A CRITICAL EVALUATION OF THE NOVA SCOTIA ENVIRONMENTAL PROTECTION ACT

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I *INTRODUCTION*

Like most regions in Canada, the Maritime provinces have been slow to respond to the growing concern over environmental protection. Only in the last half dozen years have the four provinces passed comprehensive environmental protection legislation.[1] A number of factors have contributed to this apathy; some unique, others typical of most Canadian provinces.

Unlike the highly developed central and far western regions of Canada, rapid economic development has, until now, passed by the East. With a few glaring exceptions,[2] the economy of Atlantic Canada is based on the relatively clean activities of fishing, agricultural, and light manufacturing, which do not pose major environmental problems.

Coupled with this lack of development, is a pervasive feeling among Maritimers that everything possible must be done to encourage industry to locate here, sometimes regardless of the environmental consequences.[3] Often this feeling is elevated to the status of law. For example, rather than "remedying" each annoying injunction issued against polluting industries as the

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1 *The Environmental Protection Act*, S.N.S. 1973, c.6 (proclaimed September 1, 1973); *The Clean Air, Water and Soil Authority Act*, 1970, S.N.F.L.D. 1970 No. 81; *The Environmental Control Commission Act*, S.P.E.I. 1971, c.33, as amended S.P.E.I. 1972, c. 15; *The Clean Environment Act*, R.S.N.B. 1973, c.C-6.

2 The industrial areas of Sydney, Nova Scotia and Saint John, New Brunswick are two of the most obvious exceptions. In addition, timber operations have been the focus of concern in both New Brunswick and Nova Scotia.

3 Doctor Andrew Harvey, newly elected president of the Atlantic Canada Economic Association said in a recent interview that the Provincial government's prime objective seems to be to create jobs at any cost without taking into consideration environmental effects. Quoted in the *Mail Star*, Friday, November 16, 1973, p. 1. According to Mr. G. Bagnell, Minister of the Nova Scotia Department of the Environment, his government's number one priority is economic development and will remain so until Nova Scotia can pay its way in Confederation. Interview, Tuesday, October 18, 1973.

Ontario Legislature did in the late 1940's, 50's and 60's,[4] the New Brunswick Legislature merely amended its Judicature Act[5] to prevent "individuals from applying for injunctions which if granted, would delay or prevent the construction or operation of any manufacturing or industrial plant on the ground that the discharge from such plant is injurious to some other interest."[6]

Nova Scotia, apparently fearful that potential riparian right suits might discourage prospective development or annoy existing ones has, for all intents and purposes, eliminated that cause of action. Section 2 of the *Water Act*[7] vests all water courses in the Crown, notwithstanding any law of Nova Scotia and section 3(1) gives the Governor in Council power to authorize any person to use any water course ". . . for such purposes and on such terms and conditions as are deemed proper or advisable . . . ." Once permission has been granted, "no action, process or proceeding whatsoever shall be commenced or issued in any court or before any tribunal by or against any person authorized".[8] Smelters and refineries enjoy a particularly favoured position in the Province. The *Smelting and Refining Encouragement Act*[9] enables companies and persons to apply to the Governor in Council for an Order in Council declaring the applicant subject to the Act. Section 3 then requires those subject to the Act to carry out the authorized operations "with due care . . . and take such precautions as may be reasonably and commercially possible to prevent and minimize any damage caused . . . ." In return for this minimal

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4 In response to an injunction imposed against the K.V.P. Company's Kraft Mill in Espanola, Ontario by the Ontario Supreme Court (*McKie* v. *K.V.P. Company*, [1948] O.R. 398 (H.C.)); affirmed: [1948] O.W.N. 812 (C.A.) and upheld by the Supreme Court of Canada: *K.V.P.* v. *McKie*, [1949] S.C.R. 698), the Legislature passed the K.V.P. Act, S.O. 1950, c.33, dissolving the injunction and immunizing the company from further judicial "harassment". A similar tale may be told about an injunction issued by the Supreme Court of Ontario against the Town of Richmond Hill to close down a malfunctioning sewage "treatment" plant. (*Stevens* v. *Richmond Hill*, [1955] O.R. 806 (H.C.); [1956] O.R. 88 (C.A.)).

5 *Judicature Act*, R.S.N.B., 1973, c.J.-2.

6 *Id.*, s.35.

7 R.S.N.S. 1967, c.335.

8 Prior to 1973, the Act did not apply to "small rivulets or brooks" (section 1 (k)) and the courts were able to carve a sizeable exception out of the definition of water course. See for example, *Lockwood* v. *Brentwood Park Investments Ltd.* (1970), 10 D.L.R. (3d) 143 (N.S.S. Ct., Dubinski J.); *George* v. *Floyd* (1972) 26 D.L.R. 339 (N.S.S. Ct., Jones J.). Since then the Act has been amended to include every conceivable riparian rights situation. S.N.S. 1972, c. 58, s. 1(4).

9 R.S.N.S., 1967, c. 283.

commitment, section 4 prohibits any action against the authorized activity "for pollution . . . or for committing any nuisance". However, even if the section 3 requirements are not met, "no action for injunction or indictment shall lie at the suit of the Crown or any private person".[10] Thus, both a general lack of environmental problems and an overriding desire to attract new development at any price have combined to lull Maritimers into a false sense of environmental well-being.

Like other Canadian provinces, the Maritimes have not, until very recently, appreciated the magnitude of environmental degradation. Granted, many parts of the East remain unspoiled; but, where heavy, intensive industry does exist or is anxious to locate, there is a growing concern that something must be done about existing and potential environmental destruction. This concern has only surfaced in the last few years; until recently, pollution was a subject reserved for conservationists, environmentalists and other eccentrics. Slowly, what was once the concern of the naturalist, is becoming the preoccupation of the public and the nightmare of the politician. Perhaps spurred by the example of comprehensive environmental protection legislation in Western Canada[11] and then Ontario,[12] perhaps by the demand from its owns citizens, or perhaps by the apparent soundness of the approach, each Maritime province has enacted its own comprehensive legislation.[13] The most sophisticated, and therefore most interesting is the Nova Scotia *Environmental Protection Act.* For this reason, it seems appropriate to focus our analysis on that legislation and note, where appropriate, significant differences in the other three environmental protection acts.

II *THE NOVA SCOTIA ENVIRONMENTAL PROTECTION ACT*

To deal effectively with environmental problems[14] the Nova Scotia Legislature enacted the *Environmental Protection Act*

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10 *Id.*, s.5.

11 *Pollution Control Act* (1967), S.B.C. 1967, c.34 as amended S.B.C. 1968, c.38, S.B.C. 1970, c.36.

12 *Environmental Protection Act,* S.O. 1971, c. 86 as amended S.O. 1972, c.1 and 106.

13 *Supra,* note 1.

14 The common law has never offered a particularly helpful solution to environmental problems. The difficulty stems primarily from the cost factor, difficulties of standing and the inflexibility of judicial remedies. For an elaboration of these points see P. Emond, "Changing Perspectives in the Field of Environmental Law" in Savage (ed.) *New Directions in Legal Rights* (1974, Dalhousie Faculty of Law).

(1972). The Act soon came under heavy criticism, especially from those who were concerned about the wide powers vested in the Minister and Department of the Environment, and the Liberal government of Gerald Reagan agreed to postpone proclamation until the Law Amendments Committee had examined the Act in detail. After hearings were conducted by the Committee in the Spring of 1973, it recommended a number of substantial changes. The government accepted these changes and with very little debate enacted a watered down,[15] 1973 version of the old *Environmental Protection Act.*

A. PURPOSE

The purpose of the Act as set out in section 3 is "to provide for the preservation and protection of the environment". While this statement is not particularly helpful in terms of identifying specific goals and thus providing concrete criteria to guide and evaluate governmental action, it at least suggests a general commitment to improve and preserve the quality of the environment. It is nonetheless obvious that some accommodations must be made for a pristine pure environmental standard would bar most if not all economic development.[16] Section 2, the definition section, sheds a little more light on the statutory purpose. Polution, which is the subject of a general prohibition in the Act[17] is defined in section 2 (n) as a "detrimental alteration or variation of the physical, chemical, biological or aesthetic properties of the environment" resulting from some act or omission. "Detrimental variation or alteration" is defined in section 2 (f)(i) to mean "(A) impairment of the quality of the environment for *any use* that can be made of it, or (B) physical injury or serious discomfort to any person, or (C) injury or damage to property or plant or animal life or which renders any property or plant or animal life unfit for the use to which it is normally put, or *significantly* disturbs the natural or ecological balance . . . ."[18] The definition also includes "a change contrary to the permissible level estab-

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15 The 1973 Act is "watered down" in the sense that the public has a drastically reduced environmental protection role than it had under the 1972 Act.

16 Mr. Bagnell, the Minister of the Department of the Environment, is on record as saying: "There is no intention to try and revert the province to the days of the early settlers. But we must make every attempt to at least maintain the present position if we are to control pollution and protect the environment for future generations." Quoted in an article by E. Stubbs, entitled "An Act to Protect the Environment," *Dartmouth Free Press,* March 22, 1973.

17 *Environmental Protection Act,* S.N.S. 1973, c.6 s. 23(2).

