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Deregulation and Self-Regulation in Administrative Law: A Public Interest Perspective

A paper prepared for the workshop

Deregulation, Self-Regulation and Compliance in Administrative Law

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1. Introduction

Throughout the 1990s, traditional regulatory assumptions have been challenged, and attempts to dismantle various aspects of the existing regulatory framework has been evident. Similarly, there have been numerous efforts to find and justify alternatives to existing regulatory assumptions and schemes. A current trend is one where initiatives and programs are developed that intend to change the behaviour of the regulated community without invoking regulatory requirements. These latter initiatives are often referred to as "self-regulation."

The purpose of this paper is essentially twofold. The first task is to provide some discussion on the context of, and relationship between, the terms deregulation and self-regulation. The second task is to give a public interest perspective on the implications and concerns arising from the trend toward self-regulation.

It should be mentioned that the much of the material used in this paper relates to the environmental law and policy field. However, it is a fair assumption that the implications and concerns raised in this context are probably applicable to other fields as well.

2. Understanding Deregulation and Self-Regulation

Prior to a discussion of the public interest concerns about deregulation and self-regulation, it may be worthwhile to provide some commentary on the relationship between deregulation and self-regulation. Subsequently, some of the current initiatives in this regard will be reviewed.

2.1 Relationship between Deregulation and Self-Regulation

In this paper, deregulation is defined simply as those initiatives that seek to repeal or diminish regulatory requirements in various regulated communities, or to diminish the capacity of government agencies to develop, administer and enforce regulatory programs. This definition is, admittedly, broad in its scope. However, the success of any regulatory or administrative scheme depends not only on the existence of clear regulatory requirements, but their administration, application and enforcement.

There are a number of reasons advanced to justify deregulation. Without prioritizing them, they are as follows:

- * the growing globalization of economies through liberalized trade, and the signing of the Canada-US Free Trade Agreement, NAFTA, and the Uruguay Round of GATT, which represent wide-ranging de-regulatory initiatives affecting an unprecedented number of sectors;
- * shrinking government budgets;

- * rapid technological change in some sectors, with resulting lags in regulatory currency;
- * the internationalization of standard-setting and enhanced attention to harmonization; and
- * the existence of strong lobbies by regulated communities seeking to be relieved of existing regulatory requirements.

The movement to deregulate is not usually designed to leave a total vacuum. Instead, a variety of "non-regulatory" or "self-regulatory" options have been offered. In this paper, and in the current debate, self-regulation is understood to mean the development of initiatives and programs intended to alter behaviour of the regulated community without invoking, or in lieu of, regulatory requirements. Self-regulation often includes codes of practice, voluntary agreements, administrative agreements, and other devices intended to replace regulatory requirements. In this context, "self-regulation" or "voluntarism" is the flip-side of deregulation. Of course, there are many instances where self-regulation is said to be undertaken to "supplement" the existing regulatory schemes. It will be argued below, however, that the majority of self-regulation initiatives are either intended to, or will consequently evade existing regulatory burdens, or avoid the establishment of new regulations.

2.2 Some Examples of Deregulatory Initiatives

Even an introductory discussion of current deregulatory initiatives is too ambitious for this paper. However, some examples can be given.

(i) International

The de-regulatory disciplines within the trade agreements, and the numerous examples of trade dispute panel decisions which have failed to support individual national standards, when challenged, have globalized a trade law regime hostile to divergent local regulatory regimes. The GATT has also provided an impetus to the International Standardization Organization, to globalize its activities, not merely for industrial standardization, but as an alternative to governmental regulation.

(ii) Federal

There are a number of important federal initiatives to "reduce the regulatory burdens" of the regulated community. For example, during the past few years, a number of program reviews have been undertaken with a view to identifying the efficiency and effectiveness of regulations.¹

The federal "deregulation" trend has manifested itself more in terms of devolution of federal

¹ There have been many reviews of regulatory programs since the 1970s. See: Standing Committee on Finance, "Regulations and Competitiveness" Report of Subcommittee on Regulations and Competitiveness (1993); Task Force on Program Review, Regulatory Programs (1993).

authority over various areas than in wholesale repeal of laws and programs. In the environmental field, one of the more controversial initiatives is the proposed Environmental Management Framework Agreement.² This draft agreement, sponsored by the Canadian Council of the Ministers of the Environment (CCME), proposes to devolve significant areas of federal jurisdiction to the provinces, including environmental monitoring and enforcement and compliance. In other areas, new processes and institutions are proposed to limit the development of "federal" standards, policies and programs in favour of "national" ones. The term "national" means that such initiatives are undertaken with the advice and consent of the provinces and territories.

