POLLUTION CONTROL IN CANADA: THE REGULATORY APPROACH IN THE 1980s, Kernaghan Webb. Ottawa, Ontario, Canada: Law Reform Commission of Canada, 1988. Pp. 91. Free upon request from the Law Reform Commission of Canada.

The question of how a government should control pollution and other environmental hazards remains unanswered everywhere in the world. Canada, like the United States, is tackling its share of environmental problems. Canada is also similar to the United States in that it has local and federal legislative and court systems.[1] Both the federal government and the provinces, and even many counties and municipalities, create their own environmental legislation.

In 1987, the Law Reform Commission of Canada[2] proposed a recodification of the Criminal Code.[3] In its report, the Commission suggested that a new crime be added to the Criminal Code: the crime of "Disastrous Damage to the Environment."[4] The proposed statute declares that "[e]veryone commits a crime who recklessly causes disastrous damage to the environment."[5]

In the discussion of its proposal, the Commission noted that a minority on the Commission opposed this type of legislation, and that a study paper outlining the minority view was forthcoming.[6]

In the resulting study paper, *Pollution Control in Canada: The Regulatory Approach in the 1980s*,[7] author Kernaghan Webb responds to the Commission's recommendations and argues that any additions to the current criminal law are unnecessary and unwise.[8] In addition, Webb discusses the development and growth of the regulatory model for pollution control in Canada. His book is informative and helps the reader understand the difficulties inherent in

1. For a detailed discussion of the Canadian legal system, see LAW REFORM COMM'N OF CANADA, CANADA'S SYSTEM OF JUSTICE (rev. ed. 1988).

2. A governmental commission similar to the American Law Institute.

3. LAW REFORM COMM'N OF CANADA, REPORT NO. 31, RECODIFYING CRIMINAL LAW (1987) [hereinafter REPORT NO. 31]. REPORT NO. 31 was actually a revised and enlarged edition of a previous report, tabled in Parliament in 1986 pending revision. *Id.* at 1.

4. *Id.* at 93-97.

5. *Id.* at 93.

6. *Id.* at 94.

7. K. WEBB, POLLUTION CONTROL IN CANADA: THE REGULATORY APPROACH IN THE 1980S (1988) (study paper prepared for the Law Reform Comm'n of Canada).

8. *Id.* at 71.

creating environmental legislation. His analysis offers an original perspective on the Law Reform Commission's proposals, as well as suggestions on the general structure of pollution control laws. Thus, although the focus of the analysis is on Canadian laws and issues, *Pollution Control in Canada* is useful for study in the United States or in other developed countries with similar environmental problems.

The introduction and first chapter provide a brief discussion of the public's increasing awareness of environmental issues from the early 1960s to the 1980s. Webb also discusses the government's response to increased public participation, both on the federal and provincial levels. The early sections of the book provide a useful background into the history of the environmental movement in Canada and the specific goals and policies that movement favored, thus preparing the reader to consider the specific policy questions to follow.

The discussion in Chapter Two is a major part of the paper's argument. In that chapter, Webb describes how the Canadian government's past implementation of pollution policies resulted in an extensive regulatory structure in place by the mid-1970s on both the federal and provincial levels.[9] In discussing the problems and misconceptions created by that regulatory structure, Webb argues that the problem lies not in a lack of legislation, but rather in the government's failure to achieve the goals of existing laws.[10]

After reviewing the legislative structure, Webb discusses the Canadian judiciary's response to the problem of controlling pollution. Included in this analysis is a discussion of the seminal case *The Queen v. Sault Ste. Marie*.[11] The central issue in that case involved the requisite state of mind for conviction of pollution control statute violations.[12] The court first reviewed the history of the differences between the common law mens rea requirements for "public welfare" crimes and for traditional criminal offenses such as murder or

9. *Id.* at 17.

10. *Id.* at 18-32.

11. 2 S.C.R. 1299 (1978).

12. The defendant city of Sault Ste. Marie, Ontario, was charged with a violation of Section 32(1) of The Ontario Water Resources Act. The Act states:

> [e]very municipality or person that discharges or deposits, or *causes*, or *permits* the discharge or deposit of any material of any kind into any water . . . that may impair the quality of water, is guilty of a an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or both fine and imprisonment.

