Dalhousie Law Journal

Volume 7 | Issue 2 Article 3

4-1-1983

Canadian Environmental Law in the Eighties: Problems and Perspectives

Peter Z. R. Finkle

Peter Z. R. Finkle*

Canadian Environmental Law in the Eighties: Problems and Perspectives

Environmental law in Canada has developed slowly during the last two decades. While the rise and popularisation of the environmental movement of the sixties and early seventies did encourage the creation of a federal Department of Environment and many provincial counterparts, as well as facilitate the passage of a number of pieces of legislation, there is some question as to how substantial an impact the institutions and legislation have made on Canada society.

One problem which has beset the development of adequate environmental legislation is the significant gap which has opened up between the words on paper, the "black letter law", and the actual actions undertaken by politicians and officials to implement that law. The gap between words and action is obscured from adequate consideration, because contemporary forms of legal analysis lead us to view legislation and court decisions as quite separate from the behavior of politicians and officials toward the legislation. In fact, from the perspective of an individual or industry subject to pollution control law, the central reality is the pattern of actual behavior of public officials as they implement the law. Therefore, the analysis of law presented in this paper focuses on the process of legislation, and, in particular, stresses the actual behaviour of public officials and politicians towards legislation.

A second issue in the development of environmental law is the change in the nature of the control problems which must be addressed. For example, many recently identified pollutants cause harm and are distributed by means which are incredibly subtle and complex. These same pollutants are also capable of being deadly in practically undetectable amounts. The control problems posed by these new types of pollutants have the potential to significantly alter the nature of environmental law.

* Dr. Peter Finkle, a lawyer and political scientist, is currently Director of the Offshore Administration, Ministry of Energy, Mines and Petroleum Resources, British Columbia and Adjunct Associate Professor of Public Administration, University of Victoria. He formerly served as Senior Advisor for Political and Economic Analysis with Environment Canada. The opinions expressed in this article are personal and do not necessarily represent the views of the federal or British Columbia governments.

Another issue which law, or rather legislation, has been called upon to address is the problem of planning complex, technologically sophisticated projects in a manner which will assure that environmental and social concerns are addressed and ameliorated prior to construction. New procedural forms of environmental law have been developed to meet this challenge, but they may have the unintended affect of altering certain aspects of the Canadian political system.

The analysis which follows will first address the physical nature of the environmental problems which may confront Canada in the eighties, then turn to the various types of controls which environmental agencies have implemented or considered, and, finally, end in a discussion of environmental law and politics. A concluding section suggests where environmental law is likely to go in the eighties.

The Nature of the Environmental Problems of the Eighties

Governments do not necessarily attempt to resolve every kind of environmental problem which might arise.[1] To become a candidate for goverment concern, an environmental problem must meet two conditions. First, the problem must be perceived to be a physical problem; usually by the application of scientific analysis. However, in the last ten years, it has become evident that biological anomalies produced by trace amounts of certain substances may cause biological effects in a detectable form only after many years of exposure, or when certain complex preconditions are present. This gives rise to enormous scientific problems in demonstrating cause and effect linkages. The general problem is exacerbated by the understandable desire of most scientists to adhere to traditionally stringent standards of proof when deciding whether a cause and effect relationship exists. The determination that an environmental problem exists can be a difficult and time-consuming process.

The second step necessary to the governmental recognition of an environmental problem is equally complex. Once the set of facts surrounding a particular environmental situation is more or less agreed on (in practice, ambiguity can persist even after government has begun control action), the problem must be recognized by policy makers as one which should be resolved by government. The recognition of problems rests upon bureaucratic and political choice, and is made more difficult if it involves significant re-direction of research, a

1. An interesting and useful article on the subject of government decision-making in environmental matters is W. R. D. Sewell, *Environment and Health*, ed. N. Trieff (Ann Arbor, Ann Arbor Sciences Publishers, 1970).

restructuring of legislative and regulatory priorities, and/or development of new legal approaches. The analysis which follows focuses on four contemporary pollution problems, each of which has been seen by some writers to have the potential to cause major changes in our overall approach to control.

The environmental concerns of the sixties and seventies have dealt largely with what may be now termed the "management of non-persistent pollutants"; that is, the management of industrial or municipal pollutants which can be broken down relatively rapidly by natural processes into water and other natural components. Thus, a water course or airshed which has received a non-persistent pollutant could reasonably be expected to absorb a certain amount, or "loading", of non-persistent pollutants without undue harm. The amount which could be placed into the receiving medium varies depending on the exact nature and anticipated use of this medium. The concept of managing pollutants and the "tailoring" of the loading of pollutants to the particular use and nature of the recipient medium shaped the nature of most pollution control legislation and the administrative approach taken by most jurisdictions to pollution control.[2]