Other areas of proposed devolvement include various provisions under the Fisheries Act concerning the protection of fish habitat. There is also a proposal to make it more difficult for the federal government to address issues of transboundary air resources. In effect, these proposals would require provincial agreement before federal action could take place.³

(iii) Provincial

By and large, Ontario has taken the most aggressive approach to deregulation. Ontario, in particular, has proposed an ambitious agenda. Some of the most serious of these initiatives include:

* Bill 26 - the Omnibus bill, received Royal Assent on January 30, 1996. This law significantly weakens a number of key provincial statutes relating to environmental protection, including:

* Public Lands Act - The Omnibus Bill revokes previous statutory prohibitions, so that, in the future, permits will only be required for activities specified by regulation. This approach could have implications for logging, mineral exploration or industrial operations on public lands; construction on public lands, dredging and filling and other such activities on public lands;

* Mining Act - Mining companies will no longer be required to seek government approval of closure plans. Instead, approvals in this regard will be optional. The law also exempts companies who surrender their mining lands to the government from any future environmental liability, even if it arises as a result of the company's prior actions. Also, companies which meet a corporate financial test will not be required to put up cash in advance to pay for the clean up of the environmental contamination left behind.

² Canadian Council of the Ministers of the Environment, Environmental Management Framework Agreement (draft) (October, 1995).

³ Canada, CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal, December, 1995, chapter 8.

* Lakes and Rivers Improvements Act - Regulations to be enacted will stipulate when approvals will be required for constructing or improving dams and other waterways. Hence the statutory prohibitions provisions will be amended.

* Other Statutes Affected - In addition to the above list, significant changes were made to the Municipal Act, Conservation Authorities Act, Game and Fish Act, which in effect reduce protection for the environment and natural resource use. Other statutes affected, such as the Freedom of Information Act, will make it more difficult for the public to access government information pertaining to important decisions.⁴

* Regulation 482 of the Environmental Bill of Rights - was filed on the day Bill 26 was introduced. It exempts bills that would result in spending cuts from the public notice requirements for environmentally significant proposals for the next 10 months.⁵

* Environmental Assessment Act - There is discussion that waste management will be partially or totally exempted from the Act.

* The Regulatory Review: In the Throne Speech in the autumn of 1995, a Red Tape Review was announced to review regulations in Ontario. The Ministry of Environment and Energy (MOEE) commenced its review in late 1995. The MOEE Regulatory Review is to review 80 of the primary regulations under the jurisdiction of the ministry. The objective of the review is to bring about reforms which will "improve the efficiency and effectiveness of environmental management," improve services to Ministry clients, reduce costs to government and regulated parties, and reduce economic barriers and competitiveness.⁶

* The Intervenor Funding Project Act (IPFA) is means to fund intervenors before selected administrative tribunals such as the Ontario Energy Board and the Environmental Assessment Board. The Act provided specific criteria for funding and was regarded as an important vehicle for public interest parties to become involved in the hearing process. Enacted in 1988 as a pilot project for a three year period, with a five year extension in 1991, it is due to expire on April 1, 1996.

In addition, the province has proposed new legislation (Bill 20) to replace the 1995 Planning Act

⁴ For a more detailed analysis of Bill 26, see: Canadian Environmental Law Association, The Environmental Implications of Bill 26 A submission to the Standing Committee on General Government, December, 1995.

⁵ The Environmental Commissioner of Ontario, whose task is to oversee the implementation and administration of the law, tabled a special report with the legislature on January 17, 1996 outlining the damaging effects of the regulation and recommending that it be revoked.

