

Green Revolution or Greenwash?

Voluntary Environmental Standards, Public Law and Private Authority in Canada

Stepan Wood¹

Osgoode Hall Law School, York University

swood@yorku.ca

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¹Assistant Professor, Osgoode Hall Law School, York University. I am grateful to Michael Fortier (York LL.B./M.E.S. 2001), Anastasia Lintner, Ph.D. (Osgoode LL.B. candidate 2002) and Michelle Fernando (York LL.B./M.E.S. candidate 2002) for capable research assistance. I thank participants in the 2001 Legal Dimensions Initiative, "Social Relationships: Refocusing the Public/Private Divide," Laval University, Quebec and a symposium on Environmental Law and Stewardship for a Sustainable Society at University at Buffalo School of Law, for feedback on earlier drafts.

EXECUTIVE SUMMARY

This paper examines the transformation of the public/private divide in the context of a set of little-known voluntary initiatives for corporate greening known as environmental management system (EMS) standards. EMS standards have profound but largely unexplored implications for environmental quality, public health and the definition of "public" and "private" in Canadian law and politics. An EMS is a set of internal policies and procedures that enables an organization to identify and manage its environmental impacts. The most prominent EMS initiative is the ISO 14000 series of standards developed by the International Organization for Standardization (ISO). Most writers characterize EMS standards as evidence of "privatization" of environmental policy, either extolling the virtues of voluntary industry self-regulation or warning about its dangers. This focus on "privatization" tends, however, to obscure the roles played by public authorities (regulators, legislatures, courts, etc.) in the establishment, shaping and operation of private authority. I address this issue by examining the entire range of Canadian public authorities' interactions with voluntary EMS initiatives and its implications for environmental law and politics.

Canadian public authorities' interactions with EMSs and other voluntary environmental initiatives can be described in eight categories: **steering** (influencing the development, use or content of voluntary initiatives through official policy pronouncements, participation in standards development or creation of legal "ground rules" or "backstops" for voluntary initiatives), **self-discipline** (applying voluntary initiatives to government operations or agreeing to international trade rules that turn voluntary standards into constraints on regulatory authority), **knowledge production** (generating and disseminating ideas, information and expertise about the design, use or value of voluntary initiatives), **reward** (providing material incentives for adherence to voluntary initiatives through regulatory relief programs, financial incentives or "green" government procurement policies), **command** (issuing legally binding requirements to adhere to voluntary initiatives through court orders or legislation), **benchmarking** (using voluntary initiatives as benchmarks for determining legal liability), **challenge** (challenging firms or other organizations to adhere to voluntary initiatives) and **borrowing** (incorporating voluntary initiatives into legal instruments such as statutes and regulations).

This wide range of interactions among a variety of public and private authorities suggests the need for an alternative conception of "government" that moves beyond the metaphor of a public-private divide, one that defines government as the entire array of ideas, goals and techniques by which a diversity of state and non-state authorities seek to shape human conduct to desired ends. In this view, the mundane, detailed techniques employed by authorities to regulate conduct have crucial political implications. The techniques of EMS and standardization, for instance, deactivate the substantial political stakes of corporate environmental management by treating them as "technical" matters to be resolved by neutral professional expertise and simultaneously as "private" matters of consumer or commercial preference to be resolved by the market. By transforming struggles over environmental harms, jobs and profits into matters of managerial expertise and market preference, these governmental techniques disguise their own role in the creation and reproduction of social power relations. This tendency is reinforced by a particular set of justifications and story-lines that vest the development of important environmental standards in large non-governmental organizations and justify this distribution of authority among the firm, market, employee, citizen and state on the basis of good business sense, managerial rationality, individual employee responsibility, autonomous consumer choice, the limits of the administrative state and the ultimate pursuit of sustainable development. Finally, I argue that law might be used to resist this tendency to "depoliticize" environmental politics, and influence the definition of public and private, by insisting on the political stakes of "merely technical" voluntary environmental initiatives and claiming a broad space for democratic experimentation in the face of the homogenizing tendencies

of trade liberalization and regulatory “reinvention”.

PART ONE: INTRODUCTION

This paper examines the transformation of the public/private divide in Canadian law and politics in the context of a little-known set of voluntary initiatives for corporate “greening” known as environmental management system (EMS) standards. These standards are developed and applied in the relative obscurity of corporate offices, management consulting firms and standardization bodies (national and international organizations that write technical standards). They have received little attention from academics and almost none from the popular news media and non-governmental organizations (NGOs). The standardization bodies that develop them have gone almost entirely unnoticed in the recent wave of controversy and popular protest over globalization and free trade that has swept the major intergovernmental trade and financial institutions. Nonetheless voluntary EMS initiatives have significant and largely unexplored implications for environmental quality, public health and the definition of “public” and “private” in Canadian law and politics.

I. ENVIRONMENTAL MANAGEMENT SYSTEMS

An EMS is a system of management policies, procedures, structures and practices that enables an organization to anticipate, identify and manage the environmental impacts of its activities. The major elements of an EMS include a written environmental *policy* setting out the organization’s environmental vision and basic commitments; a *planning* process to evaluate the organization’s environmental impacts, identify applicable legal requirements and set environmental objectives and targets; *implementation* of the EMS through roles, responsibilities, resources, training, communication, documentation and operational controls; *checking* of the organization’s performance through regular monitoring, measurement and audits along with *corrective action* to remedy any problems; and regular *management review* to ensure the continuing suitability and effectiveness of the EMS. This ongoing cycle of planning, implementation, checking, corrective

action and review (also known as the “Plan-Do-Check-Act” or PDCA model) is meant to result in continual improvement of the EMS and, ultimately, the organization’s environmental performance.

While many other voluntary environmental initiatives set environmental performance goals for organizations to meet, environmental management systems leave it up to the organization to set its own environmental performance objectives in accordance with its needs and interests. An EMS is thus primarily procedural rather performance-oriented. The thinking behind EMS is that improved management processes will lead to improved environmental outcomes.

Environmental management systems emerged as a distinct management tool in the late 1980s in the wake of several prominent environmental disasters including the chemical disaster at Bhopal, India. A growing number of industrial firms, many of them large multinational corporations, expanded and consolidated their existing environmental management tools (*e.g.*, environmental policies, environmental audits, public environmental reports and pollution prevention programs) into systematic programs to manage the environmental impacts of their operations. Many of these environmental management systems were modelled after the “total quality management” systems that had recently swept the business world. By the early 1990s many firms supported the development of uniform guidelines for EMSs to enable comparability and create a level playing field for trade. Standardization bodies in several jurisdictions, buoyed by the meteoric rise of the ISO 9000 quality management standards, took up this challenge and began to develop voluntary EMS standards.

The most prominent EMS standardization initiative is the ISO 14000 series of global standards developed by the International Organization for Standardization (ISO). The ISO 14000 series consists of ISO 14001, which specifies requirements for an EMS that may be objectively

audited;² ISO 14004, a more detailed and flexible guide to designing and implementing an EMS;³ and around 20 other supporting standards related to EMS auditing, life-cycle analysis, ecolabelling, environmental performance evaluation and other matters. ISO is a global federation of around 140 national standardization bodies. The main work of ISO and its member bodies is the development of technical standards by business, for business. The ISO 14000 standards are expressly intended to be one of the global business community's major contributions to the global public policy goal of sustainable development and to inaugurate a new paradigm of environmental management applicable not only to business firms but to all organizations, from hospitals to universities to military bases to government departments.

Having an EMS in place is only part of the story. Many organizations want to be able to demonstrate to relevant external audiences (*e.g.*, customers, competitors, trade associations, consumers or regulators) that their EMS conforms to a recognized standard, in order to realize reputational, competitive or regulatory benefits or respond to customer demand. This is typically achieved by having the EMS audited and certified as conforming to ISO 14001 by an accredited third-party registrar. Independent third-party certification has long been used to verify conformance to technical product safety or performance standards. In recent years it has been extended to demonstrate conformance to a broader range of quality, environmental, labour, social and other criteria. Examples include product ecolabelling programs,⁴ sustainable forestry or fisheries management programs⁵ and environmental, quality or occupational health and safety management

²ISO 14001:1996, *Environmental management systems -- specification with guidance for use* (Geneva: ISO, 1996).

³ISO 14004:1996, *Environmental management systems - General guidelines on principles, systems and supporting techniques* (Geneva: ISO, 1996). Both ISO 14001 and 14004 are currently being revised within ISO, with publication of second generation standards expected around 2003.

⁴Ecolabelling programs may apply across a range of products, like Canada's Environmental Choice program, or they may be product-specific, like ecolabels for bananas, coffee or forest products.

⁵The most prominent such programs are the Forest Stewardship Council's program for certifying sustainable forest management operations and the Marine Stewardship Council's program for certifying sustainable fisheries management operations.

system standards, including ISO 14001.

EMSs have become widespread in the private sector in the last ten years, particularly among multinational corporations and corporations operating in international markets. A growing number of multinational corporations require their suppliers to have ISO 14001 EMSs in place, EMS certification is fast becoming a requirement for doing business in a few industry sectors (e.g., auto manufacturing), and the number of ISO 14001 certificates worldwide is growing rapidly.⁶

II. EXPLORING THE INTERSECTION OF PUBLIC ORDER AND PRIVATE AUTHORITY

What little scholarship there is about EMS initiatives emphasizes their private and voluntary character, some writers extolling EMSs as evidence of a revolution in corporate environmental practices and an example of the promise of corporate self-regulation,⁷ others seeing EMSs as an example of corporate “greenwash” and a pretense for governments to retreat from environmental regulation.⁸ Running through these debates is the theme of the increasing power of private authority in public affairs.⁹ This literature makes a contribution to our knowledge by demonstrating that these voluntary initiatives, far from being apolitical, reflect the political agendas and public order

⁶The number of ISO 14001 registrations worldwide reached approximately 30,000 by July 2001. For data on registrations see Gergely Tóth, “The ISO 14001 Speedometer,” online: <http://www.inem.org/htdocs/iso/speedometer/speedometer-4_2001.html> (visited 30 October 2001).

⁷See, e.g., Joseph Cascio, “Introduction,” in Joseph Cascio, ed., *The ISO 14000 Handbook* (Milwaukee: ASQ Quality Press, 1996) 1 at 1 (“the ISO 14000 standards hold out the promise to revolutionize environmental protection as we have known it in the past quarter century”); Ruth Hillary, ed., *Environmental Management Systems and Cleaner Production* (Chichester, UK: John Wiley & Sons, 1997); Amy Pesapane Lally, “ISO 14000 and Environmental Cost Accounting: The Gateway to the Global Market” (1998) 29 *Law & Pol’y Int’l Bus.* 501; for other examples see *infra*, note 13.

⁸See, e.g., Riva Krut and Harris Gleckman, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (London: Earthscan, 1998); Saeed Parto, “Aiming Low,” in Robert Gibson, ed. *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview, 1999) 182; for other examples see *infra* note 13.

⁹See, e.g., A. Claire Cutler, Virginia Haufler and Tony Porter (eds.), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999); Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington, D.C.: Carnegie Endowment for International Peace, 2001).

conceptions of particular social actors. It also contributes to burgeoning debates about regulatory "reinvention"¹⁰ and the role voluntary corporate initiatives should play in public policy.¹¹

This tendency to focus on the "privatization" of environmental policy tends, however, to underemphasize an important aspect of the politics of voluntary environmental initiatives: public authorities and legal systems are deeply involved in the constitution and exercise of "private" authority to the point that it may no longer be useful to discuss these voluntary initiatives in terms of a public-private divide. By emphasizing the voluntary and private character of these environmental initiatives, the debates over EMS initiatives tend not to acknowledge the full extent of the entanglement of public authorities and voluntary initiatives.¹² Numerous writers have addressed certain aspects of this interaction,¹³ but very few have attempted to examine it

¹⁰See, e.g., Cass Sunstein, "Paradoxes of the Regulatory State" (1990), 57 *U. Chi. L. Rev.* 407; Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990); D. Osborne and T. Gaebler, *Reinventing Government* (Boston: Addison-Wesley, 1992); Ian Ayres and John Braithwaite, *Responsive Regulation* (New York: Oxford, 1992); Neil Gunningham and Peter Grabosky, *Smart Regulation* (Oxford: Clarendon, 1998).

¹¹See, e.g., Gunningham & Grabosky, *ibid.*; Gibson, *supra* note 8; Carlo Carraro and François Lévêque, eds., *Voluntary Approaches in Environmental Policy* (Dordrecht, Netherlands: Kluwer, 1999).

¹²Cf. Liora Salter, *Mandated Science: Science and Scientists in the Making of Standards* (Dordrecht, Netherlands: Kluwer, 1988) 31-32 and 178-80 (arguing that the debate over regulation versus deregulation neglects the reality of standards, which are neither fully public nor fully private and always involve some degree of coordination between public and private sectors).