Though the problem of non-persistent pollution is unlikely to disappear as an environmental concern in the eighties, public and government attention is increasingly focusing on *persistent* pollutants.[3] This type of pollutant does not readily break down into its natural components and tends to cause harm at extremely low dosage levels. While there is a continuum from persistent to non-persistent pollutants, the essential differences between the two types

---

2. See, *e.g.*: The Alberta Clean Air Act, S.A. 1971, c. 6 and the Alberta Clean Water Act, S.A. 1971, c. 17 both Acts permit the use of site specific licensing and regulations, the licensing approach is fully detailed in both pieces of legislation and is more commonly used in practice. The Province of British Columbia utilizes a permit system but their Pollution Control Act S.B.C 1967, c. 34 allows standards (regulations?) to be made by a Pollution Control Board. Their permit approach (site specific) is most commonly used. In Ontario pollution control is usually through the Environmental Protection Act S.O. 1971, c. 86 and/or the Ontario Water Resources Act Citation. Both these complex statutes permit regulations on site specific licensing and both set, at least formally, very high standards. For example, section 32 of the Ontario Water Resources Act prohibits any discharge of material which, in the opinion of the Minister, may impair the quality of any water. The air pollution control portions of the Environmental Protection Act R.R.O. 1970, Reg. 15 are designed to control ambient air pollution. The Nova Scotia Environmental Protection Act S.N.S. 1973, c. 6 establishes a site specific permit system at section 23.

3. See generally R. Howard, "Poisons in Public" (Toronto: James Lorimer & Co., 1980); T. Page, "A Generic View of Toxic Chemicals and Similar Risks" (1978) 7 Ecological Law Qtly. 207; and especially R. M. Howard and D. A. Chant, "Ecotoxicity: Responsibilities and Opportunities" (Canadian Environmental Advisory Council, Report No. 8, Supply and Services Canada, 1980).

permit a useful if somewhat imprecise policy distinction to be drawn. Persistent pollutants are less susceptible to control regimes which focus upon a permissible loading for a particular medium, because these pollutants both persist locally and also spread geographically, sometimes through quite subtle pathways. Persistent pollutants frequently cause severe harm to biological tissues; and yet this may be difficult to document scientifically, since these pollutants may have effects only over very long periods of time, or may become concentrated to harmful levels in a complex "food chain". A variety of disturbing concerns regarding persistent pollutants have recently gained wide publicity. Persistant pollutants have generated, and probably will continue to cause, public alarm and government concern.

It is interesting to note how the physical differences between persistent and non-persistent pollutants have served to determine the nature of the control regimes which suggest themselves as appropriate to each class of pollutants. Non-persistent pollutants may be locally managed without catastrophic effects, even if local control is ineffective. But such an approach would seem foolhardy in the case of persistent pollutants. Similarly, one jurisdiction may choose to use a local watershed as a repository for non-persistent pollutants and forego the use of the water for other purposes without apparent harm to its neighbours. However, this same approach to persistent pollutants might give serious cause for alarm to neighbouring jurisdictions because it is nearly impossible to prevent the movement of persistent pollutants.

Noise, shade, and billboards are regarded by many as a significant category of environmental concern. While these problems can be serious and are, from a certain perspective, environmental issues, they have been traditionally resolved through zoning regulations usually at the municipal level. Though increased concern for these problems is evident, and new technical data suggests that the concern is not misplaced, it seems unlikely that the present approach to control will need to change.

A final category of environmental problems that might be mentioned for purposes of illustration is the broad category of severe land use problems. These concerns encompass the severe misuse of forested lands, as well as environmental problems associated with irrigation, the over-intensive use of agricultural land, and industrial development. These land-use problems are, from a historical perspective, perhaps the most ancient type of environmental issue. One need only recall how Israel, the land of milk and honey in biblical times, or the

fertile crescent between the Tigres and Euphrates rivers, deteriorated in their productive capacity because of agricultural and forestry practices, which caused severe erosion and changes in the micro-climate with almost irreversible results. Similarly, modern irrigation practices in Africa, (not to mention the Garrison Diversion in the United States) have the potential to cause excessive salinity in soils. The related problem of soil erosion which attended ancient, and to an extent, contemporary forestry practice, has also been cited by various authorities as potentially capable of producing severe and relatively permanent injury to land productivity.[4]

It is noteworthy that while various scientists have considered the general environmental concerns posed by various agricutural or forestry practices, governments have only rarely come to grips with these problems as a coherent whole. From the legal perspective, a wide variety of approaches have been taken by different jurisdictions in dealing with this general category of problems: for example, economic incentives for good forestry or agricultural practices and various regulatory approaches, including the control of land ownership. While this type of environmental problem has the demonstrated capacity to reduce, and even destroy, the productive capacity of vast land areas, it has not met with a coherent governmental or legal response commensurate with the extent and nature of the problem. Yet, although the evidence suggests that this kind of potential environmental problem may increase in the 1980s, it seems unlikely that a major governmental effort will be made in Canada, or indeed elsewhere, before the turn of the century.[5]