⁶ See: Ministry of the Environment and Energy, Regulatory Review Project, "Quick Information #1" p. 1 (1996).

(Bill 163). As part of this package, the Comprehensive Set of Policy Statements, which were to direct local planning authorities in the exercise of their discretion, is being replaced with a far less onerous Provincial Policy Statement.⁷ The provincial ban on the approval of solid waste incinerators was repealed in late 1995. Finally, even some of the key advisory committees (which were expert and multi-stakeholder in nature) have been disbanded. They include the Environmental Assessment Advisory Committee, the MISA Advisory Committee (Municipal Industrial Strategy for Abatement) and the Advisory Committee on Environmental Standards (ACES).

2.3 Examples of Self-Regulation Initiatives

(i) "Pure" Voluntary Initiatives

Perhaps the least controversial, although not devoid of discussion, are various types of voluntary initiatives where industry associations form their own code of behaviour. A good example of this type of initiative is the "Responsible Care" program undertaken by Canadian Chemical Producers Association.⁸ These type of initiatives are at least problematic since they do not formally involve government agencies and they are intended to avoid or replace regulatory obligations.

(ii) Voluntary Agreements

Both the federal and provincial governments in Canada are promoting voluntary initiatives. In Ontario, there are essentially two broad categories of these types of initiatives. The first category is where the government attempts to "challenge" industrial sectors to improve their performance. These types of programs supplement existing regulatory programs rather than attempting to replace them. However, these programs are often developed where regulatory programs could be established, and at one time would have been established.⁹

The second category of voluntary program pertains to "voluntary agreements." Since the early 1990s, there has been a proliferation of voluntary agreements between industrial sectors, the province and the federal government. For example, there are a growing number of existing or proposed "voluntary pollution prevention agreements." Examples of these agreements include:

⁷ For commentary, see: Rick Lindgren, "Ontario's New Planning Policy: Inquiring Minds Wants to Know" Intervenor Jan./Feb. 1996, pp. 6 and 7.

⁸The Canadian Chemical Producers' Association, A Primer on ... Responsible Care and Sustainable Development, December, 1994.

⁹ For example, the "4P" program (Pollution Prevention Pays Program) that challenges industries to reduce emissions is a provincial example, with the Accelerated Reduction/Elimination of Toxics (ARET) as an example at the federal level. A remaining sector to be regulated under the Municipal-Industrial Strategy for Abatement (MISA) program is that which discharges to sewers. This sector was intended to be regulated. It now seems that a voluntary program will be undertaken.

the Motor Vehicle Manufacturers' Agreement, the Canadian Chemical Producers' Agreement, the Metal Finishers' Agreement, and the Automotive Parts Manufacturers' Agreement among others.

The basic thrust of these agreements is to have industry reduce specific pollutant emissions through series of actions identified in the agreement. Each agreement is different. Hence, the scope of the pollutants covered, the specificity of the initiatives, the types of activities, the reporting requirements, and the availability of information about progress under the agreement vary from one agreement to another.

(iii) Compliance Agreements

The federal government recently attempted to introduce "compliance agreements" as an alternative to regulation, for all matters within its jurisdiction. Bill C-62, The Regulatory Efficiency Act, was introduced into Parliament in December, 1994. After a campaign by various public interest groups, the bill expired on the Order Paper in February of this year. It would have permitted any company to receive exemption from any federally designated regulation, by entering into a privately-negotiated agreement, with the relevant regulatory authority to meet the goals of the regulation by other means. The sectors targeted for first "regulatory reform" included mining, health and therapeutic products, forestry, automotive products, aquaculture, and biotechnology. All sectors with significant health and environmental impacts.

(iv) Self-Certification

An increasingly influential example of self-certification is the ISO 14000 series for certification of environmental management systems, developed by the International Standardization Organization (ISO).

The ISO has 111 members, comprised of national standards bodies from countries that have them, and other organizations or individuals from countries that do not. It is an industry body that has typically produced technical standards for industry. However, with its move into the ISO 9000 series on "total quality management," and now into certification of environmental management systems, it is venturing into domain of public policy.