¹³See, e.g., Naomi Roht-Arriaza, "Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment" (1995) 22 *Ecology L.Q.* 479-539; Scott Butner, "ISO 14000 -- Policy and Regulatory Implications for State Agencies," paper presented at National Pollution Prevention Roundtable Annual Meeting (10 April 1996), available at <<http://www.seattle.battelle.org/p2online/iso-regs.htm>> (visited 21 June 2001); Anthony Reiley, "The New Paradigm: ISO 14000 and its Place in Regulatory Reform" (1997) 22 *J. Corp. L.* 535; Henry Balikov and Patrick Cavanaugh, "The Overselling of Government 'Reinvention': How Government Expectations of EPA's Project XL and ISO 14000 May Prove Counter-Productive," *Albany L. Envtl. Outlook* (Spring-Summer 1997) 23; Naomi Roht-Arriaza, "Developing Countries, Regional Organizations, and the ISO 14001 Environmental Management Standard" (1997) 9 *Geo. Int'l Envtl. L. Rev.* 583; Douglas Taylor, "Is ISO 14001 Standardization in Tune with Sustainable Development?" (1998) 13 *J. Envtl. L. & Litigation* 509; Douglas Taylor, "ISO 14000 and Environmental Regulation" (1999) 9 *J. Envtl. L. & Practice* 1; Paula C. Murray, "Inching Toward Regulatory Reform -- ISO 14000: Much Ado About Nothing or a Reinvention Tool?" (1999) 37 *Am. Bus. L.J.* 35; Keith Pezzoli, "Environmental Management Systems (EMSs) and Regulatory Innovation" (2000) 36 *Cal. W.L. Rev.* 335; Pollution Probe, *The Future Role of Environmental Standards* (Ottawa: Pollution Probe 2000); Paulette Stenzel, "Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?" (2000) 37 *Am. Bus. L.J.* 237; Jason Morrison *et al.*, *Managing a Better Environment: Opportunities and Obstacles for ISO 14001 in Public Policy and Commerce* (Oakland, CA: Pacific Institute, 2000), available at <<http://www.pacinst.org>> (visited 30 July 2001); Roy W. Shin and Yu-Che Chen, "Seizing Global Opportunities for Accomplishing Agencies' Missions: The Case of ISO 14000" (2000) 24 *Public Admin. Q.* 69-94; Dianne Saxe, "ISO 14001/14004 and Compliance in Canada," paper prepared for the Canadian

comprehensively.¹⁴ This is also true to a lesser extent of the literature on voluntary environmental initiatives generally.¹⁵ In fact, diverse public authorities around the world have begun to participate in and influence the development of voluntary EMS initiatives and incorporate them into their strategies and programs in an increasing variety of ways, including by officially endorsing or encouraging private sector EMS implementation, conducting or disseminating research about EMSs, providing financial incentives for EMS implementation, relaxing regulatory requirements or criminal penalties for companies that implement voluntary EMS standards, making implementation of voluntary EMS standards mandatory through legislation or court order, applying voluntary EMS standards to their own operations, developing or agreeing to international trade rules that may turn voluntary international standards into constraints on governments' regulatory options, and steering the development and use of voluntary EMS standards in particular directions.

It is at this interface between state and non-state regimes that the most interesting questions about EMS standards and other voluntary initiatives arise. Distinctions between public and private, state and non-state, mandatory and voluntary, are not particularly helpful in understanding the significance of EMS standards. Rather, EMS standards demonstrate that the practices of government traverse the categories on which our understandings of law and politics are typically based. I investigate this interface by exploring the forms of public authorities' engagements with voluntary EMS standards in Canada and examining the "governmental" implications of this important

Standards Association (20 December 2000) (copy on file with author); Cary Coglianese and Jennifer Nash, eds., *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington, DC: Resources for the Future, 2001).

¹⁴A notable exception is Meidinger's work on the interaction between the U.S. legal system and environmental certification systems, including EMS standards. See, e.g., Errol Meidinger, "Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think" (2001) 31 *Env't L. Rptr.* 10162.

¹⁵The literature on voluntary environmental initiatives generally lacks systematic inquiry into how non-state regulatory systems interact with each other and with other forms of regulation, or how state actors can engage with voluntary initiatives in an integrated public-private regulatory strategy. Notable exceptions include Ronald B. Mitchell, *Intentional Oil Pollution At Sea* (Cambridge, MA: MIT Press, 1994); Gunningham & Grabosky, *supra* note 10; Kernaghan Webb, "Voluntary Initiatives and the Law," in Gibson, *supra* note 8, 32; Kernaghan Webb and Andrew Morrison, "Voluntary Approaches, the Environment and the Law: A Canadian Perspective," in Carraro and L  v  que, *supra*, note 11, 229.

experiment in “private” regulation. In Part Two of the paper I describe the ways in which Canadian public authorities have engaged with voluntary EMS initiatives. In Part Three I explore the implications of these engagements for the (re)definition of the public-private divide in Canadian law and politics. I conclude by the paper with some suggestions about the possible role of law in facilitating or resisting these transformations.

PART TWO: PUBLIC AUTHORITIES’ ENGAGEMENTS WITH VOLUNTARY EMS INITIATIVES IN CANADA

I. INTRODUCTION

A variety of public authorities in Canada have begun to engage with environmental management systems and voluntary EMS standards in a range of interesting ways. I use the term “public authorities” broadly to denote the entire Canadian state apparatus, including government ministers, departments, agencies, bureaucrats, procurement personnel, regulators, committees, legislatures, prosecutors, courts, administrative tribunals, military facilities, local governments and public utilities. Their engagements with EMS initiatives to date have fallen, I suggest, into five rough categories: *steering*, *self-discipline*, *knowledge production*, *reward* and *command*. I also identify three other categories of engagement which have not yet been employed by Canadian public authorities in relation to environmental management systems, but can be discerned in their engagements with other voluntary initiatives: *benchmarking*, *challenge* and *borrowing*. Together these eight categories give an indication of the range of Canadian public authorities’ engagements with “private” governance in the field of environmental protection.¹⁶

¹⁶Two caveats are in order. First, these eight categories of engagement overlap substantially. A single program or action may involve several modes of engagement simultaneously. Second, the list of categories is tentative and open-ended, subject to variation with changing information and the character and purposes of analysis. Its main purpose is not to set down a definitive typology but to expose the extent and variety of interactions among public and private authorities in the field of environmental management.

II. MODES OF ENGAGEMENT

A. Steering

First, Canadian public authorities have sometimes engaged with voluntary initiatives such as EMSs and EMS standards in a mode that can be described as “steering”: encouraging voluntary initiatives, inhibiting them or steering their development, content or use in a particular direction. At a certain level, all the modes of engagement I identify could be described in this way. “Steering” might thus be viewed as an umbrella category covering most public authorities’ interactions with voluntary initiatives. Nonetheless, Canadian public authorities have exhibited several types of conduct that are distinct enough from the other categories of engagement to be considered separately. The primary driver for these engagements is, as Pollution Probe observes, that “notwithstanding their voluntary nature, standards are properly regarded by policy makers as an instrument of governance.”¹⁷

Although “steering” often involves active, intentional efforts to mold conduct, it can also be passive, or even inadvertent. First, it may include surveillance or intelligence-gathering. Governments officials may participate in standards development, for instance, as much to observe and stay abreast of industry developments as to push standards in any particular direction.¹⁸ In this case “steering” consists in patrolling a particular conception of the appropriate boundary between government and “private” spheres. Second, public authorities may inadvertently send signals that influence voluntary initiatives. For instance, governments may, on one hand, publicly encourage firms to use EMSs and environmental certification initiatives, but on the other, maintain regulatory

¹⁷Pollution Probe, *supra* note 13 at 41.

¹⁸In Salter's view this is also true of industry participants: intelligence-gathering about competitors and informal coordination are often more important to industry participants than the content of particular standards. Liora Salter, “The Housework of Capitalism: Standardization in the Communications and Information Technology Sectors” (1993-94) 23 *Int'l J. Pol. Econ.* 105 at 116.

frameworks such as forest tenure laws or environmental audit disclosure rules that inadvertently inhibit such use.¹⁹

In any event, public authorities in Canada have engaged in “steering” voluntary EMS initiatives in at least five ways: by pronouncing official policies on environmental management systems, formally constituting and funding standardization bodies, participating in the development of voluntary EMS standards, providing strategic policy leadership for standardization activities and regulating the development, content or use of voluntary initiatives.

1. “Talking the Talk”: Official Policy Pronouncements

First, some public authorities in Canada and elsewhere have formulated and pronounced official policies on private sector use of voluntary EMS initiatives. Such pronouncements, which range from off-the-cuff remarks to detailed policy statements, can have important legitimization or delegitimation effects for voluntary initiatives.²⁰ Their content varies from enthusiastic (but often vague) endorsement, to active promotion, to enunciation of conditions or goals for public authorities’ involvement or support, to enumeration of concerns, to active resistance (although this last is very rare in the case of EMS). In Canada official pronouncements have tended toward endorsement and promotion -- “talking the talk” of EMS as part of a broader agenda of regulatory flexibility. Very few Canadian government authorities have initiated serious consultations or issued careful policy

¹⁹A recent report by the B.C. government, for example, found that the province’s forest tenure system, in which government determines forestry planning requirements, harvest rates and environmental protection standards, made it difficult for forestry companies to demonstrate the long-term commitment to sustainable management planning for a defined geographic forest area required for certification under leading sustainable forestry management programs. British Columbia Ministry-of-Forests, Implementing Forest Certification in British Columbia: Issues and Options -- Report Summary (March 2001), online: <http://www.for.gov.bc.ca/het/certification/researchproject.htm> (visited 7 August 2001).

²⁰Such legitimization effects depend largely on the credibility of official pronouncements among relevant audiences, with off-hand, vague endorsements typically having much less effect on the use of voluntary initiatives by industry or consumers than deliberate pronouncements by well-informed officials who are capable of distinguishing genuine innovations from mere “business as usual” advances. See Carlo Carraro and François Lévêque, “Introduction: The Rationale and Potential of Voluntary Approaches,” in Carraro & Lévêque, *supra* note 11, 1 at 9-10.

pronouncements about how, why or in what conditions they will endorse voluntary EMS initiatives; but this may be changing as some federal and provincial authorities have begun earnest policy development efforts regarding EMS.²¹

2. Constitution and Funding of Standardization Bodies

Second, the federal government is involved in the establishment and operation of voluntary standards-setting bodies in Canada. Although not involving overt direction of standardization activities, this is an interesting but overlooked dimension of interaction between governments and voluntary standardization. Standards-setting bodies in most countries have complicated relationships to the state apparatus. The Standards Council of Canada, Canada's principal voluntary standardization organ and its national ISO member body, is a "quasi-non-governmental organization".²² It is a federal crown corporation established by statute in 1970, reporting to Parliament through Industry Canada and receiving federal government funding.²³ Its statutory

²¹Some federal government departments (e.g., Environment Canada) and government officials in several provinces (e.g., Alberta, B.C., Nova Scotia and Ontario) have expressly encouraged private sector use of EMSs, often in very general terms in public remarks, web sites or pamphlets. Some have issued discussion papers or establish modest government-industry partnerships around EMS implementation, but most of these efforts have been *ad hoc* and uncoordinated. More recently, federal officials participated in the development of a joint Canada-Mexico-U.S. policy statement on EMS. See North American Commission for Environmental Cooperation, *Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems* (Montreal: CEC, 2000), online: <<http://www.cec.org>> (cautiously supporting use of EMSs to achieve public policy goals, endorsing structure and approach of leading EMS standards such as ISO 14001 and enunciating ten elements voluntary EMSs should have to satisfy governments' concerns about environmental performance, pollution prevention, public accountability and legal compliance). Alberta and Ontario have begun to elaborate policies on the incorporation of EMS into their regulatory frameworks. See "Rewards," below. Still, considering that EMSs have been in wide use for more than a decade, the paucity of considered policy statements is surprising.

²²Leon Gordenker & Thomas G. Weiss, "Pluralising Global Governance: Analytical Approaches and Dimensions" (1995) 16 *Third World Q.* 357; cf. Salter, *Mandated Science*, *supra* note 12 at 179.

²³*Standards Council of Canada Act*, R.S.C. 1985, c. S-16, as am. S.C. 1987, c. 1, S.C. 1996, c. 24. The Standards Council of Canada oversees Canada's National Standards System, an informal federation of more than 270 independent organizations. It delegates the actual writing of standards to accredited standards development bodies such as the Canadian Standards Association (CSA), a private not-for-profit corporation. For an excellent overview of standardization in Canada, see Canadian Institute for Environmental Law and Policy, *CSA Environmental Standards Writing: Barriers to Environmental Non-Governmental Organizations Involvement* (Toronto: CIELAP, May 1997). Like the Standards Council of Canada, the majority of ISO national member bodies are state-owned, but the ISO member bodies in most advanced industrial democracies other than Canada are private not-for-

mandate is to promote efficient and effective voluntary standardization in Canada by (*inter alia*) promoting public-private sector cooperation.²⁴ Thus its constitutive instrument emphasizes the hybrid public-private character of standardization.²⁵

3. Participation in Standards Development

Third, Canadian government officials have participated directly in the development of EMS standards in Canada and ISO since the beginning of EMS standardization in the early 1990s, by sitting on national standards committees and serving as Canadian delegates to ISO meetings.²⁶ Indeed, government officials participate in most voluntary standards development in Canada.²⁷ Canadian standards committees operate on a consensus basis and employ a “balanced matrix” to ensure that their membership reflects a rough balance among standards users (industry), service/professional representatives (including consultants, auditors and registrars), government officials and “general interest” members (a grab-bag for consumer, environmental and labour representatives, academics, etc.).²⁸ Government officials often cite the balanced membership and

profit organizations formally independent of the state.

²⁴*Standards Council of Canada Act, ibid.*, s. 4(1).

²⁵Salter's work on health, safety and communication standards provides a detailed insight into this public-private hybridization inherent in standardization bodies. See, e.g., Salter, *Mandated Science*, *supra* note 12; Salter, “The Housework of Capitalism,” *supra* note 18.

²⁶Federal government officials have been the most active, a few playing prominent roles in the development of the ISO 14000 standards. Provincial officials have also participated on a limited scale, and municipal officials have begun to participate in Canadian EMS standards committees.

