

# POLLUTION AS A CRIME: THE FEDERAL RESPONSE<sup>1</sup>

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## INTRODUCTION:

The year 1970 marked the beginning of several new federal legislative initiatives aimed at providing more effective federal controls over certain of Canada's common property resources. There are three major statutes that are applicable, and this paper deals with these and some of the issues raised by them.

## FISHERIES ACT:<sup>2</sup>

The Federal Minister of the Environment has frequently pointed to the Fisheries Act<sup>3</sup> as the principal statute which the Federal Government will use to develop and promulgate national effluent standards aimed at controlling the waste discharge practices of a variety of specified industries. The stated objectives in setting such standards are the preservation and enhancement of the quality of Canadian waters. Recent amendments<sup>4</sup> to the Fisheries Act when combined with the existing regulatory powers found in Section 34 make it possible for these objectives to be achieved.

Prior to the new amendments the act prohibited the direct or indirect deposit into waters frequented by fish of a variety of prejudicial or deleterious substances. These substances included ballast, coal ashes, stone, the offal of fish or marine animals, decayed or decaying fish, nets or related fishing apparatus,<sup>5</sup> lime, chemicals, drugs, poisonous matters,<sup>6</sup> and debris generated by persons engaged in logging, land clearing or related operations.<sup>7</sup> Prohibitions such as these reflected a relatively narrow and low level concern for the preservation of the quality of Canadian waters and no obvious concern at all for restoring those waters already dead or dying. A higher level of concern is reflected in the amended Section 33. For example, the principal pollution offence now found in the Act (the one with the greatest potential for criminal prosecutions and the one with which all persons carrying on waste generating practices should be concerned), is contained in amended Section 33(2). The Act now makes it an offence for a person to:

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1. The text of this paper was originally delivered to the Pollution Program of the Department of Continuing Education, the Law Society of Upper Canada, May 11th and 12th, 1972.
  2. Fisheries Act R.S.C. 1970 c.F.14, as amended by 1969-70 C.63 (1st supp. c.17) herein-after cited as the Fisheries Act.
  3. See for example "Maritime pulp mills singled out for attack in new Fisheries Act", *Globe and Mail*, Monday, February 2, 1970.
  4. See Fisheries Act, Sections 33(2) and 33(4) - 33(11) inclusive: Section 33A, 33B, 33C and 33D, all proclaimed in force as of July 15, 1970, S.O.R./70-29, *Can. Gaz. Pt. II*, Vol. 104, No. 15.
  5. Fisheries Act R.S.C. 1970, F.14 s.33(1)
  6. id s.33(2)
  7. id s.33(3)

"... deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substances or any other deleterious substances that results from the deposit of that deleterious substance may enter any such water."<sup>8</sup>

A deleterious substance is defined as:

"... 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 deleterious to fish or to the use by man of fish that frequent that water, or

"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 deleterious to fish or to the use by man of fish that frequent that water . . .".<sup>9</sup>

The Act further provides that "... without limiting the generality . . ." of the preceding definition the phrase 'deleterious substance' includes (1) substances and classes of substances,<sup>10</sup> (2) quantities or concentrations of substances and classes of substances in water,<sup>11</sup> as well as (3) treatments, processes and changes in water<sup>12</sup> where these have been proscribed by the Governor in Council.<sup>13</sup>

The definition of a deleterious substance is sufficiently ambiguous that it is difficult if not impossible to say with confidence whether or when a particular substance is deleterious within the meaning of this definition. Clearly a substance is deleterious if, when added to water, it so degrades the receiving water that it becomes deleterious to fish.

Sawdust deposited on snow and ice, but which eventually found its way into waters frequented by fish<sup>14</sup> and mud and silt which settled in spawning grounds after being deposited in the tributary of a river frequented by fish,<sup>15</sup> have been held to be deleterious substances. But are these and similar substances still deleterious if the deposit of a small quantity of them in the same volume of water, or of the same quantity in a large volume of water causes no sensible deterioration in the quality of that water? A similar question arises in respect of categories of substances such as nutrients. Phosphorus is a nutrient which may degrade water and be deleterious to fish only with the passage of time. The major problem created as a result of the inflow of phosphorus compounds into waters is not the pollution but the enrichment of the receiving waters. What in fact happens as a consequence of this nutrient addition is that