18 The definition is taken from the one proposed in W.H. Charles, *The E.P. Act — A Working Paper to Consider the Scope of the Act.* (November 19, 1972) at 1,2. (Emphasis added).

lished by the Minister by regulation", thus enabling the Minister to expand the definition to meet new problems as they arise and enabling the Department to avoid having to prove "impairment" or "pollution". From these two sections, the Legislature's commitment to environmental quality appears to be substantial. Understandably, the Act evidences a bias in favour of *uses* to which the environment can be put and therefore seems to preclude environmental protection merely for the sake of research or posterity.[19]

The statutory purpose fails to reconcile two key issues: (1) the extent to which public participation should be used for environmental protection purposes and (2) the appropriate or optimal balance between flexibility and wide governmental and ministerial powers on the one hand, and fettered discretion and statutory guidelines on the other. In this regard, a *Working Paper* on the 1972 Act prepared by that Act's draftsman, Professor Bill Charles, is helpful. He notes that the purposes were, inter alia, to provide (1) some mechanism through which the public might not only express its concern for environmental issues but contribute to their resolution in a "real way", and (2) the flexibility and necessary powers for the Minister, Department and Council to react quickly to rapidly changing circumstances and generally carry out their responsibilities under the Act.[20] Both purposes are realistic and commendable.

To the extent that the public is generally denied access to the courts[21] for environmental protection purposes, it should have some input into the alternate dispute-settling mechanism at the Department of the Environment. Public participation is essential for a number of reasons, all of which will be discussed when we

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19 Nevertheless the definition could be construed as protecting such "uses" as Ecological Preserves. Professor Franson's recent article on such uses might provide the basis for such an argument. See: R.T. Franson, "Legislation to Establish Ecological Reserves For the Protection of Natural Areas," 10 *Osgoode Hall L.J.* (1972) 583.

20 *Working Paper, supra,* note 18 at 4,5.

21 The public is generally denied access to the courts to resolve environmental problems because of the technical complexity, time, expense and uncertainty of pursuing common law remedies. Potentially the most useful remedy, riparian rights has been abolished by the *Water Act*, R.S.N.S. 1967, c. 335. Furthermore, in return for compliance with an approval or permit issued under the Act, section 55(2) imunizes "any one authorized by [the Minister]" from "any proceeding", thus apparently preserving and extending the defence of statutory authorization to all authorized activities. Even if the difficulties of the common law could be overcome, they would be available against only those persons who have not received a permit or approval "to pollute."

consider specific statutory provisions in the Act.[22] Regardless of the persuasiveness of these specific arguments public participation is generally a desireable end in itself. Perhaps this sentiment was best captured by Churchman when writing about a related problem — urban planning. He notes:

> We are so used to thinking in terms of goals and attainment, that it is like imagining the fourth dimension to think otherwise. The so-called goals [of decision-making] . . . profit, pleasure and learning are really the means, the means whereby people can contribute, to life's plan. It is contribution which is the goal, because contribution is the full expression of one's individuality. We create problems and attempt to solve them in order to contribute.[23]

The decision to give those who administer the Act unfettered discretion and wide regulatory powers is not so obviously sound. Again, I will defer my specific objections to the detailed discussion of the Act; however, a few introductory comments are appropriate. On the whole, the strategy of wide powers conforms to the recent thinking on the subject.[24] Too specific policy guidelines and too detailed standards may be counter productive. In a new field, the best, most effective way of dealing with the problem may not be known beforehand, and hence legislative commitment to a particular approach may limit the administration's ability to adjust its procedure in light of lessons learned during the initial implementation period. Furthermore, abatement technology changes rapidly and the Department must have the flexibility to respond to these particular changes. The problem with broad, unfettered regulatory powers, however, is that it *may* be an invitation to arbitrariness and capriciousness in the administrative decision-making process.

Without commenting further on the "statutory purpose" of the Act, one important point should be noted. Sections 2 & 3, and the comments made by the legislative draftsman in the *Working Paper* provide rough criteria with which to measure and judge the effectiveness of the Act. The extent to which the specific provisions in the Act deviate or may deviate from these goals will give some idea of the degree to which these rather laudable legislative goals have been displaced.

Essentially the regulatory approach of the Nova Scotia *Environmental Protection Act* is a two-tiered one. Standards must be

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22 *Infra*, at p. 82.

23 Churchman, "The Case Against Planning," *Management Decisions* (summer 1968)

24 See: H.W. Arthurs, "Regulation-Making: The Creative Opportunities of the Inevitable," 8 *Alberta Law Review*, (1970) 315.

set and then, on a case-by-case basis, applied to all existing and potential sources of pollution. The standard setting function is generally a policy-making function, and hence highly discretionary; whereas the law-applying function is, by definition, more amenable to fixed standards and criteria. The first decision therefore may be described as "administrative", the second as "judicial" or "quasi-judicial". This general distinction between policy-making and policy-applying provides a useful framework in which to structure our examination of the Act.

B. *POLICY FORMULATION*

(1) *The Minister*

Policy is made concurrently by the Minister, the Environmental Control Council, and the Governor in Council. By far the most important role is assigned to the Minister. He has, by section 22, the "general supervision and control of the management, preservation, and protection of the environment". More specifically, section 8 (1) gives him, inter alia, the power, to "(a) develop, coordinate, and enforce policies, planning and programs relating to the preservation and protection of the environment, (b) coordinate the work and efforts of departments, boards, commissions, agencies and officers of the province respecting any matter relating to the preservation and the protection of the environment, . . . (n) adopt or amend or repeal or prescribe standards regarding the quality and character of contaminants and waste that may be discharged into the environment and establish the permissible levels thereof by regulation and establish fees in relation thereto".[25] To accomplish these ends the Minister is given a wide variety of tools including the power to investigate pollution problems (section 8 (1)(c)), to conduct research within the Department (section 8 (1)(e)) and outside (section 8 (1)(i)) and, with Cabinet approval, to utilize the facilities and personnel of other departments and agencies and to delegate duties and functions to other departments and agencies (section 8 (2)). He may also engage the services of experts having special technical or other knowledge (section 7 (1)). Thus the Minister virtually has a free hand to establish criteria that best reflect Departmental policy. In such a situation personalities become extremely important.

The present Minister is Mr. G. Bagnell, a former Dartmouth pharmacist who holds the twin portfolio of Environment and Tourism. Formerly, he was responsible for Environment and

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25 "Fees" refers to a fee to cover administrative costs, not effluent charges. Interview with Mr. G. Bagnell, October 18, 1973.

Mines and Minerals, a combination that some critics felt was incompatible with the government's new determination to give the environment increased protection. Although Tourism and Environment are interrelated, the Minister's present preoccupation with Tourism may not be serving the fledgling Department of the Environment particularly well [26]

Notwithstanding the Minister's preference for tourism over environment, his appointment to the Environment post was generally well received. But there is of course no guarantee that future environment ministers will share his strengths and there is a risk that the extremely broad powers of the Act may be misused. For this reason many groups have strongly attacked the lack of controls on ministerial power.

The Act's critics on this point make for strange bedfellows indeed. They include the *4th Estate* and a member of the Conservative Opposition, Mr. G.I. Smith. The *4th Estate's* concern is that, "where large discretionary powers are left to an individual minister it may become very easy for him to become attached to the persuasive arguments of industry". And, echoing a familiar concern "There is no guarantee that succeeding governments will appoint capable, or even interested environment ministers".[27] Mr. Smith's objection on the other hand, was that the "all-pervasive" powers in the Act would jeopardize the "rights of the individual" by granting the government jurisdiction "over everything we do — even breathing".[28] One group therefore saw the wide discretionary powers as giving the Minister a free hand to go easy on industry, the other saw it as giving the Minister the power to go too hard on individuals. The common thread of both concerns is that fair environmental protection is unlikely to be realized unless the Minister's powers are formalized in the Act.

(2) *The Environmental Control Council*

The second policy-making body, the Environmental Control Council (hereafter the Council), established under section 9 (1) consists of not less than twelve and not more than fifteen members appointed by the Cabinet on the recommendation of the Minister. Eleven members shall represent concerned and interested groups ranging from the engineering profession and conservation groups to the academic community, with the twelfth, the Deputy Minister,

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26 One official of the Department, who wishes to remain anonymous, estimated that the Minister presently spends about 90% of his time on Tourism and 10% on Environment.

27 Editorial, *4th Estate* February 22, 1973.

28 Reported in *Halifax Mail Star*, May 13, 1972.

serving as an ex officio member. In addition to these, the Minister may recommend to the Cabinet that four more persons be appointed to the Council. The Council is "citizen oriented" in the sense that, with the exception of the Deputy Minister, no member may hold a position with the Nova Scotia or federal public services.[29] The only formal prerequisite for membership is Nova Scotia residency. Once the Council is established, all appointments are for two year periods and members may not be reappointed for more than one consecutive term.[30]

Much of the activity of the Council is conducted by the Executive Committee made up of three members of the Council, the Executive Secretary and the Deputy Minister.[31] The Committee is charged with the responsibility of conducting the business of the Council between meetings (section 20 (3)(a)) and referring matters to the Council for its advice and comment (section 20 (3)(c)).[32]

The Council's policy-making role is much more modest than the Minister's. Under the 1972 legislation it was given extensive power to develop and coordinate policy with the Minister (section 18); however, these powers have been severely circumscribed in the 1973 edition of the Act. This reduced role is seen most clearly in section 22 (section 18 in the old Act). Under the old Act both the Council and the Minister were given "general supervision and control of the management, preservation and protection of the environment". This has now been changed to give the Minister sole responsibility for the environment. The desire to limit Coun-

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29 Government personnel input comes from an "Advisory Group". See the discussion *infra* at p. 79.

