have been issued.

Pursuant to the *Act*,[191] substances can also be deemed deleterious and have been declared so in regulations. For example section 3 of the *Pulp and Paper Effluent Regulations*, declares "total suspended solids," "oxygen-demanding decomposible organic matter," and "toxic wastes" as deleterious substances. Similarly, arsenic, copper, lead, nickel, zinc, total suspended matter, and radium 226 have been declared deleterious pursuant to section 4 of the *Metal Mining Liquid Effluent Regulations*.[192]

Even with this "declared deleterious substance" method, the Crown is faced with difficult problems of proof. The Crown must identify to the satisfaction of the court that the substances deposited were in fact those prescribed by regulation and that deemed acceptable levels of deleterious substances were exceeded. The Crown must closely follow the prescribed testing procedures set out in the regulation. In *R.* v. *Irving Pulp and Paper (No. 1)*,[193] the New Brunswick Provincial Court dismissed a subsection 33(2) charge because the toxicity test performed by the prosecution did not precisely correspond with that described in the *Pulp and Paper Effluent Regulations*, Schedules IV and V.

As a general comment, proof beyond a reasonable doubt may be a sensible burden to be observed in typical criminal cases, but in the scientifically imprecise world of

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188. *R.* v. *Vancouver Wharves Ltd.* (27 May 1980), Decision No. 4023, (B.C. Prov. Ct) Morrison J. [unreported], as cited in Kolankiewicz, *Implementation of B.C.'s Pollution Control Act in the Lower Fraser River*. (M.Sc. Thesis, Faculty of Graduate Studies, School of Community and Regional Planning, University of British Columbia, 1983).

189. For example, in a 1969 British Columbia Provincial Court decision, Shaw J. acquitted the accused because the testing procedures were "unsatisfactory" and "inconclusive": *R.* v. *Reichhold Chemicals (Canada) Ltd.*, *supra*, note 186 at 2. See also *R.* v. *Cardinal River Coals Ltd.* (1972), 1 F.P.R. II, 13 (Alta. Prov. Ct) at 14.

190. Subsection 33.2(12) provides that the alleged violator "may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination." Subsection 33.2(13) requires that the alleged violator be given reasonable notice of the intention to introduce the certificate, together with a copy of the certificate in question.

191. Para. 33(11)(c) and (d), and subs. 33(12).

192. See *supra*, notes 31-32. Because the pulp and paper and mining regulations do not legally apply to "existing" operations, the "declared deleterious" route can only be used with "altered," "expanded," "reopened" and "new" operations. This point is elaborated on in Webb, *supra*, note 3, chap. V.

193. (1976), 2 F.P.R. 78 (N.B. Prov. Ct).

pollution, it means that a great many potentially harmful substances will elude the court's grasp. The criminal courts are accustomed to the immediate and demonstrable harm and risk associated with traditional criminal behaviour: criminal courts may not be the most appropriate forum for checking and controlling the less obvious and less tangible harm associated with many modern pollutants. All this having being said, as government officials, courts, and polluters become more familiar and experienced with pollution offences, problems in this area may subside.

(c) *Sentencing*

While the *Sault Ste Marie* case clearly established the existence of strict-liability pollution offences, distinct from the criminal category, there is evidence that in practice some courts continue to approach pollution offence adjudication from a criminal perspective.[194] In some respects, this is at least understandable. Although regulatory pollution offences are in substance "civil", they are enforced as penal laws "through the utilization of the machinery of the criminal law."[195] Because the courts responsible for adjudication of pollution offences spend most of their time dealing with charges laid under the *Criminal Code*, it is easy to see why judges in these courts might be inclined to treat pollution offences as criminal as well.

But there are definite dangers associated with having criminal and regulatory offences adjudicated by the same courts. After a day of the more traditional types of criminal cases, pollution offences might not seem so serious.[196] Most pollution incidents are not deliberate, intentional acts, there is usually no evidence of harm,[197] and the accused in pollution cases are frequently upstanding corporate citizens. Sentences imposed by courts in pollution cases often reflect these factors. Thus, for example, one judge refused to make use of ordering powers which could restrict operations because "the company in this particular instance has shown an awareness of the problem, and a most commendable willingness to keep pollution to a minimum, while at the same time maintaining its production quotas and continuing as an integral part of the province's contribution to the gross national product."[198] Another judge pointed out "if in fact there had been that proof [actual injury to the environment], I think the amount of the fine would have been substantially greater than what I'm considering now."[199] It should be reiterated that, as time goes on, courts seem to be expressing greater and greater impatience with corporate polluters (see above at 32).

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194. For example Stuart J., *R.* v. *United Keno Hills Mines Ltd.*, *supra*, note 178 at 46, unequivocally stated that "pollution is a crime." For an excellent discussion of sentencing in environmental cases, see Swaigen and Bunt, *supra*, note 75.

195. See *Sault Ste. Marie* at 1302.

196. See statement to this effect in Canada, Commission on Pacific Fisheries Policy, *Final Report: Turning the Tide: A New Policy for Canada's Pacific Fisheries* (Vancouver: Minister of Supply and Services Canada, 1982) (P.H. Pearse, Commissioner) at 213.

197. See *supra*, note 75.

198. *R.* v. *Cardinal River Coals Ltd.*, *supra*, note 189 at 18.

199. See *R.* v. *Canadian Forest Products Ltd.* (31 October 1980) (B.C. Prov. Ct) Johnson J. [unreported].

The courtroom may be a particularly inappropriate forum for addressing ongoing pollution problems. This point is well made by Justice Harrigan of the New Brunswick Provincial Court who in one case commented:

> I have evidence out of the mouth of your own witness, that indicates to me that even with every best effort put forth by the mill, this situation [ongoing pollution] can't be corrected for a year and a half. Now, that being the case then, I say to myself, can you then reasonably lay another charge within the next year and a half, and hope to get a conviction. On the one hand you are not seriously arguing that I should try to apply subsection 7 [court ordering power], and on the other hand, by what your own witness has said you have practically barred yourself from successfully prosecuting a further charge for every day that mill might be polluting the waters, because all the company has to do is get up and say we are making every honest effort to correct it, as a result of being chastised on April 15th, 1977 by some sort of a fine.[200]

When courts impose sentences in pollution control cases, they are engaging in a highly subjective process. Legislation provides no guidance as to how sentencing powers are to be used. *Dicta* from previous court decisions can be of assistance, but the range of factors considered from one case to another, and the divergent attitudes presented therein, can render them more confusing than helpful. As one frustrated judge remarked: "I think it is impossible to reach anything that is going to be what other judges would reach. I think it is, unfortunately, a matter somewhat of guesswork."[201] As time goes on this "guesswork" may be replaced by a more coherent set of sentencing criteria. It should be noted that when a guilty plea is entered, negotiation about appropriate penalties frequently takes place between the parties concerned, and courts will usually agree to the Crown's suggested sentence in such cases.[202]

The unpredictability of sentencing, coupled with the length, expense and uncertainty associated with proof, make it difficult for government officials to rely on prosecutions for day-to-day enforcement purposes to the extent associated with traditional criminal cases, except in the most clear-cut, flagrant situations.

(2) Courts and Pollution Control

In contrast to traditional police enforcement activity, where contact between police and criminals is kept to a minimum and is highly formalized (for example, police reading "rights" to arrested parties), government-industry contact in pollution control situations is frequent and ongoing, and is usually informal. With the increased government-industry interaction, the opportunity for claims of administrative unfairness to arise increases.

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200. See *supra*, note 81 at 98.

201. See *R.* v. *Whonnock Lumber Company* (1971), 1 F.P.R. III-1A at 1 (B.C. Prov. Ct), Guinet J.

202. According to J. Swaigen, Ontario Ministry of Environment prosecutor, in a private communication with the author (August 1987).

The two legal doctrines embodying notions of fairness which are most directly relevant to pollution control decision making are "procedural fairness" and "abuse of process." The doctrine of procedural fairness applies most clearly to administrative decision making (for example, negotiation and implementation of permits, licences, control orders, programme approvals, etc.), while the abuse of process doctrine is of particular relevance to prosecutorial decision making.

(a) *Procedural Fairness*

In the 1979 case, Nicholson v. *Haldimand-Norfolk Regional Board of Commissioners of Police*,[203] the Supreme Court of Canada held that, even though no statutory procedures had been established which set out the obligations owed by a municipal police board with respect to dismissed probationary police constables, such constables are entitled to know why they were dismissed and be given the opportunity to respond to those reasons. The *Nicholson* case was a landmark decision in Canadian administrative law. It sounded the death knell to the then-accepted notion that no common law obligations of procedural fairness were attached to administrative decisions where interests were affected, unless they were decisions of a judicial or "quasi-judicial" nature (that is, those decisions which resembled the classic court situation, affecting the rights of individuals).[204]

It appears that the effect of the *Nicholson* case, when read together with several others which followed it,[205] will be to force government officials previously operating outside the realm of judicial review to make many administrative decisions in a way which tends to ensure a modicum of procedural fairness to affected individuals.[206] Subsequently, the doctrine has been applied to the benefit of both regulatees and to certain concerned third parties.

The case *Re MacFarlane and Anchor Cap & Closure Corp. of Canada Ltd.*[207] offers a good illustration of the formal and informal negotiation process underlying agreements to control pollution, and court scrutiny of that process. In 1977, the Director of the Ontario Ministry of the Environment and Anchor Cap negotiated a control order pursuant to provisions set out in the *Environmental Protection Act, 1971*. The order required Anchor Cap to install certain equipment and thus control pollution resulting from its operations. Subsequently, in response to a request from Anchor Cap

203. (1978), [1979] 1 S.C.R. 311.

204. See, generally, D. Mullan, "The Developing Law of Procedural and Substantive Fairness," in E. Case, P. Finkle, A. Lucas, eds., *Fairness in Environmental and Social Impact Assessment Processes* (Calgary: Canadian Institute of Resources Law, 1983) at 15.

205. See, e.g., *M.N.R.* v. *Coopers and Lybrand* (1978), [1979] 1 S.C.R. 495; *Martineau* v. *Matsqui Disciplinary B.* (1979), [1980] 1 S.C.R. 602; *A.G. Canada* v. *Inuit Tapirisat of Canada* (1980), [1980] 2 S.C.R. 735.

206. To exactly what extent the procedural fairness doctrine will apply to administrative decision making remains to be seen. Mullan, *supra*, note 204, notes that to date the greatest affect of *Nicholson* has been on highly individualized decision making and not on more broad policy-based questions.

207. (1981), 33 O.R. (2d) 317 (Div. Ct).

for a delay in the installation of the equipment, the Director granted an amended order extending the deadline for installation.

As the extended deadline approached, Anchor Cap again requested an amendment. Acting on Ministry instructions, Anchor made a twenty-page application with an accompanying engineering report explaining the position of the company. The Director considered and rejected this application for amendment, at which point Anchor Cap purported to exercise its rights pursuant to the *Environmental Protection Act* (*EPA*) to appeal to the Environmental Appeal Board. The *EPA* did not provide any appeal procedure which expressly applied to administrative refusals to amend a control order pending a Board decision on the merits of the appeal.

On a preliminary question whether the Environmental Appeal Board had jurisdiction to hear the appeal, the Board held that the refusal to amend an order amounted to an order in itself, and thus could be appealed. The Director appealed to the Divisional Court to quash the Board's decision. The Court upheld the Board's decision, concluding that a formal and expensive procedure, such as requiring Anchor Cap to submit a twenty-page application plus an engineer's report which was then subject to careful consideration, *did* affect Anchor Cap significantly, and therefore amounted to an appealable control order.

In the *Anchor Cap* case, it is presumed that the motivations underlying the discharger's application for an amendment were completely above-board. Nevertheless, companies wishing to delay installation of abatement equipment as required pursuant to the terms of a control order could conceivably take advantage of the ruling in the *Anchor Cap* case by making unnecessary appeals, because appeals defer order enforcement pending a Board decision on the merits of the appeal.[208] The legislation has since been amended so that a decision to amend an order is not considered to be one capable of appeal.[209]

The *Anchor Cap* case and others[210] demonstrate how court scrutiny of the pollution control process may force administrators to "tighten up" their negotiations, to be very careful about the language used, the officials assigned to the task and the requirements made on polluters, to set up procedures in advance where statutes are silent, and to be aware of the fact that the consequences of their informal and formal actions can have an important bearing on their perceived fairness in handling polluters.