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8.	The Fisheries Act	s.33(2)
9.	id	s.33(11) (a) (i) (ii)
10.	id	s.33(11) (a) (iii)
11.	id	s.33(11) (a) (iv)
12.	id	s.33(11) (a) (v)
13.	id	s.33(12)
14.	<i>Regina v. K.P. Wood Products Co. Ltd.</i> , in the Provincial Court of British Columbia before his Honour Judge D. M. MacDonald, Kamloops, B.C. July 2, 1971.	
15.	<i>Regina v. Kamloops Pulp and Paper Company Ltd.</i> , unreported judgement of His Honour Judge S. Van Male, Kamloops, B.C., June 17, 1971.	

the waters are initially enriched but because of this unnatural enrichment (assuming a non-natural source of phosphorus) the eutrophication of those waters is accelerated and the water suffers an untimely death. In time, and as a consequence of this process, the waters will become deleterious to fish, if for no other reason than that the nutrient generated growth and subsequent decay of aquatic plants consumes the oxygen on which the fish rely. Is it sufficient for a charge under the Act that a substance which is being deposited in the waters will eventually render that water deleterious to fish, or is it necessary for the substance to have a more immediate negative impact? These kinds of questions should be considered by any lawyer who has a responsibility to advise a client who is or who anticipates carrying on an activity which will generate some waste as a by-product of that activity. Some lawyers have already asked these questions and as a consequence have challenged the constitutional validity of this part of the Fisheries Act.<sup>16</sup>

The need for such a concern is even more obvious when one considers the law as presently written. If any person, corporate or otherwise, is presently discharging any waste by-product into any Canadian waters frequented by fish, and if that waste by-product is a deleterious substance within the statutory meaning of that term, then this person is liable to be prosecuted for a violation of Section 33(2) of the Fisheries Act. The absence of knowledge or 'mens rea' is a doubtful defence.<sup>17</sup> The best defence is being able to argue that the wastes being deposited are of a type and quantity for which standards have been fixed in regulatory form and that they are being deposited under conditions which have been prescribed by regulation. When regulations are in existence, the deposit of a deleterious substance becomes an offence only if the deposit is contrary to the governing regulations.<sup>18</sup> In any case, if there is a deposit contrary to law, whether it be contrary to a section in the Act or to a regulation passed pursuant to the Act, the convicted offender is liable to have the same sanctions imposed. Offenders may be fined a maximum of \$5,000 for each offence<sup>19</sup> with each day being a new offence.<sup>20</sup> There is provision also for an order of the court prohibiting the convicted person from committing any further such offence or requiring such a person to cease carrying on any activity specified in the Order which, in the opinion

16. See Constitutional Issue raised in the Vancouver Sun of April 15, 1972. According to this news report Friell Lake Logging Ltd., has been charged under the Fisheries Act (apparently Section 33(3)) with putting stumps, slash and other debris into the Malksope River, a salmon spawning stream 90 miles west of Campbell River. Lawyers for the accused are reported as saying that: "The question to be determined is to what extent the federal government can control or effect a provincial right — such as a right to log."

17. See e.g. *The Queen v. Pierce Fisheries Ltd.*, [1970] 12 D.L.R. (3d) 591; *Regina v. Churchill Copper Corporation Ltd.* [1971] 4 W.W.R.481.

18. *The Fisheries Act* s.33(4)

19. *id* s.33(5)

20. *id* s.33(6)

of the Court, will or is likely to result in the commission of further such offences.<sup>21</sup> Furthermore, should the Minister direct that action be taken to repair or remedy the offending conditions, or to reduce or mitigate damage caused by the proscribed activity, the Act now provides that the Crown may initiate civil proceedings to recover all reasonable costs from the person responsible.<sup>22</sup>

