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CONTROL OF POLLUTION FROM SOLID WASTES: A PLEA FOR A CONCEPTUAL APPROACH.

By J.K. Canagarayar*

Pollution in the modern context is not a phenomenon but a dilemma. The legal means adopted so far in the effort to control pollution, have on the whole lacked coherency and direction. This absence of even a degree of uniformity has in effect negated the process of identification of viable principles. It is in this context that this paper seeks to project a conceptual approach to the development of legal criteria for the control of pollution. Recent Canadian legislation in regard to pollution from solid wastes is used in this paper as a framework to illustrate the need for a more rational and meaningful approach to pollution control, in order to promote the development of principles in a field where none exist at present.

The term "solid waste" assumes different connotations, dependent largely however, on whether it is conceived from the manufacturer's, consumer's or community's point of view. When the term "waste" is conceived from the community's point of view, it conveys a technical connotation. The term "waste", when used in relation to the manufacturer's or consumer's notion, conveys a meaning similar to that used in every day parlance. Provincial legislation in Canada has been mainly directed towards the control of pollution from solid wastes in accordance with the community's concept of the existence of "solid wastes". In other words, the primary aim of control practice has been to provide for the disposal of material which the community considers "waste", without due consideration being given to the fact that this can be accomplished only by a regulatory system aimed at the manufacture of products that could end up as "waste", and the reduction of the possibilities of consumers treating substances as constituting "wastes". The

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limitations in this singular approach towards the control of pollution from solid wastes has led a few provinces to embark on policies that seek to identify and control "wastes" as conceived from both the manufacturer's and consumer's points of view.

The operation of the *Alberta Beverage Container Act*[1] in the light of the *Alberta Litter Act*[2] brings out the distinctions that may arise by virtue of the modes of conceiving "solid waste" as from the manufacturer's, consumer's and community's points of view and also illustrates the attempt at the exercise of control, at the different stages of identification of "solid wastes". The *Alberta Beverage Container Act* was enacted essentially to control the manufacture and disposal of containers which may be considered "waste" by the manufacturer and consumer after their respective uses had been served. In other words, the Act *prima facie* formulates a control policy aimed at containers considered "waste" by the manufacturer and the consumer, with the ultimate purpose of influencing the community's consideration of containers as "wastes". If not, the enactment of the *Beverage Container Act* would have served no purpose, for the *Litter Act* in Alberta prohibits the disposal in unauthorized places, *inter alia,* of containers as well.[3] The levy of a heavy fine for a retailer's or manufacturer's refusal to accept the containers provided for consumption which they would consider as "waste",[4] and the provision of an incentive to the consumer to retain the empty containers which he would otherwise consider as "waste",[5] are clear indications of a control policy directed towards the manufacture's and consumer's disposal of substances which in accordance with their notions would constitute items of "waste". When the container with its beverage or liquor passes out of the manufacturer's or retailer's hands to that of the consumer's, it may not be treated as waste by the consumer in the belief that the container could still be subjected to recycling or disposed of in a landfill. Until the container is found lying in a private or public land even the community may not treat it as "waste".

The *Alberta Litter Act* as distinct from the *Beverage Container Act* attempts to prevent "waste", as from the community's point of

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1. *Alberta Beverage Container Act,* Alta. St. 1971, c. 10, as amended by 1972, c. 16.
2. *Alberta Litter Act,* Alta. St. 1972, c. 61.
3. *Alberta Litter Act, op. cit. supra,* note 2, sec. 1 (d) read with Secs. 2, 3, 4, 5 and 6.
4. *Alberta Beverage Container Act, op. cit. supra,* note 1, Secs. 2 and 6.
5. *Id.,* sec. 2 (1).

view, from coming into being. The *Beverage Container Act* on the other hand seeks to eliminate the possibilities of the manufacturers and consumers treating containers as "waste". The Act attempts to reduce the possibilities of consumers and manufacturers treating containers as "wastes", by providing an incentive to the former to return the containers to the retailer or manufacturer for a refund and shifting the responsibility to the latter for the disposal of the containers either through recycling or change in the process of manufacture and/or marketing[6].