How has the doctrine of procedural fairness affected the position of third parties who wish to participate in compliance negotiations? At this point, the key determining factor for courts seems to be the nature of the third-party interest. Those individuals or groups who would be especially affected by a negotiation decision (for example, the granting of a licence or control order) are more likely to receive such procedural fairness safeguards as notices, opportunities to be heard and respond, and justifications

208. This abuse was suggested by Swaigen in "Procedure in Environmental Regulation" in Finkle and Lucas, eds., *supra*, note 12 at 88.

209. See the Ontario *Environmental Protection Act*, subs. 122(3), enacted by S.O. 1983, c. 52, s. 17.

210. See, e.g., *Monsanto Canada Inc.* v. *Canada* (1986), 1 F.T.R. 63.

for any decision made. Thus, for example, competitors, landowners or landusers, who would be particularly affected by a decision, have an advantage over the "public-interest" environmental groups, who in turn have a more general interest.[211]

A good example of this situation is the *Re Islands Protection Society* v. *The Queen* case.[212] By reason of their long use and occupation of the land for fishing purposes, registered Indian trappers were granted standing to seek relief concerning a licence renewal application for cutting trees on a tree farm. In the same case, however, the court held that a group of local residents dedicated to the protection of the natural environment in the area did not have sufficient status. Fairly consistently since the *Islands* case, third-party public interest groups who do not establish a particularly affected interest to the satisfaction of the court have been prevented from gaining participation in the administrative process *via* the procedural fairness doctrine.

The package of procedural protections associated with fairness — safeguards such as an opportunity to receive notice of a pending decision which might affect interests, and an opportunity to make representations to the government decision makers and to receive reasons for those decisions — may, in the short term, seem destined to slow down negotiations, thereby rendering them less efficient. However, in the long term, a more open and complete negotiation process allows for a more comprehensive decision, and one which has greater legitimacy in the eyes of affected interests and the general public.

While the courts have not as yet seen fit to fully extend third-party participation in the negotiation process using the procedural fairness doctrine, there are some indications that government departments will introduce procedures on their own initiative which open up administrative decision making.[213]

(b) *Abuse of Process*

In at least three pollution prosecutions,[214] the decision by government officials to abandon the negotiating process in favour of enforcement actions has been the subject of abuse of process allegations. At issue in these cases was the existence or non-existence of immunity from prosecution given apparent compliance by dischargers with

211. See Mullan, *supra*, note 204 at 25. Other third-party cases include: *Re Greenpeace Foundation of British Columbia and Minister of the Environment* (1981), 122 D.L.R. (3d) 179 (B.C.S.C.) and *Re Village Bay Preservation Society and Mayne Airfield Inc.* (1982), 136 D.L.R. (3d) 729 (B.C.S.C.); *Sierra Club of Western Canada* v. *R. in Right of B.C.* (1984), 54 B.C.L.R. 82 (S.C.); *Sea Shepherd Conservation Society* v. *R. in Right of British Columbia and Minister of Environment* (1984), 55 B.C.L.R. 260 (S.C.); *Re Narain* (1983), 45 B.C.L.R. 191 (S.C.).

212. (1979), 98 D.L.R. (3d) 504 (B.C.S.C.).

213. The best example of this is the Ontario Ministry of Environment, which has introduced a new policy requiring arrangements for public discussion of most amended or new control orders. The problem with this policy is that public access is gained only after negotiations have finished. Ontario, Ministry of Environment, *Policy Manual: Pollution Abatement Program*, s. 1.9 at 05-02-07.

214. See *R.* v. *Rayonier Canada Ltd.* (1974), 1 F.P.R. II, 25 (B.C. Prov. Ct); *Re Abitibi Paper Company and the Queen* (1979), 24 O.R. (2d) 742 (C.A.); *R.* v. *Johns-Manville Canada Inc.* (1980), 9 C.E.L.R. 137 (Ont. Prov. Ct).

negotiated agreements. Two of these cases are described below because they highlight some of the procedural pitfalls inherent in a combined negotiation/enforcement model.

In *Rayonier*, federal officials participated in the formulation of a provincially negotiated compliance schedule with a Rayonier pulp mill located in British Columbia. It was alleged that the federal Minister responsible had assured his provincial counterpart that federal *Fisheries Act* proceedings against the accused would not be instituted if the provincial requirements reflected federal concerns. Federal toxicity requirements were not set out in the provincial permit. The EPS prosecuted in spite of the fact that the terms of the provincial schedule were apparently being adhered to. The court held that the federal prosecution did not constitute abuse of process, that the terms of the *Fisheries Act* subsection 33(2) were breached, and that therefore the accused Rayonier pulp mill was guilty as charged. There is no provision in place under the *Fisheries Act* and *Pulp and Paper Effluent Regulations* which provides immunity from prosecution when informal compliance schedules are being followed.[215]

Two unusual characteristics of the *Rayonier* case could help explain the judge's decision. First, there was no evidence that federal officials gave a guarantee of immunity from *Fisheries Act* prosecution *directly to the accused.* It appears the one assurance given that there would be no prosecutions occurred between the federal and provincial ministers concerned. Rayonier was not a party to this assurance, and therefore it could be argued that Rayonier could not rely on it against an EPS action. Second, the compliance schedule in question legally involved only provincial and Rayonier representatives. Apparently, separate *federal*-Rayonier standards were contemplated for a later date; in particular, EPS felt that toxic pollutants were not adequately controlled by the terms of the provincial permit.[216] Judge Bowen-Colthurst of the British Columbia Provincial Court concluded as follows:

> The defence says that the Federal authorities had in effect agreed to these standards [provincial] which even if complied with would still result in infractions of subsection 2 of section 33 of the *Fisheries Act* and that under these circumstances this prosecution constitutes an abuse of process. I do not agree with this submission. In my view the participation of the Federal authorities which I find as a fact occurred in the setting up of provincial standards does not constitute consent to infractions of the *Fisheries Act* nor does the decision to formulate by the Federal authorities similar regulations.[217]

The judge did not elaborate on what circumstances might constitute abuse of process.

A second case which considers the abuse of process defence in a pollution control context is *Re Abitibi Paper Company and the Queen.*[218] This case involved Ontario legislation which specifically provided for immunity from prosecutions in certain

215. In Ontario, if one is fully complying with the terms of an order or programme approval issued pursuant to the *Environmental Protection Act* (ss. 6, 9 and 10), one is immune from prosecution (subs. 146(2)). See also the Québec *Environmental Protection Act*, s. 116.2, concerning the "approved depollution programs."

216. See unreported transcript (6 March 1974) at 22 and 29, per Crown counsel Digby Kier. See Webb, *supra*, note 3 at 437.

217. See *Rayonier*, *supra*, note 214.

218. See *supra*, note 214.

circumstances. In this case, the accused operated a paper mill and began discussions with a senior official of the Ontario Ministry of the Environment respecting a programme for improvement of the accused's secondary effluent system with a view to eliminating pollution of a river. Following a series of meetings the accused volunteered to begin a programme which was approved by the official. To avoid delay, work was begun although official approval of the Director had not been obtained.

Where a programme is approved by the Director under certain provisions of the *Ontario Environmental Protection Act*, the accused is given immunity from prosecution while the work proceeds. In one letter the senior Ministry official wrote the accused that should the programme not be completed by 31 December 1976, as agreed, the Ministry would establish a control order to ensure completion and that failure to meet such a control order would subject the accused to the probability of prosecution. In November of 1976, the official met with the accused's engineer and expressed satisfaction with the progress of the programme. However, later that month the accused was charged with violation of the *Environmental Protection Act, 1971*.

In effect, an *informal* compliance schedule was reached between Abitibi and a provincial environmental official. The terms of this agreement were being adhered to, and then a prosecution was instigated. The Ontario Court of Appeal held that, in spite of the fact that the negotiated agreement did not fall within the terms of the immunity from prosecution provided by the *Environmental Protection Act, 1971*, a prosecution in these circumstances nevertheless constituted an abuse of process, and should accordingly be stayed.

The judgment of the court turns on a distinction between *criminal* and *civil* proceedings. Following the 1977 Supreme Court of Canada decision in *R.* v. *Rourke*,[219] the Court held that the jurisdiction of courts to stay *criminal* proceedings for abuse of process had been found to be very limited. In the *Abitibi* case, all three judges were careful to characterize proceedings with respect to the *Environmental Protection Act, 1971* as *civil*[220] in nature. According to the court, if a proceeding is with respect to a provincial statute, then it must be civil. Having made this characterization, the court then held that the fact-situation described in the *Abitibi* case amounted to an abuse of process. In *obiter dicta*, one of the three judges (Jessup J.A.) also considered whether the Abitibi-type circumstances would amount to abuse of process in *criminal* proceedings. Jessup J.A. concluded in the affirmative.

The *Rayonier* and *Abitibi* cases provide some clues but few conclusive answers concerning the application of the abuse of process doctrine to pollution prosecutions. Synthesizing the judgments in the two cases, it appears courts will consider the following types of questions in the course of determining the merit of an abuse of process claim: Who made the assurance of immunity from prosecution (namely, what level of official and from what level of government)? To whom was the assurance

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219. (1977), [1978] 1 S.C.R. 1021. The *Rourke* case was a landmark Supreme Court of Canada decision in which it was held that courts have an extremely limited authority, if any at all, to stay a criminal proceeding for abuse of process.

220. Dickson J. in *Sault Ste. Marie, supra*, note 153, characterized strict liability offences as civil in nature.

made (was it made directly to the discharger, or was it made to an official of another level of government)? What authority did the official have to make the assurance (for example, did legislation provide for immunity from prosecution in certain circumstances)? What was the nature of the assurance made (was it an assurance of immunity from both federal *and* provincial prosecutions, or only immunity from prosecution pursuant to specific legislation under certain agreed upon circumstances)? Who launched the prosecution (were they federal officials, provincial officials, from the same or different departments)? And finally, pursuant to what legislation was the prosecution launched?

In conclusion, to the government official attempting to reach an agreement with a polluter to correct a pollution problem, "judicialization" of the control process formalizes negotiations. This slows down administration and stultifies give-and-take bargaining. While there is obviously an element of self-protection underlying the government official's ambivalence towards the court's role as a check against arbitrary and unfair government action, the official's position should not be dismissed too lightly. The court's conception of justice is based on the judicial model, with all its formal and adversarial trappings. The informal arrangements and compromises which officials sometimes enter into may not meet the court's expectations of a fair process, but in a world where fast and expert decisions are increasingly necessary, they usually "get the job done." However, it is important that government action be carried out in an open and accountable, as well as an efficient manner. A balance between flexibility and fair, open action must be struck.

The long-term effect of court challenges to governmental action in the pollution control process would appear to be a "tightening up" of administrative practice, including greater care in who negotiates with polluters, in what is said (e.g., assurances) and how it is said (e.g., as terms in control orders and not casual, over-the-phone remarks).

D. Extra-legal factors

The implementation gap can only partly be understood by looking at the legal and judicial problems. In the final analysis, extra-legal factors such as political will, pro-development biases of government, and bureaucratic discomfort with legal processes may explain how implementation actually takes place more accurately than any legislative deficiencies. Because these extra-legal factors extend beyond the scope of this paper, they are only briefly alluded to here.

(1) Political Factors

A number of commentators have pointed out that the legislation-making process is itself a product of political compromise, with the result that pollution control legislation contains sweeping, politically attractive but administratively impractical statements about environmental protection, and then leaves the tough decisions to the bureaucrats

and courts.[221] Paul Pross, professor of Public Administration at Dalhousie University, notes as follows:

> Pressured by significant publics to address themselves to important but divisive issues, governments have found it necessary to draft minimal legislation which leaves out the regulatory provisions whose precision would arouse opposition. Such legislation appeases all and satisfies none, least of all the officials who must develop regulations and negotiate their application. Frustrated at the mixed results of their efforts, we attribute their failure to bureaucratic bungling. In reality, however, the constraints they are working under are political rather than bureaucratic.[222]

Another political factor which tends to prevent effective implementation of pollution control legislation is the "revolving door" syndrome,[223] which often sees the Minister responsible for the Environment move to another portfolio just about the time he or she develops the experience to capably carry out the function.[224] It is a fact of political life that elections are held about once every four years: unfortunately, ministerial experience in environmental matters frequently cannot be gained in such a short period of time.

Federal-provincial politics can also have an important bearing on how legislation is implemented. Behind closed doors, many federal and provincial bureaucrats admit that a particular course of action or inaction was adopted in order to respect another level of governmental jurisdiction in that area, or "to demonstrate our jurisdiction over those matters."[225]

Public opinion and economic prosperity are other factors which can affect implementation.[226] If the party in power perceives strong public support for environmental action, this can enhance the likelihood of strong enforcement. If, however, there is a downswing in the economy, environmental protection may be put on the back burner, while more economically attractive policies bathe in the public spotlight.