There are few federal regulations passed pursuant to the regulatory powers of the Fisheries Act or any other relevant statute which prescribe both the kinds and quantities of deleterious substances which may be deposited with immunity and the conditions under which such deposits can be made. Substantial publicity has been given to the Pulp and Paper Effluent Regulations which came into force in November of 1971.<sup>23</sup> No publicity has been given to the fact that these regulations do not apply to any pulp mills presently operating in Canada. The regulations provide that they shall apply to new, expanded, altered and existing mills<sup>24</sup> on or after the date specified in Schedule F of these regulations.<sup>25</sup> According to Schedule F the regulations were made applicable to new, expanded and altered mills on November 24, 1971.<sup>26</sup> The regulations do not apply to existing pulp and paper mills because Schedule F has not specified a date of application to such mills. Further, there is no provision, either in the Act or in the regulations, to allow existing mills to deposit deleterious substances until such time as the regulations are made applicable to them. It follows that each existing pulp mill in Canada which presently deposits a deleterious substance contrary to Section 32(2) of the Fisheries Act is, and shall continue to be, in contravention of that Act until the regulations are made applicable to such mills. In any case, the regulations set standards for only three categories of deleterious substances: total suspended solids,<sup>27</sup> oxygen demanding decomposable organic matter<sup>28</sup> and toxic wastes produced by a mill.<sup>29</sup> There is no pretence that these are the only deleterious substances generated in pulp mill operations; yet all other substances are not presently regulated.

More recently, regulations have been published in the Canada Gazette which seek to control the discharge of mercury or mercury compounds from plants which produce chlorine or sodium hydroxide by the electro-

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21.	id	s.33(7)
22.	id	s.33(10)
23.	Pulp and Paper Effluent Regulations, P.C., 1971-2281 November 2, 1971, hereinafter referred to as the Pulp Regulations.	
24.	id	s.2(1)
25.	id	s.6
26.	id	Schedule F
27.	id	s.3(1) (a)
28.	id	s.3(1) (b)
29.	id	s.3(1) (c)

lysis of sodium chlorine brine.<sup>30</sup> Why the Governor in Council has taken steps to control this particular elemental metal rather than any others is probably explained by the publicity which has been given to it. While there was an awareness of and concern for both the real and potential dangers of mercury contamination prior to 1970, the newspapers gave substantial coverage that year to this particular problem. In the *Globe and Mail* of Saturday, January 10, 1970, the Honourable Jack Davis, then Minister of Fisheries, identified one or more plants in Saskatchewan as the probable source of the mercury contaminating the Saskatchewan River. Commercial fishing in Lake Winnipeg had already been stopped. The Minister went on to state that in order to keep the contaminated fish from the market place and to ease the economic plight of the fishermen, the Federal government would continue to buy contaminated pike and pickerel taken from the river (at market prices). He claimed that more than \$100,000 had been spent in the preceding two months, and that as much as \$400,000 might be spent before the river was fully cleaned. Subsequently, it was reported that the alleged offender would clean up its practices and refrain from further dumping.<sup>31</sup> Other dimensions of the problem were written about. The Commons Standing Committee on Miscellaneous Estimates heard testimony that mercury and other heavy metals such as lead were being found in food products including fish.<sup>32</sup> Commercial fishing in Lake St. Clair was banned by the Federal government<sup>33</sup> and more than sixty commercial fishermen were deprived of their traditional livelihood.<sup>34</sup> Even the right of the fishermen to collect unemployment insurance was questioned.<sup>35</sup> The Honourable George Kerr, then Ontario Minister of Energy and Resources Management, ordered eleven Ontario plants to stop using or discharging mercury.<sup>36</sup> A ban on the sale of perch and pickerel from Lake Erie threatened the jobs of one thousand people employed in the fishing industry.<sup>37</sup> Next, Saskatchewan banned all fishing on the Saskatchewan River for 300 miles, from Saskatoon east as far as the Manitoba border. The reason given for the ban was the unsafe mercury residue levels found in fish throughout that river system.<sup>38</sup> At the time, Windsor fish merchants<sup>39</sup> and Ontario tourist camp operators<sup>40</sup> were publicly complaining that they had suffered an economic loss because of the mercury contamination, and shortly there-

30. *The Canada Gazette, Part II, Vol. 106, No. 7, Ottawa, Wednesday, April 12, 1972, p.436.*

31. *Globe and Mail, Tuesday, January 20, 1970.*

32. *id Wednesday, March 18, 1970.*

33. *id Wednesday, March 25, 1970.*

34. *id Thursday, March 26, 1970.*

35. *id Friday, March 27, 1970.*

36. *id Wednesday, April 1, 1970.*

37. *id Thursday, April 2, 1970.*

38. *id Friday, April 17, 1970.*

39. *id Saturday, April 4, 1970.*

40. *id Saturday, April 18, 1970.*

after Howe Sound on the Canadian West coast had to be closed to fishing.<sup>41</sup> Two days later the public learned that the estimated loss to the Manitoba fishermen was between \$2.5 million and \$5 million and that up to 1,000 persons had been put out of work.<sup>42</sup>