²⁷In addition to participating in many non-governmental standards committees, governments have their own standards development organs. For example, one of the four standards development organizations accredited by the Standards Council of Canada, the Canadian General Standards Board (CGSB), is a federal government organization within Public Works and Government Services Canada. Although CGSB does not develop EMS standards, it provides EMS auditing and registration services to public and private sector clients.

²⁸See, e.g., Canadian Standards Association, *Guideline B: Procedures for Establishing and Maintaining Standards Steering Committees*, 2d ed. (June 1989, revised December 1990), reprinted in CIELAP, *supra* note 23, Appendix C.

consensual process of Canadian standards committees and ISO itself as key reasons to endorse voluntary EMS standards,²⁹ but the impression of balanced consensus may be misleading. Industry and consultants usually make up a large majority on committees, the CSA often has difficulty maintaining the “balanced matrix” on its environmental standards committees³⁰ and ISO has been criticized repeatedly for its dominance by big industry from advanced industrial countries.

4. Strategic Policy Leadership

Fourth, strategic leadership of national and international standardization activities is seen by many governments as a priority to ensure international competitiveness of home industry. It was only in March 2000, however, that the Canadian federal government launched the *Canadian Standards Strategy*, to “provide direction and leadership on how to use standardization to best advance the social and economic well-being of Canadians in a global economy”.³¹ The *Strategy* promotes the use of standards as complements to regulation, calls for fuller representation of the broadening range of “standardization stakeholders” and acknowledges that fiscal restraint and global trade are driving public authorities’ increasing reliance on voluntary standards to achieve public policy goals.³²

²⁹See, e.g., Commissioner of the Environment and Sustainable Development, *Report of the Commissioner of the Environment and Sustainable Development 1999* (Ottawa: Queen’s Printer, 1999), online: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c9menu_e.html> (visited 1 April 2001) [hereinafter CESD, 1999 Report].

³⁰See CIELAP, *supra* note 23.

³¹See Standards Council of Canada, *Canadian Standards Strategy and Implementation Proposals* (March 2000), online: <http://www.scc.ca/>. The *Strategy* was the product of a stakeholder consultation process led by the Standards Council of Canada and Industry Canada.

³²The *Strategy* is expressly based on two assumptions: that (1) standards are becoming a pillar of the new global trade system, and (2) fiscal restraint means that industry and government are struggling to do more with less and standards can offer effective, less costly ways to achieve the objectives of reducing costs, eliminating regulatory burdens and protecting the public interest. *Ibid.*

5. Regulation of Voluntary Initiatives

Finally, public authorities may regulate the development, use or content of voluntary environmental initiatives. Canadian public authorities have generally taken a “hands off” approach to the development and use of voluntary initiatives,³³ including EMSs. Nonetheless various forms of state regulation may affect the development and use of EMS initiatives directly or indirectly, including:³⁴

- *Competition law*, which addresses the possible anti-competitive effects of competitors coming together to devise rules for themselves;
- *Misleading advertising laws*, which may apply when a firm violates the requirements of a voluntary standard to which it subscribes (e.g., ISO 14001), yet represents itself as conforming;
- *International trade law*, in particular the Agreement on Technical Barriers to Trade (TBT Agreement), which requires member states, including Canada, to do everything reasonable to ensure that voluntary standards-setting bodies in their jurisdiction adhere to the Code of Good Practice for the Preparation, Adoption and Application of Standards, which essentially applies the TBT Agreement’s trade disciplines to voluntary standardization: *i.e.*, where international standards exist on a subject, domestic standardization bodies should use them as the basis for their own standards;³⁵
- *The presence or absence of clear ground rules* for the development and use of voluntary initiatives, such as requirements of public participation in the development or implementation of voluntary initiatives, or public disclosure of information on participants’ performance (to date, Canadian governments have not enacted such rules); and
- *The presence or absence of a credible “regulatory backstop”* in the form of monitoring and enforcement of existing environmental laws and demonstrable will to step in with regulatory instruments should voluntary initiatives fail to achieve public policy objectives.

³³ See, e.g., Webb, *supra* note 15.

³⁴ See generally *ibid.*; John Moffet and François Bregha, “Non-Regulatory Environmental Measures,” in Gibson, *supra* note 8, 15.

³⁵ See Agreement on Technical Barriers to Trade (1994), reprinted in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, Uruguay Round (1987-1994)* (Geneva: GATT Secretariat, 1994), arts. 3.1, 4.1, and Annex 3 [hereinafter TBT Agreement]. The TBT Agreement is also available online: http://www.wto.org/english/docs_e/legal_e/legal_e.htm. See also “Self-Discipline,” below.

B. Self-Discipline

The second major way Canadian public authorities have engaged with voluntary EMS initiatives can best be described as self-discipline.³⁶ It is possible to distinguish two forms of self-discipline: public authorities “walking the walk” by implementing EMSs in their own operations; and public authorities ratifying international agreements that turn voluntary standards into potential constraints on their authority.

1. “Walking the Walk”: Implementing EMSs in Government Operations

Canadian public authorities at all levels of government have begun to develop and implement their own EMSs, some on their own initiative and others as a result of pressure from central government authorities. At the federal level most major departments and several agencies now have EMSs, although they vary substantially in scope, detail and degree of implementation. The federal Auditor General and the Commissioner of the Environment and Sustainable Development (CESD) began to encourage federal organizations to implement EMSs in the mid-1990s. Facing mostly desultory responses they soon turned to prodding and shaming, referring to EMSs as “essential” for government operations and publicly exposing several departments’ foot-dragging.³⁷ The CESD and Environment Canada play central roles in assisting federal government bodies to develop and implement EMSs and appear to consider EMSs mandatory, at least for the

³⁶This category coincides roughly with Doern *et al.*'s “regulatory regime III,” the state’s regulation of itself. G. Bruce Doern *et al.*, “Canadian Regulatory Institutions: Converging and Colliding Regimes,” in G. Bruce Doern *et al.*, eds., *Changing the Rules: Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999) 3.

³⁷See, e.g., CESD, 1999 Report, *supra* note 29.

25 major federal departments and agencies that must file Sustainable Development Strategies.³⁸

Some provincial and territorial ministries have also begun to implement EMSs and a substantial and growing number of Canadian municipalities have implemented EMSs either for their entire operations or for subordinate bodies such as water or waste management units. Central provincial government authorities have generally done little to coordinate, encourage, assist or push these developments.

Several interesting issues arise from these self-applications of EMS to the public sector, including:

- *Reasons for implementing EMSs:* Although Canadian public authorities list many reasons for implementing EMSs, one looms large: to set an example for the private sector.³⁹ In reality, however, the leading edge of EMS design and implementation is found in forward-thinking corporations, consulting firms and standardization bodies, along with innovative public-private consortia outside Canada.⁴⁰ Far from leading by example, many Canadian

³⁸Implementation of formal environmental management systems has been an expectation of departmental sustainable development strategies since they were first introduced in the mid 1990s. A 1995 federal government guide to greening government operations declared that federal departments and agencies "are to develop and implement formal environmental management systems" as part of their sustainable development strategies. Government of Canada, *Directions on Greening Government Operations* (Ottawa: Public Works and Government Services Canada, 1995), online: <<http://www.sdinfo.gc.ca/SDinfo/ENG/docs/ggo/default.cfm>> (visited 17 December 2001); see also Government of Canada, *A Guide to Green Government* (Ottawa: Minister of Supply and Services, 1995), online: <http://www.ec.gc.ca/grngvt/grngvt_e.htm> (visited 3 December 2001). In 1999 the Commissioner for Environment and Sustainable Development said that he expects to see "accelerated development" of EMSs in the "second generation" of departmental sustainable development strategies. Commissioner of the Environment and Sustainable Development, "Moving Up the Learning Curve: The Second Generation of Sustainable Development Strategies" (December 1999), online: <http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/c9dec_e.html> (visited 3 December 2001). Nonetheless EMSs have not expressly been made legally mandatory for federal organizations in Canada, as they have in the U.S. where all federal facilities must implement EMSs by 2005. See *Greening the Government through Leadership in Environmental Management*, Exec. Order No. 13148, 65 Fed. Reg. 24593 (21 April 2000). The new Canadian Environmental Protection Act authorizes regulations respecting the establishment of environmental management systems for federal government operations, but none have yet been promulgated. *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 209(1)(a) [hereinafter *CEPA 1999*].

³⁹As Agriculture and Agri-Food Canada expresses it, the federal government, as the single largest organization in Canada and the largest employer, purchaser and landlord, can set an excellent example for Canada by implementing EMSs. Agriculture and Agri-Food Canada, *Agriculture in Harmony with Nature II: AAFC's Sustainable Development Strategy 2001-2004*, Publication 2074/E (Ottawa: Public Works and Government Services Canada, 2001) at 43, online: http://www.agr.ca/policy/environment/eb/public_html/pdfs/sds/SDSII_en.pdf (visited 24 April 2001).

⁴⁰E.g., the Sigma Project in the U.K. ("Sustainability - Integrated Guidelines for Management") (online: <http://www.projectsigma.com>) and the Multi-State Working Group on Environmental Management Systems in the U.S. (online: <http://www.dep.state.pa.us/dep/deputate/pollprev/mswg/mswg.htm>).

public authorities are simply scrambling to keep up with the private sector.⁴¹

- *Endorsement of ISO standards:* Most Canadian public authorities' EMSs are modelled on ISO 14004 or (less often) ISO 14001. The federal government has expressly endorsed ISO 14004 as a guide for public sector EMSs.
- *Verification and oversight:* Verification of the implementation and performance of public sector EMSs in Canada is haphazard and incomplete. Most government organizations disclose basic information about their EMSs and some report publicly on their EMS performance. The Auditor General and CESD monitor the federal government's implementation of EMSs; there is typically no such oversight in the provinces. While some Canadian public authorities have obtained third-party certification for certain individual facilities' EMSs, most have avoided certification largely because of the expense involved.
- *Variety of settings:* Finally, Canadian public authorities have implemented EMSs in a wide variety of organizational settings, from entire government departments to individual branches, agencies, operating units, facilities or even single buildings. They have been applied in a range of fields including environmental regulation, food inspection, transportation, electricity generation, water and waste management, military supply, forestry operations and other resource activities.

2. Voluntary Standards as Self-Imposed Constraints on Public Authority

Canada is a party to international trade agreements that may transform voluntary international standards developed by obscure, often industry-dominated standardization bodies such as ISO into potential constraints on Canadian governments' freedom to set their own legal standards for health, safety and the environment. Under the 1994 Technical Barriers to Trade (TBT) Agreement, member states must base their domestic "technical regulations" -- *i.e.*, environmental and other regulations governing products or their related processes or production methods -- on existing voluntary standards developed by international standardization bodies such as ISO unless the standards would be "an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or

⁴¹ See, e.g., CESD, "Moving Up the Learning Curve," *supra* note 38; Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons* (October 1995), ch. 11, "Environmental Management Systems: A Principle-based Approach" online: <<http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9511ce.html>> (visited 1 May 2001) (observing that federal organizations are far behind the private sector in EMS implementation).

fundamental technological problems.⁴² Under these rules, regulations that are based on existing international standards are presumed not to create an illegal obstacle to trade, but regulations that deviate from international standards may be, and have been, challenged as trade barriers.⁴³

Although the full measure of these trade disciplines has yet to be taken, they clearly have potential implications for public authorities' engagements with voluntary environmental initiatives. When public authorities begin to promulgate mandatory regulations on matters covered by voluntary standards, as Nova Scotia and New Brunswick have done by making ISO 14000-based EMSs mandatory in the gas pipeline industry,⁴⁴ those standards may become a discipline on governments' authority to design their own regulations.⁴⁵ Ironically, therefore, EMS standards, which are almost universally identified with regulatory *flexibility*, may ultimately impose a *constraint* on such flexibility.

C. Knowledge Production

The third mode of engagement has as its defining feature the generation and dissemination of knowledge about voluntary initiatives. Canadian public authorities have engaged in such knowledge production by conducting or sponsoring *research* and *education* regarding the design,

⁴²TBT Agreement, *supra* note 35, art. 2.4. Other prominent international trade agreements to which Canada is a party impose similar disciplines, most prominently the WTO's Sanitary and Phytosanitary Measures Agreement and the North American Free Trade Agreement. It is not clear whether regulations relating to EMSs would come within the definition of "technical regulations".

⁴³Indeed, Canada has been among the most aggressive states in enforcing these disciplines against its trading partners, for instance successfully challenging the European Communities' ban on hormone-fed beef as an unjustified deviation from international food safety standards. See *EC - Measures Affecting Meat and Meat Products (Hormones)*, Report of the Appellate Body, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 Feb. 1998). More recently, however, the WTO Appellate Body rejected Canada's challenge to a French ban on chrysotile asbestos, holding that the ban was a "technical regulation" within the meaning of the TBT Agreement but holding (for the first time in GATT history) that it was justified under the public health exception of Article XX of the General Agreement on Tariffs and Trade. See *EC - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WTO Doc. WT/DS135/AB/R (12 Mar. 2001). WTO dispute settlement reports are available online, <<http://www.wto.org>>.

⁴⁴See "Command," below.

