

PRESSURES AND CONSTRAINTS:
THE ONTARIO "SPILLS" BILL

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PRESSURES AND CONSTRAINTS: THE ONTARIO "SPILLS" BILL

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ABSTRACT

This dissertation uses a case study of environmental legislation, the Ontario "Spills" Bill, to explore why sometimes the capitalist state acts against the capitalist class and the role of social forces in this process. In so doing it employs a Gramscian analysis to examine the various strategies of the Bill's supporters and opponents, and the government's response. It utilizes an interpretive historical methodology, with archival material and interviews with key informants as its data sources. The substantive goal of the dissertation is to improve our understanding of the problems inherent in the creation of effective pollution legislation. The study establishes that in this case fluctuations in the balance of power affected the government's position; and that these were influenced by structural constraints, power resources, political change, alliances, prevailing ideologies, environmental events and the international insurance market. In addition, it notes that underlying this struggle was another conflict over the institution of a new legal regime.

The perception that there is a lack of differentiation between the types and uses of the property owned by polluters is identified as aiding the maintenance of the status quo. Health is observed to act as a surrogate for environmental issues in pressuring for change, but to provide only a fragile foundation for environmental change.

Overall, the project illustrates the structural constraints that limit the actions of governments and restrict the influence of capitalists. Additionally, it demonstrates the role of agency in encouraging change, and the obstacles that political will can overcome to achieve any change.

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TABLE OF CONTENTS

INTRODUCTION	1
INTRODUCTION: Spills and Issues	2
A Spill	2
Another Spill	5
Mississauga	7
The "Spills" Bill	7
The Issues	9
The Dissertation	11
Conclusion	15
PART I: THE THEORETICAL CONTEXT	18
CHAPTER 1 Theories of the Law, the State and Social Movements	19
Introduction	19
Theories Concerning the Law	19
Marxist State Theorists	21
Class Struggle Theorists	25
The Provincial Level of the State	27
Social Movements and Environmental Law-Making	29
Studies of Law Creation	32
Conclusion	35
CHAPTER 2 Excursus	38
Introduction	38
Legitimacy	39
Hegemony	43
Similarities and Differences between Legitimacy and Hegemony	45
The Application of Gramscian Concepts to a Fragment of the Law	47
A Neo-Gramscian Perspective	49
The Methodology	51
Conclusion	53

PART II: THE EARLY STAGES	56
CHAPTER 3 The Introduction of a Bill	57
Introduction	57
Creation of Institutions	58
History of Spills - Definition of a Problem	61
Other Legislation	67
The Political Setting	69
Formation of Environmental Groups	71
The Maintenance of a Facet of Hegemony	74
The Struggle over an Aspect of Hegemony	76
Structures and Policy Preferences	81
Conclusion	90
CHAPTER 4 The Observable Level of Conflict	97
Introduction	97
Political Actors, Policy Preferences and Arguments	98
Government - Policy Preferences and Arguments	102
Local Government	104
The Opposition	105
The Opposition - Policy Preferences and Arguments	109
The Insurance Industry	116
The Supporters: the Environmental Movement	118
The Environmentalists: Policy preferences and Arguments	120
Key Issues	126
Resources	134
Conclusion	141
CHAPTER 5 The Organization of Bias: structures and silences	149
Introduction	149
Bias Through Structures	150
Bias Through Silences	158
Future Bias	172
Conclusion	173
CHAPTER 6 The Organization of Bias: the struggle over meanings	178
Introduction	178
Capitalist Interests as National Interests	180
The Use of Prevalent Ideas	182
Environmental Interests as National Interests	185

Language	189
Conclusion	196
PART III: THE MIDDLE YEARS	200
CHAPTER 7 The Middle Years: the balance of political power	201
Introduction	201
The Passage of the Bill and the Construction of Regulations	202
Political Power	205
Access to Political Parties	205
Access to the Bureaucracy	208
Industry's Resources	211
Environmentalists' Resources	214
A Different Perspective	215
Structural Constraints and Events	218
The Balance of Political Power	221
Conclusion	221
CHAPTER 8 The Middle Years: the insurance industry	225
Introduction	225
Insurance Capital	226
The Problem of Insurance	228
The Availability of Insurance?	230
Industrial Capitalists' Position	233
The Insurance Market	235
Conclusion	241
PART IV: PROCLAMATION AND IMPLEMENTATION	244
CHAPTER 9 The Proclamation	245
Introduction	245
A New Conjuncture	246
The Strategies of the Opposition Forces	247
The Strategies of the Supporters	258
The Role of the Provincial Level of the State	264
Implementation	277
Conclusion	288

PART V: CONCLUSION	295
CHAPTER 10 Conclusion: Concepts and Themes	296
Introduction	296
The Law	299
Property	304
Health	312
Power	314
Risk and Insurance	316
The Environment	318
Conclusion	320
APPENDICES	325
Appendix I: Methodology	326
Introduction	326
The Case Study	327
Archival Material	329
Problems of Archival Research	337
Interviews	338
Problems with Interviewing	341
Conclusion	342
Appendix II: Chronology of Events	347
Appendix III: Ministers of the Environment	351
Appendix IV: Submissions to the Standing Committee on Resources Development	352
Appendix V: Acronyms	355
REFERENCES	357
LIST OF TABLES	xii

LIST OF TABLES

Table 1	Total Spills Reported to the Ministry of the Environment 1973-77	66
Table 2	Quantities of Liquid Contaminants Spilled 1974-77 (Gallons)	66
Table 3	Source of Spill Incidents, 1977 - 1983	263
Table 4	A Yearly Comparison 1986 - 1991 of the Numbers of Occurrences and Spills	280
Table 5	Spills by Receiving Medium, 1988-1991	281
Table 6	Four Year Comparison of Highest Ranked Industrial Sectors, 1988 - 1991	282
Table 7	Four Year Comparison of Spills by Material, 1988-1991	283

"Ultimately, the issue is not risk, but power;
the power to impose risks on the many
for the benefit of the few"
(Perrow 1984: 306).

INTRODUCTION

INTRODUCTION: Spills and Issues

There has been little attempt to generalize about the process of law creation. This may be because of the sheer number of laws passed every year (Chambliss, 1986; Curran, 1993), and because law in most English speaking countries is based on precedent as well as the statutes. To achieve an understanding of this process requires an examination of the creation of laws that were turning points and produced a new approach to a problem, and changed particular relationships between the state, capital and social movements. This dissertation is the examination of one such piece of environmental legislation and the struggle over its passage and proclamation.

A Spill

On April 13, 1985 a transformer belonging to Hydro Quebec was being transported to a storage depot near Edmonton operated by Kinetic Ecological Resources Group of Nisku, Alberta. The transformer leaked, a catch-basin under it overflowed, and transformer oil - polychlorinated biphenyl (PCB) diluted tetra-chloro-benzene - was spilled¹ (Turnbull, 1985a).

The spill occurred in Kenora, Ontario, an area in Ontario that is closer to Manitoba than to Toronto. The transformer began leaking in Ignace, Ontario, and deposited patches of fluid on about 135 miles of the Trans-Canada Highway until the

truck stop in Kenora where it was discovered. The truck driver reported the spill to his head office, which informed the Ministry of the Environment. Within half an hour the service station where the truck was parked was closed, and within twenty two hours the affected area of the Highway was closed, and remained closed for a week.

The costs of the accident were large. The Husky station where the truck was parked lost an estimated \$130,000 in sales for the thirteen days it was closed. It was estimated that the detour through Fort Frances cost Canadian truckers \$140,000. On top of this there were the costs of other detours and delays, sealing and resurfacing the road, and the possible future health damages to the driver and passengers of a car (a man, his pregnant wife and two children) that was following the truck along the highway (Turnbull, 1985b; Canadian Press, Dec. 5, 1985).

The cost to the Progressive Conservative Party may have been the end of over forty years of rule as the governing party in Ontario. This spill occurred during an election campaign, and whereas the distance from Toronto would normally have meant that it would have received limited media coverage in the middle of a government's term of office, the election meant that the event made interesting news. The electorate was particularly aware of the dangers of toxic substances, as it had recently been reminded of environmental dangers by graphic reports of a gas spill in Bhopal, India. The Progressive Conservatives were running with a new and somewhat controversial leader, Frank Miller, who had not shown much concern regarding environmental health effects in the past². The statement by the Environment Minister, Morley Kells, " If you are a rat eating PCBs on the Trans-Canada highway, you might have some problem", added

to the impression that the Tories were indifferent to environmental concerns (Spiers, 1986).

The Liberal Party and the New Democratic Party regarded the election as a chance to overthrow the Conservatives, and the Kenora spill provided them with an ideal issue³. The fact that the Kinetic Ecological Resources Group was based in Alberta and transporting Quebec goods, made the firm an easier target for the opposing parties than one based in Ontario transporting Ontario goods, which might have involved potential voters or party supporters. Environmental protection, therefore, became an issue in the campaign, and contributed to the inability of the Conservatives to form a majority government. Unlike past occasions when they had been in a minority position, the Progressive Conservatives failed to achieve the support of one of the opposition parties. In June 1985, they were swept out of power, and the Liberal Party formed a minority government with the support of the New Democratic Party⁴. The Liberal-NDP pact included the proclamation of the controversial "Spills" Bill, which had been passed, but not proclaimed, six years earlier.

The "Spills" Bill had received little media attention during its committee hearings in 1978 and 1979, and yet it proved to be one of the most contentious pieces of legislation introduced by the government of the day. Its passage was made necessary by an environmental disaster; its proclamation was the result of another environmental incident. The failure to proclaim the Bill helped to bring down a government; and the struggle over whether to proclaim it as it was passed, or to change it, was the subject of

an intensive lobbying campaign by some sections of the environmental movement and industrial capitalists.

Another Spill

Environmental legislation may be more affected by events than other legislation, although the political and economic conjuncture in which the event occurs determines the particular response. The "Spills" Bill was in fact related to another incident involving PCBs that had occurred five years prior to its introduction and twelve years prior to its proclamation. In November 1973, a Canadian Pacific freight train was derailed when it was hit by a truck at a level crossing near Dowling, Ontario, 30 miles northwest of Sudbury. Two electrical transformers were split open, and 1,500 gallons of battery transformer fluid containing 70% polychlorinated biphenyls (PCBs) were spilt. The driver of the truck was found to be negligent in the accident. Preliminary cleanup work was done at the time of the spill, but further soil removal was delayed while the Canadian Pacific Railroad (CP) and the Ontario Ministry of the Environment (MOE) argued over the responsibility for cleanup costs and the extent of the clean-up required⁵.

By March 1977 there had been lengthy negotiations between the ministry and the Canadian Pacific Railroad, and tests showed that the chemicals had seeped into the ground water table that supplied the wells of the Dowling community, although there were no serious traces of PCBs in any of the private wells (the CELA Newsletter, 1977b; Malarek: 1977). There was, also, a concentration of forty million parts of PCBs per billion remaining in the soil, and the designated safe limit for drinking water was three

parts per billion. The ministry served the Canadian Pacific Railroad with a cleanup order to remove the soil under section 42 of the Environmental Protection Act. The railroad appealed the order to the Environmental Appeal Board claiming it was not responsible for the accident, which had been caused by a careless truck driver, and that it was not bound by provincial orders because it was a crown corporation. It also argued that the materials when shipped were not labelled a dangerous commodity (Malarek, 1977). In August 1977 a tribunal of the Environmental Appeal Board⁶ ruled that the delay in the initial cleanup had allowed the situation to deteriorate from "serious" to "catastrophic" (Environmental Appeal Board, 1977). It ordered the Ministry of the Environment and Canadian Pacific Railroad to share the costs of removing the PCBs⁷. This decision was appealed by both sides⁸ (the CELA Newsletter, 1977c). Yet, any further delay increased the possibility that the drinking water for the community would be contaminated.

In November 1978, the Minister of the Environment introduced Bill 209, later Bill 24, which commonly became known as the "Spills" Bill. In March 1979, Canadian Pacific Railroad and the Ministry of the Environment reached an agreement on the PCB removal procedure and a cost-sharing arrangement. Whether this was an attempt by CP to reduce the possibility of the Bill being passed, at least in its original form, can only be a matter for speculation. Certainly, the Bill contained the potential for an increase in future costs for the railroad.

Mississauga

In view of the strong opposition from several large corporations and business associations, and opposition from the Minister's caucus, it is possible to speculate that this Bill would never have been passed if another environmental incident had not occurred. In November 1979, a Canadian Pacific freight train carrying propane, chlorine, toluene and caustic soda derailed in Mississauga. Nearly 250,000 people living within twenty five square miles of Mississauga were evacuated because of the fear that the propane-fed fire would cause the chlorine to explode. This event was the impetus for the government to pass the "Spills" Bill⁹. In December 1979, the "Spills" Bill, now Part IX of the Environmental Protection Act, was passed by the Ontario legislature.

The "Spills" Bill

This Act provided for the immediate clean-up and restoration of the environment by the owners and controllers of the spilled product, and the right to speedy compensation for victims of spills from an Environmental Compensation Corporation established by the legislation. It required immediate notification of a spill to the ministry. A spill was defined as a discharge of a pollutant that is abnormal in quantity or quality; and is discharged into the natural environment from or out of a structure, vehicle or container. The Act authorized the Minister to give the owner or person in control specific orders and directions following a spill, and, if they failed to comply, to take remedial action and to sue to recover the cost. The owner or person in control had the right to take legal action to recover all or part of the cost from anyone who would

be liable under common law, such as if the spill occurred as a result of negligence. They were absolutely liable for cleanup, so that they were required to cleanup immediately and to do everything "practicable" to restore the natural environment. They could recover the costs from the person at fault or their insurance company later. If they were not at fault and unable to recover their costs from others, they could appeal to the Environmental Compensation Corporation. Strict liability applied to compensation for victims, so that the polluters could escape liability by claiming "due diligence", that is that they had taken all necessary precautions to prevent a spill.

On the surface it appears that the "Spills" Bill was an implement used by the provincial government to ensure that a crown corporation could not avoid responsibility for spills. However, this seems a broad brushed approach to a jurisdictional matter. It might have been simpler to approach the federal government to sort out the jurisdictional problems. This raises the question of why the provincial government introduced this legislation. There was no lobbying by the environmental movement to obtain legislation on spills. A Gallup Poll in 1977 noted that concern about pollution had decreased (Canadian Institute of Public Opinion, 1977). If the government wished to make a statement concerning the environment, why, and why did it choose this issue? Also, why was the Bill changed? Why was the proclamation delayed for six years? If there were such severe problems with the Bill, why was it proclaimed within six months of a new government?

The Issues

The dissertation explores the broad theoretical issue of why the capitalist state acts against the capitalist class when that class is opposing such actions. In addition it is concerned with the subsidiary issue of how do social forces influence state policies. It employs a neo-Gramscian perspective, which argues that the state incorporates both consent and coercion, and it uses the concept of hegemony to explain why the subordinate classes consent to their domination. Thus the populace consents to the status quo because everyday practices and beliefs reinforce the view that the present practices in the state, civil society, and the economy are in the general interest. However, hegemony is never complete and the state has to create change in response to the questioning of the status quo; sometimes these changes will be structural but they will be limited and not touch the core structures of capitalism. This suggests that the state's actions against the capitalist class are a part of its role of maintaining hegemony. It also implies that the state is subject to various pressures and constraints that will influence its actions in opposition to the capitalist class. Thus, it is not only the fact that the state sometimes acts against the capitalist class that requires examination, but also the specific actions and the influences on these actions.

The law embodies both the consensual and coercive aspects of the capitalist state, and thus is a suitable object for analysis of the actions of the capitalist state at a more specific level. The dissertation uses a case study of an environmental law, the Ontario "Spills" Bill, to examine the process of the creation of environmental legislation and the pressures and constraints that the provincial level of the state encounters. It

employs a historical interpretive methodology in the hope of increasing our understanding of these events¹⁰.

The ideology of the neutrality of the law serves to maintain hegemony, but the consequences of this are the continual introduction of new laws in response to the changes of the various strands of this aspect of hegemony. In this case, the provincial government introduced the "Spills" Bill for complex reasons related to the institutional needs of the bureaucracy, ideological demands, cultural changes, the political economy and international demands, amongst others. However, the construction of laws is subject to hegemonic practices. Thus the content of this legislation was the result of a struggle between supporters and opponents of the Bill, which was influenced by power resources, structural constraints, pressures to affect change or maintain the status quo, and the perceptions of those involved.

The final Act was the outcome of a struggle which spanned a period of six years. The analysis suggests that the balance of power between social forces was an important factor in this struggle, as was an alliance with political forces. It examines the various dimensions of power during the Hearings of the Standing Committee on Resources Development through an analysis of power resources and arguments, the structures that resulted in an overemphasis of arguments favourable to the interests of the industrial capitalist class, and the use of traditional views and language. Additionally, the analysis takes a broader view and examines the balance of power of social forces in the three conjunctures: during the SCRD Hearings, during the interim period, and during the period leading up to the proclamation.

As the topic of spills incorporates concerns about the environment and health, these could be expected to be a focus of the debates surrounding this Bill. Yet, as will be shown, these became the silences during this process. Other themes regarding the anxieties of industrial capitalists concerning insurance and risk emerged to hold central stage. Also another struggle over the law is shown to have been occurring alongside this conflict over spills legislation. Additionally, it will be demonstrated that underlying the whole process was the concept of property. While property might be expected to be an issue in environmental legislation, what will be argued will be that it was involved not only as real property but also as a right and as a relation, and that the way property was viewed restricted the creation of environmental legislation. A further theme running through the thesis indicates the importance of environmental events in setting the stage for change and limiting the power of industrial capitalists to maintain the status quo.

The Dissertation

The dissertation has ten chapters, which can be divided into five sections: the theoretical presentation, the historical conditions that encouraged the government to deal with spills, the Hearings of the Standing Resources Development Committee, the years when the Act remained unproclaimed, and the proclamation. The first chapter discusses theories that might be useful to explain why the state acts against the interests of the capitalist class, and what role social forces play in this process. It examines theories that have focused on the state and law, and those that have concentrated on

social movements and the environment. It concludes that a neo-Gramscian perspective will contribute to our understanding of the process of this legislation.

The second chapter elaborates on the neo-Gramscian perspective and discusses the difference between the concept of hegemony and that of legitimacy. It also discusses whether concepts that use analogies to Italian history, and were developed to explain the lack of revolutionary fervour of Turin factory workers and the failure to create a revolution in the West, are appropriate tools to examine the conflict surrounding one provincial bill. It concludes that the constitution of hegemony involves everyday practices and beliefs, and that this Bill was one small conflict in the multitude of struggles over the construction of these practices. It proposes that an interpretive historical methodology is a suitable method for such an analysis because it involves the collection of massive details; and therefore it aids our understanding of how accepted practices and beliefs constrain change, but also impose limits on industrial capitalists in the maintenance of hegemony.

The third chapter attempts to reconstruct the pressures that encouraged the Ontario government to introduce the "Spills" Bill. These were the previous history of responses to spills in Ontario, the changes in the types of spills, the economic and political costs of spills, the international context, and the perceived economic health of certain sectors of the economy. It notes that the Bill was created to serve a dual purpose of achieving cleanup with little cost to the ministry, and of obtaining compensation for victims to alleviate the government's political problems regarding spills.

The next three chapters discuss the conflict that occurred during the Standing Committee on Resources Development Hearings concerning the Bill. Each chapter focuses on a level of power. Chapter 4 examines the observable level of power and highlights the key arguments that were used by the supporters and opponents of the Bill. It also looks at the key issues that were discussed, and the resources that were employed to achieve certain outcomes. It argues that at the overt level there is the appearance of a possibility of obtaining a change in the balance of power, but power favours the status quo, because change will result in a change in the distribution of power resources.

Chapter 5 examines the ways in which bias is constructed through structures, exclusion (intended and unintended), and through silences resulting from lack of knowledge, minimal or non-discussion of certain issues, and full discussion of others. It suggests that the foundation for further bias was laid down by leaving a great deal to be decided by the regulations. Chapter 6 discusses the struggle at the level of language and meanings, through the attempt to articulate interests to the general interest, the use of prevalent ideologies and concepts, and the use of language to convey legal meanings, and as a tool to privilege, change or reinforce meanings.

The fourth part of the thesis examines the period from the passage of the Bill until its proclamation six years later, and the reasons for this delay in proclamation. Chapter 7 examines the balance of political power, and the ways in which industrial capital organized to persuade the government that the Bill was "a bad bill", and the constraints that it encountered. Chapter 8 discusses the role of the crises in the insurance

industry and the role of that industry's international structures in delaying the proclamation of the Bill.

The last part of the thesis discusses the reasons for the proclamation. Chapter 9 suggests that the balance of power of political forces changed because of the spill at Kenora and an election. It examines the strategies of the opposition and the supporters of the Bill, and the ways in which the government attempted to meet the demands of industrial capital within its own political constraints.

The conclusion examines the role that the law, property and health played in this process, and various themes that have occurred throughout the dissertation. It indicates that underlying this conflict was a struggle to prevent the introduction of the concept of absolute liability into statutory law. It also proposes that the prevailing concept of property aided the ability of industrial capitalists to water down the Bill and to delay its proclamation. It suggests that health is a fragile foundation for the support of environmental legislation, because of its basis in the uncertainty of science and the difficulties in maintaining it at the forefront of the discourse, but that, paradoxically, it is health and its uncertainties that encourage the entry of environmental concerns into the discourse. It indicates that the perception of risk-taking as an essential element in capitalism is of limited risk-taking, so that the availability of insurance became a crucial element in the proclamation of the Bill. The chapter concludes that environmental issues are power issues, and each small change affects the balance of power and contributes to another strand in the construction of a counter hegemony.

Conclusion

The thesis uses a case study of the genesis of a piece of environmental legislation to explore the question of why a capitalist state acts against the capitalist class when a section of that class is vehemently opposed to its actions. It explores the pressures and constraints experienced by the Ontario government through the process of the introduction, passage, and proclamation of the "Spills" Bill. It suggests that governments encounter structural and political constraints which both encourage and discourage such actions, but that the balance of social forces and their alliance with political forces are crucial variables influencing government actions. It further suggests that everyday practices and ways of viewing the world are so engrained that they bias the process, and that if change is desired these should be the target for change.

END NOTES

1. Polychlorinated biphenyls (PCBs) were used for fifty years as a coolant in electrical equipment. In the 1950s and 1960s they became acknowledged as possessing "a high degree of toxicity affecting all forms of mammals, birds and fish", so that in 1973 a general agreement under the auspices of the Organization for Economic Cooperation and Development (OECD) to eliminate PCBs was reached (Environment Canada, March 1980). In particular, these compounds are considered to be a serious environmental problem, as they resist biological degradation and have a half life of twenty five years. Scientific studies have linked PCBs to birth defects, nervous disorders, changes in liver functions and cancer (Malarek, 1977). However, some scientists argue that the problems of PCBs have been exaggerated (Interview, Scott, 1993).
2. Frank Miller as Minister of Natural Resources was opposed to sport fishing being banned in the English Wabigoon river system. George Kerr, the Minister of the Environment, wished to ban sport fishing because of the high levels of mercury contamination in the river. There was a public split during the 1977 election campaign over this issue (the CELA Newsletter, 1977a).
3. The NDP received an upsurge in popularity following the spill, aided by Bob Rae's song that PCBs stood for Progressive Conservative Bungling. According to Spiers (1986), they were unable to hold on to this lead because they had narrower financial resources than the Liberals and their programme could be easily mimicked or stolen.
4. In the 125 seat House, the Conservatives obtained 52 seats, the Liberals 48 seats and the New Democratic Party 25 seats. After a series of negotiations, the New Democrats and the Liberals signed a formal pact assuring the Liberals of two years in office in return for certain legislation. The Conservatives were defeated in the House on June 18, 1985, and the Liberals were asked to form the government (Spiers: 1986).
5. Preliminary cleanup work was done at the time of the spill, but the Ministry of the Environment failed to require any further action from the company until September 1975. CP began further excavation in November 1975, but discovered that the PCBs had migrated to a depth of 15 feet and further excavation would endanger the track. Digging ceased and the excavated soil remained at the site while "the ministry developed a program". On June 30, 1976 the Ministry requested CP to remove the soil and to engage a soil consultant to conduct a drilling and sampling program. In September, CP stated that it was not prepared to accept further financial responsibility for the spill. In March 1977, the Ministry issued a ministerial order to CP to clean up the spill.

6. The Environmental Appeal Board provides a mechanism of appeal to persons or companies affected by decisions of officials of the Ministry of Environment. It is authorized to confirm, alter or revoke government control or stop orders, conditions to certificates of approvals or refusals of certificates (Malarek: 1977).
7. The Canadian Environmental Law Association felt that this decision was important because railways, which are under federal jurisdiction, would be forced in the future to comply with provincial environmental laws in certain situations. However, the negative aspect of this decision was that in ordering a government body to pay for rectifying environmental damage the cost was borne by the public not the polluter (the CELA Newsletter, 1977b).
8. A lawyer for the Ministry of the Environment stated in a telephone conversation to CELA that although the Ministry felt that the Board's decision was incorrect, its priority was to get the clean-up started, so no decision had been made regarding an appeal as it would delay clean-up (the CELA Newsletter, 1977b). This suggests that the ministry would have accepted the Board's decision had the Canadian Pacific Railroad been willing to do so.
9. There is some debate about the influence of Mississauga on the passage of the Bill. One member of the business community in conversation with the author argued that it made no difference. Environmentalists argued that it did encourage its passage.
10. The methodology is discussed in Appendix 1.

PART I: THE THEORETICAL CONTEXT

CHAPTER 1

THEORIES OF THE LAW, THE STATE AND SOCIAL MOVEMENTS

Introduction

Theoretically, this work is positioned at the intersection of theories of the law and the state, and social movements. This chapter will examine these theories, and discuss how they help to explain why governments introduce legislation antagonistic to the interests of capital or one of its major sectors.¹ It will also consider how these theories suggest that social forces² play a role in the process of the genesis of legislation.

Theories Concerning the Law

Theories concerning law creation have been classified into structural functionalist, liberal pluralist, Marxist and feminist³ (Comack & Brickey, 1991). Functionalism emphasizes stability, order and harmony, and was dominant in sociology in the 1950s. From this perspective, the law reflects a consensus in society. It represents what Durkheim (1964: 79) called the "collective conscience", which is the totality of the norms and values of the members of a society. It acts as a form of integration, and informs people of what is appropriate behaviour in certain situations; it serves to mitigate conflict and is a form of social control (Parsons, 1980). The state

from this perspective is a neutral force that represents society as a whole, protects its values, and punishes transgressions of societal norms and values (Durkheim, 1964: 83-5). Functionalists assume consensus and emphasize the cultural aspects of law-making, and do not acknowledge power differences nor conflict over the content of various laws.

Two overlapping perspectives, liberal pluralism and a Weberian perspective, allow for conflict in society. Pluralists suggest that there is conflict between competing interest groups. From their perspective, the legal system is autonomous, and provides a neutral system through which conflicts are resolved and the "rule of law" binds competing factions together (Caputo et al., 1989: 3). Power discrepancies are acknowledged within this perspective, but they remain at the level of interpersonal relations, and the influence of social, political and economic variables in the emergence of various laws is ignored (Comack & Brickey, 1991: 19).

Max Weber relates law creation to the political economy. He argues that law creation in respect to property and contract law was a prerequisite for the development of capitalism (Weber, 1954). Weber also regards the form of the law as the outcome of struggles. He argues that the dominant form of law in England (empirical law and some Kadi law⁴) was the culmination of a struggle between lawyers, who were advocating common law, and ecclesiastical judges, and sometimes the universities, who were advocating Roman law. He suggests that the domination of notables and a centralized justice system resulted in the retention of common law, but it also enabled the monarch to introduce rules of evidence that favoured the merchants. This less rational and less bureaucratic system of justice contradictorily aided the

development of capitalism, because the consequent forms of law, that is the organization of the courts and the trial procedure, resulted in a "virtual denial of justice to the economically weak" (Weber, 1978: 354).

For Weber, although laws are related to the necessities of capitalism, law is independent with its own rational logic. Marx, however, does not regard the law as autonomous. He also sees a relationship between the law and capitalism, for "every form of production creates its own legal relations", but social relations are expressed in the State and through the law (Marx, 1977: 349, 184). Contemporary Marxists argue that the law is influenced by economic, political and ideological factors. Their analyses of the law can be divided into two types: those related to the various schools of state theory, and those concerned with the class struggle.

Marxist State Theorists

Derivationist state theorists argue that the functions of the state are derived from the logic of capitalism, and an analysis of state actions must be based on an analysis of capitalist accumulation and the contradictions of the capitalist system (Holloway & Picciotto, 1979; Hirsch, 1979). Pashukanis is a pioneer of the legal studies school within this perspective. He argues that the form of the law is derived from commodity circulation, and emphasizes the relations between the forms of law and the reproduction of social relations (Pashukanis, 1978). He does not directly relate law to the production process, although other derivationists have done so (Jessop, 1984). This school functions

at a highly abstract level, and ignores the role of historical contingent factors and various social forces (Jessop, 1980).

Another state theoretical perspective is that of the instrumentalists. Instrumentalists argue that the economic base determines the processes of the superstructure (the state, the law and ideology). They suggest that the state acts at "the behest" of the capitalist class, that is the state is directly influenced by the capitalist class through individual positions within the state, personal relationships and pressure by members of this class (Domhoff, 1979; Miliband, 1973). The law is created by the state, and is used as a tool to support the interests of the dominant class, so it protects property, and applies coercion in different ways to different classes. This does not explain why laws are created that are antagonistic to the interests of the capitalist class, why subordinate classes accept these laws as legitimate, and why there is an ideology of equality surrounding the law; nor does it explain the variations in the law at different times and place.

Structuralists argue that the state is relatively autonomous from the economic area, but state actions are determined by the necessity of preserving capitalism, and thus undertaken "on behalf" of the capitalist class while functioning to maintain some element of cohesion between the classes (Althusser, 1971; Panitch, 1977; Poulantzas, 1980; Miliband, 1989).⁵ Within this perspective, negative state actions towards capitalism are by definition in capital's interest. The state has to be relatively autonomous from the capitalist class, so that it can create laws that constrain the activities of capitalist class fractions in the long term interest of capitalism (Poulantzas, 1975).

The law, therefore, reinforces the present structural arrangements and inequalities. Poulantzas (1980) argues that this is achieved through the displacement of the class struggle from the workplace to the juridical arena where the worker is defined as a citizen and equal. The law assumes that individuals are political and economic equals, and thus mystifies the basic class inequalities. This perspective does not focus on the struggle to create the law, and ignores the role of non-class forces and non-class ideologies.⁶

A variant of the structuralist perspective which overlaps with the derivationist perspective, focuses on the crises and contradictions of capitalism. The argument is that the state's role is contradictory, because it has to satisfy the functions of accumulation and legitimation, which entails fostering profit-making conditions and maintaining social harmony. Its contradictory policies will result in conflicts and problems whose solutions will result in further contradictions, because they do not deal with the basic dilemmas of capitalism (O'Connor, 1973; Offe, 1984). Offe argues that the reasons for actions unfavourable to capital can be located in the attempts by the state to balance these structural contradictions, which he defines as "the tendency inherent within a specific mode of production to destroy those very pre-conditions on which its survival depends" (Offe, 1984: 132). Social policies, and the consequent legislation and regulations, are an attempt to deal with the problems of the state apparatus resulting from contradictory demands and systemic requirements.

Parallels can be drawn between Offe's theory of social policy formation and environmental policy formation, for contradictions can be discerned between the

necessity to prevent environmental degradation and to accumulate capital. As Habermas (1975: 41-44) has noted, to satisfy the imperatives of growth limitation resulting from a limit of finite resources and the capacities of the ecological system to absorb pollutants, capitalist societies would have to transfer from the unplanned production of exchange values to the planned production of use values, and thus to abandon their prime principle of organization.

There are problems with the above explanation when applied to specific policies and legislation. It can be assumed that there is an overall contradiction between growth and protection of the environment, but this does not explain what determines specific policy choices in attempting this balancing act. It might be possible for the state to ignore future considerations and concentrate on supporting present growth and technology in the belief that a technological fix would be found in the future. In addition, this theory does not explain the content of legislation within a particular state, and it does not allow for ideological influences, nor for a role for social forces, in the creation of social policies and legislation.

Theorists have attempted to deal with these problems by focusing on the internal reasons for state actions with an emphasis on the institutions and the bureaucracy of a particular state. Within this institutionalist perspective, the autonomous state mediates conflict, and is more subject to the influence of state structures, party organizations, and international political events and organizations, than the demands of social forces (Skocpol, 1985; Block, 1981). Institutionalists suggest that despite the reasons for action, whether the state will in fact act depends upon whether it has the

institutional means to act. This, in turn, depends upon the historical development of the specific state being examined. The state has interests of its own, but the independence of the specific state and specific state department to satisfy these interests will vary at particular historical conjunctures. State institutions are deemed to influence policy in interaction with social, economic and ideological factors (Orloff & Parker, 1990). Thus, the social policy orientations of social groups are structured by state institutions and activities, as well as by economic and cultural factors. From this perspective, the state bureaucrats will formulate laws to suit the requirements of their department, but within a particular context. Although social forces are not completely absent from this perspective, they are not the focus of the analyses. This perspective overlaps with a Weberian position as the law is autonomous and created to meet the goals of the state institutions.

Class Struggle Theorists

In contrast to institutionalist/state-centred analysts, neo-Gramscians emphasize the role of social forces in policy development and the creation of legislation. Law for Gramsci is a mixture of coercion and consent. It is an instrument of the state that shapes every detail of the lives of the populace. It unites the ruling class and moulds the views and everyday lives of the masses into supporting the development of capitalism (Gramsci, 1971: 246-7). The legislators create the rules, and the masses consent to their operation, and, if necessary, alter their behaviour to conform to them (Gramsci, 1971:

266). The law also offers the opportunity for change, because the legal terrain is one on which struggles are conducted (Gramsci, 1971: 256-7).

Neo-Gramscians, therefore, focus on ideological and political factors as well as the economic aspects of hegemony and crises. Hall (1988) emphasizes politics and ideology in his examination of the role of the new Right and the development of the "hegemonic project" of the Thatcher state. Cuneo (1990) explores the role of the labour movement and the feminist movement in the development of pay equity policies, and the attempt by the state to conduct a passive revolution in response to their demands. There is, however, a tendency of some neo-Gramscian theorists to emphasize one aspect of the development of hegemony, for example the political aspects of the state (Poulantzas, 1980) or the textual aspects of discourse (Laclau & Mouffe, 1985), and to ignore the actions of social forces in creating hegemony and in increasing the constraints and the contradictions faced by the state.

Another theorist, who bears many similarities to Gramsci, is E.P. Thompson. Thompson (1978: 96) views the law from the perspective of the powerless, and argues that it invades every aspect of everyday life. He regards the law as a contradictory phenomenon that can be used sometimes by the powerless, because of its necessity to appear impartial to perform its legitimizing role.

The rhetoric and rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true relations of power, but at the same time, they may curb that power and check its intrusions (Thompson 1975: 265).

Other theorists are more reluctant to see the law as a constraint on the powerful. White (1986: 22, 45) argues that the assumption of neutrality enables the law to ignore differences, so that collective political action is required to obtain change. Others (Hall et al., 1978: 193-4, 208) argue that the gains that have been made by the working class through the enforcement of the rule of law were the result of struggle, and that the law performs in the long term service of capital to protect private property and contract, and to enforce public order. They develop a Gramscian analysis of law and order in the British state, but emphasize the coercive role of the law with the consensual functions of the state operating in civil society through discourse. Such an analysis downplays the consensual functions of the law and the role of economic factors in influencing state actions and popular consent.

The Provincial Level of the State

The struggle over the "Spills" Bill occurred at the provincial level of the state. Marxist state theorists often ignore this level of the state or assume that it is a mirror of the national capitalist state. Yet, its position between the local level and the federal level ensures that it is subject to different influences and performs different functions from the other two levels. It is also affected by federal state policies that may have been influenced by considerations other than provincial state interests, and is subject to pressures from the local level. House (1986) suggests that the interests of the political elite, the role of ideology related to region, and the role of other forces independent of social class are influences in provincial policy making. While the provincial level has

more autonomy than the local level of the state, this autonomy is restricted, as this level may have a limited influence on federal economic policies, and is dependent on the federal level for financial support to carry out or deal with the effects of federal policies. Also, its economic concerns will be provincially or regionally specific, and it has to provide financial support to, and respond to, the demands of the local level.

A provincial government is in a contradictory position. As an intermediate level of government, it is both dominant and subordinate. Its position regarding environmental issues is ambiguous and complex, as the environment was not an issue at the time of Confederation and pollutants do not respect political boundaries. It can create stricter environmental legislation than the federal level, without threatening the overall legitimacy of the capitalist nation state. However, such policies may require justification in terms of a provincial ideology, and they are vulnerable to sectional interests, such as a dominant capitalist class fraction or central Canadian banking interests (Stevenson, 1977; Marchak, 1986; House, 1986).

Like the local level of the state, there is an imbalance between political authority and economic power at this level (Clark & Dear, 1984: 135). Moreover, the degree of autonomy from the federal level of the state in regard to its economic functions may affect this level's legitimacy functions. Stevenson (1977) suggests that unlike other Western states, Canadian provincial governments are expanding their accumulation functions and the federal government is expanding its legitimacy functions. Other analysts argue that there has been an expansion of the state at both the central and "subnational" level of government, but that the latter exhibits a much greater growth in

expenditure levels than the central government (Goldsmith & Newton, 1988; Sharpe, 1988). If the provincial level is expanding its accumulation functions, it may mean that the provincial level is experiencing an increase in autonomy, which suggests an increase in its problems. Paradoxically, the more the provincial level is tied to the federal level, the more it can act independently of it. The provincial government can legitimize its actions by calling for a decentralized democracy, and if it fails to "deliver the goods", it can blame the federal government. The more it is independent of the federal government, the more it has to work to maintain the legitimacy of the status quo, for it has to sustain the loyalty of its residents and support from the nation state. This suggests that the ability of a provincial government to create stricter environmental legislation is inversely related to its degree of economic independence from the federal government. Nevertheless, all Canadian environmental legislation is influenced by the other levels of government, and the relationship between the different levels affects specific legislation.⁷

Social Movements and Environmental Law-Making

The process of environmental law-making is usually one of conflict, because it is often antagonistic to capital accumulation. Weber suggests that the creation of the form of law is the result of struggle and is related to the provisions of suitable conditions for capital accumulation. This does not explain the content of law and the creation of laws that restrain accumulation. Also his concept of the law is contradictory as on the one hand it is autonomous and on the other it serves capitalism. Marxist theories situate the law within a broader political, ideological and economic context. But

while they suggest various reasons for the state to act against capitalist interests, such as the contradictions of the capitalist system being played out; the long term interests of capitalism; the interests of the bureaucrats; the product of class struggle, none seems an adequate explanation in itself to explain the creation of environmental legislation to curb the actions of the capitalist class.

One problem is that Marxist theorists are concerned with the capital/labour conflict, and those theorists who have extended Marxism into the areas of social movements have been content to discuss domination and subordination (a Weberian concept) or oppression, the effect of domination and subordination. This may be useful in explaining the issues faced by social movements based on ascription, but it is not helpful in explaining the relationship between the environmental movement, the state and capital, and the role the law plays in this relationship. It leaves degradation of the environment to be theorized as an adjunct to the exploitation of labour within the production process, the environmental movement as an adjunct to the labour movement, and law as a factor of legitimation. Thus, degradation of the environment is a by-product of the production of surplus value, and the populace is incidentally affected by this process and consequently protests. However, the term exploitation incorporates the concept of extracting from a person that which belongs to them for another's use or purpose. Thus surplus value is that value which is produced by wage labour but claimed by the capitalist. Whereas although exploitation of the environment may be a factor in the production process, if the environment is defined as the property of the community, its degradation is a process of extraction and use of this community resource.

Another problem is that several Marxist theorists leave the labour movement as the prime force for change, and indicate that the solution to these issues is an alliance between the labour movement and the environmental movement. In practice, while there have been some attempts at such an alliance (Grossman, 1985; Geiser, 1983; Logan & Nelkin, 1980), the environmental movement is frequently on the opposite side from that of labour, usually because the issues are presented as jobs versus the environment. Although the prevention of environmental degradation has been shown to create jobs (Woods Gordon, 1989; Miller, 1980: 33; Logan & Nelkin, 1980: 12-13), this does not deal with specific conflicts. Also, the labour movement may not be involved in a particular environmental issue, for it may be of more interest to the intellectual service stratum of the middle class (Kreisi, 1989; Cotgrove & Duff, 1980), or affect Natives or the petit bourgeoisie more than wage labour. If the complexity of the state and environmental law creation is to be understood, social forces should be considered as independent entities in their relationship with capital and/or the state (Jessop 1984). Incorporating an understanding of non-class forces into an analysis of the state and law-making may highlight different aspects in the policy-making process.

Within a Marxist perspective, as noted above, neo-Gramscians have attempted to incorporate non-class forces into their analyses. Jessop (1984) argues for an examination of "officialdom-people" relations, and the interaction and linkages between the state and the various social forces supporting and opposing particular policies. Social movement theorists working within this perspective have emphasized the importance of the development of a counter hegemony, that is a different world view,

in the struggle for change. The law has a role of maintaining hegemony. It obtains consent and enforces coercion. Yet, it also creates openings for the development of a counter hegemony, so that the content of law is the result of various struggles, and depends on the balance of power in a specific historical time and place.

Studies of Law Creation

A policy is a direction, or an intent, to pursue a certain political path that may entail the passage of certain legislation. Sociologists often examine policies, but they examine the specific legislation that implements such policies less frequently. In Marxist discussions concerning the law, the formation of the law and the application of the law are frequently compressed. The result is that studies emphasize the implementation of the law, and assume that particular laws are the result of the rights and/or obligations endowed by the bourgeois state to maintain the capitalist system. This does not automatically explain the existence of a particular law, or the struggle over the introduction of that law.

To my knowledge there are few studies of the reasons for, and the process of, the introduction of environmental legislation. The few studies that do mention this process, and those studies that have examined occupational health and safety legislation, suggest that political, economic, and ideological influences should be studied in each particular case. Handler (1978) examines the reasons for the "success" or "failure" of environmental legislation in the United States. His discussion begins by arguing that the National Environmental Policy Act of 1969 (NEPA) was the result of several factors.

First, it was the result of a court case, which held that agencies must consider the opinions of interested parties in decisions on power plant sites. Secondly, it was the result of the growth of the legal arm of the environmental movement and the ensuing number of court cases. Finally, it was the result of the concern of Congress regarding the way federal agencies handled natural resources and the environment. Handler's interest is how the NEPA, an ambiguous statute that created a somewhat impotent agency and was faced with a hostile administration, was transformed into a highly visible, active force by the environmental movement. He does not, therefore, elaborate why Congress was concerned about the attitude of federal agencies towards the environment, nor the struggle over the formation of the Act.

George Hoberg (1990) compares the different regulations of Alachor in Canada and the United States, and argues that different political restraints led to a ban on Alachor in Canada and no ban in the U.S. He explores three major explanations for this divergence: science, interest group politics, and legal and institutional arrangements. He concludes that different interpretations of the risks contribute to different decisions, but they can only be explained by reference to the economic importance of Alachor, and the need to maintain the legitimacy of current institutional arrangements.

Other studies that may be helpful in understanding the introduction of environmental legislation are those concerned with the introduction of occupational health and safety legislation. There are similarities between these two types of legislation. Both challenge the productive process. Both are concerned with whether this process is, or may be, dangerous to health. Also, the struggle concerning such legislation involves

the capitalist class, a social movement and the state. The differences are sometimes the population whose health is threatened, the particular social movements involved, and the ministerial departments.

Studies of the introduction of occupational health legislation in Ontario (Canada), Italy, Victoria (Australia) and the United States suggest that the reasons for the introduction of such legislation have certain factors in common. The legislation is a response by the government and employers to the costs (both economic and medical) of occupational health issues, to pressure from the labour movement, to particular crises and the result of changes in the political balance of power (Walters, 1983; Calavita, 1986; Carson & Henenberg, 1988; Curran, 1993). What such studies imply is that law is a multidimensional entity, and to understand environmental legislation the economic and political circumstances and the struggles that helped to shape the law should be examined in each case.

Social Movement Theories

Unlike occupational health and safety law, the major protagonists in the creation of environmental law are the state, capitalists, and the environmental movement.⁸ Traditional social movement theories examine the reasons members join a social movement, and the role of resources in the success or failure of the social movement organization (Gurney & Tierney, 1982; McCarthy & Zald, 1977). With the exception of the labour movement, theorists do not explore social movements as agents of change and the relationship between the state, capital and social movements.

The development of Post-Marxism has resulted in a rejection of the concept of the working class as the privileged agent of change, and has suggested a role for other social movements as additional or new agents of change (Boggs, 1986: 9; Cohen, 1982: 195; Mouffe, 1983: 23; Laclau & Mouffe 1985: 165). Recently, there has been an explosion of theoretical approaches in this area to explain the growth of "new" social movements and to theorize them as a force for change. Canel (1992) divides these approaches into New Social Movement Theory and Resource Mobilization Theory. The former focuses on "social integration, normative contestation, control of cultural production, and expressive action", whereas the latter "addresses themes of system integration, political processes, and instrumental action". Carroll (1992) suggests a third approach, a Gramscian approach, which he argues is complementary to the other two approaches. It retains the linkages to political economy and political praxis, and yet by emphasizing an analysis of how consent is organized it maintains the linkages to ideology expressed through everyday lives and beliefs.

Conclusion

Law is not an autonomous entity. Environmental legislation is the result of a struggle between conflicting interests which takes place on the terrain of the state. As this struggle is between groups with different power resources, it is to be expected that within a capitalist economy the form of the law and the content of the law, would favour capitalists. Nevertheless, this is not always the case. Both form and content are contingent, and dependent upon the outcome of various struggles within a specific

historical context. What is of interest is why the outcome of such struggles does not always favour capitalists.

This chapter has discussed the ability of various theories of the law, the state, and social movements to provide an adequate explanation of the creation of a law opposed by the capitalist class. Each perspective has advantages and deficiencies, but the neo-Gramscian perspective is considered to be appropriate for an examination of the struggle over the content of a law, because it focuses on the relations between the state and social forces. This perspective incorporates the concept of hegemony, and encourages an examination of the ways in which everyday concepts and practices are accepted, and how they contribute to consent to the status quo. It accepts that consent is not only produced in civil society but also on the terrain of the state and in the economy. It also argues that various factors differ in each conjuncture, which encourages a consideration of the historical background, and the political, economic and ideological context of specific legislation.

Thus, the thesis will examine the interests of the provincial government, and of the opposition and the supporters of the legislation; and the political and economic context in which these interests were played out. It will investigate how accepted ideas and practices and the actors' concepts of property, health and the law contributed to the construction of this legislation. In addition, it will illustrate how the prevailing structures and fluctuations in power resources both encouraged and constrained the goals of the capitalist class and of environmentalists.

END NOTES

1. Not all environmental legislation is antagonistic to capitalist interests. It can provide the impetus to new industries, such as the pollution prevention industry (Woods Gordon, 1989). However, given that several capitalists objected strongly to this legislation, and none supported it, it can be defined as being antagonistic to their interests. To argue that it was in the long term interests of capital is not sufficient, as it does not explain how it was so designated. Also, the government had no such intent. Even if this had been so, it does not provide an adequate explanation as to why the government chose this route. Other policies would have provided more direct investment in pollution abatement industries, and/or greater protection against environmental degradation.
2. For the purpose of this work a social force is defined as an agent or representative of a social stratum or group, which is working to obtain or prevent change.
3. A feminist analysis is relevant in some environmental analyses, but it is not relevant in this particular case study, so feminist approaches in the sociology of law will not be discussed. For a summary of such analyses, see the introductory chapter of Social Basis of Law, 2nd. edition (Comack & Brickey, 1991).
4. Empirical law, usually referred to as common law, is based on precedents. Kadi law is based on values (Weber, 1978: 352).
5. Miliband moves from the strict instrumentalist position to argue that although the state does act "on behalf" of the capitalist class, it does not act mainly "at its behest" (Miliband, 1977: 74). Later, he argues that the relationship between the state and the capitalist class is that of a partnership, which holds provided the state does not pose a fundamental threat to capitalist interests (Miliband, 1983). Recently, this position has been elaborated to emphasize that the state does impose constraints on capital especially in times of crisis (Miliband, 1989: 31-3).
6. Poulantzas (1980) did consider the role of social movements in achieving change, but his death prevented this being developed.
7. The Ontario Spills legislation did not include radioactive spills because atomic energy is the responsibility of the federal government.
8. The concerns of the labour movement and the environmental movement do often overlap. Nevertheless, the bureaucratic separation of these interests means that the former is primarily concerned with occupational health issues and the latter with environmental issues. Also as some sectors of the environmental movement would argue that production should cease if it results in any environmental degradation, there is inevitably a basis for conflict in some issues.

CHAPTER 2

EXCURSUS - HEGEMONY AND LEGITIMACY

Introduction

It was suggested in the previous chapter that a neo-Gramscian perspective is a useful approach to an analysis of the creation of a law that was opposed by a section of the capitalist class, because it provides the tools for examining power relations between the state, capitalists and social forces. This chapter will explore the advantages of this perspective especially in relation to the concept of hegemony compared with the concept of legitimation; the appropriateness of Gramscian concepts in an examination of one specific struggle over the creation of a law; and the compatibility of an interpretive historical methodology with a Gramscian perspective.

The first section considers the differences between the concept of legitimation and that of hegemony. It argues that the concept of hegemony is preferable to that of legitimation because it incorporates the possibility of oppositional forces obtaining change. This is followed by a discussion of the appropriateness of a Gramscian analysis. It suggests that this type of analysis is useful in an examination of the creation of a law because the concept of hegemony directs us to examine everyday practices and beliefs, and accepts that opposition occurs at different sites in the state, the economy and

civil society. The final section proposes that interpretive historical methodology is a suitable method for such an analysis, because it encourages the collection of many details, which illustrate the acceptance of perceptions, beliefs, and the ways in which the institutional process works to maintain the status quo. Such details also illustrate the ways in which these beliefs and practices are opposed, and how they constrain industrial capitalists to maintain the hegemonic order.

Legitimacy

Legitimacy has been used in an ambiguous manner in analyses of the state. It is a Weberian concept that has been adapted by Marxists and used to provide a functionalist explanation of social policies. Max Weber (1946: 78-79) argues that the state is a relation in which one group dominates another group, and that obedience to the state rests on inner justification and external means. Legitimacy is a claim to authority that is accepted by others, and legitimation is the process by which such claims are accepted. Weber discusses three types of legitimation: traditional legitimation based on ancient mores and a "habitual orientation to conform"; charismatic legitimation based on an extraordinary personal gift of grace; and rational-legal legitimation based on rationally created rules that must be obeyed under the threat of legal sanctions. As the state possesses a monopoly of violence, underlying each type of legitimation are the external means of enforcing obedience through coercion.

Weber's concept of legitimacy limits any conception of change and resistance. Essentially, the status quo is accepted because it has always been so, because

the ruler possesses certain qualities, or because the rules are perceived to be reasonable and disobedience will result in punishment. Thus, change can only be obtained if for some reason norms and values are no longer rooted in tradition, the ruler dies or his qualities are deemed inadequate, or the rules are no longer perceived as rational, or sanctions are not sufficient or can no longer be applied. But these are the effects of change not the reasons for change. The latter are rooted in questions of why norms and values change, why certain changes take place, why perceptions change, and why sanctions become insufficient or not applicable. The answers to such questions may be found in an analysis of the process of resistance rather than the effects of resistance.

The Weberian concept of legitimacy has been adapted by some Marxists to explain why the capitalist state acts in ways antagonistic to the capitalist class, but it fails to include any explanation of change. Habermas (1975: 36) argues that the recoupling of the economic to the political has increased the need for legitimation - for the state is not just securing the general conditions of production, but is engaged in it. This legitimation has been acquired by the development of a formal democracy that supports generalized motives, but avoids participation. Mass loyalty is obtained by granting citizens the right to withhold acclamation after a period of years. Such acclamation depends upon the satisfaction of expectations within the system.

Whether state intervention in the economic sphere requires legitimation, or is a factor in the maintenance of legitimation, is a matter for debate. The entry of the state into this area may be the result of the necessity to acquire legitimation, or a means of justification for the acts of that particular state or government. In addition, in the

latter part of the twentieth century privatization of state ownership is increasing, so the state is withdrawing from this area. Also, whether acclamation through the ballot box indicates mass loyalty is questionable. Habermas does not deal with the lack of acclamation by abstaining from voting, and he assumes acclamation when the choice of alternatives is non-existent, or not on the agenda, or undeveloped.

The movement from Keynesianism to monetarism, with increased privatization of government interests, suggests that direct state involvement in the economic arena through ownership or investment is not a prerequisite for the existence of advanced capitalist states. In fact, other theorists, such as McBride (1992), argue that with the growth of neo-Conservatism there has developed a "legitimacy deficit", which has resulted in increased coercion and an increase in emphasis on the ideological aspects of legitimacy.

Offe (1984) has suggested several explanations of legitimacy. In his early writings his position is similar to that of Habermas (1975). Legitimation is defined as shared norms and values and thus mass loyalty to the political system. In his later articles, he suggests there are several aspects to legitimacy. It can be regarded as the prevalence of attitudes of trust in the system, and the justifiability of the institutional arrangements and political outcomes of a regime or government (Offe, 1984: 267-270). He considers problems of legitimacy from a functional perspective. The inability of society to function results in questions being raised concerning the ability of the system to work within certain standards, which could result in the questioning of the foundations of society (Offe, 1984: 267-270). This definition implies an instrumental legitimacy that

depends on the state's ability "to deliver the goods", and other reasons for the prevalence of an attitude of trust are not considered. Recently, Offe suggested that legitimacy occurs when norms and interests overlap.¹ This begs the question of how such norms and interests are developed, and if norms and interests conflict, who or what institution determines which ones are considered.

David Held (1984: 299-369) attempts a typology of legitimacy and consent. While not defining legitimacy in terms of levels, he does indicate the possibility of levels of consent. Held places coercion, tradition, apathy, and pragmatic acquiescence on a continuum of consent, but rejects them as bases of legitimacy. He suggests three types of legitimacy: legitimacy dependent upon instrumental consent, legitimacy based on norms and available knowledge, and legitimacy based on norms and complete knowledge. He regards instrumental consent as a very weak form of legitimacy, as it involves a general compliance to dominant political and economic institutions because of future expectations. This form of legitimacy contains the potential for disillusionment with the government and even the state as a whole, if political and social changes are not undertaken, if changes are inadequate, or if they continually fail to develop (Held, 1984: 308). Instrumental consent, therefore, may provide an impetus for change. For Held, any strong form of legitimacy is based on normative consent. Norms are accepted as given. The possibility of normative change, or that these demands and needs can be created, or brought to the forefront of popular consciousness, is not discussed. However, he does suggest that focusing on strategic issues to maintain legitimacy, and marginalizing others, results in the development of forms of resistance.