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221. J.F. Garner and A.R. Galbraith, in *Judicial Control of the Administrative Process: Report of a Conference at Ditchley Park* (Oxfordshire: The Ditchley Foundation, 1969) at 18, state:
> It seemed to be accepted in discussion that Congress often did not intend the agency or department to carry out the terms of the enabling statute in the broad way that would most obviously appear to follow from the words of the statute, but instead expected a balance to be struck at a somewhat lower level; this for political reasons.

While the authors here are commenting on the American legislative process, the statement would appear to apply with equal force to Canadian situations.

222. P. Pross, "Water and Environmental Law: Bureaucratic Constraints," in *Water and Environmental Law*, S. Guppy, Y. Fern and B. Wildsmith, eds. (Dalhousie: University Institute for Resource and Environmental Studies, 1979) 139 at 167.

223. See, e.g., criticism to this effect directed at the federal Environment ministers by T. Davey, in "Environmental Harmony Requires Transdisciplinary Conductors" *Water and Pollution Control*, 1977/1978 Directory at 35-43, esp. at 38.

224. To illustrate this point, in the sixteen-year existence of Environment Canada, there have been eleven ministers assigned the responsibility for its operation.

225. Based on confidential discussions with federal and provincial officials.

226. See comment to this effect by Schnaiberg, *supra*, note 11 at 25.

No matter how impressive legislation might sound, it takes the political willpower of Cabinet and the Environment Minister and the concomitant resource allocations to the Department of Environment to make pollution control work.[227] There have been numerous indications of this lack of willpower at the federal level. Some frustrated bureaucrats have "set up" private prosecutions because political and departmental obstacles have prevented "in-house" enforcement.[228] Regulations, promulgated fifteen years ago, still lack a date of application,[229] and there have been cutbacks to environment programmes while initiatives of many other departments have remained untouched.[230] Pross comments:

> An official who believes that the government is not firmly committed to the policy he is mandated to implement will be all too aware of the sanctions that may be imposed on him [e.g. personal, budgetary and even unit emasculation] if he interprets his orders too literally.[231]

(2) Pro-development Tendencies of Government

For all the media attention it receives, environmental protection often has a relatively low priority in government. This can partly be explained by the fact that, unlike other regulated activities, pollution is usually the by-product of an activity otherwise encouraged by government and society. The extraction and refining of raw materials, the manufacturing of new chemicals and commercial products are activities which are intended to improve our quality of life, and are generally welcomed as such. In addition to the benefits to society, such activities bring many rewards to government by way of personal and corporate tax revenues and the political benefits which flow to governments taking credit for economic prosperity and full employment.

In Canada, government and industry often have an extremely close relationship, wedded by common objectives,[232] common attitudes[233] and more concrete ties such as

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227. Pross, *supra*, note 222 at 140, esp. at 144.

228. Information disclosed confidentially by a federal official.

229. See, e.g., the *Pulp and Paper Effluent Regulations* with respect to standards for existing mills as discussed before at 26.

230. See, e.g., the cutbacks in recent years to the Canadian Wildlife Service and to research and development staff of Environment Canada.

231. Pross, *supra*, note 222 at 144. Pross goes on to note that officials are often too sensitive to the climate of public and governmental opinion, often giving up far more than is necessary, in anticipation of politically inspired criticism.

232. E.g., the Nielsen Task Force's concern with efficiency for the federal government strongly resembles private industry concerns in this regard. In fact, the Nielsen Task Force drew heavily on private sector "expertise" in the making of its reports.

233. To reduce this to its simplest dimensions, for Canadian governments, full employment is a major preoccupation. For industry, full employment means a more buoyant economy, with more money and consumers more apt to buy industry products.

government loans, grants and subsidies.[234] Governments are hungry for revenue and employment-generating projects. In this broader context of government-industry partnerships, environmental protection may not receive the priority it should. Departments of environment are usually considered a junior portfolio within Cabinet, in terms of prestige and power.[235]

The fact that environmental protection is just one of many policies pursued by government, and that it is a policy which may receive quite a low priority can be reflected in government organization. At the federal level, for example, Environment Canada is the lead federal actor involved in pollution control, but in law many of the programmes it administers are the responsibilities of other departments.[236] Thus, Environment Canada administers the pollution control provisions of the *Fisheries Act*, but the *Fisheries Act* is nominally the responsibility of the Department of Fisheries and Oceans. Environment Canada also administers the environmental component of the Pulp and Paper Modernization Grant Programme through its membership on inter-departmental "Management-Committees," even though nominally the programme is an initiative of the Department of Regional Industrial Expansion. Environment Canada certifies the equipment which qualifies for an accelerated capital-cost allowance (tax deduction) although Revenue Canada has responsibility for administering the federal income tax legislation. As a result, environmental interests are in many cases "under the wing" of another department.

(3) Bureaucratic Factors

Given the legal and judicial deficiencies and the lack of political willpower and pro-development tendencies of Government, it is apparent that the government official responsible for administering pollution control legislation performs an extremely difficult task. That being said, there are also characteristics of bureaucrats which can impede full and effective implementation. While recognizing that they are not a homogeneous group, the author has found the following observations reflect traits of many bureaucrats.[237]

Because of the technical nature of much pollution control, bureaucrats are often recruited from the private sector so that they have the expertise to carry out their functions. While industry experience may result in more informed discussions between government officials and the private sector, it may also affect the neutrality of even the most well-intentioned public servant.

Bureaucrats may choose to invoke or not invoke a legal instrument provided him or her for reasons which do not reflect problems with legislation, courts, or his or her

234. See, e.g., P. Johnson, *Canadian Industrial Incentive Legislation: Government Financial Assistance Programs in Canada* (Toronto: Butterworths, 2 vols., revised continuously).

235. See, e.g., comment to this effect in Lax, *supra*, note 109 at 66.

236. Discussed in greater detail in Webb, *supra*, note 3.

237. See *ibid.*, chap. V.

political masters. Bureaucrats may resist initiating formal sanctions because this may mean relinquishing control over a polluter to "the lawyers", an admission of failure of bureaucratic negotiatory techniques. Bureaucrats, many of whom are engineers or scientists, may feel uncomfortable and unfamiliar when dealing with legal jargon, and may prefer to keep communications at a technical level. Some may fear that formal legal sanctions will put bureaucratic practices as much on trial as those of the polluter, and may attract unwanted media attention (others however may thrive on media attention). Some bureaucrats may be reluctant to adopt an adversarial role with regulatees they have been dealing with on a non-confrontational basis for an extended period.

CHAPTER THREE

Trends in Pollution Control

Pollution control is constantly evolving as understanding of and experience with the concepts and legal instruments grow. In recognition of this evolution, a number of important trends in the use of pollution control legislation are herein identified and analyzed. Members of the public are becoming more directly involved in pollution control decision making. The number of prosecutions is increasing in some jurisdictions (particularly in Ontario), indicating a more balanced persuasive *and* enforcement emphasis. The roles and responsibilities of federal, provincial and local governments appear to be changing. There is growing recognition that incentives may be useful for some classes of polluters who are not responsive to command-penalty measures. There is also some indication of an increasingly responsible attitude by industry towards the handling of pollution problems. Taken together, these trends are indications of a coming to grips with pollution control. The trends, their likely causes and effects are explored below.

I. Increased Public Participation

As time goes on, the role of the citizen in the pollution control process is increasing, and becoming more important.[238] Environmental groups have developed considerable expertise in pollution control matters, and have expert spokespersons who articulate their concerns directly to government and the media. At the legislative level, citizen participation has undergone a remarkable transition over the past thirty years, from virtually no statutory recognition of a role for the public in 1960's legislation, to express commitments to citizen involvement in virtually all stages of the process provided in legislation introduced in 1987.[239] There has been a significant increase in

238. See J. Swaigen, "The Emergence of the Public in Environmental Decision-making" in J. Swaigen, ed., (1981) *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 1. See also K. Webb, "Taking Matters Into Their Own Hands: The Increasing Role of the Public in Canadian Pollution Control" (Paper prepared for presentation to a meeting of the Law and Society Association at the Learned Societies Conference, Windsor, 7 June 1988) [publication forthcoming].

239. See, e.g., discussion of the 1987 Manitoba *Environment Act*, below. See also more detailed discussion in Webb, *ibid.*

citizen-launched court procedures in order to assure the citizen's participation in government decision making concerning environmental issues and,[240] furthermore, an associated increase in private prosecutions has been noted.[241]

This rise in citizen participation can be attributed to a number of factors. First, at a very general level, citizens are less trusting of government than they once were.[242] The traditional "manager-client" relationships between government departments and resource users is less tenable in an age where "the public good" is no longer easily equatable with the unchecked growth and expansion of the private sector.[243]

Second, citizens have seized the legal tools available to them and are beginning to take their concerns to the courts. To a citizen excluded from the pollution control process, courts may appear to offer the possibility of a public, high-profile, judicial hearing before a legally impartial arbiter, and potentially a way to circumvent bureaucratic quagmires. With the introduction of the *Charter* and the development of the procedural fairness doctrine, courts have assumed a more direct and powerful role over legislation and administration than was once possible.[244] In 1985, the Canadian Environmental Defense Fund was privately established to help citizens raise the money needed to launch precedent-setting environmental court cases and to participate in hearings before environmental tribunals.[245] A good example of a legal tool which has been championed by public interest groups is the *Penalties and Forfeitures Proceeds Regulations* promulgated pursuant to the federal *Fisheries Act*. The regulations provide that a private citizen who initiates an action under the *Fisheries Act* which results in a

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240. For example, *Re Pim and Minister of the Environment* (1978), 23 O.R. (2d) 45 (Div. Ct); *Canadians for the Abolition of the Seal Hunt & Harrison* v. *The Minister of Fisheries and the Environment* (1980), 10 C.E.L.R. 1 (F.C.T.D.); *S.E.A.P.* v. *Atomic Energy Control Board* (1977), [1977] 2 F.C. 473 (A.D.); *Croy* v. *Atomic Energy Control Board* (1979), [1981] 1 F.C. 515 (A. D.); *Binbrook Anti-Dump Committee* v. *Regional Municipality of Hamilton-Wentworth* (1980), 10 C.E.L.R. 65 (Ont. Div. Ct); see also *1981 Annual Report of the Ombudsman to the Legislative Assembly of British Columbia*, C.S. 81-063 at 53; *Energy Probe* v. *Atomic Energy Control Board* (1984), [1984] 2 F.C. 138 (T.D.); *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee* (1985), 19 D.L.R. (4th) 356 (Ont. Div. Ct); *Re Ontario Energy Board* (1985), 19 D.L.R. (4th) 753 (Ont. Div. Ct).

241. For example, there have been five private prosecutions pursuant to subs. 33(2) of the federal *Fisheries Act* since 1981, while none had been reported previously.

242. For example, Michael Adams, President of Environics Research Ltd. (a polling company) is reported as saying that "Canadian voters have become considerably more well informed and critical, more cynical generally toward institutions and more self-reliant, and more pragmatic in their responses to political appeals and politicians" in R. Howard, "Make Public Poll Results, Ottawa Told" *The [Toronto] Globe & Mail* (29 May 1986).

243. This is paraphrased from Finkle, "New Approaches to Fairness: The Bureaucracy Responds," in Case, Finkle, Lucas, eds., *supra*, note 204 at 31-34.

244. Discussed in greater detail in Webb, *supra*, note 238.

245. *Ibid.*

fine will receive half of any penalty imposed.[246] Penalty-sharing arrangements have existed under the *Act* since 1868,[247] but had essentially been unused until the 1970s. The fact that private citizen initiated prosecutions pursuant to the *Fisheries Act* have resulted in convictions[248] has increased the attractiveness of such actions to environmentalists. On the other hand, the expense, the difficulties associated with mounting a successful case and the time-consuming nature of such actions detract from use of this route except as a last resort.