30 The Council approach is typical of all provincial regulatory schemes in the Maritimes. The Crucial difference, however, is that unlike Nova Scotia, the other Councils and Commissions are made up of government officials who represent indirectly government departments. Newfoundland is typical in this respect. Its advisory Commission on Environmental Quality is made up of at least one representative from Mines, Agriculture and Resources, Health, Fisheries, Economics and Municipal Affairs, and Housing. Interested members of the public may be appointed to the Commission, although it is not mandatory. See: *Clean Air, Water and Soil Authority Act,* S.N.F.L.D. 1970 c.81 s.5. See also: *The Environmental Control Commission Act,* S.P.E.I. 1971, c.33, s.3.

31 The Committee members are Charles Campbell, Malcolm Moores, Peter Odgen, and the Executive Secretary, E.L.L. Rowe.

32 Control over the agenda and what is referred to the Council may play a substantial role in policy formulation. Such powers in the Committee prompted A. Manzer, spokesman for the Dartmouth Lakes Advisory Board to comment that the "balance [is] too strongly in favour of the Committee to the detriment of the Council." Reported by B. Hinds, "Control Council", *Chronicle Herald,* April 4, 1973.

cil's power is also evident in section 17. Both the original and amended versions of the section give the Council power to recommend policies to the Minister,[33] review and appraise activities of other persons, government departments and agencies in light of their impact on the environment, make recommendations to the Minister on environmental guidelines for the use of other departments, and recommend to the Minister regulations and standards for the preservation and protection of the environment. To enable the Council to carry out these functions the old section gave it the power to inquire into any matter pertaining to the preservation and protection of the environment (section 17 (1)(d)) and to appoint standing and special committees (section 17 (1)(f)). Under the new section, however, investigations are conducted by other departments and boards only pursuant to an order of the Cabinet (section 19). By stripping the Council of one of its prime information gathering tools, its effectiveness as a policy adviser has been correspondingly reduced.[33a] Furthermore, the new Act, by reducing the number of mandatory Council meetings from twelve to three (section 13 (1)) also betrays its general intent to limit the Council's policy-making role.[34]

This reduced policy-making role for the Council may be interpreted as a substantial deviation from the public participation goal noted above.[35] The Council was the only formalized mechanism for obtaining a public input at the crucial policy-making stage. When the 1972 Act was presented to the legislature, its strong Council feature was generally applauded by public interest groups working in the environmental protection field.[36] This feature of the Act, however, came under heavy criticism from those who felt a citizen Council should perform a strictly advisory function. The concern about too much public participation surfaced primarily before the Law Amendments Committee during its review of the 1972 Act in the Spring of 1973. The comments of Mr. W. Crossman, an observer at the hearings are particularly helpful.

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33 The new legislation was extended to give the Minister power to "consult with and seek the advice of the Council". (section 8 (1) (p)).

33a Under section 17(1)(b) the Council may review and appraise the programs and activities of other persons, government departments, and agencies in light of their impact or effect on the environment and make recommendations to the Minister.

34 In fact the Council does meet approximately once per month.

35 See the discussion *supra* at p. 77.

36 See for example the comments of Mr. M. Ritcey, Chairman of the Cole Harbour Environmental Council as reported by B. Hinds in an article entitled, "Control Council", *Chronicle Herald*, April 4, 1973.

He notes that "the members of that Committee were frightened of citizen participation. They called it a question of the "ministerial system of government".[37] One Committee member, according to Crossman, equated citizen participation with "an erosion of democracy" and suggested that if the public wanted to participate "it could do so at the polls every four years".[38] What may finally have persuaded the Committee to tone down the Council's powers, however, was the fear that a strong Council might "frighten away industry". As might be expected the diluted Council in the 1973 Act has come under vociferous attack by those who supported the strong Council features of the 1972 Act.[39]

(3) *The Cabinet*

Although the Cabinet has a much more substantial policy making function under the new Act than it did under the old; its role is still subordinate to both the Minister and the Council. Noteworthy changes in the new Act which have enhanced the Cabinet's power include section 6, which gives the Cabinet rather than the Minister power to appoint a civil service "advisory group", and section 19 which gives the Cabinet rather than the Council power to require other departments and agencies of the government to investigate any matter for the Council. This latter function has been supplemented by a new section, section 8 (2) which gives the Cabinet supervisory control over ministerial use of other government facilities and personnel. By retaining the power to appoint the chairman and vice-chairman of the Council and by acquiring power to appoint the members of the Council (section 9 (3)), the Cabinet is able to exert some influence over the direction and activities of the Council.

(4) *The Advisory Group*

Finally, brief mention must be made to the "advisory group". Under section 6 the Cabinet may establish an advisory group consisting of representatives of other government departments or agencies whose functions are concerned with or affect the preservation and protection of the environment. The precise role of the group is unclear. Presumably it is to report to the Cabinet on matters assigned to it by that body.

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37 W. Crossman, "Law Amendments Committee", *4th Estate*, April 13, 1973. Although the Committee stressed the inappropriateness of an appointed body taking precedence over elected representatives, it overlooked the fact that an appointed official, a county court judge, may make the final decision in a case. (section 53). See: "What the People Say" *Mail Star*, April 12, 1973.

38 *Id.*

39 See, for example, B. Hinds, "Control Council", *Chronicle Herald*, April 4, 1973.

(5) *Evaluation*

Under the new legislation, therefore, the policy making nerve centre is largely within the Minister's office. He is assisted by a Cabinet appointed Council whose functions have become largely advisory, and by a civil service advisory group whose structure and functions are presumably to be determined at a later date. Co-ordination between other government departments and agencies is encouraged by prior cabinet approval for extra departmental activities.

There are a number of remarkable features about the way in which policy is to be made in the new Department. Perhaps the most noteworthy is the extent to which the Act has over the past two years been modified to insulate the policy-making function from any public input.[40] Initially, the Council, made up of private citizens, was to play a major part in formulating departmental policy. While not entirely satisfactory,[41] this at least brings the decision-making process a step closer to the public in the sense that the Council is comprised of public members who owe no particular allegiance to predetermined government priorities and therefore are able to approach questions of policy in a more objective, environmentally sensitive frame of mind. Furthermore, the Council embraces a representative cross-section of interested and diverse groups with the result that its decisions are more likely to be a fair reflection of informed public opinion rather than a single man's bias as to a given problem. By stripping the Council of its general supervisory, control and policy-making functions, and many of the tools it needed to perform those functions, the Legislature has seriously curtailed an effective and formalized means of assimilating public input into governmental policy. A "real" public contribution therefore, has become an empty slogan rather than government policy.

Much of what was to be performed by the Council under the old Act, is now left to the Minister, and many of his functions are now the responsibility of the Cabinet. Thus by moving the decision-making process into the higher government echelons, policy-making is once and sometimes even twice removed from the Coun-

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40 Ann Martel summarized the changes as follows: "In the second draft five sections requiring the Minister to consult with the Council are deleted. The two sections which permit the Council to make public its report to the Minister are deleted. For all intents and purposes, the E.C.C. described by Mr. Bagneli as the "teeth" of the Act, no longer exist." Editorial, *4th Estate*, February 22, 1973.

41 See the discussion in the *CONCLUSION, infra* at p. 102.

cil, and that much further removed from the public. Granted, the Minister is eventually accountable to the Legislature and may be questioned briefly by the opposition on his decisions, but these controls are at best only minimal.[42]

Another important feature of the policy-making procedure is the inordinate degree of discretionary power conferred on those responsible for the decision. There is absolutely no legislative statement about how conflicts between environmental protection and other goals are to be resolved. Everything is left to the discretion of the policy makers, including whether or not to take *any* steps toward an improved environment.[43] Discretion and flexibility is, as the *Working Paper* points out,[44] needed when a new department embarks on a new mission, especially in an area in which technology is changing so quickly; but to give the Department a blank check may be extremely dangerous, particularly in the hands of the wrong man. In an attempt to achieve a "flexible legal and administrative framework" and to provide "broad powers" for the decision makers, the *Environmental Protection Act* has put the new Department in a potentially vulnerable position.

The consequences of a lack of public participation and wide ministerial powers may be most unfortunate. An examination of some of the literature on the subject suggests that this particular combination may in fact prove to be environmentally disastrous.

With regard to broad, discretionary powers, M. Holden in a very perceptive article entitled *Pollution Control as a Bargaining Process*,[45] contends that policy decisions about water quality standards are not primarily analytic, but rather are designed to accomodate the regulated. Because the legislation gives the decision-maker a free hand, he tends to follow the path of least resistance and, as Holden writes, this tends to be toward a mutually beneficial and comfortable relationship with the polluters.

> [T]he actual evidence indicates that, while the various parties use the analytic confusions, they are moved largely by recognition of the implications of any particular decision for the interests which they have in mind.[46]

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42 This point was illustrated particularly well recently when the government introduced into the legislature a "laundered" summary of the McLaren Atlantic Report on Wreck Cove. See: *The Cape Breton Post*, Nov. 22 for a comparison of the Report and the Summary.

43 I am not suggesting that this is what the government had done or will do, only that it *could* do this.

44 *Working Paper, supra,* note 18.