⁴⁵See generally David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 1998) at 1407.

implementation, verification or effects of environmental management systems:

- *Research:* Numerous federal and provincial government departments have funded or carried out modest pilot projects, case studies and surveys of the design, implementation or performance of EMSs in particular firms or jurisdictions, but none have come close to the research programs on EMS sponsored by various governments and public-private consortia in the U.S. and Europe.⁴⁶ Canadian governments have also supported EMS research by sponsoring research conferences on voluntary initiatives, publishing collections of research papers and hosting electronic research discussion fora.⁴⁷
- *Education:* Canadian public authorities have propagated knowledge and expertise regarding EMSs through two principal modalities: training and publicity. Training ranges from basic primer courses for businesspeople to advanced training for experts such as EMS auditors. More commonly, Canadian public authorities have responded to the emergence of voluntary EMS standards by simply publicizing information about EMSs, typically through passive means such as government web sites. Such publicity is usually aimed at industry but sometimes at consumers as well. It usually encourages the use of EMSs and conveys information about EMS standards and the design, implementation, certification, advantages or sector-specific applications of EMSs. It seldom enunciates public authorities' reservations or concerns; those are typically addressed in other contexts.⁴⁸

These activities are closely related to official policy development and pronouncement⁴⁹: research is a crucial input in policy development and education is an important channel for generating support for preferred policies among relevant constituencies. Governments often sponsor or conduct research and education as elements of carefully orchestrated policy projects and incorporate the fruits of non-state research and creativity into their own policy making, effectively moving some policy development costs off government budgets.⁵⁰ In any event these engagements with voluntary initiatives are usually integrated more or less into public authorities'

⁴⁶Probably the most ambitious empirical study of EMS implementation and performance is the *ISO 14001 Pilots* project sponsored by US EPA and conducted by researchers from the Environmental Law Institute and the University of North Carolina. Information on the project can be found online: <http://www.eli.org/isopilots.htm>.

⁴⁷As to the latter, Industry Canada hosts the Voluntary Codes Research Forum, a leading arena for informal exchange of information about research into voluntary corporate codes generally with frequent attention to standardization and EMS-related issues. The Forum consists of a web site and listserv facilitated by Dr. Kernaghan Webb, Senior Legal Policy Advisor and Chief of Research, Canadian Office of Consumer Affairs, Industry Canada. The Forum can be found online: <http://strategis.ic.gc.ca/SSG/ca00973e.html>.

⁴⁸See the discussion of official policy pronouncements under "Steering," above.

⁴⁹*Ibid.*

⁵⁰See, e.g., Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law" (1997) 21 *Harvard Env'tl L. Rev.* 537.

broader political agendas, particularly those springing from platforms of fiscal restraint, government downsizing, regulatory reinvention, free enterprise and global competitiveness.

D. Reward

One of the most prominent themes in discussions of voluntary initiatives is that voluntary initiatives can be the basis for a new relationship between regulators and industry emphasizing flexibility, efficiency, partnership and market incentives rather than the perceived rigidity and inefficiency of conventional "command and control" regulation. In this vein, public authorities in various countries, including Canada, have begun to incorporate voluntary EMS initiatives into their regulatory strategies by offering concrete rewards for voluntary EMS implementation. These rewards typically take three forms: (1) *regulatory relief or forbearance* (i.e., relaxation of existing regulatory requirements or forbearance from introducing new ones), (2) *financial incentives* and (3) *"green procurement" policies*.

1. Regulatory Relief and Forbearance

First, governments in several jurisdictions have begun to establish programs that relax existing regulatory requirements (such as permitting, reporting, inspections or technology requirements) for firms that implement EMSs.⁵¹ In 2001 Alberta became the first Canadian

⁵¹These programs also often provide other kinds of incentives including subsidies, technical assistance and reputational benefits (e.g. official government recognition, eligibility for awards and the privilege to display logos or other indicia of participation). The most prominent examples are probably the U.S. EPA's National Environmental Performance Track program and the Netherlands' framework licence system. For information on Performance Track see the official program web site at <<http://www.epa.gov/performance-track>>; on the Dutch framework licences see Netherlands, Ministry of Housing, Spatial Planning and the Environment, *Circular on the Framework Licence and the Customised Licence* (November 1999) (copy on file with author).

jurisdiction to launch an official program offering regulatory relief to firms that have EMSs in place.⁵² Alberta Environment's LEAD (Leaders Environmental Approval Document) program, currently in a pilot phase, requires participating facilities to implement a very rudimentary EMS,⁵³ maintain a clean compliance record, demonstrate past environmental performance that exceeds legal requirements, commit to future environmental performance goals and measures that exceed legal requirements and are based on continuous improvement and pollution prevention, implement meaningful public consultation and report annually on performance. In return, facilities will receive modest regulatory incentives such as preapproval for minor process and equipment changes, facility-wide performance targets ("bubbles"), performance- rather than technology-based requirements and expedited permitting procedures, along with various forms of public recognition. Ontario is likely soon to follow with its own program and other Canadian governments may be considering such programs as well.⁵⁴ In addition to these general regulatory exemption programs, some Canadian public authorities have experimented on a modest basis with incorporating EMSs or EMS-related initiatives into government-industry negotiated agreements, but it is unclear to what extent such agreements involve relaxation of existing regulations or forbearance from introducing new rules.⁵⁵

⁵²See Alberta Environment, *LEAD Program Guide -- A Guide to Alberta Environment's Leaders Environmental Approval Document (LEAD) Program: Pilot Phase* (April 2001), online: <http://www.gov.ab.ca/env/protenf/publications/LEADProgramGuideApr01.pdf> (date accessed: 17 July 2001).

⁵³In contrast to most EMS-based regulatory relief programs which either require a mature, third-party certified EMS or an EMS that goes significantly beyond the requirements of ISO 14001, the LEAD program requires only a loosely defined "basic" EMS that need not be fully developed, need not have all the elements of an ISO 14001 EMS and need not be verified by an independent third party. Alberta Environment is, however, considering a "tiered" program in which upper tier participants must have an ISO 14001-equivalent, independently audited EMS. *Ibid.*

⁵⁴Ontario is seriously considering regulatory incentives for EMS implementation in its "Performance Plus" program currently under development (personal communication). As to other governments, it is possible, for instance, that Environment Canada could couple EMSs with regulatory incentives in pollution prevention plans authorized under the new *Canadian Environmental Protection Act, CEPA 1999*, *supra* note 38, s. 56.

⁵⁵See, e.g., Ontario Ministry of the Environment, Environmental Partnerships Branch, *Progress Report 2001: Ontario Initiatives in Pollution Prevention* (Toronto: Queen's Printer, 2001), online: <http://www.ene.gov.on.ca/envision/techdocs/355101e.pdf>; Draft Memorandum of Understanding Between the Governments of Canada, Ontario and Alberta and the Canadian Chemical Producers' Association on Environmental Protection Through Action Under CCPA Responsible Care®, online: <http://www.ec.gc.ca/nopp/chemical/ccpa/indexe.htm> (visited 30 October 2001).

In addition, firms that have EMSs may be rewarded with leniency in enforcement after a regulatory violation is discovered. Environmental enforcement policies in some jurisdictions extend some leniency in the exercise of enforcement discretion to firms with EMSs. Not so in Canada: although many environmental policy-makers and permitting authorities in Canada encourage firms to implement EMSs, Canadian environmental enforcement policies appear to give little or no weight to voluntary EMSs.⁵⁶ Upon conviction, courts may consider implementation of a voluntary EMS as a mitigating factor in sentencing for environmental regulatory offences, although I am unaware of any instances of this happening.⁵⁷

2. Financial Incentives

While numerous foreign governments have offered grants, tax credits, preferential access to government loans and other financial incentives for private sector EMS implementation or certification, to date Canadian public authorities have not made much use of these tools.⁵⁸

3. Green Government Procurement

Governments are among the largest purchasers of goods and services in a jurisdiction and

⁵⁶Environment Canada's new Compliance and Enforcement Policy, for instance, makes no mention of EMSs at all, although it does recognize the "power and effectiveness of environmental audits as a management tool" and encourages their use. Environment Canada, *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999* (Ottawa: Environment Canada, 2001), online: Environment Canada homepage, <http://www.ec.gc.ca/enforce/homepage/cepa/CEPA99_final_eng.pdf> (date accessed: 4 July 2001).

⁵⁷For example, the new *Canadian Environmental Protection Act* is the first legislation in Canada to expressly authorize a sentencing court to take the presence of an EMS into account as a mitigating factor in sentencing. *CEPA 1999*, *supra* note 38, s. 287(c).

⁵⁸Between 1994 and 2000 the province of Nova Scotia offered a corporate income tax credit to assist Nova Scotia companies with costs of achieving ISO 9000 or 14001 certification. The credit was 25% of eligible expenditures, which included audits, registrar fees, training and documentation. Very few companies claimed this tax credit for ISO 14001 certification expenses, reportedly because the provincial government failed adequately to bring it to industry's attention (personal communication).

their purchasing policies can have a substantial impact on business. Many governments, including the Canadian federal government, have encouraged suppliers to implement EMSs or obtain third-party certification of their EMSs, but only a handful, none of which are Canadian, have made this a formal purchasing preference or requirement.⁵⁹ Although green procurement policies may reward firms that adhere to voluntary initiatives, they can also have a coercive aspect: EMSs may ultimately be transformed into a *de facto* requirement for doing business if enough public and private sector buyers make EMS implementation or certification a purchasing requirement.⁶⁰

E. Command

Both industry and government usually resist proposals to make voluntary initiatives mandatory. It is very uncommon for public authorities to issue legally binding commands requiring firms to implement EMSs or demonstrate their conformance to an EMS standard. On the rare occasions this has happened in Canada it has been with the affected firms' or industry's support, either because they found the alternatives even worse, they were planning to implement or obtain certification of an EMS anyway or they stood to benefit directly from the arrangement:

⁵⁹No Canadian government appears to have made EMSs a formal procurement consideration or requirement, although the federal government encourages government buyers to purchase from firms that are ISO 14001 certified. Public Works and Government Services Canada, "ISO 14001 -- A new tool for Buying Green," online: <http://contractscanada.gc.ca/sl/en/iso14-e.htm> (visited 20 March 2001). Some government entities in Japan and Switzerland reportedly give formal preference to suppliers with EMSs. Laura E. Berón, "ISO 14000 and Trade Implications: Facts and Trends," paper presented at Seminar on Trade, Environment and the ISO 14000 Series, Ninth Annual Meeting of ISO/TC 207, Kuala Lumpur, Malaysia (4 July 2001) (copy on file with author). The U.S. EPA is considering preferential government procurement treatment of products manufactured at facilities participating in the Performance Track program. US EPA, *Summary of EPA's Performance Track Proposal* (9 March 2000) (copy on file with author). The US Departments of Defense and Energy reportedly require first- and second-level suppliers to be ISO 14001 certified. Stenzel, *supra* note 13 at 270.

⁶⁰Although this situation is still a long way off, the trend toward requiring EMSs can be expected to continue in private sector procurement (*see supra* note 6 and accompanying text) and spread to public sector purchasing as well.

- First, in a handful of cases Canadian judges have used creative sentencing powers⁶¹ to order an environmental offender to implement an ISO 14001-based EMS or obtain ISO 14001 certification.⁶² In every case the defendant either proposed or agreed to the order, often because it was considering implementing or certifying an EMS anyway and could expect lower fines and fewer charges in exchange. Prosecutors and judges support such orders because they believe ISO certification will enhance future compliance; moreover it is easy to verify and is obtained at the defendant's expense.⁶³
- Second, Nova Scotia and New Brunswick were among the first jurisdictions in the world to make EMS implementation mandatory for all firms in a particular industry sector.⁶⁴ Both provinces have enacted regulations requiring gas pipeline operators to implement ISO 14000-based EMSs.⁶⁵ This was part of a move toward greater self-regulation in the sector: the governments supported mandatory ISO 14000 implementation as a credible external benchmark that would make self-regulation acceptable, while industry positively preferred

⁶¹*E.g.*, *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, s. 220(1); *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 190. The *Canadian Environmental Protection Act* expressly authorizes a sentencing court to direct an offender to "implement an environmental management system that meets a recognized Canadian or international standard," but no orders appear to have been made under this new provision. *CEPA 1999*, *supra* note 38, s. 291(1). Although Ontario pioneered creative sentencing in Canada, the Harris conservative government has ordered provincial prosecutors not to use it. *Saxe*, *supra* note 13 at 29. Two pillars of neoliberal politics appear to be in tension here: on one hand, an agenda of flexible regulation in which voluntary initiatives are encouraged and proposed regulations are subject to cost-benefit analysis; and on the other hand, an agenda of "zero tolerance" laws and tougher penalties that seldom seem to be subjected to the same cost-benefit disciplines.

⁶²*R. v. Prospec Chemicals Ltd.* (1996), 19 C.E.L.R. (N.S.) 178 (Alta. Prov. Ct.) (ordering chemical company which was already a member of chemical industry's voluntary Responsible Care program to implement third-party certified ISO 14001 EMS); *R. v. Van Waters & Rogers Ltd.* (1998), 220 A.R. 315 (Prov. Ct.) (ordering chemical company to undergo independent environmental compliance and ISO 14001 EMS audits, upgrade its EMS manual and operational controls, establish procedures for ongoing evaluation of conformance to ISO 14001 and present an EMS workshop to industry peers, but not ordering ISO 14001 certification); *R. v. Calgary (City)* (2000), 272 A.R. 161, 35 C.E.L.R. (N.S.) 253 (Prov. Ct.) (ordering city to obtain ISO 14001 certification for two of its water treatment plants by 2003 and declaring that an ISO 14001 EMS was "far in excess of what the present law and regulations require of a municipality"). *Saxe* discusses these cases and also mentions a fourth unreported decision, *R. v. Prototype Circuits Inc.* (ordering circuit board manufacturer to establish an EMS leading to ISO 14000 certification). *Saxe*, *supra* note 13. Finally, in another case the court ordered the federal government to fund a tribal council's development of an EMS: *R. v. Canada (Minister of Indian Affairs)*, [2000] O.J. No. 5076 (Ont. S.C.J.) (Quicklaw) (ordering Department of Indian Affairs to pay \$200,000 to support tribal council's development of a pollution prevention and environmental management system program for fuel storage tanks).