The private prosecution mechanism, while capable of acting as a check on government prosecutorial discretion, can also interfere with the proper exercise of that discretion.[249] A private prosecution can, for example, deprive government officials of control over the *timing* of prosecutions, forcing government to abandon negotiations prematurely, when less drastic enforcement action might have been sufficient to induce compliance. It is true that provincial Attorneys-General have the power to stay private prosecutions launched pursuant to federal or provincial legislation and have in fact done so on some occasions.[250] However, the unfavourable impression created by government stopping citizen actions tends to ensure that the stay power is only invoked in extreme circumstances.[251]

One commentator has suggested that the problem of citizen interference with proper prosecutorial discretion is particularly acute with respect to blanket prohibition types of offences, such as subsection 33(2) of the *Fisheries Act*, and sections 5 and 14 of the Ontario *Environmental Protection Act*:

> It makes it an offence to put anything into the environment and leaves it to government discretion that that offence won't be prosecuted unless it's in the public interest to do so; unless there's some compelling reason. When we introduce into that system the ability of a private citizen to prosecute, I think we have thrown a monkey-wrench into it, because he is

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246. Note that, by the terms of the *Penalties and Forfeitures Proceeds Regulations*, it is possible for a private citizen to *initiate* a prosecution (e.g. lay an information) without actually conducting the legal proceedings before the court, and yet still receive half of any fine imposed. Thus, e.g., in *R.* v. *Crown Zellerbach Properties Ltd.* (1981), 3 F.P.R. 84, a private citizen (a member of the environmental group "the Fraser River Coalition") laid an information against a polluter, under subs. 33(2) of the *Fisheries Act*, but agents of the federal Department of Justice carried out the prosecution. The prosecution resulted in a conviction and a $28,000 fine was levied. Pursuant to the terms of the *Penalties and Forfeitures Regulations*, the private citizen who initiated the prosecution received $14,000. The case is described in greater detail under the name *R.* v. *Crown Zellerbach* in Webb *supra*, note 3 at 188-191 and 292-294.

247. In the *Fisheries Act* of 1868, the provision was contained in the statute itself (subs. 17(4)).

248. In addition to *Crown Zellerbach*, *supra*, note 244, other private citizen-initiated prosecutions which have resulted in convictions include *R.* v. *Panarctic Oils Ltd.*, *supra*, note 147 and *R. ex rel. Home* v. *Cyanamid Canada Inc.*, *supra*, note 106.

249. For more detailed discussion of private prosecutions, see, generally, Webb, *supra*, note 3 at 284-322.

250. Discussed in greater detail in Webb, *supra*, note 3 at 306-310. In 1986, a private prosecution with respect to Eldorado Mining Ltd. at Baker Lake Saskatchewan was stayed. Some provincial pollution legislation prohibits prosecutions unless there is consent of the Environment Minister. See, e.g., the Newfoundland *Department of Environment Act*, s. 49, and the New Brunswick *Clean Environment Act*, s. 33.2.

251. See, e.g., description of Riley Creek incident in Webb, *supra*, note 3 at 294-300.

not going to be balancing the same public interest questions as the Government is when it makes a decision. The section that he's going to launch his prosecution under was really set up to make government discretion work. If the private citizen can prosecute only when there has been a violation of a specific quantity or a specific regulation that would be one matter. But, when the private citizen can prosecute under the broadranging Section 14 of the Environmental Protection Act in Ontario, or Section 33 of the Fisheries Act, I think we have a real problem.[252]

Two issues raised by this comment and to which no response will be made here (since they are each deserving of separate studies in themselves) are: (1) whether a government enforcement agency or a private citizen can be said to represent the "public interest" and (2) whether it is possible to have conflicting sets of "public interests."

One important conclusion which can be drawn from the above-quoted comment is that the interference with discretion problems might not be attributable so much to the existence of private prosecutions *per se*, but rather to the existence of broadly written offences such as subsection 33(2) of the *Fisheries Act*, which leave a great deal of discretion in the hands of government officials. The all-purpose subsection 33(2) is used to control sources of water pollution ranging all the way from chicken farming to massive industrial operations. To make such an offence workable, EPS has entered into informal arrangements with polluters, and with provincial authorities, as outlined earlier in the paper. The *Cyanamid* case is a good illustration of how informal exercises of discretion by government can be circumvented by private prosecutions. In that case, a private prosecution was launched after both provincial and federal officials declined to bring enforcement action. Cyanamid was found guilty and a fine of one dollar was imposed.

Those industrial operations which are technically in continuous violation of subsection 33(2), such as the "existing" pulp and paper operations, appear to be particularly vulnerable to private prosecutions. The "monkey-wrench" capabilities of private prosecutions could be significantly reduced if the subsection 33(2) offence was replaced, or supplemented, by other statutory or regulatory provisions which "legalized" the informal compliance agreements and federal-provincial administrative arrangements currently in use.[253] With "existing" pulp and paper operations, a private prosecution to enforce the terms of a compliance schedule would appear to be preferable to a private prosecution enforcing an absolute prohibition of pollution. Again, this points to the inadequacies of the current legislation which does not accurately reflect the realities of pollution control.

252. G. Lloyd, as quoted at 117-118 in "When the Administrative and Enforcement Process goes Wrong: What Role for Parliament, the Legislature, the Public and the Courts?" in *Roundtable Discussion on Toxic Chemicals Law and Policy in Canada*, Proceedings of a Seminar held on 15-16 June 1981, organized by the Canadian Environmental Law Association and the Canadian Environmental Law Research Foundation, 1981, Toronto, Ontario.

253. See, e.g., the *Fisheries Act*, para. 33(13)(*f*). Moreover, if effluent regulations were promulgated for other than the six industrial sectors already covered, private prosecutions would enforce the terms of these regulations rather than the blanket prohibition contained in subs. 33(2).

Meaningful public participation depends above all on the free flow of information between government and interested parties.[254] If the public is not consulted at the regulation formulation stages, subsequent regulations may be criticized as government-industry "pacts," negotiated "behind closed doors."[255]

Freedom of information legislation represents a last-ditch method for citizens to obtain disclosure of government data. A much more fruitful approach is for government to involve citizens at every reasonable opportunity in the pollution control process. Open government is accountable, trusted government. In this regard, the 1987 Manitoba *Environment Act* is a step in the right direction: the *Act* expressly commits the government to inform and involve the citizen in virtually every aspect of the pollution control process, from the drafting of regulations to the formulation of individual licenses and the taking of enforcement actions.[256]

Citizen groups have had considerable success at making their opinions known[257] through their studies, press conferences, court challenges or private prosecutions. This success encourages more action. Everyone benefits from open, meaningful public participation:[258] decisions become more comprehensive, their legitimacy is enhanced, and the likelihood of problems arising later is decreased. The recent developments towards an enhanced public participation role in pollution control bode well for the future.

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254. For a comprehensive discussion of information availability in the environmental context see M. Rankin, "Information and the Environment: the Struggle for Access" in Swaigen, ed., *supra*, note 238 at 285-333.

255. See, e.g., comment to this effect in Estrin and Swaigen, *supra*, note 1 at 471. Subsequently, the federal government announced a more open policy on public consultation during the regulation formulation stages.

256. See, e.g., Manitoba *Environment Act*, subs. 2(1) (objectives); subs. 6(1) (state of the Environment report); subs. 10 (licensing requirements); s. 27 (appeals); and s. 41 (draft regulations). See also innovative public participation provisions in the *Canadian Environmental Protection Act*. Discussed in more detail in Webb, *supra*, note 238.

257. See comments to this effect by the Technical Director of the Canadian Petroleum Association, as reported in "Conservationists gaining respect, oil industry says," *supra*, note 6.

258. Even industry officials have admitted the importance of public involvement: Inco officials reported to an Ontario Standing Committee that "after the announcement of the new control order in July 1978, they had felt the negative effects of what they perceived to be public misunderstanding and mistrust resulting from inadequate public information about the control order process, rationale and contents." As related in Ontario Standing Committee on Resources Development, *supra*, note 180 at 48.

II. Increasing Use of Prosecutions

In some Canadian jurisdictions, there has been evidence in recent years of a trend toward greater use of the prosecution mechanism to enforce environmental protection legislation.[259] There are any number of possible explanations for this increase. First, attitudes have changed. Now that the dust of experimentation in the seventies is beginning to settle, there is recognition that prosecutions can play an important role in environmental protection, especially with regard to simple negligent or intentional misbehaviour. When environmental protection legislation was first introduced, administrators may have tacitly or subconsciously adopted a "kid-glove" approach to enforcement, in order to give the private sector time to adjust to the "new rules of the game." It appears that some governments are now starting to take the kid gloves off.[260] As well, citizen groups are making it known that if government does not prosecute, they will. This strategy of embarassing the government into prosecuting is sometimes expressly admitted, such as in the *Crown Zellerbach* case.

As well, government is becoming more expert at the environmental protection game: vague, unenforceable permit terms and conditions have been identified as a stumbling block to successful prosecutions.[261] Administrators are "tightening-up" their investigatory and negotiatory practices.[262] In Ontario, Québec and British Columbia, for example, special enforcement squads have been set up, independent from the officials in day-to-day contact with industry. There are now a growing number of experienced government prosecutors who know their way around evidential and due diligence stumbling blocks. Available information suggests the success rate with prosecutions has been high.[263] As this success is publicized, more prosecutions are likely to follow.

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259. In Ontario, for example, the number of prosecutions carried out by Ministry of Environment which reached the courts pursuant to the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Pesticides Act* rose from 69 in 1977-78 to 105 in 1981-82 according to *Ontario Statistics 1982* (Toronto: Government of Ontario) at 33. Curiously, later editions of *Ontario Statistics* do not permit cross-annual comparisons of this nature. Also according to Ackerman and Clapp, *supra*, note 108, prosecutions in British Columbia increased between 1976 and 1980.

260. For example, both the Ontario and Quebec governments are taking more active prosecuting stances toward polluters. See Ontario Standing Committee on Resource Development, *supra*, note 180 at 67. In reference to Quebec see F. Shalom, "Quebec will bill polluters for cost of 10-year toxic-waste cleanup" *The [Toronto] Globe and Mail* (10 June 1986): "Quebec Environment Minister Clifford Lincoln told a news conference that a team of specially trained investigators will be set up to enforce regulations and collect proof of excessive polluting by industries."

261. See *Gibson*, *supra*, note 12 at 50, concerning the Ontario situation, and concerning the British Columbia situation, Ackerman and Clapp, *supra*, note 108.

262. See also the effect of the *Sault Ste. Marie* case on enforcement activities, above at 26-32. Documenting the "tightening up" effect: M. Jeffery, *supra*, note 172; and see J. Swaigen, "Prosecution Can be Effective Method to Control Polluters" (1984) 3:10 *Ont. Lawyers Weekly* (6 July).

263. Swaigen, *ibid.*, states that, in Ontario between 1981 and 1984, approximately two thirds of those charged pleaded guilty under the Ontario *Environmental Protection Act* and *Ontario Water Resources Act*. Between 1975 and 1981, the conviction rate was 79%, between 1982 and 1983 — 90%, and between 1983 and 1984 — 95%.

Used in excess, prosecutions can instill a legalistic, confrontational atmosphere between government and industry which, in the long term, may not be conducive to effective pollution control.[264] However, a balanced enforcement and negotiation approach, in which prosecutions complement and reinforce the co-operative techniques, may offer the greatest likelihood of success.[265]

III. Changing Roles and Responsibilities of Government

By the mid-seventies, all three levels of government — federal, provincial and municipal — were administering extensive pollution control legislation. On the basis of more than ten years experience, it is becoming evident that certain levels of government are better suited to handle certain types of pollution control activites. This has been reflected to some extent in a visible evolution of roles and responsibilities.

The federal government has to a certain extent provided a national presence for pollution concerns, acting both as a spokesperson and advocate for Canada on the international scene. Domestically, it has established nation-wide standards and strengthened provincial enforcement to ensure that "pollution havens" do not develop. The provinces, on the other hand, have offered more of a "front-line" administration and enforcement presence, since they have a particular interest in and greater contact with industries located within their jurisdiction. The municipalities are logical caretakers for sanitation in local regions, and can maintain local sewage treatment facilities and waste disposal sites, as well as enforce by-laws regarding discharges within their boundaries.[266]

There are indications, however, that the enforcement role is gradually consolidating at the provincial level. Even in the early seventies, federal officials generally conceded primary enforcement responsibility to the provinces.[267] Nevertheless, this did not prevent occasional federal enforcement "incursions" at odds with provincial activity.[268] Then, in the mid-seventies, the federal Department of Environment negotiated informal

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264. In this respect, Canadians may be able to learn from the somewhat less than successful prosecution-oriented American experience as described by E. Bardach and R. Kagan in *Going By the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982) at 104-116; see also L.H. Edelman and R.E. Walline, "Developing a Cooperative Approach to Environmental Regulation" (1983) 16 Nat. Res. Lawyer 489.

265. Swaigen, in Duncan, ed., *supra*, note 114 at 6, contends that the more active prosecution approach in Ontario has enhanced the position of MOE negotiators.