ONT. REV. STAT. ch. 332, § 32(1) (1970) (emphasis added). The law has since been

robbery.[13] It then recognized three different levels of mens rea that might be used to convict a defendant of a crime.[14] The case is critical because it did not hold the defendant to absolute liability, as the prosecution urged. Instead, the court adopted the "intermediate" level of mens rea, that of strict liability, for "public welfare" offenses against the environment. Strict liability, unlike absolute liability, allows the use of a "due diligence" defense.[15]

After his thorough discussion of *Sault Ste. Marie*, Webb next describes the enforcement of the criminal and civil pollution control laws. Typically, enforcement involves negotiations backed up with the threat of adjudicatory enforcement actions.[16] One major problem since *Sault Ste. Marie* is that defendants have successfully used claims of "abuse of process" to defend against governmental actions, because the government has not used adjudication consistently in its pollution cases.[17] Because of the important role courts

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amended to remove municipalities from the definition of potential defendants. *See* ONT. REV. STAT. ch. 361, § 32(2) (1980).

Because the statute does not mention any mens rea requirements, the court had to decide if the statute intended to impose common law levels of mens rea, or absolute liability. (The "strict liability" standard, which allows a defendant to assert some defenses, had not yet been recognized.) The absolute liability standard allows no defenses and does not require the prosecution to show knowledge.

13. *See* 2 S.C.R. at 1309.

14. Prior to *Sault Ste. Marie* there had been a debate concerning the proper standard of liability for "public welfare" offenses. Two levels of mens rea existed: absolute liability (no need to prove any mental state), and criminal (need to prove knowledge or "guilty mind"). The *Sault Ste. Marie* court recognized a new standard: strict liability. Since a defendant may assert a few very limited defenses (such as "due diligence") to avoid strict liability, the Court held that the possibility exists that a defendant to a strict liability crime can avoid conviction. K. WEBB, *supra* note 7, at 34-36.

15. A court will rarely allow the "due diligence" defense. "Due diligence" is available when the defendant took every step that a reasonable person would have taken to avoid the pollution. For a more comprehensive discussion of *Sault Ste. Marie* and its ramifications for both "true" criminal law and such bodies of public welfare law as environmental law, see Hutchison, *Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offenses Get a Home of Their Own*, 17 Osgoode Hall L.J. 415 (1979) and Reid, *Regina v. Sault Ste. Marie, A Comment*, 28 U.N.B. L.J. 205 (1979).

The Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. 1989), is an American statute with criminal provisions similar to those of the Ontario Water Resources Act. However, one must "knowingly violate" a provision of the Clean Air Act to incur penalties. *See* 42 U.S.C. § 7413(c)(1)(A). This level of mens rea is much more burdensome for the prosecution than the strict liability in *Sault Ste. Marie*. *See* 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW 2-329 to 330, for a more comprehensive discussion of the Clean Air Act's policies and criminal provisions.

16. K. WEBB, *supra* note 7, at 46-49.

17. Cases go to the adjudication stage only when the negotiations between the governmental regulators and the defendant break down, because the regulators usually try to resolve any conflict before bringing the case to trial. Once a case is brought to trial, however, the abuse of process defense has been used successfully. *See, e.g., Re Abitibi*

play in enforcing the government's pollution regulations in Canada, the "abuse of process" defense presents a serious obstacle to government enforcement.

Webb points out, however, that the use of this defense has had the beneficial effect of forcing the regulators to tighten up the administrative process, resulting in "greater care in who negotiates with polluters, in what is said . . . and how it is said."[18] Webb's argument is well taken. Nevertheless, it seems that until the "tightening up" is completed, the government is at a disadvantage—the efficacy of enforcement is threatened unduly by the availability of the "abuse of process" defense. Of course, forcing the regulators to "tighten up" their practice is quite desirable in the long term for the control of pollution in Canada.

From this discussion of the Canadian government's current pollution control problems, Webb shifts in Chapter Three to a discussion of Canadian attitudes towards pollution control, analyzing various groups' views of the pollution problem.[19] He first charts the legal trends in the area of public participation.[20] It is in this area that Webb is most hopeful about the future of conservationist efforts. He cites growing and noticeable public participation in, and support of, environmental protection laws. He finds it promising that legislation is being enacted, and that the public is now attacking polluters in court. The 1987 Manitoba Environment Act[21] is a good example of these trends. Webb notes that the Act has some especially encouraging language in its objectives section:

> [T]he aims and objectives of the department are to protect the quality of the environment and health of present and future generations of Manitobans and to provide the opportunity for all citizens to exercise influence over the quality of their living environment.[22]

After discussing the public's role in the growth of environmental legislation, Webb analyzes the changing attitudes of other entities. On both the local and national levels, for example, the government has become aware of the need for pollution control and enforce-

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Paper Co. Ltd. and the Queen, 24 O.R. 742 (1979); *Regina v. Johns-Manville Canada, Inc.*, 9 E.L.R. 137 (Ont. Prov. Ct. 1980).