⁶³*Saxe*, *supra* note 13 at 26.

⁶⁴Governments in Brazil, the Caribbean, Zimbabwe and elsewhere have reportedly considered or enacted legislation requiring all firms in sectors such as forestry or cruise shipping to implement EMSs, and some developing countries have reportedly considered requiring all firms to implement EMSs as an easy fix for inadequate or under-enforced environmental regulation. *See, e.g.*, Meidinger, *supra* note 14 at 10166; *Saxe*, *supra* note 13 at 30; Stenzel, *supra* note 13 at 276. The European Union recently considered but rejected the idea of making its voluntary EMS initiative, the Eco-Management and Audit Scheme (EMAS), mandatory.

⁶⁵*See Pipeline Regulations*, N.S. Reg. 66/98, s. 19(1) (requiring pipeline companies to establish an EMS to the ISO 14000 standard or equivalent); *Gas Pipeline Regulation*, N.B. Reg. 99-61, s. 46 (requiring all gas distributors to develop and implement an EMS) and *Gas Distribution and Marketers' Filing Regulation*, N.B. Reg. 99-60, s. 7(12) (requiring all gas distributors applying for a permit for a gas pipeline that will affect a "sensitive feature" to develop an EMS that meets the requirements of ISO 14000 or a similar standard). Neither province requires companies to have their EMSs certified by a third party.

ISO 14000 to government regulation.⁶⁶

- Finally, Alberta's LEAD program will make implementation and maintenance of an EMS a licence term and specify the minimum elements of the EMS in the licence itself. This appears to be the first instance in Canada in which regulators will require EMS implementation or certification as a term of an operating permit or administrative order.⁶⁷

Industry's willingness to have these EMS standards turned into binding legal requirements may also reflect the special role that voluntary standards developed by formal standardization bodies such as CSA and ISO play in government regulation. Governments have a long tradition of incorporating voluntary technical standards (*e.g.*, for building materials, construction, plumbing, fire safety, engineering, food safety, medical devices and so on) into mandatory regulations.⁶⁸

In addition to these "public law" methods, the terms of a voluntary EMS initiative may be made mandatory through private litigation. A firm may agree to adhere to an EMS standard or other voluntary initiative in an agreement with regulators, a commercial supply contract or trade association membership agreement.⁶⁹ Such a voluntary undertaking may be converted into a legally

⁶⁶Saxe, *supra* note 13 at 38.

⁶⁷See Alberta Environment, *LEAD Program Guide*, *supra* note 52 at 7 and Appendix B. In addition, at least one licensing authority has expressly relied on a regulated entity's plans to obtain ISO 14001 certification as a basis for issuing an environmental approval. *Re Material Resource Recovery SRBP Inc.*, No. EP-97-04 (Ont. Env'tl. Assessment Bd., 21 Jan. 1998) (approving hazardous waste facility partly in reliance on applicant's plan to apply for ISO 14001 certification). The decision is discussed in Saxe, *supra* note 13 at 30.

⁶⁸See Salter, *Mandated Science*, *supra* note 12 at 25. The CSA estimates that approximately one-third of its standards have been referred to in provincial and federal laws. CSA, "Association activities," in ISO 14001:1996, *supra* note 2 (back matter). Saxe reports that the term "CSA" is mentioned 233 times in Ontario statutes and regulations alone, 170 of these mentions being in building code regulations. Saxe, *supra* note 13 at 37. See also Robert W. Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health" (1978) 56 *Tex. L. Rev.* 1329 for an account of the use of voluntary standards in the development of U.S. health and safety regulations.

⁶⁹For example, the Canadian Electrical Association has announced that all its members must have an ISO 14001 or equivalent EMS in place by a certain date; the U.S.-based International Council of Cruise Lines recently announced that it will make EMS implementation a mandatory membership condition, in an effort to preempt tougher government regulation and reduce adverse attention to chronic marine pollution; the Canadian Chemical Producers' Association requires its members to implement the Responsible Care program; and numerous other industry associations in Canada and around the world require their members either to subscribe or verifiably demonstrate conformance to various environmental principles or codes of conduct. Courts have held that industry associations may use contract-based actions to discipline members for failure to meet agreed-upon voluntary standards. Webb, *supra* note 15 at 38. Adherence to voluntary initiatives could also be made a term of insurance or finance contracts, although I know of no such contracts involving EMS.

binding command when a party to the agreement seeks judicial enforcement of the agreement.⁷⁰ Some commentators believe that these private law enforcement tools hold the key to successful regulation of corporate behaviour through voluntary codes.⁷¹

F. Other Engagements

Finally, three other modes of engagement can be discerned in Canadian public authorities' interactions with voluntary initiatives other than EMSs. These engagements may at some point be employed in relation to EMS initiatives.

1. Benchmarking

Canadian courts often use widely accepted voluntary standards and other evidence of industry custom as benchmarks⁷² for determining whether a defendant exercised "reasonable care"

⁷⁰Webb, *supra* note 15; Meidinger, *supra* note 14.

⁷¹See, e.g., Webb, *supra* note 15 at 38-39; Dr. Webb has also made this argument in postings to the Voluntary Codes Research Forum listserv (*see supra* note 47). In addition to contract law, voluntary initiatives may also be enforced through property or trust law in certain circumstances. See Meidinger, *supra* note 14.

⁷²The term "benchmarking" is often used to describe a technique used by organizations to study "best practices" in other organizations or industries in order to assess and improve their own practices. I do not use the term in that sense but in the sense of a third party adjudicator judging an organization's performance against a chosen external standard.

ISO 14000 to government regulation.⁶⁶

- Finally, Alberta's LEAD program will make implementation and maintenance of an EMS a licence term and specify the minimum elements of the EMS in the licence itself. This appears to be the first instance in Canada in which regulators will require EMS implementation or certification as a term of an operating permit or administrative order.⁶⁷

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⁶⁷See Alberta Environment, *LEAD Program Guide*, *supra* note 52 at 7 and Appendix B. In addition, at least one licensing authority has expressly relied on a regulated entity's plans to obtain ISO 14001 certification as a basis for issuing an environmental approval. *Re Material Resource Recovery SRBP Inc.*, No. EP-97-04 (Ont. Env'tl. Assessment Bd., 21 Jan. 1998) (approving hazardous waste facility partly in reliance on applicant's plan to apply for ISO 14001 certification). The decision is discussed in Saxe, *supra* note 13 at 30.

⁶⁸See Salter, *Mandated Science*, *supra* note 12 at 25. The CSA estimates that approximately one-third of its standards have been referred to in provincial and federal laws. CSA, "Association activities," in ISO 14001:1996, *supra* note 2 (back matter). Saxe reports that the term "CSA" is mentioned 233 times in Ontario statutes and regulations alone, 170 of these mentions being in building code regulations. Saxe, *supra* note 13 at 37. See also Robert W. Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health" (1978) 56 *Tex. L. Rev.* 1329 for an account of the use of voluntary standards in the development of U.S. health and safety regulations.

⁶⁹For example, the Canadian Electrical Association has announced that all its members must have an ISO 14001 or equivalent EMS in place by a certain date; the U.S.-based International Council of Cruise Lines recently announced that it will make EMS implementation a mandatory membership condition, in an effort to preempt tougher government regulation and reduce adverse attention to chronic marine pollution; the Canadian Chemical Producers' Association requires its members to implement the Responsible Care program; and numerous other industry associations in Canada and around the world require their members either to subscribe or verifiably demonstrate conformance to various environmental principles or codes of conduct. Courts have held that industry associations may use contract-based actions to discipline members for failure to meet agreed-upon voluntary standards. Webb, *supra* note 15 at 38. Adherence to voluntary initiatives could also be made a term of insurance or finance contracts, although I know of no such contracts involving EMS.

binding command when a party to the agreement seeks judicial enforcement of the agreement.⁷⁰ Some commentators believe that these private law enforcement tools hold the key to successful regulation of corporate behaviour through voluntary codes.⁷¹

F. Other Engagements

Finally, three other modes of engagement can be discerned in Canadian public authorities' interactions with voluntary initiatives other than EMSs. These engagements may at some point be employed in relation to EMS initiatives.

1. Benchmarking

Canadian courts often use widely accepted voluntary standards and other evidence of industry custom as benchmarks⁷² for determining whether a defendant exercised "reasonable care"

⁷⁰Webb, *supra* note 15; Meidinger, *supra* note 14.

⁷¹See, e.g., Webb, *supra* note 15 at 38-39; Dr. Webb has also made this argument in postings to the Voluntary Codes Research Forum listserv (see *supra* note 47). In addition to contract law, voluntary initiatives may also be enforced through property or trust law in certain circumstances. See Meidinger, *supra* note 14.

⁷²The term "benchmarking" is often used to describe a technique used by organizations to study "best practices" in other organizations or industries in order to assess and improve their own practices. I do not use the term in that sense but in the sense of a third party adjudicator judging an organization's performance against a chosen external standard.

in a tort case⁷³ or “due diligence” to avoid committing a regulatory offence.⁷⁴ Several commentators and government officials have suggested that implementation of an ISO EMS constitutes “due diligence”.⁷⁵ Although no Canadian court has yet used voluntary EMS standards as a benchmark for liability, the prospect is increasingly likely and deserves critical attention, because:

- It is doubtful that an ISO 14001 EMS satisfies the requirements of reasonable care. While it enables an organization to implement systematically its own environmental goals and prevent unplanned pollution incidents, it does not require the organization to achieve any particular level of environmental performance or legal compliance -- its focus is on ensuring *conformance to the standard* rather than avoiding breach of legal duties of care;
- The use of EMS standards as benchmarks for liability may give voluntary industry-developed initiatives a power they could not achieve on their own, by effectively imposing the terms of such initiatives on organizations that neither used the initiative nor participated in its development;⁷⁶ and
- The prospect of such judicial benchmarking may place other state actors in a dilemma, as Webb points out: if government officials fail to participate in the development of voluntary initiatives “there is a risk that the standards produced will be considered reasonable by judges ... even though they may be viewed as inadequate by government”; but if government officials do participate in the development of voluntary initiatives in an effort to influence their content, it may be difficult for prosecutors to argue later that the initiative does not constitute “due diligence” even though the government’s views may not have been reflected in the

⁷³See, e.g., Webb, *supra* note 15; Meidinger, *supra* note 14; Saxe, *supra* note 13. In tort actions, voluntary initiatives may be used to determine “reasonable use” of land in a nuisance action or, more commonly, “reasonable care” in a negligence action. See, e.g., *Visp Constr. v. Scepter Mfg.* (1991), 45 *Constr. L. Rep.* 170 (Ont. Gen. Div.) (defendant in product liability action not negligent because its manufacturing process conformed to voluntary CSA standard, CSA standard was reasonable notwithstanding that CSA was made up largely of manufacturers’ representatives and that higher standards allegedly existed, and defendant took reasonable care to assure its product met the CSA standard particularly by maintaining CSA certification of its products and manufacturing process).

⁷⁴In Canada, a defendant will not be found guilty of a strict liability offence, which includes most environmental regulatory offences, if the person establishes that he or she exercised “due diligence,” *i.e.* did everything reasonable in the circumstances to avoid committing the offence. See *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353; Elaine L. Hughes, “The Reasonable Care Defences” (1992) 2 *J. Envtl. L. & Practice* 214. Due diligence is essentially equivalent to the civil negligence standard. In both civil and regulatory cases, conformance to industry custom is usually strong evidence of reasonableness unless the custom itself is unreasonable or the defendant’s particular circumstances require more.

⁷⁵See, e.g. Saxe, *supra* note 13 at 21; Taylor, “ISO 14000 and Environmental Regulation,” *supra* note 13 at 20; Taylor, “Is ISO 14001 Standardization in Tune with Sustainable Development?” *supra* note 13 at 530-531; CESD, 1999 Report, *supra* note 29 at para. 1.45 (declaring ISO 14001 to be the standard of due diligence). In fact, demonstrating “due diligence” and thereby avoiding regulatory liability appears to be one of the leading motivations for public sector organizations to implement EMSs, as Canadian public authorities face more frequent environmental prosecutions and increasingly severe penalties if convicted.

⁷⁶Webb, *supra* note 15 at 32, 40.

initiative as adopted.⁷⁷

2. Challenge

Another mode of engagement with voluntary initiatives that has been pursued by some public authorities in the environmental arena is to challenge firms to pledge to implement voluntary environmental measures and report their results publicly. This is often used as an alternative to introducing new regulatory measures. In Canada, it has been used to address such issues as greenhouse gas emissions and releases of toxic substances, but no government has yet developed a challenge program involving industry adoption of EMSs.

3. Borrowing

Finally, public authorities can incorporate voluntary initiatives developed by non-governmental bodies into legal instruments without making their observance mandatory. For instance, statutes, regulations, operating permits or agreements with regulated entities might specify a voluntary standard as a default basis for issuing approvals; make exceedance of a voluntary standard the trigger for documentation, reporting or remediation duties; adopt a voluntary standard's definition of a term; or authorize the use of a voluntary standard for testing, inspecting or measuring a regulated entity's operations, equipment, or products. Although this has not been done with EMS standards, one could imagine regulations, for example, authorizing the use of ISO environmental auditing standards or specifying ISO 14001 certification as a basis for "deemed" approval of particular kinds of activities.