Hegemony

The notion of hegemony was developed as a part of a strategy for overthrowing Tsarism by Plekhanov in 1883-84. It referred to an alliance of the leadership of the proletariat and its political representatives with other groups, such as the peasants, intellectuals and some bourgeois critics, for the purpose of ending Tsarist rule (Bocock, 1986: 25). Lenin expanded this strategy to include intellectual leadership of the party, so that workers would not fall into the trap of trade union consciousness and would focus on a revolutionary strategy (Lenin, 1947: 41, 134; Bocock, 1986: 25-27). Gramsci argues that the strategy to seize the Russian state was a "war of manoeuvre", which he describes as a frontal attack, meaning a violent revolution. Hegemony, which he defines as intellectual, moral and political leadership, had to be developed after this seizure. Change in Western capitalist states with their well-developed civil society has to be achieved through different methods, such as "a war of position", a subtle approach. As hegemony involves the acceptance of the intellectual, moral and political leadership of the dominant class in every aspect of society, it permeates everyday perspectives and practices. It is these everyday perspectives and practices that have to be altered before any substantial change can occur, and thus a (counter) hegemony has to be developed. Gramsci, therefore, uses hegemony as a concept to analyze how Western states are organized to maintain the dominance of the bourgeoisie, and also as a strategy to obtain change.

The Gramscian concept of hegemony is similar to that of legitimacy. Hegemony can be defined as intellectual, moral and political leadership of a group,

which is exercised in the economy, in the state, and in civil society, and is attained through the active consent of the mass of the population. It is the acceptance of a particular view of the world that results in particular practices that favour a particular group. Hegemony is more than instrumental legitimacy, for it incorporates the ideological justification of the state's and the dominant group's programme through everyday beliefs and practices. The present way of thinking and acting is taken for granted, and this "naturalness" in the approach to social, political, economic and ethical issues ensures that the basic organization of society is maintained.

In many ways Gramsci's concept of hegemony is similar to Held's normative legitimacy, but it is Janus faced as it embodies consent and resistance. For Gramsci, hegemony includes the leadership of the bourgeoisie and the development of a (counter) hegemony by the masses. Counter hegemony is not a term used by Gramsci. He envisages it as the other side of hegemony, which, as it is not domination, creates openings for resistance. This resistance extends beyond classes to include various social forces, but under the leadership of the working class.

Hegemony is not static, and compromises and adaptations to the values of the subordinate groups have to be made to maintain it. This fluidity creates openings for the development of a counter hegemony and the possibility of obtaining change. Change is initiated by the state in response to popular demands (or the necessities of capitalism), but there are limits to this response. Gramsci (1971) argues that when required the state will conduct "a passive revolution", which involves structural change, but not changes

to "the core structures" of capitalist society. Nevertheless, the fact that the state does respond, results in consent.

Similarities and Differences Between Legitimacy and Hegemony

Some theorists (Miliband, 1973: 233; Bocoock, 1986: 83-102) suggest that there are major similarities between Weber's concept of legitimacy and Gramsci's concept of hegemony. Both Weber and Gramsci incorporate ideas of force and consent, and consider the role of cultural, moral and political factors. This position is problematic, for it can result in an overemphasis of the role of the state, and an underestimation of the role of social forces. Buci-Glucksmann (1980: 57, 409 n.32) regards legitimation as a narrower concept than hegemony. She argues that the concept of legitimation leads to "an underestimation of the forms of struggle and organization of the working class in its hegemonic aspiration". In sum, the difference between legitimacy and hegemony is that the latter concept is broader and more dynamic. Discussions of legitimacy are limited, because they do not explain change and exclude the idea of resistance. Held (1984) suggests that we consent to actions for various reasons, but this explains our consent, not the state's actions. Also, Held does not incorporate any explanation of changes in consent. Offe (1984) suggests that norms and interests require that the state takes certain actions to maintain acceptance of the present system, but norms and interests are taken as given.

The concept of hegemony may be more useful in providing an explanation of the state's actions. Hegemony suggests that resistance can cause changes in norms and

values, which affect the state's actions. It implies that the maintenance of the present power relations requires a continual reconstitution of hegemony in response to the development of a different perception of the world. Thus, there is a continual dialectic between hegemony and a counter hegemony, and this can be related to actions of the state against the capitalist class as one side of this dialectic. The linkage of this concept to that of Gramsci's "passive revolution", explains why any actions by the state against capital will always be limited. A passive revolution reconstitutes hegemony and may involve some structural change, but the state will ensure that the basic structures of capitalist society will be exempt. Thus, the organizing principles of capitalism: production for profit, continual growth, the concept of private property, will remain unaltered.

Legitimation and hegemony are related. The former is a part of hegemony, and focuses on the state side of the equation. The latter incorporates legitimation, and assumes state actions against capital are in response to some form of resistance. Pressure to act in certain ways can be created by social movements, and by prevalent cultural views and practices. It can also be created by the necessity to bring about change for the interest of capitalism as a whole, that is "in the national interest". The state interprets the form of the response to pressure, but as it is subject to many pressures its response will incorporate the concerns of several interests. Hegemony, therefore, implies a subtle limitation and direction of action, but it does not define which particular action is taken. This depends on the political and economic interests of the state at that particular conjuncture.

The Application of Gramscian Concepts to a Fragment of the Law

Gramsci was concerned with the problem of why the working class consented to its own domination and did not revolt, as was suggested by Marxist theory and its Leninist interpretation. He developed his concepts to explain the failure of the factory movement in Turin to win the support of the working class, and the later support of fascism by the working class. As much of his work was written in a Mussolini prison, it was written in code, often using metaphors of Italian history, which has resulted in slightly different interpretations of his writings. His work has had a profound influence on French structuralists, such as Althusser (1971) and Poulantzas (1975); discourse theorists, such as Laclau and Mouffe (1985); and social movement theorists, such as Boggs (1986) and Carroll (1992). It has also influenced neo-Marxist writings on the state and political economy, such as Jessop (1990) and Carroll (1990).

Gramscian theory is useful in an analysis of conflict outside the capitalist/labour conflict, because it expands the analysis of resistance beyond structures and class struggle to include other forms of resistance on other terrains than that of labour and the factory floor. It also provides a set of concepts to analyze how consent is organized in the economy, the state, and civil society. It suggests that this occurs through organic intellectuals,² through a strategy of passive revolution, and through the definition of capitalist interests as general interests. It claims that resistance can occur on all these sites through a redefinition of the general interest, through everyday practices and beliefs, and through a strategy of alliances. At one extreme, Gramsci's analysis has

resulted in Althusser's theorizing of how structures organize consent, and at the other extreme, it has resulted in Foucauldian analyses of micro resistances.

The concept of hegemony recognizes that consent is organized in every aspect of everyday life. This suggests that there are multiple overlapping areas of domination, oppression and exploitation, and that, therefore, there are multiple areas of resistance. Hegemony is multifaceted, and each facet is a point of resistance, and each struggle is important as a contribution to change. It is composed of a network of multiple strands, and each strand comprises a cluster of ideas and practices over which there are struggles with each change affecting other components of a cluster and other strands. Thus, hegemony is continually being reconstituted in response to resistances and the demands of capitalism.

Neo-Gramscians have extended Gramsci's work to theorize the multitude of different resistances in contemporary society. For neo-Gramscians, the working class is no longer the leader of transformative social forces, although for many it is an essential participant in the opposition forces. However, neo-Gramscians vary in their approaches. Some argue that resistance through a political party is subordinate to the necessity of establishing a shared vision of the world while recognizing differences among the groups that contribute to this vision (Carroll, 1992: 12-14). Jessop (1984: 364), however, argues that it is within the party system that cleavages are defined and that political relations influence the framework from which the "national-popular will" might emerge. He emphasizes the importance of analyzing "how state power is realized in and through specific practices and forces". Cuneo (1990) focuses on an alliance

between the labour movement and the women's movement to develop a counter hegemony, and the response of the state through a passive revolution, which is a top-down process of change by which the state controls change, enforces limits, and ensures that the essential elements of capitalism remain unaltered. In sum, neo-Gramscians examine the ways in which consent is organized, consider a broad base of resistance to the existing power structures on different terrains, and also the ways in which the state responds to such resistances.

A Neo-Gramscian Perspective

A neo-Gramscian analysis will therefore investigate how the status quo is maintained through the structures of the state, and everyday practices and traditional concepts. The law is an appropriate subject for a Gramscian analysis. Gramsci considers the state to be a mixture of consent and coercion, and the abstract entity law incorporates this mixture. Its coercive aspects receive consent because it does sometimes restrain the actions of the powerful, and it does protect individuals and their property. In this way, it performs an ideological function, which helps to legitimate the status quo. The law also plays a part in the maintenance of hegemony and creates openings for change. Thompson (1975) examines "a bad law, drawn by bad legislators and enlarged by the interpretation of bad judges", but argues that the ideology of the rule of law prevented it from being completely bad, and thus it received a measure of consent. If one accepts that social change is desirable, the focus should be not the ways in which laws are implemented, even though the powerful may be restrained by their

implementation. It should be the ways in which laws are created with the object of preventing the creation of "bad laws", and opportunities for lax interpretations of any laws. This is because law is "the medium within which other social conflicts (are) fought out" (Thompson, 1975: 267), and its ideological role requires that it appear neutral and above class interests, and that it purports to serve the general interest.

This project will analyze the creation of a law. It will examine the institutional process through which the "Spills" Bill passed to ascertain whether it precluded or encouraged change, and whether other practices would have encouraged change. It will look at the procedures of the Standing Committee on Resources Development, bureaucratic consultations and considerations, and the Panel that was established to examine the Regulations. It will examine the acceptance of traditional definitions and practices, the ways of viewing concepts, and the acceptance or questioning of ideological beliefs, to illuminate whether they encouraged or forestalled change. Thus it will indicate whether the concepts of property, health and risk forestalled or encouraged change. It will explore what this legislation meant for the law in general. It will also explore the ways in which industrial capitalists' interests were linked to the general interest and the ways in which these linkages were contested. One way in which this will be accomplished will be through an examination of the arguments and language that was used in the Hearings that were held by the Standing Committee on Resources Development.

As Gramsci suggests that the state conducts a passive revolution in response to a decline in hegemony, the project will examine the reasons for the

introduction of the legislation. Related to this, it will examine the broader pressures on the Ontario government at the different stages of the process towards proclamation. Also, as a passive revolution involves change but not of the essential elements that constitute capitalism, it will study the type of choices the provincial government made concerning the content of the legislation.

Of prime interest in a Gramscian analysis is the role of social forces in encouraging or forestalling change, which involves an examination of the resources and strategies of the supporters and opponents of the legislation, the alliances that were forged, and whether cooptation took place. This indicates that the different dimensions of power and the fluctuations in the balance of power should be examined in the different conjunctures. Also, it suggests that the interconnectedness of the political and economic aspects in the formation of the "Spills" Bill should be examined, not only at the national level but at the international level, specifically the international insurance market.

The Methodology

This type of analysis requires a detailed investigation of the creation of legislation. It entails a study of the conditions prior to the introduction of the legislation, and an assessment of the reasons for its introduction. It also involves an examination of the different conditions at each stage of the process, of the various social relations, and of the structural constraints and conjunctural opportunities that the social forces faced.³

An appropriate methodology for such an analysis is an interpretive historical method. Skocpol (1984: 363) has created a typology of historical methods:

a general model, an interpretive model and a comparative causal model. Interpretive historical sociology focuses on what happened using various concepts to provide an understanding of the events (Skocpol, 1984: 368). It can be argued that this project meets Skocpol's two requirements for interpretive historical sociology, as the topic of environmental protection, specifically spills, is significant in the present, and it examines the intentions of the actors in the given historical setting (Skocpol, 1984: 368). How useful such criteria are, is debatable, as what is significant inevitably depends on the author's assumptions, and the intentions of the actors can only be partially identified.

Skocpol's categories are ideal types and it is rare for one piece of research to fall neatly into one of them. Thus this research also examines the structural context, and attempts to emphasize the interaction between structure and agency in this struggle. The research also has aspects of causal historical sociology when it asks why this Bill took this course, examines the differences between the various stages and attempts to elaborate some causal connections. However, the method is inductive, and the goal is primarily to achieve an understanding of the processes that took place through "thick description"⁴ (Geertz, 1973), which it is hoped will illuminate particular themes and concepts.

This type of analysis requires archival research involving documents, transcripts, letters, memoranda and reports of Legislative debates in Hansard. It encounters various problems of missing documents and difficulties in obtaining access to the records. It needs to be supplemented by interviews with key personnel; and interviewing faces such difficulties as selective memories, vague recollections, and an

unwillingness to be interviewed. Such problems mean that there has to be a focus on amassing as much detail as possible in the hope of filling in the gaps.⁵

The challenge of the interpretive historical approach is that of retaining theoretical concerns and not losing them among the historical details. This means that there has to be a continual movement from the specific to the abstract and vice versa in the analysis. The object is the interaction of theory with the evidence or the evidence with theory, but "theory must work on the empirical without either dominating it or being dominated" (Abrams, 1982: 333). Historical sociologists have to walk a tightrope, so that they are "down there among the details" as required by Stinchcombe (1978), but that they do not lose sight of their theories and concepts. In the process they hope to highlight patterns or concepts to achieve a measure of understanding of how or why the event occurred, and thereby to introduce new elements into the debates concerning social change.

Conclusion

Laws set the framework for various struggles, but they are often the culmination of other struggles. These struggles are not isolated between bureaucratic officials or political representatives on the terrain of the state, but involve other social forces from economic sites and sites within civil society. The struggles over environmental protection laws are of particular interest because they involve the transfer of some production costs from the public and/or the government to industry. They also

reconstruct the ways in which property rights are viewed and involve a shift in the power arrangements of society.

This study is an examination of the genesis of one pollution law, the Ontario "Spills" Bill, which occurred at a turning point in attitudes towards the environment. It will employ a neo-Gramscian perspective and an interpretive historical methodology. This perspective incorporates the concept of hegemony, which is broader than that of legitimation, directing the researcher to examine everyday practices and beliefs, the strategies of social forces and the government, and the balance of power in specific conjunctures. Historical interpretive methodology complements this perspective because the method focuses on accumulating many details, which can illuminate everyday practices and beliefs. It employs concepts to interpret these details, and also uses the details to indicate particular themes or concepts that warrant further investigation.

The following chapters will examine the struggle between industrial capitalists and environmentalists over the content of the "Spills" Bill and whether it would be proclaimed into law. They will analyze the strategies employed by the opponents and supporters of the Bill, the initiatives of the government, the reasons for the fluctuations in the balance of power, and they will assess whether the Bill did create any change in the prevention of pollution. Finally, the conclusion will tease out some themes and concepts that occur throughout the analysis (such as the necessity of adequate insurance and the concept of property) and indicate what they suggest for our studies of environmental law creation.

END NOTES

1. In explaining his concept of legitimacy to the author at McMaster University in February 1991, Dr. Offe argued that full legitimacy depended upon an overlap of norms and interests, but there were occasions when either norms did not include interests or vice versa.
2. Organic intellectuals are persons from various classes or sectors who are articulate and push for change.
3. Structural constraints are elements in a social formation that cannot be changed within a specific time period whereas conjunctural opportunities are those elements that can be changed within a given time period (Jessop 1984: 253).
4. Clifford Geertz means by this phrase "our own construction of other people's constructions of what they and their compatriots are up to" (Geertz, 1973: 26-27).
5. The data sources and the problems encountered in the research are discussed in more detail in Appendix 1.

PART II: THE EARLY STAGES

CHAPTER 3

THE INTRODUCTION OF A BILL

Introduction

Governments address some issues and not others. Sometimes, they are responding to concerted lobbying through which the environmental movement makes claims that a certain problem exists that requires a legislative response. Sometimes, they are responding to an event to prevent its recurrence, or to put in place mechanisms to deal with the effects of any similar events. Sometimes, they are responding to institutional problems that need further clarification and simplification. None of these reasons occurs in a vacuum; and they do not explain why certain claims are granted a response and not others, why certain events initiate legislative responses, and why certain institutional problems initiate a response and others are ignored.

Policy-making is a complex process, and environmental policy-making is even more complex. It is affected by issues that range from the local to the international, and by issues that cut across other departments at each level of the state. It is developed within a framework of ideas not only about the environment, but also about the role of the state, the responsibility of the individual and/or corporations, the market and economic growth. It is produced in a historical context of past decisions.

It involves institutions that encourage a focus on certain issues, and specific approaches. Geographic boundaries restrict what can be accomplished within each level of the state and the nation state. The state of the economy also determines what is assessed as "affordable"; and the type of economy affects the assessment of whether a policy will impinge on economic growth or will have a minimal impact. The societal context specifies who possesses the power resources, how they are used, and who decides what is considered important. The political context defines who possesses the political power resources, and what pressures can be placed on the government to act.

The focus of this chapter will be to examine how spills became defined as a problem that required political intervention. It will suggest that institutional arrangements, the lack of the capacity of the ministry to carry out its mandate, the division of powers within the Canadian constitution, the pressure of other legislation, the political setting, and the formation of environmental groups, all contributed to the definition of spills as warranting the attention of the government. It will further suggest that the economy granted the opportunity for legislative activity concerning spills. In addition, it will argue that structures and policy preferences ensured that the content of the Bill focused on sanctions rather than regulations or the mechanisms to deal with spills.

Creation of Institutions

Following World War II, both the federal government and the provinces in Canada introduced legislation dealing with the environment. The increase in scientific

data and studies; events, such as the London smog disaster in 1952; the investigation of pollution in the Great Lakes in 1946 and 1964 (Macdonald, 1991); and the examples of increased legislation regulating the environment in the United States, had all resulted in the introduction of some environmental issues into the discourse and the definition of certain pollution problems as warranting regulation. In the 1950s and 1960s, legislation was passed, and bureaucracies were created, to deal with air and water pollution.

In Ontario, the Ontario Water Resources Commission was created in 1956, and the Air Pollution Control section was established in the provincial Department of Public Health in 1957. In the late 1960s and early 1970s, pollution became a salient public issue because of several events: the grounding of the Arrow oil tanker, the discovery of high mercury levels in the fish in the Great Lakes (Woodrow, 1980: 25), the publication of Silent Spring by Rachel Carson in 1962, and the International Conference on the Human Environment in Sweden in 1972, at which several industrial nations indicated they would reduce pollution. Increased media coverage, parliamentary interest, and public awareness expressed through public opinion polls encouraged both levels of government to create institutional mechanisms to deal with environmental issues. At the federal level, the new Department of the Environment, Environment Canada, was created in 1971; and this was followed by the creation of separate departments in Ontario, Alberta, and Quebec.

The creation of bureaucracies, and the ways in which responsibilities are distributed amongst different levels of the state, and amongst various departments, affects which problems are selected, how these problems are defined, and the consequent

agendas and possible solutions to these problems. The state has to have the 'capacities' to deal with a problem (Skocpol, 1985), but the ways in which these 'capacities' are structured will affect the type of response. The provincial level of the state has limited powers over environmental issues. The environment was not an issue at Confederation, so powers between both levels of government are not clearly defined. Also, environmental issues do not confine themselves to provincial borders. In addition, jurisdiction over the environment does not fall solely to the Ministry of the Environment. This is not unusual. In Canada, no department of the environment is completely responsible for environmental issues, and this has limited the ways in which they can respond to environmental problems.

In Ontario, as elsewhere in Canada, the Department of the Environment, which was created through the Environmental Protection Act in 1971, was composed of some, but not all, branches of other departments concerned with environmental issues; and extra responsibilities were added with the passage of new legislation. It included the Air and Waste Management and Pesticide Control Sections from the Department of Health plus a branch that dealt with Ontario's conservation authorities. In 1972, this Department was combined with the Ontario Water Resources Commission to create the Ministry of the Environment. The responsibilities of the department were extended through the passage of the Pesticides Act in 1973, and the Environment Assessment Act in 1975 (Bell & Pascoe, 1988).

History of Spills - Definition of a Problem

Throughout the 1970s, two separate but related problems, which were not adequately covered by existing environmental legislation, plagued the Ministry of the Environment. One problem was the cleanup of hazardous spills. The other was the provision of compensation for the victims of spills. The former problem was illustrated by the difficulties the Ministry of the Environment had encountered in trying to get Canadian Pacific Railroad Co. Ltd. to clean up the pollution from the Dowling train crash. The latter problem is illustrated by the inability of the Ontario government to find sufficient proof to establish that Dow Chemical of Canada Ltd. was responsible for the mercury pollution of the Detroit River and Lake Erie. This resulted in an out of court settlement for fractions of the damages originally claimed by the fishermen and bait dealers for loss of income from the pollution of Lake St. Clair by mercury.¹

These problems were compounded by a growing awareness of the dangers of hazardous substances, especially PCBs, dioxin and mercury, and their relationship to health. This awareness can be attributed to several factors. There had been an increase in scientific knowledge; and this had been reported in the media. Also the media had covered environmental events, such as Seveso, in Italy in 1976,² Love Canal in the United States in 1978, and the possibility of Minamata disease among the Indians of the Grassy Narrows and Whitedog reserves. In addition, environmental groups were exerting pressure to publicize such events and scientific studies.

The ministry was also receiving pressure from within the legislature to "do something" about spills and compensation for victims of spills³ (Hansard, November 28,

1978). Both the 1975 and 1977 elections resulted in Progressive Conservative minority governments. Also, Stuart Smith, the leader of the Liberal Party, was knowledgeable in environmental matters, and felt that the Progressive Conservatives were vulnerable in this area (Interview, Parrott, 1993). Thus, both opposition parties were articulating concerns about environmental issues including spills, and this attention attracted media interest (Winfield, 1994).

The ministry was encountering several problems in its attempts to minimize the effects of hazardous spills. These problems included the slowness of the legal process, inconsistent fines, the lack of concern regarding spills, and what was viewed as an escalation of the hazard potential of spills.

Slowness of the Legal Process

The Ontario government had been ineffective in attempting to use the legal process to deal with the problem of spills. Its use of the courts to establish liability had delayed cleanup and often made the situation worse, as occurred in the Dowling rail accident. Also, if the government could prove responsibility, this did not always meet the legal requirements, so it had to resort to moral suasion⁴ (Hansard, November 23, 1978). The legal process was slow and seemed an inappropriate method of dealing with environmental matters. The burden of proof was on the government to prove that the plaintiff was responsible for pollution, and not the plaintiff to prove that he was not responsible. For many reasons, such as the uncertainty of science, synergism, and costs,

it was extremely difficult to prove fault. Also, the tardiness in dealing with one case affected other cases, and whether other companies were charged.⁵

Inconsistent Fines

Another problem was that sanctions were inconsistent and often not severe enough to act as a deterrent. Several court cases illustrate this inconsistency. In 1977, an Ontario trucking company was fined \$2,000 for the offence of causing the discharge of a contaminant, and \$500 for failing to report the discharge, following an oil spill that caused damage costing over \$40,000. (the CELA Newsletter, 1977a). In another case, a judge stated that deterrence was a principle in his sentencing, and "that to be a deterrence, the fine has to be substantial enough to make an impression on this and other offending companies, or potential offenders". He fined American Can of Canada Ltd. \$64,000 on 16 charges of mercury pollution into Lake Superior contrary to section 32(2) of the Fisheries Act (the CELA Newsletter, 1977f).⁶

Lack of Concern Regarding Spills

There was a lack of concern by industry regarding the seriousness of spills, which was expressed through a lack of reporting of spills and a lack of emphasis on prevention. The government was concerned about the amount of oil not reported as spilled and not cleaned up. In 1976, the ministry received 91 reports from the public of which 47 reports led to the discovery of oil spills that had not been reported. In 1977, it received 106 reports - again 47 had not been previously reported (Compendium of

Background Information, 1978). (No statistics were made available about the lack of reporting of spills of hazardous products). Sometimes there was a delay before the spill was reported. For example, the Port Loring spill occurred a year before the ministry heard about it⁷ (Hansard, November 24, 1978). Of the known 300,000 gallons of oil spilled during 1976 and 1977, 100,000 gallons were not cleaned up. Of the approximately 394 oil spills, 329 were cleaned up, so 65 oil spills were not cleaned up.

Some industries did not emphasize the prevention and the reporting of spills. For example, Algoma Steel Co. Ltd. was charged under the Ontario Water Resources Act and the Environmental Protection Act in 1976. During late 1975 and early 1976, it had discharged phenol into the St. Mary's River, which supplies the drinking water for Sault Ste. Marie. The ministry stated that the discharges impaired the drinking water and the quality of fish. It complained that it had always experienced difficulty in persuading Algoma Steel to report spills promptly. This lack of concern for pollution prevention was illustrated by the few workers responsible for this area. According to the vice president of the corporation only eight out of nine thousand employees were involved in pollution control⁸ (the CELA Newsletter, 1976c, 1977b).

Escalation of the Hazard Potential of Spills

One indicator of internal pressure on the government to introduce spills legislation would be an increase in the number of spills. There were approximately 1,000 spills each year of which the ministry received reports of about 600, but there had been a slight decrease in the number of confirmed spills since 1973 (Compendium of

Background Information, 1978). What may have been a major factor in the ministry's decision to introduce this Bill was that the type of spill was changing from that of oil to hazardous materials. The ministry considered hazardous materials to be difficult to detect and to clean up (Hansard, November 23, 1978). The percentage of total spills that were oil spills (petroleum, fuel oil, vegetable oil, or similar oils) had declined slightly from 72% in 1973 to 69% in 1977. In contrast, the percentage of other substances, including hazardous materials, had increased from 28% in 1973 to 31% in 1977 (Table 1). Moreover, the quantity of hazardous materials spilt was greater than that of oil. From 1974 to 1977, an average of 650,000 gallons per year of hazardous materials, such as ammonia, phenolic compounds, and concentrated acids, were spilled from industrial facilities, storage facilities and during transportation. In the same period an average of 450,000 gallons of oil per year was spilled (Compendium of Background Information, 1978). The ministry argued that hazardous materials were difficult to clean up or neutralize, because of their rapid solubility. It was, therefore, vital to initiate containment before they reached a major watercourse or groundwater.

In sum, the ministry was finding that it did not possess the resources to prevent spills, and to ensure compensation for victims from the polluter. The law was inadequate to encourage notification of a spill or to encourage cleanup of a spill (Parrott, SCRD, June 18, 1979: R-2150-2, 3). Compensation for damage was limited to the judicial determination of fault or other bases of liability, and the amount depended upon

TABLE 1

Total Spills Reported to the Ministry of the Environment 1973-77

Year	Total Spills	Oils*		Other substances including hazardous materials	
		Number	% of Total	Number	% of Total
1973	696	507	72	189	28
1974	525	394	75	131	25
1975	604	430	72	174	28
1976	596	416	70	180	30
1977	538	372	69	166	31

* Oil of any kind or in any form, including but not limited to, petroleum, fuel oil, vegetable or similar oils.

Source: Compendium of Background Information for The Environmental Protection Amendment Act 1978

TABLE 2

Quantities of Liquid Contaminants Spilled 1974-77 (Gallons)

Year	Oil	Hazardous Substances	Other Liquid Contaminants
1974	396,000 G.	366,000 G.	17,425,000 G.
1975	690,000 G.	1,368,000 G.	1,778,000 G.
1976	385,000 G.	543,000 G.	6,161,000 G.
1977	323,449 G.	321,626 G.	16,295,365 G.

Source: Compendium of Background Information for The Environmental Protection Amendment Act 1978⁹

judicial discretion. In addition, the ministry's own interests suggested the need for some legislation to deter spills. Less oil, and more hazardous materials or other liquid contaminants were being spilled; and these materials required immediate action and could not await the completion of a long judicial process. It was costly to the government to pursue court actions, especially when they took several years to resolve¹⁰ (Scott, SCRD, June 18, 1979); and if no one was at fault, the government paid the costs (Parrott, SCRD, June 18, 1979: R-2150-2, 3). The government was vulnerable, because it had been in power so long; and the opposition, supported by the media, was clamouring for the issue of spills to be resolved (Interview, Parrott, 1993). Public concern regarding chemicals and the movement of chemicals was escalating (Interview, Scott, 1993). To forestall an increase in costs from cleanup, the potential costs of compensating victims, the costs of litigation, or the political costs to the government of the non-compensation of victims, the ministry needed the power to enable it to intervene quickly to prevent a spill deteriorating into a disaster.

Other Legislation

Legislation in other jurisdictions can have political effects beyond its borders. It highlights problems and suggests ways of solving such problems, and in this way it exerts pressure on governments to introduce similar legislation. The process of the passage of this legislation usually involves some form of debate and the consequent dissemination of information beyond the immediate jurisdiction; and actions resulting from the new legislation may impinge on other states. Thus, the closing of the U.S.

borders to the importation of PCBs created a problem regarding their disposal in Canada, especially in Ontario.

At the time of the introduction of this Bill there were several pieces of legislation dealing with the cleanup of pollutants and compensation of victims in Canada. Much of this legislation was specific to a particular pollutant or environment e.g. The Nuclear Liability Act; The Pesticide Residue Compensation Act; The Canada Shipping Act, Part XX; The Fisheries Act; The Arctic Waters Pollution Prevention Act; The Pesticides Act - Ontario; The Fishermen's Assistance and Polluters' Liability Act - Manitoba.¹¹ Nevertheless, the existence of this legislation established some precedents in this area. Not only did it provide experience in the implementation of such legislation, but also experience in its construction. For example, the General Counsel at the Ministry of the Environment had been involved in the introduction of The Pesticides Act - Ontario, which provided him with experience in liability legislation.

Cooperation with the federal government in new moves to control the transportation of hazardous materials also encouraged the Ontario government to become involved in this area (Interview, Scott, 1993). There was consultation with the federal government regarding the introduction of parallel legislation to the federal bill concerning the transportation of dangerous goods, which the federal government was introducing¹² (Hansard, November 4, 1977); and regarding a new waybill system and regulations concerning the reporting of shipments of contaminated material (Hansard, November 21, 1977). This meant that there was an ongoing debate regarding the transportation of hazardous materials. It is possible to speculate that this may have emphasized the need

for such legislation, or the Ontario government may have wanted to prevent the federal government from dominating the area.

It is also possible to speculate that Japanese compensation arrangements for Minamata victims increased awareness of the need for compensation arrangements. The victims of Minamata disease visited Grassy Narrows in 1975, and met with ministry officials.¹³ In 1976, the ministry produced a report on mercury poisoning in Iraq and Japan (Swaigen, 1981). Also, the ministry was interested in compensation, and, in 1975 & 1976, the ministry hired two summer students to produce a report of these arrangements (Interview, Swaigen, 1993). In addition, an article in the Globe and Mail in 1978 described the compensation arrangements in Japan¹⁴ (Swaigen, 1978).

The Political Setting

In spite of the growth of the legislative mandate of the Ministry of the Environment, it is questionable whether the environment was a high priority for the Ontario government. The actions and statements of the government suggest that economic concerns eclipsed any environmental concerns. The ministers of the environment were frequently changed¹⁵ (Hansard, October 17, 1979; Witten, 1994). In 1977, the Davis government extended the abatement order for the Reed Paper Company, because the threat to close the operation would have meant a loss of 1,700 jobs. The new Minister of the Environment in January 1978, George McCague, viewed environmental regulations as an unnecessary restriction on economic growth (Globe & Mail, January 24, 1978).¹⁶ The government tended to favour rhetoric over action. For

example, in the election campaign of 1977, there was a suggestion that pollution fines of millions of dollars would be initiated by a new Conservative government. After the election, officials in the Ministry of the Environment described this statement as wishful thinking, and as encouragement to the United States to honour its commitments regarding the Great Lakes (Oziewicz, 1978).

The structure of government with its divisions of responsibilities for the environment also creates problems in developing coherent environmental policies. The ministry's limited efforts at reform resulted in conflicts with other state agencies and affected economic interests (Winfield, 1994). In this election campaign, there was a public split between the Minister of Natural Resources, Frank Miller, and the Minister of the Environment, George Kerr. The Environment Minister wished to close the Wabigoon River to sport fishing as had been requested by the native people, but the Minister of Natural Resources rejected this policy (the CELA Newsletter, 1977e).

Then, as now, there were problems of the division of powers concerning the environment between the federal and provincial governments. After the discovery of mercury contamination in the Wabigoon River in 1969, the federal government claimed that responsibility for closure for fishing was the provincial government's, whereas the Ontario government claimed that responsibility lay with the federal government (Estrin & Swaigen, 1993). There were times when the federal and provincial branches of government cooperated. In 1976, the Ontario Ministry of the Environment, at the request of Environment Canada, laid charges of mercury pollution against American Can of Canada Ltd. (the CELA Newsletter, 1976b). However, on

another occasion the decision of one branch of the federal government resulted in a spill. In the winter of 1976, the federal government decided to use ice-breakers to keep the channel in Parry Sound open, allowing Imperial Oil tankers to sail into the federal harbour and to unload oil. Protests were made by citizens, local MPPs and the local MP, but before anything could be achieved, a tanker went aground and spilled thirty five thousand gallons of diesel, stove and fuel oil¹⁷ (the CELA Newsletter, 1977c).

Even when the two levels of government cooperated interaction was limited. Members of the staffs of the Ministry of the Environment, the Ministry of Natural Resources and the Ministry of Health sat on the Federal Task Force on PCBs (Hansard, December 16, 1977), and cooperated regarding the transportation of PCBs. Yet the federal government did not pass on all its information concerning PCBs to the provinces. For example, the detailed breakdown of quantities of imports of PCBs by individual users was a trade secret, and confidential under the terms of the Environmental Contaminants Act¹⁸(Hansard, December 7, 1978).

Formation of Environmental Groups

The development of the environmental movement in Europe and in the United States, combined with the same influences that encouraged the growth of environmental institutional structures, encouraged the development of the environmental movement in Canada. In Ontario, Pollution Probe was formed in 1969; and in 1970, its offshoot, the Canadian Environmental Law Research Association,¹⁹ (later the Canadian Environmental Law Association (CELA)) was created to obtain change through legal

reform and litigation. Pollution Probe and CELA grew throughout the 1970s and campaigned successfully with other environmental groups for the passage of the Environmental Assessment Act in 1975. This Act provided for the environmental assessment of any proposed major undertaking and public participation in the decision-making process. As it would question the cement kiln burning of PCBs, it would indirectly exert pressure on the Ministry of the Environment regarding its claim to be acting to protect environmental health.

CELA's mandate was to promote legislative reform to prevent environmental degradation, to litigate to establish precedents, and to encourage the enforcement of existing legislation. Legal reform focused on prevention by targeting the source of pollution, and not by sanctions after the fact. Sanctions were considered to be covered by existing legislation; and the focus was to encourage the enforcement of this legislation and the imposition of adequate fines to deter future pollution.

CELA was involved in several spills cases. Also, the information concerning lack of government action, and the relationship between pollution and health, was publicized in various articles in the newspapers, and environmental journals, such as Probe Post, Alternatives and the CELA Newsletter. Despite this involvement and this publicity, obtaining spills legislation was not a platform of the environmental movement. Theoretically, the common law torts of nuisance, negligence, riparian rights,²⁰ trespass, and strict liability could be used to compensate for harm to property and health, so CELA had concentrated on litigation to obtain compensation. This did not mean that CELA was content with the present process of litigation. The General Counsel noted

that no victims of widespread pollution had successfully sued a large corporation for their losses, even when provincial governments had sued on their behalf (Swaigen, 1978). The reasons were the delaying tactics available to wealthy corporate defendants, the high costs of lawyers and scientists, the lack of availability of government scientific reports, restrictions on class actions, onerous proof requirements, lack of standing (the requirement that a plaintiff show substantial damage beyond harm to the public) and the viewpoint of judges.

CELA complained that judges chose to interpret the law narrowly (Swaigen, 1978). The plaintiff had to prove a direct cause and effect relationship between the manufacturing processes used by the defendant and the damage to the plaintiff's interest. This was extremely difficult to prove with the uncertainty of science, multiple sources of pollution, and synergistic effects. Costs were also a factor. The costs of collecting the evidence to prove a causal link were high. When they were combined with the costs of lawyers and the possibility of having to pay the costs of some defendants' fees should the plaintiff lose, they were beyond the means of most individuals.

CELA was preoccupied with lobbying for the Environmental Assessment Act, with obtaining implementation of the existing legislation, with other environmental problems, and with obtaining funding. In the latter part of the decade both CELA and Pollution Probe were encountering financial difficulties and had to limit their activities.²¹ CELA found it difficult to secure sufficient private funding, because it was not well known to the public, and had been defined as "Stalinist", "Marxist" and

"radical" by barristers, and some large corporations (Beardwood, 1990). Also, corporations and government departments were wary of funding potential plaintiffs:

...our Advisory Law Office is not an attractive thing for corporations to fund, who often express fears that we might use their money to sue them - unlikely but not impossible. Government departments such as Environment and Natural Resources consider us a pain in the neck (CELA, letter, 1976a).

In 1976, CELA applied to the Ontario Legal Aid Plan for interim funding and became a legal aid clinic in 1977. While this gave it a stable basis for its litigation activities, it did initially produce some uncertainty about its ability to fund its lobbying activities. Nevertheless, extensive informal contacts were maintained with both opposition parties. They involved the exchange of ideas and information, which enabled the opposition parties to question the actions of the government (Winfield, 1994).

The Maintenance of a Facet of Hegemony

While there had been an increased growth of environmental awareness throughout the 1970s, the Progressive Conservative government in Ontario was encountering problems in presenting an image of environmental awareness and of acting to protect environmental health. The granting of yet another abatement deadline to the Reed Paper Company at Dryden,²² and the replacement of the deadline of 1978 for sulphur dioxide abatement to three years hence for Inco Ltd. in Sudbury, resulted in public protests. The opposition parties' protests in the legislature brought the minority Conservative government close to defeat in 1978; and a public opinion poll indicated that

a snap election conducted on the issue of environmental protection would have resulted in the government's defeat (Howard, 1980: 34-5).

The government encountered particular problems regarding PCBs. In August 1977, a tribunal of the Environmental Appeal Board accused the ministry of turning the PCB spill at Dowling into a "catastrophe", because of a delay in cleanup instructions (Environmental Appeal Board, 1977; Malarek, 1977). In September 1977, the danger of PCBs was emphasized by the banning of their use except in sealed equipment in Canada. In January 1978, George Kerr was moved in the cabinet shuffle, because he "had a difficult time fending off opposition charges that the province was not protecting citizens and the environment from contamination by PCBs" (Globe & Mail, January 24, 1978). However, the new Minister, George McCague, also encountered problems regarding PCBs. The U.S. closed its border to PCBs, which increased the problems of the disposal of PCBs in Canada, because the contract of the St. Lawrence Cement Co. Ltd. to burn PCBs in cement kilns was under review by the Environmental Assessment Board. This left the government with no alternate plans other than to store the substance in drums until other arrangements could be made (Malarek, 1978). Thus, the passage of one piece of environmental legislation had effects elsewhere in that it increased the pressure for legislation to deal with potential spills.

The publication of the results of the first survey conducted under the federal Environmental Contaminants Act 1976 in April 1978 increased the awareness of the dangers of PCBs and of the lack of adequate policies. This Act empowered the federal government to determine whether a particular substance posed a threat to the

environment, and to restrict or ban its use if it were deemed to be a danger to the environment. PCBs were the first substance for which the Act was used.²³ The survey confirmed the public's fears concerning PCBs. It found that 70% of the PCBs in Canada, 17 million pounds, were in Ontario. Moreover, it noted that PCBs were considered a serious environmental problem, because of their widespread distribution in the environment, their resistance to biological decomposition and their tendency to accumulate in the food chain. The linkage of health problems to environmental problems exerts pressure on governments to act; and this report related PCBs to birth defects, nervous disorders, changes in liver function, and cancer (Malarek, 1978).

The Struggle Over an Aspect of Hegemony

While the environmental movement did not lobby for the introduction of spills legislation, it did help to create the conditions under which such legislation was desirable. Increased environmental awareness since the 1960s had meant that governments had to present themselves as environmentally concerned. To achieve action, the environmental movement needed to show that this concern was limited, and at the level of rhetoric. In the 1970s, one of these skirmishes was over the phrase "the polluter pays". The "polluter must pay" was a policy enunciated by the Federal Environment Minister and the Ontario government in 1970, and again in 1975. Environmentalists attempted to use this phrase to persuade the government to act, but they were sceptical that this was anything but rhetoric. They argued that this policy of the "polluter pays" was "mere puffery", and never translated into action, that the government accepted the

dominant ideology that corporate prosperity was good for the province whatever the price, and that there was little interest in resisting business pressure and answering questions about the real costs of pollution (Swaigen, 1978; Howard, 1980: 19).

By the late 1970s, pollution concerns in Canada had begun to lessen. The Canadian Institute of Public Opinion (1977) reported that although environmental awareness was the same as in 1975, concern had dropped. Macdonald (1991) argues that other environmental concerns, such as saving the whales and the seals, and that other political concerns, such as the election of the Parti Québécois in Quebec in 1976 and the repatriation of the constitution, diverted attention from pollution issues. In Ontario, however, pollution was being connected to health problems. In 1975 and 1976, linkages were suggested between Minamata disease and mercury poisoning at Grassy Narrows. There was an escalating unease about PCBs and toxic chemicals and the government's inability to deal with the issues. In 1978, the federal government report emphasized the linkages of PCBs to health problems and noted the large quantity of PCBs in Ontario. In the same year, the Love Canal was declared to be a disaster area. This event not only raised questions about Canada's landfills and connected health problems to soil pollution, but also prompted concerns amongst residents who drew their water from Lake Ontario, which was threatened by Love Canal (Macdonald, 1991: 111-2).

Industrial capitalists were not unaware of these environmental concerns. Their strategy was to emphasize the uncertainty of science, and the economic costs of the loss of jobs if stricter pollution controls were introduced and they had to shoulder the burden of costs. They argued that there was insufficient evidence of the linkages

between pollution and health problems, that smaller firms might be forced out of business and presumably that there would be a loss of jobs. If the government chose to be more strict regarding pollution, it had a choice between losing jobs or paying for cleanup.

The cleanup is going to cost money, and much of the 1980s debate will centre on who pays the bill: industry or the public at large, through either higher prices or government incentives (Rosenbaum, 1979: 47).

The government did not wish to become involved in paying for the cleanup of spills, nor did it wish to provide extra aid to business when it supported government withdrawal from the provision of services. Loans were available to industry, but they were available to "create new jobs, develop skills, increase exports or replace imports, develop new products, stimulate key industries or regional development." (Witten, 1979). The government wanted to transfer the costs of spills elsewhere, and to avoid the political fallout of individuals facing huge costs from spills. It did not, however, wish to penalize industrial capital to the extent that it would result in the unacceptable political result, a reduction in jobs.

The institutional, political and ideological bases for change were present. Institutions were in place to deal with environmental problems. Impetus for change was present. The process of litigation was proving to be an inadequate method of dealing with spills. This was creating both economic costs for the ministry and political costs for the government. The groundwork had been laid by two unpublished government reports on compensation schemes, and the preparation of legislation by George Kerr before he left the ministry (Swaigen, 1978). A crisis in relation to the problems of PCBs had developed. The federal statement on the quantity of PCBs in Ontario and their

health hazards; the closing of the US border to the export of PCBs; the problems of disposal of PCBs in Ontario, which had been increased by the provisions of the Environmental Assessment Act; and the censure of the government regarding its lack of action in the Dowling issue - all of these factors had raised fears concerning the presence of the existing quantity of PCBs, the lack of adequate policies, and the possibility that illegal dumping might occur in the future.

The P.C. government was, therefore, encountering a crisis regarding spills. There are indications that there was internal pressure to institute some form of control over spills from within the Ministry of the Environment. Certainly, the number of hazardous spills had increased, and the court cases suggest that the ministry should have had some concern regarding chemical and PCB spills. It was also encountering external political pressures to show that it was developing policies to protect the public from potential health hazards, especially PCBs. Politically, it was vulnerable because it was in a minority position, thus making it more susceptible to pressure for change.

Institutional, political and ideological pressures to act, while necessary, are not sufficient to bring about action within a capitalist society. Inaction can be justified because of a lack of funds, the poor economy, or potential economic repercussions that will result in a loss of jobs. Thus, the government needs a vibrant economy in which to act against capital. In 1978, Ontario was the richest province in Canada, but its share of the wealth was declining in favour of the West with its booming oil economy. The federal government was practising restraint, and its policies of hiring freezes and decentralization, which included the movement of some federal jobs out of Ontario, were

predicted to have negative effects on the Ontario economy (Litchfield, 1978). Unemployment in Canada was increasing and inflation was beginning to increase again. In the view of business, future predictions were gloomy. The recession in the United States was predicted to last another two years; the Conference Board in Canada estimated a rise of 3.9% in the Ontario Gross Domestic Product in 1979; the Ontario unemployment rate was forecast to rise to 8%; and business investment was expected to exhibit a slow growth (Litchfield, 1978).

Offe (1984) theorizes that the introduction of social policies antagonistic to capital can be traced to attempts by the state to deal with the problems created for the state apparatus by contradictory demands and systemic requirements. This can be regarded as applying to environmental policies where the fundamental contradiction is between the necessity to prevent environmental degradation and to support capital accumulation²⁴ (Habermas, 1975). In this case, the government needed to introduce legislation to solve the problems encountered by officials in that particular ministry and to satisfy ideological demands. Given the above economic predictions, and as McCague had argued that environmental protection laws were restricting industrial development, it was probable that economic arguments would have forestalled any environmental legislation that would create additional costs for business.

The bright spots on the economic horizon were, however, the chemical and petroleum industries, which were encountering a strengthening of demand, and steel exports, which were benefitting from a devalued dollar (Litchfield, 1978). Apart from the transportation industry, these industries were the ones that would be affected by a bill

concerning spills. It could be argued, therefore, that the government was less reticent to proceed with this Bill because it was not imposing a burden on industries that were encountering economic problems. It has also been suggested that by focusing on environmental issues the government was diverting attention from its more difficult economic problems (Interview, Parrott, 1993). As a railway company had helped to create the problem by refusing to pay for cleanup because it was a crown corporation, the government may not have been too upset about any negative repercussions in that industry. Also, the government may have felt that any negative repercussions would be offset by the power granted to the ministry to clean up a spill and to avoid future costs.

Structures and Policy Preferences

The institutional, political, ideological and economic conditions were, therefore, in place for the introduction of a bill concerned with spills. The content of the Bill would, however, be affected by structures and policy preferences that would exclude certain alternatives from consideration, and limit the Bill to sanctions rather than preventive measures.

The structure of government into different levels, and different departments with different responsibilities, constrains change. This structure ensures that policy decisions are taken in a segmented fashion and defines certain interests as outside of the specific policy-making process. Spills, like most environmental problems, require a holistic approach. The prevention and control of spills requires consultation between several departments and all levels of government. It involves ministries concerned with

health,²⁵ transportation, industry and commerce, consumer affairs, energy, and agriculture and fisheries. Bias is mobilized by restricting the policy-making process and the possibilities of the type of legislation to specific areas. For example, radiation was excluded from this Act, because atomic energy is the responsibility of the federal government.

Policy preferences, therefore, were limited to the areas considered to be within the provenance of the ministry. They, therefore, focused on the prevention of spills via sanctions, that is after the fact, instead of prevention via regulation of the source, that is before the fact. Within these structural constraints, the political party in power, the Progressive Conservative Party, had the further constraint of a political ideology of less government interference in industry, and, therefore, no further regulations.

Alternate Policies

Certain alternate policies could, therefore, have been considered. They were excluded from the agenda because of divisions of power amongst the various levels of government and different departments, and because the government's ideology discouraged increased regulation of industry. Increased regulations regarding the transportation of goods could have been introduced. This had been suggested. The Minister had been asked in the House to take steps to ensure that trucks transporting PCBs were lined to prevent leakages; and it had been noted that the transportation of hazardous materials in the US took place in impact resistant railcars (Hansard, July 4,

1977, & November 7, 1978). Certain goods could have been banned from being transported in various fashions. They could have been restricted to reinforced trucks, or not in trucks at all, or only in reinforced train carriages. Railways could have been forbidden to carry flammable products and toxic materials in adjacent cars, (as was to occur in the Mississauga train derailment), or on the same train. There could have been a requirement for better maintenance of railway tracks, and a restriction of trucks carrying hazardous products to certain routes.

More radical alternatives could have been examined, but this was unlikely to occur within that ideological context. Prevention at source could have been discussed, for example by not producing such hazardous materials, by examining whether they were really necessary, and by encouraging the development of alternate products. Certain chemicals could have been banned from production, from being used in the production process, from being imported or exported, and from being sold; and the use of certain pesticides could have been banned. This is not as radical as it sounds. George Kerr notified industry that it should begin to search for alternatives to PCBs (Hansard, November 18, 1975: 658), and PCBs had been banned from use except in closed systems.

Neo-Conservative Ideology

This was a period of the growth of neo-conservatism; and the political party in power, the Progressive Conservatives, supported the idea of less government, and assumed that the private sector could organize and get things done more efficiently

than the public sector.²⁶ The Premier, Bill Davis, moved to the right following the return of a minority government in the 1975 election, as many Tories blamed the electoral losses on the free-spending, centralized style of government (Hoy, 1985).

Claire Hoy, in his biography of Bill Davis, states:

Margaret Thatcher and Ronald Reagan were already heralding a resurgence of the right, and Davis, always ready to go with the flow, thought he'd hop on the bandwagon himself (Hoy, 1985: 135).

The new direction was to be one of restraint; and two members of the party's right wing, Frank Miller and Jim Taylor (who was to be a member of the Standing Committee on Resources Development), were appointed to the health and social services portfolios, and a fundamentalist teacher was given correctional services. Following the return of another minority after the 1977 election, the stated policy was again one of fiscal restraint and individual responsibility (Financial Post, November 19, 1977; Globe & Mail, April 5, 1977; Toronto Star, April 18, 1977; Manthorpe, 1977). McKeough, a proponent of fiscal restraint, became Ontario Treasurer, and was later replaced by Miller. In 1978, Gordon Walker was appointed Minister of Correctional Services. Walker was a right winger, who had proposed the Sunset Law,²⁷ which was adopted by the Ontario Progressive Conservative Conference in 1976. He would later write A Conservative Canada, stating the philosophy of conservatism. Many of these initiatives on the right in the Davis government were limited to rhetoric, because of the Premier's populist style of government. Nevertheless, they formed the basis of several policies. For example, Walker applied zero based budgeting to correctional services, and cut programs, civil service positions and spending.

One strand of neo-conservatism is a reduction in government, that is a reduction in the number of regulations and the size of the bureaucracy. This was an issue at the end of the 1970s when there was a perception of the growth and pervasiveness of government regulation (Stanbury & Thompson, 1980). Canadian First Ministers asked the Economic Council in 1978 to undertake a series of studies to review the effects of regulations on the private sector. This was also a concern of some Ontario MPPs. For example, McCague, the Minister of the Environment in early 1978, argued that there was an over-regulation of the environment, and that the environment protection laws might be holding back the development of industry (Globe & Mail, January 24, 1978).

This concern regarding increased regulations was combined with the environmental position that the "polluter pays" to justify the abrogation of the ministry's responsibility for cleanup via this Bill.²⁸ The ministry did not wish to extend its services and to impose further regulations, but it did not want to be faced with the potential high costs of the cleanup of hazardous spills. Yet, an ordinary citizen would not have the expertise and finances to clean up such spills; and would prefer to wait for a court decision before attempting to clean up. The delay might increase the damage from the spill. The solution was to place the responsibility for cleanup with the private sector, the owners and controllers of the pollutant. While this acknowledges that most citizens are not capable of dealing with hazardous spills, it also absolves the ministry from responsibility for cleanup. It does not have to invest in equipment, labour, or the development of technology or expertise. Cleanup is the responsibility of the spiller,

which is often a private company. Unfortunately, the private sector is unlikely to invest capital in preparation for those rare, large spills, which it prefers to assume are unlikely to happen.

Ideologies can encourage policy preferences and actions by governments, but they can discourage the pursuit of other actions and policies. Doern and Phidd (1992: 38) suggest:

...ideologies can help to foreclose certain policy options or reduce levels of commitment to particular courses of action and to particular ideas. They can help screen out ideas which are unacceptable or that will only be used as a last resort.

Two possible alternate policies were that the ministry could assume the burden of cleanup and then charge the business concerned, or that the government could tax potential polluters and use this fund for cleanup costs. These policies would have ensured a quicker cleanup, and that the necessary resources were available for major spills. It is also possible that they might have encouraged the development of more efficient methods of dealing with spills. But they required increased government intervention and administration at a time when the government was calling for a reduction in government services. In addition, any expansion of the government into the business of cleaning up spills would have required the registration of the composition of hazardous products and their side effects. This would have entailed persuading industries to divulge trade secrets. It also contained the possibility that the public would become more aware of the hazards that were being transported across the province and the potential for future hazardous spills. A tax would have encountered similar difficulties. It would have

raised questions about a hierarchy of hazards, which would have required that technical information be made available to the government. The government was unlikely to impose further taxes on all business, both for ideological reasons, and in view of the increase in oil prices and the deteriorating economic situation. Also, the history of spill cleanup, and the difficulties in persuading polluters to pay the costs, acted as a deterrent from pursuing these routes.

Alternate policies were, therefore, excluded because the prevalent ideology of the Conservative Party was to reduce regulations and the provision of services, and to devolve responsibilities to the private sector, which was deemed to be more efficient. The policy preference to emphasize sanctions via liability for cleanup rather than regulation, was the less efficient method of deterring spills. It did deal with the ministry's concern regarding its economic costs of cleaning up spills, which suggests that this was the primary motive for the legislation. However, by not emphasising regulation, the possibility of spills was not reduced to any great extent. Also, the necessity to provide victim compensation to assuage governmental concerns regarding the political costs of spills was increased, for it has been suggested that under-regulation of the economy may increase the need to compensate victims of pollution (Swaigen, 1981).

Leachate

Leachate from landfills was excluded from the Bill, and this area was within the provenance of the ministry. Love Canal might have suggested that this should have been included in the legislation, although the reports may have occurred too late for

its inclusion. It is possible that the ministry was focusing on immediate spills to the exclusion of slow leaks, because it was mainly concerned with PCBs. Also, the assumption that most spills can be prevented, implies that the owners or controllers are liable. If leachate had been included, it could have been argued that when landfills were established future leaks and hazards from leaks could not have been foreseen, given the existing state of knowledge. The inclusion of leachate, therefore, might have weakened the basic premise of the Bill. Also the government had announced that it would in the future be responsible for some off site capacity for waste (Macdonald, 1991: 222), and wished therefore to retain this as a separate issue.

Result of Policy Preferences

These policy preferences directed discussions into whether the sanctions would achieve the goals of deterrence of spills, immediate cleanup, and compensation of victims. One assumption of this Bill was that the requirement to clean up and pay compensation would be an inducement to polluters to modify their behaviour and to anticipate and prevent pollution. This excluded other policies from consideration.

Once the ministry had chosen to emphasize prevention through sanctions, the present structures of the law encouraged the ministry to pursue a policy focusing on liability for cleanup and compensation, and to end the necessity to prove fault. The requirement of proof of fault, as it rested on uncertain scientific evidence, would have ensured costly legal delays. The Bill was, therefore, constructed with the concept of absolute liability on the premise that the polluter would be completely liable for cleanup

and compensation. The problem was that having chosen this route instead of that of increased regulation, the legislation was inevitably embroiled in a conflict that was centred around the prevailing concept of property. Given that property is an organizing principle of capitalist society, that this was a Conservative government, that there was an increase in neo-conservatism, and that the present perception of property does not distinguish between types of property and types of owners of property and their rights, the legislation was bound to be contentious.

Environmental lawyers argue that property cannot be used to interfere with a neighbour's enjoyment of property. Where a property owner brings an inherently dangerous substance onto his/her land, and it escapes causing a neighbour harm, the neighbour does not need to prove negligence or carelessness (Swaigen, 1978). If the ministry had been able to strengthen this position, and to distinguish between the different types of property of both the spillers and the victims, there would have been less space for conflict over the content of the Bill. The lack of distinction between the types of owners of private property meant that any attempt to strengthen the case of the victim of a major spill by a large corporation, would enhance the case of the victim of a small spill by a private individual. This created an opening for the argument that small property owners would be put in a position in which they were also victims. In addition, the effects of a spill might mean different things for different people. It could affect one person's livelihood, another person's shelter, another person's health; it could be an inconvenience or an aesthetic problem; or it could only affect common property and not people at all. Thus, the uses of property, the types of owners of property and the types

of property affected by a spill might be very different. This also created an opening whereby minor property violations on to common property, such as a spill of maple syrup on to a road, were emphasized.