A key issue for environmentalists, arising from the promotion of the ISO 14000 series, is that it does not establish actual performance standards for companies. It merely requires that companies comply with local, national standards, and certifies that the management system is capable of delivering its corporate goals. However, it is currently being promoted as an alternative to national and local standards.

A helpful evaluation of the program has been completed by Benchmark Environmental Consulting for the European Environmental Bureau. Entitled "ISO 14000: An Uncommon Perspective - Five Questions for Proponents of the ISO 14000 Series," it states that:

The International Organization for Standardization (ISO) 14000 series takes the ISO into

a new domain of public rather than engineering standard setting, and pushes the argument for business "self-regulation" into a new phase. Unlike the British BS7750 or the European EMAS, the ISO presents a system for global environmental management that was drafted sans public debate, will be implemented regardless of public opinion or pre-existing international environmental conventions, measures a firm's compliance with its management system, not its environmental, health and safety performance, produces volumes of environmental information that is confidential and need not be given to the public, government authorities or workers; and requires compliance only with local regulation, not with international or even the firm's home country standards.¹⁰

3. Public Interest Concerns and Issues

Deregulation and self-regulation clearly raise a number of profound issues in the general public policy field and in particular, in administrative law. Interestingly, there has been only modest debate, if any, on the administrative law implications of these trends.

Before the public interest concerns toward deregulation and self-regulation are discussed, it is worthwhile to briefly review the general attitudes of the public on these issues.

3.1 Overview - The Canadian Attitudes Towards Regulation

Three recent polls in Canada suggest that the trend toward deregulation and self-regulation, at least with respect to the environmental field, is contrary to the wishes of the public. The polls demonstrate that the public wants stronger, not weaker, government action to protect the environment.

The Canadian Council of Ministers of Environment commissioned polls to determine public attitudes to environmental law, twice yearly since 1988. The latest results, released last September, demonstrate that the public attitudes have grown more supportive of strong environmental standards laws over the years.¹¹

The majority believe Canada has gone only 30% of the way toward a safe environment. Seventy eight percent said environmental regulations should be strictly enforced even in times of recession. When asked to identify the best way to reduce industrial pollution, 48% cited strict laws and heavy fines to punish companies and 29% chose the use of public reporting of companies' pollution levels to embarrass them. Another 25% favoured tax breaks and financial

¹⁰ Benchmark Environmental Consulting, ISO 14000: An Uncommon Perspective - Five Questions for Proponents of ISO 14000 Series The European Environmental Bureau, October, 1995, p. 1.

¹¹ See: The Environmental Monitor, "Canadians and the Environment" Presentation to the Canadian Council of Ministers of the Environment, Whitehorse, Yukon Territories, October 23, 1995.

incentives. Seventy percent believe government should restrict use of chemicals when there is only a possibility of damage, or evidence of damage but no proof (the application of the precautionary principle.) Twenty-seven percent would wait for scientific proof (a decline of 9% between 1988 and 1994).

Similarly, in a late 1995 poll conducted by Metro Toronto, residents of the Greater Toronto Area (with a population of four million people) ranked environmental services as the most important of all the types of services provided by municipal government. Fifty-nine percent supported increasing spending on these services.¹²

A January 1996 poll conducted for the World Wildlife Fund by Environics Research Group found that 81% of Ontarians (67% from Northern Ontario) favour government action to protect a system of parks and wilderness areas, even when reminded that this could result in reduced logging, mining and urban development. Seventy-six percent believe that completing a network of protected areas will make very little difference to the deficit.

Finally, polls of business attitudes confirm the importance of strong laws and regulations in achieving environmental protection. KPMG Management Consultants conducted a poll of over 300 businesses, school boards and municipalities in 1994, questioning them about their environmental management programs.¹³ Of those that had programs with the necessary elements, 95% said that their number one motivation for having the program was compliance with regulation. Sixty-nine percent also cited concerns about potential directors' liability, a factor also related to environmental laws. Only 16% claimed to have been motivated by voluntary programs, putting such programs near the bottom of the list of motivators.

It follows from these polls that there is a trend to ever increasing support for environmental protection through regulation, rather than deregulation.