45 M. Holden, *Pollution Control as a Bargaining Process,* (Ithica Cornell U. Water Resources Center, 1966).

46 *Id.*, at 18.

The most vociferous and dominant group in any regulator-regulated combination is the regulated industry. Public interests are equated with the regulated's interests or are lost in a maze of rhetoric and ambiguity. Charles Reich traced similar tendencies in the regulation of the United States pulp and paper industry.[47] Whenever administrators are given large amounts of discretion to develop policy and programs, there is always a danger that the discretion will be exercised in a way that best reflects the interests of those that are regulated. This tendency is accentuated in Nova Scotia and other Maritime provinces because the new environment departments lack staff and technical expertise and may, therefore, be required to rely on industry input for their information.[48] Furthermore, by developing a close "working" relationship with their "clientele", the administration neutralizes potential adverse opposition from this powerful group. Thus, there is a danger that policy will be shaped by the polluter who knows what he wants and has ample opportunity to get it.

If the decision-makers require flexibility and broad discretionary powers to cope with problems of environmental protection, the only solution to the problem of bureaucratic co-optation by the regulated is to bring the whole decision-making process out into the open and encourage more public participation. Professor Davis, in his book *Discretionary Justice*,[49] emphasizes the advantages of openness in the following passage:

> The seven instruments that are the most useful in the structuring of discretionary powers are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair and informal procedures. Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice . . . When plans and policies . . . are kept secret . . . private parties are prevented from checking arbitrary and unintended departures from them.[50]

But openness without formally encouraging public participation

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47 C. Reich, "Public Policy and the Nations Forests, 50 *So Cal. Law Rev.* (1962), 381. The tendency may not be as strong in the pollution abatement field because the regulater is not in continual contact with the regulated and therefore the potential to develop comfortable working relationships between the two is not as great.

48 This tendency may be less pervasive in practice because recently the Maritime provinces and especially Nova Scotia, have been prepared to accept the fairly strict air and water quality standards proposed by the federal government. Although the provinces are reluctant to establish such precedents in a field reserved constitutionally for the provinces, they feel they have no alternative. Interview with Mr. G. Bagnell, October 18, 1973.

49 K.C. Davis, *Discretionary Justice* (Baton Rouge: Louisiana State University Press, 1969).

50 *Id.* at 78.

or some public input is not enough. A formalized public input into the policy-making process will help neutralize the influence of polluters by adding alternatives to offset a pro-industry tendency. It will tend to provide the Department with sufficient support for its pro-environment decisions to help it weather potential criticism from industry and other development minded groups. In short, it provides a countervailing power base for the Department and thus enables it to strike a more environmentally sensitive balance between the compelling interests of economic development and environmental protection.

The argument that the public has very little to contribute at the more specific policy-making levels because of the highly scientific and technical nature of the decision-making process is without foundation. Public scrutiny of scientific and highly technical findings would help guarantee the validity of the results. Professor Thompson makes the point in the following manner:

> It cannot be assumed that . . . evaluation will take place within the administrative system because there are too many factors inhibiting rigorous testing —e.g. agency heirarchy, agency self interest, etc. Rigorous evaluation can be ensured only by testing the decision in a forum where conflicting interests will ensure that these inhibiting factors are minimized. For example, the mines department's decision about the adequacy of a tailings disposal system will be rigorously evaluated only if the decision is tested in a proceeding that includes persons whose interests are opposed to the mining operation.[51]

The policy-making function, as determined by the Act, is deficient in two important ways. First, by vesting wide discretionary powers in the Minister, there is danger, especially over time, for ministerial and departmental policies to reflect the interests of the regulated. Unduly fettering the Minister's discretion, however, may not be the solution in the pollution control field. What is needed, in addition to statutory and administrative guidelines, is a countervailing public input. The second deficiency, therefore, is the lack of formalized public input at the policy-making level. This is not to suggest that the "public" should determine policy, but there must be some mechanism to ensure that it is at least solicited and heard.

C. *POLICY APPLICATION*

Once policy is translated into standards and regulations (section 8 (1)(n)), it is applied through an elaborate system of prior approvals. The procedures vary slightly for existing and potential sources of pollution, although essentially they are the same. Ex-

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51 A. Thompson, "Freedom of Information", (Working Paper for the Environmental Law Workshop, Banff, Alberta, March 6, 7, 1972) at 12.

isting problems are regulated by permits (section 23) or program approvals (section 30, 31). Potential problems are dealt with by requiring an applicant to submit appropriate plans and specifications to the Department and prove to its satisfaction that his operation will not contravene the Act (section 28). Superimposed on top of this regulatory framework is a second system of orders which purport to enable the Minister to deal quickly and effectively with pollution problems that, for one reason or another, cannot be handled properly by the normal prior approval procedures. Decisions, adverse to the applicant or "polluter" may, under certain circumstances, be the subject of a hearing or review by the Council, or an appeal to the appropriate court.

This particular approach to pollution, while typical of most Canadian provinces, is, for the most part, ineffective. It demands too much from an over worked Department of the Environment, and relies too little on self-applying regulation. It vests the Minister and his staff with inordinate discretion which purports to give him needed flexibility, but which in fact merely "identifies to whom the pollution lobbyists should direct their energies".[52]

(1) *Existing Facilities*

(i) *Permits*

All existing plants, structures, facilities or undertakings that discharge or emit waste into the environment, or remove any material from the environment which causes or tends to cause pollution are regulated by way of permits under section 23. A person responsible for an existing problem must file with the Minister within one year after the Act is proclaimed[53] information respecting the waste discharged or material removed, daily average and maximum discharge and removal rate, and the location of the works.[54] The informant must then apply to the Minister for a permit within thirty days after being notified that one is required. After receiving the application, the Minister may, if he wishes, seek the advice of the Council (section 23 (6)), require additional plans or other information from the applicant, refuse to grant the permit, or grant the permit in whole or in part upon such terms as

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52 I. McDougall "Weak Protection Law Proposed," *Chronicle Herald*, April 1973.

53 The Act was proclaimed September 1, 1973.

54 In addition to this section, the Minister may, under section 25, also require a person to measure or monitor his discharge of waste and report the results to him.

he may prescribe (section 23 (8)).[55] There are no statutory criteria setting out the basis on which permits are granted; however, section 23 (7) prohibits the issuance of a permit if the applicant has not complied with the provisions of the Act and the regulations. Once a permit has been issued, the applicant is not immune from further ministerial supervision for under section 23 (9) the Minister may suspend or cancel a permit issued by him.

A lack of precise criteria to guide the issuance of permits is another indication of the Legislature's determined attempt to achieve the flexibility and power needed to respond to new and changing problems in innovative ways. This argument loses some of its persuasiveness, however, when one realizes the potential number of applicants and the available departmental staff.[56] Unless there is enough staff to give each applicant the attention and scrutiny required to ensure that an effective pollution abatement program is adopted, permit issuing becomes a rubber stamp operation, not a case-by-case analysis of each application on its merits. If such is the case flexibility is needed only for the more difficult applications; the others could and should be disposed of by routinely applying legislative or clearly enunciated departmental standards.[57] This would help ensure that each applicant was treated fairly, efficiently, and without unduly restricting his personal freedom.

The *Working Paper* suggests a somewhat different solution to the problem posed by the potential number of applications. First, it notes that the government "should obviously only be concerned, at least initially, with the more significant and serious polluters". Control over less significant polluters could then be implemented after the Department is established and policies are more clearly defined.[58] To this might be added "after the Depart-

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55 No estimate of the number of persons who might fall within this category is available. To give an indication of the barrage of applications that might be expected, British Columbia has licensed over 6,000 persons and there is no suggestion that this includes all who must be licensed under the Act. To date, the Department has received approximately 290 applications for permits and approvals.

56 At present, the Department has approximately 18 engineers on staff. Whether this is sufficient to deal with the number of applicants received will depend on a number of factors including the complexity of the applications and the quality of the staff. To date, there is no indication that the present staff cannot adequately handle the applicants; however, there is a danger that this may happen, especially if the number of applications received increases.

57 As of December 1974, no such standards had been adopted under the Act.

58 *Working Paper, supra* note 18 at 3.

ment has established a respectable track record and proven its ability to deal effectively with the toughest problems". However laudable these suggestions and rationales may be, especially in terms of fairness to and concern for the weaker economic units of the society, they are unrealistic. To tackle the most difficult problems with a limited staff,[59] unclear policies, and before the bugs have been worked out of the system is to invite disaster. The biggest polluters are normally able and prepared to put up the best fight. And a few early setbacks for the Department might set unfortunate precedents and demoralize the staff. For example, the Minister has admitted that something less than full compliance with the Act is all that realistically can be expected from Sysco over the next few years.[60] To demand more would jeopardize jobs and alienate a generally sympathetic public. Thus one of the most blatant polluters will continue until it is economic to phase out much of its present plant and replace it with new and more efficient equipment.

Nor is it entirely clear that the Department should take the opposite tact and concentrate its efforts on reducing the less significant pollution problems. Such an approach might well be characterized as a poor allocation of scarce resources. Given limited staff and finances, more may be accomplished by focussing on a few major polluters rather than on a number of small ones. Furthermore, there is a tendency for agencies and departments during this early stage of their life cycle to be far more aggressive and effective than mature, well established agencies.[61] Perhaps a more successful policy would be to deal with applications randomly, hoping on the one hand to establish favourable precedents with the less serious problems and thus creating an important deterrent effect, while on the other hand grappling with the complexities and pressures involved with the more serious individual cases, thereby achieving the best possible mix of approaches.