Conclusion

The "Spills" Bill was the outcome of various political and economic influences on the provincial level of the state. The previous history of responses to spills in Ontario, the changes in the types of spills, the economic and political costs of spills for the ministry and the government, the international context, and the perceived economic health of certain sectors of the economy, helped to encourage the introduction of this Bill. The Bill was created to serve a dual purpose. It was intended to reduce the potential future costs to the ministry of the cleanup of hazardous spills, and to avoid disputes over responsibility for cleanup. It was also an attempt to deal with the government's political problems of the appearance of unconcern regarding toxic pollutants by legislating responsibility for compensation for the victims of spills. The position of the provincial level of the state within the larger Canadian state, the structure of the law, the political ideology of the political party in power, and the development of a strand of counter hegemony centred around PCBs and pollution issues, constrained the government regarding the type of legislation it could introduce.

The Bill was to receive less than full support from both the present Minister of the Environment and the Progressive Conservative caucus. It combined the environmental concept that "the polluter pays" with the neo-conservative concept of "less

government interference". The result was detrimental to sectors of industrial capital, the supporters of neo-conservatism, as it transferred the costs of spills from the provincial government to the private sector. However, the Bill could be construed as an attack on the rights of private property, which created an opportunity for sectors of industrial capital to oppose it. There was no distinction between the types of property and the uses of property of the spillers, so large business could argue for changes by emphasizing the implications for individual property owners and small business, which the government wished to encourage (Witten, 1979). In addition there was no distinction regarding the different effects of a spill, so large corporations could direct attention to minor spills. The chances of the Bill being passed at all, or in anything like its original form, were small indeed.

END NOTES

1. The suit against the Dow Chemical Company was begun by the Ontario government in 1971. Eventually an out-of-court settlement was made. Marion Bryden, NDP, claimed that the outcome of the Dow Chemical lawsuit was "miserably small compensation" for the Lake St. Clair fishermen who had lost their livelihoods as a result of mercury discharges by the company (the CELA Newsletter, 1976a, 1977h; Hansard, October 16, 1979: R-407). See note 5.
2. Dioxin was a by-product of pesticide production by Hoffman-La-Roche's plant in Italy. Plant officials failed to inform the local people when an accident resulted in dioxin drifting over the neighbouring community (Perrow, 1984).
3. In the month of November alone, there were several questions in the House concerning spills. These involved two spills of PCBs at Falconbridge in the last two years and the problem of dealing with the 450 barrels of contaminated material from one spill (Hansard, November 3, 1978: 4549-50; November 14, 1978: 4857); a spill of sulphuric acid in the Thunder bay area (Hansard, November 7, 1978: 4659-61); and a spill of oil at Port Loring (Hansard, November 23, 1978: 5197-98; November 24, 1978: 5286-87; November 28, 1978: 5377).
4. See note 7 below.
5. The above suit against Dow Chemical of Canada Ltd. in note 1 was for \$25 million in general damages to the Detroit River, Lake Erie, Lake Huron, the St. Clair River and Lake St. Clair. By July 1976, the government decided that there was insufficient proof to establish that Dow was responsible for the mercury pollution of the Detroit River and Lake Erie, but the charges against the other bodies of water remained (the CELA Newsletter, 1976a). The case was settled out of court after seven years, but during that period it had been used to defeat the demands that Reed Ltd. be sued for mercury contamination because this case had to be settled first (the CELA Newsletter, 1977h).
6. In 1976 the Ontario Ministry of the Environment at the request of Environment Canada laid charges of mercury pollution against American Can of Canada Ltd.
7. The Port Loring spill involved the contamination of the community's wells by gasoline leaking from a Gulf Oil gasoline station. This spill occurred one year before the Ministry was notified about it. There were several problems surrounding this spill. The owner of the gasoline was the owner of the gas station, although the Gulf Oil Co. installed the tanks. Gulf Oil did not have a legal obligation to clean up, but was persuaded by the Ministry of the Environment that it had a moral obligation to do so (Hansard, November 23

1978: 5197-8; November 24, 1978: 5286-7; November 28, 1978: 5377; May 15, 1979: 1953-4).

8. This is another illustration of low fines. The Ministry requested a fine of \$90,000, but \$16,500 was imposed (the CELA Newsletter, 1976c, 1977b).
9. The marked variations in the figures between hazardous substances and other liquid contaminants suggests that there was a lack of clear definition between the two categories.
10. One example was the Power Tank Lines' case, which had been before the courts since 1973.
11. The federal government had set up an oil pollution compensation fund into which shipowners had to pay. Also, in the 1977 amendment to the Canadian Federal Fisheries Act, fishermen were given the right to sue for loss of revenue. In the Fishermen's Assistance and Polluters' Liability Act -Manitoba many of the traditional defences available to polluters were removed. These included the claim that a fisherman's loss of income was caused not by the defendant's contamination of the fishery, but by the Government's ban on sales of contaminated fish (Swaigen, 1978, & 1981).
12. This bill was introduced in 1978 but died on the order paper. It was eventually passed in 1979 and proclaimed in 1980.
13. Minamata disease is a form of mercury poisoning which is named after Minamata, Japan, where it occurred as a result of industrial pollution by the Chisso corporation. In 1974 and 1975, there were several articles in Canadian magazines concerning the contacts between the Minamata Disease victims and the native Indians of the White Dog and Grassy Narrows reserves. Also, the Minamata Disease Patients Association did attend a meeting between the Indians and the provincial government (Alternatives, 1975).
14. In Japan, a special tribunal, similar to the Ontario Workmen's Compensation Board (now the Ontario Workers Compensation Board), dispensed compensation without the costs and delays of litigation; and in some cases it was not necessary to prove that a factory's emissions caused harm. It was only required that the known effects of a chemical released be consistent with the symptoms found in the diseased victims (Swaigen, 1978).
15. Ms. Bryden, NDP, stated that there had been five Ministers of the Environment, since that ministry was established in 1971. She suggested that the number of ministers illustrated the low priority of environmental issues for the government (Hansard, October 16, 1979: R-407). Between 1971 and 1985 there were nine environment ministers with an average tenure of 17 months compared with the

average tenure of 23 months for a typical minister in the Davis government (Winfield, 1994).

16. This attitude was an echo of an earlier federal government statement which suggested that Ontario's environmental standards on resource companies doing business in Ontario lay at the root of some of Ontario's economic difficulties. Also, it was suggested that Ontario should reduce its environmental standards or return some of the money which had been paid to maintain those standards (Hansard, December 9, 1977).
17. Five days later the Ministry of Transport burned most of the oil off the water. The oil tanker, the Imperial St. Clair, resumed transportation of oil in February 1977 despite local protests (the CELA Newsletter, 1977c, V.2, No.1).
18. A list of electrical equipment containing PCBs was, however, provided to the Ontario government.
19. The Canadian Environmental Law Research Association consisted of two organizations: a legal organization, the Canadian Environmental Law Association (CELA), and a research organization, the Canadian Environmental Law Research Foundation (CELRF). These two organizations were structurally separated in 1976 when CELA received funding from the Clinic Funding Committee, and were physically separated in 1990.
20. Riparian rights are the rights of owners of land bordering on rivers or streams to enjoy the continual flow of that water, changed neither in quantity or quality. Polluters have the defence of the right to pollute if the Ontario government has issued a certificate of approval (Rounthwaite, 1975).
21. Both organizations had received support from the Federal Local Initiative Plan grants. These ended in 1974. Pollution Probe had a membership base, but CELA was forced to rely on funding from charitable foundations, corporations, and government grants for specific projects. Corporate funding was curtailed by the Anti-Inflation Board's restriction of donations to the amount prior to the enactment of the regulations plus an allowable increase, which reduced the possibilities of finding new donors. Federal government funding was curtailed because of a policy of restraint (Beardwood, 1990).
22. Reed Paper Co. Ltd., a British multinational, had been dumping mercury in the English Wabigoon river system since 1962. By 1970 more than ten tons of mercury had been dumped into the river. International evidence concerning the health effects of mercury pollution resulted in the Ontario government ordering the company to cease its mercury pollution. It complied, although some mercury continued to trickle out. The company was also ordered to introduce pollution control devices to deal with its other pollution within 5 years. The company

agreed, but the 1970s saw this deadline continually being extended on the grounds of costs. Commercial fishing was banned in 1970, although sport fishing was allowed to continue. Nothing was done about cleanup or compensation to the Natives concerning the loss of their livelihood or the damage to their health (Howard, 1980).

23. In 1973, there was a general agreement under the auspices of the Organization for Economic Cooperation and Development (OECD) to eliminate PCBs from every form of industrial use by member states. Questions of a scientific, technical, economic, administrative and jurisdictional nature imposed constraints on the speed with which this policy could be implemented in Canada (Environmental Contaminants Board Review Report on PCBs (Polychlorinated Biphenyls), March 1980).
24. See note 1, Chapter 1.
25. The division regarding environmental health can be traced to the Environmental Protection Act 1971. Occupational health, that is conditions which affect health within buildings, is the responsibility of the Ministry of Labour. Conditions that affect the environment at large are the responsibility of the Ministry of the Environment. Responsibility for the health of the community rests with the Ministry of Health. While this makes perfect sense in bureaucratic terms, it assumes that health can be segmented into discrete entities. Occupational health inevitably overlaps with environmental health, and both overlap with community health.
26. Neo-conservatism comprises a bundle of ideas. It advocates the freedom of the market, economic efficiency and minimal state intervention. It is founded on beliefs in individualism, the benefits of the market, traditional family values and discipline. In 1975, the federal government adopted a policy of monetarism and reduced state involvement, which was to some extent accepted by the provinces (Howlett & Ramesh, 1990: 221-2). In 1976, the Business Council on National Issues was formed to limit the power of the state (Langille, 1987). These initiatives and the ascent of a neo-conservative federal government in 1984, formed the backdrop to the process of this Bill. While it is questionable that neo-conservatism achieved a dominant hegemony in Canada (Haiven et al, 1990: 11), elements did become a part of the political culture.
27. The Sunset Law specifies that after a designated period a government agency, board, commission or program is phased out, and if it is considered necessary, the government must justify its re-creation from scratch (Walker, 1983: 56).
28. The "polluter pays" was claimed to be a policy by both the federal and the provincial government. It was enunciated by Jack Davis, the federal Environment

Minister, in 1970, and cited in the Ontario legislature by Frank Miller, the Minister of Health, in 1975.

CHAPTER 4

THE OBSERVABLE LEVEL OF CONFLICT

"You are going to get into conscience and equity and so on and that has no place in this bill." (Taylor, SCRD, August 28, 1979: R-1610-2).

Introduction

Any discussion of conflict includes a discussion of power. Power is a complex phenomenon that several theorists have defined in different ways (Lukes, 1986). It is a concept that identifies the production of significant outcomes that benefit certain interests. These effects are achieved through the actions of agents in a specific conjuncture. Several authors (Lukes, 1974; Offe, 1984; Schrecker, 1984) have identified several dimensions or spheres of power. The next three chapters will discuss these dimensions. This chapter will consider the observable dimension of power, and it will examine the arguments of the actors before the Hearings. The following chapter will explore the ways in which bias was mobilized through the exclusion of certain issues. It will be followed by a chapter that discusses the ways in which language and meanings were constructed to support the various arguments.

This present chapter will examine overt influences on decision-making, which Offe labels the first tier of policy conflict and Lukes classifies as one dimension

of power (Offe 1984: 159; Lukes 1974: 11-15). Conflict is mainly overt, and expressed through political actors and policy preferences. At the federal and provincial level of government in Canada, some of these debates occur within the bureaucracy and are hidden from public view (Schrecker, 1984: 7). However, the debates before the Standing Committee on Resources Development (SCRD) are a matter of public record, and these will be the focus in the next three chapters.

This chapter discusses the political actors, and their policy preferences and arguments. It examines the key issues, and the resources of the actors. It argues that individuals play a part in affecting outcomes. It also suggests that the prioritization of economic concerns affects environmental decision-making, and can be used by industrial capitalists to forestall change. Thus, the argument that the Bill would be detrimental to small business was effective in diluting the severity of the Bill. The chapter argues that power favours the status quo, because change will result in a change in the distribution of power resources.

Political Actors, Policy Preferences and Arguments

The Minister and the General Counsel

Macro sociologists tend to dismiss the importance of individuals in the production of social change. It is difficult to isolate the influence of individuals from the influence of social structures; and in conducting a macro analysis their role can be overlooked. Although the reasons for the introduction of the "Spills" Bill can be traced to the operation of several factors rooted in a particular historical, political, and

economic conjuncture, the personalities of the key actors involved were an integral part of the process. Possibly, whether a Bill is introduced or passed in its original form, depends upon the position of the minister within the cabinet, the commitment of the minister, and the support of the bureaucrats within the ministry.

In 1978, the Ministry of the Environment was not a high profile position within the Ontario government.¹ The new Minister, Dr. Parrott, had not been involved in the formulation of a policy on spills and the early drafting of the Bill. He had to be sold the Bill by his bureaucrats, but he then gave it his full support (Interview, Parrott, 1993). Initially, he was not fully aware of what the Bill did, and did not, cover. For example, on one occasion in the Legislature, he stated that the Bill covered radioactive material (Hansard, April 2, 1979: 610),² which he later admitted was within the provenance of the federal government (Hansard, October 16, 1979: R-411). Unlike Dr. Landis, the General Counsel for the ministry, he was prepared to compromise (Interview, Parrott, 1993; interview, Swaigen, 1993; Mancini, SCRD, June 28, 1979: R-1520-1). He had problems with caucus, and heavy criticism of the Bill meant that he was willing to drop absolute liability for compensation for damages, so that he could get the Bill on to the books (Parrott, SCRD, November 26, 1979: R-2055-1, R-2115-1).

Hon. Mr. Parrott:... If the will of this committee is not to accept absolute liability, I will be disappointed; no question about that. But I won't consider it a major defeat of - to put it in the highest terms - my administration.

Mr. Mancini: But you put it in the bill. You must be willing to defend it a little more vigorously. (SCRD, June 28, 1979: R-1525-1).

Dr. Parrott was well liked. He had considerable respect from the environmental community for withstanding pressure and pushing the Bill through, despite vehement opposition from industry, and pressure from the environmental community to impose more draconian legislation. John Swaigen, CELA, described him as the "best environmental minister" (Interview, Swaigen, 1993). Bill Glenn, Pollution Probe, admired him:

Parrott was a great guy, ... who got a lot of heat from everyone. If I had had to pick a minister, as the minister of seventies, he would have been it. It was an incredibly unpopular thing to do ... He took the heat and pushed it through. I respected him for that. (Interview, Glenn, 1993).

Dr. Parrott accepted the criticisms as a part of being in government, and considered that this deflected the attention of the Opposition parties from economic problems (Interview, Parrott, 1993).

Dr. Landis, the General Counsel for the ministry, had drafted the Bill, and he was determined that it would be passed. Dr. Parrott acknowledged this:

I would like to so name Dr. Landis for having done an excellent piece of drafting on a very significant piece of legislation. Although I have heard a fair amount of rhetoric about why this bill came forward, I think I should put it on record that it was -I would not say at the insistence, but I would say at the prodding of our general counsel (Hansard, May 15, 1979: 1964).

Henry Landis wanted the Bill passed so that the ministry would obtain cleanup without delay, and so that the ministry's lawyers would be more successful in court (Interview, Scott, 1993; interview, Swaigen, 1993). Some committee members thought that he had "masterminded" the Bill (Riddell, Hansard, December 11, 1979: 5380), and his statement that the idea that those who create the risk should pay for the consequences was "not a

foreign concept that I've invented from outer space", but had originated from a judgment in the Power Lines case, supported this opinion (SCRD, June 18, 1979: R-2205-2). Dr. Landis had been with the ministry since its early years. He was a brilliant, but eccentric, man with strong views. He was arrogant - the sign over his office door said "Enter with Awe" - and this arrogance nearly destroyed the Bill (Interview, Parrott, 1993). He was intellectually committed, and detested people who did not put the same amount of energy into something, which meant that he was constantly at war with people (Interview, Scott, 1993). He could not be easily dismissed, because there was substance behind what he said, but during the Hearings his personality became more important than the substance. His stridency was interpreted as a threat to clean up every little spill with expensive consultants and machinery, and then to charge industry (Interview, Scott, 1993).

Landis lacked diplomacy and was not prepared to compromise, because he felt that there had been too many compromises in the past. This attitude made him an easy target for the opposition (Interview, Parrott, 1993; interview, Scott, 1993). He aroused the ire of several politicians and members of the CMA, and was depicted as the "evil genius behind the Bill" (Interview, Scott, 1993). He replied to questions that should have been answered by the Minister (Interview, Huxley, 1991). He suggested different interpretations and definitions of legal terms from those suggested by the lawyers for the large companies. It was felt that he lacked knowledge of business:

... it's a case of legislating against those in private enterprise, versus the author of this bill, who may not have had the experience of operating a business on his own initiative whether it be small or large, ... It is certainly difficult to understand how the author of this bill can justify the matter that is put into it (Rollins, SCRD: June 18, 1979: 2145-2).

One bureaucrat commented that Dr. Landis behaved in the same way towards environmentalists (Interview, Scott, 1993). His relations with CELA throughout the Hearings were, however, amicable. This is surprising considering that he had described the members of CELA as "Stalinists" in the early 1970s, and there had been other occasions when his relations with that organization had been strained (Beardwood, 1990; CELA, letter, 1976b). His attitude may have changed because CELA was supporting this Bill, and because it was now more established and was receiving its funding from Legal Aid.

All governments in a capitalist society have to take the concerns of industry into account. This Progressive Conservative government was receiving concerted lobbying from the business community, and encountering economic problems (Swaigen, 1979a: 5). But, it was in a minority position in the legislature, so it had to pay more attention to factors of legitimation than a government in a majority position. It was vulnerable because it had been in power so long, and Stuart Smith, the Leader of the Opposition Liberal Party, was knowledgeable in this area (Interview, Parrott, 1993). Its political goals were divided between satisfying a general demand "to deal with spills", and the demands of industry, which were expressed in caucus and through presentations at the Hearings³ (Swaigen, 1979a: 5).

Government - Policy Preferences and Arguments

The goal of the bureaucrats and the Minister was to create legislation that would result in immediate cleanups, and compensation for the victims of a spill. The

prerequisite to put such a policy in practice was legislation to increase ministerial power to order the cleanup following a spill, to gain access to property to clean up, to increase the incentives to industry to clean up, and to provide relief for innocent victims. This, it was hoped, would avoid lengthy litigation, reduce cleanup costs, and prevent the development of embarrassing political situations. The ministry claimed that the law was inadequate, inconsistent and slow (Parrott, SCRD, June 18, 1979: R-2150-1; Scott, SCRD, June 18, 1979: R-2155-2).⁴ The ministry did not want to have to determine who was at fault, and waste valuable time looking for the negligent party (Landis, SCRD, August 28, 1979: R-1515-1).

The ministry did not want responsibility for the actual cleanup (Parrott, SCRD, October 4, 1979: R-1605-1). It lacked cleanup capability, and it had no intention of acquiring it. On the one hand, the ministry maintained that it wished to provide an advisory role and technical expertise to the owners and carriers of hazardous goods. On the other hand, it argued that it did not have the expertise to clean up, and that this was possessed by the company concerned (Brief, Metropolitan Works Committee, SCRD, February 21, 1979; Parrott, SCRD, October 4, 1979: R-1605-1).

The issue of compensation was a difficult one for the government, which supported reduced government involvement. In the policy stage, the bureaucrats supported insurance as the method of compensation, but Dr. Parrott supported a combination of insurance and a fund (Parrott, SCRD, June 28 1979: R-1520-1). The ministry's initial position was that it preferred not to administer, nor to pay for, a compensation fund, especially as it was difficult to assess contributions from industries

other than the petroleum industry (Parrott, SCRD, June 13, 1979: R-1535-1; Parrott, June 21, 1979: R-2120-1-2). Opponents of the Bill constantly emphasized its negative effects on the small operator, especially as certain spills could not be prevented (Board of Trade Submission, June 12, 1979; CMA submission, May 17, 1979; Toye, CMA, SCRD, June 14, 1979: R-2045; Macdonald, CCPA, SCRD, June 18, 1979: R-2035-1, R-2125-1). As the government was pursuing a policy of developing small business, it was susceptible to this argument, and it responded by creating a fund to cover the small operator, Acts of God or the insolvent operator (Parrott, SCRD, June 21, 1979: R-2110-2).

Local Government

Local government supported the Bill because it would reduce their costs. The only submission from an individual local government was from Metropolitan Toronto (February 21, 1979), which supported the Bill, because it would accelerate the cleanup, minimize environmental damage, facilitate the recovery of costs and assist the injured party in obtaining compensation. The Municipalities⁵ which were often on the front line in the cleanup of spills met Dr. Landis and Dr. Parrott before the introduction of the legislation, and presented a submission at the Hearings. They supported the Bill because it transferred the onus to the private sector from the municipality, reduced litigation, and avoided the development of a huge bureaucracy to deal with spills.

The major concern of the municipalities was to obtain the exemption of the normal municipal costs of salting and weed spraying. The environmental damage

caused by these activities was not raised by any of the Committee members. One member did suggest that there was a problem with the granting of this exemption. It would exempt a spill by a spraying truck, or damage from salt in the spring runoff (Rollins, SCRD, June 14, 1979: R-2150-1-3). The analogy to normal farm practices by Dr. Parrott (SCRD, June 14, 1979: R-2155-1) meant that this subject was not pursued. No-one was willing to limit the normal practices of farmers, who were regarded as a powerful constituency, and were represented on the Committee.

The Opposition

The "merchants against industry thesis" has created problems in defining the various fractions of the capitalist class. This is because Naylor (1972) grouped capitalists in the transportation services in nineteenth century Canada with those in the financial sector of banking or insurance. Clement (1975, 1977) also distinguished between an indigenous elite in financial services, transportation and utilities, and a comprador elite in the branch plants of multinational corporations. Marx (1981: 229) is less rigid in distinguishing transportation capitalists from industrial or productive capitalists. He argues that on the one hand the transport industry forms an independent branch of production, and on the other, it is "a continuation of a production process within the circulation process and for the circulation process".

In this dissertation it is assumed that transportation capital is a fraction of industrial capital, but that transportation capitalists may have different interests because of this bifurcation. There is no evidence to show that transportation capitalists behaved

differently from other industrial capitalists in this case. The railways opposed the Bill, and they were a part of the inner circle that worked for its abolition. The truckers were not a part of that circle, but they did oppose the Bill. However, some of the arguments of transportation capitalists did differ from those of other industrial capitalists.

Insurance capital is a fraction of finance capital. As Marx (1977) suggests in The Class Struggles in France, financial capitalists are not always allied with the industrial bourgeoisie; their interests sometimes differ. Insurance capital is discussed in more detail in a later chapter. Briefly, it is divided between the general insurance industry and the life insurance industry. One sector of the general insurance industry, the firms, provided support for the ministry in its arguments at the Hearings. Another sector, the brokerage houses, provided support for industrial capital. The firms offer insurance on the market. The brokers act as middlemen and obtain insurance for their clients, so they are closer to industrial capital. I have therefore treated the general insurance industry as a fraction of finance capital, and assumed that it is segmented, as the different sectors of that industry behaved differently throughout this period.

Various business associations and large industries comprised the opposition. The associations were the Canadian Manufacturers Association (CMA), the Canadian Chemical Producers' Association (CCPA),⁶ the Canadian Agricultural Chemicals Association (CACA),⁷ the Canadian Manufacturers of Chemical Specialties Association (CMCS),⁸ the Ontario Petroleum Association (OPA),⁹ the Canadian Steel Environmental Association (CSEA)¹⁰ and the Ontario Natural Gas Association (ONGA).¹¹ Industries that produced specific briefs opposing the Bill were Canadian

Pacific (CP) (June 28, 1979, October 4, 1979) and Canadian National (CN) (June 18, 1979). Several firms, such as Dow Chemical, were represented by more than one association.

The Canadian Manufacturers' Association (CMA) organized the opposition from the introduction of the Bill until its eventual proclamation. This Association is older than most of the other organizations involved in this struggle. It arose in the midst of the manufacturers' struggle for greater tariff protection at the end of the nineteenth century. The Association represents a broad spectrum of manufacturers from large firms, such as the Steel Company of Canada, to small firms with five employees. It is "an advocacy group and a dispenser of services". It avoids systematic policy participation, but reacts to policy initiatives, because it does not have a peak association format necessary to achieve policy consensus (Coleman, 1988: 195-197). It had clashed with CELA in 1974 when it had advised its members to assess carefully donations to CELA. They should take account of CELA's position regarding Legal Aid assistance in actions against "polluting industries", and the difference of CELA's position from that of the CMA's regarding the ministry's Green paper on Environmental Assessment (CMA, letter, 1974).¹²

Small independent businesses that were affected by the Bill were the truckers and the farmers. Presentations were submitted by the Tank Truck Carriers' Division of the Ontario Trucking Association (OTA) (June 13, 1979), and by the United Cooperatives of Ontario (UCO) (June 28, 1979). The latter did not directly represent the farmers, but submitted a presentation that was concerned with the transportation of

farm goods. (The Conservation Council of Ontario also claimed to represent the farmers, and it supported the Bill). At this stage, the Ontario Federation of Agriculture did not present a brief, so the farmers were not directly represented, although several members of the Committee were farmers.

Kaplan (1989: 61) describes the trucking industry as "an unintegrated collection of separate, segregated, non competing subindustries", so it is difficult for one association to represent all truckers. The Ontario Trucking Association (OTA) is a voluntary trade association founded in 1926, which mainly represents the regulated sector of this industry (Kaplan, 1989). In 1979, its membership comprised 1300 for hire and 80 private carriers plus 450 suppliers of products and services to the industry. These members varied from small carriers operating fewer than 10 vehicles to the largest fleets in Canada (SCRD, June 13, 1979: R-1525-1). The OTA was preoccupied with pressures to deregulate the industry from some provincial cabinet members, from federal officials, and from the United States (Kaplan, 1989: 168). The Tank Truck Carriers' Division gave a presentation at the Hearings, and the OTA presented a brief to the Regulatory Panel in 1985. The truckers were concerned about liability, and the possibility of future increased difficulties in obtaining insurance should the Bill be passed.

The United Cooperatives of Ontario was created in 1914, and had developed into the largest farm supply cooperative in Ontario. It had a total membership of over 46,000, including 50 independent farm supply cooperatives with a membership of over 31,000. They (SCRD, June 28, 1979: R-1430-1) stated that they were representing the cooperatives and 80,000 Ontario farmers. They were also associate

members of the Ontario Petroleum Association, so they may have had other interests in the Bill. Their concerns were similar to those of the truckers; and were centred around the Bill's effect on their degree of liability, and the possibility of an increase in their insurance rates. One concern was that liability would be passed to the weaker links in the marketing chain. Yet, the cooperatives and the farmers were already at a disadvantage in negotiating contracts, and liability was already being passed to them, so it is unlikely that this Bill would have resulted in a major change.¹³ In fact, it was more likely that this would be prevented by the Bill, and yet they supported the position of the large corporations.

The Opposition - Policy Preferences and Arguments

The major policy preference of the opposition was to avoid the assumption of additional costs in the production and distribution process. Its arguments were that the Bill would be detrimental to small business, it would mean a radical change in the law, it would mean further unnecessary regulations, and the Bill would not achieve its goal of preventing spills. It suggested that the costs should be assumed by the public sector, and that any legislation should be conditional upon the availability of adequate insurance and the creation of a compensation fund.

Small Business

The process of the production and implementation of regulations favours the large company over the small company (Yeager, 1991: 42-50). The costs of

compliance are larger per unit of production for small firms, which also have less access to expertise (Yeager, 1991: 42; Brittan, 1984: 102).¹⁴ Also the costs of litigation are more easily borne by large companies, and it is often economically rational for them to engage in protracted litigation (Schrecker, 1985: 9-21). This results in enforcement agencies concentrating on prosecuting the smaller companies to achieve better records of enforcement (Yeager, 1991: 42-50; Beardwood, 1990: 26). These factors reduce the ability of small companies to compete. From the perspective of large companies, therefore, it is advantageous to support increased regulation and reduce the number of competitors. Yet, the manufacturing associations and the large corporations argued that this Bill would be detrimental to small business (Toye, CMA, SCRD, June 14, 1979: R-2115-2; Cooper, OPA, SCRD, June 14, 1979: R-2210-1). However, it is questionable that this was a major reason for opposition to the Bill. After the proposal of a fund to alleviate the potential problems for small and medium business as well as the victims of a spill (Parrott, SCRD, August 28, 1979: R-1015-1,-2, R-1020-1), these groups continued to oppose the Bill.

This Bill was different because it imposed sanctions. It is probable that where spills are concerned sanctions are more detrimental to large business than small business, whereas regulations are more detrimental to small business. The mandatory imposition of responsibility for cleanup and compensation, without the use of any discretion regarding exceptions, excluded bargaining from the process of the cleanup of spills, and diminished the role of litigation. These were two areas in which the large company possessed considerable power, which it would be reluctant to see reduced.

It is beyond the scope of this project to investigate the degree of influence that large business has within business associations. Still, the representatives of the industry associations did work for large companies, and the policies they espoused were more beneficial to large companies than to small ones. Also, as the dues for the Canadian Federation of Independent Business are set with a cap to prevent larger firms obtaining undue influence (Coleman, 1988: 88), it is possible that large companies are perceived by small firms to have a greater influence in other business associations. The Canadian Federation of Independent Business (CFIB), which represents small business, did not present a brief. This may have been because they were not interested in environmental issues at that time (Interview, Lloyd, 1993).

One reason that small companies might suffer because of the Bill was because of the predicted behaviour of the large companies. The opposition was not reticent in admitting that the large companies would attempt to circumvent the intentions of the Bill by passing the onus to the small company. It argued that the Bill would result in a change of the point at which ownership would be assumed. This would occur at the factory gates, so it would transfer the risk to small business (Smith & Husby, UCO, SCRD, June 28, 1979: R-1440-1-2-3, R-1445-1; Swenor, CMA, SCRD, October 4, 1979: R-1540-1-3; Cooper, OPA, SCRD, June 14: R-2210-2). Also, those organizations with greater bargaining power would require the smaller weaker companies to indemnify them from damages that might occur; and there would be a growth of "fly-by-night" operators (Toye, CMA, SCRD, June 14, 1979: R-2045-1; Swenor, CMA, SCRD, October 4, 1979: R-1540-1-3).

Radical Change in the Law

Industry wanted the concept of absolute liability dropped from the Bill. It suggested that the proposed legislation meant a radical change in the law, as it would abandon a tradition of liability based on fault or negligence, and affect other areas of the law (Macdonald, CCPA, SCRD, June 18, 1979: R-2020-2, R-2030-2, R-2035-1, R-2150-2; Chevalier, CACA, SCRD, August 28, 1979: R-1450-2). If liability were introduced, industry wanted the concept of fault to be retained, and the defence of due diligence, Acts of God, and wilful or negligent acts of a third party to be allowed (Toye, CMA, SCRD, June 14, 1979: R-2050-2; Chevalier, CACA, SCRD, August 28, 1979: R-1450-2, Chalmers, CP, SCRD, October 4, 1979: R-1420-2). There was one discussion which seemed unreal in a Canadian context. One representative argued that the petroleum industry was concerned about war and acts of terrorism (SCRD, June 21, 1979: R-2140-1-2):

Mr. Cooper: If a war occurred, I guess we'd have to say we think we would be a target. I think I can quote a conversation that said we're likely to just close the refinery and give you the keys. We don't want that risk. (OPA, SCRD, June 21, 1979: R-2140-1).

Unnecessary Regulations

Industry utilized the prevalent distaste for increasing the regulation of industry to argue that they did not need any more regulations (Atmore, OTA, SCRD, June 13, 1979: R-1530; Chevalier, CACA, SCRD, August 28, 1979: R-1450-1; Farmer, ONGA, SCRD, August 29, 1979: R-1440-2; Weldon, CCPA, SCRD, October 4, 1979: R-1220-1). The opponents noted that under existing legislation they were regulated by

The Gasoline Handling Act, the Federal Pest Control Products Act, the Ontario Pesticides Act, the Federal Food and Drugs Act, the Federal Environmental Contaminants Act, and the Ontario Environmental Protection Act. In addition the federal government was proposing further regulations under the proposed National Transportation of Dangerous Goods Act. This argument obfuscated the distinction between sanctions and regulations for the Bill was concerned with sanctions not regulations.

Industry, especially the oil companies, had been attempting to address the problem of spills because of some embarrassing spills (Interview, Scott, 1993). It argued that the present system of responsibility for cleanup and compensation was adequate, so the Bill was unnecessary (Weldon, CCPA (Dow Chemical), SCRD, June 18, 1979: R-2120-1; Wood, CCPA (Polysar) SCRD, June 18, 1979: R-2150-1; CP Submission, June 28, 1979). The necessary procedures were in place to deal with spills, as contingency plans were already in place. The Ontario Petroleum Association (Cooper, SCRD, June 14, 1979: R-2155-3) had established a national research group, the Petroleum Association for Conservation of the Environment (PACE), and had major spill contingency plans in every company, and conducted training exercises to deal with spills. The Canadian Chemical Producers Association had a Transportation Emergency Assistance Plan (TEAP) that had a 24 hour advice program (Chevalier, CACA, SCRD, August 28, 1979: R-1450-1).

Would Not Achieve its Goals

Industry maintained that the Bill would not act as an incentive to prevent spills, but would lower the standards of prevention, because business would have to pay for cleanup even if it had acted prudently (Gray, CMA, SCRD, June 14: R-2020-2; Toye, CMA, June 14, 1979: R-2050-2; Cooper, OPA, June 14, 1979: R-2200-2; R-2210-1; Swenor, CMA, SCRD, October 4, 1979: R-1555-1). The Bill could increase environmental damage by allowing unqualified persons to clean up a spill. The opponents noted that a scientific group, which examined the cleanup of the Amoco Cadiz off the French Coast in 1978, had suggested that political factors served to increase environmental damage.¹⁵ In a report to the sixth international oil spill conference, the scientists had argued that too often cleanup operations were ineptly managed, and the techniques used were geared to assuaging public wrath instead of the preservation of habitats (Weldon, SCRD, October 10, 1979: R-1455-2, R-1500-1).

The opponents argued that the changes would not achieve the goals. Yet, they would involve huge costs, change the pattern of commerce, affect small business in a detrimental fashion, and would not reduce the amount of litigation (SCRD, OPA, June 14, 1979: R-2210-2; Cooper, OPA, SCRD, June 21, 1979: R-2135-2; CCPA, June 18, 1979: R-2025-1; Band, CN, SCRD, October 4, 1979: R-1515-1, 2).

Public Should Assume the Costs

The policy preference of the industry groups was that the public sector would pay for cleanup and compensation, so that the problems of spills would not be

privatized. They argued that the legislation would be discriminatory. All would be compensated, but the owners and controllers would be the source of funds, without any assessment of "reasonableness or good faith" (Macdonald, CCPA, SCRD, June 18, 1979: R-2035-1). They wanted fault to determine liability with the costs of spills to be recovered from whomever was at fault through the courts.

Mr. Wildman: ... Aren't you really saying you don't want to be put in the position of having to pay for initial costs and then having, yourselves, to pursue whoever you feel to be more at fault or to be completely at fault through the courts to recover some or all of your cost?

Mr. Weldon: We're opposed to paying initial costs if the reason we have to pay is because the statute says we have to pay just because of ownership and not fault (SCRD, CCPA, June 18, 1979: R-2200-2).

As already noted large corporations have the advantage in the courts, and fault in the area of environmental damage is extremely difficult to prove. Industry argued that when no-one was at fault the taxpayers should share the burden. Their rationale for the assumption of costs by the taxpayers was that as society as a whole benefitted from these goods, it should bear the costs (Atmore, OTA, SCRD, June 13, 1979: R-1530-1; CMA Brief, May 17, 1979: 10; CMA, SCRD, June 14, 1979: R-2050-1; OPA Brief, June 14, 1979: 5; CCPA, June 18, 1979: R-2025-2; CP Brief, June 28, 1979: 2).

Insurance

The salient argument of the opposition was to suggest that the legislation required the provision of adequate reasonable insurance, which did not exist (Toye,

CMA, June 14, 1979: R-2055; R-2120-1; Cooper, OPA, June 14, 1979: R-2210-1; Macdonald, CCPA, June 18, 1979: R-2025-1, R-2035-1. Mr. Weldon, CCPA, (SCRD, October 4, 1979: R-1200-1) argued that the insurance that Dr. Landis had referred to in earlier meetings was not adequate, and was expensive. Mr. Swenor, CMA, (SCRD, October 4, 1979: R-1520-1) produced a letter to Dofasco from their brokers, which suggested the company might lose some of its existing insurance coverage. Mr. Atmore, OTA, (SCRD, June 13, 1979: R-1525-1-2) suggested that insurance would become "prohibitively expensive". The onus was, therefore, on the ministry to ensure that adequate insurance was available. This would prove to be a difficult task.

The Insurance Industry

This Bill was unusual, as it was directly affected by the policies or perceived policies of the insurance industry. Representatives from this industry were from the Insurance Bureau of Canada, and from the Insurers' Advisory Organization of Canada (SCRD, August 29, 1979). Brokers did not submit a presentation; but their estimates of the effects of the Bill were appended to the CMA submission (October 10, 1979), and a representative from Marsh & McLennan did attend the later Hearings.

One problem in the discussions regarding insurance was that the members of the Committee were not aware of the differences amongst the organizations in the insurance industry. The Insurance Bureau of Canada (IBC) is the major organization of the property and casualty insurance companies operating in Canada. It is the main vehicle for reaching the public and the politicians. Its role is to gather statistics, discuss

topics of mutual interest, and to develop public education programs. It acts in an advisory capacity to the industry, which means that it can make recommendations (McQueen, 1985: 249; Orr, IBC, SCRD, August 29, 1979: R-1020-1). Its representatives were the Chairman of the IBC's Liability Committee, who was from the United States Fidelity & Guaranty Insurance Company / Fidelity Insurance Company of Canada; and a representative from Royal Insurance Company of Canada, which was the major company in the general insurance industry.¹⁶ The Insurers' Advisory Organization of Canada (IAO) inspects buildings and suggests insurance rates (McQueen, 1985: 143).

The bureaucrats and the Minister assumed that the Insurance Bureau could predict accurately the availability of pollution insurance and a possible range of rates. This would have seemed a reasonable assumption given that one representative for the Insurance Bureau was from Royal Insurance Company. They were, therefore, surprised when the information they had obtained was contradicted by the assessment of several insurance brokers.

The brokers were Marsh & McLennan, the largest insurance broker in the world and based in the United States, and Reed Stenhouse, a world wide operation with claims to be the largest insurance broker in Canada, Britain and Australia; and other brokerage companies. They argued that there would be problems obtaining adequate insurance, and insurance at reasonable rates, should the Bill be passed. There was some suspicion that the brokers were influenced by their clients. But as the brokers thought that it would make it more difficult to sell insurance, there was an incentive for them to

oppose the Bill (Interview, Scott, 1993). Insurance relating to environmental matters was becoming more difficult to obtain. If the large companies should transfer ownership to the truckers, premiums would increase, because the truckers would not be able to bear the cost of a major spill. Increased premiums would make insurance more difficult to sell.

The Supporters: the Environmental Movement

The environmental movement is a fragmented, informal organization composed of different groups with different, but overlapping goals and constituencies. In 1979, it was a small community with overlapping directors and members, for example, John Willms, Canadian Nature Federation, was a member of CELA's board. There were several environmental groups concerned enough about this Bill to participate in the Hearings. These were the Canadian Environmental Law Association (CELA), Pollution Probe, Canadian Nature Federation (CNF),¹⁷ the Federation of Ontario Naturalists (FON),¹⁸ the Conservation Council of Ontario (CCO),¹⁹ and the Sierra Club.²⁰ Other organizations did not participate, but did lend their support to lobbying activities.

The major actor concerned with the legal aspects of environmentalism was CELA whose mandate was litigation and law reform. John Swaigen, the General Counsel, kept the other groups informed, and organized support for the Bill (Interview, Glenn, 1993). Resources were spread so thin that the environmental movement did not have the luxury to have several groups handle an issue, but the "Spills" Bill was one

issue where the ENGOs worked as a coalition, and all supported CELA's position (Interview, Glenn, 1993). For example, John Willms wrote to the Minister and the Standing Committee on Resources Development to state that the Canadian Nature Federation supported the comments and submissions contained in CEI.A's brief (Submission, Exhibit F4, SCRD).

In 1978, CELA was in the midst of a process of reorganization. It was searching for donors, applying to the Ontario Legal Aid Plan, and searching for new office space. It had not lobbied for the Bill. The General Counsel, John Swaigen, knew that the ministry was interested in compensation,²¹ but he had not been consulted, and knew few details until the "Spills" Bill was introduced. Swaigen (Swaigen, memorandum, 1978) analyzed the Bill, and the Board of Directors passed a motion on February 5, 1979:

Resolved that CELA support the principle that the manufacturers, sellers, and handlers of hazardous substances should be strictly liable for all escapes of the substances, subject to our strong reservations about the implementation of this principle in the proposed amendment to the Environmental Protection Act (CELA Minutes, February 1979).

CELA's reservations were the limited definition of a discharge, the power of the Cabinet to make exemptions, the need for a list of hazardous substances and their location, and the need for a fund for cleanup and compensation. After the introduction of Bill 209, CELA did a considerable amount of lobbying. Swaigen wrote to the Premier, the Minister of the Environment, the leaders of the opposition parties, and MPPs. He also wrote to various environmental and conservation groups, and the National Indian Brotherhood, asking them to support the Bill and to submit briefs to the Committee.

The major environmental organization in Ontario in 1978 was Pollution Probe which was run as a co-operative. Several of its researchers possessed expertise in one or a group of areas. Bill Glenn was the researcher responsible for hazardous chemicals, acid rain, the pulp and paper industry, and spills. Pollution Probe was concerned that its campaigns would be on the leading edge, so every year it planned its strategy for the coming year. If an issue entered the mainstream, or other groups were following it, the issue would be dropped, and new areas would be taken up.

Pollution Probe saw the Bill as a key component of environmental legislation that dealt with an area that had not been addressed before (Interview, Glenn, 1993). Its strategy was to provide background support for CELA, to reinforce the arguments for passage of the Bill, and to suggest a more radical bill. Glenn wrote an article in Probe Post, and Probe produced a presentation at the Hearings in which Glenn stated:

The detailed concerns and arguments will, I hope, be more fully expanded in the presentation of my colleague from the Canadian Environmental Law Association, ... I want to put perhaps the legislation in some context and make some general comments (Glenn, SCRD, August 29, 1979: R-1520-1).

The Environmentalists: Policy preferences and arguments

The policy preference of the environmental movement was legislation that would prevent spills. It would have preferred the enforcement of strict regulations. If sanctions were the preferred route, it wanted legislation that would ensure that victims were compensated, the environment restored, and that the polluter paid the costs of a

spill. The nexus of the struggle between environmentalists and the opposition was the concept of absolute liability. The opposition argued for the retention of the status quo. Environmentalists regarded payment of costs and compensation by the polluter as a deterrent, which could only be achieved through the retention of absolute liability in the Bill.

In the initial stages before the Hearings and during the early submissions, CELA pressured the government to broaden the Bill, and to produce more rigorous legislation. When, after the summer, the opponents of the Bill became stronger, it became more defensive. It focused on supporting the Bill and criticising the arguments and suggestions of the opposition. It summarized the problems of litigation and the necessity of incentives to prevent spills. It argued for an extension to cover other discharges, for more precise definitions, the necessity for a fund to be supported by industry, a limitation on the power of the cabinet and the publication of the Regulations in the Ontario Gazette.

Support For Incentives

In support of the Bill, environmental groups reiterated the Minister's statement of the necessity for the Bill and provided some additional reasons for such legislation. Pollution Probe (Glenn, SCRD, August 29, 1979: R-1520-2) suggested that the Bill was the most enlightened comprehensive legislation since the Environment Assessment Act. The absolute liability clause ensured that the financial responsibility for spills would be that of the persons who manufactured, stored, transported and marketed

hazardous products. In addition, it was sensitive to victims. CELA (Woods, SCRD, August 29, 1979: R-1535-1) augmented the ministry's argument concerning the problems of leaving the resolution of cleanup and compensation to the courts. It wanted legislation to deal with the obstacles to obtaining compensation for victims through the courts. These obstacles included the amount of time involved in litigation and negotiation, the large legal and research costs, the problems of standing, the exclusion of class actions, the responsibility for the burden of proof resting with the victim, the problems of proving causation, the variation in the basis of liability according to the situation, and the restrictions on the scope of damages. It argued that the Bill with its provisions for absolute liability would solve some, but not all, of these problems.

All the environmental groups wanted legislation that would provide an incentive to prevent spills, and regarded the Bill as fulfilling this requirement. Some did have reservations about this role. The FON stated that some spills were inevitable for major oil and chemical companies, but still argued that the incentive of absolute liability for compensation would reduce the number of spills (Reid, FON, SCRD, August 28, 1979: R-1415-2).

Extend Coverage

One policy preference was to extend the coverage of the Bill to incorporate other forms of discharges, such as discharges in small quantities or over time, or discharges where the accumulation or loss or damage occurred at a different location (Woods, CELA, SCRD, August 29, 1979: R-1535-1, R-1550-2; Timms, CCO, August

28, 1979: R-1555-2). As the Bill was encountering some opposition, and the inclusion of other discharges received no support from the ministry, CELA suggested that the inclusion of these discharges might be the subject of a future amendment.

CELA (Woods, SCRD, August 29, 1979: R-1545-2,-3, R-1550-1) also wanted to extend the definition of pollutants to include heat and radiation. It argued that heat could be a spill or a discharge, for example if the equipment for heating asphalt were parked under a tree, the heat would kill the tree; or if there were a spill of a flammable substance it might result in combustion. The ministry had omitted radiation, because it was the concern of the federal government. CELA argued that whereas atomic energy is exclusively within federal jurisdiction, radiation is not. The federal government is only concerned when it is produced by atomic energy and the transmutation of atoms, which excludes microwaves and X-rays. It argued that there was a residual provincial role in this area, as it was not occupied by federal legislation. It suggested that if radiation in an enclosed system escapes, for example, from Xray machines or microwave ovens, it may be described as a spill. Although the NDP supported this suggestion, it received little support from members of the other two parties.

Definition of Ownership

CELA (Woods, SCRD, August 30, 1979: R-1125-2 - R-1135-1) also wanted a definition of "the owner". It argued that it is often difficult to identify ownership in industry. It was concerned that in a contractual relationship the more

powerful parties might transfer the potential liability to the weaker parties. As "owner" is not a precise legal term, a court might look at the Sale of Goods Act to establish who had title at the time of the spill. Title is complex and can be passed on in the terms of the contract, so CELA suggested that a more precise definition of the "owner", or the empowerment of the court to look beyond the question of title would be useful.²²

A Fund

CELA wanted a compensation fund not for the owners or controllers, but to aid victims where the owner or handler could escape liability, or the identity of the polluter could not be established, as had occurred at Love Canal, and was occurring on the Serpent Lake Reserve where acid and leachate were draining from an abandoned acid factory into Lake Huron. The fund would provide compensation for persons suffering loss or damage; and would apply to municipalities or other persons ordered by the ministry to clean up a spill. This fund could be levied against sectors of the industry involved in the manufacturing, selling, or handling of hazardous substances. It could be large enough to cover both claims and administration costs (Swaigen, letter, 1979b).

Regulations

The experience of exemptions of broad classes of projects under the Environmental Assessment Act and the lack of notification until after they had been granted, had made environmentalists wary of any political process that could change the

intent of an Act and make it purely symbolic (Reid, FON, SCRD, August 28, 1979: R-1435-2). They, therefore, advocated limiting the power of the Cabinet to make regulations exempting any spill or class of spill. They also suggested that the Minister should have the statutory duty to issue directions for cleanup when a polluter refused, or was unable to act, or could not be found. To ensure that the Minister and the cabinet could not circumvent the Act, they further suggested that any intention of exemption, including exemption by regulation, should be published, and that there should be opportunities for the public to make submissions and to protest (Swaigen, memorandum, 1978; Reid, FON, SCRD, June 13, 1979: R-1630-3, August 28, 1979: R-1425-1, R-1435-2; Timms, CCO, SCRD, August 28, 1979: R-1555-2, R-1600-2).

CELA (Woods, SCRD, August 30, 1979: R-1045-1), also, wanted input into the construction of the Regulations. It suggested that a copy of each regulation should be published in the Ontario Gazette and not take effect until 60 days after publication. During that period, any person might make a submission in writing. It argued that the provisions of the Act would affect the health, wellbeing, and property of the people of Ontario, so it was important that they should be allowed to comment if exemptions to the cleanup of spills or to the right of compensation were granted. Also, as exemptions were usually at the request of industry, the ministry should listen to potential victims, examine the legislative precedents, and receive public input before acceding to the request.

Proclamation

CELA, with what was to prove incredible foresight, suggested that the Act should not come into force on a day to be named by the Lieutenant Governor, but upon receiving royal assent; or within 90 or 120 days or some specific point after receiving royal assent. It stated that the major provisions of the Act were not dependent upon regulations, and it was concerned when environmental legislation was not promptly proclaimed or implemented. The Minister argued that the fund was a problem, because it would involve a lot of work after the third reading of the Bill, but he was willing to consider proclamation on or before a given date to be determined by the government (SCRD, August 30, 1979: R-1100-1 - R-1105-1). This commitment was not kept by the government.

Several policies were suggested, but they were not discussed. They were the collection of information about the distribution of toxic materials in the province and about the effects of spills, increasing the efficiency of the mechanisms for cleanup, the introduction of technology to prevent spills, and the recognition of the concept of ecological loss. These will be reviewed in the discussion in the next chapter.

Key Issues

The key issues in the discussions were whether there should be absolute liability for cleanup and compensation, and whether there should be a fund and how it should be financed. Discussions ranged around whether absolute liability for cleanup

should be replaced by strict liability, and whether a fund should be supported by industry or by the government. Arguments focused on the experiences with absolute liability in other legislation, whether the use of absolute or strict liability would be a radical change in the law, the experiences with funds, and the methods of financing compensation funds.

Absolute Liability

There was a considerable amount of confusion concerning the terms "strict liability" and "absolute liability". This was because until 1978, strict liability in common law was absolute liability. With R. v. Sault Ste. Marie, 1978, the category of strict liability was introduced into quasi-criminal law. The various discussions regarding these concepts were confusing for the members of the committee who were not lawyers. They were faced with different opinions from the experts, who represented different interests.

The ministry and the environmental movement argued that there was Canadian legislation that incorporated absolute liability, and there were few, if any, problems. One example was the Canada Shipping Act where liability for cleanup was not based on fault, and shippers had to pay into a fund regardless of fault or record. Another was the Pesticide Act - Ontario. This Act imposed severe penalties on an owner and a person in control of a pesticide; and it was remarked that the industry had responded well to this Act (Landis, SCRD, August 28, 1979: R-1520-1). The Insurance Bureau of Canada supported this position. It noted that the insurance industry had experience with absolute liability under several acts, such as the Nuclear Liability Act and the Arctic Waters Pollution Prevention Act (Kennedy, IBC, SCRD, October 10,

1979: R-1015-1). It had also encountered contractual liability in construction where the contractor assumes liability for injury to persons not arising out of anybody's negligence (Lightbound, IBC, SCRD, October 10: R-1020-1).

The CMA argued that there had been problems with the use of the concept of absolute liability in legislation. The Occupational Health and Safety Bill, Bill 70, had imposed absolute liability, but this was changed to strict liability after a judgment in which the plaintiff was found liable, but could not have done anything to prevent the occurrence (Swenor, CMA, SCRD, October 4, 1979: R-1530-2). The CMA also claimed that the federal legislation regarding the transportation of dangerous goods would be altered in the Fall. Although this legislation had originally excused the owner and controller for more reasons than the "Spills" Bill, their position was to be strengthened when the accident could not have been prevented. The Ontario Petroleum Association argued that this change was identical with the reverse onus of proof (McCulloch, OPA, October 4 1979: R-1025-1, R-1035-1).

The opposition suggested the compromise of replacing absolute liability with strict liability, which, some argued, included "reverse onus" (Cooper, OPA, SCRD, June 14, 1979: R-2215-2; Swenor, CMA, SCRD, October 4, 1979: R-1530-1, R-1535-1). It suggested that strict liability allows certain defences regarding fault; and there were discussions about what this entailed, and what defences were allowed under Canadian law, and whether this was appropriate in civil law (Swenor, CMA, SCRD, October 4, 1979: R-1530-1, R-1535-1). Reverse onus presumes negligence by the owner, unless he satisfies the court that he exercised due diligence to prevent the spill

from occurring (Cooper, OPA, SCRD, June 14, 1979: R-2215-2; Swenor, CMA, SCRD, October 4, 1979: 1530-2, 1535-2). Swaigen (CELA, SCRD, December 3, 1979: R-2130-1) stated that it was a rule of evidence that could simplify the proof of causation. The plaintiff has the onus to prove that the event occurred and to prove that he/she had suffered damage. The defendant has to disprove the causal link between this event occurring and the damage that ensued. The burden of proof is shifted to the defendant. There was disagreement regarding the definition of this concept, and CELA argued that what industry wanted would involve a weakening of liability under the present common law.

The CMA argued that strict liability was closer to the present legal position. The Supreme Court of Canada had dealt with strict liability, and defined a strict liability test. The CMA (Swenor, SCRD, October 4, 1979: R-1525-2, October 10: R-1120-1; Outerbridge, SCRD, November 26, 1979: R-2135-1) suggested that the Supreme Court had taken a position against the principle of absolute liability in the case of R. v. Sault Ste. Marie in 1978. Also, the Law Reform Commission had taken this position in a treatise on strict liability. It had argued that one cannot do more than one's best, and that reasonable care and due diligence should be a defence in all cases. The social value of an activity, the potential for really serious damage of the activity involved, and the probability of serious damage, should all be assessed. In other words, latitude should be given to the courts to exercise their judgment (Toye, CMA, SCRD, June 14, 1979: R-2045-2, R-2050-1; Swenor, CMA, SCRD, October 4, 1979: R-1525-2).

This position was refuted by CELA. It pointed out that the examples used by the CMA were from criminal law not civil law, and the Law Reform Commission had argued the opposite position regarding strict liability and civil law. It argued that if allowance were made for cases beyond inevitable accidents, it would weaken the present common law under Rylands v. Fletcher (CELA brief, August 1979; Swaigen, CELA, SCRD, December 3, 1979: R-2125-1, 2, R-2135-2, R-2140-1, 2).

Dr. Landis did not agree with the definition of strict liability by the CMA, and argued that, according to two legal textbooks on civil law, strict liability included as defence: Acts of God, nature, and possibly a third person. He did not think that reasonable care was a defence (Landis, SCRD, October 10, 1979: R-111-2, R-115-1). This produced irate reactions from the CMA and the Conservative members of the Committee, who argued that Dr. Landis had twisted strict liability back to absolute liability (Eaton, SCRD, & Swenor, CMA, October 10, 1979: R-1115-2).