3.2 Overriding Concerns

Attempts to question and reform regulatory frameworks both at the federal and provincial levels are not new. In fact, regulatory frameworks have tended to evolve over time to include new approaches and new processes on an on-going basis.

Despite these changes, one of the key constants that must be retained in the move to update the regulatory framework is respect for the rule of law. The rule of law recognizes the rights and duties of government and citizens, and that the interpretation of those rights and duties is the responsibility of the judiciary, carried out with due process. The fundamental importance of the

¹² The GTCC Quality of Life Steering Committee, Comparative Advantage: An Enviably Quality of Life (October, 1995).

¹³ KPMG, Canadian Environmental Management Survey, (1994).

rule of law is that it invokes a number of key principles. Without attempting to be exhaustive, the key principles identified for this paper include: fair and consistent decision-making, public accountability, and due process.

The concerns with deregulation and self-regulation vary depending on the type of initiative proposed. However, the following concerns are common.

(i) Lack of Equal and Consistent Decision-Making

One of the key attributes of the rule of law is that it applies to all the regulated community. However, many self-regulation initiatives run contrary to this principle. Perhaps the most obvious example pertained to the negotiations of compliance agreements under the proposed Regulatory Efficiency Act. A report prepared for the Standing Committee that was to review that statute was highly critical of the proposal. The report noted that the proposed law

contemplates a system under which there may eventually be as many different rules as there were persons initially subject to a particular regulation. One person may be dispensed from the application of five sections of a regulation, a second may be dispensed from the application of the whole regulation, while a third person remains subject to the regulation because he was unable to persuade public officials to grant him any dispensation. To describe such a system as one that respects the principle of equality before the law strains credulity.¹⁴

The consequence of the individually negotiated compliance agreements is that there is an inherent unfairness to the system - those with the resources, expertise and access to the compliance agreement scheme may hold a significant advantage over other players. Rather than having a regulatory framework that makes the law applicable to all, mechanisms like compliance agreements ensure that the playing field becomes anything but level for competitors. Small businesses in particular are disadvantaged under this scheme.

As with to compliance agreements, most self-regulation initiatives tend to result in different rules applicable for the same targeted constituency. Within the environmental field, this problem may be quite serious. For instance, the negotiation of voluntary agreements may or may not include all companies within an industrial sector. If some of those companies are not part of the agreement, they gain an advantage over those who are. In addition, environmental benefit may be at best modest if the non-included companies are causing a disproportionate bigger part of the problem (such as high levels of toxic emissions). Moreover, local communities do not get the environmental benefit from non-included companies.

Governments may be hesitant to regulate for the purposes of including companies which are not part of the program, since regulating for a few may be as difficult as regulating for the whole

¹⁴ Report on Bill C-62, Prepared for the Standing Joint Committee for the Scrutiny of Regulations, February 16, 1995, at 7.

sector.

Finally, the administrative burden placed on the government with respect to negotiating and implementing these non-regulatory measures with individual companies, may exceed the costs of promulgating and enforcing a single regulation.

(ii) Loss of Accountability of the Regulated Community

One of the basic concerns of self-regulation is that there is simply less accountability from both the regulated community and the government. This loss of accountability manifests itself in a number of ways, such as enforcement and disclosure.

Regulation of economic or personal behaviour normally includes a legal standard of acceptable behaviour and the possibility of enforcement action if the standard is breached. The use of law to change, affect, or control corporate activity has been fundamental to the strategies of public interest groups over the past 25 years.

Reliance on law was not misplaced. Business also relies on strong regulation when it desires to achieve important goals. For example, the entire field of commercial contract law pertains to the negotiation of legal instruments for as strong and enforceable provisions as possible. The Intellectual Property chapter of the current GATT agreement requires that WTO (World Trade Organization) member governments establish entire domestic legal regimes, new in some countries, to protect intellectual property and make infractions of these rights subject to strong enforcement actions. The regulatory nature of the IP chapter provides a singular contradiction with the de-regulatory bent of the other chapters of the GATT.

Compliance plans raise serious concerns about enforceability. Although technically they are binding in the sense of contract law, the issues of who will enforce them, when, and how remain uncertain at best. Moreover, the will, resources and probable successes of enforcement are far more problematic in these arrangements than with regulations.