266. See, e.g., Estrin and Swaigen, *supra*, note 1 at 20-22, re: Ontario.

267. See comments to this effect in footnotes 23-25 at 427 and 152-155 at 478 of Woodrow, "The Development and Implementation of Federal Pollution Control Policy Program in Canada, 1966-1974" (Ph.D. Thesis, University of Toronto, 1977).

268. See, e.g., description of federal-provincial enforcement actions with respect to the Irving Paper Mill of St. John, New Brunswick in Webb, *supra*, note 3 at 377-393.

arrangements with the provinces which established the provinces as lead enforcers.[269] By the early eighties, federal prosecutions in many regions had tapered off to virtual insignificance while provincial enforcement was on the increase in some regions.[270] At the same time, the federal Department of Environment began to emphasize its advocacy role.[271]

At the municipal level, a recent study suggests enormous variations in enforcement of municipal anti-pollution by-laws. Inadequate resources appear to be at the heart of the problem: it may be unrealistic to expect smaller municipalities to hire full-time pollution control inspectors.[272] As a result, at least one province (Ontario) is considering "measures to improve the inspection of industrial discharges and to increase the uniformity of enforcement."[273] It has been suggested that a provincial "by-law enforcement team" be formed so that smaller municipalities can be relieved of the responsibility.[274]

A consolidation of enforcement responsibilities at the provincial level appears sensible in many respects. It allows for a concentration of financial resources and enforcement expertise which could lead to more consistent and effective enforcement than a scatter-gun federal-provincial-municipal approach. But there are innumerable examples supporting the need for a strong federal government back-up system for enforcement and co-ordination, permitting it to intervene in situations of provincial or municipal laxity.[275] The legal and economic feasibility of provinces enforcing federal legislation with federal funding might be a method of ensuring nationwide consistency of enforcement, and is deserving of further exploration.

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269. See description of accords and other administrative arrangements in Webb, *ibid.*, at 173-200.

270. Statistics to support this claim are difficult to obtain, and point to an area where more empirical research would be most useful. The jurisdictions where prosecutions appear to be on the upswing are Ontario and British Columbia (see Swaigen, and Anthony in Duncan, ed., *Environment Enforcement*, *supra*, note 114. Quebec has also indicated its intention of increasing enforcement action (see *supra*, note 261). Federal authorities continue to maintain a relatively strong enforcement presence with respect to coastal waters and fisheries, particularly in British Columbia. See Canada, The Commission on Pacific Fisheries Policy, *Final Report*, *supra*, note 196.

271. As described in Canada, Federal Task Force on Program Review, *Improved Program Delivery, Environmental Quality Strategic Review, A Follow on Report* (Ottawa: Supply and Services Canada, 1986) at 38-40.

272. See G. York, "Sewers Pose Growing Pollution Risk" *The [Toronto] Globe and Mail* (17 March 1986) at A1 and A14; A. Lindgren, "Program to Monitor for Toxic Wastes in Region's Sewers" *The [Ottawa] Citizen* (18 March 1986). Both newspaper accounts refer to an unpublished federal study.

273. See York, *ibid.* at A14.

274. According to M. Kai Millyard, Pollution Probe, *ibid.*

275. For example, D. Mackay, in "Tackling the Toxic Threat" *The [Toronto] Globe and Mail* (8 April 1986) at A7, notes concerning toxic controls:

> The only agency that can take the lead is Environment Canada. It has to bring together provincial, U.S. state and federal agencies, municipalities and others to attack the problem. To date, it has shown little interest in taking such a bold initiative.

IV. Use of Incentives

Although less visible, and perhaps more objectionable to some than command-penalty measures, the use of financial incentives to assist polluters is widespread, and can in certain circumstances result in quicker and more effective environmental protection than would coercive measures. In Alberta, a joint government-industry initiative known as the Alberta Government-Industry Acid Deposition Research Program is exploring the causes and effects of acid rain in that province.[276] As of December 1985, in Ontario, the federal and Ontario governments have agreed to help subsidize the cost of abatement measures for severe cases of sulphur dioxide emissions. Pursuant to the federal *Income Tax Act*, an accelerated capital-cost allowance is available for equipment purchased primarily for the purpose of abatement.[277] Most jurisdictions have legislation providing their Minister of Environment authority to give grants and subsidies for environmental improvement.[278]

Financial incentives take many forms and possess a variety of distinctive legal and operational characteristics. In another paper written by the author, a more complete description of incentive programmes is undertaken.[279] Below, a brief outline of one such initiative is set out.

Pollution control poses many difficult problems, but perhaps the most troubling are those associated with marginal "existing" industries. The problem can be summarized by a single question: "How do you apply new rules to old players?" The less than satisfactory response of Canadian jurisdictions to date points to an inherent limitation of current command-penalty techniques: that is, a threat of penalty is not a very effective pollution control inducement to ailing, marginally profitable industries, struggling to stay afloat. Essentially, current control legislation focuses on pollution control as if abatement decisions were made in isolation from other decisions of industrial operations when in some cases a broader approach would appear to be more appropriate. The Canadian experience with the pulp and paper sector is described below as an example of this phenomenon.

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276. According to Dr. H. Sandhu, Senior Research Manager, Research Management Division, Alberta Department of Environment, the Alberta Government-Industry Acid Deposition Research Program is a 60%-40% (government-industry) shared-cost initiative, which has been in place since 1983 (telephone conversation, October 1987).

277. The *Income Tax Regulations*, schedule II, class 24.

278. For example, in Quebec, the Quebec Minister of Environment has the power to grant loans or subsidies to groups or individuals to promote the training of environmental protection experts and to construct or operate waste management systems (the *Environmental Quality Act*, subs. 2(d) and Part XII). In Nova Scotia, the Nova Scotia Minister of Environment has the authority to give grants and loans for research and training and for the development of waste management and waste disposal facilities (the Nova Scotia *Environmental Protection Act*, para. 8(1)(*l*)) and the Prince Edward Island *Environmental Protection Act*, s. 12.

279. Webb, *supra*, note 3, Chapters VII to IX.

The *Pulp and Paper Effluent Regulations* promulgated in 1971 pursuant to the federal *Fisheries Act* recognized the existing industry problem by setting two sets of effluent standards: one for "existing" mills (defined as those mills in operation prior to 1971), another for "new," "expanded" or "altered" mills (mills built or significantly rebuilt or expanded since 1971). A date of application for the existing mills standards has never been set. Instead, federal officials announced that they would negotiate compliance schedules with mills, individually. According to the most recent statistics available (1982), there was still substantial non-compliance with the existing mill standards.[280]

Studies by federal and provincial governments in the late 1970s[281] revealed that the old and less efficient mills (the majority of which are located in Eastern Canada) needed modernization as well as pollution abatement investments. It was also found that, not only were these mills the least able to generate capital, they usually also were the worst polluters.

Starting in 1979, the federal and affected eastern provincial governments joined forces to offer the pulp and paper industry a "Modernization Programme" in which government offered to pay industry twenty-five per cent of the cost of modernizations, provided those modernizations met government approved objectives, including those relating to environmental protection and energy conservation. The federal legislative foundation for the Modernization Programme consisted of one long, ambiguous statement buried in the schedule to an appropriation act.[282] The actual description of the programme was contained in federal-provincial subsidiary agreements. Even in these, eligibility criteria for grants were described in vague terms, thus leaving wide discretion in the hands of government officials. This discretion not only gave officials flexibility in bargaining, but it also meant that potential applicants and third parties had little advance indication of what types of programmes would be approved.

Negotiations leading to the awarding of grants were highly technical and often lengthy, involving federal and participating provincial bureaucrats. Neither legislation nor subsidiary agreements provided recourse for rejected applicants. Third parties were not involved in these negotiations nor were there provisions for third-party participation at the follow-up stages. Grant applications were treated as confidential, and successful grant agreements were considered contracts, to which normal rules of privity of contract would apply.

From 1979 to 1986, ninety-four grants to fifty-four companies were distributed, at a cost to participating governments of $613 million thus generating a claimed $5.5 billion in capital investment.[283] To date, the author has not been able to determine the reduction in pulp and paper emissions resulting from the programme.

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280. See *Status of Abatement from the Pulp and Paper Industry* (EPS — 1/PS/1 — October 1984).

281. Discussed in greater detail in Webb, *supra*, note 3, chap. IX.

282. *Appropriation Act No. 5, 1973.*

283. See K. Noble, "Forest industry attempts to kick the grant habit" *The [Toronto] Globe and Mail* (31 December 1985).

Properly conceived and implemented, incentives can enhance government's ability to induce abatement. On the other hand, the question can be asked, should government be financing the private sector to meet government's own regulatory standards? Will the existence of incentive agreements affect prosecutorial decision making? To date, little research in this area has been undertaken. Regardless, it is likely that government will continue to use incentives to complement their command-penalty regulatory programmes.

V. Refinements to Existing Control Regimes

The legislation and regulations which establish control regimes are constantly being amended to reflect new understandings of pollution problems, and new approaches and perceived changes in public and judicial attitudes toward environmental protection. There seems to be three trends in the type of refinements taking place in the 1980s. First, legislation is being consolidated, so that problems of a similar nature are all treated pursuant to the same regime. The British Columbia *Waste Management Act*, which is intended to rationalize and replace the *Pollution Control Act*[284] and the *Litter Act*,[285] is an example of this type of refinement. Second, legislation has also been amended to give administrators and courts more and better options in their handling of pollution situations. The enhanced remedial powers and beefed-up penalties introduced in Manitoba's new *Environment Act* and revised Ontario *Environmental Protection Act* (discussed above at 31-32, 35, and 37) are illustrations of this type of legislative improvement.

Third, both the scope and focus of control legislation are also being improved in some jurisdictions. The enhanced citizen participation role in the new Manitoba *Environment Act* (discussed earlier) is one example of this type of improvement. The 1986 Municipal/Industrial Strategy for Abatement (MISA) introduced by the Ontario MOE in 1986 is another example of this type of refinement. The primary objective of MISA is to introduce new measures to reduce persistent toxic effluents. Formulation of the strategy followed recognition that existing wastewater treatment was largely inadequate to control non-conventional toxic pollutants.[286] According to the white paper which first outlined MISA (issued in June 1986), the MOE initially plans to promulgate new toxic regulations for municipalities and eight major industrial sectors.[287] The first step will be the creation of comprehensive and rigorous monitoring requirements. Once

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284. Repealed by s. 47 of the *Waste Management Act*.

285. Repealed by s. 41 of the *Waste Management Act*.

286. See generally, MISA White Paper, MOE, June 1986.

287. The eight identified industrial sectors are: petroleum refining, organic chemical manufacturing, inorganic chemical manufacturing, pulp and paper, metal mining and refining, industrial minerals, iron and steel manufacturing, and electric power generation, *ibid.* at 3.

these are in place, it is expected that the MOE will be able to compile data from which toxic effluent standards would follow.[288]

The standards are to be based on the Best Available Technology Economically Achievable (B.A.T.E.A.).[289] Both monitoring and permissible effluent standards will be subject to periodic review. To date, draft effluent monitoring standards for the petroleum refining sector have been established. The draft regulations attempt to be comprehensive, involving tests of 155 chemicals, some monitored daily, others weekly and the remainder three times quarterly.[290] The petroleum refinery industry is expected to be fully in compliance with the monitoring regulations within six months of their promulgation as law.[291] The consultation process which has lead to the draft of the monitoring regulations appears to have been thorough, open, and fair. It comprised a joint industry/government technical committee with representatives from the federal and provincial governments and the petroleum industry and an independent advisory committee consisting of knowledgeable members of the public. The draft regulations and the report of the independent advisory committee were also distributed to the public for comments.[292] Regulations restricting toxic effluents from the petroleum refinery sector are targetted to be in force by the end of 1988.

It is likely that the MOE's experience with the petroleum refinery sector will be the prototype for similar more comprehensive regulations in most other Canadian jurisdictions. For this reason, it is important that the MOE be careful to ensure that the current largely co-operative atmosphere between government and industry does not become antagonistic. The choice of the petroleum refinery sector as the first target industry to be subject to the new regulations is strategically a good one, given the relatively small number of refineries in the province, the relative similarity in refining processes from one refinery to another, and the comparatively good environmental record and economic health of the industry.[293] These almost ideal conditions for the introduction of new, more stringent regulations are not likely to be repeated in other sectors. Difficulties in the drafting of the permissible effluent regulations could include problems such as defining and defending the numbers representing industry-wide B.A.T.E.A., and the prospects of continually amending the regulations to reflect changes in monitoring detection capabilities and B.A.T.E.A. over time.