A second solution to the problems proposed by the *Working Paper* is categorization. This may be done by either restricting the meaning of pollution[62] or by exempting certain persons or classes of persons from the provisions of the Act.[63] Both suggestions received support from the government and the 1973 legislation was amended accordingly. Pollution is defined in the new Act as a

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59 At present, there are 16 engineers on the Department Staff.

60 Interview with G. Bagnell, October 18, 1973.

61 Katz and Kahn, *The Social Psychology of Organizations* (Wiley, 1966).

62 *Working Paper, supra* note 18 at 5.

63 *Id.*, at 6.

"detrimental alteration or variation of the . . . environment" that causes or is likely to cause "(A) impairment of the quality of the environment for any use that can be made of it, or (B) physical injury or serious discomfort to any person or (C) injury or damage to property . . . which renders . . . [it] unfit for the use to which it is normally put, or significantly disturbs the natural ecological balance or . . . [is] contrary to the permissable levels established by the Minister by regulation". (section 1 (n)(f).[64] Not only has pollution been less broadly defined in the new Act than the old,[65] but those activities to which the Act applies have been circumscribed considerably. "[T]he Act does not apply", according to section 50 (2), "to accepted ordinary activities of individuals, households and farms — except to the extent prescribed by the Governor in Council". Farm feed lots, therefore, although a major pollution problem in Nova Scotia may not be regulated.[66] Furthermore, under section 51, the Minister, with the approval of the Cabinet, may make regulations "(b) exempting from the application of section 24 a permit, approval, licence or other authorization or class thereof; . . . (d) exempting persons or classes of persons, matters or things from the provisions of this Act or regulations". Section 24 absolutely prohibits the issuance of a permit or licence that approves discharges of waste into the environment without ministerial approval. Thus the stage is set under section 51 for regulations that exempt certain activities from ministerial supervision and that exempt certain classes of persons and things from the application of the Act. While both techniques will undoubtedly lessen the Department's work load, they raise serious questions about potential discrimination. Without a preannounced rationale for exempting some activities rather than others, both the government and the Department are open to charges of favouritism.[67] Again, a purely random approach to the problem might prove to be a far more satisfactory method of reducing the work load.[68]

(ii) *Program Approvals*

In addition to the section 23 permit, a person responsible for an "existing source of waste discharge" may submit to the Min-

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64 The definition is, with a few minor exceptions, the one proposed in the *Working Paper, supra* note 18 at 5.

65 The old act defined pollution as "Any alteration or variation of the physical, chemical, biological or aesthetic properties of the environment . . . ." (section 1 (e)).

66 S.O. 1971 c.86 s. 8(4).

67 See the discussion *infra* at p. 91.

68 This may in fact be what is happening.

ister, [69] under section 30 (1) a program to prevent or reduce existing or *additional* discharges[70] of waste into the environment. On receiving such a submission the Minister may refer the program to either the Committee or the Council or both for further consideration and advice.[71] If the program is approved it *shall* set out the details of the proposed abatement program including a time schedule for completion (section 30 (c)) and, more importantly, a warning that the approval may be rescinded at some future time if, after consultation with the Committee, he is of the opinion that it is necessary or advisable for the protection or preservation of the environment to do so (section 31 (d)).[72]

The situation is thus most ambiguous for the polluter. Section 23 places him under an unqualified obligation to notify the Minister of the problem and, if required, make application for the appropriate permit. Whether a permit is issued depends on whether the applicant has complied "with the provisions of this Act and the regulations"; an apparent reference to the quality standards that may be established under section 8 (1)(n). If a permit does not issue, section 23 (1) appears to require that operations cease: "No person shall . . . operate . . . a facility . . . unless he has obtained a permit from the Minister". Section 30, however, offers these same persons an attractive alternative to the apparently rigorous standards of section 23. Under this provision it may be possible to obtain qualified (section 31 (d)) ministerial sanction in exchange for a promise to adhere to a remedial program. However, the Act does not set out any criteria by which these applications are to be judged;[73] the Minister has an apparently free hand to negotiate whatever arrangement seems appropriate in the individual circumstances. In short, the applicant is free to extract as many concessions as he can from a Minister with open-ended discretionary power.

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69 By putting the initiative on the person to submit a program approval, individuals are presumably encouraged to "clean up their own backyard."

70 The use of the words "additional discharges" is very suspicious for it suggests that persons who alter their plans may be entitled to a program approval rather than the potentially stricter approval.

71 In the 1972 Act, the Minister, after consultation with the Committee could refer the program to the Council (section 34). Now the Minister may circumvent the Council input entirely and confer only with the Committee.

72 Unfortunately there is no similar warning clause for permits issued under section 23. Section 23 (9) gives the Minister power to suspend or cancel a permit, but only in "the manner prescribed in the regulations."

73 Nor, for that matter, is there anything indicating which applicants are entitled to opt for program approvals rather than permits.

On the other hand, while the dangers inherent in giving the Minister a free hand may be substantial, this approach is not without some merit. For individuals as well as society, a strict application of section 23 to all existing sources of pollution would not only seem unfair, but would create great economic hardships.[74] Most pollution problems in the Maritimes began at a time when environmental protection was a non-issue. Industry was begged to locate in Eastern Canada, often without regard for the environmental consequences. [75] In some instances federal and provincial governments competed to see which level of government could be the most generous and lay claim to the credit for the jobs created. Concern over waste disposal and resulting environmental damage was minimized. For companies that have grown and prospered within this environmental laissez faire milieu, it would be possibly both unreasonable and unjust to change the rules without some advance warning. In the urban planning field, for example, most planning acts exempt non-conforming uses from zoning changes[76] and therefore it may be argued by analogy, similar provisions should be made in the environmental protection field. Because expectations of immunity have been created within industry by both levels of government, a compromise must now be struck in a number of important cases. The issue is, therefore, not whether program approvals are inherently perverse, but whether they can reflect the best compromise possible.

Before attempting to answer that question, some of the issues that should be basic to the granting of program approvals must be surveyed. First, the analogy to planning law is of limited utiltiy in resolving the question. The differences between, for example, a rooming house in a single family dwelling zone and a craft mill on a beautiful stretch of Nova Scotia shore are far more striking than the similarities. One may cause some slight inconvenience and annoyance to its neighbours, the other may do irreparable damage to potential fishing and recreation areas. And if we change the pollution example slightly to include lead or mercury contaminants, the argument in favour of prompt remedial action at the expense of reliance interests becomes more persuasive. Whenever the source of pollution poses long term problems for the environment, the government should be prepared to act immediately to

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74 This is especially true if the quality standards are particularly strict.

75 For example, Scott Paper Co. Ltd. came to Nova Scotia under an agreement in which the provincial government assumed responsibility for affluent treatment. The government has not been able to deal with the problem satisfactorily and the pollution of Boat Harbour continues at an alarming rate.

76 *Planning Act*, S.N.S. 1969 c. 16, s. 45.

minimize the dangers. Likewise where pollution poses a threat to human health the government should be prepared to eliminate them regardless of the economic consequences.

Not only is a polluting generating activity potentially more harmful than a non-conforming use, but the vested interests dependant upon pollution are not worthy of great consideration. For the last few years the "writing has been on the wall" for all to read. Concern about pollution grew quickly, but it did not appear yesterday. Those commercial interests that failed to heed the warnings should not now be permitted to claim any credit for their lack of foresight. In this context, the retroactive nature of the legislation may not be of too great a concern. Because some companies have been expending large sums of money over the last few years to remedy their pollution problems, we may now confidently insist that others follow their example.

What then should determine which abatement programs are approved and which are not? Three criteria are listed below in descending order of importance.

(1) The nature of the damage caused by the pollution. Pollution that endangers public health must be stopped immediately; however, pollution whose effects are less drastic must be remedied in direct proportion to the long term consequences of the pollution. The more serious the pollution, the more stringent the abatement program.

(2) The reliance interests that underlie the pollution. To determine the extent of the interest, the department should look at (a) the terms of any agreement that brought the company here in the first place (this factor becomes less important over time), (b) the length of time the company has been operating, (c) the extent to which other companies have been able to solve similar pollution problems, and finally (d) the availability of adequate abatement technology. Greater weight should be given to the last two factors.

(3) The economic hardship that would follow adherence to a program.

However, if these factors are to be given credit in the approval decision, a formidable problem of logistics will have to be overcome. Inasmuch as the concerned industries have a virtual monopoly over the relevant data, the Department's bargaining skill may be heavily outweighed and its overall role less than effective. Approvals may become little more than symbolic reassurance for an apprehensive public rather than a real contribution to pollution abatement.