The very fact that many self-regulation initiatives are "voluntary" suggests that enforcing measures of the commitments in these initiatives is not possible. It is often argued that enforcement of these initiatives would not be through traditional enforcement mechanisms, but through the "court of public opinion." The failure to abide by commitments is supposed to create an embarrassment factor that would compel industry to comply with their promises.

However, enforcement through the "court of public opinion" carries with it many assumptions.

1. public interest groups and government personnel have the resources, interest and information sufficient to determine when the commitments are not being met;
2. an interested media that is willing to publicize the problem;

3. an interested public that will be able to take action when companies do not meet voluntary commitments; and
4. corporate decision-makers that regard it a high priority to live-up to such initiatives especially even during times of recession.

Frequently, regulation imposes reporting requirements on the regulated interest. These reports may contribute to enforcement actions, or serve other public interest functions. Self-regulation not only removes standards governing behaviour, but may also remove the public reporting requirements. Indeed, in some instances, the regulated community opposes the reporting requirements as strongly as the standards, a testimony to their potency as a means of imposing accountability on a sector.

Certainly this is one of the key concerns with the ISO 14000 process. One analysis posed the question of how governments, workers and the public get access to all the environmental information prepared by an ISO 14000 certified company.

At this time, it appears, such information will not be available for public scrutiny. ISO 14000 requires that environmental records simply need to be stored, not communicated, and the auditing and certification may be done by consultants who already advise the company. Independent auditing is not required. As Benchmark Consulting noted, "Without external audit and public disclosure, self regulation is an oxymoron."¹⁵

(iii) Loss of Due Process for the Public

It is a hallmark of public interest reform groups in Canada that citizens want more involvement in decisions with significant social, consumer, and environmental impacts.¹⁶ Therefore, many of the legal reforms instituted over the past twenty-five years both established a framework of legal regulation, and incorporated mechanisms for increased public participation as an element of reform.

Examples from the environmental field in Ontario include:

- * the establishment of boards and tribunals for the issues of important environmental and natural resource approvals, such as the Environmental Assessment Board, the Environmental Appeal Boards and the Ontario Energy Board;

¹⁵ Benchmark Consulting, *supra*, p. 16.

¹⁶ There is considerable literature on this issue. For an earlier perspective, and then a more recent one, see: P.S. Elder, (ed.) Environmental Management and Public Participation (Toronto: Canadian Environmental Law Research Foundation, 1976) and Marcia Valiante and Paul Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice" in Steven A. Kennett (ed.), Law and Process in Environmental Management (Calgary: Canadian Institute of Resources Law, 1993), pp. 142- 169.

* the availability of intervenor funding to provide a financial means for public interest intervenors to participate in environmental hearings; and

* the notice and comment provisions of the Environmental Bill of Rights¹⁷ where the rights of public notice and comment are guarantees for designated approvals, and for governmental policies and regulations that are environmentally significant.

In addition to these provisions, common law has also broadened access to the courts through liberalized standing and intervention rules.¹⁸ Similarly, most governmental agencies have developed policies recognizing the value and need for public participation in decisions affecting the environment and natural resources.

While these kinds of provisions are less pronounced at the federal level, the need for legislated environmental rights has been recognized by the Standing Committee on Environment and Sustainable Development.¹⁹ The federal government has proposed to carry through with some of those proposals.²⁰

Comparable structures have been established in other public policy fields. In addition, governments now are increasingly obliged to consult with concerned groups and individuals before changing policies or laws.

The elimination of government oversight through deregulation removes not only the framework of standards, but also the opportunities for public involvement in devising standards, in monitoring effects, and requiring enforcement when appropriate.

The legal process of regulation-making, in itself, has provided a basic level of public notice and information, with opportunities for public involvement and accountability through reporting. Deregulation and self-regulation remove these hard-won current rights of public involvement in legal processes, which are fundamental to our democratic system.

For example, the vast majority of voluntary pollution prevention agreements concluded to date have been negotiated behind closed doors. In fact, the agreements were devoid of any consultation with the public, environmental groups, unions or health and safety organizations.