The Insurance Bureau of Canada argued that the introduction of strict liability was a radical change in Canadian law, as the law in Canada was based on the law of negligence with absolute liability applying in certain areas. If the concept of strict liability was included in the Bill, it would have to be elaborated, as it was not one known to Canadian law (Kennedy, IBC, SCRD, October 10, 1979: R-1100-1). Strict liability applied in the area of product liability in the United States. There, absolute liability meant that there was no argument concerning fault; strict liability meant that there was no need to prove negligence, but there had to be "just cause" regarding how the hurt

occurred, such as, it was not fit for the intended use (Kennedy, IBC, SCRD, October 10, 1979: R-1100-1).

Funds/Compensation

The government needed a compensation fund to get the legislation through the House (Interview, Parrott, 1993). A key issue was whether the fund should be supported from general revenues or by some form of levy on the industries concerned. Contradictorily, the Conservative MPPs, who supported less government involvement, proposed a government supported fund, and the NDP MPPs, who traditionally support government involvement, proposed an industry levy (Johnson, SCRD, October 4, 1979: R-1515-1, October 10, 1979: R-1135-2; Eaton, SCRD, October 10, 1979: R-1055-2; Makaruchuk, SCRD, June 21, 1979: R-2120-2).

There was also previous experience of legislation regarding compensation funds. The Criminal Injuries Compensation Fund; the Unsatisfied Judgment Fund; the Workmen's Compensation Board's Insurance scheme;²³ and a fund under the Canada Shipping Act in which the liability for cleanups was not based on fault, and into which all shippers had to pay despite fault or record, were mentioned. Some members of the Committee, particularly those from the NDP, supported a system similar to that of the Workmen's Compensation Board. Industry wanted a fund supported by general revenues, such as the Criminal Injuries Compensation Fund. It argued that government insurance funds were bureaucratic and expensive to administer. Canadian National's representative stated that the Workmen's Compensation Board's fund cost 12½% to

administer. Yet, he was unable to state the administrative costs of private insurance, and one NDP member argued that it cost three times more to operate a private insurance fund than a government insurance fund (SCRD, October 4, 1979: R-1445-2, R-1450-3).

Business holds tax measures in low esteem, because it mistrusts governments' abilities to manage finances fairly and efficiently, and because it feels that taxes become lost in the bureaucracy and a maze of programs. It also mistrusts industrial levies, because it fears that they will be absorbed by government bureaucracies, and because they are difficult to apply equitably to a whole range of businesses (Mallett, 1991: 18-19). The opposition argued that a fund would not be necessary if absolute liability were dropped from the Bill (Swenor, CMA, SCRД, October 4, 1979: R-1600-2; OPA second submission, October 1979). If not, a fund would be required to deal with the problem of no fault spills or cases where the polluter could not be located (Macdonald, CCPA, SCRД, June 18, 1979: R-2035-2). This fund should be a publicly supported fund, such as the Criminal Injuries Compensation Board (Chalmers, CP, October 4, 1979: R-1430-1, 2; Chevalier, CMCS, SCRД, June 21, 1979: R-2215-2).

A fund supported by general revenues would require an increase in taxes. The opposition, therefore, had to justify its rejection of its usual position. It also had to counter the argument that payment from the public sector would create a huge bureaucracy, which was contrary to its ideological position regarding the growth of government. The opposition opposed the proposal of a specific tax increase and a levy to support a fund,²⁴ but argued for financing for a compensation fund from general revenues. It argued that this would be cheaper and avoid an increase in the bureaucracy,

which occurred with public insurance funds²⁵ (Macdonald, CCPA, June 18, 1979: R-2035-2; Chalmers, CP, SCRD, October 4, 1979: 1430-1, 2; Band, CN, SCRD, October 4, 1979: R-1450-2, 3, R-1455-1).

Environmentalists initially maintained that a fund should be supported by industry to retain the concept of an incentive not to pollute (Woods, CELA, SCRD, August 30, 1979: R-1020-1). The FON suggested that private support would prevent the fund developing into a form of tokenism, and would ensure that peer pressure would encourage safeguards. Also, industry could assess the risks better than the government (Reid, FON, SCRD, June 13, 1979: R-1630-2). They eventually supported a fund financed by government to ensure that compensation was available for the victims of spills, but they were worried that this might destroy the thrust of the Bill and suggested that this should be a temporary measure (Reid, FON, August 28, 1979: R-1430-2).

The supporters attempted to retain the concept of sanctions as an incentive. They argued that the fund should recover the money paid out unless the responsible parties were impecunious or would be made so. In addition, they suggested that individual handlers and manufacturers should be required to carry insurance, so that they could compensate the fund or the victim directly; and this insurance should be related to risk history. They further suggested that the victim's right to compensation should be unlimited, so that he could collect for all his damages; and if limited liability were established for specific polluters, the limits should be substantial to retain the incentive to take precautions.

The Minister was reluctant to introduce a public insurance system, and argued that the background information was not available. (Yet, the ministry did expect the insurance industry to develop a form of insurance for spills). The ministry initially supported an industrial levy (SCRD, June 21: R-2120-2). It dismissed the suggestion of public funding and argued that it was not logical for the consolidated revenue fund to undertake a disproportionate amount of the costs of spills (SCRD, October 10, 1979). Later, it supported funding from general revenues for an initial period (SCRD, December 3, 1979: R-2215-1).

Resources

Resources can be defined narrowly or generally. They can be labour and money, negative pressures such as the ability to organize boycotts or strikes, and structural constraints or opportunities (McCarthy & Zald, 1977; Piven & Cloward, 1979). Access to resources does not mean that they are used; but the knowledge that access is possessed can influence the way others act. Resources can be non-actions. They may involve the ability not to act, such as not to invest, and to withdraw services, such as in a strike, or the ability to riot or to threaten to riot (Piven & Cloward, 1979). Such instances tend to be exceptional. But the threat or potential threat not to act or to withdraw services can be potent power resources if the services are regarded as essential. This power resource is held by both capitalists and labour, but is usually more effective in the hands of capitalists. Labour can be legislated back to work, but capitalists cannot be legislated to invest because they possess the additional power resource of mobility.

The only comparable resource of the environmental movement is purchasing power - the consumer will not buy a particular product or will buy a "green" product. This has had some limited success, for example the Nestles campaign, the boycott of California grapes and "green" consumerism. To be completely effective the use of this resource requires immense organization, which a fragmented social movement does not possess; or the development of elements of a counter hegemony that encourages the state or capitalists to act. This resource is difficult to use in relation to specific legislation, so in any environmental legislation there is an imbalance of political resources.

Resources of the Opposition

Industry has the resources of access to the government, immense lobbying resources, and the threat of the withdrawal of investment. It is automatically consulted regarding bills that will affect it. It was consulted after the introduction of this Bill, and later after its passage, to make it as palatable as possible. The legal subcommittee of the CMA was approached by Dr. Landis regarding the wording of the Bill, so that certain phrases were changed. For example, "everything that is physically and technically possible" was replaced by the word "practicable" on its recommendation (Landis, SCRD, June 14, 1979: R-2100-1).

The opposition had more resources and experience than the environmental movement in the lobbying process. It could mount a large lobbying campaign to oppose

the Bill. Several business associations and large companies presented submissions and were present at the Hearings:

... a dozen multinational corporations and trade associations submitted briefs, met with cabinet ministers and members of the government and opposition party caucuses, and appeared before a legislative committee with batteries of lawyers and executives when the Ontario Government introduced legislation last year to make them clean up after spills and compensate pollution victims (Swaigen, 1979a: 5).

The CMA had access to the Committee members outside the Hearings. It aroused the fears of the members who were farmers that the Bill would have a negative effect on farming (Swenor, CMA, SCRD, October 4, 1979: R-1555-2). It also approached several Conservative MPPs over the summer, so that on their return they registered their disapproval in caucus. Support for consideration for the spillers grew, and party members were applying pressure on cabinet (Interview, Swaigen, 1993; interview, Huxley, 1991).

The opponents were occasionally aggressive. In one meeting, the OPA representative raised a point of order, which a Committee member questioned whether a non-Committee member had the right to do (SCRD, November 26, 1979: R-2115-2). The OPA and the CMA argued that a new amendment did not meet what had been agreed in a previous meeting, although Dr. Parrott argued that it had been discussed, but not agreed. The CMA attempted, informally, to replace this with another amendment that both the CNF and Dr. Landis argued would weaken liability under the present law (Willms, CNF, SCRD, November 26, 1979: R-2215-2, 3; Landis, SCRD, November 26, 1979: R-2230-3).²⁶

Industry's major resource is its economic power. In times of recession this power is enhanced. Although there are divisions within business, and the interests of large and small business frequently vary, there are similar basic interests. Also, if these interests do vary, the power of the large corporate organizations to present their perspectives and to dominate industry associations may be assumed to prevail. This Bill was opposed by several large companies and business associations. The Canadian Manufacturers Association had 6,000 members in Ontario who produced over 80% of the manufactured goods in Ontario. The Ontario Petroleum Association represented over 90% of the volume of petroleum handled and used in Ontario, and represented all the major companies in the marketing and distribution of petroleum. The Canadian Chemical Producers Association had 66 member companies, which represented 95% of the Canadian production of industrial chemicals, and the total assets of its member companies in Ontario amounted to \$2 billion.

These industries and associations did use the threat of non-investment. They argued that the Bill would discourage industry from locating or expanding in Ontario. For example, the Canadian Manufacturers of Chemical Specialties Association (CMCS) stated that the Bill was unique to Ontario. This meant that it threatened the competitiveness of the manufacturing sector, so finished products would be imported. The result would be the "deindustrialization" of Ontario, and the creation of a warehouse economy (Chevalier, CMCS, SCRD, June 21, 1979: R-2210-3, R-2215-1, R-2215-2). CN argued that neither industries nor other businessmen would find Ontario "an attractive place to carry on business or to reside" (CN submission, June 18, 1979). The

General Counsel for the ministry noted that the Pesticide Act had not resulted in industries moving out of Ontario, but this point was ignored.

It was argued that industrial levies redirected funds from investments, research and development, and were not necessarily recovered from the marketplace. For example, Mr. Cooper, OPA, argued that the funds for the Maritime Pollution Claim Fund, which had received few claims, came from oil exploration funds (Cooper, OPA, SCRD, June 21, 1979: R-2115-1). A similar argument was used to oppose the imposition of absolute liability, as it was suggested that funds would be diverted from pollution control purposes to purchasing insurance protection (CN submission, June 18, 1979).

Although many representatives of the business associations were from large companies, they and the individual large companies continually emphasised the Bill's negative effect on small business, and farmers. Not only was the Bill predicted to destroy the industrial life of the province, but also its rural life. The Canadian Agricultural Chemical Association (Chevalier, SCRD, August 28, 1979: R-1455-1) suggested that it would result in the denial of a vital product (pesticides) to the Ontario farmer and discourage farm activity in Ontario. The United Cooperatives Organization suggested that the Bill would result in the erosion of the number of farms in Ontario. It would affect the distribution of petroleum products, fertilizers, pesticides, herbicides and other agricultural chemicals sold by farm supply cooperatives. These products were necessary to produce low cost food, for, according to a federal government study,

without agricultural chemicals Canada's food supply would drop 40% (Coulthard, UCO, SCRD, June 28, 1979: R-1430-2).

The opposition succeeded in the lobbying process. The tone of the Committee had become more sympathetic to industry by October 1979 to such an extent that this was noted by the representative for Canadian Pacific; and CELA realised that it "had been snookered" (Chalmers, CP, SCRD, October 4, 1979: R-1420-1; interview, Swaigen, 1993). The Conservative party members supported the position of the CMA, and criticized Dr. Landis, so that he refused to comment unless requested by the Minister (SCRD, November 26, 1979: R-2220-1). In a disagreement between Dr. Landis and the CMA representative regarding the interpretation of strict liability in civil law, one member became irate and suggested that Dr. Landis leave, and then remarked:

Mr. Minister, I would suggest that if the legal counsel that is drafting this for you that is before us, doesn't want to try to direct the legislation in the way that this committee is directing it, that you get another legal counsel to carry it out (Eaton, SCRD, October 10 1979: R-1115-2).

The Resources of the Environmental Movement

One resource that the environmental movement possessed was that it had the legal resources to analyze the Bill. CELA employed lawyers, had lawyers on its Board of Directors, and had been working in the area of legal reform and litigation for several years. It had contacts with the Opposition parties regarding their stance on the Bill (Swaigen, letters, 1979e; 1979i). It was accepted as the legal representative of the environmental movement. CELA was invited by the Minister to provide input on the Bill at the Hearings, and it had discussions with Dr. Landis and provided input into the

amendments (Swaigen, letter, 1979c; Swaigen, memorandum, 1979; Parrott, letter, 1979).

CELA encouraged environmental groups, and other interested organizations, such as the National Indian Brotherhood and the Federation of Ontario Cottagers, to express opinions regarding the Bill. Some, such as the Conservation Council of Ontario, did state their concerns.²⁷ Others did not. CELA and other environmental organizations wrote several letters to the Premier, the Leader of the Opposition, Committee members, and the ministry. They stated their anxieties about the replacement of absolute liability by strict liability and about a motion to limit the compensation to people assisting in cleanup to certain classes of people (CELA et al., letters, 1979a, 1979b; Swaigen, letters, 1979i, 1979j).

Environmentalists could not lobby the government to the same extent as industry. They were reluctant to litigate or lobby, because of insufficient staff, lack of funding, other mandates and priorities, distance from the provincial capitals or Ottawa, or lack of legal training. Swaigen (1979a) argued that these obstacles could be overcome, but he suggested that fear of losing charitable status, as a result of engaging in political activity, was a deterrent to political action.

Environmentalist organizations had nothing to match the economic resources of the opponents of the Bill. They could not afford expensive lawyers, and they could not produce anything like the economic threats of business. Environmental threats appear less concrete, more questionable, and something that may happen in the long term. Three Mile Island occurred on March 28, 1979, and yet there was no

conception that something of this nature could happen in Ontario. The assumption that a dangerous spill would occur was absent from the discussions, even after Mississauga in November, 1979. Damage to the economy can be the result of damage to the environment, and the use of complicated technology and toxins may increase environmental degradation, but these factors were not considered. Economic resources are possessed by business, but the reason these resources are so powerful is that the definition of these resources that is accepted by government and the community is that of business.

Conclusion

There was overt conflict between the government, the large companies and various business associations, and the environmental movement, with the insurance industry divided between the government and the opposition. The debates were more passionate than usual (Interview, Scott, 1993). Underlying these debates was the question of whether change would be obtained through the elimination of the power of industry to transfer the costs of spills to the victims or the public purse. The justification for the retention of this power was that hazardous goods benefit all society. The grounds for its abolition were that others, who do not have the power to prevent spills, pay the costs, and that there was no incentive for those who can prevent spills to pay the costs of avoiding them. These issues extended beyond the privatization of the costs of spills to whether this was a radical change in the law, whether it would radically change

commercial activity, whether insurance was available, and whether the Bill would achieve the desired goals.

The prioritization of economic concerns affects environmental decision-making, and can be used to forestall change. Thus, the argument that the Bill would be detrimental to small business, especially as insurance was not available to cover spills, was effective in reducing the sanctions aspect of the Bill. The opponents conducted a successful lobbying campaign centred around these issues. This was aided by the personality of the General Counsel. Environmentalists, who had originally supported an extension of the Bill, were thrown on the defensive. The outcome was a diluted Bill that was linked to the provision of adequate insurance. A great deal was left to the regulations. Also, the confusion and complicated debates resulted in those who had attended the Hearings coming away with different impressions regarding what had been decided.

Power favours the status quo because change has effects beyond the immediate issue, and will result in an alteration in the balance of power. These effects provide salient arguments to oppose change, and it requires that extra element to tilt the balance to favour change. It is debatable whether the Bill would have been passed if Mississauga had not occurred. While it increased the determination of the opposition, because it indicated their potential liability (Interview, Scott, 1993), it also increased the pressure to pass the Bill.

The Bill was passed with absolute liability for cleanup and strict liability for compensation. The former achieved the main goal of the ministry to achieve a

speedy cleanup to forestall increased environmental damage and embarrassing situations. The latter meant that victims still had to go to the courts to obtain compensation, but that they could apply to the fund. This Environmental Compensation Fund was also available to spillers who could not cover the costs of cleanup. The result was limited sanctions in relation to government costs, but minimal sanctions in relation to victim costs. The regulations remained to be constructed, which enabled the opposition to mount a strong lobbying campaign, so that the Bill was not proclaimed for six years. Before the discussion of the reasons for the delay, an examination of non-issues will also suggest why the Bill took the form it did.

END NOTES

1. See note 15, Chapter 3.
2. In a discussion regarding the shipment of contaminated radioactive material through Ontario by US trucks in which it was noted that the US Atomic Waste Laws were being broken, it was argued that the Atomic Energy Control Board sets the rules and issues the permits for transportation. Dr. Parrott argued that the definition section of the "Spills Bill" was broad enough that if any harm should occur from that transportation it would be construed as a spill and therefore would be the transporter's responsibility (Hansard, April 2, 1979: 610).
3. The CMA had a campaign to lobby all Conservative MPPs, who then demanded the government back off; and it had access to some members of Cabinet (Interview, Huxley, 1991; interview, Swaigen, 1993).
4. The Minister mentioned the Dowling and Port Huron spills. The Deputy Minister, Mr. Scott, noted that the Power Tank Lines case had been before the courts since 1973, had received different decisions at different levels of the judiciary and was still there.
5. They were represented by the Municipal Liaison Committee representing the Association of Municipalities of Ontario, the Association of Counties and Regions of Ontario, and the Rural Ontario Municipal Association.
6. Canada has no peak association for the chemical industry, but informally the Canadian Chemical Producers Association speaks for most of the industry, especially for the basic chemicals and materials sections of the industry. There are considerable interlocks between chemical associations with the more senior executives of large companies sitting on the CCPA's board and less senior executives of the same companies sitting on other chemical associations' boards (Coleman, 1988: 206-7). The CCPA was formed in 1962, and had 64 member companies in 1979. Their total assets in Ontario were estimated at \$2,000,000,000, and they employed 20,000 workers (CCPA submission, June 18, 1979).
7. The Canadian Agricultural Chemicals Association was formed in 1952. It was a national trade association representing firms manufacturing pesticides for agricultural purposes. Its provincial councils liaised between industry and concerned authorities, both public and private. It defined its purpose as that of information sharing, professional counselling, and problem researching in cooperation with government ministries and officials, with agricultural and forestry producers, with the teaching professions, and those concerned with human and animal health, and environmental protection (SCRD, August 28, 1979).

8. The Canadian Manufacturers of Chemical Specialties Association was founded in 1958, and in 1978 had 120 member companies of which 80 operated in Ontario. It claimed that it represented both large and small companies because over half of the eighty companies employed fewer than 100 people. Its member companies were involved in the manufacture and sale of specialty chemicals, raw materials and equipment such as aerosols. Specifically, they produced consumer and industrial finished chemical products and related raw materials such as soaps, detergents and sanitary chemicals; waxes and polishes; house and garden pesticides; flame retardant chemicals; and water treatment chemicals (SCRD submission, June 18, 1979).
9. Members of the Ontario Petroleum Association were: BP Oil Ltd., CFMG Inc., Gulf Canada Ltd., Imperial Oil Ltd., Petrofina Canada Ltd., Shell Canada Ltd., Sunoco Inc., and Texaco Canada Ltd. Associated members were: Canadian Tire Corporation and the United Cooperatives of Ontario.
10. The CSEA was an organization of Canadian steel producers. Its Ontario based members included Algoma Steel Corporation, Atlas Steels, Dominion Foundries and Steel Ltd., Slater Steel Industries Ltd. and the Steel Company of Canada Ltd. (CSEA Submission, August 10, 1979). As it was administered by the CMA, it can be assumed to be a separate division of that organization.
11. The Gas and Petroleum Association was formed in 1919, and in September 1972 it became the Ontario Natural Gas Association. Its members included natural gas and oil transmission companies, natural gas distribution utilities, natural gas and oil producers in Ontario and companies that are major suppliers of steel pipe, meters, valves, and sundry materials to the oil and gas industry and its consumers. It consisted of a number of companies including Union Gas Ltd., Consumers' Gas Company, Northern and Central Gas Corporation Ltd., and TransCanada Pipelines Ltd. (Submission of Ontario Natural Gas Association, August 29, 1979).
12. After a meeting with CELA and various prestigious supporters, the CMA agreed to circulate a memo to members of the legislation committee, but CELA suspected that the original CMA memo had resulted in the loss of grants from some corporations.
13. The United Cooperatives indicated that to get a railroad siding they had to sign a contract in which they accepted all liability regardless of whether it was the railroad that was at fault. They gave an example how two years previously they had to bear the whole cost of a cleanup and damages of a spill of liquid fertilizer at Claremont because of the indemnification clause required by the railway as part of its rail siding agreement even though the spill occurred through the negligent act of the railway's employees (SCRD, June 28, 1979: R-1435-2, R-1450-2).

14. Mr. Husby, UCO, pointed out that their competitors in the propane business self-insured, whereas they insured for over \$5 million. With this Bill, their insurance costs would increase whereas it would minimally affect their competitors. He suggested that it would be in the interest of these larger firms to support the Bill because it would help them relative to the United Cooperatives (SCRD, June 28, 1979: R-1500-1).

A recent example of the distortion of the competitive balance between large and small firms was the requirement of the removal and replacement of underground storage tanks more than five years old. For some independent gas stations, the cost of removal exceeded the value of their properties, which enabled large companies "to move in and reduce competition." (Mallet, 1991: 15).

15. In the Amoco Cadiz spill, the French government was reluctant to allow the use of dispersants in water deeper than 50 metres, because of pressure from ecology and nature groups. This had resulted in Amoco being able to escape much of its liability on the grounds that the French government had not allowed them to use dispersants. This event could have been used to argue that the government should ensure that highly trained cleanup specialists were always available in the event of a spill. This spill caused the West German government to question whether cleanup could be left to the oil companies, and to pay highly trained crews to be on 24 hour alert to deal with spills and then to send the bill to the spiller (Davidson, 1990).
16. Royal Insurance had 10% of the Canadian market in 1978 and expected \$1 billion in premium income by 1983. Its actual premium income in 1983 proved to be \$390 million and it was overtaken as the major company by the Cooperators Group Ltd. of Guelph before this Bill was proclaimed (McQueen, 1985).
17. The Canadian Nature Federation (John Willms) was a confederation of provincial nature federations of which the Federation of Ontario Naturalists was one (SCRD, November 26, 1979: R-2215-2).
18. The Federation of Ontario Naturalists (FON) had been established in 1931, and it had 1200 members in 1978. Its primary interest was the protection and appreciation of wildlife, wilderness and natural areas. This had recently led to a concern regarding the effects of environmental contaminants (SCRD Submission, June 13, 1979).
19. The Conservation Council of Ontario (CCO) was supported by 37 organizations and claimed to represent one & one quarter million citizens. It produced the Ontario Conservation News and was regarded by the Minister, Mr. Parrott, as an established authority representing a broad spectrum such as the Ontario Federation of Labour, the Ontario Federation of Agriculture, and the Junior Farmers Association (SCRD, August 28, 1979: R-1555-1 - R-1600-1).

20. The Sierra Club was founded in 1892 in the United States. It was an "outings and naturalists club", and is concerned with the preservation and protection of the natural environment in Ontario. The organization submitted a brief to the committee, and its representative, Mr. Dewees, spoke in support of the Bill during the amendment process (Submission, October, 1979; SCRD, November 26, 1979).
21. John Swaigen had encountered difficulties in obtaining a copy of work completed by two students researching compensation schemes for the ministry (Interview, Swaigen, 1993).
22. The CMA and the UCO were also worried that the stronger members of the parties might require the weaker to indemnify them for any compensation they might pay a victim. The CMA (Toye, SCRD, June 14, 1979: R-2040-2) proposed that the phrase "in the absence of an express or implied contract" be deleted, and that the right of contribution and indemnification could not be diminished or excluded by a private contract, and that all such contracts would be null and void.
23. Now the Ontario Workers' Compensation Board.
24. The Ontario Solid Waste Management Association supported the Bill, and the creation of a fund supported from fees from the generators of hazardous materials (Ontario Solid Waste Management Submission, December 3, 1979). Obviously, this meant that the carriers would be exempt.
25. Large companies, especially the railroad companies, were opposed to making contributions to a fund. Large companies are self-insured for the first layer of risk for a substantial amount before they touch their insurance. It was, therefore, unlikely that they would ever access the fund (Chalmers, CP, SCRD, October 4, 1979: 1420-2,-3, 1425-1,-2, 1430-1; Band, CN, SCRD, October 4, 1979: R-1445-3).
26. Dr. Parrott argued that the previous amendment proposed by the OPA was never discussed, and that what had been agreed was absolute liability for cleanup and reverse onus for compensation. The OPA and the CMA argued that at a previous meeting it had been agreed that absolute liability was to be dropped for strict liability. Mr. Outerbridge, CMA, argued that the amendment proposed by the Minister did not bring in reverse onus, and informally proposed an amendment which he argued fulfilled the requirements of the committee (SCRD, November 26, 1979).
27. The Conservation Council of Ontario sent a letter to the minister stating its support and concerns regarding Bill 209 (March 21, 1979). Its concerns were that exemption by regulation was open to abuse, that the Bill was vague regarding

ministerial responsibility, that it did not provide for the right of victims to recover costs and damages where the owner or person in charge of contaminant could not be identified, and that it did not provide for other persons' costs in cleanup. It suggested that a fund was necessary, and that the Bill should apply to gradual and continuous leaks.

CHAPTER 5

THE ORGANIZATION OF BIAS: STRUCTURES AND SILENCES

"This is the most undercovered series of meetings I have seen" (Glenn, Pollution Probe, SCRD, August 29, 1979: R-1520-2).

Introduction

The last chapter focused on the arguments that were presented at the Hearings of the Standing Committee on Resources Development. It explored the observable dimension of power, and examined the various discussions about several issues. In this chapter it is argued that there is a second sphere of power that occurs through the mobilization of bias. Bias is organized to exclude certain values or interests, so that non-decision-making ensures that some potential issues never become actual (Lukes, 1974: 19; Schrecker, 1984: 44). This chapter will discuss the ways in which structures and silences constructed bias by emphasizing particular factors and ignoring others. It argues that structures, such as the process, the privileging of some parties, and the non-inclusion of other groups, contributed to a form of bias. Such exclusions were frequently the result of the unconscious traditions that remained unquestioned, and thus helped to maintain the present construction of hegemony. It further argues that silences achieved through a lack of knowledge, the minimal or non-discussion of some topics, and the focus on legal mechanisms instead of the broader issues, reinforced this bias. It notes

that the framework for future bias was laid by leaving a large portion of the Bill to be constructed through regulations.

Bias Through Structures

Structures create a form of bias. The actual process of the SCRD Hearings mitigates against change. The concerns of certain groups are considered more important than other concerns. Also, not all the affected parties are represented at the Hearings. This is not a deliberate exclusion. It is the result of traditional consultation of certain parties, a lack of consideration of the broadening of the consultation process, and the fragmented composition of groups that might warrant consultation. This ensures that those with the most power resources can present their case, but it fails to ensure that those with more limited resources or those who are indirectly affected or may be affected in the future are present.

The Process

To some extent the structures of government create the illusion of participation. The Standing Committee on Resources Development only discusses a bill after it has been approved by Cabinet, and received second reading. By this time most bills have been drafted by the bureaucracy, gone to Cabinet, then to the Legislative Council, then to the bureaucracy, back to Cabinet and then caucus and to public review via first reading, then to second reading, and finally to the committee stage. Unless

there is some form of consultation before the first reading, it is problematic whether changes can be initiated at this stage of the process.

No consultation took place before the "Spills" Bill was introduced (Interview, Parrott, 1993), although there were discussions with the CMA legal committee after the first reading (Landis, SCRD, June 14, 1979: R-2100-1). However, the Minister did indicate that the Bill could be changed. His personal philosophy was that government must make decisions and then they should be discussed and changed, and also the Bill was contentious within his caucus (Interview, Parrott, 1993). Committee hearings are, however, controlled by government members, who are in the majority. This Bill was unusual because it received support from the opposition members, whereas support from the government representatives was weak (Interview, Parrott, 1993). Also, the background of the Committee members, especially those who dominate the proceedings, can make a difference. Several Committee members were farmers or from rural constituencies, and one member had been an insurance broker.

Bias Through the Privileging of Various Parties

The government and business are the main holders of power in the policy-making process. In many ways, business can be considered the major power holder because it possesses a "privileged position" in the process (Lindblom, 1977). This occurs because corporate decisions affect the economy, which in turn affects the whole society. Business controls investment, and governments wish to promote economic growth. Government, therefore, has to take account of the concerns of business and is

constrained in its attempts to restrain business (Lindblom, 1977). Schrecker (1984/5: 50) suggests that in Ontario "all new regulations must be preceded by an assessment of such factors as their impact on investment climate, the incentive to work and the formation of new businesses". This structural bias creates opportunities for business, or a section of business, to influence legislation in its favour. In the case of the "Spills" Bill, the CMA had input into the wording of the Bill, its lobbying with others who opposed the Bill did influence MPPs, and during the construction of the regulations there was an immense effort by the ministry to consult with manufacturers and others who would be affected by the Bill¹ (Hansard, May 15, 1979; Swaigen, letter, 1979h).

The bias towards the business associations and the large companies by some members of the Committee meant that they accepted the interpretations of the law from the lawyers for the CMA, and did not wish to hear the interpretations of the General Counsel for the ministry. One Committee member complained in the legislature about the treatment of Dr. Landis during a meeting set up so that he could explain his concerns regarding the presentation of the arguments against absolute liability by industry. The member protested that the Conservative members cut him short and reprimanded him, so that the Committee was unable to hear what he had to say:

I felt that we should have given Dr. Landis an opportunity to convey his thoughts to us about the absolute liability, but he was cut short. There was one Conservative member on the committee who I felt reprimanded him for really no apparent reason (Riddell, Hansard: December 11, 1979: 5380).

According to Lindblom (1977), large farmers share the "privileged position" of business in policy-making. This also held for small farmers during the

Hearings. There is no farming organization that separates farmers according to size, and the Committee did not make any distinction between a family farm and one that employed workers.² Farmers were not directly represented at the Hearings, but were indirectly represented by the Conservation Council of Ontario and the United Cooperatives of Ontario.³ These two organizations took opposite positions. The CCO also stated that the Ontario Federation of Agriculture was one of its members, was aware of its position, and had been given an opportunity to dissent (Timms, CCO, SCRD, August 28, 1979: R-1600-1). The UCO argued that, as a farm supply cooperative, it represented the interests of farmers. Discussions focused on the negative implications for farmers regarding the use of pesticides and spills of beans or manure. Thus, the farmers and several members from rural Ontario on the Committee felt that exceptions should be made for farmers. Farmers were, therefore, granted exemptions for normal farm practices, and a lower financial level of liability before they could claim from the fund.

The environmental groups were prepared to treat farmers as a special case. CELA was initially opposed to the exemption of farm wastes. It argued in letters to the SCRD members and the media that water pollution problems in the Great Lakes and sub surface drainage systems were partly the result of farming practices (Swaigen, letter, 1979d, 1979g). It also noted in its brief that the OECD had estimated that pollution from farm activities would increase 50% between 1978 and 1985 (Woods, CELA, SCRD, August 30, 1979: R-1145-1). Nevertheless, environmentalists did not state any opposition to the use of chemicals in farming, supported the exemption of the normal

practices of farming, and were more flexible regarding the liability for farmers (FON, SCRD, August 28, 1979: R-1425-2).

Structures Do Not Ensure the Presence of all Parties

There is no mechanism by which representatives of interested groups, or groups that could contribute information, are ensured a presence at the Hearings of the Standing Committee on Resources Development. The Hearings are announced in the Ontario Gazette and in the Legislature, and it is assumed that interested people will appear. Certain organizations are invited to provide input, but these are limited. These meetings were not reported in the popular press, possibly because they focused on complicated legal points and areas that do not make interesting subject matter for the press. Also, the times of the meetings were frequently changed, so it was difficult to obtain information. It is possible that groups that might have provided input did not know about the Hearings, or were not directly affected by the Bill, as in the case of experts. Also some groups had other commitments, or lacked the personnel to cover several areas, or were not fully aware of the implications of the Bill.⁴ The ministry notified CELA, which informed the environmental community and others, but not the victims of previous spills. No-one invited scientific experts to appear. An alternate mechanism would have been to invite a broad range of representatives of various groups, especially those who were used as examples in the discussions, and to cover their costs.

Several groups were cited as examples of suffering in the past because of the lack of legislation, or cited as those who would suffer negative effects from this Bill.

Many of them were not present. The victims of previous spills, such as the Lake St. Clair fishermen and the Dowling residents, were not present to discuss their experiences. Small business, which was continually cited as a group that would suffer negative effects from the Bill, did not have an independent representative. It was represented by business associations, such as the CMA, the CMSCA, and the Board of Trade of Metro Toronto, but these represented both large and small business, not solely small business. Cottagers were not represented at all, although they were also frequently cited by the business associations as a group that would suffer negative effects from the Bill.⁵

CELA did notify various environmental groups, but several groups were not represented. This may have been because there were so few groups with few resources (Interview, Glenn, 1993). Also, the tax structure may have deterred political participation, which would threaten their charitable status (Swaigen, 1979a). It may have indicated a lack of interest, as environmental groups lacked the personnel to do anything more than focus on a few issues at a time; even CELA and Pollution Probe had to choose their areas carefully. Thus, opponents of the Bill represented over twice as many groups as the supporters. Manufacturing associations and large firms were represented by several people whereas a single environmentalist represented his organization. It was no wonder that the General Counsel for CELA remarked that the conservationists were "outgunned" at the hearings (Swaigen, letter, 1979f).

Aboriginal communities were not represented. Yet Indigenous people could be argued to have a direct interest in a "Spills" Bill, as Natives had experienced the effects of pollution on their reserves. For example, the National Indian Brotherhood

had recently consulted CELA regarding the cleanup of drainage and leachate from an old acid factory on the Serpent River (Roy, letter, 1979a). CELA did ask for their support, and the Union of Ontario Indians did contact the Clerk of the Committee. However, the Clerk was unable to schedule them for the requested week, and did not call back with any appropriate time for another week⁶ (Roy, letter, 1979b). Thus, they were unable to present a brief to the Committee, and the Committee did not discuss the issues from an aboriginal perspective.

Experts were notable by their absence. Scientific experts were not present to discuss the health effects of toxic spills, or the differences in cleanup requirements between toxic, oil or other types of spills, or the technical aspects of preventing them. Economic or business experts were not there to discuss whether this Bill would deter commerce, would result in changes in the location of the passage of title and result in different commercial practices, and to discuss the costs of spills or cost/benefit analyses. Social scientists were also not present to discuss the social impact of spills, and whether "society" benefits from the production of chemicals. Insurance experts were present, but as there was a disagreement between the industry associations and the brokers, an independent expert on the insurance industry would have been helpful. There were lawyers from the large companies and the environmental groups, but there were no "neutral" lawyers, such as those from the universities, to discuss absolute and strict liability despite the confusion over these terms. The General Counsel might have been expected to fill this position, but given his relationship with industry, this was not

possible. The Attorney General only appeared to discuss the issue of waivers after the Mississauga disaster.

Thus, the supporters were under represented compared with the opponents. Certain groups were absent, so that other groups spoke for them, or their perspective was not examined. Although the Minister frequently stated that the wishes of the Committee were being carried out, this ignored the unequal representation of the political parties on the Committee.

Hon. Mr. Parrott: ... I just hope ... that you say that this reflects the will of this committee ... I think and hope that you will accept that this committee made that motion and carried it.

Mr. Wildman: We will accept that Mr. Eaton moved the motion and that the Liberals and Tories voted for it. (SCRD, December 3, 1979: R-2205-1).

Thus, bias is mobilized through process. The process reinforces power discrepancies. In the Hearings, only the issues raised by those presenting briefs were discussed. Several groups did not present briefs for various reasons, such as they were unable to do so, or they were not approached. This non-appearance may have been because of costs, the limited time frame of the Committee, understaffing, other demands, a lack of interest, or the location of the hearings in Toronto (Swaigen, 1979a). They may not have heard about the Hearings, or if they had, it was not in time to present a brief, or they could not present at a time convenient for them (Glenn, SCRD, August 29, 1979: R-1520-2; Swaigen, 1979a; Roy, interview, 1993). Another factor was that it was difficult to keep track of the progress of the Bill, because the Committee changed the meeting times and its agenda at very short notice. Presenters would appear and not be

heard, or other interested parties, such as CELA, would have to change their plans if they wished to listen to the discussions (Swaigen, letter, 1979i). All of which increased the difficulties for those with limited resources to provide input and to be aware of the proceedings.

Bias Through Silences

Silences contribute to the organization of bias. They are achieved through a lack of knowledge, through a failure to pursue certain issues, through a diversion of topics into other areas, and through the minimal or nondiscussion of topics mentioned in a brief or the presentation of a brief.

Lack of Knowledge

A lack of knowledge contributes to silences. In this case, there were no statistics regarding the costs of spills. There was a lack of knowledge of the effects of spills, the extent of hazardous substances in the province, and a lack of information regarding insurance.

The ministry did not know the actual costs of spills, so it could not produce figures regarding the costs to the government of dealing with spills.

Mr. Parrott: As Mr. Symons (Director, Pollution Control Branch, MOE) said, we haven't kept a record of those costs, to give you those statistics; that's our problem (SCRD, October 4, 1979: R-1140-2).

A breakdown regarding the costs of cleanup, the costs for victims, the costs of compensation to victims, and the costs of litigation, plus some estimate of future costs,

probably would have strengthened support for the Bill. The ministry did not produce estimates regarding whether the Bill would make any difference to its costs. It did not reiterate the numbers of spills and the types of spills, which although they were in the Compendium of Information, would have benefitted from repeating.

Industry also did not produce figures regarding the costs of spills to business. The chemical industry was unable to produce any figures:

Mr. J.A. Taylor: ... Do you have any experience in terms of the number of accidents that didn't involve liability, either negligence, tort. In other words, what is your experience in terms of the number of cases that you would be affected by in the light of the absolute liability?

Mr. Chevalier: Actually, we don't have any facts or figures, lets put it that way (SCRD, CMCSA, June 21, 1979: R-2230-2).

The petroleum industry stated that it did not have specific numbers, but of its members who kept current records none had a record of an oil spill with costs exceeding half a million dollars in the last two years (McCulloch, OPA, SCR D, October 4, 1979: R-140-2). This did not indicate the size of the firm, the location of the spills, the type of damage, and was too short a period to be useful.

Little information was available about the impact of spills. Pollution Probe, (Glenn, SCR D, August 29, 1979: R-1525-1, 2) suggested that a "knowledge base" should be developed. This would determine the environmental impact of large and small scale spills. Also, it would develop information about appropriate cleanup procedures needed within a "type-time" frame, soil migration rates, stabilities, byproducts, and synergism. Pollution Probe also suggested that tests should be conducted by independent laboratories, but they should be funded by the public and industry as both produce waste.

This was not discussed by the Committee, despite the problem of the lack of information concerning the effects of spills, the degree of risk, and the consequential problems of setting insurance rates. Glenn pointed out that with the appropriate knowledge the insurance industry could set realistic insurance rates for whole classes of industrial chemicals and waste products, which would reflect the degree of risk of a spill. Pollution Probe was suggesting that industry and the government pay for the assessment of the costs of spills, but the results of this assessment might have had negative consequences for both of them. It could have resulted in an increase in the economic costs for manufacturing industries by raising insurance rates, which might result in higher prices. It could have also resulted in an increase in the political costs for the government by focusing attention on the dangers of spills and what actions the government was taking to forestall spills.

The fact that there was little information about the presence of hazardous substances in the province was ignored. CELA's suggestion, in its comments on Bill 209, that the ministry should publish annually a list of hazardous substances stored or deposited in the province, and their locations, including landfill sites and dumps, was not raised during the Hearings by either CELA or the ministry (Swaigen, letter, 1979b). This would have entailed the notification by private industry of the amount of hazardous substances on any premises to the ministry, and would have developed an awareness of the contents of the landfill sites in the province. The request may have been prompted by the information that Ontario possessed most of the PCBs in Canada, and the wish to know what other hazardous substances were being stored in the province.⁷ Why CELA

failed to raise it is a puzzle, but it may have felt that it wanted to focus on obtaining adjustments to the Bill and to prevent it being diluted. The ministry may have excluded it from consideration because it wished to exclude landfill sites from this legislation. Interestingly, CELA did not request that information concerning the transportation of hazardous substances be published, and yet, if the assumption is made that spills occur during transport, this would be crucial information in any assessment of the risks of spills.

As already noted in the previous chapter, the Committee's lack of knowledge of the insurance industry, regarding how it was structured and how rates were set, proved to be a problem in constructing the Bill. The opposition was able to emphasize the difference between the statements of the IBC and the brokers. The IBC did point out that the brokers were not the insurance companies, and Dr. Landis also argued that it was the information from the insurance principals, the companies that provide the coverage, which was important (Landis, SCRD, October 4, 1979: R-1500-1,2, R-1505-1), but this point was ignored by the opposition and not taken up by the Committee members. The IBC could not predict the rates accurately because the insurance companies had little experience in this area, but neither could any broker. This lack of knowledge and experience meant that the opposition, with the help of the brokers, could argue that the available and potential insurance would be useless and at extortionate rates; and therefore a large spill would result in bankruptcy for many companies.

The Failure to Pursue Cost/Benefit or Risk Analysis

Risk analysis and cost/benefit analysis usually appeal to bureaucratic organizations and industry. They reduce risks and costs to economic values, and increase the role of experts from science and economics in the decision-making process to the detriment of popular participation. They usually favour capitalists because the underlying assumptions are such that only economic costs are included in the calculations; and the future costs of prevention are easier to measure than future benefits. The method has been alleged by social scientists (Schrecker, 1984; Yeager, 1991) to be uncertain, and the final decisions are inevitably political, although cloaked by the mantle of scientific expertise.

There was a suggestion by the opposition that cost/benefit analyses should be conducted to examine the effects and costs of implementing this legislation (Weldon, CCPA, SCRD, June 18, 1979: R-2120-2; R-2125-1; Cooper, OPA, SCRD, June 21, 1979: R-2100-2). This proposal was not pursued. The NDP members of the Committee argued that the risks and cost of spills to society and to spill victims, and also the benefits to society, would have to be measured as well⁸ (Makarchuk, SCRD, June 21, 1979: R-2120-2; R-2125-2). This argument may have deterred the opponents from pursuing this route.

One of the witnesses suggested we should have a cost-benefit analysis of the costs of this kind of legislation. I'd like to ask him whether he would include in the cost-benefit analysis the cost that spills over the years have cost society and the taxpayers ... (Bryden, SCRD, June 18, 1979: R-2205-3, R-2210-1)

and

We can measure the cost of getting our legislation through. We can probably measure the cost to cover the potential spills ... But in terms of the benefits to society, that's a very difficult process to measure (Makarchuk, SCRD, June 21, 1979: R-2125-2).

These types of analyses assume knowledge. If they were to be used, but included societal costs of past spills rather than hypothetical future benefits, they would require the assembling of data. Such data would indicate who was responsible for what spills and the economic costs of spills to the government and the victims. If the opposition could have restricted the analysis to the potential costs of the Bill at the level of the firm, or to the future bureaucratic costs of the ministry, the analysis might have favoured the status quo. If the assessment of the past costs of "externalities" to the public were included, the results were likely to support change, because it would involve examining the costs of the one thousand spills in Ontario, the past source of payment for the costs of cleanup, and the direct and indirect costs to the victims. This might have encouraged discussions not only of who should bear the risks, but of the relative risks of future spills, and what would occur if there were a major spill in Ontario. It might have resulted in a questioning of the claim by CP that "risks could not be declined" (CP submission, June 28, 1979), and in a discussion of the effects of actual spills by industry, and not hypothetical cottagers.

Lack of knowledge aided those opposing the Bill, because it excluded risk or cost/benefit analysis. Thus the discussions focused on who would bear the cost of the spill and how this would be legislated (which are political questions) without full knowledge of past spills. The experts that were consulted were from the insurance

industry not scientists. They did not possess statistics or experience regarding spills, and were likely to have some interest in restricting liability for spills. This ensured that predictions regarding the insurance market would play a role in determining the type of legislation.

Diversion of Topics

One way in which the lack of knowledge can be a power resource is that it avoids the presentation of information, and leaves openings for speculation to be presented as "facts". This was achieved by the opposition focusing on spills from oil tanks in cottages, or spills of farmers' produce, such as beans or maple syrup:

... --there has been underlying all of the discussions a sort of assumption that everything that ever gets spilled is some dreadful thing made by chemical manufacturers. That's not what the evidence of the groups was in the earlier stages of the hearing of this committee (Weldon, CCPA, SCRD, October 10, 1979: R-1440-1).

or alternatively the effects of terrorism or war:

No-one likes to mention it very much but we all recognize that bombing has become a way of life; there are bomb incidents all over the place; people use bombs to protest everything and it's entirely feasible that irresponsible persons could cause a spill by using a bombing incident or some violent act to attract attention (Weldon, CCPA, SCRD, June 18, 1979: R-2120-1).

Initially, the Minister did mention spills that the ministry had encountered problems in achieving a satisfactory cleanup, spills that the victims had encountered difficulties in obtaining compensation, and spills that had proved costly for the ministry. These examples were not mentioned in the later Hearings, where the concerns were those

of insurance and a fund, and discussions regarding chemical spills by manufacturers did not occur.⁹

Also, issues can be diverted into discussions regarding mechanisms, so that the broader aspects are ignored. One diversion was a discussion of liability if people other than the producers conducted the cleanup and had access to property, instead of focusing on the mechanisms and technology for cleanup. Several opponents focused the discussion on the rights of the Minister to delegate volunteers to invade their property, the problems of passing proprietary information to volunteers, the damage that might be inflicted by such volunteers, and their unwillingness to be responsible for compensating such volunteers¹⁰ (Weldon, CCPA, June 18, 1979: R-2105-1, October 10, 1979: R-144-1, R-1510-2,3, R-1520-2; Chevalier, CMCSA, June 21, 1979: R-22230-3, R-2225-1; Chevalier, CACA, August 28, 1979: R-1455-2, 3).

The one discussion regarding health focused on the limitations period for a claim instead of the possible health effects from spills. The period had been reduced from six years in Bill 209 to two years in Bill 24. CELA (Woods, SCRD, August 30, 1979: R-1105-2 - R-1125-2) wanted it to be extended to six years from the date the person knew of the loss or damage. Instead of discussing the possibility of health effects from spills and the latency aspect of such effects, the discussion focused on legal norms. CELA's arguments were concerned with legal mechanisms: a period of two years was not consistent with the recommendations of various law reform commissions or committees, or with relevant legislation in many jurisdictions including Ontario, Manitoba, British Columbia, England, Scotland, New South Wales, and South Australia.

It did argue that extensions should be granted at judicial discretion. It stated that this had occurred in England following the dismissal of a case in which the victim suffered lung damage through silicosis that was not manifest until 6 years after the cause of action. The ministry argued that the Attorney General had advised the ministry that the two year period was the accepted norm, and that it was two years from the date the person should have known about the harm (Landis, SCRD, August 30, 1979: R-1110-2). It was, therefore, left at two years.

A Minimal Discussion of Health

Although one reason for the introduction of the Bill was the public's concern regarding the health effects of hazardous spills, there was little discussion concerning health. Pollution Probe and the FON raised the issue in their briefs, but the Committee did not debate the issue. Threats to health provide an impetus for action concerning the environment (Hume Hall, 1990), so it is probable that any discussion would have encouraged support for the Bill. The lack of a general discussion of the effects of spills, or of toxic chemicals and their effects on human life, contributed to a lack of discussion of health. It may have been because of scientific uncertainty regarding health effects, which are complicated by latency and synergism. There was no discussion regarding the difficulty in proving the effect of a spill on a population, nor the difficulty in proving that it has had no effect.¹¹

Discussions regarding victims focused on damage to their property or their livelihood; they were victims because they had been affected economically, not because

of effects on their health. In fact, the Ontario Petroleum Association argued that this was not a life and death issue and therefore did not warrant such extreme legislation. It admitted that if it were a life and death issue, it would be logical to ban the production and transportation of hazardous goods, but argued that it was not a question of preventing the loss of human life.

The extreme nature of absolute liability under the proposed Bill 24 is not justified by the absolute character of the evil which is sought to be prevented as in the case for example where the saving of human life would be in question. If the extremity to be cured was this absolute why stop at merely imposing absolute liability instead of following logic and going all the way and prohibiting all use and transportation of the pollutant? (Cooper, OPA, SCRD, June 14, 1979: R-2205-1).

The OPA obviously thought that this statement implied how illogical the Bill was. Yet, pollution had been related to morbidity and mortality. Victims of spills had died from the effects of Minamata disease in Japan, there were suspicions that the spill at Seveso would result in extreme health problems in the future, and Love Canal was being related to several health problems. By defining victims as economic victims, an opening was created to define the owners and controllers as victims because they would also encounter costs.

Statistics were also lacking regarding cases of damages caused by spills. It was not known whether the lack of success of victims in obtaining recompense was due to the difficulty in proving liability because of the uncertainty of science, or because the victim lacked financial resources to fight for recourse (Leigh, OPA, SCRD, October 4, 1979: R-1150-2-3).

Victims of a spill are likely to encounter either health problems, economic problems, or both. In addition, there is likely to be a public cost if victims suffer from environmentally caused diseases. But these issues were not raised. There was also little discussion of occupational health. The division of the government into its component parts may have excluded this matter from discussion by the Committee. Yet, workers work in factories in which there are spills, they transport hazardous chemicals across the province, and may be the first affected if there is a spill.

There was no discussion of the health impact of toxins, and whether the possibility of the effects of a spill should be considered when registering a new compound, although this was suggested by Pollution Probe (Glenn, SCRD, August 29, 1979: R-1520-2 - R-1525-2). This was the responsibility of the Ministry of Health at the federal level. This again suggests that the division of responsibilities between levels of government and ministries prevents the development of a holistic policy towards spills.

A Minimal Discussion of Environmental Damage

There was surprisingly little discussion of environmental damage. The environmental groups (Glenn, Pollution Probe, August 29, 1979: R-1520-2 - R-1525-2; Reid, FON, June 13, 1979: R-1620-2,3) stated their reasons for concern regarding toxic chemicals, and that some one and one quarter million gallons of toxic chemicals were spilt every year, but there was little discussion of these concerns. The environmental groups stated their concerns and that was the end of it. It was as if the mere statement qualified as participation, and that there was no need for further discussion.

The concept of "ecological loss" was introduced by the representative for the Federation of Ontario Naturalists. He argued that loss could not always be measured and compensated in economic terms (Reid, FON, SCRD, June 13, 1979: R-1625-2,3, August 28, 1979: R-1420-1,2, R-1435-1). In the Bill, the object deemed appropriate for compensation was defined in narrow terms with the provision of compensation related to economic loss and not "ecological loss". Injury or damage to plant life was not eligible for compensation unless some associated economic use was affected, for example, damage to a wildlife habitat was not considered a matter for compensation. The Bill also defined the method of compensation in economic terms. Environmentalist groups, such as the FON, argued that compensation should occur where restoration was not possible, and the appropriate compensation could be the creation of a similar habitat elsewhere (Reid, FON, June 13, 1979: R1625-2-3). This suggestion was not promoted strongly, possibly because of the problems associated with obtaining provisions to ensure adequate compensation for economic loss, and there was no further discussion of this idea by the Committee.

Minimal Discussion of the Techniques of Cleanup

There was little discussion regarding the actual mechanism of cleanups and whether any method was more efficient, except in the most abstract terms. The Metropolitan Toronto Works Committee (February 21, 1979) did point out the major weakness of the government's position. It noted that the legislation did not require the owner or controllers to maintain the necessary equipment to deal with spills, and that the

Ministry of the Environment lacked cleanup capability and did not intend to acquire such equipment. It also described its own procedures, which could have provided a basis for a discussion. It had a reporting procedure so the departments concerned were notified. It possessed equipment for emergency containment and the cleanup of oil spills on major Metro watercourses, and this equipment was often used to carry out cleanup work for those responsible for the spill. Recovery of the costs was then sought from the polluter. Possibly because the Metro Toronto Works Committee only sent a letter to the ministry, and the comments they made were not raised by the municipalities, these points were not discussed by the Committee. CELA did not raise them and neither did the other environmental groups. Thus, the lack of availability of equipment for cleanup, whether the companies should be required to possess such equipment, or whether the ministry or the municipalities should supply it, was not discussed. There was also no suggestion that companies transporting hazardous goods develop a government-approved contingency plan as occurred in the United States (Swaigen, 1979b). The assumption was that if the owners or possessors of hazardous goods were threatened with the responsibility for cleanup, they would supply the equipment.

There was also no discussion of the available technology to deal with spills.¹² Several questions could have been considered: Was the appropriate technology available to deal with toxic spills? Was it expensive? Would it be better to have a central agency to cleanup? What happened elsewhere? Was there research in this area? How difficult was it to clean up toxic spills? If there were a toxic spill tomorrow, how would it be dealt with? What expertise was available provincially or nationally? Were

any mechanisms in place to encourage the development of this type of expertise? What policies would encourage the development of expertise? For example, should an organization be created to encourage firms to collaborate on this issue, or should a fund or some form of financing be created to develop such expertise?

Environmentalists did raise the question of the availability and use of technology to prevent spills (Reid, FON, August 28, 1979: R-1420-2; Woods, CELA, August 29, 1979: R-1540-3, August 30: R-1140-2,3; Dewees, Sierra Club, November 26, 1979: R-2155-2), but this did not elicit any general discussion of these issues. Some environmental groups suggested that it was possible for industry to use technology to avoid spills, and therefore industry bore more responsibility for a spill. CELA noted that hazardous spills could be prevented by the design of containers, packaging, and vehicles; the determination of timing, the mode, and the route of transportation; and the use of fewer dangerous ingredients in the manufacturing process. Interestingly, the Ontario Solid Waste Management Association suggested in its written brief that specifications for containerization and placarding should be implemented, but this was not taken up by the Committee (Ontario Solid Waste Management Association, Submission, December, 1979).

No Discussion of Causes

There was no discussion concerning the causes of spills, although the Mississauga spill occurred towards the end of the Hearings. Are most spills caused by inadequate structures carrying toxic chemicals, or by the poor maintenance of roads or

railway tracks? Do most spills occur when goods are being transported or do they occur during the process of production? Into what medium are most spills discharged - water, soil or the air? How important are spills from cottages? A definition of the cause of an event and the effects of an event determines how one constructs a procedure to prevent the event recurring. Such a discussion might have affected how the Bill would be constructed.

Future Bias

If a bill is passed and most of the decisions are left to the regulations, and consultation is to occur, it means that the debate continues and an item by item battle occurs. People forget that the bill is passed, and the advantage is shifted to the opponents of the bill. The onus is on the drafters to meet with everyone to clarify the regulations, and this creates opportunities for the same political conflict to continue (Interview, Scott, 1993). It also creates opportunities for those who are consulted to exert influence.

