POLITICAL ECONOMY OF ENVIRONMENTAL HAZARDS, by T.F. Schrecker, Protection of Life Series, Law Reform Commission of Canada, 1984.

In early Stuart days English men of property became increasingly disillusioned with rules who taxed them without Parliamentary authorization, governed without popular consent, protected huge monopolies, demonstrated little respect for the life and limb of individual Englishmen and placed themselves above the purview of the common law.[1] Yet English legal and political commentators of the time could not bring themselves to a fundamental re-thinking of the political structure which gave rise to such perceived injustices. In the words of Christopher Hill they encountered a "stop in the mind" which rendered them incapable of articulating the concept of Parliamentary (rather than Royal) sovereignty even in theoretical form.[2]

In a similar fashion one might conclude that modern Canadian legal and political thinkers encounter a "stop in the mind" when they attempt to deal with the reality of power distribution under monopoly capitalism.[3] Like their Stuart predecessors such writers are well able to articulate their grievances but are often either unable or hesitant to carry their analysis through to its logical conclusions. The Law Reform Commission of Canada's recent study paper *Political Economy of Environmental Hazards* by T.F. Schrecker is a work of this sort. It identifies a group of "policy makers" who impose "externalities" on others without public review, "govern" behind closed doors, engage in monopolistic practices, demonstrate little respect for the life and health of ordinary Canadians and place themselves above the purview of both provincial and federal law. Yet Mr. Schrecker encounters a "stop in the mind" which prevents him from articulating a legal or political theory sufficient to the problem he has identified.

To make this assertion is not, however, to deny that the study paper represents a valuable contribution to the literature of law reform in general and the field of environmental law in particular. The book is truly impressive in scope, eclectic in the sources drawn upon and convincing in its analysis of the dimensions of the problem of environmental hazard. By its publication, the Law Reform Commission of Canada has made a significant contribution to legal literature.

The dimensions of the problem of environmental hazard are outlined in the first four chapters of Mr. Schrecker's study paper. The first chapter is in essence an account of the relative ineffectiveness of present Canadian Environmental legislation. Particular problems involving the general inadequacy of existing sanctions,[4] use of inappropriate language

1. See generally, Christopher Hill, *The Century of Revolution, 1603-1714* (1980) W.W. Norton.
2. *Id.* at 53.
3. Paul A. Baron & Paul M. Sweezy *Monopoly Capital* (N.Y. Monthly Review Press).
4. T.F. Schrecker, *Political Economy of Environmental Hazards*, Protection of Life Series, Law Reform Commission of Canada, 1984 p. 9.

in enabling legislation,[5] disuse of existing legislative powers,[6] limited resources of governmental agencies, inadequate public access to relevant information[7] and the negotiability of almost all aspects of environmental "law" from the terms of legislation[8] itself through agency regulation[9] to compliance timetables[10] are clearly and convincingly documented. This negotiation is portrayed as almost exclusively a closed matter between government officials and industry representatives with little or no effective citizen participation.[11] Further, the context of negotiation is one in which the corporate financial resources which can be brought to bear on a particular problem are greater than the resources that government can allocate to particular issues,[12] and in which certain government departments may be inclined to side with industry against environmental protection.[13] In a broader context Schrecker argues that, granted the expectation that government must generate economic growth, "business' role as a provider and controller of investment all but guarantees it a uniquely preferred status with respect to a broad range of government decisions".[14]

In the second and third chapters of the working paper it is argued that dangerous value judgments are implicit in both scientific methods used to assess the degree of environmental hazard presented by any particular activity[15] and in economic analysis of the amount of environmental danger that society should willingly incur on a cost-benefit calculation.[16] It is in Chapter Four, however, that Mr. Schrecker offers his most important contribution. It is here that he raises the most disturbing questions with regard to legal theory and the legitimacy of law. His argument at this point, under the heading "Business Corporations as Policy-Makers" is clear, logical, well supported and, for these reasons, profoundly disturbing.