Another example of this approach was the negotiation of the compliance agreements between

¹⁷ See: Environmental Bill of Rights, 1993, S.O. 1993, c. 28, Part II.

¹⁸ See: Valiante and Muldoon, *supra*.

¹⁹ Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention - CEPA Revisited June, 1995, chapter 14.

²⁰ Canada, CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal, December, 1995, chapter 3.

business and government in the proposed Regulatory Efficiency Act. In that bill, the negotiations would have been undertaken in secret. Moreover, it appears that even the results of the negotiations would not have the benefit of full public disclosure.

Apart from the lack of public input into the negotiation of the self-regulation initiatives, self-regulation also deprives citizens of legitimate public policy debates. As a general rule, voluntary agreements expressly recognize the ability of government to regulate regardless of the agreement.²¹ However, in practice, a presumption by the regulated industries is that government would be pre-empted or hesitate to regulate industries on matters that are covered under a voluntary agreement. Industry is willing to risk a short term detriment (as defined under a voluntary agreement) to "cover the field" in order to anticipate and prevent regulatory action by government.

This regulatory presumption has two consequences. First, with the proliferation of voluntary agreements coupled with government downsizing, the capacity of government to regulate is at risk. Second, it should be recognized that most of the voluntary agreements are in areas of very significant and frequently controversial public policy.

One clear example of this consequence pertains to the goals and scope of the voluntary agreements. In effect, the inclusion of more modest goals and scope have pre-empted the broader public policy debate on the topic. A classic example with respect to pollution-related issues is whether pollution prevention initiatives are limited to "emissions" of toxic substances, or can also focus the "use" of substances in the first place. Industry has argued strongly that the focus of the regulatory programs must be limited to emissions. The key voluntary programs relate to reduction of emission rather than focusing on use.²²

4. Summary and Conclusions: The Future Regulatory Framework

There is little question that a more detailed analysis is needed with respect to self-regulation initiatives. Moreover, each initiative has to be examined to determine the precise concerns. However, one of the key questions that should be asked in that analysis is simply this: should effort be expended on attempting to devise a different system to guide behaviour or should more effort be put in improving and bettering the existing regulatory framework?

²¹ For example, see: CCPA Voluntary Pollution Prevention Partnership MOU, at 2.

²² For example, the purpose of the MOU between CCPA and the MOEE is to "reduce emissions." [p. 1] Most of the programs are emissions based. However, 23 U.S. states now have toxic use reduction laws that do focus on chemical use. Similarly, the International Joint Commission which monitors regulatory programs of both U.S. and Canada have recommended examining feedstocks and chemical use as a means of furthering pollution prevention. See: International Joint Commission, Seventh Biennial Report to the Governments of Canada and the United States (1994).

4.1 The Case for a Regulatory Approach

Proponents of self-regulation often suggest that the present regulatory system is not working. However, there is little analysis as to the nature of the problem. A report prepared for the Standing Joint Committee for the Scrutiny of Regulations put the issue this way:

Those critical of the use of regulations as a policy instrument typically characterize regulations as inflexible, difficult to amend, and therefore as being inefficient. Although it seems trite, it must be pointed out in response to such criticisms that none of these attributes are capable of being possessed by regulations themselves. In fact, such criticisms relate not to regulations per se, but rather to the process by which regulations are made and amended. There is no inherent reason why the regulatory process cannot be more responsive to changing circumstances. In the end any process, including the regulation-making process, can only be as effective as those in charge of it.²³

Making the regulatory system work better, in the end, serves the broader public interest better than devising an alternative system with potentially equally or more pitfalls than the current approach. It is submitted that, in the environmental field, this position is especially germane. The federal government, in proposing changes to one of its key environmental statutes, stated:

Rules and regulations are a fact of life for businesses throughout all countries of the world, including Canada. Whether they related to health, trade, environmental or competition standards, they exist not only to ensure a level playing field for business, but to protect Canadians and enhance their future. The job of government is not simply to set these regulations, but to ensure they are set fairly. ... As stated in the Government's recent Building A More Innovative Economy "regulations play an important role in society, helping to assure that our markets are competitive, our products are safe, and our environment clean."²⁴

