LAW, MARKETS AND RESOURCE MANAGEMENT

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Law in a liberal capitalist society is multi-dimensional and multi-purpose. It is facilitative, symbolic, constitutive and coercive. There are academic reputations to be made in articulating the theory and providing the examples to support these sweeping assertions.[1] In this short essay, I will look at law's constitutive power, and specifically, at the way in which law, by validating the market as an essential decision-maker, impedes a reconceptualization of our approach to resource management, and thereby helps perpetuate inappropriate development of the Atlantic region's primary resource industries.

In discussing the market, I want to challenge the conventional wisdom on the functions and nature of states and markets as expressed in Volume One of the *Report of the Royal Commission on the Economic Union and Development Prospects for Canada* (The Macdonald Commission). The *Report* defines states as "concentrations of coercive authority backed by force which govern particular citizenries within fixed boundaries"; by maintaining law and order, states provide "the minimum framework of security for the pursuit of private goals in society and economy." The market, in contrast, "co-ordinates innumerable private economic decisions without resort to coercion," and "allocates resources impersonally to their most profitable use in a context of consumer sovereignty."[2]

The idea of the market as an arena of private autonomy is central to liberal legal ideology. We are used to thinking about our personal lives as more or less private and everything else as public,[3] but in traditional legal theory, the line between private and public demarcates the areas in which individuals are free to create their own rights and obligations through the exercise of their freedom of contract from those areas where rights and obligations are defined by the state. Thus, contract, tort and property are considered to be private law, allowing

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[1]Four articles I have found particularly useful in theorizing the role of law in a democratic capitalist society are P. O'Malley, "Law Making in Canada: Capitalism and Legislation in a Democratic State" (1988) 3 Canadian J. of Law and Society 54, A. Bartholomew and S. Boyd, "Toward A Political Economy of Law" in W. Clement and G. Williams, eds, *The New Canadian Political Economy* (Kingston: McGill-Queen's U. Press, 1989), R. Devlin, "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence" (1989) 27 Osgoode Hall L. J. 219, and R. W. Gordon, "Critical Legal Histories" (1984) 36 Stanford L. Rev. 57.

[2]Macdonald Commission *Report*, vol. 1 (Ottawa: Minister of Supply and Services, 1985) at 41-42.

[3]Of course, as the women's movement understood, the personal is political and the intimate is legally constructed. Only certain relationships qualify for the legal status of family, and the law prohibits certain sexual acts, even by consenting adults. See, for example, the peculiar definition of "in private" in s. 159 of the *Criminal Code*, R.S.C. 1985 c. C-46.

individuals to regulate their relations with each other, in contrast to criminal law, in which the state regulates individuals' relations with each other and with the state. But the public/private distinction is socially constructed, not natural or inherent. Studies of different times and different cultures reveal the extent to which the boundary between public and private is infinitely varied. Critical scrutiny of legal doctrine, moreover, reveals that the distinction is so manipulable that it is logically incoherent.[4] For example, in creating jobs for communities, governments and courts invoke the public character of large private enterprise to justify extensive subsidies and special protection from private tort actions for injunctions to prevent industrial pollution.[5] Yet governments and courts refuse to intervene when these same enterprises close down their operations, destroying the communities which have sustained them. That decision is characterized as a private decision, beyond the reach of law.[6]

At their simplest, markets permit people to exchange things, now or in the future. Markets in illegal commodities or services operate outside the legal regime which defines and protects the rights of property owners, but even these markets are not private markets, since participants in them are subject to criminal sanctions for their activity. Markets in legal commodities are even less private, since they exist only because the law will enforce any agreements that the participants make with respect to resources, tangible or intangible, in which the law permits them to claim a property right. Markets work because law supports the assumptions on which they work. Yet these assumptions – that some resources can and should be "propertised"[7] and that allowing individuals to buy and sell these resources in the market will secure maximum individual freedom and fulfilment and, incidentally, the good of society – are increasingly untenable in the real world of the 1990s. Equally untenable is the assumption of the Macdonald Commission that markets operate noncoercively, to secure the most profitable use of resources. Economic coercion is as real as, and often more powerful than legal sanctions.

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[4]E. Mensch and A. Freeman, "The Public-Private Distinction in American Law and Life" (1987) 36 Buffalo L. Rev. 237. For a clever critique of economists' categories which also illustrates the manipulability of the public/private distinction, see L. Marsden, "The Labour Force is an Ideological Structure: A Guiding Note to the Labour Economists" (1981) 7 Atlantis 57.

[5]For example, see two statutes whose history I hope someone will soon write: *The Factories Act*, S.P.E.I. 1881, c. 11, and *The K.V.P. Company Limited Act, 1950*, S.O. 1950, c. 33. The latter statute involved litigation which the K.V.P. Company thought had been unsatisfactorily resolved in the courts. See *McKie* v. *K.V.P. Co.*, [1948] 3 D.L.R. 201 (Ont. H.C.), aff'd [1949] 1 D.L.R. 39 (Ont. C.A.) and [1949] 4 D.L.R. 497 (S.C.C.).