The MISA programme is ambitious and sweeping in its terms. Given the likelihood of changes in political winds, the only guarantee that the programme will be carried out in the way it has been announced would be in statutorily codified obligations, requiring regulations for specified sectors by fixed dates. However, the many

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288. *Ibid.* at 10, 12.

289. *Ibid.* at 2, 8, 31.

290. MISA draft effluent monitoring regulation for the petroleum refining sector.

291. *Ibid.* at 50.

292. MISA Bulletin, MOE, July 1987.

293. MISA draft effluent monitoring regulation for the petroleum refining sector, MOE, July 1987 at 48-50.

unforeseeable twists and turns which inevitably lie between the objective of putting regulations into place and their actual promulgation reduce the likelihood of such obligations ever being statutorily entrenched.[294]

VI. Changing Industry Attitude

Faced with poll after poll indicating that Canadians consider environmental protection an important societal priority, and sustained efforts by governments, courts and environmental groups, industry seems to be slowly accepting the fact that pollution control is here to stay.

Larry Thibault, president of the Canadian Manufacturers Association is quoted as saying:

> Responsible companies believe that there are many operators out there who are not as careful as they should be. They have no quarrel with the government taking such companies on in court to get the bad actors out of the system.[295]

The Technical Director of the Canadian Petroleum Association has recently stated that the petroleum industry can no longer shrug off conservationists as a lunatic fringe.[296] Following prosecutions in Ontario, enforcement staff report greatly improved co-operation from previously recalcitrant operators.[297] The recently released National Task Force on Environment and the Economy calling for "sustainable economic development" and the need for government-industry co-operation is another sign of the responsible attitude taken by most actors in the private sector.[298]

There is growing recognition that environmental protection can have benefits, namely "reduced waste, sales of by-products, more efficient use of raw materials, energy savings and sometimes the development of totally new products."[299] It has been

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294. See, e.g., *Re Aluminum Co. of Canada and the Queen* (1986), 55 O.R. (2d) 522 (Div. Ct).

295. As quoted in Ohlendorf, *supra*, note 191 at 43.

296. As described in "Conservationists gaining respect, oil industry says," *supra*, note 6.

297. As described by Swaigen (MOE) in Duncan, ed., *supra*, note 114, and as related to the author by M. McKenney, Task Force Leader, Investigations and Enforcement Branch. Little empirical evidence is available from other regions, and is sorely needed.

298. Canada, *Report of the National Task Force on Environment and Economy: submitted to the Canadian Council of Resource and Environment Ministers* (Ottawa: The Task Force, 24 September 1987).

299. See Ohlendorf, *supra*, note 179 at 42 quoting J. Donnan, MOE.

reported "that companies manufacturing pollution abatement equipment are doing a brisk business."[300]

While it may be premature to say that industry has embraced the environmental ethic, evidence of such an attitudinal change should not really be so surprising: environmental protection was a change in "the rules of the game" when regulatory pollution control measures were first introduced. As government, courts and the public were adjusting to these new rules, so was industry.[301] The problems of today are usually in the nature of weeding out bad actors and reacting to newly discovered problems. The wholesale industry opposition which might have been characteristic of earlier years is uncommon. If nothing else, the rhetoric has certainly improved.

300. *Ibid.* at 43. However, John Sikes, an environmental consultant to the pulp and paper industry, in a 1987 private conversation with the author, observed that companies specializing in pulp and paper abatement research have been decimated in the past decade. He lamented the passing of the government sponsored research programmes of the 1970s (for discussion of some of these terminated programmes see Webb, *supra*, note 3 at 518-522).

301. *Ibid.* at 46.

CHAPTER FOUR

On the Horizon — The Proposed New Crime

The face of pollution control has changed significantly over the past thirty years. Governments have replaced sweeping but largely unenforced prohibitions characteristic of the pre-1960s with the regulatory control framework in place today. The transition from prohibition to control marks the first significant step towards a coming to grips in the sense that an absolute "hear-no-evil-see-no-evil" approach has been replaced by a more realistic "let's-keep-things-under-control" position.

In the second half of the 1980s, there is evidence of a second important advance towards coming to grips. However, this headway is made largely at the operational rather than legislative level. As government officials, the courts, regulatees and the public have become more familiar with the pollution control process, they have begun to adjust their approaches and practices. After close to two decades of experience in regulatory pollution control, there is a growing appreciation and understanding of the strengths and limitations of the various instruments, actors and institutions involved.

Notwithstanding this growing appreciation and understanding, there is widespread concern that available regulatory instruments are not adequate to attack the ongoing threat posed by pollution of the environment. The view has been expressed by the Law Reform Commission of Canada in Working Paper 44,[302] that the pollution control armoury needs to be augmented by providing in the *Criminal Code* a separate new offence entitled "crimes against the environment." As proposed in the Working Paper, this new crime is intended to complement the existing array of regulatory instruments, not supplant them.[303] Subsequently, the Law Reform Commission, in its Report 31, *Recodifying Criminal Law: Revised and Enlarged Edition of Report 30*, has recommended the addition of a crime for those who recklessly cause disastrous damage to the environment.[304] At first blush, these proposals seem attractive. Most will agree that pollution is a serious problem. It can only help to have the widest possible variety of weapons at hand to combat this growing threat to public health and safety and to the

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302. See *supra*, note 22.

303. *Ibid.* at 4: "Far from limiting the scope of environmental agencies, it is intended that the explicit prohibition, in the *Criminal Code*, of some acts or omissions seriously harmful or endangering to the environment, will provide those agencies with an important additional tool."

304. *Supra*, note 22 at 106-110.

quality of life. However, great care must be taken not to look to the criminal law as a "cure-all" for the pollution problem, which is mostly regulatory in nature.

Looked at from a regulatory, enforcement perspective, a new crime against the environment may not prove as beneficial as it first appears. In this section of the paper, the operational problems associated with a crime against the environment are explored. It is suggested that the enforcement considerations described in this section need to be carefully considered by legislators before any such proposals are acted upon. At the most basic level, attacking the problem of environmental pollution through the criminal law diverts the time and energy of society away from the *real* problems of environmental protection — problems of regulatory implementation. And to the extent that the call for creation of a new crime indicates a belief that the existing command-penalty "guns" are not big enough, it is, I submit, fundamentally misguided. As Professor Andrew Thompson of the University of British Columbia has noted, the weaknesses of the present system

> will not be cured by enacting more statutes and regulations creating more environmental offences and penalties.... The writing of ... new prohibitions and penalties is often the response of the regulator who lacks the means or knowledge to manage the problem.[305]

The solution to the problem of environmental pollution lies in more strategic and concerted use of the framework already in place. What is needed most urgently is the political will to use to their full potential the weapons already available. The addition of a "bigger gun," or the "ultimate sanction" of possible conviction under the proposed new *Code* offence, may give the appearance that the environment is thereby better protected. But such an appearance is misleading.

First, it fails to recognize the possibility that the existing regulatory regimes specifically relating to protection of the environment, together with the more general *Code* provisions not specifically addressing environmental protection, may be quite adequate to deal with the problem, if they are appropriately and consistently applied. By diverting attention away from the fact that the real problem may lie in the lack of resolve to enforce existing laws, the creation of a new crime may give rise to a false confidence that the problem is being dealt with. Second, if it has been difficult to secure convictions and large penalties with the existing regulatory pollution offences, the situation will be even more bleak with a new crime against the environment. Proof of *mens rea* and restrictive procedural requirements will decrease the likelihood of criminal conviction.[306] Problems in obtaining convictions under the proposed new crime might send wrong signals to those acquitted and to other polluters who are supposed to be deterred by the prospect of criminal conviction. Third, the inevitable confusion

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305. Thompson, *supra*, note 1 at 5.

306. On this point see N.C. Sargent, "Law, Ideology and Corporate Crime: A Critique of Instrumentalism" (Paper presented to the Law and Society Association at the Learned Societies Conference, Windsor, Ontario, 7 June 1988).

whether specific conduct amounts to a criminal offence or merely a regulatory infraction will impose an additional and unnecessary burden on those administering the law.[307]

The existence of a special environment offence in the *Code* may, in fact, result in new and unexpected problems. As discussed earlier in this paper, criminal notions of enforcement which emphasize prosecutions and courts are often inappropriate in environmental settings. Administrators have come to recognize that many instances of pollution are indicative of more fundamental problems in the operation of particular industrial establishments. The most effective way in which they can advance the cause of a clean environment often is to work with the polluter to find a solution to the underlying problem, rather than to prosecute each detected transgression. The threat of possible prosecution is reserved as a tool for encouraging the co-operation of the polluter and as a means for punishing the flagrant offenders who refuse to co-operate in clean-up efforts.

The addition of a specific crime against the environment would mean that regulatory prosecutions need no longer be reserved only for the worst transgressions. Logically, the rationale for restrictive use of regulatory prosecutions would shift, leaving them to be directed against less serious violations that are now usually handled without resort to the courts. This would result in increasingly legalistic and adversarial relations between government and the private sector. The dangers of a heavily court-oriented approach have been demonstrated by the U.S. regulatory experience.[308]

Moreover, the possibility of government bringing a criminal prosecution in relation to any particular incident of pollution might result in the courts imposing the heavy procedural restrictions associated with the criminal law on government officials in the carrying out of their regulatory functions. This would frustrate the co-operative aspect of present implementation efforts. Thus, the introduction of a new environmental crime could inject uncertainty into current enforcement practices just as they are beginning to be rationalized.

As was described earlier in the paper, most Canadian governments now have at their disposal a wide variety of regulatory offences which are more than adequate to deal with the pollution problem. Environmental protection legislation authorizes courts to levy penalties on convicted polluters up to one million dollars per day, imprison in certain cases and, in others, order remedial action or shut down a source of pollution.[309] Only in the past few years have courts even begun to make full use of the sentencing powers available to them. This array of sanctions in regulatory legislation makes the addition of a specific *Code* environmental offence unnecessary.

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307. Dr. Hans-Jörg Albrecht of the Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, West Germany, who has been studying the enforcement of the new environmental crime in West Germany, has reported that the addition of the crime has caused significant conflicts between administrators of regulatory and criminal environmental offences: correspondence from Dr. Albrecht, November 12, 1987.

308. See, e.g., "regulatory unreasonableness" discussion in Bardach and Kagan, *supra*, note 264 at 104-116, and Edelman and Waldine, *supra*, note 264.

309. Discussed above at 29, 32, 38.

In support of the proposed crimes against the environment, Working Paper 44 argues that the full force of the criminal law is needed to convey societal abhorrence and condemnation of particularly outrageous acts of pollution.[310] It is presumed in Working Paper 44 that the stigma which attaches to a conviction of a regulatory offence is not as severe as that which attaches to a criminal conviction, regardless of the facts which give rise to the conviction or of the severity of the penalty imposed. This is simply not borne out in practice.

Like crimes, regulatory pollution offences can attract severe penalties. They are generally treated seriously by the courts, government, industry and the public at large, and conviction for such offences carries significant negative social stigma.[311] Regulatory legislation already exists which expressly recognizes the sanctity of the environment and its need to be protected.[312] Administrators may address both negligent and intentional polluting activity with strict-liability regulatory offences (see above at 38). With regulatory offences they can avoid the difficult task of proving *mens rea* (as is required with criminal offences) and they can generally expect convictions with the possibility of heavy penalties. Characterization of pollution offences as civil and public welfare in nature rather than criminal may even support procedural innovations in sentencing not possible with criminal offences.[313]

The argument in favour of creating special "crimes against the environment" is predicated on two premises. First, that there is a certain category of polluting activity that is so culpable that it is truly criminal in nature and therefore calls for the full sanction of the criminal law and, second, that the existing provisions of the *Code* are not adequate to deal with this particular type of criminal behaviour. The first premise is most certainly correct. Acts of pollution which endanger human health and safety or cause actual injury to humans, and acts which damage property are criminal if committed with the requisite mental element to ground criminal liability. The position taken in this paper is that current *Code* offences, with the endangerment and vandalism refinements proposed by the Law Reform Commission of Canada in its recent Report

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310. See *supra*, note 22 at 46-47.

311. For example, if regulatory offences were not treated seriously and did not attract significant societal stigma, why would government expend over $2 million on prosecuting a regulatory offence (as in the *Suncor* case, *supra*, note 82), and why would the private sector so vigorously argue due diligence defences (see, e.g., almost any issue of *Canadian Environmental Law Report*)? Regulatory environmental legislation can and does explicitly express society's abhorrence for environmental degradation (see note 312, *infra*).