18. K. WEBB, *supra* note 7, at 49.

19. *Id.* at 55.

20. *Id.* at 55-59.

21. Manitoba Environment Act, MAN. REV. STAT. ch. 26 (1987).

22. *Id.* ch. 26(2)(1); see also similar language in the Canadian Environmental Protection Act, 1988 Can. Stat. ch. 22.

ment.[23] Attitudes in the business community have also changed. While business interests have not wholeheartedly approved of conservation measures, "[t]he wholesale opposition which might have been characteristic of earlier years is uncommon. If nothing else, the rhetoric has certainly improved."[24] The concern about a clean and safe environment in Canada now exhibited by all parties (the public, government and business), Webb concludes, may result in some real environmental progress.

Beginning in Chapter Four, Webb develops the main thesis of his paper. He argues that the Commission's proposed "crime against the environment" is misguided.[25] Webb finds neither a justifiable need for a new criminal offense nor a strong showing that the new offense will not detract from current enforcement efforts.[26] Webb believes that there is an adequate framework within the existing Canadian criminal law to deal with the particularly egregious offenses[27] that the proposed law hopes to reach.[28]

Webb's point is fairly convincing; this statute may not provide the answer. A body of well-developed legislation for the regulation of pollution already exists.[29] Webb feels that the government regulators must enforce existing laws to their fullest extent.[30] He asserts that the Commission's proposal misses the point: pollution can best be controlled by a stronger administrative agency able to select between strong prosecutory and negotiation tools. He feels that there is no need for new criminal sanctions, but rather a need for some

23. The Manitoba Environment Protection Act provides only one example of the governmental role in the fight against pollution. *See* K. WEBB, *supra* note 7, at 61-67.

24. *Id.* at 68.

25. *See supra* notes 11-12 and accompanying text.

26. K. WEBB, *supra* note 7, at 76.

27. Examples of such conduct include those polluters who consistently treat the fines that the government imposes as simply a cost of doing business. Another group of "heinous" violators practice "midnight dumping," the "intentional clandestine disposal of toxic or noxious wastes in an unauthorized manner that damages the environment." *Id.*

28. According to the official comments to the Commission's proposed crime, the commissioners feel that the new criminal law is necessary because of the "need to use criminal law to underline the value of respect for the environment itself and stigmatize behaviour causing disastrous damage with long-term loss of natural resources." REPORT NO. 31, *supra* note 3, at 93.

29. Webb points to existing provisions in the Criminal Code, including: subsection 202(1) (criminal negligence); subsection 176(2) (common nuisance); and subsection 387 (criminal mischief). Webb also points to the Oil and Gas Production and Conservation Act, R.S.C. chs. O-4 (1970), which prescribes criminal penalties for those who cause or permit oil and gas spills. K. WEBB, *supra* note 7, at 73-76.

30. *See supra* notes 11-12 and accompanying text; *see also* K. WEBB, *supra* note 7, at 76.

civil sanctions with real teeth, so that the agency could negotiate with polluters from a position of power. Any statutory additions should be made with the greatest of care, and only if truly needed.

The paper concludes by examining a scholarly remark made in the early 1970s about then-existing federal regulations[31] and analyzing whether the remark's promise has been achieved in the late 1980s. Webb feels that many environmental goals are on their way to being accomplished as the public, the legislatures, and the courts all work to gain a deeper understanding of difficult problems.[32] However, he feels that statutes creating new crimes must be scrutinized closely to ensure that they really attack the perceived problems and comport with the regulatory structure for controlling pollution.

In addition to these conclusions, Webb makes some recommendations for action and study.[33] He recommends refining the existing regulatory regime to make it more effective. His research proposals include: a study comparing the current legislative models that are used to combat pollution; a study of the actual methods of enforcement of pollution control legislation across Canada; an empirical study of the effects of the Commission's proposed legislation and its enforcement practice; and further study into the use and feasibility of increased sanctions in regulating pollution.[34]

In addition to providing the "minority" viewpoint on a important environmental proposal, *Pollution Control in Canada* offers a concise survey of current Canadian pollution control legislation. This study paper would enhance any society's debate on the most effective means to control pollution.

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31. The comment was made by Professor C. G. Morley of the University of Manitoba:

> 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.

K. WEBB, *supra* note 7, at 77, citing Morley, *Pollution as a Crime: The Federal Response*, 5 MAN. L.J. 297, 311 (1973).

32. *Id.* at 79-80.

33. *Id.* at 81-84.

34. *Id.* at 83.

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