With the concern which this publicity both created and reflected, the government had good reason to take steps to prohibit those practices which gave rise to the mercury problem. And, while we may begin to relax on the assumption that these regulations will reduce the mercury contamination problems to manageable proportions, we must not assume that these problems have been solved. Similar problems, perhaps even similar crises, are almost guaranteed if the current available literature is correct.<sup>43</sup>

Apart from the regulations to which reference has just been made, there are no regulations in existence which are applicable to any person whose present activities result in his depositing deleterious substances into waters frequented by fish. It is worth emphasizing that the discharge of any substance which comes within the statutory definition of a deleterious substance and which is not otherwise legally justified is, and will continue to be, an offence under the Fisheries Act until there are regulations. But before there can be regulations several time consuming steps have to be taken. Standards must be determined for each deleterious substance intended to be regulated, regulations must be passed proscribing these substances and incorporating the recommended standards, and these regulations must then be made applicable to the offending party. Until this is done there are undoubtedly a considerable number of persons whose present and proposed activities leave them defenceless to a charge under the Fisheries Act.

There is one other substantial amendment to the Fisheries Act which is relevant to any consideration of possible prosecutions under the Act. It is now possible for any employer or principal to be criminally liable for the action of his employee or agent. The Act provides that in any prosecution for an offence under Section (33):

“ . . . it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.”<sup>44</sup>

This provision, which subjects an employer or principal to the possibility

41. *id* Wednesday, April 23, 1970.

42. *id* Saturday, April 25, 1970.

43. See e.g. **Toxic Substances**, prepared by the Council on Environmental Quality, April, 1971, Publication of the Council on Environmental Quality, U.S. Government Printing Office.

44. The Fisheries Act s.33(8)

of a criminal prosecution as a consequence of the act of his employee or agent, deserves serious consideration. This is particularly so when, as is here provided, the liability will fall unless the accused principal or employer establishes that the offence was committed without his knowledge. While the placing of the onus of proof upon the accused is not foreign to Canadian law, being branded a criminal because of a statutorily created vicarious responsibility is less common. There are good reasons for provisions such as these but their presence is remarkable because of the substantial onus they place upon anyone who must defend himself against a charge under this section.<sup>45</sup>

#### CANADA WATER ACT:<sup>46</sup>

The Canada Water Act contains two principal offence-creating sections, each of which is dependant upon regulations for its effectiveness. Now that the Act has been proclaimed, it is an offence for a person to:

“. . . deposit or permit the deposit of waste . . . in any waters comprising a water quality management area . . . or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter any such waters.”<sup>47</sup>

A waste is defined<sup>48</sup> in language similar to the Fisheries Act definition of a deleterious substance. The significant difference between the two is that the Fisheries Act is concerned with substances that are deleterious to ‘fish’ or to man’s use of those fish. The Canada Water Act is concerned with substances which so alter quality that the ‘use’ of the water by man or by animal, fish or plant that is useful to man, is detrimentally affected. Presumably, the different emphasis reflects the Federal government’s constitutional jurisdiction over sea coast and inland fisheries<sup>49</sup> in the first instance, and its responsibility for human health and welfare in the second.<sup>50</sup>

The questions raised by the uncertain parameters of the definition in the Fisheries Act are also raised by the equally uncertain parameters of the definition of waste in the Canada Water Act.<sup>51</sup> However, in this instance, these questions do not demand immediate answers because it is only an offence to deposit a waste if the waste is deposited in waters

45. See e.g. *Regina v. Kamloops Pulp and Paper Company Ltd.*, unreported, oral judgment of His Honour Judge S. Van Male, Kamloops, B.C., June 17, 1971.

46. The Canada Water Act, 18-19 Elizabeth II, C.52, (See 1st. supp. C.5) hereinafter referred to as the Canada Water Act.

47. *id* section 8

48. *id* s.2(1) (k) and 2(2).

49. The British North America Act, 1867 as amended Section 91(12).

50. *id* s.91(27) is frequently cited as the principle constitutional basis for Federal legislation aimed at safeguarding human health and well being.

51. One further complicating element in the Canada Water Act definition of waste is the requirement that the result of the deposit be detrimental to the “use” of the water — a phrase which is much broader than one which reads detrimental to the “health” of the user.

comprising a designated water quality management area, and, if Section 8 has been proclaimed to apply in respect of that area.<sup>52</sup> No Canadian waters have yet been designated, and it is therefore impossible to commit a Section 8 offence.