[6]J. W. Singer, "The Reliance Interest in Property" (1988) 40 Stanford L. Rev. 611, presents a persuasive argument for using existing private law principles to give workers some protection against plant closures or some right to compensation when a plant closure devastates a community.

[7]For a provocative discussion of the legal theory behind decisions to propertise or to refuse to propertise particular resources, see K. Gray, "Property in Thin Air" (1991) 50 Cambridge L. J. 252.

I will use two examples to suggest some of the dimensions of my challenge. The first is the government response to the financial collapse in 1982 of Natsea and H.B. Nickerson and Sons Ltd., a smaller company which had acquired control of Natsea in 1977. In order to reap the anticipated benefits of Canada's new 200-mile offshore limit, Nickerson and Natsea invested heavily, with borrowed money, in the latest fishing technology – deep-sea fishing boats which cost $2 million and destroyed the habitat of the fish they were designed to catch. When the companies could not pay the bills, the federal and provincial governments provided $105 million to restructure Natsea. Private investors, principally the Jodrey and Sobey families, put in $20 million, and ended up with control of the company. The mainstream regional media, which had conducted an hysterical campaign against nationalization of the fishery, whole-heartedly supported this "private-sector solution," especially as it involved regional entrepreneurs. With its near monopoly confirmed, Natsea continued to shift resources from the inshore fishery to the more capital-intensive deepsea fishery, and the current crisis in the Atlantic fishery due to declining fish stocks is one of the consequences. In a market economy, in which fish are the property of whoever can catch them, it is unprofitable for capitalists to take the long view.[8]

My second example – the event that determined the focus of this piece, and makes it both a rant and a keening – is the deaths of twenty-six coal miners in Pictou County, Nova Scotia, in the Westray mine disaster. Westray, which went into production in late 1991, is the most recent attempt to mine the thick, gassy and very dangerous coal seams which twist and turn in fantastic convolutions, folds and faults deep beneath the surface in Pictou County. The mine is privately owned by Curragh Resources Ltd., Toronto, but produces coal for the provincially-owned Nova Scotia Power Corporation. Under its fifteen-year contract, the Power Corporation must take 700,000 tonnes of coal a year, and pay for an additional 275,000 tonnes regardless of whether it is needed.

Smoke from coal-burning power plants is a major contributor to acid rain, yet requests for an environmental impact assessment hearing before the mine opened were brushed aside with glib assurances that Pictou coal was cleaner than coal from the federally-owned and state-supported Devco mines in Cape Breton, a direct competitor with Westray for the Power Corporation's business. The Westray mine is situated in the riding which gave Prime Minister Mulroney his first seat in Parliament. When work began on opening the mine, the riding was represented provincially by Conservative Don Cameron, now the Premier. Development costs for the mine, which exceeded $140 million, were subsidized by the federal and provincial governments. It employed 250.

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[8]For a discussion of these issues, see R. Williams, "The Restructuring That Wasn't: The Scandal of National Sea" in G. Burrill and I. McKay, eds, *People, Resources and Power* (Fredericton: Acadiensis Press for Gorsebrook Research Institute, 1987) 74.

Persistent questions about safety conditions in the mine were brushed aside, even when raised in the provincial Legislative Assembly. The mine is not unionized; some unionists suggest that as part of its anti-union efforts, the owners hired many workers with limited coal mining experience. Despite the lack of alternative employment in the area, miners have quit because they believed that the mine was unsafe. Since the mine opened, there have been seven serious roof collapses, and repeated high methane readings.

If the market truly allocated resources to the best advantage, there would be very little coal mining in Nova Scotia. Given the physical characteristics of Nova Scotian mines – the high levels of methane gas in Pictou, the seams that extend for miles under the ocean in Cape Breton – there are many other coal deposits that can be mined more profitably. The Westray mine would never have opened without the inducement of millions in government loans, loan guarantees and grants, and a guaranteed market in the Nova Scotia Power Corporation. Yet to simply decry government involvement in the project, and call for a return to free markets and private enterprise, is to miss the point. Curragh Resources thought it could make a profit from opening Westray. Perhaps it expected its profit from an increase in the price of its shares, or from the various untendered contracts it could award, rather than from the mine itself. Be that as it may, developing natural resources simply by making them available to anyone who sees a chance for a profit leads to disasters like Westray.[9]

Allowing the market to allocate the rewards for resource development encourages a slash-and-burn approach. Profitability is measured in the short-term, regardless of short or long-term costs that do not show up on the corporate balance sheet. Law offers the policy-makers a range of options for encouraging a more responsible approach to resource development, but, by maintaining, and indeed, partially creating, the perception that there are fundamental differences between the state and the market, the public sphere and the private, law helps limit the kinds of transformations that policy-makers envision, and that the rest of us ask for and accept.

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[9]For a discussion of these issues, see H. Glasbeek and E. Tucker, *Death by Consensus: The Westray Story*, Working Paper No. 3 (Centre for Research on Work and Society, York University: 1992).