The difficulty of dealing systematically with large-scale land-use problems is due, in part, to a traditional legal attitude which sees the use of land as a private matter to be "influenced", if at all, by the market, tax incentives or municipal zoning laws, but as inappropriate for a direct regulatory approach. The environmental problems caused by the misuse of agricultural and forest land are unlikely to be viewed holistically, but rather as discrete issues. Moreover, the Canadian federal system complicates any governmental undertaking based on a "unitary" perception of land-use problems. Therefore, while issue-oriented land-use problems may be dealt with by various jurisdictions in the next decade, it is unlikely that new, systematic,

---

4. See: E. Eckholm and L. R. Brown, "The Spreading Deserts - The Hand of Man", Worldwatch Paper 13, August 1977, United Nations Publication.
5. See: L. R. Brown, "The Worldwide Loss of Cropland", Worldwatch Paper 24, Oct. 1978, United Nations Publication; and E. Eckholm, "Planting for the Future: Forestry for Human Needs" Worldwatch Paper 26, United Nations Publication.

legal approaches will be developed to address this ancient environmental problem in a scientific manner.

While this brief survey of four environmental problems does not exhaust the field, and omits in particular important issues of energy and resource depletion, it does encompass the major categories of environmental concern where man's activity produces as a "by-product" a specific physical change which may need to be controlled or ameliorated.

Governmental Approaches to Environmental Protection

This section of the paper examines four major governmental approaches to the control or amelioration of environmental problems. Each analysis will briefly examine the following: the general philosophy behind the approach; the major variants within each; the advantages and disadvantages which seem to be attached to the general approach and its variants; and the possible directions which may be anticipated in the eighties.

The first, and least direct, governmental approach to pollution control is the "educative approach" which is government's attempt to modify both the attitudes and behaviour of the general public and/or private industry. The educative approach may generally be divided into two distinct parts. The first is aimed at the general public, and the second is more specifically targeted, usually at industrial polluters.

Educative efforts aimed at the general public can take many forms, including, public seminars, public consultation programs, advertising, public relations, support of client organizations and sponsorship of research or other types of work. These efforts may have real impacts but, for the most part, the return on investment cannot be ascertained with precision. Government educative programs rarely are able to demonstrate that they have had as profound an impact as the work of writers like Rachel Carson. In addition, it is unlikely that government educative efforts would or could break new ground since they are developed and financed by public servants who are constrained both by the inherent conservatism of the bureaucracy and by the attitudes of the government in power.

Since government's general educative efforts are unlikely to be dramatically effective, it is worth inquiring into the reasons for the use of this indirect approach. While the reasons behind these programs are rarely fully articulated, they may be assumed to include an attempt to gain political support for both the government agency and its programs, a means of having some influence where there is lack of

jurisdiction or enabling legislation to pursue more direct programs, and, finally, a method of giving useful information to members of the public. The inherent drawback of these general educative efforts is that the "responsible" individual who alters his behaviour in ways which have costs attached may be placed in a worse position relative to his "irresponsible" neighbour. Also, from the perspective of environmental agencies, there is the possibility that "soft" educative efforts may become a substitute for more difficult pollution control activities.

The educative approach can also be targeted at industry with the use of unenforceable guidelines, standards, or codes of practice. This also may involve the development through consultation, scientific research, and other activities of non-binding pollution control limits for municipalities or, more usually, industry. The code or guideline is supposed to be adopted either through moral or political influence (good corporate practice), or at another level of government as an enforceable regulatory standard. From several perspectives the adoption and promulgation of guidelines and codes of behaviour is an activity which may have certain inherent problems.

First, unenforceable guidelines which are complied with by an industry or firm may penalize the good corporate citizen compared with the bad. Secondly, when a guideline is created by one government with the hope that it will be adopted by another, the stimulus to create a realistic and enforceable standard may be missing since the creator is neither confronted with the problem of enforcement nor with direct trade-off between the costs of pollution control and the desire for industrial developments. Finally, the government agency creating the guidelines may be seen to be indirectly regulating in areas beyond its jurisdiction with all the attendant intergovernmental problems which that could entail. On the other hand, the development of guidelines and recommended codes is a sensible and natural result of the research work of government. Moreover, it is unlikely in Canada that small municipal or provincial governments would be able to support their own research establishments in the environmental areas. It is more efficient for the government agencies with greater resources to create and publish the result of their work in the form of recommendations.

The educative approach to pollution control, whether in the form aimed at the general public or targeted at industry is an ubiquitous complex and subtle group of activities whose impacts defy assessment. The central problem is to distinguish in what situation these activities are an appropriate substitute for the more direct legal and economic

approaches which follow.