Once waters are designated, however, there are some serious implications for any person who is depositing, or who proposes to deposit a waste substance into these designated waters. According to the way the section is drafted, every deposit of a waste into designated water is an offence except when the deposit is:

“. . . in quantities and under conditions prescribed with respect to waste disposal in the water quality management area in question, including the payment of any effluent discharge fee prescribed therefor . . .”<sup>53</sup>

Here also it is doubtful that the absence of knowledge or mens rea, (with the likely exception of a charge of permitting a deposit), is a good defence.<sup>54</sup> Consequently, if a water quality management area is designated, a person is liable to be prosecuted for violation of the Act unless his action complies with the requirements of all relevant regulations promulgated pursuant to this Act.<sup>55</sup> If a waste substance is deposited in designated receiving waters, and if Section 8 has been proclaimed applicable but no regulations have been passed, then the responsible person is liable to be prosecuted and convicted of a criminal offence.

The other principal offence is contained in Part III of the Act. Section 18 prohibits both the manufacture for use or sale in Canada and the import into Canada, of any cleaning agent<sup>56</sup> or water conditioner<sup>57</sup> containing a prescribed nutrient<sup>58</sup> in a concentration which exceeds the prescribed<sup>59</sup> maximum permissible concentration of that nutrient in that cleaning agent or water conditioner.

Only one regulation has so far been written and brought into force. As a consequence, it is now an offence to import into Canada, or manufacture for use or sale in Canada, any laundry detergent containing phosphorous and all its compounds in excess of 20% by weight expressed as phosphorous pentoxide or 8.7% by weight expressed as elemental phosphorous.<sup>60</sup>

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52. The Canada Water Act s.40(3)

53. id s.8

54. See, e.g. footnote 16 supra and section 31 of the Canada Water Act.

55. This can be compared with the Fisheries Act, s.33(4) (a) which provides that compliance with regulations passed pursuant to another Act and made applicable to the waters in question is a good defence.

56. The Canada Water Act s.17(a)

57. id s.17(c)

58. id s.17(b)

59. id s.19(a) and (b)

60. Regulations Respecting the Control of Phosphorus Concentration in Cleaning Agents, P.C. 1970 - 1341 29 July, 1970.



There is a relatively simple explanation why Parliament considered it necessary to make special provision in the Canada Water Act for the control of nutrients, why phosphorous was the first prescribed nutrient, and why laundry detergents were the first (and so far only) cleaning agent subjected to federal control. In 1969 the press was already publicizing the fact that phosphorous based detergents were contributing to the eutrophication of Canadian waters.<sup>61</sup> Concurrently, the Federal government was publicizing its new policy on proposed federal legislation for the comprehensive management of water resources in Canada.<sup>62</sup> On November 5, 1969, a government Bill<sup>63</sup> incorporating this policy was introduced to the Commons and received first reading. There was nothing in this Bill comparable to the nutrient provisions of the present Act. When, on November 20, 1969, it was moved in the House of Commons to read Bill C-144 for the second time,<sup>64</sup> the legislation was still silent on nutrients although the nutrient controversy continued. In January, a report of one of the International Joint Commission's technical advisory boards identified phosphorous as one of the major causes of Lake Erie's serious pollution problems.<sup>65</sup>

It was in February, 1970, that the federal government publicly committed itself to reducing phosphorous in laundry detergents by the summer of 1970 and eliminating them by the end of 1972.<sup>66</sup> All ten provincial governments reportedly agreed to support the Federal initiative<sup>67</sup> and amendments to the Canada Water Act were subsequently introduced into the House of Commons.<sup>68</sup> While the wisdom of the intended controls was challenged,<sup>69</sup> the publication in April, 1970, of an International Joint Commission Special Report effectively guaranteed the adoption of the amendments by the House of Commons and the eventual Federal controls.<sup>70</sup>

Whether a person is convicted under Section 8 or Section 18, the

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61. See, e.g. *Globe and Mail* of Tuesday, October 7, 1969 and Wednesday, November 5, 1969.

62. See here the Policy Statement on Proposed Federal Legislation for the Management of Water Resources in Canada released in the summer of 1969 by Otto E. Lang, then Minister of Energy and Water Resources.