Schrecker's analysis of the Business Corporation as policy-maker is cast in a Galbraithian Mould emphasizing the monopolistic nature of capitalism in Canada and the consequent impotence of "free market" constraints on the behaviour of the most important economic actors within our borders.[17] Given this reality and a general lack of cor-

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5. *Id.* at 11.
6. *Id.* at 11.
7. *Id.* at 12, 13.
8. *Id.* at 7-9.
9. *Id.* at 14, 15.
10. *Id.* at 15.
11. A practical example of this process as regards legislative drafting is shown at page 7, economic reasons for citizen non-participation at pages 16, 17, 18 and the practical irrelevance-save as a legitimating device-of existing public inquiry procedures at page 19.
12. *Id.* at 21.
13. *Id.* at 14, 20.
14. *Id.* at 23. This aspect is in fact more disturbing than Schrecker gives credit for. See generally John Calvert, *Government, Limited* (1984) Canadian Centre for Policy Alternatives.
15. *Id.* Chapter Two: "The Politics of Science".
16. *Id.* Chapter Three: "The Limits of Economic Analysis".
17. *Id.* at 69-62.

respondence between corporate and citizen interests in fields such as product safety and environmental hazard[18] (where corporate profits are maximized through taking advantage of "negative externalities"[19]) Shrecker seems to argue that the "public interest" in the true sense can only be protected by government action.[20] Granted, however, that "a reduction in measured productivity is exactly what one would expect as a result of such regulation"[21] it can hardly be expected that large corporations will welcome government initiatives in this area.

To what extent then is government, acting in the public interest, in fact free to establish limits to corporate policy-making? In addressing this question Schrecker draws attention to a number of practical constraints on government action that are usually ignored in legal literature,[22] thus avoiding lawyers' theory — fetishism so scathingly characterized by Judge Frank nearly 40 years ago: "[i]f the realities are out of line with the theory, that is just too bad for the realities".[23]

Within Schrecker's framework the fundamental reality lies in the interplay of the inequality of resources that exist in a world where "the operating revenues of corporate behemoths . . . often dwarf the revenues of the governments, and even the GNP's of some countries . . ."[24] and the dependence of governments on private capital to generate employment, economic stability, prosperity.[25] There are accordingly serious political disincentives[26] to governments that are inclined to attempt to become "masters in their own house" even if direct corporate manipulation of public opinion is discounted altogether.[27] Corporate control of investment flow makes it necessary for governments to maintain a "favourable investment climate"[28] and, where bold governments err too much in the direction of the broad public interest industry-wide "capital strikes" can quickly bring them back into line.[29] Moreover, the fact that corporations operate on an international scale (and have the advantages of multiple-sourcing,[30] vertical integration[31] and diversification[32])

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18. *Id.* at 66.
19. *Id.* at 39-42.
20. *Id.* at 66-67.
21. *Id.* at 41.
22. See for example Gall, *The Canadian Legal System* (2d) at 69-70, wherein the only constraints acknowledged on the "Diceyan-Wade" model of parliamentary sovereignty are said to relate to federal division of powers, judicial review, and "entrenched" provisions. Contrast R.V. Ericson *The Constitution of Legal Inequality* (1983) (John Porter Memorial Lecutre, Carleton University) at 7 who argues that emphasis on "constitutional doctrine" narrowly defined is to obscure "macro economic, political, cultural, and social forces beyond control . . ."
23. Frank, *Courts on Trial* (1973) (Princeton University Press), 63.
24. *Supra* n. 4 at 60.
25. See *Supra* n. 14 and accompanying text.
26. *Supra* n. 4 at 63.
27. Which is not of course realistic. See *supra* n. 4 at 67.
28. *Id.* at 68.
29. *Id.* at 69.
30. *Id.* at 60.
31. *Id.* at 61.
32. *Id.*