Without concrete standards to guide the Department or at least a strong public input to counter balance the industry input, the Department will likely heavily favour industry interests. As Holden notes, the same process that occurred at the policy-making level occurs at the policy application level:

> What these cases, and many similar ones suggest is that the accretion of many small exceptions in the [policy implementation and] policing process[es] amount to a significant deviation from the policy norm [statutory purpose] from which the regulatory agency began. The more this is so, the more it must be clear that large amounts of regulatory action have little or nothing to do with the achievement of any overall systemic result, and much more to do with achieving a tolerable day-to-day working arrangement.[77]

While it is still too early to tell, this potential problem does not seem to have materialized. Indications are, for example, that the Department will approve a pollution abatement program for Anil Canada[78] that incorporates at least the "best practicable" technology. Nevertheless, the *tendency* for government agencies to be satisfied with a "tolerable day-to-day working arrangement" with those they are purporting to regulate does exist.[79]

(iii) *Orders*

Perhaps to minimize the difficulty of responding effectively to unanticipated pollution problems, or perhaps merely to give the Department another technique for dealing with those who have not received the required permit, the legislation arms the government with an all-pervasive weapon called an "order".

Section 26 permits the Minister to order any person who he believes on reasonable and probable grounds is discharging any material into the environment that may tend to cause pollution or is contravening the regulations or standards prescribed under the Act to (a) cease the contravention, (b) limit or control the rate of discharge of the waste, (c) stop the discharge of the waste, (d) comply with directives set out in the order, (e) install, replace or alter equipment or (f) immediately stop operations where he believes there is an immediate danger to human life, the health of any person, property or likelihood of irreparable and irreversible damage to the environment; and under section 34(1) the Minister, after consulting with the Committee, may order remedial action to be taken to control, combat, eliminate or mitigate a cause of pollution. Where any person causes the discharge of a waste into the environment that causes pollution, the Minister, after consulting with the Committee, and when he is of the opinion that it is in the public interest to do so, may order such persons to do all things necessary to repair the injury or damage (section 34(2)). If the person refuses, the Minister may

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77 Holden, *Bargaining Process*, *supra*, note 45.

78 This comment is based on information gathered at the Hearing into Amil Canada Ltd., Chester N.S., December 4, 1974.

79 See, however, the comment in note 47.

take the appropriate remedial action and recover his costs in a court of competent jurisdiction as a debt due the Crown (section 34 (3)).

Both sections are essentially "last resort" sections that do not derive their effectiveness from their everyday use. Faced with a particularly stubborn polluter who has refused to comply with the permit or approval section, the government has recourse to the order. However, in light of our earlier discussion about the dangers of government co-optation, orders will probably not be widely used for much more than bargaining purposes.

(2) *New Facilities*

(i) *Approvals*

Under section 28 (1), no person shall begin to construct new facilities or to alter existing ones "that will or [are] likely to cause pollution . . . contrary to [the] Act or the regulations" unless the abatement plans and specifications have been approved by the Minister. Until either the regulations or the Minister requires greater specificity, the plans, according to section 28 (2) (a), (b), (c) must show the location, size and capacity of the facility, nature of the process to be used, reasonable data to demonstrate the feasibility of the process in light of the provisions of the Act, details of the waste that will be discharged into the environment during construction, and finally, details of waste that will be discharged into the environment from the operation of the facility itself. Section 28(2) enables the Minister to seek advice from the Committee on particular applications at his discretion. This is unlike the original Act which demanded that the Minister refer each application to the Committee (section 32 (3)); however, this procedural safeguard has been abandoned, apparently in the interests of expediency and ministerial discretion. One section that has not been diluted in the new Act is section 29, which puts the Minister under a duty to require applicants to make whatever changes are necessary to ensure that the facility will not discharge wastes into the environment contrary to the Act or regulations.

This part of the Act raises a number of questions which, if left unanswered, may raise substantial objections. First, it is unclear why the Act uses "permits" when approving existing operations, and "approvals" when approving new ones. Different words raise a presumption that they mean different things, and, if this is so, what is the difference between the two and what is the rationale for making the distinction? Secondly, section 23 prohibits, inter alia, the operation of any facility that discharges waste into the environment or "removes any material from the environment, the removal of which causes or tends to cause pollution", while section 28 merely requires approval for new facilities that

will or are likely to cause pollution, and alterations to existing facilities that will or are likely to result in a discharge of waste into the environment. Again the reasoning behind the different terminology in the two sections is obscure. It becomes even more perplexing when one realizes that within one section, section 28, one standard applies to new facilities, "will or are likely to cause pollution", and another to alterations of existing ones, "will or are likely to result in a discharge of waste into the environment". Finally, although section 28 (2)(b) requires an applicant who intends to build a new facility that may cause pollution to submit plans and specifications setting out details of waste that will be discharged[80] into the environment during the course of construction, there is apparently no control over facilities that will, when constructed, pose no pollution problems; but which may, during construction, cause serious problems. If section 28 was intended to cover such a situation, it should be explicit. If it was not, the Act is seriously defective in this regard.[81]

(3) *Evaluation*

The primary control or policy application mechanism envisioned under the Act is an elaborate system of permits, approvals, program approvals and orders. The advantage of this approach over other regulatory techniques such as self applying rules and standards, lies in the enormous degree of control and supervision given the Department over each pollution problem. The disadvantages of this technique, however, are many. Enormous control requires an enormous staff and with that comes the problems of inefficiency and delay that have become synonymous with large bureaucracies. From a civil libertarian point of view, this degree of control poses substantial restrictions on the freedom of those who come within the ambit of the Act,[82] and society should be reluctant to accept such controls unless they are necessary and used wisely. The most important problem of individualized regulation is that it requires the Department to commit itself to the

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80 A mere liklihood that waste will be discharged is insufficient.

81 For example, Sandy Lake has become seriously silted up in the past year from construction along the shores of the lake. When built, the structures will not pose a serious pollution problem; however, their construction has almost ruined the lake.

82 Mr. G.I. Smith, M.L.A., objected to the "all pervasiveness" of the 1972 version of the Act, because as he argued, the bill would grant government jurisdiction "over everything we do —even breathing". *Mail Star*, May 13, 1972.

applicant, sometimes irrevocably, without sufficient information on which to make a wise decision. This becomes especially serious in a field in which changing technology and changing social values can make well thought out decisions obsolete overnight.[83]

If permits and approvals are to be issued fairly, they must be issued in light of predetermined standards. Standards not only tell the applicant what case he has to make to receive an approval, but also confine the Department's discretion and minimize the likelihood of preferential treatment for the more vociferous and economically powerful applicants. Granted, program approvals are tailored to meet the specific requirements of the applicant, but these are or will become of secondary importance as time goes by, and all new facilities are regulated under section 28. It is very difficult at the outset, however, to draft lasting standards and approve specific technologies, especially in light of the rapid developments occurring in the pollution and pollution abatement field. A substance, such as mercury which is regarded as harmless metal one day, is found to be a deadly poison the next. And who knows what the next "environmental crisis" will be? Technology which may achieve satisfactory results today, may be made obsolete by a new invention tomorrow. Thus, there is or should be great reluctance on the part of the Department to promulgate specific standards and approve applications, in view of the difficulties involved in subsequent recession or amendment, notwithstanding legislative jurisdiction to the contrary.[84] The detrimental reliance — vested rights argument becomes particularly compelling if persons have complied with specific government directives. The result is that a serious gap develops between the pollution abatement that is, at any particular time, economically feasible and the degree of abatement and control demanded by the Department under the permits and approvals. If permits are changed to respond to new problems and incorporate new technologies, old ones must be rescinded and new ones issued. But this is a very difficult, time consuming process. It requires a large and energetic staff. Department personnel must first verify that new standards can and should be developed, then draft standards, presumably after extensive consultation with those who will be directly affected, and finally must re-licence each polluter or class of

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83 This appears to be what happened in the Anil Canada case. The company complied with Water Authority directives and adopted the prescribed pollution abatement system only to find that it was ineffective. Public Hearing into Anil Canada Ltd., Chester, Dec. 4, 1974.

84 However, section 23(9) gives the Minister authority to, "suspend, cancel . . . . a permit issued by him in whole or in part in the manner and upon such grounds as are prescribed in the regulations".

polluters. One can only speculate about the time involved with an adequate staff, but with an inadequate one the task would drag on forever.

A potential solution to this dilemma is to design a two-tiered regulatory structure that uses standards (self-applying regulations) to establish minimum effluent and emission objective and flexible effluent and emission charges[85] to provide an incentive to persons to automatically reduce pollution as new abatement technology becomes available. While determining the most appropriate "fee" is a complex and difficult task, the standard-effluent charge approach may well require a much smaller staff to set up,[86] provide fair warning to everyone and hopefully achieve a higher degree of pollution abatement. Provision would also have to made to ensure that especially difficult problems were given special and individualized attention from the Department but this would not be particularly difficult to build into the scheme.

D *HEARINGS, REVIEWS AND APPEALS*

Like most provincial statutes, the Nova Scotia Act gives those "directly affected"[87] by departmental decisions a *formal* hearing,[88] but it does not guarantee other "affected" persons similar rights to a hearing. The result is a one-sided procedure that confines participation to one segment of those affected and ignores the damaging spillover affects of potentially sloppy administrative action from an overworked and vulnerable bureaucracy. The specific provisions of the Nova Scotia Act amply demonstrate these points.

The operative section is section 27 (1). It states that where a "permit is refused, suspended or cancelled pursuant to section 23 or an order issued pursuant to section 26 the [decision] . . . *shall* be referred to the Committee or Council pursuant to sub-section 2 of section 17 within five days". (emphasis added).[89] Orders not referred to the Council or Committee within five days shall "term-

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85 Effluent charges could be a term of the permit or approval issued under the present Act.

86 Enforcement would undoubtedly pose some problems, but they would not be any more difficult than the ones encountered under the existing statutory framework.