63. Bill C-144, An Act to provide for the management of the water resources of Canada including research and the planning and implementation of programs relating to the conservation, development and utilization of water resources; Second Session, Twenty-eighth Parliament, 18 Elizabeth II, 1969. At that time the Honourable J. J. Greene, then Minister of Energy, Mines and Resources, was responsible for introducing Bill C-144 and piloting it through the various hearing stages. Responsibility for the administration of the Act now lies with the Honourable Jack Davis, Minister of the Environment.

64. See the speech to the House of Commons delivered by the Honourable J. J. Greene, November 20, 1969.

65. See the *Globe and Mail*, Wednesday, January 24, 1970.

66. id Saturday, February 7, 1970.

67. id Thursday, February 19, 1970.

68. id Tuesday, March 31, 1970.

69. id Tuesday, March 31, 1970.

70. Special Report on Potential Oil Pollution Eutrophication and Pollution from Watercraft, Third Interim Report on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River, April, 1970.

sanctions which may be imposed are the same. Here, as in the Fisheries Act a person may, upon a finding of guilt, be fined up to \$5,000 for each offence.<sup>71</sup> In addition, he may be ordered by the Court to refrain from further similar violations,<sup>72</sup> or to cease carrying on any specified activity which, in the Court's opinion, would or would be likely to result in further violation.<sup>73</sup>

#### CLEAN AIR ACT:<sup>74</sup>

The need for laws which will be effective in both preserving and enhancing the quality of the air can no longer be seriously disputed. A variety of newspaper articles which pre-date the Act give some indication of the kinds of air pollution there are and the damage caused. Fluorides from an Ontario fertilizer plant damaged crops to such an extent that over a three year period approximately \$300,000 was awarded by arbitrators to 58 farmers who had complained of crop damage.<sup>75</sup> Sulphur dioxide from publicly owned and operated power generating stations periodically causes alarm,<sup>76</sup> while the same contaminant from privately owned smelters is alleged to have retarded the growth of publicly owned trees<sup>77</sup> and has been blamed for forest fires.<sup>78</sup> Smoke and particulate matter from incinerators may reduce visibility and contribute to the soiling of clothes;<sup>79</sup> while the odour from barnyards<sup>80</sup> can cause human discomfort and depreciate the value of both private and public property. Carbon monoxide,<sup>81</sup> unburned hydrocarbons,<sup>82</sup> oxides of nitrogen<sup>83</sup> and lead,<sup>84</sup> all contribute to the creation of urban smogs which, it has been alleged, cause cancer and untimely death.<sup>85</sup> Examples such as these, combined with the allegation that air pollution is responsible for an estimated one-half of man's diseases,<sup>86</sup> have been responsible for the high level of public concern and assured some governmental response.

With the passage of the Clean Air Act, the Commons has hopefully provided an effective tool for engineering the federal response to the

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71. The Canada Water Act s.28(1)

72. id s.28(2)

73. id s.30

74. S.C. 19-20 Elizabeth II, C.47, assented to June 23, 1971, proclaimed in force as of November 1, 1971, hereinafter referred to as the Clean Air Act.

75. Globe and Mail, Thursday, April 9, 1970.

76. id Thursday, April 2, 1970.

77. id Thursday, April 9, 1970.

78. id Wednesday, March 4, 1970.

79. id Wednesday, April 8, 1970.

80. id Tuesday, March 31, 1970.

81. id Monday, March 23, 1970.

82. id Thursday, April 23, 1970.

83. id Saturday, February 14, 1970.

84. id Saturday, March 7, 1970.

85. id Thursday, March 19, 1970.

86. id Tuesday, February 24, 1970.

problems of air pollution in Canada. While a substantial part of the Act is directed specifically at cleaning up the federal government's own contribution to the problem,<sup>87</sup> it is the proposed controls over the private sector (with one exception) which will be dealt with here.

The exception is the provision made for setting ambient air quality objectives.<sup>88</sup> The Minister may, for any air contaminant,<sup>89</sup> formulate three categories of ambient air quality objectives: tolerable,<sup>90</sup> acceptable<sup>91</sup> and desirable.<sup>92</sup> Such objectives are nothing more than a yardstick with which to measure the quality of Canadian air in order to determine whether conditions are deteriorating or improving. Should any person, corporate or otherwise, fail in his activities to meet these objectives he does not thereby commit an offence under the Act although he may be acting contrary to its spirit. There are however, a number of substantive offences which, with the support of the sanctions provided, and if seriously enforced, will encourage practices consistent with these objectives.