This Act was structured so that a great deal was left to be constructed through the regulations. This permitted the possibility of future bias, and both sides wanted input into the creation of the regulations and notification in the Ontario Gazette (CCPA submission, June 18, 1979; Woods, SCRD, August 30, 1979: R-1045-1). Some business associations wanted a formal mechanism for review and comments during the regulation period, and to ensure that industry would be consulted so that the regulations could be assessed for "technological effectiveness and commercial feasibility" (Chevalier,

CACA, SCRD, August 28, 1979: R-1500-1, 2). Environmentalists wanted an amendment that ensured prior notification and input. The NDP and CELA pointed out that this was the practice of other jurisdictions. In addition, they stated that a paper for the Ontario Royal Commission on the Freedom of Information and Privacy supported the prior presentation for public input, and that there were precedents in Ontario and in the federal area, especially in the environmental field, for regulations to be published and time given for comment (Bryden, SCRD, December 5, 1979: R-940-1; Swaigen, SCRD, December 5, 1979: R-1005-2, 3). The Minister did agree to put a notification of regulations in the Ontario Gazette sixty days before they went into force, but this was not an amendment (Parrott, SCRD, December 5, 1979: R-1000-2, R-1010-1).

Conclusion

Usually the SCRD Hearings are likely to result in only marginal changes in a bill. This was not the case with this Bill. The Minister was under considerable pressure from his caucus and from industry to change the Bill. It is possible that as he had not created the Bill he was less committed to passing it unchanged, and his personality was such that he was amenable to suggestions. The Hearings were therefore unusual in that the Committee was considering a bill that was introduced by the government but opposed by the governing party and supported by the opposition parties. Industrial capitalists had already been able to institute some changes following Second Reading, and they were able to lobby the governing party with considerable force outside the Hearings, especially during the summer recess. This lobbying made the government

committee members more sympathetic to the views of the opponents of the Bill. The Hearings were not reported in the general press, so Environmentalists were not able to address a wider audience to support the Bill, and the structures of the Hearing process underplayed their interests.

Structures and silences helped to organize bias. Structures privileged certain groups, such as industrial capitalists, and not other groups, such as previous victims. Certain issues, such as the availability of technology to prevent spills, the dangers of toxic chemicals, and the concept of "ecological loss", were raised but not pursued, or the discussion focused on the less contentious aspects. A discussion requires several Committee members to comment on a brief, or to ask questions. If a brief is long, not all the points will elicit discussion, so that it requires several briefs to emphasize a point.

There was more discussion over the issues raised by the opponents, as the same issue would be raised repeatedly because there were more of them and they produced more briefs. There were fewer supporters, and each supporter focused on certain aspects: CELA on the legal complications, Pollution Probe on toxic chemicals, the FON on damage to the environment, so there were many details in each presentation, and little repetition. This resulted in some issues being ignored. Policies would be suggested by the supporters, but either they were not taken up and discussed, or if they were taken up by the NDP, they were dismissed by the other members of the Committee, or ignored.

In addition, some issues were not explored further because the persons who could have given the information were not present, such as the victims of spills or those who had participated in previous cleanups. Certain issues, such as the possibility of Band Councils being treated as municipalities and the causes of spills, were not even raised because there was no representative to present them or because those that were present were focusing on other aspects.

The results were a limited defence of the Bill by the government party, a focus on the availability of insurance (which was of interest to industry), and the exclusion of other perspectives and issues. Discussions centred around minor spills, such as farmers' spills of beans and maple syrup, and cottagers' oil spills, not toxic spills, health issues or even environmental issues. The process, therefore, resulted in an emphasis on the interests of the more powerful parties, and through silences or minimal discussion downplayed the interests of the other parties, and thus created a form of bias.

END NOTES

1. During 1980, officials at the ministry met with the representatives of a large number of industry associations, municipal associations, several corporations, and the insurance firms and agents.
2. Murray Gaunt, M.P.P., argued that there was no evidence that large corporations were entering farming (Gaunt, letter, 1979).
3. The Ontario Federation of Agriculture did oppose the Bill during the Panel Hearings in 1985.
4. The Director of Health and Environment of the Union of Ontario Indians was involved with various meetings and did not demand a time to present. In 1983, the Union was involved in discussions regarding whether a fourth category to clean up and receive provincial compensation could be created for Band Councils in the Regulations. The discussion centred around whether Bands were property owning bodies: the ministry arguing that they were; and the Union arguing that they did not hold fee simple, but did exercise control so that they were similar to municipalities (Pellat, memorandum, 1983, interview, Roy, 1993).
5. CELA (Swaigen, letter, 1979a) did write to the Federation of Ontario Cottagers asking them to support the Bill, but they did not present a brief.
6. The Director of its Health and Environment Program stated in a letter to CELA that he would write a letter to the committee stating their concerns. These were centred around the implications the Bill would have in providing authority to Band Councils to intervene in dangerous spills and to spend provincial money to retain a spill quickly. There is no record of this letter (Roy, letter, 1979b).
7. It was not until April 1992 that the NDP government in Ontario issued a list of 21 hazardous substances that were candidates for banning in the province. These included dioxins, furans, mercury, arsenic, PCBs, and several organochlorides found in coke-oven tars. Some of the deleterious effects of these compounds are cancers, the suppression of the immune system, and the creation of hormonal imbalances in wild-life (Mittelstaedt, 1992).
8. This was a struggle at the level of language. Industrial capitalists regarded costs as those that the firm would encounter if the Bill were introduced. Benefits were viewed as those that the ministry would achieve with a lowering of its present costs, and that the victims would receive, as their costs would be alleviated. However, if the present costs to the ministry, the victims and the firm were measured rather than estimated future costs to the firm or estimated future benefits to the ministry then the outcome of the analysis might be different.

9. There was some discussion of chemicals from crop spraying being dispersed by the wind, and liability if the farmer should receive the incorrect mixture of chemicals and apply it to his land. The former would not be a spill, and in any case would be designated as a normal farm practice and be excluded from coverage by the Bill. It is questionable whether the latter would be a spill, and it would be subject to the application of common law.
10. An amendment was passed on December 5, 1979 that stated that the Ministry would have the right to designate the type of people to assist in cleanups (Parrott, SCRD, December 5, 1979: R-1010-1).
11. The requirement of proof of negative health effects is in itself a form of bias (Schrecker, 1984).
12. The Minister of the Environment, Ms. Ruth Grier, announced in April 1992 the establishment of a new department which would work with industries to encourage technologies and processes to prevent pollution. It was stated that in the future the ministry would try to eliminate the production of pollutants rather than attempt to regulate pollutants after they had been produced (Mittelstaedt, 1992).

CHAPTER 6

THE ORGANIZATION OF BIAS: THE STRUGGLE OVER MEANINGS

It should be noted that it is society as a whole that demands that these risks be created. If these risks are not taken, Ontario as we know it, would cease to exist. (Canadian Pacific Submission, June 28, 1979).

Introduction

The struggle for hegemony includes a struggle over whether the prevailing perceptions and meanings should be maintained, or whether they should be changed. Hegemony includes both a class and a national popular dimension. One facet of the dominant hegemony is that the interests of the dominant class are perceived as concomitant with growth and the national interests (Gramsci, 1971: 182, 241). To challenge this facet of hegemony requires those desiring change to question these linkages between capitalist interests and growth and to disarticulate them from the interests of the nation as a whole, or alternatively to replace the class that constitutes the hegemonic class. As the latter is an unlikely event in Canada and most Western countries, it is the former that requires the attention of environmentalists and others desiring change.

The prevailing hegemony in Western capitalist countries prioritizes the needs of productive enterprises in policy making, because economic growth provides the fiscal resources for the state to provide services, and provides employment to maintain

a comfortable lifestyle, and thus retain support for the present system.¹ Thus, the threat of Reed Paper Ltd. to close its Dryden plant in 1979 delayed the pollution control deadline, and in 1985 the Canadian government committed itself to providing \$150 million in direct subsidies to smelter operators for pollution abatement (Schrecker, 1985).

This hegemony also restricts this production and growth to a short time span. For example, if a firm does not make a profit within a specific time frame, it will be forced to declare bankruptcy because the creditors will withdraw support or the bank will recall its loan. Only on rare occasions will the government support a loss-making enterprise for any length of time. National interests are defined as including economic growth, and the factors that create this economic growth and the time frame for this economic growth, are usually defined by capitalists.

There is an alternate viewpoint. It is possible that the national interests could be defined as not necessarily including economic growth or including economic growth over the long term. They could be defined to emphasize quality of life issues. Such a perspective would give priority to the preservation of resources over the exploitation of resources. It would emphasize the prevention of illness through environmental degradation over the disregard of the externalities of production. It would emphasize restraints on market competition and the creation of strict environmental and occupational health and safety legislation, and the development of a broad social safety net.

To achieve the ascendancy of this counter hegemonic perspective requires a strategy that chips away at the perception that economic growth is synonymous with

national interests. Any struggle for change, therefore, occurs not only in the structural realm, but also in the realm of meanings and language. This chapter examines this part of the struggle in the Standing Committee on Resources Development Hearings. It discusses the creation of meanings by the coupling of capitalist interests to national (in this case provincial) interests, the use of prevalent ideas, and the use of language in support of the interests of the opposition. Also, it examines the struggle by environmentalists to disarticulate capitalist interests from the national/provincial interests and to present other ideas and other meanings.

Capitalist Interests as National Interests

Capitalist interests are privileged in the policy-making process, because Western capitalist governments rely on private investment to sustain economic growth to provide employment and to provide finances to support state services. Offe (1984: 151) argues that "the power position of private investors gives them the power to define reality". Those who desire change rarely question the prioritization of economic growth. Throughout the Hearings, the opponents of the Bill attempted to link their opposition to economic growth and to national/provincial interests. Thus, they argued that they represented the public interest:

... the public of Ontario appear to have chosen to continue to have important phases of their economic life conducted by the corporations such as Canadian Pacific and as long as that is so, it lies in the mouths of their representatives to ask that they be fairly dealt with (Canadian Pacific Submission, October 4, 1979).

They related economic growth to societal benefit, and portrayed capitalists as social benefactors, who contributed to the high quality of life and the economic well-being of Canadians, and produced goods for all. For example, the production of chemicals was stated to be beneficial, as chemicals controlled diseases, maintained a high standard of public health, and preserved natural resources in agriculture and forestry (Chevalier, CACA, SCRD, August 28, 1979: R-1445-2). The CMA, the OPA, and others maintained that society benefitted from production. Therefore, the public should share the risks of spills during the production and the transportation of goods, and should shoulder the burden of the costs of spills (Swenor, CMA, SCRD, October 4, 1979: R-1545-3). Cooper (OPA, SCRD, June 14, 1979: R-2205-1) stated:

It's not a question of a marketer creating a risk for his sole benefit, society also benefits, and hence society itself should expect to bear some portion of the risk of the harm, ...

The opposition acknowledged that risk was inherent to capitalism, but argued that the inherence of the risks dealt with by the Bill did not arise from the activities of any person or company, but out of the decisions society had made regarding its form of organization and lifestyle. Society had chosen the capitalist system, which had given it its present level of technological development and comfort, so it had to accept the trade-offs (MacDonald, CCPA, SCRD, June 18, 1979: R-2025-2; Band, CN, SCRD, October 4, 1979: R-1445-1,2). The opponents also used hyperbole. For example, they argued that the complete elimination of risk would involve inconvenient and expensive procedures, such as closing major highways to let tank trucks proceed with

a police escort (MacDonald, CCPA, SCRD, June 18, 1979: R-2025-2, R-2030-1 & R-2030-2).

Repetition of an argument helps to reinforce it. This argument, that as society wanted and benefitted from certain goods it should bear the risks and pay the costs, was repeated several times by different business associations. Its repetition helped to establish it as a factor to be considered.

The Use of Prevalent Ideas

Capitalist society is supported by a cluster of everyday beliefs that help to maintain the system. The opposition used some of these ideas to support its position. It used the concept of property, the concept of equal justice under a neutral law, and the strand of neo-conservative ideology that argues that government bureaucracy hinders the productive enterprise, to promote its case.

The Concept of Property

The concept of property appeared throughout the discussions. The opponents used it as "real property" to oppose volunteers trespassing on land. They used it as an intellectual property right to oppose volunteers participating in cleanups, which might mean the conveyance and loss of proprietary information (CMCS Submission, June 18, 1979: 10; CCPA Submission, June 18, 1979: 14). Property was used as a relation. The supporters argued that ownership of a pollutant should not impose special obligations (CCPA Submission, June 18, 1979: 16).²

The most effective use of the concept of property was its use as private property. In this guise, it was treated as a homogeneous entity that could not be subdivided into different types other than that of the spiller and the victim. Thus, all types of property of the spillers should be treated in the same way. This enabled the opposition to imply that the government was not playing its role as a protector of private property. The opposition could then emphasize that the victims of the legislation would be homeowners, cottagers, farmers, and small business, and not necessarily rich or large business.³ Many examples given by industrial capitalists were oil spills from oil tanks in cottages (Huxley, CMA, SCRD, October 10, 1979: R-1525-2 - R-1535-2; Swenor, CMA, SCRD, October 10, 1979: R-1545-2,3), and one of their supporters on the Committee objected to the reference by CELA to industry and stated that they were interested in the ordinary citizen (Taylor, SCRD, August 30, 1979: R-1020-1). This perception of property was not questioned by the environmentalists, and they did not raise the question of the different effects of spills for different victims, which might have enhanced the different types of spills by different property owners.

Equal Justice Under A Neutral Law

One prop of capitalism is the perception that there exists equality under the law. This ignores the unequal society in which the law operates. As Balbus (1977: 577) notes "... the systematic application of an equal scale to systematically unequal individuals necessarily tends to reinforce systemic inequalities." The weight of power favours capitalists within the courts and they would be unwilling to lose this advantage.

The opponents used this assumption of equality before the law to argue that the Bill deviated from the concept of justice and legal policy in Ontario (Weldon, CCPA, SCRD, October 4, 1979: R-1230-2; Band, CN, SCRD, October 4, 1979: R-1440-1). They were guilty because of ownership and lacked recourse to the courts. They claimed that the Bill was not "fair" and discriminated against them, and quoted legal experts to support their case. They argued that even if a manufacturer had done everything he could be expected to do, and others had caused the spill, he would have to pay for cleanup. There was no defence of due diligence, acts of war, Acts of God, or third parties. Also, there was no provision for an appeal against unreasonable or extreme orders given by the Minister.

Neo-Conservative Ideology

The opponents traded on the growing support for neo-Conservative ideology. They implied that in an era in which the government was cutting back, the Bill would grant the bureaucracy immense powers, and the manufacturers and transporters would be its future victims (Atmore, OTA, SCRD, June 13, 1979: R-1530-1; Weldon, CCPA, SCRD, June 18, 1979: R-2100-1; CP Submission, June 28, 1979; Chevalier, CACA, SCRD, August 28, 1979: R-1455-2; SCRD, October 10, 1979: R-1440-1 - R-1520-2). They argued that they were already over-regulated and suffering from other legislation:

There has been increasing concern expressed publicly by the business community in the last few years about over-regulation and the cost of regulation. As you're well aware, businessmen have been rising on platforms all over the country complaining about this kind of thing (Weldon, CCPA, SCRD, October 4, 1979: R-1220-1).

Weldon, CCPA, suggested that the government was using "a 10-ton sledgehammer to kill a mosquito", as spill cases that were not cleaned up and resulted in uncompensated victims were rare. The opponents also suggested solutions, such as compulsory insurance and an increase in the sales tax, that it knew a Conservative government could not accept, because they were antithetical to its ideology (Cooper, OPA, SCRD, June 14, 1979: R-2205-2, June 21, 1979: R-2115-1; OPA submission, October 1979).

Environmental Interests as National Interests

To construct a different viewpoint, environmentalists had to sever the articulation of industry's interests with national/provincial interests, and to articulate environmental interests with national/provincial interests. They did this by questioning industry's claims, by arguing that environmental interests were a part of economic interests, by using the ideology of a free market, by explaining the justice of the concept that the polluter should pay, and by emphasizing the health problems of spills.

Questioning the Industry's Claims

Environmentalists questioned the opponents' argument that the Bill would be disastrous for the economy of Ontario. CELA (SCRD, August 29, 1979: R-1535-2) argued that industry had produced no evidence regarding the effects on its economic health. It noted that industry had focused the discussions on extreme and improbable situations, instead of making the data available to compare with the 1,000 spills reported each year in Ontario. Regarding insurance, even the insurance industry did not know to

what extent it would be available (Woods, CELA, SCRD, August 29, 1979: R-1535-3, R-1540-1).

Environmentalists also attempted to reconstruct the definition of economic interests. They defined them as broader than commercial interests, by emphasizing that spills were an economic problem for the rest of society. They reiterated that spills were not a minor problem, and they were costly to the government and to the people involved. Toxic spills, as opposed to oil spills, were expensive and difficult to clean up. Many spills resulted in large legal costs for ordinary people, or for the government, during the legal process of establishing liability.

Ideology of the Market

The supporters also used the ideology of the market to argue their case. They argued that if capitalism worked there should be no problem, and if there were a problem the system should be changed. The free enterprise economy would solve the problem of the lack of insurance, as the market responded to new demands, and historically the insurance industry had responded to new needs (Reid, FON, SCRD, June 13, 1979: R-1630-2; Woods, CELA, August 29, 1979: R-1535-3, R-1540-1). CELA argued that if the Act proved to be an incentive for the prevention of spills, the number of spills would decrease. Thus, whether premiums and coverage would rise or fall would depend upon experience and the market. It implied that the Bill would result in the privatization of the policing of spills with the insurance industry performing the police function.

Environmentalists also used the idea that risk is inherent to capitalism, and spills were an additional risk that capitalists took. Reid (FON, SCRD, June 13, 1979: R-1620-3) argued that they were a normal cost of doing business, and as business made a profit it should bear the risks. CELA suggested that if the market did not work there were alternatives that would deal with the industry's objections. These were mandatory liability insurance, the requirement that no fault liability insurance for finished products should be the responsibility of the manufacturer not the individual dealer or trucker, or the establishment of a private industry fund (Woods, CELA, SCRD, August 29, 1979: R-1540-1). Such alternatives were unlikely to find favour with industry or government.

Concept of Justice

All the environmental groups focused on the concept that the polluter should pay - in fact, the FON suggested that this was an Ontario tradition (Reid, SCRD June 13, 1979: R-1620-3). They dismissed the suggestion that the Bill was unjust, and argued that it reversed an injustice. It was more just that the person who could have prevented the spill would pay for its cleanup, and not the government or the innocent victim (Deweese, Sierra Club, SCRD, November 26, 1979: R-2155-2; Willms, CNF, SCRD, November 26, 1979: R-2210-2). It was also less just to transfer liability from small operators to small innocent victims (Sierra Club Submission, October 1979). Both the environmentalists and the NDP emphasized that the manufacturers had a choice regarding which product they used, whereas the public had no influence on this decision

and therefore no responsibility for a spill (CELA Submission, August 29, 1979: 6; Sierra Club Submission, October 5, 1979: 2; Bryden, SCRD, June 28, 1979: R-1515-2).

Concept of Health

Some environmentalists linked the production of toxins to negative effects on the health of society. Toxins were dangerous and in large quantities throughout the province. Glenn suggested that the Minister had been encouraged to introduce the Bill because of a popular concern regarding toxins, and

"... because the propagation, use, transport and disposal of hazardous chemicals and chemical waste is the most direct threat to human health industrial nations face today." (Glenn, Pollution Probe, August 29, 1979: R-1520-2)

He argued that little was known about the potential and adverse effects of these chemicals, as few were tested adequately and only a small number was adequately regulated. He noted that approximately 100,000 industrial chemicals were in use, and 1,000 more were coming on stream annually (Glenn, SCRD, August 29, 1979: R-1520-3).

Environmentalists suggested that the experts were concerned about the effects of toxic chemicals. The FON (Reid, SCRD, June 13, 1979: R-1620-2, 3) noted that the Great Lakes Water Quality Board Report in 1978 had reported the presence of 2,800 toxic chemicals in the Great Lakes Basin. It had recommended that an inventory should be conducted and the health risks evaluated. The former Canadian Chairman of the International Joint Commission had warned that there was a chemical time bomb in the Great Lakes, and that immediate action was necessary. Pollution Probe quoted Dr.

Gus Speth, Chairman of the U.S. Toxic Substances Strategy Committee, who had argued that man-made toxic chemicals were a significant source of death and disease in the United States, and that 100,000 workers were believed to die each year because of physical and chemical hazards (Glenn, SCRD, August 29, 1979: R-1520-3).

Language

Language is a method of struggle through the use of binary oppositions and metaphors to denote specific meanings (Richardson et al., 1993). It is also a system through which perceptions are organized, so it is a terrain of struggle over whose perceptions will dominate, and which terms will be used in the future. The contenders struggled over metaphors and terms that held certain implications and meanings. In addition, there was friction over legal language because it would determine the foundation of future struggles.

The Use of Language as a Tool: binary oppositions and metaphors

Language is used to organize systems of thought. One way in which this is done is through the use of binary oppositions. Binary oppositions place things in a hierarchy. The first side is always superior to the other. The opponents of the Bill suggested that jobs/investment were juxtaposed against environment/cleanup (CN submission, June 18, 1979: 11; CMCS Submission, June 18, 1979: 5; CCPA Submission, June 18, 1979: 9; CSEA Submission, August 10, 1979: 5), and benefits to society versus the harm of spills (CCPA submission, June 18, 1979: 5-7; CP Submission,

June 28, 1979: 2; CMA Submission, October 4, 1979: 2). They also posited the traditional view of costs versus benefits. The costs that should be examined were the costs to the firm and the bureaucracy in introducing the Bill whereas the benefits were the reduction in costs to the ministry or the victims (Weldon, CCPA, SCRD June 18, 1979: R-2120-2; R-2125-1; Cooper, OPA, SCRD June 21, 1979: R-2100-2).

The supporters were less adept at using binary oppositions. They tried to raise fears regarding toxins and health, but they did not juxtapose them against the profits of the chemical companies, and they did not produce details regarding environmental damage by large companies in Ontario and juxtapose them against their profits. They did, however, suggest an alteration in the traditional view of cost/benefit analysis so that the cost side of the equation should include the cost to society of previous spills (Bryden, SCRD, June 18, 1979: R-2205-3, R-2210-1; Makarchuk, SCRD, June 21, 1979: R-2120-2; R-2125-2).

Metaphors were used to change the meanings of various words, or to expand the meanings to include other categories. The opposition expanded the intent of the word "victim". It portrayed large and small businesses as "victims", because of the economic costs that they would be expected to assume, and because insurance was not available or was too costly for absolute liability. It argued that there were two "innocent" parties, but they were not treated equally. One, the owner or controller of the product, was blamed, whereas the other was compensated (Band, CN, SCRD, October 4, 1979: R-1435-3, R-1440-1). New "victims" would be created because small business would be forced to accept new risks and liabilities with the passage of the title

to the goods earlier in the marketing chain. Large business was also a "victim", because it was assumed that industry had the "deepest pocket" and could pass the costs on to the consumer, whereas this was not always possible as other factors also affected prices (Cooper, OPA, SCRD, June 14, 1979: R-2205-2; Chevalier, CMCS, SCRD, June 21, 1979: R-2210-2). If a fund were created, responsible companies would also be "victims", because they would pay for the acts or defaults of others (Macdonald, CCPA, SCRD, June 18, 1979: R-2035-2).

CELA fought over the definition of a victim by linking "innocent" to "victim". It argued that business was not a victim because it could prevent spills, and those who were not the owners or carriers were the "innocent victims". Traditionally, if two "innocent" people have to suffer, the one to suffer the most should be the one who caused the harm. They may be "innocent" in that neither was negligent, but the "innocent victim's" position was not equal to that of the manufacturer or the carrier, who could prevent the spill. It argued that new victims would not be created, because under the present common law system fault only applied in the case of negligence. Liability for pollution could be granted based on trespass, riparian rights, nuisance, negligence, and strict liability, as in Rylands v. Fletcher (CELA, SCRD, August 29, 1979: R-1540-1, 2).

There was a struggle over whether the Bill fitted in with Canadian legal traditions. The opponents defined it as a radical bill, which was a "major change in the basic law of Ontario" (CCPA, SCRD, June 18, 1979: R-2030-2). The OPA argued that "absolute liability is most extraordinary, it goes further than any Canadian or provincial

law" (OPA, SCRD, June 21, 1979: R-2050-2). It was suggested that "This proposed rule is at variance with the concepts of justice and legal policy in Ontario" (CMCS, SCRD, June 21, 1979: R-2210-1); and that it was "unprecedented in its severity" (CCPA, SCRD, June 18, 1979: R-2020-2).

The environmentalists suggested that there was nothing unusual about this Bill, because absolute liability already existed in Canadian law. Willms (CNF, SCRD, November 26, 1979: R-2210-2) argued that other legislation did exist that required that circumstances beyond the everyday should be considered, such as the Gasoline Handling Act, which set out standards for gasoline storage where there was a possibility of natural disaster. The supporters suggested that what the opposition was recommending was radical. The opponents were proposing weakening the present liability for cleanup, so that in certain situations someone using, owning, storing or transporting hazardous substances would have no responsibility (Willms, CNF, SCRD, November 26, 1979: R-2210-2). CELA (Woods, CELA, SCRD, August 29, 1979: R-1535-3, R-1540-1) also suggested that making liability dependent on insurance was a radical and an unprecedented departure from the common law. For example, liability for torts under the present law did not depend on insurance.

Both sides used different metaphors. Whereas the opposition used the words "public" or "society", environmentalists substituted the words "taxpayers" and "consumers". The use of the word "taxpayers" instead of "public" symbolizes the transfer of costs from business to people, whereas "public" is a vague entity. Dewees (Sierra Club, SCRD, November 26, 1979: R-2150-3, R-2155-1) questioned this transfer

of costs and used the word "taxpayer" several times in his presentation. He argued that the "taxpayers" should not have to pay for spills when they could not prevent their occurrence. The assumption of costs by the "taxpayers" would remove all incentives to the owner and possessor, which was vital when "the stuff" was particularly hazardous. If no-one were clearly at fault "the taxpayer" would have to pay, but there was nothing a "taxpayer" could do to avoid spills.

Supporters of the Bill also attempted to undermine the metaphor of "society" (and by implication "national" interests) by substituting "the consumer of the product". CELA (Woods, SCRD, August 29, 1979: R-1545-1) pointed out that it was a specific "consumer" that benefitted from these products and not the public. It argued that members of the public could choose to share the costs by buying the products and paying a higher price for them, but they should not be compelled to expose their assets and health to risk to support a particular industry.

The phrase "Acts of God" implies a lack of fault and something that could not be prevented, and was used by the opponents to argue that spills were often faultless. The supporters suggested that the damage consequent upon an "Act of God" could be avoided by spending money on prevention, and by taking certain precautions, such as improving the packaging or not transporting the materials in dangerous weather conditions (Reid, FON, SCRD, June 13, 1979: R-1620-3; Sierra Club Submission, October 1979). They suggested that a different design could have prevented many spills from occurring. For example, a tanker truck could be designed so that a spill would not occur in an accident, as trucks in the nuclear industry were designed to withstand 100

mile per hour collisions. (Reid, FON, SCRD, June 13, 1979: R-1630-1, August 28, 1979: R-1420-2, R-1425-1; Woods, CELA, SCRD, August 30, 1979: R-1140-2).

Struggle Over Legal Language

Legal language is a mechanism by which the intentions of government are translated into practice. The nuances of legal language are important, because they can be closed or open, and limit or expand the potential for future struggles and opportunities for power to be exercised. Legal language lays out a system through which legislation is interpreted, and demarcates the boundaries of this system. It is therefore an area of struggle for it determines the rules for future disputes.

The opponents and supporters contested the use of certain words and their meanings, especially those that would define the degree of cleanup that would be required. The opponents disputed the use of the words "practicable" and "restoration". "Practicable" it was argued meant whatever was possible. This was unrealistic, as it implied anything that could be achieved without any tests of what was appropriate, feasible, or reasonable (Snelgrove, CMA, SCRD, June 14, 1979: R-2030-2, R-2035-1; Weldon, CCPA, SCRD, June 18, 1979: R-2040-2, R-2045-1, R-2045-2; Leigh, OPA, SCRD, June 21, 1979: R-2155-1; Chevalier, CMCS, SCRD, June 21, 1979: R-2220-1 & 2; Chevalier, CACA, SCRD, August 28, 1979: R-1455-2). The Deputy Minister argued that "reasonable", which was preferred by industry, was one of the most used words in court, and

I think you can sum up "reasonable" by saying that it's a legal draughtsman's cop-out, the bane of the courts, and a lawyers's delight (Scott, SCRD, June 21, 1979: R-2155).

It would, therefore, provide the opening for future contests to avoid payment of costs and compensation.

The opponents also argued that "restoration" implied that the environment had to be restored to the condition it was in prior to the spill. This took no account of the financial costs, the natural resources, or that there might be situations where it might be better not to clean up. It preferred "reclaim" (Snelgrove, CMA, SCRD, June 14, 1979: R-2030-1; Weldon, CCPA, SCRD, June 18, 1979: R-2045-2, R-2045-3, R-2050-1; Chevalier, CMCS, SCRD, June 21, 1979: R-2220-2; Chevalier, CACA, SCRD, August 28, 1979: R-1455-2).

Environmentalists were also concerned about the language of the Bill. They wanted language that would require the utmost efforts to clean up, and would not be detrimental to the claims of victims of spills in the courts. They, therefore, took the opposite position from that of the opponents regarding most words. In their opinion "practicable" was not defined and the degree of restoration was not specified. This created opportunities for spillers to avoid rectifying the damage they had caused. The FON, (Reid, FON, SCRD, August 28, 1979: R-1420-1) argued that "to do everything practicable" should be defined as "to do everything that is physically and technically able to be done". CELA (Woods, CELA, SCRD, August 30, 1979: R-1145-2, 3,) argued that "practicable" meant using the best available technology to accomplish the task, and that did take account of costs.

CELA (Woods, CELA, SCRD, August 30, 1979: R-1040-1, 2) wanted the word "direct" to be omitted. It thought that its inclusion would exclude claims for compensation for injuries caused by a spill, but not considered direct injuries. It gave the example of a government ban on fishing, which could result in the loss of income to fishermen, or employment in tourism, but could be claimed to be an indirect loss caused by the ban.⁴

Conclusion

In sum, the conflict over the "Spills" Bill can be viewed from several dimensions. It can be examined at the level of manifest power in which the resources and the arguments of the actors can be investigated. It can be explored through the ways in which power is maintained through the exclusion of people or issues to create a form of bias. This chapter examined power at the level of language and meanings, and the ways in which they were employed to support the arguments. The opponents of the Bill articulated economic interests to provincial interests. They argued that economic production provided societal benefits, and therefore the cost of spills should not be internalized, but should be paid for by society through the mechanisms of government. They also suggested that the Bill was contrary to Canadian traditions and prevalent ideas. In addition, they used the lack of differentiation according to different owners, uses, or types of property to argue that the Bill would create hardships for the weaker members of the business community as well as individuals; and contradictorily they used the lack

of differentiation regarding the effects of spills for different owners to emphasize minor spills⁵.

The supporters of the Bill failed to dislodge the prioritization of industry's interests. They used the ideology of the market and risk in their arguments, and attempted to disarticulate industrial capitalists' interests from those of the nation/province by refuting the opposition's claims to societal benefit. However, no environmental group was radical enough to argue that if society benefits from the production and transportation of toxic chemicals and should therefore bear the costs of spills, it should share the profits from the production of hazardous goods. On the other hand, environmentalists did emphasize the relationship of the production of toxins to ill health and to damage to the environment, but they failed to mobilize interest around health or the environment. They did recognize that the Bill would have different effects on different sizes of business and would prove more of an incentive to large industry to focus on prevention and to substitute less harmful material:

If we are dealing with a farmer or with a service station operator, where a major spill might be a once-in-a-lifetime sort of thing, then surely the incentive is minimal. But when we are dealing with a Shell Oil or Dow, or other major companies in the business of large volume, then assigning the true costs of the spill to the industry is going to act as an incentive over time to reduce the number of spills, and therefore to reduce the total cost (Reid, FON, SCRD, August 28, 1979: R-1415-2).

However, they did not query whether different types of property owners should be treated in the same way, neither did they discuss the different types of victims and emphasize the different effects of different spills.

Language was used as a tool of persuasion and was an object of struggle. "Victims" were the recipients of spills or they included the blameless spiller. Spills that were not paid for by the spiller were covered by the "public" or the "taxpayer", and "society" or the "consumer" benefitted from the production of toxic chemicals. There was a struggle over the meanings of the legal language of the Bill, which would provide the rules for future struggles.

Environmentalists failed to develop a concern regarding health, and they accepted the prevailing perception of property. They were put in the position of defending the Bill because the government did not construct a strong defence, which resulted in their fighting on the terrain chosen by industry. The opposition shifted the focus to the mechanisms of the application of the Bill, rather than the underlying concepts, with the aid of silences and the use of accepted ideas and metaphors. This stressed the difficulties for industry, and their concerns became the focus for discussion.

END NOTES

1. **Kenneth Gibbons argues that the argument that environmental concerns must give way to economic growth has two roots: profit and jobs. He suggests that:**

The paradox of environmentalism is that the political-economic ideologies that it confronts share a similar interest in growth, regardless of the reasons for desiring such growth (Gibbons, 1985).
2. **CELA argued that the legal relation of ownership, which was designated by title, did not indicate responsibility, and, therefore, the actual polluter would not bear the responsibility for the spill (CELA Submission, August 29, 1979: 23-4).**
3. **The one exception was the property of farmers. Farmers were granted the exemption of normal farm practices, and a lower rate at which they could claim from the Environmental Compensation Board. In other respects the "Spills Bill" still applied to them.**
4. **See Note 1, Chapter 5.**
5. **If a spill would create hardship, such as bankruptcy, for the small business community, it was unlikely to be of a minor nature.**

PART III: THE MIDDLE YEARS

CHAPTER 7

THE MIDDLE YEARS: THE BALANCE OF POLITICAL POWER

Introduction

After the election in March 1981, the new majority Conservative government proceeded slowly towards proclamation of the Bill. The new Minister, Keith Norton, did state that the draft regulations would shortly be submitted to parliament (Norton, letter, 1981a), and they were circulated to the Chairman of the Standing Committee on Resources Development and the two opposition critics (Norton, letters, 1982a; 1982b). Still, the Bill was not proclaimed. Two factors were important in influencing this lack of proclamation. One was the balance of political power, which will be considered in this chapter. The other was the insurance industry, which will be discussed in the next chapter.

With a majority government, the balance of political power favoured the opponents of the Bill, and this chapter will examine how industrial capitalists influenced the government through their access to the politicians and the bureaucracy. Also, it will consider their use of resources to persuade the government that the Bill was "a bad bill", to create an alternative, and to assemble a wide range of social forces to oppose the Bill. It will argue that the opponents failed because structures imposed constraints, spills

continued to occur, and the balance of political power changed. It will suggest that the law is a structural constraint that limits the power of both governments and capitalists, as it imposes rules, which in the interest of the maintenance of hegemony, they cannot disregard, even in minor matters. It will further suggest that industrial capital failed to consider that spills will continue to occur and that politicians have to deal with the political ramifications of these spills, and that it also failed to foresee that the balance of power is changeable.

The Passage of the Bill and the Construction of Regulations

During the process of the Bill through the Hearings, it received several amendments. Absolute liability for cleanup was removed in the event of war, insurrection, terrorism, or from events that were due to a natural phenomenon or to the actions of a third party over whom the owner or controller had no control. Strict liability was to apply regarding the compensation of victims from a spill; and polluters could claim that they had taken all reasonable steps to prevent a spill. A Compensation Fund was to be created and supported out of the consolidated revenue fund. It would compensate over a certain level of costs and would handle certain situations where the polluter could not be found. Neither side had won. Environmentalists viewed the Bill as a watered down version of the original intent. Industry regarded the Bill as draconian as it was still liable for cleanup.

The accident in Mississauga increased the pressure on the government to pass a bill concerned with spills. This accident involved the evacuation of approximately

one quarter of a million people and could have been a major disaster. Again it involved Canadian Pacific. It raised new concerns regarding the requirement that residents sign a waiver before they received financial help for out-of-pocket expenses; the problems of obtaining legal advice; the lack of the ability to pursue class actions; the non-acceptance of liability by CP and the role of the insurance companies in this decision. The accident served to highlight the necessity for legislation in this area and to exert pressure not to delay the Bill any longer in the committee stage. It is possible to speculate that if the federal government had not introduced Bill C-25, the Transportation of Dangerous Goods in November 1979, which enforced consistent regulations regarding the transportation of hazardous goods, the pressure would have intensified to demand a more stringent act and early proclamation.¹

The Bill was eventually passed on December 11, 1979. Although the environmentalists and the NDP argued that the Bill had been "radically changed" in the past eight months, they reluctantly supported it to get it passed.

Mr. Speaker, I hope the bill will prove to be a useful addition to our environmental legislation; for that reason I will vote for third reading, but I hope that it is not another piece of window dressing like the Environmental Assessment Act (Bryden, Hansard, December 11, 1979: 5379).

Many factors were left to be decided by the regulatory process. This created the opportunity for industrial capitalists to fight on another front to change the Bill more to their satisfaction, or even to prevent its proclamation. Fears of delays in its proclamation had been expressed by not only environmentalists but also members of the opposition parties. Mr. Gaunt, an MPP for the Liberal Party, at the second reading

of the Bill stated that his fear was "of a very powerful lobby moving in on the minister's office after royal assent or after committee hearings" (Hansard, May 15, 1979). No date was set for the proclamation and the fears of the supporters of the Bill were to be justified, as it was six years before a panel was formed to examine the Regulations.

The next stage in the passage of the Bill was to draft the regulations. This was more difficult than the supporters of the Bill had envisaged. Initially, the process proceeded smoothly.² The bureaucrats consulted the insurance industry and the industries and business associations that had attended the Hearings. They also consulted industries and associations that had not submitted briefs to the Committee, such as the Ontario Mining Association and the Ontario Federation of Agriculture. The ministry also conferred with various government departments³ and the Municipal Associations.

The principles for the regulations were constructed. They were designed so that exemptions for spills limited the scope of the legislation, and out of province compensation was limited to those jurisdictions with reciprocal legislation. They encouraged adequate insurance coverage without imposing mandatory insurance: no compensation was to be available for the first \$500,000.00 and only a few costs above this limit would be eligible for compensation; and firms with assets over \$1,000,000.00 would not be eligible for compensation (Scott, letter, 1980). Administrative procedures were constructed: persons from the district offices of the Ministry of Natural Resources (MNR) were to be designated to be responsible for organizing the cleanup process; procedures for handling the claims through the Ministry of Consumer and Commercial Relations (MCCR) had been suggested; and a booklet, Accidents Happen "Spills" Bill

24, had been produced (Symons, memorandum, 1980; Mulvaney, memorandum, 1980; O'Donnell, letter, 1980). However, with the election of a Progressive Conservative majority government, the balance of political power had changed.

Political Power

Political power is rarely static. It is subject to various influences. The extent that the interests of various social forces are represented in political parties, especially the party in power, will affect the degree of political power that they possess. Another variable is their ability to gain access to the bureaucracy so that they can present their opinions. Other factors are the degree of organizational resources among the various fractions of social forces, their ability to form alliances both within the social force and externally, the ability of a particular social force to develop a specific world view and to use the media to promote this perspective. In addition, structures may aid or constrain the goals of a social force, and unpredictable events can create problems or alternatively assist in the promotion of its perspective.

Access to Political Parties

The interests of capital are granted a privileged position in political parties, because of capital's centrality in the investment, production and finance process (Lindblom, 1977; Wolfe, 1989: 98). This position, which is reflected in the interaction between the state and capital, is seldom open to public scrutiny (Lindblom, 1977; Schrecker, 1984). Even social democratic parties cannot ignore the power of capital, but

its influence is enhanced when conservative parties have a majority position in the legislature. As noted in the previous chapter, prior to the election industrial capitalists had access to caucus and the cabinet. With a change to a majority of 70 seats for the Progressive Conservative government in 1981, the PCs were less influenced by pressure from the opposition parties and the environmental movement. The poor state of the economy also encouraged the government to be more responsive to pressure from industry, for spills are a by-product of economic activity, which the government wished to encourage.

The Ministers of the Environment between 1981 and 1985 were sympathetic to industry. Keith Norton was sensitive to the particular problems of the chemical companies (Elston, letter, 1983), and was supportive of the position of industrial capital in general. Murray Elston (letter, 1983) in a letter to CELA noted that:

... it certainly causes me great concerns when the Minister of the Environment for Ontario stands in his place in the House and delivers statements which sound like they have been taken from presentations from chemical companies.....That same statement almost word for word, was delivered to us by two representatives of the Dow Chemical Company...

Norton also argued that all liabilities did not fall into the categories of absolute and strict liability, and that the provision of insurance was crucial in the drafting of the regulations (Norton, letter, 1983). A later Minister, Andy Brandt, also, expressed concern regarding the impact of absolute liability and the provision of adequate insurance (Hansard, March 22, 1984; Toronto Star, August 15/3, 1985). His interests were the less contentious issues of the provision of potable water, and of pollution from sewage disposal (Interview, Brandt, 1993), possibly because he had a background in municipal politics.

Although capitalists have a privileged position in the policy process, governments will respond to political events or try to avoid political problems. Despite consultations with industry regarding the principles of the regulations, and extensive lobbying by the CMA, the government was reluctant to change the legislation in 1981. The Mississauga spill was too recent. The Premier, Bill Davis, in a letter to the CMA stated:

"I do not feel that it would be appropriate to give consideration *at this time* to changing the substance of the legislation, particularly when it is, I believe, one of the most progressive attempts by any jurisdiction in the world to resolve the different interests of the environment, the public, and industry in meeting a situation so dramatically illustrated by the recent spill in Mississauga."(my italics) (Cited in Norton, letter, 1981b).

By 1983 this position had changed, and there were indications that the government was considering ways in which the legislation could be altered.

Environmental issues are not considered to be related to the production process, and none of the established political parties claimed to prioritize environmental interests. This can be both an advantage and a disadvantage. Legislation does affect the environment, and environmentalists need political representatives to support their position in the legislature. Lack of direct representation may mean that only opposition parties take up their cause, and that an issue may be dropped when, or if, a party attains power, especially if the issue is detrimental to the productive process, and the interests of either capital or labour. Yet, it does mean that all parties when in opposition are open to considering environmental issues, and to promoting such interests in the legislature.

Environmentalists do, therefore, have channels of communication into the Legislature, but they are minimal when compared with those of capital and labour. They

receive information from the opposition parties, and they contribute information to these parties. These links may be retained after a party has achieved power. The party may be won over to the environmentalists' position, and even if it does not wholly support their cause, the stand it took in opposition may not be easily dismissed. Also, there are particular conjunctures when environmental issues are granted a more central position by governments, as was to occur in Ontario in 1985.

CELA's relationship with the Minister was strained under the new majority government. For example, on one occasion, the Minister, Keith Norton, accused one of CELA's lawyers of a combative tone in her letter, and resented the "insinuation of inaction on the drafting of the regulations", and the allegation of "negotiations behind closed doors" (Norton, letter, 1982a, 1982b). CELA was kept informed by the opposition parties. They sent it copies of the draft regulations, although the ministry did eventually send it a copy. Also the opposition parties notified it about the lobbying tactics of industry and the questions that would be asked in the Legislature (Vigod, letter, 1982; Elston, letter, 1983).

Access to the Bureaucracy

Another determinant of power is the ability to gain access to the bureaucracy. Schrecker (1984: 90) notes that at the federal level the Department of Environment's policy was to support broad "consultation" with industry, but only "commentary" by environmental groups concerning proposed regulations. This also applied at the provincial level, where the bureaucrats actively sought the opinions of

industry. In the initial process of constructing the regulations, the ministry had meetings with several sectors of industry, and consulted 25 trade associations and several individual industries. This dialogue with industry was to continue for several years (Industry Task Force Proposal, 1983: 2). In 1983, the officials at the MOE and the CMA met several times, and the CMA was given copies of the report of Peter Armour, the ministry's private insurance consultant. Later, industry was consulted regarding the possibility of changing the Bill through the regulations.

Although industrial capitalists did not realize it at the time, their actions did worry the bureaucrats (Interview, Wood, 1993). The bureaucrats were concerned that the Bill would result in changes to commercial practices, and that title to property would be passed at the plant gates from the manufacturer to the carrier, the owner of a small business, or a farmer to avoid liability under the Act. To clarify this situation, the ministry had discussions with both Dow and CIL regarding their practices in relation to chlorine contracts, and was reassured that the present practices would continue. With Dow the transfer of title to chlorine occurred at the place of shipment; with CIL at the place of delivery (Scott, memorandum, 1980; Weldon, letter, 1980). In addition, Dow vehemently denied that it was spearheading a drive to persuade chemical companies to transfer title at the plant (Weldon, letter, 1980). As Dow retained title in only about 5% of their contracts, any change was unlikely to make a huge difference to the firm (Weldon, letter, 1980b). However, the ministry was sufficiently concerned to suggest to the Municipal Engineers Association that it canvass its members for their experiences

and any recent changes in industrial practices, and decided to watch the situation (Scott, memorandum, 1980).

The bureaucrats were probably correct to be concerned about the transfer of ownership, and other matters. In 1983, several prestigious law firms (Campbell, Godfrey & Lewtas, letter, 1983; Blake, Cassels & Graydon, letter, 1983; Osler, Hoskins & Harcourt, letter, 1983; McCarthy & McCarthy, letter, 1983a) warned various industries that the Bill drastically increased civil liability for environmental impairment, and granted rights of compensation to persons not previously so entitled, and that defences in common law would be eliminated with respect to the cost of preventing, eliminating and ameliorating adverse effects of a spill. For example, Blake, Cassels & Graydon, (letter, 1983) stated that:

... the duties obligations and liabilities imposed under Part IX of the Act extend significantly beyond those duties, obligations and liabilities presently contained in those Ontario statutes and regulations which are directed towards environmental impairment and protection.

Another law firm advised its clients that sales should occur "at the factory door", that potential pollutants should not be disposed of on the firm's lands, and that if pollutants were on the firm's lands the land should be sold, transferred to dummy corporations or the pollutants should be located and recovered. Also when lands were purchased, the vendor should agree to indemnify the firm with respect to any liability arising out of the Act⁴ (McCarthy & McCarthy, letter, 1983a). The opinions of the law firms were passed to the ministry, and these, and the proposals of the Industry Task Force, probably encouraged the ministry to consider modifying the Bill. Again industry was consulted

and obtained opinions from its lawyers concerning the feasibility of the proposed modifications (Blake, Cassels & Graydon, letters, 1984 & 1985).

Environmentalists did not meet with the bureaucracy. They complained that they were excluded from the process of constructing the regulations, and that the process of publishing the regulations in the Ontario Gazette, as promised by Dr. Parrott, was not being followed (Norton, letter, 1981b; Vigod, letter, 1982; Norton letters, 1982a, 1982b). These concerns were intensified in late 1983 when there were indications that the Bill would be going to the Cabinet for reconsideration, because of the lobbying by the CMA and other groups (Vigod, letter, 1983b). Also, as Dr. Landis was no longer the General Counsel, the support for their position from the upper levels of the bureaucracy was reduced (Interview, Huxley, 1991).

Industry's Resources

Organizational Resources

Resource mobilization theorists (McCarthy & Zald, 1977) have highlighted the importance of resources in the success or failure of formal and informal organizations. Industrial capital did have considerable organizational resources. It had a peak organization, the CMA, which lobbied steadily for the abolition of the Bill. In the words of one businessman "The CMA was driving the politicians around the bend" (Interview, Huxley, 1991).

The opposition also possessed the resources of several large industries. These included access to the opinions of prominent law firms; access to persons with a

wealth of experience and education; and the time and money to employ these resources strategically. Various large companies and associations⁵ developed a unique response to the Act by forming a coalition to seek an alternative. They constructed an Industry Task Force composed mainly of lawyers and business graduates, some with political connections, others with strong legal skills, and others with strategic skills. Three members, Tim Huxley of Stelco, Norm Stewart of General Motors, and Dickson Wood of Du Pont, were delegated to consider the issues raised by the Bill. Individual companies consulted prestigious law firms, and conducted extensive legal research into the legal concepts of absolute and strict liability. They combined the results, and examined various scenarios to formulate a proactive response to the Bill and a methodology for funding. Some people on the Task Force were involved in the environmental committees of the CMA, and they persuaded the CMA to support their stance (Interview, Wood, 1993). Through the CMA, they met with representatives of the Toronto Insurance Conference and the Ontario Risk and Insurance Management Society, and these representatives helped to compile the brief which was submitted to the government (Canadian Insurance/Agent & Broker, May 1983). A new bill was drafted, and this policy response, The Industry Task Force Report, was submitted to the government in November 1983.

The Industry Task Force Report (1983) argued that the four main law firms in Toronto had determined that the standard of care established by the legislation imposed "absolute liability without regard to fault in almost all instances." It argued that this was different from the agreement in 1979 in which the standard of care was to be

based on fault or strict liability. It suggested certain changes. Liability should be based on fault, but with the obligation that the owner or controller took reasonable steps to prevent a spill - strict liability based on reverse onus. The cleanup should be reasonable and remedial in nature, so that wealth would be considered in the requirements for restoration. The ministry should pay the innocent victims' claims for injury, property damage and out-of-pocket expenses. Finally, payment for financial losses should be reserved to the courts to decide. The revenues should be from the Provincial Consolidated General Revenues, which would be reimbursed by those found responsible for spills, and by additional levies imposed on those "found to be avoiding their environmental responsibilities". The Task Force suggested that certain amendments would be required to obtain the desired changes.

Alliances

Alliances both internally and externally are important in creating power. The Task Force did not stop at producing a report. It attempted to form an alliance of social forces in both the economic sector and civil society. It talked to different industries, and "reached out" and talked to all segments of society. Initially, it concentrated on forming an alliance of productive forces through the CMA, and then it focused on obtaining the support of other trade associations (Interview, Wood, 1993). These trade associations sent people out to inform other social forces, such as the farmers, of the problems with the Bill. The Task Force, also, explained its position to various groups within the insurance industry, for example Tim Huxley talked to the

Ontario Risk & Insurance Management Society (ORIMS) (Rimscan, April, 1984: 3). The result was that the Task Force constructed a broad based alliance of diverse groups, such as farmers, chemical producers, automobile producers, steel producers, the mining industry, the food industry and dry cleaners. One businessman suggests that their efforts resulted in the whole business community supporting a political policy stance for the first time in Canada (Interview, Wood, 1993).

Environmentalists' Resources

Environmentalists had few resources. The Clinic Funding Committee limited the number of lawyers employed by CELA; and CELA's mandate covered other law reforms and litigation. Although Pollution Probe did support CELA's efforts to obtain public debate regarding the regulations (Campbell, letter, 1982), its policy was to direct its limited resources towards concerns that were at the "cutting edge", and, after bringing them into the public discourse, to focus on new issues (Interview, Glenn, 1993). Other environmental organizations were concerned with other issues, and had limited resources and staff. As far as the environmental movement was concerned, the Bill was passed; it was just a matter of proclamation. CELA occasionally reminded the ministry of how long it had been since its passage, but, until 1984 when there were indications that the Bill might be amended, it did not pursue any concerted lobbying.

In 1984, the increased lobbying by the opposition forces, and the possibility of the Bill going to the Cabinet for reconsideration, encouraged CELA to renew its lobbying for the proclamation of the Bill. It created a research base concerning

spills with information from the MOE, other Environmental Non-Government Organizations (ENGOS), and newspaper reports; and environmentalists wrote articles and letters to the newspapers (Patterson, 1984; Giorno, letter, 1984; Giorno, memorandum, 1985). CELA organized ENGOS to lobby for proclamation of the Bill. Also, it allied with the Union of Ontario Indians, who wanted the government to include bands as a class of people designated by the regulations to be responsible for cleanup and to be eligible for compensation (Vigod letters, 1983a; 1983b; Pellat, memoranda, 1983a, 1983b).⁶ However, there was no attempt to form other external alliances with other social movements.

A Different Perspective

To achieve acceptance of its position, industry needed to develop a different attitude among the public regarding industry and its responsibility for spills. The strategy of creating a different perspective is usually the route pursued by new social movements opposing the dominant perspective supported by capital. Industry had attempted this strategy during the SCRD Hearings, and continued to pursue it in the wider community. One example was when E. L. Weldon, Q.C., General Counsel for Dow Chemical of Canada Ltd., gave a paper at a conference held by the Canadian Environmental Law Research Foundation (CELRF). Weldon attempted to abolish the perception of industry as self-interested and ignoring societal needs by arguing that environmentalists have "vested" interests. He portrayed the environmental movement as an expanding industry of lawyers, planners, scientists, consultants and paid staff

members, who depend upon demands for studies, hearings or regulations to ensure a continuing demand for their services. He blamed "society" for pollution, and argued that "society" creates the risks by choosing to live a modern life style, and should, therefore, bear the risks. He suggested that the slogan "Let the polluter pay" was a fallacy, as the polluter would not pay. Either his insurance company would pay, or, if not, small businesses and farmers would be made bankrupt. He, also, linked the proposed provision of a fund to the present initiative to reduce government regulations by suggesting that it would produce a horrendous mass of regulations and administration (Bhagat, 1980: 38-40).

After disarticulating industry from the responsibility for pollution and the "good guys, bad guys dichotomy", Weldon argued for the acceptance of risk, the privileging of commercial technology over laboratory technology, and the privileging of experts over citizens in standard-making. He, also, suggested that cost effective studies should form the basis for a compensation fund, so that it was not a burden on the public purse (Bhagat, 1980: 38-40). This transferred responsibility to that nebulous entity called society. It limited technology requirements to commercial technology, so that judgments would be based solely on costs, not possibilities. It made standard-making the responsibility of industry and excluded citizens from the decision-making process, and it reintroduced the concept of cost/benefit studies, which usually exclude social considerations.

Another aspect of industry's strategy was to argue that toxic chemicals were not as dangerous as was believed. The chemical companies lobbied the government

and the opposition parties. They argued that chemicals, such as dioxin and PCBs, were not proven to be of a dangerous nature to individuals, and that dioxin was a natural product of combustion and it came from many sources in the province (Elston, letter, 1983).

One problem in obtaining support or opposition for legislation is that it is difficult to arouse public interest because the language and the technical terms are difficult to understand. Even the members of the Standing Committee on Resources Development had found the legal terms mystifying, and there had been little reporting of its proceedings. Therefore, the first step in garnishing support from the wider community was for the opposition to portray its perspective in understandable language. The members of the Industry Task Force, therefore, translated the highly technical legal position of the Bill into lay terms; and argued that it was constructed incorrectly and should be changed (Interview, Wood, 1993).

The Task Force promoted their alternate position by talking to MPPs, and newspaper, radio and television reporters; by participating in debates; and by meeting with specific interest groups, such as farmers and individual insurance agents (Interview, Wood, 1993). The members had access to a wide range of journals to promote their perspective, such as business journals, trade journals, insurance journals, law journals, and journals for truckers and farmers. They began to gain ground in the construction of this different perspective towards the problem of spills, and they obtained strong support in the Conservative caucus, and support from a broad spectrum of society. The major

problem was to devise a methodology by which the government could back out from proclaiming the Bill (Interview, Huxley, 1991).

Environmentalists were consistently attempting to develop another perspective towards the environment, but the number of sympathetic journals was less than those accessed by the opponents. Their main strengths were the number of spill events that were reported in the popular media and a general increase in environmental awareness. However, they were attempting to deal with environmental issues on several fronts, and what was deemed as important by one organization was not necessarily considered a priority by others.