"drastically increases the bargaining power of the firm in dealing with individual host governments".[33] The result, according to Schrecker, in that "their size and control over investment flows confer on TNCs the ability to negotiate with national governments *at least* as equals, even in the case of the affluent, economically diverse and highly industrialized societies of western Europe [emphasis added]."[34]

To this point the analysis presented in *Political Economy of Environmental Hazards* is clear persuasive and profoundly disturbing in the context of the Canadian legal system, where the legitimacy of law is ultimately founded on democratic and/or consensus principles. In the final chapters, however, where Mr. Schrecker attempts to formulate proposals for law reform, he runs into a "stop in the mind" every bit as perplexing as that encountered by early Stuart political reformers.

Rather than either exploring the implications of his analysis for Canadian political and legal theory or attempting to formulate proposals which might come to task with a problem of this enormity, Mr. Schrecker falls back on that old mainstay law reform — the recommendation of procedural reforms![35] Thus, starting from the premise that "the legitimacy of decisions about who is entitled to do how much of what to whom . . . is a function not only of the defensibility of decision rules, but also of process",[36] specific proposals are made concerning a myriad of essentially procedural matters ranging from increasing accessibility to information, through public funding of environmental groups, to the encouragement of civil litigation with respect to environmental pollution.[37]

The central difficulty with these proposals is that they are, simply, irrelevant. No procedural reform will *of itself* save even one Canadian from either dangers at work or environmental poisoning. Nor, even taking all the proposed reforms together, will anything have been done that will fundamentally alter the present distribution of power that permits corporations to spew carcinogens into the air or kill our rivers, streams and lakes for profit. The author himself concedes that "[u]nder the most balanced procedural regime imaginable, industry will still control more extensive financial resources than other interested parties, will maintain the bargaining advantage derived from control over investment flows, and will still have to be dealt with on a day-to-day basis in attempting to achieve compliance."[38]

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33. *Id.* at 69.

34. *Id.* at 70.

35. This "out" is frequently used by persons who would save the pretense of reform from analysis suggesting that any changes that are practically possible may be pointless. I have discussed another example in "Prescribing Change Without Reform" (forthcoming) *Windsor Yearbook of Access to Justice.*

36. *Supra* n. 4 at 76.

37. *Id.* at 76, 77. The theoretical framework involving these proposals would seem to be derived from pluralist conflict theory. This has been effectively criticized for reducing qualitative diversity of parties to a single quantitative dimension. See Cain and Kulesar, "Thinking Disputes: An Essay on the Origins of the Dispute Industry", 16 *Law and Society Review* 375 at 380.

38. *Id.* at 78.

Even on the assumption that procedural change might bring forth radically different environmental legislation or more meaningful levels of enforcement there is no reason to believe that such changes could endure without Canada being made to suffer serious economic detriment. The recent development of infrastructure capable of sustaining advanced industries in third world countries coupled with intense inter-state competition for investment and the profit maximizing raison d'être of corporations suggests that economic "growth" belongs to those jurisdictions able to offer the lowest possible standards of wages, taxation, workers rights, occupation health or environmental quality.[39] Nothing in *Political Economy of Environmental Hazards* comes anywhere near to offering an antidote for this novel constellation of causes of state powerlessness.

The author himself would seem to be aware of the likely impotence of the reforms suggested. The best assessment of his proposals is, perhaps, that which he offers in his closing words:[40]

> Given the arguments made at various points in the present paper about the nature of the influence and constraints on government influence, such proposals for procedural reform may appear utopian.

Nonetheless, no legal analysis should be judged solely by reference to the quality of the concrete proposals for reform that are directly generated by it. This is a most important publication. It should be read by everyone with a serious interest in the area.

W. Wesley Pue
Assistant Professor of Law
Carleton University

39. See: John Calvert, *op. cit.*

40. *Supra* n. 4 at 78.