The earlier tendency towards the complete negation of the consumer's view-point as to situations of pollution from solid wastes in the adoption of control policies, is effectively brought in the manner in which the *Alberta Litter Act* has dealt with disposals of waste by an individual on his own land and on the land of another. For example, section 5 of the *Alberta Litter Act* emphasizes the fact that the control effort is being directed to provide for situations only where the community considers "littering" as leading to or constituting "waste". The section states that no person would be permitted to dispose of litter, without permission, on any land other than on his own. In effect, this means that the individual's notion of "wastes" may be considered as being irrelevant in regard to the issuance of control regulations, even though such "wastes" may ultimately influence the community's notion towards solid wastes. Again, Part II of the *Litter Act* dealing with "unsightly property", identifies the existence of pollution from solid wastes in any property including that of an owner's, if it would in the opinion of an enforcement officer when viewed from a highway constitute "unsightly property". Here again the community's reaction is taken as the guiding factor in the formulation of control policy irrespective of whether the individual treated it as waste or not.

In Ontario too there is an increasing tendency to direct the control effort towards items that the individual would himself consider waste, apart from considerations as to whether the community may treat such items as wastes. Thus the category of wastes which an individual is permitted to dispose of on his own land is limited to domestic wastes.[7] Moreover section 65 of the

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6. Thus for instance in the Nova Scotia Twin Cities Co-Operative Dairy Ltd. milk containers (2% B. F. partly skimmed), specific directions are provided for the utilisation of the containers for a variety of other purposes. This is an example of how marketing methods could help to control littering.

7. (1973) 8 *Canadian Environmental Control Newsletter* at p. 160.

Environmental Protection Act[8] seems to indicate that there would be "littering" if material was placed in an approved receptacle, in a manner that would contribute to "litter". Litter being defined as including "any material left or abandoned in a place other than a receptacle or place intended or approved for such material" (sec. 63). Thus it follows that if discarded paper was left in an open receptacle in such a manner that it might be blown off, it may be said that there is "littering". This provision aims at the individual's notion of "waste", that is, when he discards it, and not that of the community. The announcement in Ontario that any person with more than two derelict vehicles on his property, irrespective of any other considerations, may be subjected to pollution control regulations, is strong testimony of the trend in recent legislation towards laying emphasis on the proper disposal of items that are viewed as "wastes" by consumers.[9]

Even though there are indications that pollution from solid wastes could be effectively controlled only by reducing the possibilities of the manufacturer or consumer treating his products as "waste" on the sale or consumption of an item, it appears that legislation has not yet proceeded beyond the stage of promoting refund or deposit practices in regard to beverage containers. Though pollution control of "wastes", as identified from the community's point of view, constitutes the main thrust of any pollution control program, the reluctance to identify substances considered as "wastes" by the other two groups may lead to ineffective functioning of pollution control programs. Thus for instance, "Pollution Probe" in its recent reference to the absence of effective control policy in Ontario in regard to beverage containers, points out the limitations in the approach of identifying "waste" from the community's view-point, as a sole method of pollution control. "Pollution Probe's" attack is mainly directed towards the illusory concept of "waste" perpetuated by industrial advertising which has led the consumer in Ontario to believe that the continued production of non-returnable containers did not contribute to "waste", as they could be subjected to recycling, when in fact only two percent of such containers were being recycled and that too with great difficulty because of the metallic composition of the containers[10]. This illustration itself indicates the need to employ a control strategy

8. (1973) 6 *Canadian Environmental Control Newsletter* at p. 139.

9. (1973) 8 *Canadian Environmental Control Newsletter* at p. 160.

10. (1973) 6 *Canadian Environmental Control Newsletter* at p. 139.

directed towards the manufacturer's and consumer's notions of "waste", in order to implement an effective pollution control program.

Control procedure aimed at the manufacturer's notion of "waste" means more than the mere compulsion of the manufacturer to accept the responsibility for the disposal of material that he considers to be "waste". Packaging and canning policies are geared towards either attracting or providing facilities of convenience to the consumer. The mere reacceptance of beverage cans by the manufacturer as prescribed under the *Alberta Beverage Container Act* would only continue to perpetuate the convenience policy in marketing practices by the use of combinations of metals (eg: labelling methods where plastics are used on metals) and the duplication of metal forms (eg: protective coatings of one metal by another), which in the long term may not be conducive to recycling or reuse. For, in order to cover the increased costs in the reacceptance and disposal of containers, the manufacturer would only have to raise the price of the beverage in order to make the same profits as before, and he may also have to provide more convenience facilities to attract a reluctant customer wary of the rise in price of the beverage. Thus the present control policy in Alberta although directed towards the manufacturer's notion of "waste", may not induce him to embark on a policy of recycling or reuse of the containers. The failure of the refund and deposit systems in the control of pollution in regard to containers in Alberta and British Columbia is ample testimony to this paradox.[11]