The concern of the environmental movement for the proclamation of the "Spills Bill" should not be exaggerated. The movement is inclined to respond to government initiatives, and has a wide range of interests. Environmental concerns in 1984 were centred around the government's wish to reduce regulations and government interference in everyday life. While the "Spills Bill" was mentioned at a government sponsored symposium on environmental regulation that was attended by several environmental groups, it was not the focus of their discussions.⁷

Structural Constraints and Events

Structural constraints and unforeseen events can both favour and hinder capital. The creation of law is subject to its own rules and regulations, and Constitutional Law dictates the process by which laws are created and what regulations can cover. Law, therefore, restrains governments to some extent, so that governments

cannot change laws on a whim or to favour a particular group without due process. Unless the government introduced a new bill into the Legislature, it could not change the basic principles of the Act, and it was limited to constructing lenient regulations. This would not achieve industry's objectives, as a regulation cannot change the intent of an act, and would be limited to classifying and exempting spills. To change the absolute liability section of the Bill, a new bill or an amendment had to be introduced in the Legislature (Blake, Cassels & Graydon, letter, 1984, & 1985; Osler, Hoskin & Harcourt, letter, 1983a & 1983b; McCarthy & McCarthy, letter, 1983b). While the Act allowed for exemptions, it "provides a code dealing with spills and the various provisions are interdependent, it is difficult to imagine that the Ministry would be prepared to see whole sections deleted ...". Also it was not the intent of the Legislature to permit "minute dissection" of the Act (McCarthy & McCarthy, letter, 1983b).

The ministry did consider a regulation to exempt certain spills, or classes of spills. These would be spills from sewage works or water works, from waste management or waste disposal sites, discharges of a pesticide licensed under the Pesticide Act, spills of water from reservoirs formed by dams when caused by natural events and spills of pollutants from fires. Lawyers consulted by one firm considered this "proposed regulation" to be so broad that it went beyond "classifying and exempting", and removed the concept of absolute liability for the cost and expense of cleanup and restoration. They argued that this would be an amendment by deletion, and beyond the power of the Lieutenant Governor (Blake, Cassels & Graydon, letters, 1984, & 1985).

To introduce a new bill or amendments requires the appropriate political conditions, but these are affected by events both within and outside the control of industry. Events have a way of intruding into environmental policy-making, and political parties have to respond to the political ramifications of such events. Industry fails to build such calculations into its lobbying efforts, and yet environmental disasters are inevitable (Perrow, 1984). The warnings were in the literature. One report noted that while nationally the number of accidents had declined between 1974-81, the number of dangerous commodity accidents had increased markedly. It estimated that about two accidents involving dangerous goods could be expected per year in the Toronto area, and an accident resulting from the release of a dangerous commodity could be expected to occur in Toronto an average of once every five to ten years (Burton & Post, 1983; Eco/Log Week, 1983: 3-4).

Events encourage more radical environmental policies. No amount of rhetoric about societal responsibility and the vested interests of environmentalists can erase the fact that a company has spilled some substance into the environment. Spills rekindle fears about pollution and health damages from toxic substances. They also enable environmentalists to access the media and to propose new policies. This pressures governments to act, if only in symbolic ways. The Mississauga spill encouraged the passage of the Bill, and made changes difficult in 1981. The Eddy spill into the Spanish River meant that the introduction of a new bill was not possible in 1983. Although the opposition forces did make progress with their lobbying campaign in 1984, the Kenora

spill in the 1985 election campaign changed the political landscape, and encouraged proclamation of the Bill.

The Balance of Political Power

The opposition ran out of time. The process of persuading the government to change the legislation was overtaken by an election and an environmental disaster. The balance of political power changed yet again, as the Liberals with the support of the NDP formed a new government. The opposition forces did have access to the Liberal party, because a member of the core committee of the Task Force had Liberal connections. However, the Kenora spill resulted in the proclamation of the Bill becoming a part of the Liberal election platform. The Liberal party could not back out of this position, even if it wished, because proclamation of the Bill was a condition for the Liberal/NDP accord. The opposition forces had made the strategic mistake of failing to put their position to the NDP, and had not had the foresight to envisage it as a force capable of holding the balance of power (Interview, Huxley, 1991).

Conclusion

The opponents had laid the groundwork for change. They used their access to the politicians and the bureaucracy to develop misgivings regarding the Bill. They used their considerable resources to develop amendments and alternate legislation; and to develop the climate to accept a new approach. They were unable to generate political action because of structural constraints imposed by law, which limited what the

government could do. Also, the recurrence of spills did not grant the government the time-frame to introduce new legislation, and created demands for the proclamation of the Bill (Ontario Liberals Communique, 1983).

The occurrence of a spill during the election campaign diminished any hopes of a new bill. Even then, if the Progressive Conservatives had been able to hold on to power, the Bill might have been shelved until changes could be made in the future, for proclamation of the Bill was not among the new environmental legislation proposed by the interim Progressive Conservative government. The Liberal/NDP accord promised that the proclamation would take place. The opponents, therefore, had to win public and political opinion to their cause in a limited time frame. Again, they constructed a unique response, as will be seen in a later chapter.

END NOTES

1. The Transportation of Dangerous Goods Act was introduced on November 9, 1978 and died with the May 1979 federal election. It was reintroduced in November 19, 1979, one week after the Mississauga derailment, but died again with the defeat of the Conservative government on December 13, 1979. The bill authorized the government to set safety standards and established procedures for handling dangerous goods by rail, truck, air or water. Any accident involving toxic substances had to be reported immediately, and the owner and controller would have to clean up the spill and prevent further harm. The government could step in to take remedial measures and charge the cost to the owner or person who caused the accident (Swaigen, 1979b).
2. The passage of spills legislation by the Saskatchewan government in June, 1980 supported the government's initiative. This legislation required the polluter to restore the site to a state considered satisfactory by the Saskatchewan Environment Ministry. If the polluter did not follow the necessary steps, the ministry could clean up, and bill the polluter later for costs. It differed from Ontario's legislation in that the polluter was not strictly liable for compensation of the victims.
3. The Ministry of Industry & Tourism, the Ministry of Agriculture & Food, the Ministry of Health, the Ministry of Consumer and Commercial Relations and the Ministry of Treasury & Economics.
4. The situation created by Love Canal and the construction of the Superfund Law in the United States increased the concerns of industry and its lawyers. One member of the CMA visited the United States to discuss the implementation of the law, and the lawyers referred to it in their opinions (Interview, Huxley, 1991; McCarthy & McCarthy, letter, 1983).
5. These were the Canadian Chemical Producers Association, the Ontario Petroleum Association, the Ontario Truckers Association, the Canadian National Railway, the Canadian Pacific Railway, Stelco, Du Pont and General Motors.
6. The Union of Ontario Indians met with ministry officials on October 20, 1983. The Union wanted Bands or Band Councils included as a class of people under the Act. This would give them the right to "do everything practicable to prevent, eliminate and ameliorate the adverse effects (of spills) and to restore the natural environment", and to protect those who took action from prosecution and to be eligible for compensation. They argued that they were similar to municipalities in that they did not hold the "fee simple" in Reserve lands, but did exercise control of the lands. They did not, however, wish to be included in the definition of a municipality, as occurred under the Conservation Authorities Act, as under the Bill the Minister could order a municipality to take specific action

against spills, and they did not want to grant the provincial government the right to give orders to Band Councils (Pellat, Memorandum, 1983a).

7. CELA emphasized public participation in the decision making process, the enforcement of environmental laws, the extension of the Environmental Assessment Act, and an Environmental Bill of Rights. The Group of Eight & the Citizens' Network on Wastes mentioned liability of polluters for damage caused by their operations (Papers submitted to the Symposium on Environmental Regulation, November 1-2, 1984).

CHAPTER 8

THE MIDDLE YEARS: THE INSURANCE INDUSTRY

It would be a mistake to think that there will always be an insurance company or a big firm to provide compensation for the victims of large scale pollution (Smets, 1988: 1091).

Introduction

One factor that delayed the proclamation of the Bill was the acceptance by the government that there should be adequate inexpensive insurance available for industry to prevent potential bankruptcy from spills. This chapter will discuss the issue of whether industrial capital and commercial capital can be regarded as separate entities. It will examine why insurance was a problem, and why industrial capital was able to use it to stall the Bill. It suggests that the contradictory goals of the government made the proclamation of the Bill conditional upon the provision of adequate, cheap insurance. This may have been a possibility in the late 1970s, but by the early 1980s the structure of the Canadian property and casualty insurance industry combined with events in the international insurance market had changed the conditions within that industry.

Insurance Capital

Some analysts (Carroll, 1986: 176-7; Richardson, 1988) have suggested that the separation of commercial capital and industrial capital may be inappropriate in analyses in the late twentieth century, as there has been a merger of interests to form an embryonic finance capital. This may apply in discussions of the bank and trust company fractures of commercial capital and their alliance with industrial capital; it is less obvious in the case of insurance capital. In the eighties, there were interlocking directorships in Canada between insurance capital and industrial capital, but there were not any examples of direct ownership of insurance companies or vice versa. The integration of financial services was just beginning in the United States (Globe & Mail, December 5, 1983), and legislation ensured that insurance capital remained a separate fracture of commercial capital in Canada.

Insurance capital has several divisions. The major division is between life assurance companies, and property and casualty/general insurance companies. Life insurance companies were not involved in the discussions surrounding this Bill, because Canada has a national health insurance system and health became a subsidiary interest after the legislation was introduced. The property and casualty insurance industry was intrinsically involved in the process, but the ministry soon discovered that this sector of insurance capital was not a unified entity.

The general insurance industry is subdivided into companies, brokers, reinsurance companies and their various associations. The companies operate in a very competitive milieu. There were 300 general insurance companies in Canada in 1984.

Ten companies wrote 10% of the business compared with Britain where the top six companies wrote 70% (McQueen, 1985: 149). The largest general insurance company in 1984, The Co-operators Group Ltd., had only 5.7% of the total market of \$8.3 billion in annual premiums.

The international reinsurance companies and the pools formed by these companies comprise another sector of the industry. In the early eighties, these were composed of about 400 firms mainly operating out of London. It is in the reinsurance branch of the insurance industry that there was some merging of commercial capital and industrial capital. Captive reinsurance companies were set up offshore in Bermuda, the Bahamas and Guernsey. These companies were owned by a single company or by a consortium of companies in the same business, such as steel, or by a group of professional people, such as doctors or lawyers (Globe & Mail, December 5, 1983: 8). There were an estimated 2,000 captive firms in 1984. Many had been established by manufacturers to handle their firm's insurance, and had expanded to take on other risk (McQueen, 1985: 142).

Another sector is composed of the brokerage firms. These ranged from the large multinational companies, such as Marsh & McLennan and Reed Shaw Stenhouse, which serviced the large companies, and small independent brokers, which serviced small companies and individuals. They were represented by the Toronto Insurance Conference, which is an association of commercial insurance brokerage companies that places millions of dollars of insurance coverage in the international and domestic markets. Most property and casualty insurers in Canada are represented by the

Insurance Bureau of Canada (IBC). Other groups are the Insurers Advisory Organization of Canada, a rate-making and insurance hazard analysis group, and the Ontario Risk and Insurance Management Society.

In spite of the merging of industrial and commercial capital via captives, insurance capital and industrial capital will be treated as separate entities. This merger only applied to one fraction of insurance capital, and the other fractions, such as the brokers and the insurance companies, were distinct from industrial capital. Also, the largest general insurance company was owned by various cooperative associations in Canada. However, interlocking directorships between industries and insurance companies did exist, and the fact that the large brokers provided services for the large industrial companies suggests that they were inevitably sympathetic to the large companies' point of view.

The Problem of Insurance

In the year following the passage of the Bill, insurance surfaced as the major problem in constructing the regulations. Industrial capitalists had argued at the Hearings that adequate insurance was not available, and that what was available was too expensive; and they had used statements from the brokers to support their case. This argument had been countered by Dr. Landis, who had used the example of insurance offered by Clarkson¹ and the statements of the Insurance Bureau of Canada to support the case of the ministry (Kennedy, IBC, SCRD, October 10, 1979: R-1015-1, R-1100-1).

During the process of constructing the regulations, the ministry became aware of the contradiction between the goals of making the polluter pay and protecting small business. It was faced with a variation of Nozick's dilemma of compensation. Nozick (1974: 115) suggests that if people are prohibited from performing certain acts, because they lack the means to compensate others for the possible harmful consequences of these acts or they lack the liability insurance to cover these consequences, they should be compensated for the consequences of this prohibition. Nozick argues that the problem is that they can then use this compensation to purchase liability insurance, resulting in the public provision of liability insurance for those unable to afford it.² Thus, if the owners or controllers, who could not afford to purchase liability insurance, were forbidden to produce or transport toxic goods, they should receive compensation, which they could then use to purchase insurance. The government was not, however, forbidding an act (although the truckers had suggested this policy³), but it was demanding after-the-fact payment. If it indemnified the owners or controllers, public funds would be paying the claims of other insurance companies; if it did not, the companies might be made bankrupt.

Another problem was that the provision of compensation might remove the incentive not to pollute. This incentive is weak if pollution insurance is easily available at low rates with high limits (Arrow, 1971: 142), because it reduces corporate efforts at prevention by reducing the anticipated costs of toxic contamination (Reich, 1991: 279). Capitalism involves taking a risk in the marketplace; and insurance companies help to reduce this risk for the individual capitalist by spreading the risk around several

"entities". Arrow (1971: 142-3) argues that the complete absence of risk-shifting inhibits risk-taking, which is necessary within capitalism. Alternatively, the ability to transfer all risks completely reduces the incentives for the success of capitalism, because the capitalist is relieved of all risks associated with costs and lacks the incentive to keep his costs to the minimum. He concludes that the answer is partial risk shifting, "coinsurance"; thus the capitalist bears a part of the cost, but the other parts are transferred elsewhere.

The government was attempting to achieve this balance of "coinsurance". It wished to use the legislation to encourage the prevention of spills through sanctions, but it did not wish these sanctions to be so severe that a business would declare bankruptcy, as happened with Johns Manville following lawsuits for asbestosis (Toronto Star, November 22, 1983), nor did it wish to have to "rescue" a company because of the costs of compensation, as occurred with Chisso following payments to Minamata victims in Japan (Smets, 1988). It wanted the polluter to bear some costs, but not too many, and to protect the owners and controllers from bankruptcy (O'Donnell, letter, 1980). However, neither the government nor Arrow considered that insurance might not be available, not only for victims, but also for clean-up.

The Availability of Insurance?

The crucial points for industrial capitalists' acceptance of the Bill were that insurance was available at a reasonable price, that a backup fund was created, and, above all, that the definition of liability was not absolute. The provision of insurance would

mean that its risk would be transferred elsewhere, and that it would bear a part of the costs in additional insurance.

Initially, industrial capitalists seemed to accept the Bill. They did not view insurance as an insuperable obstacle, and believed that liability was not absolute. Reed Shaw Stenhouse Ltd., insurance brokers, had informed Dow Chemical that one underwriting group was prepared to look at Environment Impairment Liability coverage with the appropriate modifications to satisfy the liabilities imposed, although the group declined to offer a coverage quotation or terms until they had seen the final Act (Fitzgerald, letter, 1979). The Secretary & General Counsel for Dow Chemical of Canada wrote "Bill 24 in its amended form, has apparently been accepted by the business community" (Weldon, letter, 1980a). The Canadian Chemical Producers' Association thought that the private insurance industry would not have any difficulty responding with the liability as it was defined under the Act, and with the Fund playing an excess role (Belanger, letter, 1980). Others were concerned with details, such as excluding the large industries that were self-insured from the Fund⁴ (Chalmers, letter, 1980; Topp, letter, 1980), a basic limit of \$500,000 for farmers (Barrie, letter, 1980), and regulations requiring that all potential polluters take out insurance (Hughes, letter, 1980; Flott, letter, 1980).

Industry's position changed as it became aware of the limitations of the insurance coverage that was available. Insurance became a problem for the bureaucrats. Industry was demanding that insurance should be available. Also the SCRD and the Legislature had intended protection for the owners and controllers of the pollutant that

spilled, but this protection was lacking unless insurance was available at a reasonable premium, or the government indemnified the owners or controllers for insured claims made against them. In an environmental disaster, such as Mississauga, there might be claims that exceeded the limit suggested in the draft regulations, so that owners faced with a multitude of claims might be forced into bankruptcy (O'Donnell, letter, 1980).

The ministry found it difficult to obtain a unified position from the insurance industry. Interests of the various insurance fractions were likely to be different. The large brokers represented their major industrial clients who were opposing the Bill. The large insurance companies were influenced by the insurance market. In addition, the insurance industry was uncertain of the extent of liability granted under the Bill; it did not know what the demand would be, what the statistics were regarding spills, and, therefore, what its premiums would be (Chemical Week, 1983a: 48; Daw, 1984). It was not surprising that when the various ministers asked the insurance community for input, they received different responses from the various sectors. For example, in October 1980, the Insurance Bureau of Canada approved an Environmental Damage Endorsement to expand the normal comprehensive general liability policy to cover liability exposure under the Bill (IBC, letter, 1980). Insurance brokers and the CMA concluded that this had serious deficiencies, and argued that it would not produce the type of insurance coverage suggested before the Standing Committee on Resources Development (Keen, letter, 1980; Welsh, 1981: B8).

Industrial Capitalists' Position

The CMA was opposed to the introduction of absolute liability into legislation, and based its opposition to the Bill on the lack of adequate insurance to cover such liability. It had argued in its submission to the SCRD that the larger companies would be unable to obtain adequate insurance coverage for the liabilities covered by the Bill, and in the opinion of the brokers of these companies, any coverage that was available would disappear with the passage of the Bill (CMA Submission, 1979). Environmental Impairment Liability Insurance (EIL) was only offered in Canada by H. Clarkson (Overseas) Ltd., which had participated in the formation of two reinsurance pools: a world-wide pool with coverage to US \$7.5 million per claim, and a United States pool with \$15 million per policy year (Bhagat, 1980: 26). As statistics were limited in this field, consultants had produced a manual of the potential environment impairment of individual industries. The policy was based on this manual plus a technical assessment that was paid for by the insured (Bhagat, 1980). In Canada, there were about 50 policy holders ranging from small manufacturers to large oil companies (Bhagat, 1980).

The CMA argued that the policies offered by this company were inadequate, because of the payment for the engineering survey, the exclusions, the premiums to purchase some of these exclusions, the deductible per claim and the basic premium. Also the costs of coverage had increased since 1978 (Huxley, letter, 1980). In the opinion of one businessman, the Clarkson representative who came over to Ontario was "trying to sell the CMA a piece of junk" (Interview, Huxley, 1991).

The brokers supported this position. Jack Lee, Chairman of the Casualty Committee of the Toronto Insurance Conference, argued that environmental liability insurance was expensive and limited in scope (Canadian Environmental Control Newsletter, 1983). He suggested that it would be expensive for farmers, small businessmen and small manufacturers and also for large business. Both he and the CMA suggested that the owners and controllers should have access to the fund if they were not at fault but cleaned up the spill, so that they would be reimbursed for fulfilling their mandatory duty.

In an attempt to solve the insurance question, Andy Brandt, the Minister of the Environment, asked Armour/Riley, an independent insurance consultancy firm, for an opinion regarding the insurance aspects of the Bill. The consultants talked to the same brokers⁵ that the ministry had approached, but because they knew the members of the insurance industry personally, they could explore the conditions under which insurance could be supplied. The Armour report concluded that if the legislation were proclaimed, there would be reasonable insurance for spills providing the handler/generator could demonstrate good safeguards were in force (Welsh, 1984; interview, Armour, 1983). The ministry was, therefore, convinced that insurance was not a problem (Pellatt, memorandum, 1983a). The Industry Task Force argued that Peter Armour was using experience in the United States which was in a significantly different context from that of Canada, as the legislation was different and "up front" costs were paid from a government fund. However, the CMA and other associations agreed in 1983 that

insurance was not the primary issue, they considered the main issue to be the degree of liability (Industry Task Force Report, 1983).

The Bill was still not proclaimed. The Minister, Andy Brandt, wanted to review the legislation before he moved toward proclamation (Pellatt, memorandum, 1983a). Paradoxically, lack of proclamation did not occur not only because of a lack of political will, but also because of changes in the insurance market.

The Insurance Market

The popular view of insurance is that risk is transferred to another entity, whereas insurance companies regard insurance as the pooling of risk. This requires large numbers to form a large enough pool, so that in Canada two thirds of the property and casualty insurance industry is foreign owned and relies on world markets for reinsurance (Brown, 1991; McQueen, 1985). Pollution insurance or corporate liability insurance is particularly susceptible to world events. It is a specific type of property insurance in which all the insurance companies share the risk through reinsurance. A single pollution liability risk may be insured by several large international reinsurance companies with no one company taking more than they can manage (Brown, 1991: 20). The international scope of the market makes pollution insurance available, but it also means that any occurrence in the world can affect this market.

The Canadian general insurance market encountered considerable problems in the eighties. The regular Canadian six year cycle of three good years followed by three bad years began to change in the early seventies when four bad years were followed

by three good years from 1976-1978. The industry experienced underwriting losses for the next seven years, so that more money was paid out in claims than was collected in premiums. Profits came from the investment of \$14 billion in assets.⁶ But interest rates were declining, and the highly competitive nature of the general insurance industry discouraged increasing premium rates to compensate for these decreases. In 1981-1982 three high profile insurance companies went out of business.⁷ These were the first federally chartered property and casualty companies to go bankrupt in fifty years (McQueen, 1985).

Several factors were negating the successful issuance of pollution insurance world wide. Some were solely Canadian, others were world wide events, and some, especially changes in legislation and the interpretation of legislation, were specific to the United States. Because this type of insurance is based on the international reinsurance market, any event or any increase in rates in a jurisdiction affects the rates or the availability of insurance elsewhere.

Influences Within Canada

There were several Canadian events, particularly related to the oil industry, that discouraged the issuance of this type of policy, reduced the number of firms willing to issue high risk policies and encouraged an increase in rates.⁸ In 1980 the Alberta Gas Trunk Line Company (now Nova Corporation) experienced a \$38m fire in a compressor station. In 1982, the Ocean Ranger was lost off the coast of Newfoundland at a cost to the industry of over \$100 million. In 1982, Suncor, Fort

McMurray, had a \$100 million compressor house fire. In 1984, there was a \$300 million Syncrude fire at Fort McMurray, and in 1984-1985 Mobil Oil Corporation on Sable Island had a \$200 million blowout. By 1985 the number of insurers issuing policies to high risk petroleum companies had declined from fifteen to five (McQueen, 1985).

The Influence of the Situation in the United States

Different types of claims in the United States were resulting in an increase in liability rates, and a reduction in the availability of insurance. These new claims included multimillion malpractice suits, claims for damages from relatives of injured car accident victims, product liability claims, such as claims for damages from using the Dalkon Shield from A. H. Robins, and claims for damages from the manufacturers of diethylstilbestrol (DES) (Chemical Week, 1983a; McQueen, 1985). Also claims for asbestosis, amounting to US\$10 - \$30 billion, had resulted in no insurance being available for claims of asbestosis from 1982 onwards (McQueen, 1985). Canadian companies doing business in the United States were encountering higher rates, and Canadian insurance companies anticipated similar problems here (Risk Management, 1983: 87).

Canada is markedly different from the U.S. in regard to litigation. Its civil cases are tried by a judge not a jury that is empowered to award punitive damages. Its court costs are substantial compared with the United States, and the contingency fee system for attorney compensation is the exception in Canada (Risk Management, 1983:

87). The international insurance system, however, treats Canada the same as the United States, because Canadian legislation and judicial interpretations are influenced by actions in the United States (Brown, 1991: 24-5).

In the eighties, litigation and legislation in the United States were changing its pollution liability market. Its litigation decisions had resulted in the redefinition of the "sudden and accidental" requirement for the payment of a pollution insurance claim. "Sudden" no longer implied an instantaneous event; and if pollution were unintentional it was considered "accidental" (Brown, 1991). Its courts had changed per occurrence policy limits to per claim limits. The result was that the amount paid out depended upon how many properties were damaged, so that there was not a maximum payable for one spill (Brown, 1991). Judicial adjudications had applied the rules of joint and several liability⁹ not in proportion to the share of the fault of the insured, but according to their ability to pay; and those with the "deep pockets"¹⁰ were often the companies with pollution liability insurance (Brown, 1991). Some courts had stated that the insurer had an unlimited duty to pay defense costs beyond the face value of the policy; legal costs were escalating at a higher rate than settlement payments; and state legislatures were changing toxic tort laws to allow rebuttable presumptions,¹¹ strict liability,¹² and joint and several liability¹³ (Chemical Week, 1983a; 1983b). U.S. legislation¹⁴ also suggested that liability could be applied retroactively in the case of toxic torts. Toxic tort law, therefore, allowed an indefinite amount of time for claims to be filed, whereas in traditional tort law there was a time limitation, and the rules for discovery were measured from the time of injury or damage (Brown, 1991).

International Influences

World wide, there were several events that put strains on the reinsurance market. There were fierce storms in Europe, a Petroleos Mexicana oil-tank explosion cost US\$100 million, two satellites launched in the wrong orbits cost more than US\$180 million, the Korean Air Lines 747 shot down by the Soviets cost US\$306 million for passenger liability, computer technology insured against obsolescence cost US\$440 million, the Iran-Iraq war meant over US\$600 million in shipping losses in the Persian Gulf, and a class action suit for \$15 billion against Union Carbide after the toxic gas leak in Bhopal in 1984 was pending (McQueen, 1985: 142). Serious pollution accidents were increasing, and 1984 was considered to be a particularly bad year, even when Bhopal was excluded from the calculations (Smets, 1988).

These disasters combined with the changes in the legal sphere in the United States had repercussions for the international reinsurance industry. The Lloyds insurance syndicates experienced enormous losses between 1979 and 1984, so that investors in some syndicates refused to pay the estimated \$221 million in losses incurred by insurance companies trading through Lloyds (Plommer, 1985). There were also doubts about the financial stability of some commercial companies and some new reinsurers. The above changes in the interpretation of U.S. pollution law suggested immense potential losses in the future. It was estimated that the insurance industry in the United States charged premiums of \$41 million for gradual pollution insurance, but that future losses would exceed \$106 million. It was, also, calculated that the bill for pollution cleanup could total \$824 billion whereas the surplus of the entire United States

property casualty industry was \$158 billion (Brown, 1991). It was becoming more difficult for the industry to calculate the expected value of future claims and potential risks.

The Response of the Market

The outlook for the industry was uncertain. The expansion of the reinsurance industry had intensified competition, so that profits were from investment and not from underwriting. Competition was expected to increase because changes in the United States law had allowed the entry of banks into the market (Globe & Mail, 1983: B8), which would make it more difficult to recoup losses through higher premiums. From 1984 onwards there was a withdrawal from the pollution liability market. Many of Lloyds' syndicates were at their maximum premium limits, so they were taking on no new business. Captives, such as Gulf Oil's Inco, were not underwriting risks and were turning away third party business (Globe & Mail, 1983: B8; McQueen, 1985: 143). In 1985 most insurance companies dropped EIL insurance, the remaining ones increased premiums fivefold, contracts covering pollution liability were cancelled, and renewals were for a much lower limit (Smets, 1988: 1091). By 1985 only two companies were issuing environmental impairment liability insurance in the United States, and there were only eight companies issuing this type of insurance world wide (Brown, 1991). In Canada, there were only 3 firms writing environmental impairment coverage, and their rates were 70% higher than in 1984 (McQueen, 1985: 141-8). By 1986 comprehensive general liability insurance in the US excluded pollution risk (Smets, 1988: 1091).

Conclusion

During the SCRD meetings, the opposition forces had persuaded the government that there needed to be the adequate provision of insurance if the Bill were not to be disastrous for large and small businesses, farmers and truckers. The CMA had based its opposition to the Bill on the lack of insurance; and this position had received support from the brokers. It is debatable whether this was the case when the Bill was passed, but by 1985 changes in the insurance industry indicated that insurance could not fulfil the role envisaged for it by the government. The earlier conclusions of the consultant regarding the availability of insurance were now out of date, due to the particular structure of the pollution insurance industry and the world-wide crisis in that industry. The opposition forces had a stronger case than in 1978, but as will be discussed in the following chapters, another change in the balance of political power would produce the political will to overcome the insurance problem.

END NOTES

1. H. Clarkson (Overseas) Limited of London, England, offered Environmental Impairment Liability Insurance in Canada. This policy was offered on a claims-made basis rather than on the basis of occurrences happening during the policy period. It contained certain exclusions of which some were absolute and others could be bought back. In addition, an engineering survey paid for by the applicant was required before the insurance was issued (Scott, letter, 1979).
2. Nozick can be criticized on the grounds that he disregards difference, and assumes that harmful consequences should be compensated regardless of the difference in the degree of harm, but if governments do not wish the results of legislation to result in harm, this dilemma exists.
3. The Ontario Trucking Association suggested that it might be more appropriate to require insurance as a condition to engage in business (Flott, letter, 1980; Foster, 1984).
4. They argued that this would have been similar to Schedule 2 of the Workmen's Compensation Act.
5. These were Alexander & Alexander formerly Reed Shaw Stenhouse, Marsh & McLennan, Johnson & Higgins, and Sedgewick (Interview, Armour, 1983).
6. From 1974 to 1983 underwriting losses were \$3 billion, investment gains \$6 billion, for a net profit of \$3 billion. In 1984 the industry lost \$917 million and only remained profitable because of its investment income of \$1.3 billion (McQueen, 1985: 143).
7. These were Pitts Insurance Company of London, Ontario; Strathcona General Insurance Company of Ottawa; and Cardinal Insurance Company of Toronto. It has been suggested that the reasons for their demise were that they passed too much of their business on to reinsurers, who backed out or hiked rates leaving the primary companies with insufficient funds to pay claims, as well as poor management, costly administration, and high risk policies (McQueen, 1985: 143-149).
8. The petroleum industry had experienced a quadrupling of rates in the early eighties (McQueen, 1985).
9. Under the concept of joint and several liability plaintiffs need not identify all the potential defendants to bring a case. If the plaintiff wins the case, the burden of identifying the other contributors and suing them for their part of the award ("the right of contribution") falls on the defendant (Chemical Week, 1983b).

10. This "deep pocket syndrome" was one of the factors mentioned by industry in the SCRD Hearings, and was obviously a continuing concern of industry.
11. Rebuttable presumptions means that plaintiffs can use indirect evidence. It would be sufficient to show that a release of toxic chemicals took place, that the plaintiff lived in the area of the release, and that scientific evidence strongly suggests that the chemicals released contributed to the illness. This transfers the burden of proof to the defendant (Chemical Week, 1983b).
12. Strict liability requires that the plaintiff prove that an injurious action took place, and that he then tie the action to the defendant (Chemical Week, 1983b).
13. See note # 9.
14. The US Resource Conservation and Recovery Act 1976, and the Comprehensive Environmental Response, Compensation and Liability Act 1980, the "Superfund Act" (Brown, 1991: 21).

PART IV: PROCLAMATION AND IMPLEMENTATION

CHAPTER 9

THE PROCLAMATION

"the weight of various interests is continually renegotiated in the 'unstable equilibrium of compromise' that underpins hegemony." Jessop (1984: 246).

Introduction

The influence of groups on policy-making varies according to the conjuncture and the fluctuating relationship of social forces with political forces. With the Ontario election in 1985, power relationships changed; and various interests ensured that some issues, including the environment, were pushed to the forefront of the agenda. At the same time, capitalist interests had to be accommodated. This chapter examines the strategies of the opposition and the supporters of the Bill in a new conjuncture, and the ways in which the government attempted to meet the demands of industrial capital within its own political constraints. It concludes that industrial capital's influence can be limited not only by structural constraints, such as the law and the structure of the insurance industry, as was discussed in Chapter 6 and Chapter 7, but also by political constraints. In addition, it examines the implementation of the Act and whether it made any difference to the numbers and effects of spills.

A New Conjuncture

Environmental issues were to be on the agenda of any government that attained office after the election in 1985, because, for the first time in a provincial election, the environment was an issue during the campaign. This was partly because of the Kenora spill, but also because the environmental community played a more active role. An alliance of various environmental organizations concerned with conservation issues, nuclear power and pollution issues formed the Project for Environmental Priorities to lobby for environmental issues to be in the forefront of the campaign (Macdonald, 1991: 117-8). The results of the election on May 2, 1985 were 52 seats for the Conservatives, 48 seats for the Liberals, and 25 seats for the NDP.

The Progressive Conservatives formed a government after the election, but it was short-lived. The NDP held the balance of power, and it did not wish to extend the forty two years of Tory rule in Ontario. It had propped up the Progressive Conservative (PC) minority government in the past, only to receive no credit for its accomplishments, and to see promises dissolve following the election of a PC majority in 1981 (Spiers 1986: 136). Yet, the party was not in a position to go on the hustings so soon after an election. After negotiations with the Tories and the Liberals, the NDP agreed to support the Liberals in return for a written document that the Liberals would undertake certain legislative and policy reforms, and that an election would not be called for two years. The proclamation of the "Spills" Bill was a part of An Agenda for Reform - Proposals for Minority Parliament that was signed on May 28, 1985. On June

18, 1985, the Tories were defeated in the Legislature, and the Liberals were asked to form the government.

The Strategies of the Opposition Forces

Lobbying

After the election, the Canadian Manufacturers Association (CMA) began an intensive lobbying campaign. It and various trade associations, such as the Ontario Petroleum Association (OPA), and various companies, such as Dow Chemical and The Canada Metal Company, wrote to their MPPs and the leaders of the political parties, made personal visits to as many MPPs as would see them, and distributed their position paper on the Bill¹ (Nelson, letter, 1985; Irwin, letter, 1985; Weldon, letter, 1985; Howard, 1985).

Lobbying is more forceful if the lobbyists suggest alternatives and imply that they are willing to compromise. The CMA suggested to Susan Fish, the new Minister of the Environment in the brief PC government, and to the other two party leaders, that the ministry should send a copy of the Industrial Task Force's proposal to the principal environmental groups, and that its proposal of a "reversal of onus" test should be considered as a compromise. In the CMA's summary comparison between this proposal and the Bill, it noted that the differences were that remedial action would be carried out by the person at fault, restoration would be to what was considered reasonable, and personal injury and economic loss would not be covered (Thibault, letter, 1985a, 1985b). Thus, absolute liability would not exist. Liability would require that a

person must prove that he was not at fault; victims would still have to resort to the courts for compensation; and responsibility would not be limited to the owners and carriers. The CMA also asked that the Liberal caucus hear its case; it agreed to the request of caucus to meet with CELA to try to obtain a compromise.

Support of Politicians and Lawyers

Lobbying is also more likely to succeed if personal relationships with those in power exist. Industrial capitalists had links to the Liberal party, and some members of cabinet were sympathetic to their views (Interview, Huxley, 1991; Rudolph, memorandum, 1985; Walker, 1986). But they had not had sufficient time to develop a relationship with the new Liberal Minister of the Environment, and they had never consulted with the NDP (Interview, Huxley, 1991). The opposition forces did, however, have the help of a former Assistant Deputy Minister of the Ministry of the Environment, W. Bradley Drowley, who had been Special Advisor to Keith Norton and "charged with the task of meeting with all interested parties to sort out the details, concerns etc. of the Spills Bill." He acted as a consultant to the CMA when it met with the Liberal caucus in May (Rudolph, memorandum, 1985). They also had the help of a former Minister of the Environment, Andy Brandt, who lobbied against the Bill's proclamation (Rudolph, memorandum, 1985). He participated in a debate with Jim Bradley and Brian Charlton, the NDP environment critic, before the Canadian Bar Association of Ontario, where he argued that the Bill was "fraught with problems that will bring havoc in this province the like that you have never seen before" and the unlimited liability clause would "force

companies into bankruptcy and unfairly punish farmers and other individuals involved in spills through no fault of their own." He agreed that his party had "shot themselves in the foot" by drafting legislation with unlimited liability in it, and declared that this was the main reason that they had never proclaimed it into law (Henton, 1985). Brandt wrote to the newspapers, and to the mayor and members of Council of the City of Toronto arguing that the Bill had "serious implications for the financial well-being of municipalities across Ontario." (Brandt, letters, 1985a, 1985b).

Another resource is the support of the traditional intellectuals, which is helpful in granting the opposition's arguments an aura of legitimacy. As noted in a previous chapter, the opposition had the support of the opinions of several prestigious law firms, which suggested that the Bill extended the liabilities of companies considerably and would result in severe problems for business (Osler, Hoskin & Harcourt, letter, 1983a; McCarthy & McCarthy, letter, 1983a; Campbell, Godfrey & Lewtas, letter, 1983; Blake, Cassels & Graydon, letter, 1983). Also, their two most cogent arguments were that sufficient insurance at a reasonable price was not available, and that the regulations were incomprehensible. The former was supported by the insurance industry, and the latter by the opinions of CELA, and insurance lawyers (CELA, 1985b; interview, Vigod, 1993; interview, O'Donnell, 1993).

A Forum

The opposition required a forum in which to present its views. It suggested that a tripartite task force chaired by the MOE staff with representatives from

environmental and industry groups should be established (Stewart, letter, 1985; Peel, letter, 1985). The Minister rejected this suggestion because it would consist of a polarized group that would never reach consensus. He decided to appoint an independent and "objective three man panel" to consider the regulations (Rudolph, memorandum, July 4, 1985). Despite the chairman's announcement at every meeting of the Panel that the regulations, not the legislation, were under review, the opposition forces attempted to use the Panel as a medium to introduce amendments to the legislation and to obtain publicity for their case. They encountered the problems of a strong chairman (Dr. Manzig), a limited period with few public meetings, a short time to prepare their responses, and meetings in the "dead days of August" when there was less impetus to organize a presentation (Interview, Wood, 1993).

Several opposition groups felt that the creation of the Panel was a symbolic gesture by the government and that the government was ignoring their concerns. The Ontario Federation of Agriculture (OFA) charged that the process was developed to provide the public with "the illusion of open consultation with all parties". It complained that the public participation process was flawed, because the public notice was inadequate,² and the Panel's restrictive terms of reference prevented it from discussing absolute liability and the absence of an appeal mechanism (OFA, 1985a). The Ontario Trucking Association (OTA) accused the members of the Panel of being proponents of the legislation and of not listening to their concerns (Pollock, 1985).

The opposition was surprisingly poorly prepared. Several presenters were working from old drafts of the regulations. Some assumed that absolute liability applied

in both cleanup and compensation. Some assumed that unlimited liability applied, and did not realise that the Environmental Compensation Board became involved over a certain amount (IBC, 1985; Pollock, 1985; interview, Armour, 1993). Some presentations assumed that the legislation abolished the common law basis of fault, whereas it was only initially that the owner or controller was responsible for cleanup, and then the responsibility could be pursued in the courts (Interview, Manzig, 1993). Most briefs from the opposition exaggerated the amount of grief that would be experienced should the Bill be passed (Interview, Manzig, 1993). The Insurance Bureau of Canada (1985) was not aware that the legislation did not apply to leachate or to past actions, for it argued that it would not be possible for insurance to cover future losses for past actions, such as the cleanup of a dump established fifty years ago.

The truckers and the farmers were concerned about the availability of insurance. Some insurance companies and reinsurers were dropping coverage for transporters of potentially dangerous or polluting substances; and the OTA was already discussing the problems of insuring with the Automobile Facility where rates were over double those elsewhere (Pollock, 1985). The brokers had warned the farmers that the insurance industry was planning to withdraw the clause that gave them coverage for a sudden, accidental spill. Also custom sprayers, who already paid a high premium, would be affected, and this would affect farmers' costs (Clement, 1985).

The farmers used the Panel to mount a campaign against the Bill. The Ontario Federation of Agriculture (OFA) sent an information package to all County and Regional Federations, and obtained support from the United Cooperatives Organization

(Ferns, 1985). The farmers were concerned about their absolute responsibility for cleanup, and their responsibility as owners of chemicals during transportation (Cox, 1985). They argued that there was no appeal, and the only recourse was to sue the guilty parties, which would involve court costs and no resolution should the guilty party have no assets. If vandals or equipment failure caused a spill, the farmer would be responsible (Farm and Country, 1985; OFA, 1985b). The farmers also considered that the exemptions favoured the government and Ontario Hydro. In the OFA's brief, it stated that it was concerned about four main areas: the exemption of Ontario Hydro, whose nuclear operations and the transportation of radioactive fuels and wastes were exempt; the preferred position of the Crown in that landfill sites were exempt; the "weak" compensation procedures; and the "flawed" liability concept for farmers (OFA, 1985a).

The opponents were continually emphasizing the problems that the Bill would create for small business. Yet the Canadian Federation for Independent Business (CFIB), which represents small and medium sized enterprises, did not join the opposition forces. Besides more information, the CFIB wanted differential treatment based on the size of the business. It presented a submission to the Panel in which it did not support or oppose the position of the CMA and its allies. But, it did weaken their case by suggesting that the impact on small business was difficult to assess without sufficient information about spills. It proposed that the ministry obtain and publish information concerning spills history by size of firm, which would enable some assessment to be made of the problems encountered by small businesses. It wanted information

concerning the size and sector of activity of spilling firms, the costs of cleanup, the extent of claims for loss and damage suffered, and the distribution of liability. It argued that the cost of cleanup might result in insolvency for the small firm; and it suggested that this could be avoided by a sliding-scale deductible based on the ability of the business to pay (CFIB, 1985).

The truckers, the CFIB, the farmers and the municipalities feared the transfer of ownership by suppliers to the carriers or the recipient of the goods before leaving the manufacturer's or distributor's business, and also the establishment of dummy corporations to avoid paying for cleanups (CFIB, 1985; Pollock, 1985; OFA, 1985a; Minutes, October 30, 1985a & 1985b). This was not an unreasonable fear. The OTA and the IBC alleged that it was already occurring with the large manufacturers (Pollock, 1985); and it had been suggested as a strategy by the lawyers for the large companies (McCarthy & McCarthy, letter, 1983). Also, the CMA, in a meeting with the MOE, had suggested that the Bill might result in structural changes, such as companies restructuring to establish dummy corporations to isolate their assets from the risks of liability (Minutes, October 30, 1985c). Nevertheless, these fears did not discourage the truckers and the farmers from allying with the large companies to prevent the Bill's proclamation.

An Original Tactic

As it looked as if the government intended to proclaim the Bill, the opposition tried an original tactic to try to regain the dominance of its perspective. This

new strategy had not been attempted in Canada, although it had been used in the United States. On October 16, 1985, a coalition of industry and agriculture formed a group called the Citizens Advocating Responsibility for the Environment (C.A.R.E.). It included the CMA, the Canadian Chemical Producers Association, Du Pont Canada Inc., C.I.L., the OFA, the OTA, the Ontario Mining Association, the Canadian Painting and Coating Association, and its Ontario affiliate the Launderers and Dry Cleaners Institute (Ontario), and the Ontario Petroleum Association. Its mandate was to launch a campaign to rewrite the Bill. It wanted the Bill referred to a committee of the legislature for study, and it hoped to persuade MPPs to block its proclamation (C.A.R.E., 1985a; Ferguson, 1985; Rickwood, 1985).

C.A.R.E. presented itself as another type of environmental group, which was concerned that the Bill would not achieve its objectives and adequately protect the environment. It argued that the Bill did not "do justice to the environment". It did not necessarily make the real polluter responsible, it exempted institutions, mainly government institutions, which were concerned with radiation and nuclear waste, it did not deal with sewage fouling the water and beaches, and it was vague and complicated in its treatment of innocent victims (C.A.R.E., 1985a). C.A.R.E. was obviously not a typical environmental group. It produced a glossy brochure, had a Toronto Dominion mailing address and a budget of between \$10,000 and \$12,000 (Rickwood, 1985; Ferguson, 1985).

Cooptation

In his discussions regarding passive revolution, Gramsci suggests that two of the methods by which hegemony is sustained is through the formation of alliances, and through the cooptation of groups or the leaders of the opposition (Gramsci, 1971: 168, 418, 57f, 58f, 128f, 227). Industrial capital had been highly successful in forming alliances with small business, farmers and truckers, but the likelihood of the cooptation of an environmental group or its leaders, or encouraging them to restrain themselves to a less hegemonic area, seemed remote. Offe (1985: 830-1) has remarked that new social movements relate to other political actors in terms of "sharp antimonies". They are incapable of negotiating because they cannot offer concessions; and they are unwilling to negotiate because they consider their central concern to have such a high priority that no part of it can be sacrificed.

Social movements are fragmented entities. Each segment of a social movement has priorities that differ from that of other segments. Different sectors have different agendas, so that interests do not always coincide. At these times, such sectors may be persuaded that they can achieve their goals by allying with other social forces. Two groups of the environmental movement had interests that were amenable to the interests of the opposition. The Conservation Council of Ontario included the OFA amongst its members, and it disseminated the position supported by the OFA that society benefits from production and, therefore, should share in the liabilities of production. This resulted in a protest from CELA, another member of the Council (Vigod, letter, 1985b). More important from the perspective of environmentalists was the fact that

Pollution Probe was attempting to liaise with industry, and was prepared to consider a review of the Bill.

Pollution Probe had already split with the environmental community over the recycling of aluminum cans and private sector funding for recycling (Macdonald, 1990: 211). Its Director, Colin Isaacs, had begun a dialogue with industry in the fall of 1984. He was attempting to build bridges between environmental groups and industry, and to consult with industry to develop joint projects. In this way, he thought that more might be achieved than by taking a confrontational position. Isaacs saw linkages between the economy and the environment, and thought that care of the environment could support economic efficiency (Interview, Isaacs, 1993).

Pollution Probe's goals were to attack the source of hazardous spills by working towards eradicating the toxic chemicals that caused the problem, and not to prevent spills by imposing legal penalties. It was less concerned than CELA with responsibility for spills. It considered the Bill to be ineffective in placing the onus on the producer of chemicals instead of the manager or the owner of chemicals. Initially, Pollution Probe joined with CELA in dismissing C.A.R.E. as a last ditch attempt to prevent the proclamation of the Bill. Isaacs stated that the organizations in the group were strong lobbyists against the Bill for economic reasons, and had ignored the environmental and public health benefits that would result from the legislation (Ferguson, 1985).

Isaacs was persuaded that there were some areas where improvements of the Bill were possible, especially regarding the effects on the agricultural community.

On November 24, 1985, five days before the proclamation was due, Pollution Probe joined C.A.R.E., the Insurance Brokers Association of Ontario, and the Motor Vehicle Manufacturers Association in sending a telex to the Minister requesting a meeting of the interested parties to make recommendations for changes to the proposed "Spills" Bill (C.A.R.E., 1985b). They argued that there was still uncertainty regarding how the pollution insurance proposal would work. They also noted that the proposal did not include any type of auto insurance, and there were problems in this area. There was concern that auto insurers would not be providing pollution liability coverage for vehicles in Ontario, especially for trucking risks. This had increased when United Canada Insurance Co., a large insurance company providing coverage to the trucking industry, was placed under the supervision of the federal Superintendent of Insurance due to the bankruptcy of its American parent company.

Support for C.A.R.E. agreed with Isaacs' larger goal of achieving change through a different approach towards industry, which he hoped would persuade them to be less intransigent. He thought that such action would not derail the proclamation, as the government had little choice but to proclaim the Bill. He considered that an agreement to a three year or ongoing review might deal with some changes that had occurred since the Bill had passed, such as changes in the area of insurance (Interview, Isaacs, 1993). This position was similar to that of CELA, which was also prepared to consider a review of the legislation after a stated period. Pollution Probe's goal was to abolish the production of toxic chemicals. CELA's goal was to reduce hazards through the legal allocation of responsibility. Yet, in the eyes of industry, CELA was a hard line

environmental group, whereas Pollution Probe was willing to work with them to understand their position and to minimize rather than completely abolish pollution³ (Interview, Huxley, 1991).

The Strategies of the Supporters

The struggle to initiate changes in certain aspects of hegemony requires a struggle throughout civil society (Gramsci, 1971: 238-9; Showstack Sassoon, 1987: 193-204). A social force has to lobby political parties (a political party unless it was in power and in charge of the coercive apparatus of the state in Gramscian terms would be a part of civil society). It has to forge alliances. It has to communicate its views to the public and to the power holders. It has to understand the ramifications of its position and the position of its opposition. Also it has to realize the ways in which one small change has a rippling effect and contributes to other changes.

Lobbying

Environmental events usually bolster the case of environmentalists. The Kenora spill during the 1985 election campaign provided ammunition for CELA to argue against further dilution of the Bill. It lobbied all the leaders of the political parties arguing that the Bill had already been diluted at industry's request, and that the situation regarding the PCB spill in Kenora would have been different had the Bill been proclaimed (Giorno, letters, 1985a).

The change in the political balance of power changed the balance of power among social forces, and increased the status of environmental issues and the influence of environmentalists. The election had put environmental issues on the agenda, and the accord ensured that the Bill would be proclaimed in some form. Also, the new Ontario Environment Minister, Jim Bradley, had a personal commitment to environmental protection. He took the unprecedented step of appointing members of the environmental community to his office staff; and he was granted the room to manoeuvre on pollution issues by the Premier and his cabinet (Macdonald, 1991: 119).

These changes were reflected in the lobbying tactics of CELA. After the accord had been signed, CELA took the offensive. It suggested that the legislation could be proclaimed minus several subsections. These included the exception that compensation would be waived should the owner or person in control show that they took all reasonable steps, that claims for compensation must be commenced within two years, and that matters that came up before the Environmental Compensation Corporation should be confidential (Ligeti, letters, 1985).

In Gramscian terms, CELA was aware of its position and of the position of the opposition. It was not prepared to compromise on the basic principles of the Bill. Its goal was to obtain passage of the Bill with the provision of absolute liability intact and with adequate compensation for the victims of pollution. It agreed with the CMA that the regulations required revisions, because lack of clarification would result in delays with expensive litigation before victims could obtain adequate compensation. In its brief to the Panel, it recommended that the victim compensation provisions should be

simplified, that the deductible for loss and damage to a victim's property should be reduced from \$500.00 to \$100.00, and that only those spillers who would suffer substantial financial hardship should recover monies. CELA also struggled on the terrain of language. It was aware that language that appears neutral dissolves responsibility, and wanted the term "spoil creditors" to be changed to "victims". When C.A.R.E. was created, CELA drew attention to its high-powered address, and suggested an alternate meaning for the acronym should be "Corporations Abdicating Responsibility for the Environment" (Giorno, letter, 1985b).

Alliances

CELA encouraged other environmental groups to participate in the Panel Hearings. It sent them a copy of the notice of meetings and a letter from the MOE outlining the process; and it urged them to obtain a copy of the draft regulations and to file at least a written submission advocating support of the Bill (Vigod, letter, 1985). Pollution Probe did present a submission to the Panel, so CELA was surprised when it signed the opponents' telex to the Minister.

CELA also allied with the Union of Ontario Indians, which requested that they should be considered the equivalent of municipalities in regard to cleanup.⁴ There was no attempt to forge alliances with other social movements. Feagen (1994) suggests that when participants from other social movements join the environmental movement they press for alliances with other movements, whereas environmentalists who do not belong to other groups are less likely to pursue such a strategy. This may have been the

explanation and there may have been less interconnectedness among social movements in the mid-eighties; or it may have been related to the more mundane factor of lack of personnel and resources to forge any links other than the traditional ones.

CELA also attempted to break up the alliance between large industry and the truckers and farmers by suggesting that their interests were different. It pointed out that large industry caused most spills, and was contemplating circumventing the Bill by transferring ownership at the plant gate, or by forcing drivers to become independent operators working under contract to the company. Such measures would transfer the costs to small business, the farmers and the truckers. It suggested that it was in the interest of farmers to support the Bill, as they were frequently the victims of spills, and they were at risk as they lived along certain transportation routes or near hazardous waste incinerators (Giorno, letters, 1985b, 1985c).

Information

As noted in an earlier chapter, information or lack of information can be a resource. In Ontario, the situation had changed since 1978 when the Bill was introduced. The Ministry of the Environment (MOE) now kept information about spills, and CELA had been compiling statistics about spills from the ministry's data bank. CELA had the ammunition to attack the scare campaign of the CMA and its allies, and to refute the examples of small businesses, farmers and individual cottagers. The MOE statistics indicated that of the 592 reported spills in Ontario in 1983, 54% were from the activities of large companies and 25% from small & medium sized companies (the

majority from service stations). Only 4% were from individuals, 1.2% from farmers, 10% were from a public body such as a municipality, school, hospital or university, 0.8% were from ships and 5% were unknown (CELA, 1985b; Giorno, 1985a; Vigod, 1985). When the sources of spill incidents were examined, of the 592 reported spill incidents, 32.1% were transportation related, 32.8% were from plants, factories, process facilities and similar installations, 21.9% were storage related, such as from marine terminals, storage depots, service stations, and 13.2% were from sewers or other sources⁵ (Giorno, 1985a; Table 3). Few spills were the result of a drunk driver colliding with a truck carrying hazardous materials; most were from stationary sources, such as the recent Dow discharge of perchloroethylene into the St. Clair River (Giorno, letters, 1985b, 1985c).

Use of the Media

CELA used the opportunity of the proclamation of the Bill to emphasize the Bill's importance. It also highlighted industry's opposition, and reiterated how the statistics disproved industry's position regarding small business and farmers. On November 29, 1985, CELA presented the "Hanging Tough" Award to Jim Bradley for the proclamation of the "Spills" Bill. This was the first award that CELA had given to an Environment Minister, and it was "a poster sized tribute filled with newspaper clippings of the fight" (Walker, 1986). In CELA's press release, it pointed out that it was seven years and six ministers ago that the Bill had been introduced into the

TABLE 3

Source of Spill Incidents

SOURCES (% of total)	Number of Incidents						
	1977	1978	1979	1980	1981	1982	1983
Transportation related*	34.8%	33.3%	30.8%	31.9%	35.2%	32.0%	32.1%
Plants, factories, process facilities, etc.	25.7%	26.7%	27.5%	31.0%	31.4%	35.2%	32.8%
Storage Related **	27.8%	28.3%	31.6%	25.7%	19.9%	21%	21.9%
Sewers, other, unknown	11.7%	11.7%	10.1%	11.4%	13.5%	11.8%	13.2%
Total Spills	538	453	556	483	624	466	592

* Water, Roads, Rail, Pipelines, Air

** Marine Terminals, Storage Depots, Service Stations & Others (Private)

(Source: Ministry of Environment Emergency Response Coordination Office, Annual Spill Report Summary: January to December 1982 (April, 1983); Appendix "A": Case Studies of Spills 1980-1985 Frank Giorno, Research Director, CELA, August 1985).

Legislature. It indicated that industry had strenuously opposed the Bill's proclamation in spite of several spills: the PCB spill near Kenora, the spill by E. B. Eddy Co. into the Spanish River, a spill from the Boise Cascade paper mill resulting in the evacuation of Fort Frances, and the recent spill of perchloroethylene from the Dow Chemical Company in Sarnia. It described the campaign against the Bill, and congratulated the minister on withstanding the pressure.

The Role of the Provincial Level of the State

Gramsci argues that hegemonic leadership requires that sometimes the state has to pursue policies that are not in the interest of the capitalist class or a capitalist class fraction (Bocock 1986: 45; Gramsci, 1971: 161). Thus, even at the provincial level of the state, policies cannot solely reflect the direct narrow interests of capitalists; they have to express the interests of a large proportion of the population. It is essential that ordinary people accept the policies being pursued by the dominant group, and that these policies should be related to prevailing values. If this does not occur, people may feel that they have been manipulated to tolerate policies favouring ruling groups. But the compromises with other social forces cannot touch the essential economic function of the capitalist class, or the core features of capitalism (Gramsci, 1971: 161, 182).