The second, most direct, governmental approach to the control of environmental problems is what may be termed "the penal law approach". It is characterized by the direct prohibition of certain actions as well as the use of punitive measures. The approach encompasses the following: general policy-setting legislation (which may range from being specific to vague); legislation which provides for broad regulatory authority; legislation which creates licensing requirements (which are generally site-specific) for the release of pollutants; or a combination of any of these variants. The most significant characteristic of this legal approach is that the background philosophy rests upon the idea that pollution is a wrong which should be punished. The thrust of the approach (even in the case of site-specific license type legislation which is designed to permit a certain amount of pollution) is punitive. Typical legislation of this type permits judges to penalize violators of the law with quite severe fines, injunctions or even prison terms.

As mentioned above in the section on environmental problems, there are two basic types of direct pollution control. The first, and most traditional, is to try to adjust specifically each pollution source to the use and nature of the receiving medium and thus reduce the economic costs of pollution control to the minimum appropriate to the situation. This site-specific licensing approach has the obvious advantage of low cost to industry as well as potential flexibility to changing circumstances. For example, if more industry is attracted to a particular location or a "higher" use is to be made of the receiving medium then a new, more stringent license could be issued to the plant or other facility.

The apparent benefit of flexibility is, however, largely nullified by the real engineering difficulties of adding pollution control devices to completed factories. Moreover, a potential change in licensing requirements, since it involves unpredictable expenses, can create a climate of uncertainty for business which is detrimental to long term financial planning. The distinct disadvantage to the site-specific approach is its administrative costs to government which arise because a separate license must be created for each plant. Moreover, it is possible to envisage identical plants (perhaps competitors) located in different parts of the jurisdiction facing very different pollution control standards. Finally, the licensing system will, realistically, involve some element of negotiation with the plant owners regarding the appropriate standard to be met in the license. These negotiations when conducted on a plant by plant basis necessarily

involve both duplication and possible trade-offs towards the lower licensing standards already issued by the government agency.

It is noteworthy that the disadvantages of site-specific licensing type legislation apply mainly to situations where concentrations of industrial plants already exist or are likely to exist. In relatively less industrialized jurisdictions however, the approach does have the advantage of low cost to industry with fewer administrative and other costs to the pollution control agency. It is likely that the site-specific approach to substantive law will remain a part of Canadian environmental law through the eighties and beyond, but it will probably diminish in significance as it is replaced by the broad regulatory approach which focuses on classes of industries.

The second basic type of direct environmental law involves a regulatory scheme that is designed to control classes of industry. The broad regulatory type of legislation emerged in the sixties as an administratively simpler way to control non-persistent pollutants. It now seems to be the most appropriate control strategy, both for the persistent pollutants as well as non-persistent pollutants in industrialized jurisdictions. This approach largely ignores the receiving medium (whether water or air) and focuses on the pollution control devices which may be applied to the pollution source regardless of the nature or use of the receiving medium. The obvious disadvantage is that the approach is not sensitive to the potential dispersive and absorptive qualities or the uses of the receiving medium. It, therefore, sometimes requires stringent controls in situations where a site-specific approach might require either minimal or no controls. This tendency towards stringent pollution control standards gives rise to fundamental internal conflicts when applied to non-persistent type pollutants. If the regulation is to be meaningful in intensely industrialized areas, the standard must be stringent, but such a standard may seem unduly constraining when applied to plants in less industrialized locations. This internal problem is fairly easily resolved in dealing with persistent pollutants which may pose serious threats to health because the application of the most rigorous pollution control possible seems a prudent precaution. The problem, however, is difficult to resolve in determining appropriate pollution control standards for non-persistent pollutants. Moreover, the more diverse and extensive the geographic area where the standard is to be applied, the more difficult it is to determine an appropriate single standard.

The inherent disadvantages which exist in certain situations may be set against the administrative simplicity which is offered by the

broad regulatory approach. A decisive advantage (depending on one's perspective) is that this legislation tends to err on the side of greater stringency and may prevent undue exposure to persistent pollutants that may be present in almost undetectable amounts in non-persistent type pollutants. It should be noted that from the point of view of business, the broad regulatory approach has the advantage of placing all competitors within a single jurisdiction on an even footing and making the cost of doing business, if higher, at least predictable.

Returning to a more general consideration of the penal law approach, it is noteworthy that environmental controls are applied to certain industrial or municipal wastes (or even products) but do not regulate industrial or governmental planning. This essential shortcoming has resulted in the creation of a new approach to environmental problems devoted to assuring that environmental considerations would be a part of the planning process and would not simply be added on to ameliorate, perhaps at considerable cost, predictable and avoidable environmental problems.

