1985

Book Review: A Contract Model for Pollution Control, by B. J. Barton, R. T. Franson and A. R. Thompson

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Source Publication:

Canadian Bar Review. Volume 63, Number 4 (1985), p. 859-864.

A Contract Model for Pollution Control. By B.J. Barton, R.T. Franson and A.R. Thompson. Vancouver: Westwater Research Centre, University of British Columbia. 1984. Pp. 100. ($9.50)

This book is about legal and administrative structures for the control of pollution. It recommends, as the primary vehicle for pollution control, a system of individual contracts between a provincial government and polluters, though the present system of permits and criminal sanctions would

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still operate concurrently. The book recognizes that the current permit system involves negotiation, and perhaps more negotiation than regulation. The proposal would put this on a more structured footing by the formal use of contracts and contract remedies.

The limitations of criminal sanctions are illustrated by the example of a plant where new equipment has been installed at the request of government, but contrary to expectations, it fails to achieve the required reduction in contamination.[1] To prosecute in that situation would obviously be inappropriate. Prosecutions are also criticized as diverting attention to legal process and away from "solutions to the environmental problem".[2] Other arguments against prosecutions can be encapsuled in the policeman's rule-of-thumb that it's not crime if it's business.

The authors would retain criminal sanctions for situations of extreme culpability, for example the secret dumping of toxic substances to avoid controls, or the discharge of contaminants without even bothering to negotiate a contract or obtain a permit;[3] but prosecutions would not otherwise be used for the discharge of contamination in the course of business, described in the book as "process pollution".

In each contract, euphemistically to be called a "waste management agreement", the province would agree not to prosecute or make statutory orders except in limited circumstances.[4] The model agreement suggested in the book provides for the resolution of disputes by arbitration.[5]

The proposal, however, raises more difficulties than it would solve, and the supporting arguments cannot withstand serious reflection. For example, one deficiency in the use of criminal law is identified as the lack of "moral guilt".[6] Yet a large proportion (probably a majority) of the population see "process pollution" as blameworthy, and the criminal label could be a marginal influence on the proportion who see it that way. To remove the implication of sin and substitute a contract regime could encourage the perception of pollution as socially acceptable. Even if prosecutions are unusable or unused, the preservation of a criminal law regime can serve a range of purposes; providing ammunition for conservationists in public debate or in regulatory proceedings, promoting a feeling among enforcement officials that they should do something about the problem, adding weight to the government position in any negotiations, and creating some apprehension in a polluter of adverse publicity at some stage.

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[1] P. 3.
[2] P. 5.
[3] P. 9.
[4] P. 30.
[5] P. 84.
[6] P. 5.

Again, the authors see it as an advantage that "by using the contract model, the tensions created by the criminal model are reduced".[7] That approach denies any role for confrontation in relation to "process pollution". Co-operative and confrontational approaches to pollution control have each had their successes and their failures, and an optimum government program will not rely on one of these to the exclusion of the other, or otherwise exempt the vast area of "process pollution" from any confrontational response.

Of course the criminal process is plagued by enforcement problems, but they would not be solved by switching to a contract model. For example, one difficulty in prosecutions is the aversion of the courts to strict liability and the reluctance of judges to recognize standard setting as a role for legislators and regulators. Similar problems would arise with the contract model. The draft bill in the book would permit liquidated damages clauses, which would not be unenforceable as penalties,[8] but, given the propensity of courts to want evidence of fault and loss (or at least one of those two) before imposing significant sanctions, this would not provide any improvement over the criminal process. Apprehension on this point is enhanced by the authors' statement that "[a]nother incentive which could be negotiated is a right to adjust the standards of effluent downward if, for example, it is proven that the adjustment would cause no harm to the environment".[9] One of the arguments raised in the first place for avoiding the use of criminal law is the uncertainty of the significance to the environment of many pollution situations.

Other problems would arise from the nature of the contract and the roles of the contracting parties. If one accepts theories about the dominance of corporate power in governmental decision-making,[10] the contract would, to a substantial extent, be one negotiated between the polluter and representatives of polluters. Even if one denies corporate dominance in government, the result would be a bargain struck between an adjudicator and one party (the polluter) while other parties (the polluted) are absent. On either view, the structure would be biased in favour of pollution. The proposal seeks to mitigate this problem by allowing the public an opportunity to object to pending agreements and to appeal to an environmental appeal board. While that might alleviate the problem to some extent, it would still leave representatives of the polluted (where they exist) at a disadvantage, coming into the picture after the die has been cast, and even then with limited resources.

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[7] P. 6.

[8] P. 73.

[9] P. 34.

[10] See, *e.g.*, (Corporate Power and Public Policy, Lecture by Professor S. Beck, Osgoode Hall Law School, May 1985.

Added to this, the authors want the contract to be voluntary.[11] Surely that is a complete abdication of government, bearing in mind that the contract is made only with polluters and not with the polluted. The authors argue that "[f]rom the perspective of the company it is clearly more acceptable and therefore it is more likely to elicit co-operation. In this way a more fitting and broadly accepted form of regulation is more likely to be effective in accomplishing pollution abatement".[12] This is frighteningly close to the old plea for industry self-regulation. If human health is to be protected from toxic hazards and the market economy is to be protected from the externalization of cost, the solution must lie in remedies that are less acceptable to polluters, not in remedies that are more acceptable.