Because the environment had been an issue in the election, the new Progressive Conservative government introduced several environmental legislative measures. These were the establishment of a \$100 million Environmental Protection Fund to finance waste site investigations and cleanups, the creation of an Investigation and Enforcement Branch, and an increase in fines, including jail terms, for environmental offences. These measures attacked pollution by separating the enforcement branch from the abatement staff, who try to reduce pollution through negotiated Control orders, and by ensuring that the present laws were enforced. The Minister did not introduce the proclamation of the "Spills" Bill in this flurry of activity. This may indicate the extent of the success of industrial capital's lobbying efforts, and the Bill's perceived relationship to economic functions.

The Liberal government also had to take account of environmental issues. It appointed a minister to the environmental portfolio who wished to make it a proactive ministry, and who appointed former environmental activists to his staff (Walker, 1986). Nevertheless, the government could not disregard the industry/carrier group (the CMA plus representatives from the railways), and some members of the cabinet were supportive of its position (Walker, 1986). When the CMA asked for an opportunity to present its case to the Liberal caucus, the caucus invited both groups to present their views to its Environmental Committee. In the vain hope that the wide gulf between the two parties could be bridged, the caucus requested that two working groups from the respective organizations have further meetings in an attempt to achieve a compromise.

The government had to heed the views of the opponents, but the CMA's suggestion of a task force would not resolve the problem. It would only result in further delays, as the joint meetings between CELA and the CMA had indicated that they were unlikely to come to any form of consensus. CELA and the industry/carrier group had met on June 13 and June 17, but little had been resolved. The industry/carrier group regarded the abolition of absolute liability as essential, whereas CELA deemed absolute liability to be an indispensable feature of the Bill. The CMA argued that there were two spill victims: those whose property or interests were affected, and those who were involved in a spill but were not at fault or responsible. CELA considered that the latter group knew what the potential problems of hazardous substances were, could act to reduce the risks, and were more capable of dealing with spills when they occurred (Peel, letter, 1985; Patterson, letter, 1985; Vigod, letter, 1985a). The Liberals expected

immense lobbying from the opponents. They had to "damn the torpedoes", but they also had to give the opposition forces some input into the regulations (Rudolph, memorandum, 1985).

The Liberals were faced with two dominant problems: the regulations and the question of insurance. Both the supporters and the opposition did agree that there were some problems with the regulations, which one lawyer describes as confusing and "wild and woolly" (Interview, O'Donnell, 1993). Bradley decided to appoint the Panel to receive submissions regarding the regulations and to hold public meetings in August. The Panel was to make recommendations regarding the requirements for compensation, and the amounts of compensation. It was to suggest which spills would be exempt, the limit to liability for farmers, and the conditions under which insurers could recover costs from claims paid.

The Panel

In the legal culture in Canada the statutes are the skeleton of legislation and the regulations flesh out the details. This is partially because this avoids encumbering legislation with details. Also it is faster and easier, and less political, to amend regulations than to amend a bill. In addition, it is not possible to envisage all the problems or situations that might arise in practice. This is especially the case with environmental legislation, because there is usually no precedent, and the legislators are starting from zero. This was particularly the case in the "Spills" Bill, because it went further in specificity, and yet a great deal had been left for the regulations (Interview,

Manzig, 1993). Dr. Landis had drafted the regulations and had tried to close every possible loophole, so that they had become so convoluted and incomprehensible that insurance and environmental lawyers found them difficult to understand (Interview, Armour, 1993; interview, O'Donnell, 1993; interview, Manzig, 1993). Even so, it was unusual to create a panel to consider regulations. Also, it was unusual that it had such a short time and so few hearings before it produced a report (Interview, Manzig, 1993). This was not entirely a symbolic gesture, because the regulations did require further examination. But it did not meet the requirements of a review of the legislation that the opposition wanted.

The Panel consisted of a lawyer, Dr. Ted Manzig from the University of Windsor; a lawyer from industry, Jeanette McDonald from Imperial Oil; and an insurance consultant, Peter Armour. It was to formulate regulations that were comprehensible and functional. Regulations can be altered by the Cabinet, so the goal was to clarify them and to make them workable as quickly as possible (Interview, Armour, 1993). The Panel was not given the mandate to review the principles of the Bill, but it would give the various parties the opportunity to provide input into the regulations. This input was, however, constrained by the short period before the hearings began, the limited time frame, and because they took place in the middle of summer. The Panel received 55 oral and written submissions during the public hearings and 17 additional written submissions. Briefs were submitted from individuals and industrial, agricultural, insurance, environmental and municipal organizations.

On October 11, 1985, the Panel presented its report to the Minister. Most of the Panel's proposed amendments to the regulations simplified and clarified the legislation, and were accepted by the ministry.⁶ The proposal that a three tiered system for insurance deductibles should be created was, however, rejected in favour of a deductible of \$1 million. However the ministry attempted to distinguish between some types of property for the deductible was \$500,000 for farmers, \$1,000,000 for individuals, partnerships and municipalities, and \$1,000,000 plus 10 per cent of the value of the assets for a corporation.

Insurance

Insurance was a major problem for the ministry as an insurance crisis was developing in 1985. The ministry feared that the threatened proclamation of the Bill would be blamed for escalating insurance rates, and that the new comprehensive general liability policies for business would either exclude pollution coverage or not cover large amounts. It argued that the insurance crisis had nothing to do with the proposed proclamation of the Bill, and that the problem had existed prior to its statement regarding proclamation (MOE, 1985a). Some people argued that the Canadian Manufacturers' Association had increased the wariness of local insurers and made the situation worse (O'Donnell, letter, 1985a; Rudolph, memorandum, 1985).

The Insurance Bureau of Canada, which had originally proposed an insurance endorsement to accommodate the Bill, was now opposing the Bill. It feared that the government thought that the industry would provide the solution to the problem

of spills by paying the bills (IBC, 1985). It argued that although minimum limits for automobile liability insurance were \$200,000 in any claim, by law in Ontario the first \$190,000 must be available for bodily injury claims, which left only \$10,000 for property damage. This, it suggested, would barely cover cleanup costs (IBC, 1985). It also stressed that the trend was to exclude pollution insurance coverage. This was because the courts had interpreted "sudden and accidental" in a different way from the meaning held by the industry, had widened the range of claimants in liability cases, and increased the amount of awards. Also the market for environmental liability insurance was limited, and such events as the asbestosis problem and Bhopal had restricted the availability of insurance worldwide (Voutt, 1985).

The truckers, the farmers and the municipalities were also worried about the future availability of insurance. Some insurance companies and reinsurers were dropping coverage for transporters of potentially dangerous or polluting substances, which had resulted in the OTA discussing the problems of insuring with the Automobile Facility where rates were over double those elsewhere (Pollock, 1985). Farmers had been informed that they probably would be left with no insurance coverage after January 1986, and would be fully exposed to the liabilities occurring because of the Bill. The effect on other industries, such as custom spraying, would in turn affect the farmers costs (Clement, 1985: 3). The municipalities also faced a total pollution exclusion in January 1986. They were concerned about midnight dumping, sewer and water spills, and leachate (which was not considered a spill under the Bill). They were also encountering

attempts to transfer the responsibility for spills of chlorine to the municipality by changing ownership at the factory gate (Minutes, 1985a).

Some way had to be found to ensure that insurance was made available at a reasonable cost. The alternative was to make the Environmental Compensation Corporation (ECC) responsible for the costs of cleanup and compensation. This would require that "it be very well funded indeed from Government funds" (O'Donnell, letter, 1985a). The ministry received unexpected help from an insurance lawyer, Allan O'Donnell, who had been involved in the early construction of some facets of the regulations. It obtained a copy of an article by him to be published in the Canadian Underwriter, which resulted in his retention to liaise with the insurance companies to obtain insurance for liabilities imposed by the Bill.

Before any insurance company would consider any proposal, O'Donnell had to abolish the conception that the Bill would result in massive exposure for the insurance industry. He argued that the new exposures were minor, as the standard automobile insurance already covered all road carrier risks imposed by the Bill. A trucker would have to pay for cleanup and restoration immediately, and recover the loss later if someone else were partially to blame or entirely responsible. The immediate cleanup would actually reduce the costs of cleanup. In the case of the owner of a hazardous product, the increased liability for goods that spilled while in the possession of someone else could be avoided by ensuring that the trucking firm was adequately insured. He also noted that chemical companies transported their own chemicals, so that they already assumed all the carriers' liability. He suggested that as the Environmental

Compensation Corporation would indemnify those who were held liable beyond a specified deductible, insurers would be paying for small losses in total, so that insurer and reinsurer could limit their exposure (O'Donnell, 1985a).

Insurance is based on an assessment of risk. Insurers were reluctant to enter the pollution liability field, as it was difficult to calculate the degree of risk because there was little history of insurance in this area, and recent events had indicated that they could not determine the degree of exposure. O'Donnell argued that the MOE Annual Spills Reports enabled risk exposure to be estimated. The odds of a pollution loss occurring were slight as the MOE figures for 1983 were 592 spills in Ontario:

Oil Spills	301
Hazardous Material Spills	95
Gaseous Hazardous Material Spills	29
Other Materials (weak pollutants)	167 (cleanup usually not required)

Also, with a limit of \$1 million, insurers would know to what extent they were exposed, and the degree of uncertainty would be reduced. He proposed that deductibles should be substantial, as insurers of trucking firms had found that deductibles had a salutary effect on insureds in keeping their losses to a minimum. In addition, "retro premiums" should be considered, as then a high premium would allow for readjustment (O'Donnell, 1985a).

There remained the problem of insurance companies' fears that the courts' interpretation of an insurance policy would extend it beyond the original intention. O'Donnell had to find a way of avoiding the problems that had occurred in the interpretation of policies in the United States. His solution was innovative. He

suggested that "sudden and accidental" should be specifically defined as a leak that is discovered within 120 hours of its commencement. Thus, what was to be covered was a leak within a specific time frame; the event was not left to the interpretation of judges or the courts. In addition, coverage should be for named perils only, so that only declared materials would be covered by the policy. Other suggestions were that coverage should be on a claims-made basis, which would give insurers a tighter control over their losses, as old policies could not be retrieved to submit a claim, and the insurer would have the opportunity to cancel the policy in the event of too many claims (Interview, O'Donnell, 1993).

O'Donnell also had to convince the insurance industry to become involved in this type of insurance when the market was withdrawing from it. He proposed a pool of insurers as the answer; and he helped to create a pool of 24 insurance companies, the Pollution Liability Association (P.L.A.). It provided up to \$1 million in coverage for a single spill, which included defence costs. It was a hybrid between a date-of-spill and a claims-made basis, and provided coverage up to \$2 million for all claims from any number of spills involving a policy holder. Claims beyond these limits would be handled by the Environmental Compensation Corporation. In addition, the policy covered the incidents that occurred or commenced during the policy period, and it allowed a one year extension after the expiration of the policy period for a spill that began in the policy period. In this way, insurers would not be faced in the future with claims attributed to past spills (Interview, O'Donnell, 1993; O'Donnell, 1985c; MOE, 1985c). In many ways the pool was similar to Lloyds except that insurance was provided by companies

and not by syndicates, and each company provided ½ to 1% in sudden or accidental liability. The amount assumed varied according to the company: Zurich took the most, and the Cooperators, which did not usually write commercial lines nor insure big risks, took 5 to 6% (Interview, O'Donnell, 1993). The P.L.A. functioned as a reinsurance pool, so that the policy would be issued by a member or non member of the pool, who would then either cede the risk to the pool or retain a portion, or retain the whole risk. Non members would have to retain 5% of the risk when ceding risks to the pool (O'Donnell, memorandum, 1985; O'Donnell, letter, 1985c).

The insurance was created to deal with the problems arising from the Bill, so that it only applied to spills that escaped from containment. It did not apply to long-term pollution, which was covered by Environment Impairment Liability Insurance and required environmental audits, so that the insurer could appreciate the risk. It also excluded underground risks from tanks because they did not have anodized alarm systems, although this situation has changed today as it now covers modern tanks (Interview, O'Donnell, 1993). In addition, it did not use the language of the statute regarding economic loss, so the coverage was more limited than that stated in the Bill, although economic losses arising at common law were included. Two of the reasons for the introduction of the Bill were the costs of the cleanup of a rail accident and fears of health effects from toxic chemicals. The policy excluded carriage by rail, and, although there was coverage for bodily injury and death, there was no coverage for genetic defects or birth defects.

O'Donnell was probably successful because there existed the political will to proclaim the Bill and to solve the insurance question. The Bill was no longer a possibility; it was to be proclaimed on a definite day, so there was an impetus to devise ways in which the insurance industry could deal with it. Also, insurance is based on the law of averages and there were some figures on which to calculate some estimates. The ministry had examined 56 of the spills reported in 1983 that were sudden and accidental, had off-site effects and were not traffic related. The actual cleanup expenditures of these spills ranged from \$100,000 to \$175,000, which was within the range of the new insurance, and within the range of insurance usually carried by Ontario motorists (Hansard, October 28, 1985). The major breakthrough was, however, that O'Donnell devised a way in which the interpretation of insurance was not dependent upon the vagaries of judges, because they could not reinterpret a specified time frame.

Another factor contributing to his success was that O'Donnell sold the pool to the insurance industry. He provided seminars for the Insurance Institute of Canada to explain how the Bill differed from common law, what new responsibilities would be entailed, what was involved in pollution liability, and the details concerning this new form of insurance (O'Donnell, 1985b).

The Bill was nearly derailed by a crisis in the commercial automobile reinsurance market, which was the result of the crisis in the reinsurance industry. Reinsurers had come to regard commercial automobile risks as dangerous risks, and in a reinsurance market with dwindling capacity they could place their money elsewhere. They, therefore, withdrew from the market and excluded all pollution coverage from

insurance treaties covering commercial automobile risks (O'Donnell, letter, 1985b). It was anticipated that by January 1986 all policies would exclude pollution coverage. Some insurance companies were indicating that they would be cancelling their automobile insurance policies, because they could not obtain reinsurance (MOE, 1985a; O'Donnell, 1985b; O'Donnell, letter, 1985b; O'Donnell, memorandum, 1985). These risks would be accepted by the Automobile Facility, which had been established for poor risks, but it would result in an estimated increase of 200-300% in truckers' rates. Even if the Facility altered its policies from a per vehicle rate to a per fleet rate, the premium would still increase 100% (O'Donnell, letter, 1985b). Although the problem was Canada-wide and the result of the crisis in the reinsurance market, the government expected the truckers to blame the "Spills" Bill for their problems.

The collapse of the pollution insurance market never occurred, because the Superintendent of Insurance persuaded the reinsurers to withdraw their demand for a pollution exclusion and to provide reinsurance for those insurers needing it. The level of coverage was reduced. For example, Transit Insurance obtained reinsurance by treaty, so that the level was \$3 million not the \$5-10 million usually carried by their policy holders (O'Donnell, letter, 1985c). Nevertheless, this was likely to forestall any furore from the trucking industry, as it was better than the horrendous premium they would have had to pay to the Automobile Facility for \$5 million in coverage.

The creation of the Pollution Liability Association also provided a partial solution to the insurance crisis, because it provided a pool to cover pollution risks. (This was extended across Canada because insurance and reinsurance could not be obtained

through the normal market). It helped to solve the problems that farmers and pesticide operators would have faced despite the "Spills" Bill. There were about 70,000 farm liability policies in Ontario, and those issued by the 51 Farm Mutuals provided coverage for accidental spills at common law and under the "Spills" Bill. A complete pollution exclusion was expected by January 1986. The ministry suggested that farmers' premiums would be restrained if the Farm Mutuals and other insurers writing farm policies insisted that the farmer purchase a pollution policy as well as a farm liability policy (MOE, 1985b; O'Donnell, memorandum, 1985). The political problem was to make the farmers aware that this coverage would be replacing one that they could no longer obtain. Another related problem was that court settlements, and especially the accident at Bhopal, had resulted in problems for pesticide applicators. They were unable to obtain coverage, or they faced large increases in premiums ranging from 200 to 2,000 per cent. But under the regulations of Ontario's Pesticide Act, they were required to carry environmental liability insurance. Again the pool helped to provide a solution to the problem (MOE, 1986).

There was tremendous pressure on the government not to proclaim the Bill. The former Minister of the Environment was lobbying against the Bill. C.A.R.E. had been formed and had approached the Premier. The opposition had "got the ministry worried" (Interview, Wood, 1993; interview Lloyd, 1993); and at one point the ministry expected a court challenge (Rudolph, memorandum, 1985). The opposition forces, such as the CMA and the OTA, were arguing that the structures of business would be changed, and that further consultation was necessary. The CMA suggested that dummy

corporations would be created (Minutes, 1985c). The OTA suggested that small trucking companies would go bankrupt, and a monopoly situation would be created in the trucking industry (Minutes, 1985b). In a last ditch attempt to prevent absolute liability becoming a factor in law in Canada, the CMA suggested the creation of a fast action tribunal to establish fault while a consultation process to discuss the Bill took place (Denholm, letter, 1985). The OTA suggested that a stakeholder task force should be established to review and comment on the Act and the regulations (Minutes, 1985b). In spite of this pressure, the Bill was proclaimed on November 29, 1985, seven years after its introduction into the Legislature.

Implementation

The Act was proclaimed, the regulations were simplified, and insurance was in place. Now, it was a matter of how the Act would work out in practice. Would the dire predictions of industry occur? Would spills be reduced and cleaned up quickly, and would adequate victim compensation be provided? Environmentalists frequently complain that environmental legislation is symbolic, and that it is not enforced. Strangely, environmentalists claim that this Act is working, and representatives from industry claim that it has never been implemented. This may be because from the environmentalists' perspective the ministry receives notifications of spills, industries do attempt cleanup, and victims have improved access to compensation. From the industrial capitalists' perspective there have not been immense cleanup costs imposed by the ministry. The predictions of bankruptcy and the restructuring of industrial practices have

not transpired (Interview, Manzig, 1993). The effects of the Bill on spills are, however, difficult to evaluate. This section of the chapter will examine what has happened in the area of spills since the Act was proclaimed. It will examine the role of the Spills Action Centre and the Environmental Compensation Corporation in cleanup and the compensation of victims.

A Spill

Whether the Bill was a success depends on what was hoped would be achieved. Its first major test was a gasoline spill at Timmins in the March following the proclamation. This event suggested that cleanup would occur, compensation would be granted to victims, but quasi-criminal convictions would be few. In this spill, an unattended gasoline tanker was being drained into Imperial Oil's bulk fuel plant in Timmins when the coupling disconnected and 15,000 litres of gasoline were spilled. The oil entered the sewers and spread through the town. Six houses caught fire or exploded, sixteen people required medical attention, five thousand people were evacuated, six businesses were shutdown and 225,000 litres of raw sewage were discharged into the river. The Act was shown to be working: Imperial Oil established a claims office, and the ECC publicised its services to the residents and the procedures for submitting claims.

The hopes of the environmentalists that the courts would be harsher on polluters and deter spills were initially raised, and then dashed. The Provincial Court convicted Imperial Oil and the local agent on 27 counts relating to the various adverse effects arising from the spill, but on appeal the convictions were squashed on all counts

but one. The Court ruled that under the Environmental Protection Act only one generic offence occurred. Thus, there was only one pollution incident, so only one count of adverse effects could be grounds for a conviction (Rempe, 1990).

The Spills Action Centre

One result of the legislation is that information about spills is more accessible. The Spills Action Centre (SAC) was created when the Bill was proclaimed. It maintains spill records and initiates responses to spills and other urgent environmental incidents on a 24-hour per day basis. It is, however, difficult to compare pre and post Bill figures concerning spills, because the Centre did not distinguish between notification categories and spill categories in its first year of operation, and discharges into the air are now included.⁷

However, some rudimentary comparisons can be made. There were 9,063 occurrences in 1986, 11,148 in 1987, 13,183 in 1988, 15,861 in 1989, 15,774 in 1990, and 15,800 in 1991, so reported occurrences, that is the discharges of pollutants, have increased since 1986. In 1988, the first year for which there are figures that subdivide occurrences, of the 13,183 reported occurrences there were 4,072 spills. For spills to land, water, and land and water, the figure is 3,473, in 1988, 4486 in 1989, 4916 in 1990, and 4701 in 1991 (Table 4; Table 5). This is a remarkable jump from the 1,000 spills of which 466 and 592 were reported to the ministry in 1982 and 1983 (Giorno, 1985b; MOE, 1983). Since 1988 the number of reported spills has climbed to 5,345 in 1989, and 5,686 in 1990. It then declined slightly in 1991 to 5,251 (SAC, 1992a,

1992b). Part of this increase may be accounted for by the reporting of spills to the MOE that had been previously reported to other agencies, such as municipalities, the Fuels Safety Branch of the Ministry of Consumer and Commercial Relations, and the Petroleum Section of the Ministry of Natural Resources (MOE, 1983).

TABLE 4

A Yearly Comparison 1986 - 1991 of the Numbers of Occurrences* and Spills

	1986	1987	1988	1989	1990	1991
Occurrence totals by year	9063	11148	13183	15861	15774	15800
Spill totals by year			4072	5345	5686	5251
Spills discharges to land, water, & land & water			3473	4486	4916	4701

* Occurrences include spills, notifiable discharges, complaints and others, such as hazardous material released and contained in a building or truck.

(Source: Spills Action Centre, 1992a; 1992b)

TABLE 5

Spills By Receiving Medium

SPILLS RELEASED TO:	1988		1989		1990		1991	
	Spills	%	Spills	%	Spills	%	Spills	%
Land	2261	55.5	2996	56.1	3144	55.3	3120	59.4
Water	969	23.8	1135	21.2	1305	23.0	1054	20.1
Air	543	13.3	776	14.5	649	11.4	451	8.6
Land & Water	243	6.0	355	6.6	467	8.2	527	10.0
Air & Land	51	1.3	75	1.4	98	1.7	81	1.6
Air & Water	5	0.1	8	0.2	23	0.4	18	0.3
Totals	4072	100.0	5345	100.0	5686	100.0	5251	100.0

(Source: Spills Action Centre, 1992a; 1992b).

TABLE 6

Four Year Comparison of Highest Ranked Industrial Sectors

INDUSTRIAL SECTORS	YEAR							
	1988		1989		1990		1991	
	Spills	%	Spills	%	Spills	%	Spills	%
Transportation	473	11.6	715	13.4	834	14.7	785	14.9
Petroleum	547	13.4	709	13.3	712	12.5	691	13.2
Metallurgical	424	10.4	502	9.4	476	8.4	424	8.1
Chemical	416	10.2	585	10.9	615	10.8	441	8.4
TOTALS	1860	45.6	2511	47.0	2637	46.4	2341	44.6

(Source: Spills Action Centre, 1992a; 1992b).

TABLE 7

Four Year Comparison of Spills By Material

MATERIAL	YEAR							
	1988		1989		1990		1991	
	Spills	%	Spills	%	Spills	%	Spills	%
Oils	2136	50.8	2831	49.8	3144	52.4	2960	53.9
Chemicals	798	19.0	1118	19.6	1031	17.3	990	18.0
Gases	546	13.0	864	15.2	717	12.0	475	8.6
Wastes	602	14.3	763	13.4	1032	17.2	945	17.2
Unknown	96	2.3	81	1.4	32	0.6	32	0.6
Other	24	0.6	32	0.6	30	0.5	93	1.7
TOTALS	4202	100.0	5689	100.0	5991	100.0	5495	100.0

* A number of spill occurrences involved more than one spilled material. Therefore, the total number of materials spilled exceeds the total number of reported spill occurrences). The percentages are not always correct, so presumably the figures have been rounded off.

(Source: Spills Action Centre: 1992b)

If one examines spills by sector, the largest number of reported spills in the industrial sector in 1991 were from the transportation, petroleum, chemical, and metallurgical sectors. These sectors, which had formed the main opposition to the Bill, accounted for nearly half the reported spills. The petroleum sector had 691 spills, the chemical sector had 441 spills, the metallurgical sector had 424 spills, and the transportation sector, which does not include private transportation services operated by companies, had 785 spills (SAC, 1992b; Table 6). Unfortunately, there is no data relating the hazard of a spill to a particular sector. Thus, although there were 59 spills involving trains, unless each spill is analyzed, the data do not indicate how serious each spill was. The examples given by the CMA relating to the cottager or farmer account for a small number of spills. The largest number of non industrial sector spills in 1991 was attributed to hydro utilities, residential/private and sewage systems. Hydro utilities accounted for 712 spills; residential and private 405 spills and sewage utilities had 248 spills. Residential and private owner spills primarily involved discharges of operating fluids from privately owned motor vehicles, and discharges from home heating fuel storage tanks. Although oils constituted the largest proportion of spills reported to the Spills Action Centre in 1991, many of these were in small quantities. Agriculture accounted for only 78 spills. In the breakdown according to material, 28 spills were agricultural wastes, 33 were feed and foodstuff, and 50 were pesticides (SAC, 1992b).

Oils were the largest number of spills at 2,960 (53.9%) followed by chemicals at 990 (18.0%) of the 5,495 spills in 1991. The Spills Action Centre notes that many oil spills were of such a small quantity that they would not have been reported

several years ago. Chemicals were not listed as hazardous and non-hazardous, as in 1978, but the November 1992 report noted that these substances are often referred to as hazardous materials. There were 97 PCB spills (in concentrations greater than 50 parts per million), and they accounted for 9.7% of chemical spills in 1991, and 1.8% of materials spilled. In the wastes category there were 13 spills of hazardous solid waste, and 352 spills of liquid industrial waste that were not specified (SAC, 1992b).

What is important is not the spill, but the impact of the spill, and whether it was adequately cleaned up. The MOE estimated that 14% (711) of the 5,251 reported spills in 1991 would definitely have an impact, and 43% (2,283) would have a potential impact. However, confirmation of impact is not a good indicator of the extent of impact, as it does not indicate the volume or type of substance spilled, and other factors, such as the time of year, the location or the sensitivity of the environment. Of the spills with confirmed impact, 458 resulted in soil pollution, 124 in water pollution, 18 in groundwater pollution, and 15 resulted in human health or safety concerns. In regard to cleanup, 2,377 (47%) of the reported spills did have complete cleanup success. An additional 804 spills (16%) were partially cleaned up. Of those that were not cleaned up, the majority were spills to air and to water where cleanup was not possible (SAC, 1992b).

The above does not tell us that spills have increased, but it does tell us that reported spills have increased. Many spills may not have been reported prior to the "Spills" Bill. It does suggest that the Bill does not act as a deterrent to industry and others. Still, with record keeping, spills have become recognized as a problem that can

be approached by the ministry. An unintended consequence of the legislation is that the ministry has become more involved in the actual prevention of spills. In 1991 the ministry implemented a Spill Prevention Strategy. It initiated a detailed review of reported spills, and of 35 companies that had multiple spills at any one location. The primary focus was on spills having adverse effects on surface or groundwater. After a series of meetings with identified sources, about 30 companies were required to submit comprehensive workplans. They had to review their spill history and risk assessment, and their spill detection systems, and they were required to implement a schedule to upgrade their conditions. They also had to assess their diversion containment and treatment systems, and to implement a schedule for the required upgrades. They were also required to develop emergency response plans and procedures, and environmental awareness training (SAC, 1992b).

The Environmental Compensation Corporation

The legislation created an Environmental Compensation Corporation (ECC) and two groups of victims are eligible for compensation from the Corporation: the spill creditors and the owners and controllers. The Corporation is a payor of last resort and authorizes compensation to spill creditors who are unable to obtain compensation for their loss or damage from elsewhere. It also facilitates the settlement of claims, as it not only makes victims aware of their right to compensation from liable parties, but also the liable parties aware of their duty to provide compensation. The Corporation contacts possible spill victims to make them aware of the ECC and their rights under the Act, and

the procedures to be pursued to institute a claim, and it informs victims of other available compensation sources, such as the Workers' Compensation Board, and Unemployment Insurance. It also provides spill victims with information regarding the owner and controller of the spilled pollutant and the insurers, and gives them a sample claim letter and information on how to contact a lawyer. In addition, the Corporation performs an outreach function to increase awareness of the ECC so that information will be passed on to spill victims. This involves the distribution of the ECC information brochures to provincial ministries, police forces, other agencies, municipalities, groups and individuals; contact with the media; and participation in seminars (ECC, 1989).

The Environmental Compensation Corporation also acts as a backup for the owners and controllers who must pay for others' losses and cleanup, but who are not at fault and are unable to recover from others, such as insurers and those at fault. Such applicants must have agreed to settle all claims, apply within one year of the last claim, demonstrate they were not liable at common law and demonstrate that they cannot recover their losses from those who were liable for the spill. This compensation is subject to a deductible of \$500,000 for a farmer, \$1,000,000 for individuals, partnerships and municipalities and \$1,000,000 plus 10 per cent of the value of the corporations assets. There is, therefore, some attempt to discriminate between spillers.

There has been no major claim to the ECC. The amounts paid out are limited to \$500,000 per applicant, and \$2½ million per event. Beyond that it has to have cabinet approval. Also the Corporation can sue anyone that it feels is legally responsible. The mere existence of the ECC encourages a speedy settlement. It

accelerates payments by insurance companies, because if they have not replied to the letter submitted by the victim within 30 days the ECC will pursue the matter. It is, however, difficult to claim for health effects not only because of synergism and latency, but also because the Act states that compensation can only occur for a direct cause, which is difficult to prove in the case of health (Interview, Manzig, 1993).

Conclusion

Political will can overcome considerable problems. In the previous six years, the former governments had refrained from proclaiming the Bill, because of problems with the provision of insurance and with the construction of the regulations. Yet, within six months of the new government, it was on the statute books. This was in a period in which the crisis in the insurance industry was at its peak, the opposition forces had forged alliances, and had obtained the backing of some of the Bill's former supporters. The opposition had considerable resources of money, facilities, and high powered organizational and individual support. Any analysis using resource mobilization theories would suggest that they should have been successful.

Why then were industrial capital and its allies unsuccessful? I would suggest that there is no satisfactory theoretical answer as to why the state or a level of the state acts against the capitalist class. This is especially true when that class is mobilizing against the state's actions. The structuralist answer that the state is acting in the long term interests of capitalism, apart from being definitional, can only be assessed after the fact and avoids the issue.

Gramsci's concept of a passive revolution suggests that the state acts for a capitalist class or a capitalist class fraction, to bring about necessary changes without the participation of other social forces. In this way it avoids granting core concessions. Yet, in Gramsci's scenario the capitalist class or the dominant fraction rules through the state. Again, this does not explain why the state acts against the capitalist class when one sector is vehemently opposed to a specific policy, unless one falls back on the "long term interest" explanation. Can the state interpret the needs of capital better than the capitalist class? One can argue that concessions to the working class favour the realization of capital, which is necessary for capitalism. This can be translated to the level of the firm. In the case of the environment, the argument that concessions favour the long term interests of capitalism is problematic. One can argue that the abolition or a lessening of the degradation of the environment will favour the means of production in the preservation of resources and the reproduction of workers. This may provide an explanation at the abstract level of the interests of capital in general, but it is unsatisfactory when examining specific examples.

Gramsci's other concepts of "hegemony", "war of position" and "national popular" contribute towards a theoretical analysis of these events. Jessop (1990: 356) has used these Gramscian concepts to support his argument that the state will not necessarily act in capitalist ways. He argues that the state reflects the balance of social forces, because it claims to represent the national popular, that is the general interests. If one applies this type of analysis to this last stage of the genesis of the Bill, it provides a partial explanation for the government's actions. The Ontario environmental movement

was granted the opportunity to build on a developing new attitude towards the environment during the election campaign. By participating in the campaign and because of a well-reported spill, it helped to get the environment on to the agenda. It had forged linkages with the two political parties that had not held political power in Ontario, and maintained these linkages after the election, so that it was included in the consultations with industry. It had personnel within the government that were sympathetic to its position. It understood the position of the CMA and its allies, and because of its research it could produce statistics to rebut their apocryphal stories.

Industrial capital failed because in a new conjuncture it had less power, and it could not persuade the provincial level of the state to support its position. Repeated spills had made it politically difficult for the previous government to amend the Bill, and constitutional structures had prevented it from pursuing other routes. Also the grounds for industrial capital's opposition were legalistic, which even when translated into everyday language does not have as much meaning as an actual spill. New environmental problems combined with the growing environmental ethic made it politically attractive to proclaim the Bill. Chapter 7 suggested that industrial capital may be restrained by structural constraints, such as constitutional law, in obtaining its goals. This chapter suggests that it faces political constraints when the unstable balance of political forces is favourable to other interests. Democracy (or hegemonic rule) requires that the government must respond if there is enough pressure for change and certain interests become defined as the general interest.

The provincial level of the state had to adjust to the developing environmental ethic, and to take measures to reduce or, as was claimed by Jim Bradley (1985), eliminate toxic substances from the environment. It was possible that if it did not, there would be increased pressure on the government to regulate the actual production of toxic substances (which was the goal of Pollution Probe). The governing political party needed to proclaim the Bill not only for political party reasons (given the insurance crisis, it could have attempted to come to some sort of compromise), but also because it was essential to proclaim the Bill to maintain support. Environmental problems, such as the Dow Chemical toxic blob, the contamination of the Niagara River, and abandoned dump sites, were already becoming media stories. As environmental interests were now granted more credence, some reforms had to be granted. Thus the political situation suggested this reform, and problems with the regulations and the implementation could be dealt with later. The particular conjuncture required that the Bill should be proclaimed.

Proclamation of a bill does not, however, mean that it will be implemented in all the ways that supporters hope. This Act did not lead to a massive increase in the convictions of polluters. The polluter has to clean up, but "practicable" is open to negotiation. The onus is on the ministry to determine the degree of cleanup, and after the initial cleanup, the offending party can appeal ministry decisions regarding the degree of cleanup to the Environmental Appeal Board. Power still remains with industrial capitalists because they can threaten to close down a plant. Therefore, there is an

inducement to the ministry to negotiate the degree of cleanup required, and thus the possibility of cleanups being watered down in the negotiation process.

The Act is encouraging the prevention of spills by some offenders, not only because they are conscious of their liabilities, but also because the ministry is encouraging the implementation of spill prevention programmes. However, it has only made a dent in the problem. A major spill will occur in Ontario, and there are no indications that the problems of cleanup, overlapping jurisdictions, and the availability of technology for cleanups have been dealt with. In 1990, a public review panel of tanker safety and marine spills in discussing the Great Lakes noted the preparedness of "Chemical Valley" (south of Sarnia), but identified the lack of research into the hazards posed by chemical spills and the inability of the authorities to cope with them, as posing problems for adequate cleanup (Public Review Panel, 1990). While responsibility for the Great Lakes lies with the Federal government, the transfer of responsibility to another level does not eliminate such concerns.

One of the opponents of the Bill commented in an interview, "You could say we lost the battle but won the War." (Interview, Huxley, 1991). It is to be hoped that the War is not over. Industrial capital did suffer a slight loss of power, and the Act does aid in the battle against spills. Unfortunately, the focus on sanctions meant that the legislation did not require a focus on the techniques of cleanup or the use of technology to prevent spills. The federal Transportation of Dangerous Goods Act does require all major organizations to have emergency response plans to deal with incidents involving transportation of their products. But these are not the only types of spills, and there is

no requirement to integrate plans or to have plans for specific forms of spills. It is, therefore, questionable whether Ontario is in a position to deal with a major spill, and it is to be hoped that there will be more knowledge of cleanup technology and better administrative structures before it occurs.

END NOTES

1. One argument was that a drafting error had resulted in absolute liability not being changed to strict liability in 1979 (Letter, Weldon, 1985).
2. They complained that the public notice was published on August 2nd, and the hearings commenced on August 12th.
3. Isaac's position did not receive complete support from the staff at Pollution Probe.
4. A change in the status of Indians would have infringed on constitutional matters, and further changes would have delayed proclamation.
5. The percentage of incidents from plants factories and process facilities and similar installations had increased 6% since 1978 whereas storage related incidents had decreased. Transportation related incidents had decreased 1% and sewers and other sources had increased 1.5% (Giorno, 1985a).
6. The minister accepted forty one of the suggested changes to the Draft Regulations, and nine were not accepted (Letter, Bradley, 1985).
7. A spill is defined as an abnormal discharge of a pollutant from a container or structure, which may have adverse effects on the natural environment. Notifications are "notifiable discharges other than spills", and include required notifications or certain deviations in operations or fluctuations in discharges of pollutants. The distinction between the two categories is not always clear (Spills Action Centre, 1990).

PART V: CONCLUSION

CHAPTER 10

CONCLUSION: CONCEPTS AND THEMES

The "Spills" Bill was drafted out of clear ecological imperative, but it was given birth out of pure politics (Interview, Muldoon, 1993).

Introduction

This study examines only a fragment of the law. Yet, this legislation is interesting from a legal, theoretical, political, political economy and environmental perspective. Legally, the "Spills" Bill introduced a new concept of absolute liability into environmental statutory law, and was unique to Ontario; for no other jurisdiction in Canada has similar legislation¹ (Interview, Manzig, 1993). Theoretically, this dissertation is an example of the interaction between structure and agency. Structures are observed to inhibit change through process, but also to constrain the goals of the industrial capitalist class, in this case through constitutional law. Agents acting collectively attempt to influence actions through mobilization and alliances. Thus, the opponents of the "Spills" Bill organized and allied with other social forces to forestall the proclamation of the legislation. The supporters had fewer resources, and also attempted to construct alliances but mainly within the environmental movement. Politically, it illustrates how the balance of power is affected by an alliance between social and political

forces, and it depicts the limitations imposed on governments by structures and the necessity of governments to respond to the political ramifications of events. From a political economy perspective, the dissertation is an example of the influence of the global marketplace, in this case that of insurance, on provincial policies. Environmentally, it illustrates how environmental events and fears of health may act as a catalyst for action, but that such action requires the ability of environmentalists to seize the opportunities when they are presented.

This study of a struggle over social change in the area of law-making employs a neo-Gramscian analysis, using the concepts of hegemony, alliances, cooptation and passive revolution to increase our understanding of these events. The concept of hegemony suggests that everyday practices and meanings help to construct the many strands that create the web of hegemony, but that simultaneously they are developing strands of a counter hegemony. The analysis argues that hegemony is maintained through the process of the review of the "Spills" Bill through the Standing Committee on Resources Development; and that this created a form of bias in favour of the status quo not only at the observable dimension of power, but also through the less obvious dimensions of structures and meanings. Thus, power was wielded by the actors who possessed considerable resources, and who could muster significant numbers of lawyers to appear before the Hearings. Power was also structured through a process which excluded the victims of spills and scientific and technical experts who might have encouraged a focus on health and the mechanisms of preventing spills. Finally, power

was constructed by the acceptance of dominant perceptions and meanings, not only by the dominant groups but also by the environmentalists.

Throughout the thesis, it is shown that the formation of alliances is important not only in the balance of social forces but in the justification of various arguments. An alliance with the dominant political forces is a crucial factor in achieving the goal of a social force, but alliances with other groups are also important. Industrial capitalists were able to justify their representation of small business and to argue that the Bill would hurt small businesses and individuals because they were allied with the truckers and the farmers. (It was not until the later stage of the Panel that the Canadian Federation of Independent Business was involved.) The cooptation of Pollution Probe and the Conservation Council was therefore an important aspect of the strategy of industrial capitalists because they could then claim a broader base for their opposition.

These events do not fit Gramsci's concept of passive revolution, but some aspects of this concept are useful in the analysis. This was not an organic crisis involving the questioning of the hegemony of the dominant forces, which required the state to conduct a passive revolution and undertake some permanent structural changes to maintain hegemony. The events in 1978 and 1985 could possibly be described as a conjunctural crisis at the provincial level of the state. (This crisis applies to the current situation in which the balance of political forces alters so that political and economic changes are required.) The government did, however, initiate legislation that would introduce changes to the structure of the law, and created some new institutions to deal with spills and victim compensation. Also as in a passive revolution the government did

not attack the essentials of capitalism. Once it realized that it was attacking some of the property rights of the capitalist class, it backtracked and diluted the legislation.

One focus of this concluding chapter will be the concepts of law, property, and health, which, as they have been threads interwoven into the previous discussions, merit further attention. Law is examined as a method of achieving change, and this law is shown to have implications beyond legislation applying to spills. The theoretical arguments regarding property are explored, and the proposal that the reduction of property to that of the spillers and the victims hindered environmental change is advanced. The lack of attention regarding the health effects of spills and the use of health concerns as a proxy for environmental concerns is also discussed. The chapter also addresses certain themes that have transpired in this dissertation: the dimensions and fluctuations of power, risk and insurance, and the way global capitalism affects even a minor piece of Ontario legislation. In addition, it attempts to assess what this struggle suggests for other environmental struggles.

The Law

Law plays a role in the maintenance of hegemony in that it performs an ideological function as a neutral arena for other conflicts. New laws have to reflect the general interest (or what is defined to be the general interest) to some extent. Because law is regarded as neutral and it is deemed to reflect the general interest, the creation of new laws opens up opportunities for change in the distribution of power within society.² However, if any proposed new laws result in an alteration in the balance of power in

society, they will be the culmination of a struggle between protagonists who favour the status quo and those who favour change.

This dissertation suggests that the construction of laws is the result of social struggle, which is itself shaped by other laws, power fluctuations, previous struggles, international markets, ideologies, prevailing perceptions and events. This raises the question of how a law, which is the culmination of struggle between unequal protagonists in a specific conjuncture, can serve the general interest. The answer is, of course, that "it depends"; but because law, because it performs an ideological function, has to appear to serve the general interest. Thus, the ideological facet of law can be a useful tool in creating laws favourable to the environment. Yet, changes to law can have consequences beyond the immediate issue, because new concepts are introduced which affect other laws.

Absolute Liability/Strict Liability

A backdrop to the struggle over the "Spills" Bill is another struggle over the use of the legal concepts "strict liability" and "absolute liability" in the prosecution of regulatory offences committed by corporations. This struggle was conducted in an atmosphere of confusion regarding the meaning of these terms at the Standing Committee on Resources Development Hearings, and to some extent during the Hearings of the Panel.

The legal culture in Canada is complex. There are different types of law: common law and statutory law. In addition, in the case of the environment there are

divisions and overlapping mandates regarding environmental responsibilities between the federal and provincial governments, between provincial governments and municipalities, and between different departments of government. To add to this complexity there are aboriginal rights, historic rights and international agreements.

Common laws are based on historical judicial decisions, and require an individual to use the courts to claim his rights. In the case of the environment, there are five types of common law that are applicable: nuisance, riparian rights, trespass, negligence and strict liability (Estrin & Swaigen, 1993). The latter concept is based on the nineteenth century case of Rylands v. Fletcher. This case established that one is responsible for damage caused by the escape of any substance brought on to one's land even if one has taken the utmost care.³

Statutory laws are public laws created by the legislatures or the federal parliament. There are criminal and regulatory or public welfare laws. Criminal laws prohibit certain conduct; and there is a debate about whether pollution should be classified as a criminal act. Public welfare laws regulate conduct usually because of the risk it entails (Estrin & Swaigen, 1993).

Until 1978, offences were classified as true crimes or public welfare offences. True crimes violate someone else's rights; public welfare offences, that is regulatory offences, violate society's rights (Sheehy, 1992). In addition, true crimes violate the basic norms and values of the community and they are monitored by a judicial body whereas regulatory offences are perceived to be less serious in nature and they are monitored by an administrative agency. The former require a criminal act (*actus rea*)

and a criminal intent (*mens rea*) for prosecution to be successful, that is they include an element of subjectivity. The latter are regulatory offences that rest on the act (*actus rea*), and they are commonly subject to the legal concept of absolute liability, as there are few defences. In 1978, in R. v. Sault Ste. Marie, the Supreme Court of Canada created another category of "strict liability" offences. The accused are granted the defence of due diligence if they have tried to avoid committing the offence or are operating under a reasonable mistake of fact. To add to the confusion surrounding this classification, prior to 1978 the category of absolute liability offences were referred to as strict liability offences; since 1978 the terms have carried distinct meanings.⁴ This decision rendered absolute liability almost obsolete, unless the legislature had labelled the offence as absolute liability, or it had implicitly done so through allowing due diligence as a defence for other offences in the same statute.⁵

This legal regime formed the background to this struggle over the "Spills" Bill. Corporate interests did not wish to have absolute liability entrenched in a statute when a more lenient category had been created. The underlying goal of industrial capitalists was to prevent absolute liability becoming a principle in statutory law whereas up till then it had applied to common law. In the Standing Committee on Resources Development Hearings, they were able to mystify the differences in the terms, because of the recent decision of R. v. Sault Ste Marie, and because the personality of the General Counsel meant that many of his arguments were discounted. They argued for the introduction of reverse onus of proof, so that negligence would be presumed against the owner or person in control. The defendants would have to satisfy the court that all

reasonable care and due diligence had been taken, instead of the victim having to prove negligence on the part of the owner or controller. In environmental cases, it is difficult to prove definitively that the defendant is guilty of causing environmental damage, especially when considering the effects on health. This can be attributed to the uncertainty of science and the requirement to limit "false positives", that is, that an effect of a toxic chemical is stated to be true when it is not (Schreckler, 1984).⁶ This involved some transfer of power to spill victims, but it retained the principle of fault.

An Innovative Legal Regime

The "Spills" Bill did introduce an innovative legal regime. The final version imposed absolute liability for the cleanup of spills, and granted a role to a third party to go in and clean up a spill. The Bill also imposed strict liability for the compensation of the victims of spills. The onus was now on the owner or controller to show that they had been duly diligent, that is, that they had taken all reasonable precautions in the exercise of the activity, so that they would not be liable for compensation. It, thus, granted a higher level of protection for innocent victims than was offered in common law. The consequence was a slight shift in power from capitalists to government and the victims of spills, as it limited the access of the owners and the controllers of a pollutant to the courts.

The law is still limited. Certain terms such as "practicable" lend themselves to form a basis for negotiation between the ministry and the polluter. Victims are restricted regarding what they can claim concerning health. They still have to resort

to the courts, which assume equality before the law, but do not acknowledge that inequalities outside the judicial system ensure that this does not apply.

The law's function of individualizing citizens (Poulantzas, 1980) remained unchanged. Victims of pollution could not sue as a class for compensation (Woods, 1979, SCRD: R-1045). Such a measure would have increased their power in the courts and paved the way for class actions in other areas. The ministry could not introduce an additional reduction in the power of the corporate class; and as the Law Reform Commission was studying the matter, it was left for consideration in less contentious general legislation (Landis, 1979, SCRD: R-1205-2).

Property

One thread running through this thesis is the concept of property. Property permeates environmental issues and appears in many guises. It is a multifaceted concept: it is an object, a right and a relation. Usually property is regarded as an object, but bound to this object are legalistic considerations of rights, duties and liabilities. Property rights grant an individual or a group of individuals the use or benefit of property as an object, and exclude others from this use or benefit. Property is also a relationship. The legal relationship between a person and another person, and a person and an object, is designated as ownership. Ownership grants rights and power, but these are constrained by responsibilities and legal restrictions.

Discussions of private property frequently focus on Locke and his followers who defend private property as a natural right. Bromley (1991: 5), however,

suggests that we should look at Kant, who argues that property rights require "intelligible possession", that is social recognition of the property claim of the owner. A right, therefore, is a claim that the state supports and that others recognize. This implies that change is possible. It also suggests that it is a social relation between the possessor of the right, those who recognize and have certain duties towards this right, and the state, which chooses or does not choose to defend this right to this object.

Types of Property

Several authors have distinguished between different types of property. Marx considers property to be an object, although underlying this conception is the idea of property as a right and a relation. He describes three types of property: common property, individual private property, and capitalist private property. Common property is the basic form of property, and presumably was the original form of property. It is collective production to which all claim a right, and has been abolished by the development of individual private property. Individual property is the result of one's own production, which one possesses the right to keep. The petit bourgeoisie own individual property, but, in Marx's opinion, this form of property is disappearing and is being replaced by the third form of property, capitalist property (Marx & Engels, 1957: 72-4; Marx, 1967: 763-4; Marx, 1977: 349, 576). Marx regards capitalist property as the product of collective labour over which the capitalist claims ownership.

Macpherson (1978) also distinguishes between different types of property - common, private, and state property. He focuses on property rights and argues that

property itself is a political relation and not an object. It is a system of rights of each person in relation to other persons. Private property is the right of an individual or "artificial person", that is a corporation, to exclude a person from something; state property is the right of an "artificial person", that is the state, to exclude a person from something; and common property is the right not to be excluded from something. The state creates and enforces these rights.

Property in Environmental Issues

Macpherson (1978) suggests that property is "an enforceable claim" and the right to exclude or not to be excluded that is created by the state. Clement (1983: 210-224) uses this idea to explain the class position of those who direct the labour process.⁷ This concept of property can be used to explain the underlying environmental exploitation involved in the relationship between capitalists and the community. Clement's argument that there are different property relationships suggests that there is capitalist/community relationship based on the property relationship, which is a different relationship from the capitalist/labour relationship. It involves the ownership of private property and the rights of capitalists to the use of the natural environment.⁸

If it is assumed that all property was common property, as Marx suggests, the creation of private property can be deemed to have taken away the right of the community as a collective to the use of this property and given this right to persons, individuals and "artificial persons", as particular sectors of the community. The possession of private property carries considerable power, as it is a right to some use or

benefit or income, and the right to dispose of the property. These rights are not conditional on the owner's performance of any social function, and they are enforced by the state (Macpherson, 1978). Property rights are a legal right, which is based on a moral right (Macpherson 1978: 11). However, morals are not static, and can be contested, so property rights can change because the moral basis of the "enforceable claim" has changed. This may be because of the new needs of the capitalist system or the development of a counter hegemony.

Not every aspect of the environment has always been regarded as property. In 1978 when the "Spills" Bill was introduced, Macpherson (1978: 11) suggested that air and water, which in the past had not been viewed as property, were beginning to be regarded as common property. This resulted in the creation of the right to clean air and water from which none should be excluded. In the 1990s, there is pressure from the capitalist class that the state designate this common property as individual property, which allows "artificial persons", capitalists, to claim the right of use, which includes the right to pollute. Once certain aspects of the environment became recognized as property, there was the potential for them to be transformed from common property into private property.

The existing ideology will affect whether a property right is recognized, which property right is recognized, and the degree to which the state will recognize a claim to a property right. The state is the enforcer of these claims. It can create private property, and thus grants the rights to certain benefits to some individual or "artificial persons", and not to others. The state mediates claims; it limits capitalists' rights so that

they do not impede others' rights to their property; and it has the role of protecting common property rights. Property is, therefore, a relation that is the result of ideological and political struggle. Property rights are a legal right; and the state is an enforcer, creator, protector and mediator of these rights, so it will be involved in all environmental disputes.

Property Rights in the "Spills" Bill

A spill implies a sudden occurrence, which is detrimental to the environment, and to someone's property be it public or private. One form of property, such as chemical products, is spilt from another form of property, such as a truck, on to another form of property. Therefore, underlying the struggle over this legislation would be the claim to a right of property; and the prevailing concept of property would play a role in the final content of the Bill. The theoretical question that is raised is whether the Bill changed the prevailing concept of property in any way; and the more esoteric question that is raised is whether the struggle suggests any future policy changes that environmentalists should seek regarding property rights. The Bill is therefore of interest today not only because it illustrates the positions held by the state, business, and the environmental movement in struggles over environmental law reform, but it highlights the role that property rights, which are granted by the state, can play in protecting business from the payment of external costs, because the perception of such rights may fail to distinguish between different types of property and specific rights.

The introduction of the "Spills" Bill was concerned with property rights. The Bill challenged the right of capitalists ("artificial persons") and individual persons to their use of their property in a certain way in the production of income. The Bill also increased the protection of the rights of the other owners of private property (individual persons) to the use of their property, and the rights of the state ("artificial persons") concerning its property. The state was, therefore, limiting the rights of the use of property by corporations and individuals to preserve the property rights of individuals, of the state, and of the community.

Thompson (1978) notes in his study of law that " the law did not keep politely to a 'level', but was at *every* bloody level." In this study of the creation of an environmental law, the concept of property permeated the process. It appeared as an object in the desire of the corporations to protect their real property from trespass or their intellectual property from others. Also it appeared as an object and as income in the discussions regarding damage to individual property. It appeared as ownership when there was a discussion over when ownership could be transferred. It appeared as rights in the discussions regarding what rights and duties were related to ownership, what claims victims could make on these rights, and whether rights for compensation should be extended from economic rights to property to include the use and enjoyment of property (Woods, 1979, SCRD: R-1020-2 - R-1040-1). It appeared as a relation between owners and controllers, spillers and victims, and the government and the owners.

Homogeneous Property

Property was not defined in the Hearings of the SRDC; although the different types of owners were stated. It was assumed that property of the spillers was a homogeneous entity, which should be treated in the same way despite the different owners or the different uses of property. The one exception to this was the treatment of farmers, who right from the beginning of the discussions were regarded as meriting less harsh treatment in the event of a spill than small or large businesses. In addition the effects of a spill on the property of the victims was only occasionally mentioned, which encouraged this lack of differentiation.

There are different types of property or "property regimes". Macpherson (1978) distinguishes between common, private and state property, and Bromley (1991) between common, private, state and non property. The difference between common and uncommon property is often of interest to sociologists and environmentalists interested in environmental issues (Marchak, 1987; McCay & Acheson, 1987; Rutherford, 1992; Matthews, 1993). However, this thesis is concerned with the differentiation of private property. Marx differentiated between individual petite bourgeoisie property and capitalist property, and Macpherson between individual property and corporate property. In Canadian law, individual persons and juridic persons are treated the same, except that a body corporate may have had certain restrictions imposed when it was created by statute. Also individuals and corporations may be treated differently regarding deductibles and assets by tax laws (Interview, Manzig, 1993).

What the thesis suggests is that it is important to distinguish between the various types of property rights when instituting a legal regime. Corporations are regarded as "artificial persons", but although they are equal before the law they are not equal in fact. They possess immense resources and considerable political power. The perception of the private property of polluters as undifferentiated according to the types of owners and property uses mystifies the property relation, and constrains the enactment of laws to limit the property rights of capitalists, and, thereby, to protect the environment. If the property and property rights of all polluters are regarded as the same, the possible undesirable results of new legislation on individual property owners and the petite bourgeoisie, whose rights to use and benefit are recognized and protected by the state, can be used to protect corporate property owners whose different uses and benefits are also protected by the state. Also, small capitalists may have different, or possibly similar, uses and benefits for property from large capitalists, but they have different needs and interests. In this case study, the large capitalists frequently used the examples of the disadvantages of the Bill for cottagers and farmers as the basis for their opposition, and the effect of the Bill on the reduction of toxic spills by large industry was rarely discussed. Some differentiation according to forms of ownership in regard to compensation of polluters was introduced following the meetings of the Panel, but the early discussions of the SRDC assumed this lack of differentiation, which contributed to the dilution of the Bill and its delay.⁹

Health

The thesis is also concerned with the silences that occur in the process of this Bill through the various stages. The main silence was that concerned with health. While this was an influence in introducing the "Spills" Bill, it was soon superseded during this process by other concerns. The fact that spills can result in severe health problems, and also that victims request compensation not only for property damage but also for damages to their health, were not discussed during the Standing Committee on Resources Development Hearings. The only discussion was over the legalistic considerations of the period of time that should elapse before a claim would not be recognized.

The result of this silence was that the Act was structured so that compensation would only occur for direct cause. But science is not structured to provide proof of causality beyond reasonable doubt in a court of law. It is difficult to prove that health effects are the direct result of a spill, because there are problems of synergism, latency, and differences in individual propensities to a disease. Synergism means that several factors may be deemed responsible for an illness, and it has been used by some corporations to avoid accepting responsibility for workers' illnesses. Latency means that the disease may occur many years after the event, so that it is difficult to claim that the event caused the disease. These factors may be why there have been only minor health claims submitted to the Environmental Compensation Board.