312. For example, the preamble to the *Canada Water Act* reads:

> [P]ollution of the water resources of Canada is a significant and rapidly increasing threat to the health, well-being and prosperity of the people of Canada and to the quality of the Canadian environment at large and as a result it has become a matter of urgent national concern that measures be taken to provide for water quality management in those areas of Canada most critically affected....

See also the Ontario *Environmental Protection Act*, the Manitoba *Environment Act* and the *Canadian Environmental Protection Act*.

313. Swaigen and Bunt, *supra*, note 75 at 50.

31 can adequately address these acts without the creation of a specific crime against the environment.[314]

Before evaluating whether current *Code* offences supplemented by refinements proposed in Report 31 are adequate to deal with criminally culpable acts of pollution, it is first necessary to establish what can be accomplished, and what interests can be protected, by applying the criminal law in the area of environmental protection.

This issue was ably addressed in Working Paper 44. After canvassing the various possible justifications for using the criminal law to control harmful activity in relation to the environment, Working Paper 44 came to the conclusion that such use must be tied to protection of *human* interests in a safe and clean environment. The paper explicitly rejected the argument put forward by some, that the environment should be protected for its own sake even if pollution incidents should result in no risk or harm to human health or limitation upon the use and enjoyment of the environment by humans.[315]

If one agrees that it is only the human interest in a safe and clean environment which needs to be protected by criminal law, the question remains whether the current *Code*, together with the refinements proposed by the Law Reform Commission of Canada in Report 31, adequately address that need. At the most fundamental level, if an incident of pollution causes actual harm to humans and the pollution resulted from an intentional or reckless act or an act of criminal negligence, then, pursuant to crimes of criminal negligence, common nuisance and mischief, or the proposed new crimes of endangerment and vandalism, the polluter will be held criminally liable for the results of the pollution.

Subsection 202(1) of the *Code* provides that "[e]very one is criminally negligent who ... shows wanton or reckless disregard for the lives or safety of other persons." Where the criminal negligence in question causes death, the perpetrator is liable upon conviction to life imprisonment. Where the negligence causes bodily harm, the maximum punishment which courts can levy is ten years imprisonment. The criminal negligence offence would appear to be particularly well suited to environmental disaster situations such as the Bhopal, India, incident where many people died following a lethal gas leak. In the only available reported Canadian case known to the author in which the criminal negligence provision was applied to an environmental context, a corporation was acquitted in the death of three of its employees following a gas leak. The acquittal was based on the fact that the corporation's conduct was not considered to amount to such serious or gross negligence as to come within the terms of the

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314. See discussion of applicability of existing *Criminal Code* offences to environmental contexts below. Proposed changes to the *Code* outlined in Report 31 may also apply in environmental situations. Report 31 was published some two years after Working Paper 44. The main relevant provisions of the proposed new Criminal Code are: i) the re-definition of the mental element of criminal conduct in terms of three levels of culpability, namely intent, recklessness and negligence, with the accompanying clarification of which level of culpability is required to constiute particular offences against persons and against property; ii) the proposed new offence of vandalism which encompasses a variety of offences against property as set out in the present *Code*; and iii) the proposed new offence of endangerment. The applicability of each of these to the problem of environmental pollution is discussed above.

315. See *supra*, note 22 at 8-10.

offence.[316] Although the circumstances in this case were held not to constitute criminal negligence, the potential applicability of this offence to incidents of serious harm to the environment is clearly demonstrated.

Subsection 176(2) of the *Code* defines the crime of "common nuisance" as follows: "everyone [who] does an unlawful act or fails to discharge a legal duty and thereby ... endangers the lives, safety, health, property or comfort of the public" can, upon conviction, be imprisoned for up to two years. Because the criminal offence of common nuisance extends to encompass situations where "property or comfort of the public" is endangered, it could be used in situations where the environment has been affected although no lives have been endangered. Commentators have pointed out that the offence of common nuisance would appear to be well suited to "[s]erious air pollution caused by an industrial plant or dumping of effluent into water beyond authorized standards ..."[317] although, to date, no such prosecutions have been reported in Canada.

Pursuant to section 387 of the *Code*, any one commits the criminal offence of mischief by wilfully (1) destroying or damaging property; (2) rendering property dangerous, useless, inoperative or ineffective; (3) obstructing, interrupting or interfering with the lawful use, enjoyment or operation of property; or (4) obstructing, interrupting or interfering with a person in the lawful use, enjoyment or operation of property.

The maximum punishment for criminal mischief offenders who endanger life is imprisonment for life, while for public property mischief it is fourteen years imprisonment. For mischief to private property (up to five years imprisonment), the property so damaged by mischief must not belong to the wrongdoer. In fact, in the one known pollution-related prosecution pursuant to the mischief section, the accused parties escaped liability by establishing that the pollution had occurred on their own property.[318] The judge who rendered the decision indicated that the behaviour in question constituted gross negligence and wilful blindness, which suggests that in the particular fact-situation at bar the Crown might have had more success had they chosen to prosecute pursuant to the criminal negligence or nuisance provisions of the *Code* discussed above.[319]

Beyond these existing crimes, the proposed new offence of endangerment which can be committed by intentionally or recklessly creating a risk of death or serious bodily harm to any person, would cover any incidents of reckless or intentional pollution which created serious health or safety risks for humans. The fact that such risk is created by pollution of the environment rather than by some other means, such as dangerous construction practices or reckless handling of explosives, is irrelevant for determining criminal liability.

316. See *R.* c. *Chagnon (1975) Ltée*, [1981] R.L. 454 (Qué. C.S.P.).

317. See Good, *supra*, note 16 at 285.

318. See *Le Procureur général de la Province de Québec* c. *American Iron and Metal Company (1969) et Leduc* (11 February 1983) Montréal (Ct. Sess. P.) [unreported].

319. For more detailed discussion of the potential application of existing *Code* offences to environmental situations, see Glassbeek, *supra*, note 16; and Glassbeek and Rowland, *supra*, note 16 at 506.

The revised Code (Report 31) proposed by the Commission includes a new offence of vandalism. The draft Code provides simply that:

> Everyone commits a crime who, without another person's consent, damages that other's property or by physical interference renders it useless or inoperative:
>
> (a) purposely; or
>
> (b) recklessly.[320]

This offence would appear to be well suited to penalizing intentional or reckless acts of pollution which interfere with public enjoyment of the natural environment. While much of what we refer to as the natural environment is publicly owned, damage caused to it, intentionally or recklessly, by pollution would constitute a criminal offence of vandalism under the Commission's Code since it would constitute unjustified interference with the public's right to enjoy use of this public property.

In recodifying the criminal law, the Commission has been guided by the doctrine of restraint, which dictates that behaviour should not constitute a crime unless it results in harm or risk of harm to society, to individuals, or actual harm to property that cannot be redressed through private law. The Commission has advocated consolidation of offences wherever possible and it has favoured formulation of the Code in simple language that makes clear to all concerned exactly what conduct is prohibited. In the process of consolidation the Commission has recommended abolition of a number of specific offences. For example, cattle rustling and stealing from oyster beds are consolidated into a simple and clear-cut offence of theft. Exactly the same logic applies with regard to the proposed crime against the environment. All of the mischief which the offence can reasonably be expected to condemn is already covered by other provisions in the proposed new Code or in the existing *Code*.

Also, the task of defining clearly the exact conduct which constitutes a crime against the environment is practically impossible since many acts which technically amount to pollution of the environment are permitted or even encouraged by society in the pursuit of economic development. Sometimes even catastrophic alteration of the environment, as in large-scale hydro-electric projects, is regarded as desirable. To define the offence in terms of serious violation of federal or provincial standards (as is suggested in Working Paper 44) is far too uncertain a standard to meet the requirement of legality which is fundamental in criminal law. If *mens rea* offences with heavy penalties should be added at all, the more sensible approach would be to include them in legislation which specifically addresses the type of environmental harm in question. Thus, for example, the federal *Oil and Gas Production and Conservation Act* has recently been amended to provide that persons who cause or permit oil and gas spills are liable on conviction or indictment to a fine of up to one million dollars per day or up to five years imprisonment, or both.[321] Of late, provincial legislatures have begun to add heavier sanctions to their environmental protection legislation (as discussed earlier at 29 and 32).[322]

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320. See *supra*, note 22 at 87.

321. See subs. 19.1(1) and s. 49. See also the new *Canadian Environmental Protection Act*, s. 115.

322. Some existing provincial pollution legislation already included the penalty of imprisonment: see *supra*, note 143.

A codified environmental crime defined in terms of disaster or catastrophic loss (as is proposed in the Law Reform Commission's Report 31) may be equally unnecessary, since it is virtually inconceivable that there could be a catastrophic incident of pollution that would not, if the requisite mental element were present, constitute an offence under one of the provisions of the Code. Moreover, the concept of "disastrous damage to the environment" may lack the definitional precision required to comply with section 7 of the *Charter*.

Those who favour creation of a special environmental crime express particular alarm at the conduct of those polluters who flout the law and regard regulatory penalties simply as a cost of doing business. The solution to this problem, I submit, lies in toughening the regulatory sanctions for repeat offenders, and enforcing these sanctions to the point where it becomes economically unattractive to disregard the laws. In extreme cases, a polluter should be put out of business, and if necessary, the plant and equipment of that polluter should be subject to forfeiture to prevent the re-opening of the enterprise under a different name. Furthermore, where the conduct of polluters who persistently disregard court orders to clean up their operations amounts to defiance of the court, they should be charged with contempt, as has been done recently in Ontario (see above at 33),[323] and dealt with severely for that additional offence. The directors of offending corporations could also be held personally liable for the actions of their businesses (see above at 32).

The other particularly heinous type of pollution which moves some people to call for a special crime is the practice of "midnight dumping," that being the intentional clandestine disposal of toxic or noxious wastes in an unauthorized manner that damages the environment. There are many forms of conduct in our society which are beneath contempt, some of which seriously threaten the very fabric of society. But we do not attempt to prescribe all such behaviour through the criminal law, especially when more efficient and practical means such as regulatory regimes are available. Midnight dumpers who do not cause actual harm or risk of harm (if indeed there can be such a type of dumper), may be dealt with effectively through regulatory sanctions. Those who cross the line into criminality by causing harm or by creating unacceptable risks to human health and safety can be dealt with under the criminal law without creating a special crime against the environment.

It can be seen, then, that from a regulatory, operational perspective, a new crime against the environment is beset with problems which should be carefully considered before proposals of this nature are acted upon. To justify the creation of a new *Code* environmental offence, there must be a demonstrable need for such an offence, and there must be strong indication that the new crime will not detract from current efforts. As we have shown, neither case can be made out. No matter how attractive the creation of a new crime against the environment might appear to be, it is unlikely to improve protection of the environment. Surely this should be the only criterion which matters.

323. See *supra*, note 148.

Conclusions

In a 1973 article, Professor C.G. Morley of the Faculty of Law, University of Manitoba, concluded an examination of several federal legislative initiatives, new at the time, with the following comments:

> If the problems were correctly perceived, if the policy was correctly conceived, if the legislation was properly drafted, if the regulations are intelligently developed, if the laws are effectively administered and enforced and if Canadians care enough, we will cope with many of our pollution problems.[324]

While Professor Morley's comment was directed specifically at the federal legislation he examined, it would appear to apply with equal force to all Canadian pollution control initiatives. Morley accurately captures some of the main variables which determine the success of government efforts to protect the environment. Failure with any one of these variables greatly decreases the likelihood of an effective government effort.

Now, in the second half of the 1980s, with a wide variety of pollution control legislation in place and with a certain amount of experience and knowledge of its operation, we are in a position to assess just how well we measure up to Morley's tests.

First, are the problems correctly perceived? Gone are the days when environmental protection could be viewed as a single problem. We now know that pollution can be the result of intentional behaviour, but by the same token it can be caused by negligent and even blameless conduct. Pollution can be perpetrated by individuals, and by organizations (for example, corporations). Pollution can be emitted from easily identifiable sources, or from less obvious and detectable origins. Pollution can occasionally be anticipated and prevented, and at other times be unexpected and unavoidable. The damage caused by pollution can be temporary and easily cleaned up in some cases, and in others be long-term, cumulative and synergistic. Given our improved understanding of the nature of pollution, we are now in a better position to rectify the situation.