Another weakness of the proposal is that when dealing with major industrial operations, no government could replicate the technical and economic knowledge of the industry, and for that reason, as well as possible apprehensions about the political power of the industry, government officials would often not have a confident bargaining position.

Even if the proposed regime had some beneficial influence in the reduction of contamination from existing sources, it would still have a perverse influence on the generation of pollution from new sources. A corporation creating a new activity causing a new discharge of pollution into the environment would acquire a bargaining position in dealing with government. This is also relevant to another concern. Would the proposal increase the externalization of cost by increasing the use of public funds for the control of pollution? There is an obvious risk that it would. Since a reduction of pollution would be sought by bargaining, the existing level might be perceived as having a legitimacy. Any reduction from that level might be perceived as requiring the offer of something in return, and the obvious *quid pro quo* would be taxpayers' money. The book enhances that fear. A corporation that internalized the cost of its product by incurring the capital cost of preventing pollution in the first place would obtain no benefit from the bargaining process; but a corporation that failed to incur that capital cost and established its production in ways that pollute the environment, thereby externalizing part of its cost, might then be able to externalize its cost further by obtaining a subsidy. Indeed, the book proposes that "[t]here could be inducements, including forms of subsidy, offered to the company to accelerate an upgrading program".[13]

As a check against non-enforcement, the book proposes that, as under some present consumer protection legislation, the agency should be required "to report to the Legislature each year concerning agreements entered into and any enforcement activity. This is a practice that should

[11] P. 28.

[12] P. 50.

[13] P. 45.

provide an effective check against non-enforcement''.[14] Such reporting mechanisms provide no check at all against non-enforcement.[15]

A key argument for the contract model is that controls should be site-specific.[16] That is obviously true of some pollution controls, but there must also be requirements of general application. The proposal would weaken pollution control by diverting from general to site-specific provisions. The individual site response includes a propensity to accept that the industry must operate, and any resulting pollution that cannot be reduced within the economic options must be acceptable. Acquiescence may not appear so logical or inevitable if the regulatory structure includes more general requirements. Again, the emphasis on site-specific responses leaves an incredible weakness in situations where downstream or downwind interests are outside the jurisdiction.

This brings us to a further point. Pollution control is not simply a matter of preserving the natural beauty of the environment from noxious waste, nor is it a matter of balancing the prosperity of a local area against damage to the environment in that area. Pollution includes discharges into the workplace, into the atmosphere, into our drinking water and into our food chain, of toxic substances with potentially deforming and lethal effects on human life. As the Great Lakes become the toxic cesspools of North America and even the peaks of the Rocky Mountains become submerged in airborne contamination, a rational policy for survival requires that each pollution source be assessed not merely for provable loss to immediate downstream or downwind interests, but also for the contribution that it makes to the aggregate of continental and global pollution. Any such policy for human survival requires broadscale and firmly entrenched standards rather than reliance on site-specific negotiations in which the political and economic pressures of the immediate time and place will tend to prevail over the long-term continental and global interest in control over the aggregate.

Most problems with the proposal result from an initial choice of the wrong model as a source of inspiration. The proposal in the book is based on the undertakings which, in several jurisdictions, have become part of the statutory framework of consumer protection. If there is any area of law more firmly characterized by non-enforcement than pollution control it is surely consumer protection. The use of that model is even harder to defend in British Columbia where a more efficient system already operates for the enforcement of controls over in-plant pollution. Under the Workers' Compensation Act of British Columbia, the Board can impose a penalty assessment in respect of internal pollution, thereby creating an

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[14] P. 38.

[15] See, *e.g.*, The Annual Reports of the Ministry of Consumer and Commercial Relations, Ontario.

[16] P. 6.

incentive to abatement.[17] If the political process favoured the serious enforcement of pollution controls, a similar structure could be adopted for external pollution. For example, there could be licensing with an escalating structure of fees varying according to the volume, quality and duration of the pollution. If the political process would enable such a fee system to work, it could internalize cost and create incentives for the prevention and abatement of pollution that would never arise under the proposed contract model.

Finally, a disappointing feature of the book is the absence of any political analysis. The power of polluters over the polluted in the political process results not only from the natural advantage of corporate over dissipated individual interests but also from the propensities of the political process to prefer short-term over long-term interests, and to prefer local over global interests. These realities are more determinative of outcome than the choices of legal and administrative structures. It is, nevertheless, surely incumbent upon any system designer to consider the significance of his proposal in terms of its influence on the incidence of political power in relation to pollution control.

A major polluter might find the book engaging, but this reviewer, whose drinking water comes from downstream of the Niagara River, would not sleep any easier if the proposal was adopted.

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[17] See, *e.g.*, T.G. Ison, The Uses and Limitations of Sanctions in Industrial Health and Safety, Item No. 158 (1975), 2 Workers' Compensation Reporter 203; Decision No. 167 (1975), 2 Workers' Compensation Reporter 234.

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[1] The Path of the Law (1897), 10 Harvard L. Rev. 457, at p. 469.