This governmental approach to resolving environmental problems may be termed "the procedural approach". It has as its central purpose the inclusion of environmental considerations in the planning process of government and, by extension, to government subcontractors in the private sector. The philosophical underpinning of this legal regime involves influencing the government agency or sub-contractor who is undertaking a project which will effect the environment to take environmental (and social) values into consideration in its planning, implementation and operations. In addition, the procedural approach is a method of coping with the tangle of highly technical environmental and social problems connected with complex projects. Experience demonstrates that it is insufficient, expensive, and impractical to await environmental damage and then attempt to undo or ameliorate the situation with traditional penal law. Instead, environmental and social factors would be made part of the planning process through an imposed procedure. Finally, the procedural approach is a response to public demands for an independent evaluation of projects.

The Canadian expression of this approach is found in the Federal Environmental Assessment and Review Process and in various provincial processes. In general, the Canadian processes, whether grounded in legislation or administrative procedure, permit a small board to examine highly technical environmental and other data as well as public perceptions of the project. The board, after considering

the alternatives, technical data, and public submissions makes a recommendation to the minister, or other responsible official who then takes the final decision on the project.[6] The American National Environmental Policy Act is similar in that an Environmental Impact Statement is prepared by the proponent agency which must examine all technical data and receive public input on environmental and social problems associated with the proposed project and alternatives to the projects. The final decision on the project under American legislation is left to the politically appointed head of the proponent agency.[7]

There is little question that these procedures fill a void in government's methods of coping with environmental problems. Moreover, there is little doubt that this type of legal mechanism will play a growing role in Canadian environmental law. A variety of basic questions, however, may have to be addressed regarding these developing procedures. First, while there is every evidence that project proponents, developers, and others will go through the required procedures, it is not so clear that the procedure actually accomplishes its stated mission of making environmental values a part of the planning process. At this point in the development of Canadian procedures it may be too soon to assess the impact of their imposition, but some American studies have presented evidence which suggests that, at least in that country, the procedures may not have had the desired impact on the planning process.[8] In Canada, we should eventually be prepared to examine closely the impact of the process on planners and developers.

A more serious problem with the procedure adopted in both Canada and the United States is that the very exhaustive focus on technical and social detail, the comprehensiveness of the procedure and the expense of the process, may combine to effectively restrain

---

6. For example, this is the approach adopted at the federal level and in Saskatchewan. Ontario vests decision-making power in the board. Even under the Ontario act the Minister must ultimately accept responsibility for the final decision. If he is not satisfied with the board decision, he may within 28 days of receiving the decision with Cabinet approval replace the board decision with his own.

7. National Environmental Policy Act, 1969, s. 103.

8. On this point see the criticism of EARP by W. E. Reese, "Reflections on the Environmental Assessment and Review Process (EARP)", August 1979, with minor revision Nov. 14, 1979 (unpublished discussion paper prepared for the Canadian arctic Resources Committee) and more generally the criticism of the way in which the environmental assessment concept has been developed in Canada by D. P. Emond, "Environmental Assessment Law in Canada" (Emond Montgomery Pubishers, 1978). I should also note that I profited greatly from a number of conversations with Prof. Paul Emond on the general subject of environmental assessment.

political decision makers from exercising their formal final authority. The technical weight of the report when combined with the absence of articulate alternative options may preclude real political decision making even though formal authority is technically preserved.[9] This drawback may be overcome by relatively minor changes to the procedure which would assure that several recommendations result from the process, instead of just one. The Canadian Environmental Review Process could, for example, be altered to require that each panel member prepare his or her own recommendation and supportive arguments. The final decision maker would then have four or five articulated opinions about the project. Even though each is based upon the same set of facts, the variety of opinion could provide the political decision maker with real options, and the opportunity to exercise a meaningful choice.

The final point about the procedural approach is that it does not appear to have, at least from the conceptual perspective, a clear limit. While the approach developed as a method to cope with the technical complexity of the impacts of large projects and to satisfy a new public demand to be consulted, there seems little logical reason to restrict the processes to single projects. Indeed, the American experience in this area effectively demonstrates the tendency of the process to expand both in scope and in factors—social, economic and cultural—to be considered.[10]

During the eighties, it is likely that Canada will see a very rapid increase in the use of procedural processes to solve complex social and environmental problems arising out of industrial development. This increase will, in all likelihood, occur without assuring that the various processes preserve real choice for politicians. While many politicians, academics and public servants are aware of the problem of the gradual erosion of political choice available to politicians, there has so far been little sustained effort to counter that tendency. It is unlikely, therefore, that a refinement of the process to preserve real political choice will take place in the eighties.[11]

---

9. This point is perhaps best illustrated in the context of one of Canada's first and certainly most celebrated environmental impact assessments, "The Mackenzie Valley Pipeline Enquiry" (Berger Report). Although Mr. Justice Berger's Report was only a recommendation (that a decision on the pipeline be delayed for ten years), the weight of the report was such that the government had little real option other than to accept it.
10. See, *e.g.* Mr. Justice Skelly Wright's landmark decision in *Calvert Cliffs Coordinating Committee* v. *The Atomic Energy Commission* 449 F 2d 1109 (O.C. Cir. 1971).
11. See *e.g.* Flora MacDonald, "The Minister and the Mandarins" (1980), 1 Policy Options Politiques at 29.