⁷⁷*Ibid.* at 35-36.

PART THREE: IMPLICATIONS FOR THE PUBLIC-PRIVATE DIVIDE

I. INTRODUCTION

For the most part these interactions among public authorities and voluntary non-state initiatives occur in a quiet corner of environmental politics populated mainly by technical experts -- indeed in a space that many participants do not perceive as political. Nonetheless the participants are involved, wittingly or unwittingly, in the definition and redefinition of the scope and concerns of politics and law in the field of the environment. It would not be accurate to view these developments as evidence of a "relentless augmentation of the powers of a centralizing, controlling and regulating state" that has increasingly colonized the "lifeworld".⁷⁸ It would be absurd to suggest that Canadian public authorities' engagements with voluntary environmental initiatives evidence a takeover of society and the market by the agents and machinery of the state. Nor, on the other hand, does the evidence reveal a takeover of public policy making by industry. Rather, what emerges is a range of heterogeneous, shifting links among a variety of public and private authorities, through which these authorities pursue their goals not so much by domination and control as by exercising subtle and unpredictable influences upon the interests, beliefs and choices of free individuals. These links rely upon a range of experts and associated bodies of knowledge perceived to be relatively autonomous from both politics and the market (*e.g.*, accounting, engineering, standardization and law); and they involve alliances and tensions not just between public and private authorities, but among a multiplicity of public authorities themselves (*e.g.*, government ministers, environmental commissioners, legislators, regulators, inspectors, prosecutors, judges and government purchasing personnel).

This hybridization of law and market, state and non-state suggests the need for an alternative characterization of "government" that moves beyond the metaphor of a public-private

⁷⁸Nikolas Rose, *Powers of Freedom* (Cambridge: Cambridge University Press, 1999) 18.

divide to encompass the entire complex of ideals, goals, rationales, techniques, procedures and programs by which a diversity of state and non-state authorities seek to shape human conduct to desired ends (see Section II, below). This alternative conception of government prompts us, first, to examine law and politics at the level of the mundane techniques by which various authorities seek to effectuate their governmental ambitions. Viewed this way, EMSs and EMS standards instantiate a broader tendency in contemporary practices of government in the advanced industrial democracies to “depoliticize” certain issues and problems by positioning them either as technical matters to be resolved by the application of neutral expertise or as private matters to be resolved by market forces (Section III). The EMS example also signals a shift in political rationales, a redrawing of the appropriate aims and forms of “governance,” the boundaries of politics, law and market and the distribution of tasks between different authorities (Section IV). Finally, it is possible to make some tentative suggestions as to the role law might play in facilitating or resisting these transformations (Section V).

II. BEYOND THE PUBLIC-PRIVATE DIVIDE: AN ALTERNATIVE CONCEPTION OF GOVERNMENT

One of the questions posed by the organizers of this symposium was whether the metaphor of a public-private divide is still appropriate. The problem with using such language to analyze contemporary practices of ordering and directing social relations, as Rose and Miller point out, is that

the political vocabulary structured by oppositions between state and civil society, public and private, government and market, coercion and consent, sovereignty and autonomy and the like, does not adequately characterise the diverse ways in which rule is exercised in advanced liberal democracies.⁷⁹

⁷⁹Nikolas Rose and Peter Miller, “Political power beyond the state: problematics of government” (1992) 43 *Brit. J. Sociology* 173 at 174.

What is needed is an alternative way of thinking about government that avoids the limitations of these dichotomies. There is nothing new in this suggestion, of course. These dichotomies have been questioned repeatedly by successive waves of criticism in legal studies, from legal realism to feminist legal theory to critical legal studies to legal pluralism. Exploding, fragmenting or contextualizing categories of state, sovereignty, public, private and so on, have been regular features of criticism and innovation in the social sciences and law throughout the last century, so that proclaiming the “death of the state” has become part of the ritual of renewal in discipline after discipline.⁸⁰ Scholars have repeatedly attempted to sever the “king’s head” in social and legal thought, yet the next generation of critics always seems to find it back on the sovereign’s shoulders.⁸¹

That these conventional categories remain central to theories and practices of government after all this critical attention is a puzzle in itself. We might gain analytical leverage over this puzzle if we focus on the problematics of *government* instead of over-valuing the problem of *the state*.⁸² The example of environmental management systems and standards demonstrates that the regulation of environment-economy interactions is accomplished by an array of public and private authorities and institutions including standardization bodies, EMS auditors and certifiers, consultants, corporate managers, customers, regulatory agencies, legislatures, government inspectors, courts and (to a lesser extent) labour unions, consumers and public interest NGOs. It is the practices and projects of this array of state and non-state authorities that “make possible the continual definition and redefinition of what is within the competence of the state and what is not,

⁸⁰Cf. David Kennedy, “Thinking Against the Box: When Renewal Repeats” (2000) 32 *N.Y.U. J. Int’l L. & Pol.* 335 (describing similar dynamics of intellectual renewal in the field of international law).

⁸¹See Michel Foucault, *The History of Sexuality, vol. 1: Introduction* (London: Allen Lane, 1978) 88-89 (remarking that two centuries after the political revolutions that overthrew the absolutist monarchies of Europe, in the field of political thought we have not yet cut off the king’s head).

⁸²Rose and Miller, *supra* note 79 at 174-175.

the public versus the private, and so on".⁸³ In this context the familiar feminist claim that "the personal is political," modified to read "the private is public", may be more appropriate than the metaphor of a public-private divide to characterize the implications of voluntary EMS standards.

Disrupting the public-private dichotomy does not mean denying its continuing relevance, however. Rather, it calls for a broader conception of government that enables us to uncover and examine the ways in which conventional divisions between state, society, law, market, public and private are used to position certain concerns within and others outside the domains of politics, law or the state. This uncovering may in turn allow us to reclaim excluded concerns for contestation or examine how such exclusion or inclusion tracks or reproduces social relations of power and inequality.

In this broader conception, "government" can be understood as the entire collection of goals, rationales, plans, procedures and programs by which a diversity of state and non-state authorities seek more or less systematically to shape the conduct of individuals, organizations (including firms) and populations to desired ends.⁸⁴ Foucault coined the term "governmentality" to describe the techniques and justifications by which government in this sense is effectuated.⁸⁵ Governmentality can be analyzed in terms of *political rationalities* and *governmental technologies*. Political rationalities are "the changing discursive fields within which the exercise of power is conceptualised, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such

⁸³Michel Foucault, "Governmentality," in Graham Burchell, Colin Gordon and Peter Miller, eds., *The Foucault Effect* (Chicago: Chicago University Press, 1991) 87 at 103.

⁸⁴In this conception, government includes the government of the state, the government of others and the government of oneself. See generally Foucault, "Governmentality," *supra* note 83; Burchell, Gordon and Miller, *supra* note 83; Rose and Miller, *supra* note 79; Rose, *supra* note 78; Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999); Paul Rutherford, "The Entry of Life into History," in Éric Darier, ed., *Discourses of the Environment* (Oxford: Blackwell, 1999) 37.

⁸⁵Foucault, "Governmentality," *ibid.*

tasks among secular, spiritual, military and familial sectors.⁸⁶ Governmental technologies are “the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions”.⁸⁷

Expertise plays a key role in governmentality. In the field of environmental management, expertise in the form of the specialized knowledges and vocabularies of environmental management consultants, standardization experts, auditors and certifiers, provides a link between the governmental objectives of public and private authorities and the minutiae of daily life in factories, offices, markets and homes. Making this link is crucial because neither complete knowledge nor total control of the conduct of individuals, groups, firms or populations is possible. Liberal forms of government rely on “action at a distance,” recognizing a reserved domain for individual, autonomous action and molding the conception and exercise of this capacity for action without destroying its autonomy.⁸⁸ Expertise makes it possible to “reconcile the principle that the domain of the political must be restricted with the recognition of the vital political implications of formally private activities.”⁸⁹ Experts forge a link between authorities and subjects of rule, while preserving the autonomy of a “private” sphere, by translating the governmental concerns of authorities and the daily worries of individuals and groups into specialized technical vocabularies that claim the power of truth and objectivity and offer techniques to manage better, live healthier and align individual choices with governmental ends.⁹⁰

⁸⁶Rose and Miller, *supra* note 79 at 175.

⁸⁷*Ibid.*

⁸⁸This idea of “action at a distance” has been used quite effectively by some proponents of “regulatory reinvention”. See, e.g., Gunningham & Grabosky, *supra* note 10 at 10, 123-125; Peter N. Grabosky, “Using Non-Governmental Resources to Foster Regulatory Compliance” (1995) 8 *Governance* 527.

⁸⁹Rose and Miller, *supra* note 79 at 187.

⁹⁰The influential and problematic role of expertise has been recognized in numerous other contexts, including the literature on epistemic communities (see, e.g., Peter M. Haas, *Saving the Mediterranean* (New York: Columbia University Press, 1990); Peter M. Haas (ed.), “Special Issue: Knowledge, Power, and International Policy Coordination” (1992) 46 *International Organization* 1-390) and policy networks (see, e.g., Bernd Marin and Renate Mayntz (eds.), *Policy Networks: Empirical Evidence and Theoretical Considerations* (Boulder, CO: Westview, 1991);

A few sociolegal scholars have examined law from a governmentality perspective,⁹¹ and more recently a small number of environmental studies scholars have begun to apply governmentality analysis to environmental politics.⁹² In the next two sections I explore what it might mean to apply governmentality analysis to the interface between environmental law and voluntary corporate initiatives.

III. ENVIRONMENTAL MANAGEMENT SYSTEMS AS GOVERNMENTAL TECHNOLOGIES

Environmental management systems and EMS standardization can be viewed as technologies for governing human-environment interactions: collections of standard procedures, routines, techniques and documents through which the aspiration to manage the environmental impacts of organizations' activities, products and services is rendered operable. It is through these sorts of detailed, repetitive, mundane mechanisms -- such as assessing the environmental impacts of an organization's activities, setting environmental objectives and targets, developing and applying environmental performance indicators, assigning organizational roles and responsibilities, establishing and documenting operational procedures and controls, training employees, measuring and monitoring the organization's performance, testing and calibrating measurement equipment, calculating, computing and analyzing data, maintaining and managing records, and auditing and reviewing the management system -- that the governmental ambitions and schemes of public and private authorities are instantiated.

Michael M. Atkinson and William D. Coleman, "Policy Networks, Policy Communities and the Problems of Governance" (1992) 5 *Governance* 158).

⁹¹ See, e.g., Nikolas Rose and Mariana Valverde, "Governed By Law?" (1998) 7 *Social and Legal Studies* 541; Alan Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto, 1994); Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge 1993).

⁹² See, e.g., Darier, *supra* note 84.

What is revealed by viewing voluntary EMS initiatives in this light? EMSs treat the problem of environmental degradation as a question of managerial technique, to be resolved by the application of neutral technical expertise in light of the judgments of commercial actors in the marketplace. Conflicts about public health, environmental quality, competitiveness, corporate accountability and dominance among competing firms or trading blocs are acted out as if they were merely technical matters.⁹³ The result, as we shall see, is the depoliticization of a set of important environmental, public health and economic issues.

The development, standardization and implementation of EMSs are driven and dominated by industry. Within the EMS standardization community and among most public authorities this is generally acknowledged as appropriate: industry is the primary user of the standards and should play the major role in developing and implementing them.⁹⁴ EMS standards are primarily a form of corporate self-regulation and as such it is no surprise that their development is dominated by business firms (especially multinational corporations) and associated professionals, and that their content reflects the needs and interests of increasingly mobile capital in a global economy.⁹⁵

It is also no surprise that environmental management systems address a number of issues with vital political implications. These issues include:

- *The acceptable environmental impacts of business:* EMSs address this issue by establishing processes within each organization to identify the significant environmental impacts of its activities, products and services and set, implement, monitor and measure its own environmental objectives and targets;
- *The improvement of environmental performance:* EMSs leave it to each organization to decide whether, how and at what rate to improve its environmental performance;⁹⁶

⁹³Cf. Salter, "Housework of Capitalism," *supra* note 18 at 106 (commenting on standardization generally).

⁹⁴Cf. *ibid.* at 109-110.

⁹⁵Cf. Cutler, Haufler and Porter, *supra* note 9 (identifying and analyzing inter-firm regulation as one of the principal expressions of private authority in international affairs).

⁹⁶While "continual improvement" is usually understood in the environmental policy community as meaning continual improvement of environmental performance, ISO 14001 and 14004 define it as the "process of enhancing the environmental management system to achieve improvements in overall environmental performance," and

- *The question of how to manage the risk of disaster:* EMSs consider the risk of environmental disaster as a matter for proper emergency planning rather than a reason to question the continued use of certain activities or substances;
- *The role of public consultation and accountability in environmental management:* most EMSs treat public environmental reporting and the views of local communities, the public and NGOs as matters for "stakeholder management," to be used by the organization to the extent it considers necessary or desirable to maintain its viability or competitiveness;⁹⁷
- *The relationship between voluntary initiatives and state regulatory systems:* EMSs erect a distinct barrier between themselves and state regulatory systems, positioning the latter as a special element of the EMS's external environment that generates obligations and expenses for the organization and possesses exclusive authority and responsibility to determine societal environmental goals and impose corresponding legal requirements. The EMS addresses this external regulatory system through a policy commitment to legal compliance and a set of processes that treat legal requirements much like other performance parameters,⁹⁸ but the incompleteness of the arbitrage between legal systems and the EMS is underlined by the fact that organizations have been convicted of environmental regulatory violations yet still been certified as conforming to ISO 14001; and
- *Verification of environmental claims and performance:* EMSs treat the question of verification of organizations' environmental performance or their adherence to particular standards as matters for objective, neutral determination by independent commercial experts who operate with specialized professional training, tools and vocabularies, provide verification services for profit and treat the information on which verification is based as confidential so that the only information disclosed publicly is the fact of the organization's conformity or nonconformity to an EMS standard.