Some ways to avoid this sort of confusion would be to assume that exposure to toxics is bad for one's health and to provide compensation anyway, or to

compensate for the potential diseases from the known effects of chemicals and to accept that if a disease occurs many years after exposure to a spill, it is considered the result of that exposure. However, such a system is likely to be opposed by industry on the grounds of costs, and insurers on the grounds of lack of measurability, unless the government is to provide the compensation.

Health is a fragile foundation for environmental support of legislation, because environmental health concerns are underpinned by an uncertain science. Paradoxically, it is health and its uncertainties that encourage the entry of these concerns into the discourse. Whereas environmental disasters attract media attention, it is often the fear of health effects on the human population that generate support for anti-pollution legislation. This is related to a fear of unknown powerful substances, which can have disastrous or undetermined consequences, and over which a potential victim lacks control. In addition, fear of the uncertain is likely to have psychological effects (Vyner, 1988: 1097-1103). Yet this was a silent issue throughout this process. There was some debate regarding the dangers of PCBs in the interim period, as the corporations were interested in convincing politicians that PCBs were not dangerous. But there was no debate concerning the physical and psychological effects on exposed victims due to the invisibility and latency of some contaminants. In addition, there was no consideration that the mere uncertainty and disagreement among scientists can be detrimental to a victim's mental health.

Power

The dissertation examines aspects of power. It argues that there are different facets of power, and it examines different ways through which power is wielded, such as overt power through lobbying and argument, power through exclusion and silences, and power through ideologies and language. It also illustrates how the balance of power changes, and how the government has to deal with the political effects of environmental crises.

The different dimensions of power are discussed, the observable power of resources, the accepted power of structures and the power of meanings. Industrial capitalists are shown to possess considerable resources to oppose legislation they do not want. Although it is difficult in the Canadian closed system of government to discover links to the bureaucracy, clearly the CMA was consulted before second reading and industrial capitalists were consulted following the Bill's passage in the initial push to construct the regulations. The presence of a former senior bureaucrat when the CMA and the carriers met with the Liberal caucus in 1985 also suggests that ties had been developed. In addition, members of the CMA did have access to the politicians, including the Conservative Premier and the Cabinet, and later some members of the Liberal Cabinet.

The thesis stresses that despite these advantages, there were times when industrial capitalists' power was constrained because consent to the present system requires that the powerful obey the rules. Thus, the Conservative government could not break the constitutional law and amend by regulation, although it could resist

proclamation. Also the requirement of consent results in an occasional alteration of political power, which may impose some constraints on the power of industrial capitalists. Furthermore, the desire to retain consent means that politicians have to deal with the political effects of environmental events. Whereas the threat of a diversion of investment is a powerful tool, it does not create the theatre that an event can produce.

The factors that contribute to environmentalists' power are also discussed. Their power is observed to increase in minority governments, because environmental issues are a powerful weapon for any opposition. The linkages established with political parties in opposition may continue when they become the government. CELA had the advantages of ties to the personnel surrounding Jim Bradley, the Liberal Minister of the Environment in 1985; and these assistants were both sympathetic and supportive of their position. Also environmentalists gained a momentary increase in power with each environmental disaster, because of the media pressures on the government to act.

The ways in which environmentalists' power is inhibited are also considered. There is some discussion of the silences that are difficult to break, the lack of access to the bureaucracy, and the poor relations with the Minister during majority Conservative governments, all of which weakened their position. In addition, the fragmentation of the movement and the breadth of the movement are observed to result in different goals and different methods for different groups. Also it is noted that a lack of resources resulted in minimal personnel at hearings, which increased the burden on those who were involved, so that there was a tendency to focus on fewer aspects of the problem.

Fluctuations in Power

The dissertation argues that fluctuations in political power can offer political opportunities to environmentalists to advance their cause. A cautionary note should be added here. Unless the ensuing legislation becomes embedded in the political system, it is subject to revocation should the balance of political power change yet again. Reich (1991) argues that "a system built through politics can also be demolished through politics." He relates how political pressure in the 1970s in Japan compelled big business to assume the public welfare costs of economic growth; and how the compensation system for nonspecific respiratory diseases associated with air pollution was dismantled because of industry pressure in more difficult economic times. In the case of the Spills Bill, the passage of the Bill was not sufficient to ensure its proclamation. That required another fluctuation in the balance of political power. As the Act created a new bureaucracy, the new regime may be difficult to dismantle, but this is not impossible.

Risk and Insurance

Risk and the Insurance Industry

One theme running through the thesis is the requirement of the provision of insurance before proclamation of the Bill. It is an aspect of the present ideology that the assumption of profits by capitalists is acceptable because they take risks. The dissertation shows that capitalists in fact transfer as many risks as possible to others, and failing that to their insurance companies. Risk-taking may be a part of capitalism but it is limited risk-taking, and there was no suggestion that as risks should be shared the

profits should also be shared. The dissertation also shows that governments are reluctant to accept the possibility of bankruptcy resulting from the transfer of the external costs of production, especially risk, to the companies or the carriers.

The thesis also illustrates the lack of knowledge of the insurance industry by both government and industry. Industry and insurers view risk and insurance from completely different perspectives. Pollution liability insurers have to fix premiums at a rate that reflects the risk and they have to measure this risk, so if there is a data gap they cannot estimate rates. Industrial capitalists argue that if they are held liable they should be able to obtain "reasonable" insurance against the costs. But cheaper rates can only be obtained if there are fewer pollution accidents. Yet, although industry was able to organize against the Bill, there was no collective response to reduce the number of spills.¹⁰

International Finance Capital

The requirement of insurance to cover risks illustrates one way in which Canadian capitalists are subject to the power of international finance capital, and the way in which this can affect government policy. The general insurance industry in Canada is closer to pure competition than many Canadian industries. Contradictorily, this means that it is more subject to the influence of international insurance companies, because no one company has the assets to provide sufficient pollution insurance to large industry. The Pollution Liability Pool was not composed solely of Canadian companies and the largest subscriber was Zurich Insurance (Interview O'Donnell, 1993). The pollution

liability rates that are set are affected by events in the global environment over which Canadians have no control. Thus if a company located in a country with lax environmental legislation and poorly trained workers experiences a major toxic spill, this will affect pollution insurance rates world-wide, because the pools sharing the risk are global. If a country introduces legislation that changes the bases of the ability to assess future risk, and insurance companies are assessed for risks they did not intend to cover, the availability of insurance will be reduced world-wide.

In this case, insurance, or the lack of insurance, affected the process of this Bill. Once the government considered bankruptcy to be a possibility for some operators because of the Bill, and this to be unacceptable, it was forced to react to the position of the insurance industry. Proclamation was delayed until it was imperative that the government proclaim the Bill. Problems with insurance encouraged the creation of an Environmental Compensation Corporation. Also a crisis in the industry produced consternation in government regarding the conduct of commerce, because of the threat of the disappearance of insurance for truckers and pesticide operators, which would be blamed on the Bill.

The Environment

The dissertation is about an environmental law, but it does not focus on environmental issues. In the Standing Committee on Resources Development Hearings, environmentalists introduced innovative concepts, such as ecological loss and ideas about improving toxic transportation. Also environmental disasters, such as Mississauga in

1979 and Kenora in 1985, acted as catalysts for action. But from the beginning of the process, the central concern shifted from a concern over the environment to one of making the Bill palatable to industrial capitalists and their allies.

Politicians create laws but in response to pressures. Unless there is pressure from the occurrence of some graphic event or media pressure, they can ignore many environmental issues in favour of more immediate problems, such as jobs. While people express concerns regarding the environment, if the choice is posed as a choice between jobs, presented as everyday living, and the environment, presented as an aesthetic choice and therefore a luxury in hard times, they will choose the former. However, another form of pressure results from concerns over health issues, which are considered to be of interest to all, and therefore a "national/popular" issue. If community health concerns are linked to environmental concerns they are more difficult to ignore, so health is often a surrogate for the environment in the struggle to achieve environmental change.

Pollution is one area where environmental and health concerns overlap especially in the case of spills, which often combine the graphic event with the fear of health effects. The disadvantage of spills as a stimulus for change is that the drama is often short-lived, the media are fickle, and outrage is, therefore, difficult to sustain. No environmentalist wants an environmental disaster to further their cause. But the thesis does suggest that when they do occur, environmentalists should be ready to use the event to prevent its recurrence.

The "Spills" Bill, other legislation, and the growth of an environmental ethic have encouraged changes in industry's attitude to the environment since this episode. It is now good public relations to be environmentally aware, but this is always within limits. It is inevitable that in a capitalist system, industry will wish to keep its costs low, to avoid assuming the costs of externalities, and to reduce its risks. In addition, global trading blocks can increase pressures to work to the lowest common denominator, and such agreements do affect local conditions. The onus is therefore on governments to prevent spills. Whether they have the political will, will depend on other pressures that may seem to have little to do with the environment at all.

Conclusion

If one examines the three periods: the period up to the passage of the Bill, the period when it remained on the shelf, and the period immediately preceding its proclamation, the role of political power and the extent of structural constraints can be regarded as crucial variables in the development of environmental legislation. Minority governments are favourable to such legislation, and embarrassing political/environmental events combined with costs to government will also encourage government action. Structures can limit the power of the opponents of such legislation, as governments have to obey the rule of law, and the ideology of law requires this conformity. Majority governments, especially on the right, are less likely to favour environmental legislation. Other factors that are not favourable are an ideology that views property as not requiring different rules according to specific variables, an assumption that science can provide

direct proof of harm to health, and an assumption that the transfer of externalities to the firm should not increase exposure to risk.

There has been an increase in the frequency of world-wide major industrial disasters in the last 50 years, and Perrow's argument that many such accidents are "normal" suggests that others are likely to occur (Smets, 1988). Spills will, therefore, continue to occur in Ontario, but the "Spills" Bill did contribute in a small way to their reduction, and to a lessening of their drastic effects. The Bill provided an incentive for the owners and carriers of goods to focus more on prevention. It set up a Spills Action Centre to help to organize the cleanup of spills, and it created the bureaucracy to assimilate knowledge about spills, which in turn resulted in the involvement by the ministry in the prevention of spills. It also established an Environmental Compensation Corporation to assist the victims of spills. Thus the Bill resulted in a small redistribution of power in society.

Environmental issues are power issues. They are concerned with who has the right to do what, who will benefit, and who will bear the risks and the costs. Environmental change is concomitant with changes in the structures of power, but the present structures are deeply embedded in all aspects of life. To achieve change involves an alteration in the present balance of power between social forces. This balance of power varies with each conjuncture; and it is affected by political and environmental events, such as majority/minority governments, alliances, and environmental disasters, and also the resources of industrial capital and environmentalists.

The dissertation suggests that the reasons the provincial level of the state acts against the capitalist class are complex, and that the consequences may not have been envisaged. If the state's actions are in the area of the law, they will be subject to struggle over the content of the law; and the outcome of such struggles does not necessarily favour the capitalist class.

Gramsci (1971: 109, 113) argues that an understanding of one's strengths and weaknesses and those of the opposition is an essential element in the success of any struggle. This thesis is a study of one struggle and the role of human agency in achieving change. It is assumed that an understanding of past struggles will contribute to our understanding of some processes that affect change. Such studies will illustrate the resources and the vulnerabilities of those opposing change; and they will suggest other problems that should attract the attention of those working for change. This study proposes that we should examine our assumptions about property and health and their relationship to the law. It suggests that we should work for changes that reject the idea of undifferentiated property rights of polluters, and reject ideas about the necessity of conclusive scientific proof in the area of the law.

Environmental struggles are political struggles in the broader sense. They are struggles to change existing political structures; they involve the ways in which we perceive everyday life; and they infiltrate all aspects of our lives. Each small change, therefore, has repercussions that extend beyond the immediate and lay the foundations for further change. This Bill was one such example.

END NOTES

1. Saskatchewan did introduce somewhat similar legislation but it did not include victim compensation (Interview, Manzig, 1993).
2. The creation of laws and the implementation of these laws are two different facets of the law and should not be conflated. However, laws are created with regard to implementation which constrains the incorporation of bias.
3. Some members of the Standing Committee on Resources Development objected to the use of this case because it had occurred in the nineteenth century, but historical precedent is the basis of common law.
4. Strict liability in the common law context still means liability that is not based on fault (Estrin & Swaigen, 1993: 118).
5. Since the Canadian Charter of Rights and Freedoms which was signed in 1982, there has been a trend to use the interpretations of the Charter to erode the application of absolute and strict liability. The crux of this matter is whether the Charter was meant to extend its protection to corporations as legal persons (McMullan, 1992).
6. Schrecker (1984: 26-28) argues that little attention has been paid in environmental policy making to the probability of false negatives - that is the findings of no statistical effect when such an effect does exist. The decision to err on the side of business or on the side of protecting health is a philosophical decision.
7. Clement (1983) argued that property is "a set of rights that determine the *relationships* among and between people and things", and the various forms of property determine specific relationships. He focused on the capital/labour relationship. He compared the economic ownership of the right to the use and disposal of the objects of production and also the possession of the right to direct the labour process, with the lack of the right to both forms of ownership or possession.
8. It should be noted that this relationship is complex because people have multiple identities and capitalists are a part of the community.
9. When the CFIB suggested a different gradation for different sizes of business, this was supported by the Panel, but was not introduced by the government. However, differences regarding the size of the deductible were created for i) farmers; ii) municipalities, individuals and partnerships; and iii) corporations, which went some way towards meeting this request.

10. Under the Transportation of Dangerous Goods Act all major organizations are required to have emergency response plans to deal with incidents involving the transportation of their products.

APPENDICES

APPENDIX I

METHODOLOGY

Historical sociology ... is the attempt to understand the relationship of personal activity and experience on the one hand and social organisation on the other as something that is continually constructed in time. It makes the continuous process of construction the focal point of analysis. (Abrams, 1982: 16).

Introduction

Historical sociology has been firmly entrenched in English Canadian sociology from S. D. Clark onwards (Brym, 1989). Today, it covers a wide spectrum of studies of Canadian dependent development (Matthews, 1983; Laxer, 1991), the role of Indian women in the fur trade (Van Kirk, 1983), and specific social movements such as the Jewish Labour movement and the day-care movement in Toronto (Frager, 1992; Prentice, 1992), women in the labour movement in Vancouver (Creese, 1988), and regional movements in Atlantic Canada and on the prairies (Sacouman, 1979).

My dissertation is a case study that attempts to understand the processes that took place in the genesis of the Ontario "Spills" Bill. It is an example of interpretive historical sociology. This type of sociology attempts to understand the interaction between structure and agency,¹ it examines processes over time, and it highlights particular features and patterns of change. Historical sociologists ask why or how

something happened, and they attempt to explain this event or process by interpreting the evidence (Abrams, 1982: 316). The evidence can be primary sources, such as government documents, letters, minutes and newspapers, or secondary sources, such as books written about a part of the issue or problem. The object is not to give a complete representation of what occurred, for that will always be an impossible goal, as the account will always be a construct from the pieces of evidence that have been chosen or obtained. It is to highlight patterns or concepts to achieve a measure of understanding of how or why a particular event or process occurred, and thereby to introduce new elements into the debates concerning social change. This inevitably means that in observing the same process different sociologists will understand and explain it in different ways. One perspective is not necessarily correct, as another investigation of the same issue may operate from a different level of analysis, focus on different aspects and highlight different concerns. One can only hope for a partial understanding of any process.

The Case Study

Interpretive historical sociologists and researchers interested in environmental issues often study a single case. Environmental researchers have focused on specific, well-known disasters such as Love Canal, Three Mile Island, and Bhopal (Levine, 1982; Walsh, 1981, 1986; Shrivastava, 1987).² Canadian environmental case studies range from environmental regulation (Deweese, 1990), policy cases of Hamilton Harbour (Sproule-Jones, 1993), the experiences of living near a refinery (Eyles &

Taylor, 1994), acid rain (Gibson, 1990), toxic waste (Paehlke & Torgerson, 1990) to forest workers (Dunk, 1994). A few, but growing number of authors (Lax, 1979; Doern, 1990), have traced the historical process of environmental controversies.

One way of viewing the case study is as experimental research, in which concepts are used to interpret several facts to emphasize certain features. Another way is to view it as a case that is representative, as it has been chosen because it exhibited certain features. And yet another way is that the depth and totality of the description bring to light the essential features of the social relationships (Hamel, 1993; Zonabend, 1992).

I chose this case study because it was an example of the introduction of environmental protection legislation that had not been actively promoted by the environmental movement and that had been strongly opposed by a sector of the capitalist class. I hoped that by excluding lobbying pressures to introduce the legislation, the research would provide some indications of why the state sometimes acts against capital in environmental issues, but at other times fails to act. Thus, this case study is not representative of environmental legislation *in toto*, but of a sector of this legislation.

I have examined the process of the "Spills" Bill in some detail, but with an emphasis on certain features, such as the importance of risk and insurance in capitalism, and the role of political power and structural constraints in the construction, discouragement and encouragement of this piece of environmental legislation. Also by exploring the concepts of law, property, and health, I hoped to highlight the ways in which our conceptions provide a framework for such struggles, and to generate further

debate regarding whether the focus of environmental struggles should be changes in the legal concept of property, whether the use of health as a surrogate for environmental concerns should be developed or discarded, and whether those who desire change should concentrate more on struggles over the formation of laws not their implementation.

Archival Material

The initial stage of the research was to establish the context in which the "Spills" Bill was introduced. My first objective was to establish when the environment became an issue for the Ontario government, when pollution concerns developed into an issue, and whether spills were an issue in the early years of the ministry. This background documentary work consisted of establishing a history of the growth of the Ontario Ministry of the Environment, which involved consulting descriptions of the Ontario government and government documents, and consulting the debates in the Ontario Legislature concerning pollution issues and spills. This research established that the crucial Act for pollution concerns in Ontario was the Environmental Protection Act in 1971, that the ministry was created in 1972, and that spills had been a continuing focus of debate since then.

My second objective was to put this growing concern with spills in some general context. I wanted to know what was happening in relation to pollution issues elsewhere in the world, whether pollution issues were of interest to the press, and to what extent spills compared with other environmental issues were a focus of environmental groups. This involved examining press reports concerning spills and

environmental protection issues, and environmental publications, reports of spills and other issues of environmental protection. As I assumed that the position of government would be affected by the economy and the position of business, I consulted government documents concerning the economy, and reports in business magazines concerning environmental issues and the economy.

Obtaining Primary Documents

After collecting the background data, the next step was to approach the Archives of Ontario in order to examine the transcripts of the proceedings of the Standing Committee on Resources Development, and the briefs that were submitted to the Committee. I hoped that these documents would enable me to determine the views of the members of the committee and the presenters, and to establish what questions were discussed and what questions were ignored. Most of the transcripts and the briefs were there, although a few were missing.

The usual problem with historical methods is that documents are missing. The period under review was six years, and the Bill was introduced in 1978, so it was not surprising that the documents were incomplete. The Archives relies on the ministries to send them documents, and some are likely to be lost or accidentally shredded. The provincial Archives keeps designated material up to 1983, so they did not have copies of the transcripts or briefs of the Panel on the Regulations, which sat in 1985. I would later discover that most of these more recent documents were missing.

My next step was to approach the Ministry of the Environment to obtain all the available information regarding the "Spills Bill". I found that accessing data from the ministry is both difficult and time-consuming, and involves the researcher in a "Catch 22" situation. There is no list of published data, and one needs the correct title of a document to gain access. Minutes of meetings and letters are even more problematic. After consulting another researcher with experience in accessing other ministries, I tried to obtain an inventory of the files regarding the Bill. This approach proved unsuccessful with the Ministry of the Environment, as the bureaucrat concerned required that I request specific documents. It is necessary to know that a document exists before requests for access can be formulated, but if you do not know what documents are available it is impossible to request access. In addition, the ministry has a period of 30 days in which to reply to a request and this takes up more time.

I decided to focus on obtaining the briefs to the Panel for three reasons. First, the Canadian Environmental Law Association did not have them. Secondly, they would show what differences in perspectives existed, if any, between 1978 and 1985. Thirdly, I thought that they would be easy to obtain, and during the process I could establish contacts who would suggest the presence of other documents especially in the interim period.

Unfortunately, the ministry stated that they did not have the briefs. Enquiries from others suggested that the ministry might not wish to devote the time to search for the briefs, so I applied through the Freedom of Information and Protection of Privacy Act to request access to the briefs. This again meant a delay because that office

had to request information from the ministry, and again the ministry had a period in which to answer its requests.

As the briefs were not easily available, I had to pursue other avenues. I contacted the Archives in case they had them, but they argued that they should be at the ministry. I also contacted the Legislative Library, which had some briefs. They agreed to let me photocopy them, as the ministry staff had used this library because of various problems with the ministry library. My other route was to request copies from the individual organizations that had presented briefs to the Panel. This had some results, but many had destroyed their copies after the Bill was proclaimed or three years after the proclamation. Other organizations had disappeared, or had floating offices that were located at the office of the current president, so that briefs had been lost or destroyed.

Government Procedures

To comprehend why the briefs were not available, it is necessary to understand the procedures at the Ministry of the Environment. Every record of the ministry is subject to one of over 250 schedules. A schedule is created that considers the importance of the record, the likelihood that it will be kept in the future, and its importance to the next generation. The record is kept for two years. It is then sent to the Record Centre where it is kept for a period of up to ten years, after which it is destroyed or sent to the Archives of Ontario. The branch director or the person in charge of the particular committee may make a recommendation that the record should be sent to the Archives. This is sent to the Deputy Minister. The record is signed off

by Legal Services and sent to the Archivist of Ontario, who decides whether the record is important or not (Interview, Ruiter, 1993).

In sum, every record has to have a schedule, which is usually allocated for 7 years. It takes about 6 months for a record to be designated a schedule. However, there is usually a generic schedule, which is assigned until a formal schedule number is granted. In this case, no-one registered the records with the Manager of Records Management, so they were not scheduled (Interview, Ruiter, 1993). This was probably because the Panel was set up quickly and sat over a short period. The staff identified in Appendix A of the Report of the Panel on the Regulations were no longer employed by the ministry, and although I was able to contact two of them they were not able to help me. The Chair of the Panel, Dr. Manzig, said that he had left the files with the executive coordinator. The executive coordinator of the Panel had retired, but when contacted, stated that he had left all the files in his office. It is possible that the records were shredded after he left.

I found the necessity to request particular documents a restriction on the research. The Ministry of the Environment may not be as accustomed to requests for access to documents as other ministries, such as the Ministry of Labour and the Ministry of Health. Also, it has apparently suffered in the past from limited library facilities. In addition, during the period of my research, the environment became a more common focus of research and the ministry was no doubt inundated by requests for information.

The Freedom of Information procedure is time-consuming. Each applicant is granted a case officer who attempts to mediate their case. In my case I had two case

officers over the period of my research. The case officer approaches the ministry and ensures that all avenues have been pursued, and negotiates a compromise. The results of this negotiation meant that I obtained a letter stating what avenues had been pursued by the ministry. This letter did develop further opportunities for research as it stated that certain boxes that had belonged to Dr. Landis had been consulted. I requested access to these boxes through the Freedom of Information Act, and this was granted. These boxes did provide me with some information for the year following the passage of the Bill; and they illustrated the problems encountered by the ministry in constructing the regulations.

Other Sources

Another source of information was the Canadian Environmental Law Association, CELA, which granted me full access to its files. I had formed contacts there during some previous research, and I was familiar enough with the old files to be able to examine the previous relationship of CELA with the MOE and the CMA, which provided background material for the project.

CELA obtained funding as a legal clinic in 1978, and its old files are located in the basement of Parkdale Legal Clinic. This is a far from ideal location for archives, as they are at the far end of a damp basement, where many of the lights do not work; and space upstairs in this busy legal clinic is at a premium. These files are in boxes according to the lawyer who was involved with the issue, and each lawyer has several boxes. CELA's more recent archives are in the basement of its present premises. They have been collated; but documents are missing because CELA has moved several

times, or documents have been renumbered, as the librarian created a new filing system following the last move.

CELA's files contained briefs from CELA, Pollution Probe and the CMA to the Spills Advisory Panel on the Regulations, but they did not contain any other briefs or information about the Panel. This may have been because the Panel was a rushed affair in August 1985 when the librarian was on holiday. Considering that CELA has only a part-time librarian, their archives are well-organized, and the files on the "Spills Bill" also include documents from other organizations. In addition, Pollution Probe has passed on its old files to CELA because of lack of space and personnel, but they have yet to be collated.

The Liberal Research Office granted me access to government documents for 1985, with the exception of Cabinet documents. These helped me to reconstruct what pressures were experienced by the government regarding the Bill's proclamation, and its concerns over insurance and transfers of ownership. The other two parties could not grant me access. The NDP Research Office stated that all such information was in storage and access was not possible. The Progressive Conservatives stated that their files were purged after each election.

The former President of the Hamilton Wentworth branch of the Ontario Federation of Agriculture gave me copies of briefs and memoranda issued by the Federation, and the information sent to farmers by insurance companies. The Union of Ontario Indians gave me copies of their correspondence with the ministry, and various memoranda. The Canadian Federation of Independent Business sent me their brief to the

Panel and a summary of their position on the environment, and Bill Glenn, a former researcher for Pollution Probe, supplied me with various articles that provided background regarding pollution insurance.

I also obtained various reports from the government, such as the findings of the Ontario Environmental Appeal Board regarding the Dowling accident, and the federal Environment Contaminants Board's report on PCBs. The Spills Action Centre provided me with its annual reports which included spill statistics, and the Environmental Compensation Corporation provided me with details regarding help to victims. The Chair of the Corporation, Dr. Manzig, who had been the Chair of the Panel that reviewed the Regulations, sent me a copy of the Report of the Panel and details regarding a Symposium on Regulations.

The Data

The results of this research were that I amassed a considerable amount of archival data. Not all of the data are referred to in the text, but those that were are listed in the References. I collected correspondence from environmental groups, the ministry, MPPs, industry representatives, lawyers, insurance consultants, farmers and natives. I gathered memoranda, minutes, briefs, transcripts, reports, copies of legislative debates, articles and reports written for the government, for conferences, and for seminars. I also assembled newspaper clippings from the popular press, clippings from insurance journals and trade journals, and journals for farmers, lawyers, truckers, and environmentalists.

Problems of Archival Research

The major problem when writing a thesis using historical methods is that not all the pertinent data are collected simultaneously, partly because the data are difficult to access or they are scattered in various places. An ideal situation would be for the researcher to collect the documents in chronological order, examine them, and then write the dissertation. In the real world this is not possible. It took two years of correspondence with the Ministry of the Environment to receive definite notification that access to the briefs to the Panel was not possible, and six months to gain access to Henry Landis' boxes that covered the period after the passage of the Bill. Also, tracing non-government documents can be a paper chase, as they are stored in the homes of former representatives of various associations or environmentalists, or they are in storage and have not been collated, or they have been lost or destroyed. Even the straightforward accessing of information from the Ontario Archives took several trips to note what information I wished to have photocopied, and then after a wait, another trip to collect the documents. This means that it is not possible to wait for all the data to be collected before writing begins, and that alterations or expansion of certain points has to take place when the extra data are obtained.

Historical methods face the difficulties of obtaining corroboration. It may not be possible to obtain several sources pointing to the same set of facts. With recent history this is less of a problem, as if documentary evidence is not available, one can ask questions concerning the "puzzle" during the interviews. Related to this is an awareness of the presence of bias not only in the interviews but also in the documentary evidence.

This means that documentary evidence representing all the different viewpoints is preferable. This is not always possible, because of lost or destroyed material or lack of access, so there are inevitably gaps in the archival evidence.

Another problem connected with obtaining documentary evidence is that it is expensive. There is the cost of travelling to Toronto and the costs of photocopying. The Archives insist on doing the photocopying and charge double the normal rates. The ministry charges double the normal rate and a rate for processing the material. I was fortunate that I obtained a grant from the Labour Studies Programme, McMaster University, to cover some of these costs. I was also fortunate that CELA granted me a cheap rate for photocopying, and that the Liberal Research Office did not charge me anything. In addition, the drawback of having photocopying performed by others, as at the Archives and the ministry, is that if a page is missing, unless you have noted it at the time, you do not know if it was missing in the original, or the person doing the photocopying made a mistake.

Interviews

Because there were gaps in my knowledge, because some information needed corroboration or clarification, and because the people who are involved in any situation view it differently from each other and from the written records, interviews with key participants were essential. Key participants were defined as those who had played a major part in the Hearings of the Standing Committee on Resources Development, or in the lobbying process, or in the Spills Advisory Panel proceedings. The Bill had taken

six years to pass through the process and there were three periods to cover: the first encompassed its introduction, the Hearings of the committee and passage; the second covered the period in which it remained unproclaimed; and the third period comprised the time immediately before and following its proclamation. This meant that there were many people involved in this process: six Ministers of the Environment, several environmentalists, several businessmen, and others. Some were involved from the beginning until the end, others for only a short period. Several had moved or retired.

I requested interviews with the Ministers of the Environment who were in the position long enough to influence the policy process. Three agreed to see me, but one was unable to set a time. One former Conservative Minister stated that he remembered little from that period, and his papers were with the Ontario Archives. Enquiries with the Archives elicited the information that there was a restriction of 20 years on access to the papers unless permission was granted by the former Minister. I requested the required permission, but because Cabinet documents were in the papers it was refused.

I interviewed representatives from Pollution Probe, CELA, the CMA and the three representatives of companies of the CMA that had actively opposed the Bill, and a lawyer for a Canadian National. In addition, I talked to representatives from the Liberal Party and the NDP who had sat on the SCRD. Unfortunately, Henry Landis, the former General Counsel for the ministry, had died, but I did interview the former Deputy Minister. I interviewed the Chair of the Spills Advisory Panel on the Regulations; an insurance consultant, who was consulted by the ministry regarding insurance problems

and who later became a member of the Panel; and a researcher for the Panel. I also interviewed the lawyer who helped to arrange the pool of insurance companies in 1985, a farmer who was a former President of a branch of the Ontario Federation of Agriculture, and a representative of the Union of Ontario Indians. The interviews that are referred to in the text are listed in the Reference Section.

During the interview I used a tape recorder and being of a generation that mistrusts modern technology, I took notes. This proved to be wise as some respondents moved around the room or slumped back in their chairs, so that the recorder did not pick up all of their statements. The interview was unstructured. I would ask questions regarding the documentary evidence that I had found puzzling, or that required further clarification that the person might be able to supply. This was particularly the case regarding legal points, such as absolute and strict liability, and also the way in which insurance is assessed. Alternatively, I would ask questions where there was no documentary evidence, and I would pursue any points of interest. For example, I asked the Minister, Dr. Parrott, why he introduced the Bill, and I asked Colin Isaacs why Pollution Probe had signed the telex objecting to the proclamation. Also I asked the representatives of industry and the carriers why their dire predictions had not occurred. In addition, I would ask questions that would help me to understand the attitudes and motivations of the participants, which was not available from the documentary evidence. It was difficult to understand the opposition to Henry Landis, so discussing his character helped me to understand the position of the members of the SCRD and the industry

representatives towards him. I was also interested in why the attitude towards the Bill changed during the Hearings of the Standing Committee on Resources Development.

Problems With Interviewing

There was the problem of whether to conduct the interviews in the early or final stages of my research. I decided to conduct some preliminary interviews to suggest avenues I should pursue. I encountered several problems with these early interviews. First, many of those who were concerned with both phases did not remember the earlier phase, but only the events of 1985. Secondly, if they were businessmen they were willing to discuss the Bill, but only on the telephone. Thirdly, if they were environmentalists they were difficult to contact, and some of them did not reply to telephone calls. Nevertheless, I obtained enough information to provide me with a background for the examination of the documentary evidence. Also, these interviews not only served as a pretest, but suggested other people who should be contacted. When I had obtained most of the documentary evidence, I was more aware of what gaps existed in the data base.

For the second stage of interviewing, I sent a letter on university letterhead stating the purpose of my research and requesting an interview. I stated that I would telephone the key informant's secretary to set up a convenient interview time. In this way I attempted to avoid getting involved in a telephone conversation that precluded a more relaxed expanded interview. This strategy was not always successful, as some informants made their own appointments, or they preferred to call me and to talk at that

time, and some potential informants just delayed arranging a time. Also not everyone has a secretary or a business address, and so the only way of contacting them is via the telephone, and answering machines can prove to be a greater deterrent to contact than any secretary.

I would have liked to conduct more interviews, but I did interview someone from each of the main participating groups. Possibly more interviews with ministry staff would have been useful, but those who were involved were no longer with the ministry and were difficult to trace. Unfortunately, I was unable to arrange an interview with Mr. Bradley, the Minister of the Environment, in 1985, which might have given me greater details about the Panel and the insurance crisis. However, I was granted access to Liberal documents for that period which helped to overcome that deficiency.

Conclusion

I am not sure whether it is easier to conduct historical sociology on a subject within recent memory or whether it is easier to focus on documents from the past. If one works within the genre of interpretive historical sociology, which requires developing "thick description" or massive detail from the past (Geertz, 1973: 26-7; Stinchcombe, 1978), asking people what they were trying to do must contribute to our understanding of social processes. On the one hand, recent historical research has the advantage of interviewing people either to expand the documentary evidence or to act as a substitute for the lack of documentary evidence, and to gain insight into the reasons for

the varying perspectives regarding the issues. On the other hand, some documentary evidence may be more available for issues in the more distant past, as the papers may have been deposited in the archives and/or may have been collated, and after a period of years access may be granted to certain documents, such as Cabinet documents.

Interviewing encounters the problems of inaccurate memories and political sensitivities. Inaccurate memories can be overcome to some extent by conducting several interviews and obtaining as much documentary evidence as possible. Political sensitivities are a particular problem when researching environmental issues, because perspectives on the environment have changed since the end of the seventies, which were to quote Dr. Parrott "a turning point". Positions taken then may be embarrassing in view of today's attitudes. This can only be overcome by interviewing participants on both sides of an issue, and accumulating as much data as possible regarding the motivations of the participants, the diverse views regarding the issues, and the different perspectives regarding the roles of the participants.

Whether the issue is recent or past history, the past is viewed through the conceptual lens of the present. With more recent history, the participants can contribute more information, but both they and the interviewer may not be able to obtain the degree of objectivity that may be possible with history that they have not experienced. Yet, our knowledge of the past is also coloured by the views of the participants in the event, which may mean a lack of information about other perceptions or alternate positions.

I would suggest that provided that one is aware of these problems the more details one can obtain the better, and that a balance between the archival material and the

interviews contributes towards objectivity. In this project both the archival research and the interviews helped to furnish sufficient details to provide an understanding of the process of the passage and proclamation of this Bill: the interviews supplemented the gaps in the archival research, and the archival research supplemented the lack of availability of some potential informants.

One challenge of historical sociology that is concerned with a single case is the problem of non-issues. Many historical case studies, particularly when they are concerned with environmental issues, analyze conflicts, but they fail to examine situations or aspects of a conflict that were not controversial, or why this was so (Lowe & Rüdig, 1986)³. I have attempted to overcome this drawback by suggesting what policies or what issues were not considered, by examining the process in three different periods, and by attempting some comparison in my conclusion. A further examination of the lack of legislation in other provinces, why a different form of spills legislation was introduced in Saskatchewan, and a comparison of these provinces with Ontario, would contribute towards a more complete explanation.

Single case studies always benefit from further testing and comparison. My objective in this project was to achieve a greater understanding of the creation of a law through a detailed examination of the process of the introduction, passage and proclamation of the "Spills" Bill, but this in turn prompts more questions. Is health always a factor that initiates environmental legislation and is then de-emphasized? Is property always a factor that constrains such legislation? Are there any exceptions? Are environmental disasters usually the catalyst for political decisions regarding the

environment? Do decisions favouring the environment usually depend upon the balance of political forces? Such questions can only be answered by further studies of the construction of environmental protection legislation.

END NOTES

1. There is a debate regarding what constitutes agency (Thompson, 1978; Anderson, 1980). I would favour Giddens (1984: 9), who argues that agency refers to the power to act or not to act.
2. For further information about environmental case studies, see Lowe and Rüdig (1986).
3. One exception is the work of Crenson (1971) who compared air pollution policies in two similar cities with controversy in one but not in the other, but his approach is less possible when the controversy continues over a long time.

APPENDIX II

CHRONOLOGY OF EVENTS

- 1970 Total ban on commercial fishing in Lake St. Clair because of mercury pollution.
- 1971 March: William Davis became leader of the Ontario Progressive Conservative Government.
- 1971 July: Passage of Environmental Protection Act.
- 1972 Ministry of Environment created. Amalgamation of the Department of the Environment with the Ontario Water Resources Commission.
- 1973 November: Dowling - CP derailment - PCBs spilled.
- 1975 July: Environmental Assessment Act enacted.
- 1975 September: Bill Davis - minority govt - 51 seats; Stephen Lewis, Leader of NDP Official Opposition -38 seats; Liberals - 36 seats.
- 1975 Possibility of Minamata Disease on Grassy Narrows Reserve.
- 1976 July 10: Accident at ICMESA plant owned by Givaudan & Hoffman-LaRoche resulted in cloud of dioxin over Seveso, Italy.
- 1976 Port Loring gas spill.
- 1977 Minority government - Bill Davis, Premier.
- 1977 July: Environmental Appeal Board ruled the Dowling situation was catastrophic and ordered CP and the MOE to share the costs of cleanup.
- 1977 Love Canal "discovered".
- 1978 April: Results of Environmental Contaminants Survey showed most of PCBs in Canada in Ontario.

- 1978 Love Canal declared a disaster area by President Carter.
- 1978 November: "Spills" Bill introduced - Bill 209, First Reading - Amendment to Environmental Protection Act.
- 1979 March: CP & MOE reach an agreement regarding cleanup of Dowling spill.
- 1979 March: Bill 24 An Act to Amend the Environmental Protection Act, 1971.
- 1979 Standing Committee of Resources Development Hearings.
- 1979 November: Mississauga - CP derailment - 250 000 people evacuated.
- 1979 December: "Spills" Bill - Part IX of the Environmental Protection Act was passed by the Ontario legislature.
- 1980 Federal Transportation of Dangerous Goods Act proclaimed.
- 1980 Superfund created in the United States.
- 1980 June: Government of Saskatchewan passed legislation re spills - have to restore site to state considered satisfactory by the ministry. If appropriate steps are not taken, the Ministry may clean up and bill later for the costs. Can seek compensation for costs, losses or damage caused by a spill.
- 1981 March: Election Bill Davis - majority - 70 seats - only 58% voters voted; Liberals 34 seats, Smith Leader of the Opposition; NDP 21 seats - Michael Cassidy, leader.
- 1983 Espanola - E. B. Eddy Spill into Spanish River.
- 1983 October: Meeting of Union of Ontario Indians with ministry officials - want to be treated as a class of people similar to Municipalities under the Bill.
- 1983 Industry Task Force Report.
- 1984 Stelco tar spill into Hamilton Harbour.

- 1984 June: C.N. train derails near North Bay spilling sulphuric acid into river -owned by CIL being transported from Falconbridge Ltd., Sudbury to Quebec - beaver dams broke after heavy rainfall. CN assumed responsibility for derailment and the costs of cleanup.
- 1984 December: Union Carbide gas accident at Bhopal.
- 1985 April: Kenora Spill.
- 1985 May: Election. Conservative minority government. Conservatives 52 seats; Liberals 48 seats; NDP 25 seats.
- 1985 June 5: Meeting CMA/industry carrier group & CELA and Liberal Caucus.
- 1985 June 13: meeting CELA and CMA.
- 1985 June 18: Conservatives defeated. Liberals asked to form a government.
- 1985 July 1: Federal Transportation of Dangerous Goods Act -regulations came into effect.
- 1985 July 3: Govt issued proclamation naming Nov 29, 1985 as day Part IX to come into force.
- 1985 July 25: Bradley appointed 3 member Spills Regulation Advisory Panel to review 1985 Draft Regulation.
- 1985 August: Panel Hearings.
- 1985 October: Report of the Spills Regulation Advisory Panel.
- 1985 October 16: Citizens Advocating Responsibility for the Environment (C.A.R.E.) was formed. The founding members were the Ontario Federation of Agriculture; the Canadian Manufacturers Association; the Canadian Chemical Producers Association; the Ontario Trucking Association; Du Pont Canada Inc.; and CIL.
- 1985 November 29: Ontario Regulation 618/85 - Environment Protection Act - Part IX -proclamation:
Environmental Compensation Corporation created; Spills Action Centre to be phased in.

- 1985 November 29: CELA presentation to Jim Bradley "Hanging tough Award" upon proclamation of Spills Bill.
- 1985 November 29: Pollution Liability Association established.
- 1986 January: Spills Action Centre (SAC) created.
- 1992 April 28: The NDP government in Ontario issued a list of 21 hazardous substances that were candidates for banning in the province. These included dioxins, furans, mercury, arsenic, PCBs, and several organochlorides found in coke-oven tars. Some of the deleterious effects of these compounds are cancers, the suppression of the immune system, or the creation of hormonal imbalances in wild life (Globe & Mail, April 28, 1992).

The Minister, Ms. Ruth Grier, also announced the establishment of a new department which would work with industries to encourage technologies and processes to prevent pollution.

APPENDIX III

MINISTERS OF THE ENVIRONMENT

1969 - 1972	Ministry of Energy and Resources - George Kerr
July 1971	Department of Environment - George Kerr
February 1972 - April 1972	James Auld
April 1972	Ministry of Environment created
April 1972 - 1974	James Auld
1974 - October 1975	William Newman
October 1975 - Jan 1978	George Kerr
January 1978 - August 1978	George McCague
Aug 1978 - April 1981	Harry Parrott
May 1981 - May 1983	Keith Norton
June 1983 - February 1985	Andy Brandt
March 1985 - May 1985	Morley Kells
May 1985 - June 1985	Susan Fish
June 1985 - 1990	Jim Bradley

APPENDIX IV

SUBMISSIONS TO THE STANDING COMMITTEE ON RESOURCES DEVELOPMENT

February 21, 1979

R.L. Clark, Commissioner, Metropolitan Toronto Works Committee:
Comments regarding Bill 209 in response to a request from the MOE,
January 1979.

March 21, 1979

Conservation Council of Ontario: Letter to Dr. H. Parrott, Ontario
Minister of the Environment with respect to Bill 209

May 17, 1979

Brief on Bill 24, An Act to Amend the Environmental Protection Act,
Submitted by the Canadian Manufacturers' Association

June 12, 1979

Submission of the Board of Trade of Metropolitan Toronto to Mr. O. F.
Villeneuve, Chairman, and the Members of the Standing Resources
Development Committee of the Government of Ontario Regarding Bill 24
(An Act to Amend the Environmental Protection Act).

June 13, 1979

Bill 24, An Act to Amend the Environmental Protection Act, 1971 -
Submission to Standing Resources Development Committee, The
Legislative Assembly of Ontario by the Tank Truck Carriers Division of
the Ontario Trucking Association.

June 13, 1979

Submission to Standing Committee on Resources Development regarding
Bill 24 An Act to Amend the Environmental Protection Act on behalf of
the Federation of Ontario Naturalists.

June 14, 1979

Ontario Petroleum Association Brief on Bill 24: An Act to Amend the Environmental Protection Act. Submitted to the Standing Committee on Resources Development, Ontario Legislature.

June 18, 1979

Re: Bill 24 - Submissions of Canadian National Railway Company

June 18, 1979

Canadian Chemical Producers' Association Brief on Ontario Bill 24, An Act to Amend the Environmental Protection Act.

June 18, 1979

Brief to the Standing Committee on Resource Development on Bill 24 "The Environmental Protection Amendment Act, 1979" presented by The Canadian Manufacturers of Chemical Specialties (CMCS)

June 28, 1979

RE: Bill 24: Submission of Canadian Pacific Limited.

June 28, 1979

United Cooperatives of Ontario Brief on Ontario Bill 24: An Act to Amend the Environmental Protection Act

August 10, 1979

Bill 24 - An Act to Amend the Environmental Protection Act: Submission of the Canadian Steel Environmental Association (CSEA).

August 29, 1979

Submission of Ontario Natural Gas Association to the Standing Resources Development Committee.

August 29, 1979

Submissions to the Standing Committee on Resource Development regarding Bill 24, An Act to Amend the Environmental Protection Act on behalf of the Canadian Environmental Law Association.

October 4, 1979

Exhibit F4: August 30, 1979, letter to the Minister of the Environment & Chairman and Members of the Standing Committee on Resource Development from J.R. Willms re: Canadian Nature Federation Submissions -Bill 24.

October 4, 1979

Supplementary Submission of Canadian Pacific to the Standing Resources Development Committee in regard to the proposed Environmental Compensation Fund.

October 5, 1979

Submission to The Standing Committee on Resources Development: Bill 24, Regarding an Act to Amend The Environmental Protection Act. On behalf of the Sierra Club of Ontario, October 1979.

October 10, 1979

Comments on Bill 24 by the Canadian Manufacturers' Association to the Standing Resources Development Committee plus assessment by Marsh & McLennan sent to Stelco plus letter from Tomenson, Saunders & Whitehead Insurance.

October 10, 1979

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APPENDIX V

ACRONYMS

CACA	Canadian Agricultural Chemicals Association
CCO	Conservation Council of Ontario
CCPA	Canadian Chemical Producers' Association
CELA	Canadian Environmental Law Association
CELRF	Canadian Environmental Law Research Foundation
CFIB	Canadian Federation of Independent Business
CMA	Canadian Manufacturers Association
CMCS	Canadian Manufacturers of Chemical Specialties Association
CN	Canadian National
CNF	Canadian Nature Federation
CP	Canadian Pacific Railroad
CSEA	Canadian Steel Environmental Association
ECC	Environmental Compensation Corporation
EIL	Environment Impairment Liability Insurance
ENGOS	Environmental Non Governmental Organizations
FON	Federation of Ontario Naturalists
IAO	Insurers' Advisory Organization of Canada

IBC	Insurance Bureau of Canada
MOE	Ontario Ministry of the Environment (now MOEE)
MNR	Ministry of Natural Resources
MCCR	Ministry of Consumer and Commercial Relations
NEPA	United States National Environmental Policy Act, 1969
NDP	New Democratic Party
OFA	Ontario Federation of Agriculture
ONA	Ontario Natural Gas Association
OPA	Ontario Petroleum Association
ORIMS	Ontario Risk & Insurance Management Society
OTA	Ontario Trucking Association
PACE	Petroleum Association for Conservation of the Environment
PC	Progressive Conservative Party
PCBs	polychlorinated biphenyls
SAC	Spills Action Centre
SCRD	Standing Committee on Resources Development
TEAP	Transportation Emergency Assistance Plan
UCO	United Cooperatives of Ontario

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Submissions to the Standing Committee on Resources Development Transcripts, February - December 1979 (Appendix IV).

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July 4, 1977,	Legislature of Ontario, Debates.
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November 14, 1978,	Legislature of Ontario, Debates.
November 23, 1978,	Legislature of Ontario, Debates.
November 24, 1978,	Legislature of Ontario, Debates.
November 28, 1978,	Legislature of Ontario, Debates.
December 7, 1978,	Legislature of Ontario, Debates.
April 2, 1979,	Legislature of Ontario, Debates.
May 15, 1979,	Legislature of Ontario, Debates.

October 16, 1979,	Legislature of Ontario, Standing Committee on Resources Development - MOE Estimates.
October 17, 1979	Legislature of Ontario, Standing Committee on Resources Development - MOE Estimates.
December 11, 1979	Legislature of Ontario, Debates.
March 22, 1984	Legislature of Ontario, Debates.
October 28, 1985	<u>Statement to the Legislature on The Spills Bill</u> by the Honourable Jim Bradley, the Minister of the Environment

Letters

Barrie, letter	
1980	September 5, 1980, Letter Ralph Barrie, OFA, to Dr Parrott, Minister of Environment.
Belanger, letter	
1980	June 30, 1980, letter, J.M. Belanger, President, Canadian Chemical Producers' Association to Dr. Parrott, Minister of the Environment.
Blake, Cassels & Graydon, letters	
1983	July 6, 1983, letter Blake, Cassels & Graydon to T. Huxley, Stelco Inc.
1984	June 22, 1984, letter Blake, Cassels & Graydon to T. F. Huxley, Stelco.
1985	June 3, 1985, letter Blake, Cassels & Graydon to T. F. Huxley, Stelco.
Bradley, letter	
1985	October 23, 1985, Letter Jim Bradley to interested parties enclosing the Report of the Spills Advisory Panel.
Brandt, letters	
1985a	October 15, 1985, Letter A. Brandt to A. Eggleton, City of Toronto.
1985b	November 20, 1985, Letter A. Brandt to <u>The Toronto Star</u> .
Campbell, letter	
1982	December 3, 1982, letter M. Campbell, Pollution Probe, to K. Norton, Minister.

Campbell, Godfrey & Lewtas, letter, 1983

June 30, 1983, letter Campbell, Godfrey & Lewtas to Robert Swenor, Dofasco Inc.

Canadian Environmental Law Association, letters

1976a Executive Director, CELA, to the Attorney General of Ontario, March 1st, 1976.

1976b April 13, 1976: Letter CELA to Dr. Henry Landis.

CELA et al., letters

1979a October 11, 1979: Letter to Premier, Bill Davis, from John Swaigen on behalf of: CELA, Canadian Nature Federation, Conservation Council of Ontario, Energy Probe, FON, Pollution Probe, Sierra Club of Ontario.

1979b October 11, 1979: Letter to Dr. Stuart Smith from John Swaigen on behalf of CELA, Canadian Nature Federation, Conservation Council of Ontario, Energy Probe, FON, Pollution Probe, Sierra Club of Ontario.

Canadian Manufacturers' Association, letter

1974 July 15, 1974: Letter to Members of the Legislation and Environmental Quality Control Committees from the Manager, Legislation Department.

Chalmers, letter

1980 June 25, 1980 Letter N.A. Chalmers, Regional Counsel, Canadian Pacific, to Dr. Landis, General Counsel, MOE.

Denholm, letter

1985 November 19, 1985, Letter V. R. Denhom, V.P. Ontario Division, CMA, to J. Bradley, Minister of the Environment

Elston, letter

1983 May 13, 1983, letter Murray Elston, MPP Huron Bruce (Liberal), to Grace Patterson, CELA.

Fitzgerald, letter

1979 September 19, 1979 Letter E.H. Fitzgerald, Reed Shaw Stenhouse, to C.B. Crawford, Dow Chemical of Canada Ltd.

Flott, letter

1980 August 1, 1980 Letter, Stephen P. Flott, Ontario Trucking Association, to Dr. H. Landis, General Counsel, MOE.

- Gaunt, letter
1979 Letter from Murray Gaunt, M.P.P., to John Swaigen, CELA, July 31, 1979.
- Giorno, letters
1984 April 12, 1984, letter F. Giorno to ENGO's.
1985a May 27, 1985, Letters Frank Giorno to Frank Miller, Premier, David Peterson, & Bob Rae
1985b October 23, 1985, Letter F. Giorno, CELA, to The Toronto Star.
1985c October 23, 1985, Letter F. Giorno, CELA, to The Globe and Mail.
- Hughes, letter
1980 June 26, 1980 Letter J.M. Hughes, Ontario Mining Association, to Dr. H. Landis, General Counsel, MOE.
- Huxley, letter
1980 October 17, 1980, letter T.F. Huxley, Chairman, CMA Advisory Committee on Environmental Legislation to Dr. H. Landis, General Counsel, MOE.
- IBC, letter
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- 1983b June 29, 1983, letter Philip Sanford, McCarthy & McCarthy, to Dickson Wood, Du Pont, Canada Inc.
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1981a June 2, 1981, letter Keith Norton, Minister of Environment, to Grace Patterson, CELA.
1981b September 11, 1981, letter K. Norton to G. Patterson.
1982a November 5, 1982, letter Keith Norton to Toby Vigod.
1982b December 15, 1982, letter Keith Norton to Doug Edwards, President, CELA.
1983 May 10, 1983, letter Keith Norton, Minister, to Grace Patterson, CELA.
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1985b November 25, 1985, letter R. A. O'Donnell to D. Oved, MOE
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- Patterson, letter
1985 June 19, 1985, letter Grace Patterson to James McGuigan, MPP.

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1985 June 18, 1985, letter Kenneth R. Peel, CNR, to James McGuigan MPP.
- Roy, Letters
1979a January 23, 1979, letter from Alan Roy, Environmental Coordinator, National Indian Brotherhood, to CELA.
- 1979b July 10, 1979, letter from Alan Roy, Director, Health and Environment Program, Union of Ontario Indians, to John Swaigen, CELA.
- Scott, letter
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October 15, 1980, letter G. Scott, Deputy Minister, Ministry of the Environment, to A. Rendall Dick, Deputy Minister, Ministry of Treasury & Economics.
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- 1979c April 11, 1979: letter from the General Counsel, CELA, to the Minister of the Environment.
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- 1982 October 28, 1982, letter T. Vigod, CELA, to K. Norton.
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1985 June 3, 1985, letter E.L. Weldon, V.P. Secretary & General Counsel to Doug Reycraft MPP.

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Mulvaney, memorandum, 1980

October 10, 1980, Memorandum, J. N. Mulvaney, Director, Legal Services Branch, MOE, to J. Shantora, Director, Legal Services Branch, MNR.

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November 27, 1985, O'Donnell: Notes & Instructions to MOE & MCCR.

Pellat, memorandum, 1983

1983a October 28, 1983: Memorandum Re: Meeting with Ministry of Environment Lawyers, October 20/83, regarding "Spills Bill" and Draft Regulations To: R.K. (Joe) Miskokomon, and Alan Roy. From: A. Pellat, Policy Analyst, Union of Ontario Indians.

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April 17, 1980, Memorandum G.W.S. Scott Q.C., Deputy Minister, Ministry of Environment, to D.A. Crosbie, Q.C., Deputy Minister, Ministry of Consumer and Commercial Relations.

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1978 December 18, 1978: Memo John Swaigen, General Counsel, CELA to CELA Re: Environmental Protection Amendment Act, 1978.

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1979 October 16, 1979: Memo John Swaigen to Bill 24 File re: conversation with Henry Landis on Oct 15th.

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October 6, 1980, Memorandum, K. E. Symons, Director, Pollution Control Branch, MOE, to J. N. Mulvaney, Director, Legal Services Branch, MOE.

Minutes

February 5th, 1979 Meeting of CELA Board of Directors.

October 30, 1985a Meeting of the Association of Municipalities of Ontario (AMO) with the Ministry of the Environment.

October 30, 1985b Meeting of the Ontario Truckers Association (OTA) with the Ministry of Environment

October 30, 1985c Meeting of the Canadian Manufacturers Association (CMA) with the Ministry of the Environment

Interviews

P. Armour, insurance consultant, August 9, 1993.

A. Brandt, July, 1993

Bill Glenn, former researcher for Pollution Probe, August 10, 1993.

Tim Huxley, Stelco, February 20, 1991, telephone interview.

Colin Isaacs, former Director, Pollution Probe, July 14, 1993

Gordon Lloyd, formerly with the Canadian Manufacturers Association, July 19, 1993

J.G.W. Manzig, Chair of the Panel to examine the Regulations, October 17, 1993.

R. A. O'Donnell, Q.C., July 28, 1993

Dr. Harry Parrott, former Minister of the Environment, July 9, 1993.

Alan Roy, Director, Health and Environment Program, Union of Ontario Indians, and Environmental Coordinator, National Indian Brotherhood, August 27, 1992.

Fred Ruiters, Freedom of Access Coordinator, Ministry of the Environment, July 21, 1993

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Toby Vigod, General Counsel, CELA, August 10, 1993.

Dickson Wood, former General Counsel, Du Pont Inc., July 29, 1993, telephone interview.