The final approach to environmental control which will be discussed has been more proposed than implemented. What may be termed the "economic approach" has been discussed by economists and others as a means of limiting environmental damage without resorting to the allegedly inefficient, coercive, penal law approach. The central idea behind the economic approach is to harness the power of the market system to gain both technologically innovative and economically efficient environmental controls. In its optimum form, the approach involves intervention by the State to sell freely negotiable licenses to pollute a particular waterway with a specified amount of a pollutant. These legal instruments could then be bought or sold by various companies which need or want to discharge pollutants into that medium. Since the instrument has a dollar value, a company which devised new means to reduce its discharges would need fewer of these negotiable instruments, and would thus save money. Moreover, all would have some financial incentive to reduce discharges.[12]

The first problem with this approach is that the attendant value system appears to view pollution as a neutral occurrence which is not in itself bad. This assumption contrasts sharply with the penal law approach which views pollution as a wrong and ultilizes direct coercion to gain compliance. It may not be necessary to take a position on these contrasting approaches, but it seems that environmental law is based to a large extent on the notion that environmental degradation by pollution is a wrong, and that this attitude is shared by most of the public. The underlying philosophy militates against the wholesale adoption of a totally new approach to pollution control. A second, and more serious, objection to the adoption of the economic approach is that it seems inappropriate to the problems posed by persistent pollutants. With respect to these pollutants, few politicians would approve of any control system which did not clearly reduce the discharges to the minimum level commensurate with technical capacity. It is unlikely that any government in Canada would approve of any comprehensive plan to implement the economic approach to pollution control discussed above. However, several governments have implemented less extensive economic systems, either through direct subsidies or modifications of the tax

12. See *e.g.* Thomas H. Tietenberg, "Transferable Discharge Permits and the Control of Stationary Source Air Pollution: A Survey and Synthesis" (1980), 56 Land Economics 391; Richard S. Campbell *et. al.* "Water Management in Ontario - An Economic Evaluation of Public Policy" 12 Osgoode Hall L. J. 475 (1974) and J. Dale, "Pollution Property and Prices" (University of Toronto Press, 1968).

system, both of which are designed to provide industry with a financial motivation for the installation and/or operation of pollution control devices.[13]

This modified type of economic intervention is pursued in two distinct situations: first, where enforceable legislation applies, and, second, where governments have created unenforceable guidelines. In either case, the economic argument can be made that government subsidies are generally too small to have a decisive effect on corporate behaviour. The usual situation is that pollution control devices constitute significant capital and operational costs which do not generate revenue. In this situation, government subsidies, unless they are massive, do little more than provide a more or less minor reduction in a large negative cost. The subsidy does not provide a positive profit motivation, except in the rare situation where pollution control involves a recovery process, which is in itself almost profitable. The government subsidy, then, may tip the scale to make the installation and operation a profitable undertaking.

From a philosophical perspective, however, it seems strange to ask society to pay a corporation to do what it is legally required to do in any case. There is always a theoretical case for government to subsidize industry in certain circumstances, where special encouragement or protection seems justified in the public interest, but this seems quite separate from the public interest in pollution control.

In one other situation, strong political support for the use of economic intervention by government in pollution control problems has occurred and will continue. The marginal plant which claims that the expense of pollution control devices will force the plant to close has been a common object of a variety of subsidy plans. It is, however, very difficult to link the marginality of the plant solely with a question of pollution control; rather it is likely that a wide variety of problems beset the operation, only one of which is pollution control. As in the other circumstances described above, the question of subsidy should be treated separately from the problem of pollution control.

These various approaches to preserving and protecting the environment are based ultimately on political will and public acceptance. The next section of the paper will examine the dynamic relationship between environmental law and politics.

---

13. See *e.g.* Accelerated Capital Cost Allowance provisions in the Federal Tax Regulations Citation and, in Ontario, the Pollution Abatement Incentives Act R.S.O. 1979, c. 352.

Politics and Environment Law

Most approaches to Canadian law generally, and environmental law in particular, tend to view legislation separately from the political and administrative aspects of enforcement. It is often said by jurists, lawyers and public officials that a good, strict law exists, but that there is a lack of public or political will to enforce the law. This anomaly tends to obscure how the legal process appears to those subject to it, and, worse, encourages the participants in the legal process to blame others for the actual outcome of the process. For example, it is not unusual to find a piece of environmental protection legislation which declares, albeit in a vague and general fashion, that pollution contrary to a statute (or regulations or licensing authorized by a statute) is punishable by a severe fine or even imprisonment. This seemingly powerful legislation may not, however, be regularly enforced against violaters. Instead, negotiation to gain "voluntary" compliance might proceed for years, even decades, with only an occasional action at law undertaken for noncompliance. Legal action, even when pursued and successful, may result in only a small fine of perhaps a thousand dollars and even obedience to a court injunction may be the subject of further lengthy negotiations.