On one hand, standardization bodies and other EMS proponents frequently acknowledge these political stakes at least implicitly, for example by characterizing voluntary EMS standards as a contribution to public policy goals such as sustainable development, admitting that the development and use of EMS standards implicate important public interests or calling for broader

emphasize that the rate and extent of improvement in environmental performance are up to the organization to determine and will not necessarily follow simply from the establishment and operation of an EMS. See, e.g., ISO 14001, *supra* note 2 at clauses 3.1 and A.1.

⁹⁷For an account of the "stakeholder management" approach to corporate social responsibility and a proposal for an alternative "rights"-based approach, see Richard Boele, Heike Fabig and David Wheeler, "Shell, Nigeria and the Ogoni: A Study in Unsustainable Development. II -- Corporate Social Responsibility and 'Stakeholder Management' Versus a Rights Based Approach to Sustainable Development" (2001) 9(3) *Sustainable Development* 121-135.

⁹⁸For example, ISO 14001 and 14004 provide frameworks for identifying and documenting applicable legal requirements, setting objectives and targets for them, monitoring, measuring and reviewing their achievement and taking corrective action when noncompliance is discovered.

“stakeholder” participation in standards development and corporate environmental management. On the other hand, the same actors regularly remind each other and anyone else that EMSs (and standards generally) are primarily useful tools developed by business, for business, pointedly declining to characterize the involvement or conflicting interests of industry participants as “political”.⁹⁹

What is most interesting for present purposes is that the choice to employ the techniques of management systems and standardization appears to predispose the resolution of this ambivalence about the political stakes of corporate environmental management. The techniques and procedures of standardization and environmental management systems deactivate these political stakes by transforming them into technical matters to be resolved by the application of professional expertise according to apparently neutral technical criteria, and simultaneously into matters of consumer or commercial preference to be resolved by the exercise of autonomous choice in market transactions. EMSs constitute environmental protection as an apolitical matter to be administered through bureaucratic organizations. While they can, in theory, be adapted to organizations of all types and sizes, EMSs are modelled on the management hierarchies and processes of large business organizations. They emphasize routine, procedure, paperwork, formality and technical expertise. They rely largely on private market dynamics to signal the need for and success of these technical procedures and decisions, through the preferences and demands of customers, suppliers or ultimate consumers. The EMS is quintessentially a technology of the large bureaucratic organization.¹⁰⁰

Standardization, for its part, transforms conflicts over market dominance, trade barriers,

⁹⁹*Cf.* Salter, “Housework of Capitalism,” *supra* note 18 at 113 (commenting on standardization generally). As Salter explains, this tendency does not reflect a desire to disguise the dominant role played by industry in standardization, but simply to deny that this role is political.

¹⁰⁰This fact may help explain the growing use of EMSs by government departments and might justify the inference that the EMS is a mechanism by which multinational corporations and other large private organizations such as standardization bodies are redrawing the lines between public and private, in informal alliances with large public organizations.

international competitiveness, health, safety and environmental protection into technical decisions for experts and it submits determination of the appropriateness of the resulting standards to the market through firms' decisions to purchase and implement the standards and market participants' demand for certified products or firms.¹⁰¹ Standardization has been called "the housework of capitalism": like housework, it is "detailed, mundane, repetitive, and never completed," and it is "both essential and unrecognized in the constitution and reproduction of economic and class relationships."¹⁰² It is "usually considered a 'MEGO' ('my eyes glaze over') subject" in most corporate boardrooms.¹⁰³

EMSs and EMS standards are a significant form of governmental technology precisely *because* they make one's "eyes glaze over" -- that is, they mute the struggles over the distribution of risks, harms, jobs and profits inherent in environmental politics. By transforming debates over justice, poverty, racism, ecological integrity, animal rights, the intrinsic value of nature, and so on, into matters of managerial expertise and market preference, these technologies both enable relations of inequality and repression to be perpetuated and disguise their own role in that perpetuation.

In these respects EMSs and standardization instantiate a broader tendency in contemporary liberal practices of government to depoliticize certain political stakes by positioning them either as "technical" matters to be resolved by the application of neutral expertise or "private" matters to be resolved by market forces.¹⁰⁴ The tendency to "technicalize" is commonly associated with welfare

¹⁰¹ See, e.g., International Organization for Standardization, *ISO's Long-Range Strategies 1999-2001: Raising Standards for the World* (Geneva: ISO, 1998). A summary of this document, entitled "ISO in the New Century," is available online: <<http://www.iso.ch/iso/en/prods-services/otherpubs/pdf/longrang.pdf>> (Visited 30 October 2001) ("ISO develops only those standards which are required by the market. This work is carried out by experts on loan from the industrial, technical and business sectors which have asked for the standards, and which subsequently put them to use").

¹⁰² Salter, "Housework of Capitalism," *supra* note 18 at 107.

¹⁰³ Christopher Sheldon, "Introduction", in Christopher Sheldon, ed., *ISO 14001 and Beyond* (Sheffield, UK: Greenleaf, 1997) 11 at 11.

¹⁰⁴ See generally, Rose and Miller, *supra* note 79 at 196-201.

state liberalism (*e.g.*, the creation of social insurance schemes), while the “privatization” tendency is commonly associated with free-market neoliberalism. EMSs, interestingly, embody both tendencies, perhaps reflecting some of the complexity and ambivalence in the encounter between welfarist and neoliberal mentalities in contemporary government.

In general, Canadian public authorities have allowed or encouraged this (re)drawing, without attempting to push the content or use of EMSs in any particular direction. Their engagements -- *e.g.*, implementing their own EMSs as examples for industry, encouraging or requiring firms to implement EMSs and beginning to offer crudely crafted regulatory relief programs to firms with EMSs -- have been relatively credulous and unreflective in comparison to those of American and European public authorities. One might criticize these engagements as an abdication of governmental authority to regulate corporate practices, but this begs the question of how different state regulation is from private self-regulation. Among the possible differences are the following. First, official regulations are not developed by regulated entities themselves but by government officials with ultimate accountability to an electorate. This separation between regulators and regulated in standard-setting is often criticized as illusory, however, due to heavy reliance on industry for information, an increasing “customer service” orientation toward regulated industry in some governments, intense negotiation with industry over pollution standards, and the risk of regulatory capture. Second, state regulatory systems usually have public consultation processes that do not depend on the regulated entity’s discretion (*e.g.*, notice and comment, environmental assessment and judicial review), yet these are often perceived to be underused and ineffective. Third, there is Garret Hardin’s famous question, “who will watch the watchers?”¹⁰⁵ Most governments have established formal, public mechanisms to monitor the behaviour of regulatory agencies, from government watchdog agencies to citizen suits and judicial review, whereas

¹⁰⁵Garret Hardin, “The Tragedy of the Commons,” 162 *Science* (13 December 1968) 1243 at 1245-46 (“*Quis custodiet ipsos custodes?*”).

monitoring of EMS auditors and certifiers is generally non-public and achieved mainly through accreditation processes supervised by standardization bodies themselves or even more obscure institutions.¹⁰⁶ Moreover, since auditors and certifiers rely on their clients for income, there is some risk of “regulatory capture” by the client companies. While this danger is real, the risk of regulatory capture also exists in regulatory agencies, particularly given the recent tendency of many environmental agencies and their political masters to reinvent industry as clients to be served rather than polluters to be controlled.

More importantly, the technologies of contemporary state environmental regulation embody, to a significant extent, the same managerialist tendencies as EMSs to obscure the stakes, struggles and repressions of environmental politics, relying heavily on technical expertise, detailed, mundane, repetitive techniques of measurement, monitoring, calculation, assessment, inspection, etc., and relying increasingly on private market dynamics. While EMSs are a particularly clear example of these tendencies, state environmental regulation shares the same characteristics to a significant degree.

Viewed as governmental technologies, then, EMSs and standardization render environmental management a matter of technical expertise, organizational routine and market preference, contributing to the expulsion of a set of environmental and economic issues from the political domain.¹⁰⁷ Not all voluntary corporate initiatives share these characteristics, but this case

¹⁰⁶Accreditation refers to the designation of individuals or organizations as accredited to certify an organization or product's conformance to a voluntary standard. Accreditation of ISO 14001 certifiers is done by standards bodies themselves, and while there have been rumours about the inferior quality of some certifiers, particularly in the developing world, this is usually left to the market to sort out. There is very little oversight either of accreditation or accredited certifiers. Some coordination of accreditation is achieved through organizations such as the International Accreditation Forum and the International Social and Environmental Accreditation and Labelling Alliance. On the latter, see Errol Meidinger, “Emerging Trans-Sectoral Regulatory Structures in Global Civil Society: The Case of ISEAL (the International Social and Environmental Accreditation and Labelling Alliance),” paper presented at joint meetings of Law and Society Association and Research Committee for the Sociology of Law, 4-7 July, 2001, Budapest, Hungary, online: <http://law.buffalo.edu/homepage/eemeid/scholarship/ISEAL.pdf> (visited 1 August 2001).

¹⁰⁷The success of this expulsion is reflected in the fact that despite their major implications for environmental quality, public health, international competitiveness and regulatory autonomy, voluntary EMS initiatives have received little attention from academics, almost none from news media and grassroots organizations,

nonetheless draws attention to the benefits of examining the problems of "government" at the level of mundane mechanisms of rule. Such examination can enable one to expose redrawings of the public/private divide and reclaim environmental management as an arena for political contestation.

IV. ENVIRONMENTAL MANAGEMENT SYSTEMS AND THE SHIFTING RATIONALES OF GOVERNANCE

The organizers of this symposium asked participants to consider the extent to which the blurring of the public/private divide signals a shift in the rationales of governance.¹⁰⁸ The case of EMS provides evidence of such a shift of political rationalities, not just in the area of corporate environmental management but in governance generally. Political rationalities provide the discursive "software" through which governmental technologies operate and produce effects.¹⁰⁹ The political rationality of EMS -- that is, the discursive field within which the forms and goals of governance, the proper boundaries of state and market and the roles of public and private authorities are conceptualized and justified -- reinforces the tendency of EMSs and standardization, described above, to depoliticize environmental management.

The political rationality of EMS consists of a set of ideas, claims, justifications, themes and story-lines about environmental management that are developed and maintained by a transnational coalition of corporate managers, industry groups, management consultants, trade publications, standardization professionals, public authorities, academics and others. These actors are united

and have only recently begun to attract serious attention from public authorities.

¹⁰⁸To those familiar with international law or international relations, the very move to the term "governance" signals a multiple shift in political rationalities: a rejection of ineffective, formal, inflexible, hierarchical organizations in favour of pragmatic, effective, informal, organic, flexible "regimes" and networks; and a move from inefficient, corrupt, centralized public administration to efficient, honest, liberal-democratic, rule-of-law, free-market, World-Bank-friendly "good governance". Exploring the implications of this move is beyond the scope of this paper.

¹⁰⁹*Cf.* Maarten Hajer, *The Politics of Environmental Discourse* (Oxford: Clarendon, 1995) at 60.

not by a common goal or strategy (indeed, many of them have never met let alone agreed on goals or strategies) but by their employment of a particular set of claims and story-lines about the challenge of environmental degradation and the appropriate tools and actors to address it.¹¹⁰

First, the discourse of EMS reflects a distinctly “managerialist” view of the challenge of environmental degradation. Improving management practices -- in particular, by adopting an organization-wide management system based on the “total quality management” concept -- is the best way to improve the environmental performance of organizations and their products.¹¹¹ This implies a particular conception of the environmental crisis. While acknowledging that industrial society has produced severe environmental degradation, the managerialist conception does not view this crisis as a fundamental challenge to existing institutions and practices of industrial society. Rather, major environmental disasters of recent memory are interpreted primarily as management process failures, the environmental crisis is seen as under control and gradually improving, and well-planned and properly implemented management systems are seen as the key to managing the adverse environmental impacts of business.¹¹² The environmental crisis is something to be managed through the application of managerial skill, objective technical expertise, organizational routine and individual motivation.

Second, this managerialist approach is portrayed as both effecting and depending for its own effectiveness upon a transformation of corporate culture. The main potential of an EMS is often identified as its capacity to change organizational culture by integrating environmental protection into

¹¹⁰*Cf. ibid.* at 12-13, 58-68; Dorte Salskov-Iversen, Hans Krause Hansen and Sven Bislev, “Governmentality, Globalization and Local Practice: Transformations of a Hegemonic Discourse” (2000) 25 *Alternatives: Social Transformation and Humane Governance* 183.

¹¹¹*See, e.g.*, ISO Technical Committee 207 (ISO/TC 207), “About ISO/TC 207” (undated), online: http://www.tc207.org/abouttc207/aboutTC207_main.html; Cary Coglianese and Jennifer Nash, “Environmental Management Systems and the New Policy Agenda,” in Coglianese & Nash, *Regulating From The Inside*, *supra* note 13, 1 at 11 [hereinafter “EMS and the New Policy Agenda”].