Collecting and storing relevant information on the source, kinds and quantities of air contaminants is a condition precedent to effective control. In recognition of this, the Act provides that the Minister may require the operator<sup>93</sup> of any work which he reasonably believes is emitting an air contaminant to submit reports detailing the work's operations. Further, the Minister may require such an operator to submit for analysis ". . . samples of any materials used in or resulting from the operation, and of any materials emitted into the ambient air as a result thereof . . ." <sup>94</sup> Both the failure to provide the Minister with the required information,<sup>95</sup> and the failure to provide the required samples,<sup>96</sup> are offences. In each case, a person charged is liable on summary conviction to a maximum fine of \$5,000,<sup>97</sup> a court may order him to refrain from further such violations, and may also order him to cease any specified activity which ". . . in the opinion of the Court will or is likely to result in any further violation . . ." <sup>98</sup>

This, and otherwise acquired data, may be used to set the national

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87. The Clean Air Act section 10 - 18 inclusive.

88. id s.4(1)

89. id s.2(1) (a) which defines an air contaminant as ". . . a solid, liquid, gas, or odour, or combination of any of them that, if emitted into the ambient air, would create or contribute to the creation of air pollution" and includes substances [s.262(a), air containing substances s.2(2) (b) and air which has been subjected to treatment or change s.2(2) (c) where these have been prescribed by regulations (s.31)].

90. id s.4(1) (a)

91. id 4(1) (b)

92. id 4(1) (c)

93. id s.2(1) (j)

94. id s.6

95. id s.34(1) (a)

96. id s.34(1) (b)

97. id s.34(1)

98. id s.35

and specific emission standards which the Act anticipates. When the emission of an air contaminant from a stationary source<sup>99</sup> would either constitute a significant danger to human health,<sup>100</sup> or violate Canada's international treaty obligations,<sup>101</sup> the Governor in Council may prescribe national emissions standards for such contaminants.<sup>102</sup> Under normal circumstances these standards will come into force sixty days after being published in the Canada Gazette.<sup>103</sup> However, should the Governor in Council identify ". . . an emergent situation involving an extremely hazardous air contaminant . . ."<sup>104</sup> or cite any other similar national emergency, an emission standard may be prescribed and come into force without either publication in the Gazette or the elapse of sixty days. In this latter circumstance, any standard set is subject to a negative resolution of Parliament.<sup>105</sup> Specific (as opposed to national) emission standards are directed primarily at federal works, operations and businesses and will normally not be fixed unless preceded by national ambient air quality objectives.<sup>106</sup>

Once standards have been prescribed, it is an offence for an operator of a stationary source for which there are national emission standards,<sup>107</sup> or of a federal work for which there are specific emission standards,<sup>108</sup> to so conduct his operations that these standards are contravened. An operator who violates any of these prohibitions may, at the instance of the Attorney General of Canada, be enjoined from further carrying on the offending activity<sup>109</sup> and upon conviction may be faced with a fine of \$200,000<sup>110</sup> and a court order to refrain from carrying on any activity which will or is likely to violate the Act.<sup>111</sup>

Finally, in acknowledgement of the fact that the combustion of fuels<sup>112</sup> may substantially contribute to air pollution, provision is made for regulating by prescription the maximum concentration of an element in, or an additive to, any fuel.<sup>113</sup> It is now an offence for any person to:

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| 99.  | id | s.2(1) (e)  |
| 100. | id | s.7(1) (a)  |
| 101. | id | 7(1) (b)  |
| 102. | id | s.7(1)  |
| 103. | id | s.7(2)  |
| 104. | id | s.7(3)  |
| 105. | id | s.7(3)  |
| 106. | id | s.(11) and s.(12): s.20 provides that specific emission standards for any work, undertaking or business, may also be prescribed where there is a Federal-Provincial agreement on national ambient air quality objectives under section 19 and these objectives have been adopted in the province. |
| 107. | id | s.9(1) (a)  |
| 108. | id | s.9(1) (b)  |
| 109. | id | s.39(1)   |
| 110. | id | s.33(1)   |
| 111. | id | s.35  |
| 112. | id | See Section 2(1) (f) which defines a fuel as ". . . any form of matter that in its primary use is combusted or oxidized for the generation of energy."  |
| 113. | id | section 23  |

“ . . . produce for use or sale in Canada or import into Canada any fuel that contains any element or additive in a concentration that exceeds a concentration prescribed with respect to that element or additive in relation to such fuel . . . .<sup>114</sup>.”