In the above scenario, the legislator, the judge and the official each must face difficult decisions, which are rendered no easier when the actors view their parts separately. On the other hand, from the perspective of the industry the relevant outcome is a compilation of the behaviour and actions of all. While the "black letter" of the legislation says one thing, the customary, routine activities which are supposed to be affected present quite a different message. Though the written environmental legislation in a particular jurisdiction is stringent, industrial and other polluters accurately perceive, on the basis of the routine, habitual and expected behavior of public officials and politicians, that there exists little likelihood of any serious legal action being commenced against them for the violation of that legislation.

Traditional forms of legal analysis do not equip us to come to grips adequately with that type of problem. Moreover, a purely political analysis, which suggests that the problem is a failure by the politician or the public to demand strict enforcement, does little to explain either how stricter enforcement might be achieved or what results, if any, follow from enforcement that is sporadic at best.

It may be worthwhile, then, to attempt a different analytical approach to Canadian environmental law. Like other areas of law, environmental law might be viewed as a *process*, which is reflected not only in the prescription of the legislation and the decisions of

courts, but also in the mutual expectations aroused in the public, the appropriate sectors of industry, and the relevant levels of government. To take an extreme example, the text of the Soviet Constitution and the decisions of the Soviet Courts about that document yield very little information about the actual rules which prevail. In truth, the most important thing to know about the rules which operate in society is what people and government really expect to happen as a result of these rules. When law is viewed from this perspective, it is difficult to defend a severe fine when it is in practice never applied. Strict legislation which is not likely to be applied may be found to be an obstacle to meaningful environmental control, rather than a benefit. Similarly, overly general environmental protection legislation may, through this analytical lens, be seen less as a wise grant of discretionary authority, than as an unwieldly tool unlikely to be applied except with difficulty.

This "process' approach to law - an approach advocated by Myres S. McDougal and the late Harold D. Lasswell of Yale - also helps us to evaluate some of the complaints made by industry about environmental legislation.[14] If no general pattern of enforcement action exists, it would be surprising indeed to find an industry undertaking to comply voluntarily with the legislation. Plants which comply with a particular enactment without any expectation of enforcement will soon find themselves at a disadvantage vis-à-vis their competition which ignore the same legislation with impunity. One might argue that a "reasonable" industry would first ascertain the "real" rules before complying with the legislation. In fact, to a very large measure, that is exactly how industries, like individuals, decide to obey or ignore most legislation.

This brief conceptual analysis of the problems relating to administration and enforcement of environmental law suggests that the environmental legislation and regulations should be drafted with a more realistic evaluation of the political problems of administration and enforcement. The analysis also suggests that the kinds of legislation and regulations which clearly and precisely define the activities that officials and politicians are seriously intent on controlling are, in the end, the most equitable and efficient. When there is less of a gap between the written legislation and the behaviour of the politicians and officials, the industry, municipalities and individuals can more read-

---

14. A short statement of the Lasswell-McDougal approach may be found at M. S. McDougal, "Law as a Process of Decision: A Policy-oriented Approach to Legal Study" (1956) 1 Natural Law Forum 53.

ily order their behaviour to comply with the rules. On the other hand, even vague legislation may be rendered clear through action.

A regular pattern of behaviour by officials, politicians, and courts will eventually make clear the significance of even vague legislation. Finally, the analysis suggests that certain devices which tend to produce a regular, predictable outcome following the violation of an environmental law or regulation could promote compliance by demonstrating that active enforcement will be undertaken in all cases. In this category of devices one might place freedom of information, provisions that enhance the already existing right for citizens to bring an action on behalf of the crown, fixed minimum sentences, and clearer evidentiary requirements.

Another aspect of this analysis is that not only do politicians and officials "send" messages with their behaviour about a statute but they also rely on the behaviour of others to ascertain how a legal situation should be viewed. This suggests that when clear patterns of behaviour are missing regarding important jurisdictional or constitutional issues the governments involved will, basing their assessment on behaviour not "black letter" law, perceive the absence of effective rules. This can prompt competing governments in a federal system to move to occupy the field with the result of open, unregulated political competition. This situation may produce difficult, even rancorous, federal-provincial relations. The absence of patterns of behaviour to indicate settled rules sometimes exists despite a Supreme Court decision which supposedly defined the rights in the situation. While the scope of this paper precludes a full discussion of constitutional issues from this analytical perspective, the central point is that an absence of clear, consistent behaviour to buttress and effectuate legal, constitutional or jurisdictional rights may create intergovernmental situations that are extremely difficult to resolve.[15]