The benefits of a strong regulatory system cannot be understated. One of the most succinct articulation of these benefits was recently given by two professors. Michael Porter and Claas van der Linde, in a recent Harvard Business Review, outlined six reasons for the promotion of regulations. The commentators list a number of reasons for regulations:

- * to create pressure that motivates industry to innovate...
- * to improve environmental quality in cases in which innovation and the resulting improvements in resource productivity do not completely offset the cost of compliance;

²³ Report on Bill C-62, Prepared for the Standing Joint Committee for the Scrutiny of Regulations, February 16, 1995, at 15-16.

²⁴ Canada, CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal, December, 1995, pp. 4-5.

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Those critical of the use of regulations as a policy instrument typically characterize regulations as inflexible, difficult to amend, and therefore as being inefficient. Although it seems trite, it must be pointed out in response to such criticisms that none of these attributes are capable of being possessed by regulations themselves. In fact, such criticisms relate not to regulations per se, but rather to the process by which regulations are made and amended. There is no inherent reason why the regulatory process cannot be more responsive to changing circumstances. In the end any process, including the regulation-making process, can only be as effective as those in charge of it.²³

Making the regulatory system work better, in the end, serves the broader public interest better than devising an alternative system with potentially equally or more pitfalls than the current approach. It is submitted that, in the environmental field, this position is especially germane. The federal government, in proposing changes to one of its key environmental statutes, stated:

Rules and regulations are a fact of life for businesses throughout all countries of the world, including Canada. Whether they related to health, trade, environmental or competition standards, they exist not only to ensure a level playing field for business, but to protect Canadians and enhance their future. The job of government is not simply to set these regulations, but to ensure they are set fairly. ... As stated in the Government's recent Building A More Innovative Economy "regulations play an important role in society, helping to assure that our markets are competitive, our products are safe, and our environment clean."²⁴

The benefits of a strong regulatory system cannot be overstated. One of the most succinct articulation of these benefits was recently given by two professors, Michael Porter and Claas van der Linde, in a recent Harvard Business Review, outlined six reasons for the promotion of regulations. The commentators list a number of reasons for regulations:

- * to create pressure that motivates industry to innovate...
- * to improve environmental quality in cases in which innovation and the resulting improvements in resource productivity do not completely offset the cost of compliance;

²³ Report on Bill C-62, Prepared for the Standing Joint Committee for the Scrutiny of Regulations, February 16, 1995, at 15-16.

²⁴ Canada, CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal, December 1995, pp. 4-5.



* to alert and educate companies about likely resource inefficiencies and potential areas for technological improvement...;

* to raise the likelihood that product innovations and process innovations in general will be environmentally friendly;

* to create demand for environmental improvement until companies and customers are able to perceive and measure the resource inefficiencies of pollution better;" and

* to level the playing field during the transition period to innovation-based environmentally solutions, ensuring that one company cannot gain position by avoiding environmental investments.²⁵

The attributes identified in this list could be generalized to most, if not all, regulated fields.

4.2 Making the Regulatory Approach Work Better

The question should not be whether there should be a regulatory structure, but how to improve to fulfil the public policy function they are designed to do in the first place. Better designed regulations, those that encourage innovation, and are cost efficient are certainly common principles. The development of regulations that are timely, fair and result in results that are measurable, and thus, accountable, are additional principles.

For example, regulations could be improved to include clear performance goals that would give clarity to the regulated community. With clearer goals, the regulated community could have increased flexibility as to how to achieve those goals. Effort could be placed on improving how regulations are made in the first place, administered and reviewed. Better mechanisms could be put in place to assess the performance of regulations.

All of these measures, in addition to others, could be undertaken not to challenge the regulatory framework, but to enhance it by making it more effective, accountable and timely. A discussion in Canada about how to undertake such measures would be, in the long run, more productive than attempting to replace the regulatory framework.

²⁵ Michael E. Porter and Claas van der Linde, "Green and Competitive: Ending the Stalemate" Harvard Business Review, September-October, 1995, p. 128.