87 See the discussion *infra* at p. 97 ff.

88 As opposed to a less formal public hearing.

89 For example, those people who live adjacent to or within the immediate area of a source of pollution.

inate and cease to have effect". (section 27 (5)).[90] Permit refusals, suspensions or cancellations on the other hand, presumably continue in force notwithstanding noncompliance with section 27 (1); however, the person affected could theoretically force the Minister to refer his decision to the Council through *an order in lieu of mandamus.* This option is not a viable one in light of section 27 (4) which gives the Minister power to accept or reject the recommendations of the Council. There is no reason, however, to assume that the Minister will not at least refer both decisions to the Council for their advice.

The review procedure with regard to approvals and program approvals is essentially the same. Under section 33, when the Minister (a) refuses to give his approval of plans and specifications submitted pursuant to section 28, (b) requires the condition precedent to the giving of his approval, or (c) refuses to give his approval to a control program submitted pursuant to section 30, the Minister must notify the applicant of the decision and his right to review, whereupon the applicant may request the Minister to refer the matter for review. Thus, the onus is on the applicant to institute the review proceedings, but once instituted, they follow the same pattern as those discussed *supra.*

While the decision to give a disappointed applicant an elaborate review is commendable, the failure to offer similar guarantees to aggrieved members of the public places a heavy bias in favour of the polluter. It may tend to limit participation to one narrow segment of those affected. Appeals will only come from the applicant if the Minister adopts a tough, pro-environment posture and refuses an application or attaches environmentally protective conditions to an approval. Every case that comes before the Council or Committee will be for purposes of gaining *relief* from the Minister's decision; virtually none will be to enforce a higher standard of pollution abatement on the applicant.

In addition to sections 27 & 33, section 17 (2) empowers the Minister to authorize the Council or the Committee to review decisions made or conduct and hold hearings in relation to plan approvals, permits, orders made by the Minister or Deputy Minister and any other matter pertaining to the preservation and protection of the environment. These hearings are held at the discretion of the Minister, not at the option of the complainant or required by the Act. Since the Act was proclaimed in September, the Minister

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90 Under section 27 (2) notification by the Minister or Deputy Minister to the Council or Committee within 5 days shall be deemed to be compliance with section 27 (1).

has ordered that a hearing be held into the operation of the Anil Company's hardboard mill on the south shore.[91] Rather than leaving hearings to the discretion of the Minister,[92] there should be some guidelines in the Act that set out the circumstances under which a hearing must be held.

Public hearings are conducted pursuant to the Regulations passed by the Cabinet in 1973. Generally they give any "interested person" who informs the Council of his intent to appear at the Hearing the status of a "witness". As a witness the person may not only make presentations on his own behalf and call witnesses, but may also cross examine every other witness. This provision, while ensuring that hearings will not be conducted expeditiously, guarantees that every interested person may participate fully in the hearing process. The most serious criticism of the Act and Regulations respecting public hearings is that they do not ensure that witnesses have access to all relevant information before the hearing. This difficulty surfaced at the Hearing into Anil Canada where witnesses were only given a brief viewing of the company's pollution abatement proposal, although the efficacy of the proposal was one of the main issues at the Hearing.[93] The discretion not to make the recommendations of the Hearing public is another potential defect; however, it does not appear to be a problem in the Anil Hearing.[94]

While it is still too early to tell, the hearing provisions appear to be working very well. The Anil Hearing provided much useful information and offered the affected area residents an opportunity to appreciate all aspects of the problem, including the Company's plans to reduce the problem. Hopefully the precedents set in this first hearing will encourage the Minister to use this device more frequently in the future.

Beyond the hearings and reviews that may be conducted by the Council, section 53 (1) gives a "person who is aggrieved by a regulation . . . or by the refusal of the Minister to grant or issue a permit . . . or by the granting of a permit by the Minister . . ." the

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91 Conducted by the Executive Committee of the Environmental Control Council, Chester, N.S., December 4, 1974.

92 The Minister has refused to call a hearing on the proposed hydro-electric project at Wreck Cove, even though the project may cause serious environmental damage.

93 The witnesses were, however, permitted to view the proposal after the Hearing and include these findings with regard to the proposal in their written submission to the Committee.

94 The Minister has stated publicly that he intends to make the recommendations public. C.B.C. Television Interview, November 27, 1974.

right to appeal on a question of law or fact to a judge of the County Court. Clearly the applicant who is denied a permit or a company that is subject to an order is an aggrieved person and has a right to an appeal. It is not clear, however, whether a successful argument can be made that other aggrieved members of the public have a right to an appeal. The section and the way in which it fits into the scheme of the Act suggests a most ambiguous answer.

The argument that aggrieved members of the public have a right of appeal centres around the wording of the section. It specifically gives those aggrieved by the *issuance* of a permit an appeal. The only persons who could be aggrieved by the issuance of a permit are perhaps the applicant's competitors, if for example the permit was more lenient than the one issued to them, or members of the public who would be affected by authorized pollution. Clearly the applicant has no complaint if he is issued the permit he applied for,[95] nor can the Minister be aggrieved by granting the permit because it is within his power to grant or not to grant a permit. Thus, by a process of deduction, the only "aggrieved" persons in such a situation appear to be neighbours or under very special circumstances, competitors.

There are two problems with this interpretation. First, and most importantly, the Minister has said that the section was never intended to give such persons a right of appeal[96] and secondly, a recent English decision[97] directly on point confirms the Minister's interpretation. The decision suggests the apparent futility of an argument that claims aggrieved members of the public have an appeal under the Act. The facts of the case anticipate the kind of problems that the public may encounter under the Environmental Protection Act.

Under the Town and Country Planning Act, 1959,[98] a prospective quarry operator applied for a permit to extract chalk from an open chalk pit. His application was met at the enquiry stage by a flood of protests. The protesters, behind the leadership of a large local landholder, Mr. Buxton, argued that an approval would result in blowing chalk dust which in turn would not only impair the aesthetics of the area but would detrimentally affect a number of prize herds being raised in the area. Mr. Buxton's argument was especially

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95 It must be noted that the section may be construed to mean "approvals granted, but on *different* terms than those applied for." Such an interpretation would preclude any argument that extends to "aggrieved persons" including aggrieved members of the public.

96 Interview with Mr. G. Bagnell, October 18, 1973.

97 *Buxton* v. *Minister of Housing and Local Government* [1961] 1 Q.B. 278.

98 (7 and 8 Eliz. 2, c. 53).

compelling. He had invested heavily in a pedigree pig herd. He "came to live in this area because he is interested in natural history, ornithology and landscape gardening and he is in the process of establishing a conservation area on his land".[99] The approval of the application might jeopardize both these projects. In the face of these objections, the investigator made certain findings of fact and recommended that the application be turned down. The Minister rejected these findings, however, and on the basis of subsequent information given to him by the Minister of Agriculture approved the application. Mr. Buxton then appealed to the High Court under Section 31 of the Act.[100]

Mr. Justice Salmon of the Queen's Bench Division refused to consider the applicant's case, because he was not "a person aggrieved" within the meaning of section 31 of the Act. Before disposing of the case, he sympathised with Mr. Buxton's plight and even suggested that his decision might have been different if he was not bound by prior authority in the scheme of the Act.

> If I could approach this problem free from authority, without regard to the scheme of the Town and Country Planning legislation and its historical background, the arguments in favour of the applicants on the preliminary point would be most persuasive, if not compelling, for in the widest sense of the word the applicants are undoubtedly aggreived.[101]

Toward the end of the judgment, he reiterated this theme.

> Apart from authority, there is, as I have already indicated, much to be said for the view that in ordinary parlance the applicants whose amenities may be spoiled by the proposed development are persons aggrieved by the Ministers decision.[102]

In the end, however, the learned judge felt compelled to restrict the meanings of the words "persons aggrieved" to a person with a "legal grievance".[103]

He came to this conclusion after examining the scheme of the Town and Country Planning Act. Like the Nova Scotia Environmental Protection Act, it restricts development for the benefit of the public at large. Because these restrictions have severely circumscribed an individual's former right to use his land as he sees fit, subject to the common law doctrine of nuisance, an elaborate appeal procedure is provided. If the local Planning Authority

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99 Taken from the plaintiff's statement of claim.

100 The section states: "If any person . . . (b) is aggrieved by any action on the part of the Minister . . . he may make an application to the High Court under this section . . . ."

101 *Supra* note 97 at 283.

102 *Id.*, at 286.

103 *Id.*

refuses permission or grants it upon unacceptable terms, the applicant may appeal its decision to the Minister. From the Minister's decision, a further appeal may be made to the courts under section 31. No corresponding rights of appeal from a planning authority decision are given to surrounding property owners who may in some way be affected by the planning authority's decision.[104] Thus, Mr. Justice Salmon argued, "it would be strange indeed if the present applicants, who have no *right* to appeal to the Minister from the local authorities' grant of permission, nevertheless, have the right to apply to the courts from the Minister's grant of planning permission".[105] Aggrieved persons are those whose right to have the Minister comply with the statute when considering their appeal has been infringed.

This conclusion was also supported by prior authority. Mr. Justice Salmon felt the judgment of James, L.J. in *Re Sidebotham*[106] determined the matter:

> The words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.[107]

Thus, unless some legal right is infringed by the Minister, the applicants are not "persons aggrieved" and lack standing to bring the action.