Outlook of the Eighties

One of the most significant and persistent trends at all levels of government during the last five years has been the tightening of the budgetary process and a general climate of restraint in government spending. This trend, while initially associated with broad economic and fiscal retrenchment in Canadian society, will likely continue even if the economic conditions significantly improve. The trend towards

---

15. Portions of this section have appeared in a different context in "Enforcement of Environmental Law: Taking the Environment Seriously," University of British Columbia L. R. Fall, 1982 (co-authored with Professor Murray T. Rankin, University of Victoria).

budgetary restraint is evident to a surprising degree in governments located in regions of high economic growth. Moreover, the trend toward budgetary restraint in government seems to be manifest in almost all western nations.

A related trend in Canada, and world wide, is an increasing demand for general societal stability. This has often been seen as a movement toward the political right, but may perhaps be more accurately seen as growing public demand for government and societal stability. In Canada, this trend has been somewhat overshadowed by the recent acrimonious constitutional debate, but may already have begun to be discernable. Therefore, it seems likely that more stable federal-provincial relations will characterize the latter two thirds of the decade. One significant aspect of future federal-provincial relations will be clarification, sharpening and rationalization of jurisdiction. This trend, which has already begun, will intensify. The reasons behind the development are clear; distrust between governments, as between people who must work and live together, can be resolved better through clear mutual understanding of each other's rights and responsibilities. The famous quote, "Good fences make good neighbors", is likely to be a capsule description of federal-provincial relations in the eighties.

Finally, and more particularly in the environmental area, one of the central concerns of the eighties is likely to be growing public fear of persistent toxic substances in all their forms. This is already evident in the present fads for natural foods but will probably grow as more sophisticated scientific techniques increasingly reveal how these substances impact on man and his environment.

The above description of general trends, if reasonably prescient, suggests several significant changes in future Canadian approaches to environmental problems. First, there will probably be a significant decrease in resources available for educative approaches to environmental control whether aimed at the general public or more specific targets. As budgets continue to be constrained, those environmental programs most directly defensible and most clearly within the perceived jurisdiction of the government in question will take precedence over other programs. Hence, the eighties will not only see a reduction in all forms of educative approaches, but will also witness the gradual demise of "cost-shared", "joint" and many other federal-provincial programs.

A major exception to this trend will be the growth of all varieties of procedural approaches to environmental assessment including joint federal-provincial assessment procedures. The growth of the proced-

ural approach, a relatively inexpensive form of control, is a response to budgetary pressure as well as the continuing demand for integrated, technical and comprehensive planning of large projects. Moreover, the procedural approach to environmental control, since it formally involves only a recommendation to a government, can be made a joint federal-provincial process with no threat to the political authority of either government. While there is every indication that both federal and provincial procedural approaches to environmental control will expand significantly, it is unlikely that the procedures will be refined to assure that real political choices will be available at the political level. The fact that from a formal, "letter of the law" perspective, final decisions are reserved for the political level will be taken as a sufficient safeguard. Significant changes in the procedural approach to law will await a more general demand by politicians and the public for real decision making to be returned to the politicians. There are few indications that we are approaching that potentially radical change in our approach to politics.

Despite the fact that significant changes in procedural environment are unlikely, there is a possibility of major changes in the area of penal law. The growing public concern over persistent pollutants of all types when combined with the physical properties of these pollutants may provide the key both to meaningful changes in penal law and to a sensible realignment of federal-provincial jurisdiction in the field of environment. For example, those persistent pollutants which both pose a significant threat to health and move so readily that they defy containment within one province might sensibly be regarded as inherently interprovincial in character. This characteristic combined with the need to control such substance creates a formidable political and constitutional argument for federal responsibility. While the analysis does not resolve other possible disputes over jurisdiction, it does provide a meaningful beginning in the process of negotiation which must follow.

Regardless of the details of the federal-provincial division of authority over persistent pollutants, it seems clear that public pressure will increasingly demand both stringent laws and active enforcement. Moreover, the public fear of persistent substances will result in regulations which aim at the imposition of stringent standards regardless of the use or nature of the receiving medium. Hence, governments will increasingly use broad regulatory programs, as opposed to licensing approaches when controlling persistent pollutants and may be drawn to bring administration and enforcement into closer harmony with written legislation.

An interesting question which arises from this discussion is to what extent will a jurisdiction be able to pursue two conceptually different approaches to pollution control. Will it be feasible for a jurisdiction to use a licensing aproach which may not be characterized by regular enforcement in one situation and, in another set of circumstances, follow a broad regulatory approach with strict enforcement? The answer to this question will determine to a large measure the shape of environmental control legislation in Canada during the next ten years.