Each day on which this offence is committed is deemed a separate offence.<sup>115</sup> Upon conviction a person is liable to a maximum fine of \$5,000<sup>116</sup> and may also be ordered by the court to refrain from further violation of the Act.<sup>117</sup>

#### CONTROL BY REGULATION:

A dominant characteristic of these three statutes is the dependence upon standards and regulations for their effective implementation. While the Fisheries Act presently contains the absolute prohibitions described, it is clear that the inflexibility of such prohibition militates greatly against the consistent enforcement of the Act. Once regulated standards for a variety of offending substances are in force, not only will offenders have a more definitive idea of what the government expects of them, but enforcement will likely be the rule rather than the exception.

If this is true for the Fisheries Act, it is even more true for the two other Acts considered. The comprehensive water resources management envisaged in the Canada Water Act is impossible to achieve unless, a) priorities are determined for competing water uses, b) standards for offending wastes are set, and c) regulations are passed which reflect these standards and are consistent with these priorities. Even the control of nutrients under the Water Act requires the setting of standards and their prescription by regulation. The Clean Air Act depends entirely upon there being standards for a variety of air contaminants and fuel compositions, and the existence of regulations which substantively incorporate and reflect these pre-determined standards.

With the Federal pollution control legislation substantially or entirely dependent upon emission or composition standards and regulatory schemes, the procedure the government follows in determining the standards is of considerable importance. The underlying problem is essentially one of conflict generated by the competing uses of air and water — two of our common property resources. Unregulated activities which cause or contribute to both air and water pollution are an admission by inaction that such uses of our air and water have the highest priority. All other users or potential users lose by default. But when steps are taken to regulate waste emissions, a conscious decision must be made on the standards which will govern.

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114.	id	s.22
115.	id	s.33(4)
116.	id	s.33(2)
117.	id	s.35

Those who will be compelled to absorb, at least initially, the expense of installing, operating and maintaining pollution abatement equipment clearly have an interest in what ever standards are prescribed. In fairness, this interest requires that they be consulted. But their interest is a conflicting one which reflects, at best, both a desire for cleaner water and air and the corporate need to maximize profits. It is, or should be, obvious, that while such interests ought to be consulted where standards are to be set, these interests ought not to be consulted to the exclusion of all others. Individual citizens, public interest groups and other private commercial and non-commercial interests likely to be affected should also be consulted if the standards which eventually materialize are to reflect an intelligent and democratic balancing of the real or potential conflicts. The federal practice to date under both the Fisheries Act and the Canada Water Act (and the apparent practice under the Clean Air Act) is to consult informally with the industry which will be most intimately affected and some if not all of the provincial governments. Private, public and other corporate interests, have neither the right nor the opportunity to meet with and influence those in government departments who are responsible for making such decisions.

It is only in general or permissive terms that any of these Acts provide for greater, extra-governmental consultation. The Fisheries Act is completely silent in this respect. The Canada Water Act<sup>118</sup> makes reference to the holding of public hearings prior to a water quality management agency making recommendations regarding wastes and standards, but it is doubtful that this provision gives one the right to be consulted. There is no comparable provision in the Clean Air Act although, as previously indicated, the Minister may consult with interested individuals, groups, corporations and governments in carrying out his responsibilities.

Because of this new legislation's significant reliance on control by regulation, at least two steps ought to be taken. First, there should be a federal commitment to involve a greater range of affected interests in the standard setting exercise. Second, mechanisms for making involvement effective must be developed. Such a democratization of the decision making process can do nothing but help us achieve whatever air and water quality objectives we set for ourselves.

## CONCLUSION:

The statutes considered will clearly provide some degree of effective response to both air and water pollution problems in Canada. How ef-

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118. Canada Water Act s.13(1)

fective these and complimentary laws will be is impossible to predict. 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. But if we have failed or do fail in any one of these requirements, the next time we move our problems will be much more difficult to resolve. We have little time left to tolerate errors, ineffectiveness and indifference. Lawyers have a considerable responsibility to see that we do not fail.

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