It appears that the mere compulsion of the manufacturer to reaccept the containers will not induce him to remedy the factors, innate in the manufacturing process, which obstruct the adoption of a continued recycling or economic reuse system. In addition to compelling the manufacturer to reaccept the containers, the imposition of a maximum sale price of the beverage, may induce him to treat the container as "utilisable material", and to readjust the manufacturing process to his changed notion. The prohibition of the use of types of material in specific combinations in the manufacturing process may also provide an inducement to the manufacturer to adopt recycling or other reuse methods. Thus, legislation as in Alberta and the other provinces which touch on the

11. P.R. FLOCKTON, *Packaging and Solid Waste*, a report submitted to the Solid Waste Management Division, Department of the Environment, Ottawa, 1973, at p. 76.

fringes of the manufacturing process are at most only feeble attempts to reduce the possibilities of the manufacturer treating containers as "wastes".

The Saskatchewan *Litter Control Act* of 1973[12] on the contrary specifies that only "approved" beverage containers could be sold to the public (sec. 12(1), (2)). However, the Act does not mention on what basis the "approval" for the sale of the containers would be granted. The Act reflects the recent tendency to effect controls at the level of the manufacturer's notion of "waste". The Packaging Seminar held in Ottawa in 1973 also spotlighted the need to reduce the possibilities of the manufacturer treating his products as constituting "waste", by indicating the negative aspects of control strategy ending at the stage of the community's or consumer's notion of "wastes". It was suggested that the control policy should be directed towards the manufacturer's notion of "waste" as well, not merely by providing for restrictions in the manufacturing process but also by the provision of incentives for the reduction in the amount of "wastes" produced. Thus for instance as the transportation of "waste" was more expensive than virgin material, it was concluded that there should be a review of the freight rates in order to provide incentives for recycling. Proposals relating to legislation as to standard sizes, simpler packaging and the use of bio-degradable material to facilitate recycling too, were submitted in the course of the seminar.[13]

Another method by which changes in the manufacturing processes may be effected is by the levy of a tax on the use of substances that are either not conducive to economic recovery or recycling without permitting an increase in the sale price of the goods. This goal could be achieved by imposing a tax on the finished product in proportion to the real waste and the life time of the product. The "real waste" being identified as the portion of the product which cannot be recycled or reused, and the tax would be an incentive for the manufacturer to make the product easier to reuse or recycle. Taxing the short lifetimes of products would be an incentive to manufacturers to make their products more durable and easier to repair[14]. The emphasis on recycling and reuse may also lead to the

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12. *Litter Control Act*, St. of Sask. 1973, c. 59.

13. (1973) 9 *Canadian Environmental Control Newsletter* at pp. 166-167.

14. E. SANDERSON, *The Federal Role in Solid Wastes Management*, a report submitted to the Ecological Protection Branch of the Environmental Protection Service of Environment Canada, Ottawa, 1972, at p. 16.

development of an efficient collection system, initiated by the manufacturer. The present legislation in regard to containers, for instance, leaves the initiative to return the containers in the customer, and this strategy has proved to be of limited success. Industry formulates the trends in habits. If pollution control is intertwined with the change of habits, then it also involves the changing of industrial notions as to "waste".

The *Alberta Litter Act* sets the trend for the development of new modes of identification of responsibility as to the causing of "waste" as evaluated from the community's point of view. The Act attributes responsibility to the driver of a motor vehicle from which litter was disposed onto a highway, irrespective of his cognizance or ability to control the act that led to the disposal of litter. In such situations, in order to provide a remedy for the control of pollution as from the community's notion of "wastes", the law attributes responsibility to persons who are in control of the mechanism from which the litter originated. If this mode of attribution of liability is taken to its logical conclusion, it would mean that in all instances where a driver cannot be identified, responsibility for the littering should be imputed to the manufacturer. Thus this trend towards responsability based on the community's notion of "waste" and need to control it irrespective of who the actual polluter is, may prove a strong incentive to persons in control of situations that have a bearing on littering, to take precautionary and remedial measures to prevent such activity.

It may thus be stated in conclusion that the success of a pollution control program in regard to solid wastes may well depend on the extent to which the control effort is directed towards the manufacturer's and consumer's notions of waste. For, the methods of identification and control of "wastes" from the manufacturer's and consumer's points of view may ultimately have a bearing on the community's view-point as to what would constitute "waste", and pollution therefrom.