Have the policies been correctly conceived? Here, as the legislatures have gained experience, they are slowly improving their understanding in the approach to environmental problems. Absolute prohibitions and criminal offences have given way to control regimes allowing individualized standards for each polluter. Courts and administrators now have ordering powers which permit direct corrective action where necessary. Moreover, non-coercive methods are increasingly being used. In effect,

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324. See C.G. Morley, "Pollution as a Crime: The Federal Response" (1973) 5 Man. L.J. 297 at 311.

Government is beginning to take advantage of all available methods to address the multi-faceted pollution problem.

Are legislation and regulations properly and intelligently developed? Here again, the situation is gradually improving as time goes on. Legislation still does not accurately convey the realities of pollution control — the tradeoffs, the competing resource uses, the scientific and technical uncertainties and the federal-provincial factors. Many of the sanctions and powers provided are too blunt and unwieldy to be used by administrators on a day-to-day basis. Legislators have all too often failed to pass regulations which could "flesh out" the present legislative framework. Rationalization of penalties from one piece of legislation to another could be attempted in order to improve the likelihood of consistent treatment of offenders. In the past, public participation in the formulation of legislation and regulations has been insufficient, although greater effort seems to have been made to involve the public in recent years.

Are the laws effectively administered and enforced? As described in detail in this paper, there has been an evolution in attitudes and practices by government and courts toward implementation of pollution control legislation. Initially there might have been a tendency on the part of some government officials to go easy on polluters as government and the private sector adjusted to the new rules of the game, whereas now this leniency is giving way to a more hard-line approach as government in some jurisdictions begins to "get tough" and tighten up administrative, investigative and enforcement practices. Courts have introduced the notion of a public welfare, strict liability pollution offence which more accurately reflects the pollution control process. They have also indicated an increased willingness to take environmental offences seriously and to improve procedural fairness in environmental decision making. Problems associated with criminal courts handling public welfare offences however remain. The Law Reform Commission of Canada is exploring the possibility of establishing a separate set of procedures and courts for regulatory adjudication. The informal activities of government (that is to say "arrangements" between government and industry, between federal and provincial governments, and *ad hoc* incentive programmes) are now coming under increased scrutiny. Efforts to improve public participation, and to open up the pollution control process have been introduced. The author urges the creation of explicit enforcement policies such as those in place in Ontario and in the new *Canadian Environmental Protection Act*. Also needed is improved information concerning the compliance of regulatees to enhance accountability and encourage consistency in treatment. Still, pro-development tendencies of government and other institutional and individual biases and limitations will continue to hamper full implementation of legislation.

Do Canadians care enough? Surveys and opinion polls indicate that Canadians regard the environment as an important value to be protected. The frequent and increasingly sophisticated actions of public environmental groups underline the fact that the public will not be satisfied by ineffective or unenforced legislation. Citizen access to environmental protection processes could be improved. More information on the status of polluting operations and government enforcement strategies is needed.

Constant public pressure is essential to continued, diligent environmental protection by government.

In the second half of the eighties, environmental protection can no longer be considered a flash-in-the-pan concern which will go away after a few symbolic gestures have been made. The knowledge and experience gained through trial and error in the past years have put Government in a position to protect the environment in a much more comprehensive and effective way than was once possible.

It is now understood that there are limits to what command-penalty mechanisms can accomplish and that the solution is to use *all* possible approaches in concert, in a rational, planned manner. If we have unrealistic expectations of the capabilities of instruments, governments and courts, we will not be able to tackle the new, more complex and difficult pollution problems which are constantly arising. In this respect, the operational consequences associated with the proposals for a crime against the environment need to be thoroughly canvassed in the course of developing legislative reforms.

The 1980s require further refinement of the legislation in place, more comprehensive use of the framework available, more rigorous enforcement of command-penalty mechanisms, more widespread, open and consistent use of control regimes and incentives, and willingness to try imaginative solutions. A realistic attitude about the capabilities and weaknesses of instruments and institutions is the greatest legacy of the sixties and seventies.

Recommendations

Recommended Legislative and Administrative Reforms

(1) *The adequacy of emissions control legislation in all jurisdictions should be re-examined.* This re-examination is precipitated by the recent amendments to the Ontario and Manitoba pollution control legislations. The position taken in this study is that the basic legal framework for the control of industrial emissions is largely in place, and that, given the political will, the funding and the staff, an effective pollution control effort can be made within this existing framework. Although there is always room for improvement, persons concerned with the adequacy of environmental protection legislation should be wary of yet another wave of statutory amendments, ostensibly curing the ills of the existing regimes, unless it is accompanied by a firm and binding commitment to enforcement. This having been said, a rigorous examination of existing legislation, with a view to revising the penalties, increasing the administrative and judicial powers, enhancing the scope of activities covered by existing legislation, and improving public involvement in the pollution control process could be a useful exercise in the sense that it will likely send a message to polluters, government officials, courts and the public re-affirming the Government's commitment to effective environmental protection. To reiterate, however, any such legislative amendments passed in the absence of an express, long-term commitment to enforce them (for example, funding and staff allocations) risk being characterized as politically attractive but practically meaningless window-dressing.

(2) *Where governments have publicly committed themselves to establishing new legislation or new sets of regulations for particular sectors, then such commitments should as far as possible be codified in legislation.* These "sunrise" clauses would help to ensure that, regardless of changes in political climate, governments will carry out their promises or be forced to explain why they have not done so. Similarly, commitments that regulations will be reviewed and revised (for example, to keep up with technology) should be codified whenever practicable.

(3) *The use of contracts as a supplemental, alternative control approach should be attempted on a trial project basis in at least one jurisdiction to determine its feasibility.* The contractual approach shows promise of being an effective and more appropriate control method, and deserves further exploration at the field level.

(4) *As far as possible, enforcement and administrative personnel within an environmental agency should be kept separate and distinct.* Although recognizing that in the smaller, poorer jurisdictions this recommendation might not be feasible, the benefits of distinct enforcement and negotiating units are sufficiently great that such an arrangement should remain a long-term objective in those jurisdictions.

(5) *The position of existing pulp mills under the federal* Fisheries Act *should be clarified.* In 1971, effluent discharge standards for existing mills were established pursuant to the federal *Pulp and Paper Effluent Regulations.* However, unlike the standards for other types of mills, a date for application of the existing mill standards has never been set. Until a date of application is established, existing mills will remain legally subject to the absolute prohibition against all substances deleterious to fish standard set out in subsection 33(2) of the *Fisheries Act.* Thus, existing mills are legally prohibited from discharging all substances deleterious to fish while all other types of mills are subject to permissible effluent standards. As soon as possible, existing mills should be made subject to legally binding and enforceable effluent standards.

(6) *Joint government-industry research programmes into the causes and effects of pollution, and the feasibility and limitations of various pollution control technologies should be put in place.* Such programmes are public expressions of the government's commitment to correcting existing problems, and can act as important information-sharing networks for government and industries attempting to come to grips with pollution and pollution abatement.

(7) *Each jurisdiction should be statutorily obligated to publish, for each piece of pollution control legislation, an enforcement and compliance policy.* Such a policy should indicate how the legislation is to be enforced, the roles and functions of the various units within the administering agency, the relationship between the administering agency and other departments and agencies of that jurisdiction, the relationship between the administering agency and other governments, and the channels for citizen participation. Administering agencies should be statutorily obligated to update compliance and enforcement policies annually or following any significant change in compliance and enforcement policy, whichever comes first. Should an administering agency act in a manner apparently inconsistent with the stated policy, concerned persons should be able to question its actions. The agency would then be required to supply a publicly available written explanation which would be published in the following edition of the compliance and enforcement policy.

(8) *In those cases where serious harm is intentionally inflicted on individuals or property, prosecutions pursuant to the present* Criminal Code *could be undertaken.* However, from an operational perspective, creation of the proposed new and distinct crime against the environment may be undesirable, because of its negative potential

effect on regulatory efforts and the low probability of obtaining convictions by this route.

(9) *Administering agencies should be statutorily obligated to include, in annual reports, an inventory of all enforcement actions taken, the averaged cost of enforcement action (broken down into investigatory, lab, legal and other categories), and a compliance progress report, describing the improvement or worsening of each sector regulated and explaining to the best of their abilities why the changes have occurred.* In this way, all parties concerned can achieve a better understanding of how legislation is actually implemented.

Recommended Research Programmes

(1) *An empirically based comparative study of legislative regimes and enforcement practices of government agencies responsible for pollution control across Canada should be undertaken.* The primary objectives of such a study would be to reveal the different approaches to pollution control currently evident in Canada, so that the advantages and disadvantages of prosecution and negotiation-oriented approaches can be fairly examined, legislative and administrative deficiencies exposed, and information regarding effective techniques shared. Such a study could be the precursor to the development of a more consistent approach to pollution control from one jurisdiction to another. A study of this nature also could lead to promulgation of model pollution control legislation from which jurisdictions could derive their own regimes.

(2) *Further study of the feasibility of provincially enforced and federally funded federal legislation should be undertaken.* In theory, this type of regulatory enforcement scheme could enhance the likelihood of coherent, and consistent nation-wide pollution control. The study would examine the administrative, constitutional, legal, political and economic implications of such a scheme. Comparisons with the American experience in this area could be helpful. Such a study could lead to the testing of a pilot project, and then, should this prove successful, to model legislation.

(3) *The feasibility of civilly imposed sanctions, including examination of the administrative, constitutional, legal, political and economic implications of such a regime should be examined.* Comparisons with the American experience in this area could be helpful. This study could lead to testing in a pilot project format, and, if successful, to model legislation.

(4) *The feasibility and value of a separate regulatory offences regime, with its own procedures and judges, including examination of the administrative, constitutional,*

legal, political and economic implications of such a scheme should be examined. The Law Reform Commission of Canada has commenced preliminary research in this area. This study could lead to a small-scale test project, and preparation of model legislation.

(5) *Distinctions between emissions control and toxic substances control in both the legislative and the administrative contexts, should be examined.* This study could lead to preparation of model toxics control legislation and accompanying compliance strategies. Those jurisdictions currently lacking a separate toxics control regime could look to this model for guidance in formulating their own legislation.

Appendix A

List of Persons Consulted During the Course of Preparation of this Study

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Mr. Vernon Albush, Graduate Student, Faculty of Environmental Design, University of Calgary

Mr. William Andrews, Acting Executive Director, West Coast Environmental Law Association

Mr. Earle Anthony, Assistant Deputy Minister, British Columbia Ministry of Environment

Mr. Barry Barton, Research Associate, Canadian Institute of Resources Law, University of Calgary

Mr. R.N. Briggs, Director of Pollution Control, Alberta Environmental Protection Services, Edmonton

Mr. David Coon, Policy Co-ordinator, Conservation Council of New Brunswick

Ms. Cathy Cooper, Environment Canada, Legal Services, Ottawa

Mr. Peter Dauphinee, Environment Canada, Legal Services, Ottawa

Professor Phil Elder, Associate Dean, Faculty of Environmental Design, University of Calgary

Ms. Janice Forsyth, Solicitor, Department of the Attorney-General, Government of Nova Scotia

Mr. Daniel Green, Société pour vaincre la pollution, Montréal, Québec

Mr. David Halliburton, Acting Chief, Renewable Resources Extraction and Processing Division, Industrial Programs Branch, Environment Canada, Ottawa

Mr. Peter Harris, Commercial Chemicals Compliance, Environment Canada, Ottawa

Mr. Cam McDonald, Chief, Commercial Chemicals, Environment Canada, Ottawa

Mr. Mark McKenney, Task Force Leader, Investigations and Enforcement Branch, Ministry of Environment, Ontario

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Mr. Allan Maynard, ASL Analytical Service Laboratories Ltd., Vancouver

Mr. Kai Millyard, Pollution Probe, Ontario

Professor Murray Rankin, Faculty of Law, University of Victoria

Mr. Trevor Ruthman, Pulp and Paper Compliance, Environment Canada, Ottawa

Mr. Richard Scroggins, Industrial Programs Branch, Environment Canada, Ottawa

Mr. Robert Sentis, Assistant Deputy Minister, Saskatchewan Ministry of Environment

Mr. John Sikes, Pulp and Paper Environmental Engineer, Sandwell Consultants, Vancouver

Mr. K.R. Smith, Assistant Deputy Minister, Alberta Environmental Protection Services

Mr. Richard Stevens, Special Projects Officer, Manitoba Environment and Workplace Safety and Health

Mr. John Swaigen, Counsel, Legal Services, Ministry of Environment, Ontario

Ms. Elizabeth Swanson, Staff Counsel, Environmental Law Centre, Edmonton

Dr. Andrew Thompson, Director, Westwater Research Institute, University of British Columbia

Appendix B

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