Exactly the same reasoning would seem to apply to persons affected by permit approvals under the Nova Scotia Act. They may certainly be aggrieved, but not legally aggrieved. They have no *right* to a hearing or review and therefore it would seem inconsistent to suddenly give them a right to an appeal to the Court. The result, of course, is a further limitation of the goal of a "real" public input in the decision-making process.

E. *ENFORCEMENT*

The Act is enforced through the usual technique of criminal sanctions (section 48), supplemented by a selfhelp remedy for the Minister (section 54). This approach is typical of Maritime environmental protection legislation,[108] although one may seriously

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104 *Town and Country Planning Act, Supra,* note 98, s. 37.

105 *Supra,* note 97 at 284. (emphasis added)

106 (1880), 14 Ch. D. 458.

107 *Id.,* at 465.

108 S. NFLD., 1970, No. 81, s. 28, S.P.E.I. 1971, c.33, s.16(4), R.S.N.B. 1973, c.C-6, s.33.

question its efficiency.

(1) *Prosecutions*

Section 48 makes it an offence for any person to contravene a provision of the Act or regulations. The penalties are stiff. First, conviction carries a maximum $5,000 fine and each subsequent conviction, a fine of not more than $10,000. There is no restriction on who may bring the prosecution, thus enabling resourceful members of the community to bring a private prosecution.[109] They may be discouraged from prosecuting by the costs involved, the lack of damages if they win (the fine is paid to the state, not to the prosecutor) and the prospect that the Attorney General may intervene and drop the action at any time. Nevertheless, prosecutions and the publicity they generate may help alleviate specific problems. And, if an offending person refuses to remedy the problem, a new prosecution may be brought for each day that the offence continues.

The problems of bringing a successful prosecution, however, are substantial. Section 46 provides that if the accused establishes that the offence was committed without his knowledge or consent and if he exercised all reasonable diligence to prevent its commission he shall not be liable.[110] Proof problems may be difficult for the private prosecutor to overcome. Courts tend to be very suspicious of tests conducted under anything less than the most favourable conditions. This problem is partly overcome by section 44 which makes a certificate or report of an analyst of the Department prima facie evidence of the facts stated therein. The problem may persist, though, if the Department either refuses to conduct tests or make the proper certificate available to the prosecutor.[111] By defining pollution in terms of permissible maximums (section 2 (f)(ii)) the problem of "proving" pollution is somewhat alleviated; however, no regulations defining pollution have been adopted by the Department.

(2) *Self-help*

Prosecutions do not necessarily solve pollution problems, they merely make it more uncomfortable and expensive to pollute. Section 54 gives the Minister power to remedy pollution problems (failure to comply with the Act) and recover the costs and expense of the remedial action in a court of competent jurisdiction from the person causing the pollution. Where the pollution cannot be

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109 F. Kaufman, "The Role of the Private Prosecutor," 7 *McGill Law Journal* 101.

110 Because the Department was unable to prove the requisite *mens rea* in the Williams Lake case (unreported, 1972), the defendant was acquitted.

111 See the discussion *supra* at p. 93 ff.

remedied the Minister may recover damages, although just what kind of damages are recoverable is not specified in the Act.[112] The section has never been used and, based on the experience in other jurisdictions, will not likely ever be used.

(3) *Evaluation*

By using the criminal law to enforce the Act, the legislature may have seriously limited the Act's usefulness. No Act is better than its enforcement scheme. Criminal sanctions have, in the pollution control field, proven to be singularly unsuccessful. Perhaps because of the stigma that accompanies a conviction, or perhaps because of government's reluctance to use the big stick approach, convictions are few and far between. And when a person is convicted the fine levied is too small to have any real effect. Both the department and the judges seem reluctant to subject offending persons to the criminal process. The result is that those responsible for pollution are sometimes able to ignore the stiff requirements imposed on them under the Act.

There are a number of solutions to the problem. Civil, rather than criminal sanctions at least remove the judges reluctance to stigmatize an offender by imposing a substantial fine. To encourage individuals to adopt a watch guard role, fines might be paid over to the successful prosecutor. If more encouragement is needed, a treble damages clause could be inserted as an added stimulus to the aggrieved plaintiff. Effluent charges might eliminate many of these problems. This solution has received considerable attention recently, and may offer a more rational method of ordering priorities. The exclusive reliance upon criminal sanction and the failure to include other enforcement tools appears to have relegated the ultimate significance of the Act to an unconvincing statement of purpose rather than the establishment of an effective pollution abatement process.

III *CONCLUSION*

The *Environmental Protection Act* is not only representative of most Maritime environmental protection legislation, but is representative of an approach to pollution problems that has potential for symbolic reassurance to an apprehensive public rather than a real improvement in the quality of the environment. This conclusion follows from a brief examination of two themes that have run throughout this note: (1) unfettered departmental powers and (2) a lack of public participation.

The Act provides the Minister and his Department with a high degree of flexibility and unfettered power to enable him to deal

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112 Environmental Protection Act, S.N.S. 1973 c. 6, s.54.

with pollution problems. In light of the highly complex and technical nature of each problem, such powers are an obvious prerequisite for effective departmental action. But broad powers without statutory guidelines, may leave the Department in a particularly vulnerable position. Unless the decision-maker is required to apply tough, statutorily imposed standards, there is a danger that the solution to each problem will be a negotiated one that reflects the interests of the regulated and not those of the public. This tendency is accentuated if the Department lacks the resources to bargain effectively with the regulated.

The solution to these potential problems is a countervailing and balancing public input into the decision-making process. Under the Act, "participation" in this process tends to be reserved for the "polluter".[113] By opening up participation to include a concerned public the tendency noted above will be offset by a tendency to satisfy the demands of the public participants.

To be effective, public participation must be structured along the policy-making (legislative) —policy-applying (judicial) decision-making dichotomy noted above.[114] Policy-making involves decisions about how society can best use its scarce resources, or more generally, the direction in which it should be heading. These decisions are highly discretionary because there is no "right" answer, except to the extent that it best reflects society's goals. In the pollution control field, this means setting environmental quality and effluent and emission standards that best reflect socially acceptable compromises between economic development and environmental quality. The policy-applying decision, on the other hand, merely involves applying the policy decision to a particular applicant. These decisions encompass far less discretion because the process tends to be a routine application of a predetermined standard to a particular fact situation.

Because each type of decision is unique, it follows that each should be made in a different way with different degrees of public participation. Policy decisions, for example, are best made in a forum that approximates the Legislature.[115] This permits all diverse interests to provide some input, without any particular interest necessarily determining the outcome. In the pollution con-

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113 See the discussion *supra* under REVIEW, HEARINGS AND APPEALS at p. 95 ff.

114 See the discussion *supra* at p. 80.

115 The Legislature, because of a lack of time and expertise is not the most suitable institution to make these decisions.

trol context, this involves making decisions about environmental quality standards by a politically responsible Minister after hearing from all interested parties through some representative mechanism such as the Environmental Control Council. The Council, however, before making recommendations to the Minister on any policy issue *must be required* to hold public hearings to ensure that all segments of society have an opportunity to be heard. The Minister may then, on the basis of the Council's recommendation and the appended submissions of all participants at the hearing, and on the basis of his own and his expert staff's assessment of the situation, make a decision. Public hearings do not necessarily require the Minister to decide one way or another, they merely provide him with more input and information, and hence enlarge the number of alternatives available to him and give him a better indication of society's interests.

Once policy is made and translated into standards, the application of the policy to a particular applicant should be done in a different forum. Policy application leaves far less room for discretion and policy. The essence of the decision is fairness. Such decisions are better made, therefore, in a judicial or quasi-judicial setting. Public input at the policy-applying stage must be limited to insuring that pollution abatement standards are applied to and enforced against the affected person. This means that the "affected public"[116] should have an opportunity to present proofs and arguments to an impartial decision-maker that go to show the extent to which an applicant will comply with the appropriate standard. Furthermore, if any affected person is dissatisfied with the decision, he should have a right of appeal. If the permit or approval does not comply with the appropriate standard for some reason, then the Minister is making an important policy decision with regard to the applicant and it should be subject to the same procedural safeguards outlined above.

By incorporating the public into the decision-making process at both the policy-making and policy-applying levels, there is a strong liklihood that ministerial and departmental decisions will better reflect the avowed environmental protection purpose of the statute. Institutionalized public participation provides the necessary countervailing force to ensure that the Minister's powers are exercised in a way that best reflects society's environmental protection goals.

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116 "Affected" is defined here to mean those who have something more than a general public interest in the outcome of a decision.

The criticism and concerns discussed above are directed at the form and structure of the decision-making process as outlined in the statute, not at those who must administer the Act. Given the right people, the ideal type decision-making process suggested here can be achieved informally. The difficulty with that is that it depends on personalities and therefore may disappear with a new Minister or with key personnel changes.

While it is still too early to tell, the Nova Scotia Environmental Protection Act seems to be an important step in the right direction. It gives the new Department authority to deal with pollution problems in a comprehensive manner. Generally, the Department has established a respectable track record in its first year and a half of existence. There is no reason to believe that the Department, under the existing Minister and Deputy Minister, will not continue to achieve significant improvements in the quality of the environment. This end would be better served, however, by an Act that better defined the Minister's environmental protection role and included a significantly higher degree of public participation in the decision-making process.