¹¹²*See, e.g.*, Sheldon, “Introduction,” *supra* note 103 at 12; Joseph Cascio, “The ISO 14001 Standard,” in Cascio, *supra* note 7, 24 at 25.

all activities and decisions of the enterprise.¹¹³ This cultural transformation is accompanied by an ethic of individual responsibility for environmental protection, from the CEO to the lowliest employee. An EMS “gathers all your employees and managers into a system of shared and enlightened awareness and personal responsibility for your organization’s environmental performance,” relying on training, competence and motivation of individual employees rather than blind obedience to regulations or corporate directives and punishment of errors.¹¹⁴

Third, one of the most striking attributes of the discourse of EMS, shared by most contemporary voluntary environmental initiatives, is its reinvention of environmental protection as “good business” rather than an unfortunate cost. The discourse presents both aggressive and defensive business rationales for EMSs. On one hand, EMSs create “win-win” opportunities to improve environmental performance and increase shareholder value by enhancing corporate image, improving customer relations, realizing cost-savings (*e.g.*, via energy conservation or waste recycling) and promoting innovation (*e.g.*, product and process improvements).¹¹⁵ On the other hand, EMSs are portrayed as defensive tools to maintain and increase competitiveness, especially in the face of globalization and trade liberalization.¹¹⁶

Fourth, EMSs and EMS standards are portrayed as a basis for a constructive new relationship with regulators and the public based on cooperation and partnership rather than

¹¹³See, *e.g.*, Coglianese & Nash, “EMS and the New Policy Agenda,” *supra* note 111 at 12; Joseph Cascio, “Introduction,” *supra* note 7 at 4; John D. Wolfe, “CSA’s Environmental Management Program and its Relationship to other National and International Environmental Management Systems Initiatives,” in Canadian Institute, *Environmental Management Systems: Preparing for the New Reality* (Toronto: Canadian Institute, 1992).

¹¹⁴Cascio, “The ISO 14001 Standard,” *supra* note 112 at 24-25.

¹¹⁵See, *e.g.*, Coglianese & Nash, “EMS and the New Policy Agenda,” *supra* note 111 at 11; Oswald A. Dodds, “An Insight into the Development and Implementation of the international Environmental Management System ISO 14001,” in Hillary, *supra* note 7, 27; Dick Hortensius and Mark Barthel, “An Introduction to the ISO 14000 Series,” in Sheldon, *supra* note 103, 19; Gabriele Crognale, “Environmental Management at a Crossroads: Time for a Radical Breakthrough,” in Gabriele Crognale, ed., *Environmental Management Strategies: The 21st Century Perspective* (Upper Saddle River, NJ: Prentice Hall PTR, 1999) 2 at 2.

¹¹⁶See, *e.g.*, John Wolfe, “Drivers for International Integrated Environmental Management,” in Hillary, *supra* note 7, 15.

coercion and mistrust.¹¹⁷ The traditional “command and control” mode of regulation is acknowledged to have produced many successes but is seen as having reached its limit. EMSs are presented as a market-driven, voluntary, flexible, efficient and effective alternative or supplement to sclerotic, inefficient, costly, rigid, near-sighted, backlogged, overtaxed, sometimes adversarial and ineffective regulatory systems.¹¹⁸ Private market dynamics, in the form of supply-chain pressures, consumer demand and trade association requirements, are positioned as constructive alternatives to messy political deliberations and inflexible, inefficient legal systems.¹¹⁹ In turn, the citizen formerly dependent on welfare state paternalism is reinvented as the autonomous, self-helping consumer, exercising individual environmental responsibility through consumer choice.

All of these claims and story-lines are linked by an overarching goal and moral justification: that EMSs and EMS standards will contribute to the realization of sustainable development.¹²⁰ This claim is common in the discourses of corporate greening and is shared not just with most corporate environmental initiatives but with almost all environmental policy initiatives in the last decade.

Finally, the discourse locates EMSs in a non-political arena. While acknowledging the political effects of EMSs and EMS standards (*e.g.*, their contribution to sustainable development, international trade or state regulatory policy), the discourse of EMS positions corporations, standards bodies and EMSs as operating outside politics, in contrast to such “politically oriented bodies” as environmental NGOs, political parties and public authorities.¹²¹

¹¹⁷See, *e.g.*, Hortensius & Barthel, *supra* note 115 at 32.

¹¹⁸See, *e.g.*, Reiley, *supra* note 13; Murray, *supra* note 13; Pezzoli, *supra* note 13; Stenzel, *supra* note 13; Lally, *supra* note 7; Crognale, *supra* note 115; Cascio, “Introduction,” *supra* note 7; Coglianese & Nash, “EMS and the New Policy Agenda,” *supra* note 111 at 7-9.

¹¹⁹See, *e.g.*, Sheldon, “Introduction,” *supra* note 103 at 14.

¹²⁰See, *e.g.*, ISO/TC 207, *supra* note 111; Crognale, *supra* note 115 at 6; Cascio, “Introduction,” *supra* note 7 at 4. ISO’s work on EMS standards, for instance, was explicitly initiated as one of the global business community’s main contributions to sustainable development in the context of the 1992 Rio Earth Summit. ISO/TC 207, *ibid.*; Hortensius & Barthel, *supra* note 115.

¹²¹See, *e.g.*, Cascio, “Background and Development of ISO 14000 Series,” in Cascio, *ISO 14000 Handbook*, *supra* note 7, 4 at 10.

The political rationality of EMS thus redefines the legitimate concerns of the state in a manner that carves out a substantial chunk of environmental politics for organizations such as business firms to resolve on their own through technocratic management and private market signals. It vests the elaboration and application of important norms of conduct and the delivery of certain environmental public goods in large non-governmental organizations such as multinational corporations, standardization bodies, consulting firms, auditors and certifiers. It presents a particular conception of the appropriate roles of the firm, market, employee, citizen and state in managing environmental risks and harms and justifies these arrangements for the exercise of power in terms of good business sense, proper management processes, individual employee responsibility, the potential for autonomous consumer choice, the limits of the regulatory state and the ultimate pursuit of sustainable development.

This redrawing of the domain and forms of government is closely linked to two broader political discourses, ecological modernization and smart regulation. Ecological modernization has emerged, since the late 1970s, as the dominant way of conceptualizing environmental problems in the advanced industrial democracies.¹²² Ecological modernization understands environmental harm as a systematic product of the modern industrial “risk” society, but one that can be addressed through technocratic management. In this vision the environmental crisis no longer represents a fundamental threat to industrial society, as it did in the 1970s, but an opportunity for its further development. Environmental protection and industrial development are compatible “win-win” propositions. The pursuit of sustainable development, one of the key moral justifications of EMSs, is intimately linked with ecological modernization by virtue of its emphasis on integration of environmental considerations into all business and governmental decision-making, consideration of and communication with a broad range of stakeholders, and the susceptibility of environmental crisis to rational management. The political rationality of EMSs thus coincides very closely with the

¹²²See generally Hajer, *supra* note 109.

discourse of ecological modernization.

Another prominent discourse in contemporary environmental politics that is closely related to and perhaps subsumed in ecological modernization, is the discourse of “smart” or “responsive” regulation.¹²³ This discourse acknowledges the accomplishments of “command and control” regulation but argues that it has reached the limits of its cost-effectiveness and technical capacity, due to cost, inefficiency, inflexibility and regulators’ resource and information constraints. On the other hand, this discourse also rejects neoliberalism, with its radical skepticism about the capacities of the state to govern for the best and its enthusiasm for free markets, property rights and deregulation. It argues that most “regulation” is already in the hands of actors other than the state and uses this insight to propose a new conception of the regulatory process that transcends sterile regulation-deregulation and market-state dichotomies. It proposes new regulatory strategies that combine state, market, private and public actors and forms of regulation and enlist non-state resources and mechanisms such as self-regulation, EMSs, eco-labelling schemes, environmental reporting and industry-community agreements in furtherance of “governing at a distance.”¹²⁴ Some variants of this discourse draw upon private sector management discourses to promote competition and marketization in government functions, a “client service” orientation in public administration (regulated entities as clients, state as service provider), individual autonomy (individuals as self-helping, autonomous, co-responsible entrepreneurs) and managerialism (conceptualization of life in entrepreneurial terms; use of managerial techniques).¹²⁵ This discourse of regulatory reinvention meshes well with the discourse of EMS, and provides the broader rationale for most of the engagements I have observed between Canadian public authorities and EMS initiatives.

¹²³ See generally Gunningham & Grabosky, *supra* note 10 at 5-19; Ayres & Braithwaite, *supra* note 10; Osborne & Gaebler, *supra* note 10.

¹²⁴ Gunningham & Grabosky, *ibid.* at 10-13.

¹²⁵ Salskov-Iversen *et al.*, *supra* note 110.

This examination of the political rationalities of EMS suggests two things: first, that the deactivation of political conflict seen in the discourses of EMSs and standardization will be one of the key political challenges in the era of “smart regulation”. The political rationalities of EMS constitute the realm of EMSs as a private, voluntary order in dichotomous, sometimes antagonistic relation to the messy, inefficient, public realm of law and politics, and simultaneously obscure the process by which this division between public and private realms is created, by representing EMSs as always already private, voluntary and non-political.¹²⁶ The interpretation of environmental crisis as a “win-win” proposition, an opportunity for entrepreneurial thinking, a matter for expert, technocratic management “at a distance,” reinforces this tendency to mute the political struggles and distributive stakes of environmental management.

Second, it seems likely that “steering” may emerge as the most prominent form of engagement of public authorities with private authority in the field of environmental governance. The increasing emphasis on “action at a distance” in current mentalities of government points to a conception of the state as helmsman, selectively steering the development and use of regulatory strategies and tools by others through participation in the creation of voluntary programs, funding of non-state policy development institutions such as standardization bodies, provision of high-level strategic direction for non-state policy-making, pronouncement of official positions on voluntary initiatives, and regulation of the ground-rules, boundaries and limits of non-state governance by manipulating competition, securities, corporate and consumer protection law, public participation rules and regulatory “backstops”. One might also expect “reward” and “self-discipline” to figure prominently in state strategies as public authorities attempt to steer environmental self-government by offering regulatory incentives and setting examples through self-application of voluntary disciplines.

¹²⁶De Larrinaga makes a similar argument regarding the discourse surrounding Shell's involvement in Nigeria. Miguel de Larrinaga, “(Re)Politicizing the Discourse: Globalization Is a S(h)ell Game,” (2000) 25 *Alternatives: Social Transformation and Humane Governance* 145.

V. WHAT ROLE FOR LAW?

I conclude with some tentative suggestions about the role for law in the transformation of the public/private divide in Canadian politics. My research into EMSs and EMS standards reveal two important characteristics of contemporary government: first, that government, understood as all the more or less systematic attempts to direct human conduct to appropriate ends, is widely distributed among myriad public and private authorities in a hybridized public-private space; but second, that in any given problem space the unequal distribution of governmental authority tends to produce and reproduce social relations of power and inequality. Two general conclusions follow from these observations: that some form of “smart regulation,” relying on a mix of state and non-state actors and regulatory tools is appropriate to deal with the distributed character of government; but that a key challenge in the design and exercise of such government will be to resist the tendency to “depoliticize” through the move to neutral technical expertise and private market transactions. Opening space for such resistance requires, first of all, attention to the political stakes that EMSs and EMS standards tend to submerge. This involves asserting the politics of “merely technical” choices¹²⁷ such as the decision to delegate authority to technical experts or the private market and the construction of the citizen as autonomous consumer and self-helping entrepreneur. It also calls for more concrete exploration of the distributive consequences of corporate environmental management decisions than I have attempted here, along with more detailed examination of how the rationalities and technologies of environmental management produce and obscure such consequences.

Law and legal practitioners can play numerous roles in the politics of voluntary EMS standards, in some cases facilitating and shaping the expansion of “private” non-regulatory

¹²⁷ Compare Duncan Kennedy, “The Political Stakes in ‘Merely Technical’ Issues of Contract Law” (unpublished paper, 17 September 2000) (copy on file with author).

initiatives, in others resisting it, and in others playing little or no role. While strategies and techniques deployed in legal relations can probably have a significant impact on the transformation of the public-private divide, in the case of EMS standards this potential has so far gone largely unrealized in Canada. Although Canadian regulators, legislators and courts have employed most of the modes of engagement I describe in Part II, it is fair to say that their responses to voluntary EMS initiatives have been minimal and incoherent.

The important question for present purposes is whether and how law can be used to resist the depoliticization of environmental management; *i.e.* to insist on the political stakes of environmental management decisions and create space to work toward greater justice, equality, human health and ecological integrity? At a minimum, law might be deployed as a “border guard” to define and protect certain “public” stakes of EMSs. EMSs can be a very useful tool for organizations internally and in their relations with business partners and market participants, but many (including ISO 14001-based EMSs) provide inadequate guarantees of public consultation and accountability, environmental performance and legal compliance to merit giving them any particular weight in non-market relations with governments and the public. Legal tools and strategies should be designed, at a minimum, to insist on these basic public stakes when rewarding or relying on them in state regulatory instruments, for instance by requiring more than the minimal “basic EMS” defined in Alberta’s new LEAD program, requiring public consultation and transparency in the setting, monitoring and review of environmental performance and rewarding only firms that consistently exceed compliance with legal requirements (including improvement of performance on non-regulated parameters). Basic corporate governance rules requiring maximization of shareholder value might be revisited to expand the range of “stakeholders” whose interests managers are permitted (or required) to take into account. Moreover, legal actors such as prosecutors and courts should be urged to take a firmly skeptical attitude toward EMSs and EMS standards and inform themselves fully of their characteristics before incorporating them in orders or using them as a

standard for liability.

More ambitiously, governments, lawyers and citizens might use law as part of a broader political strategy to influence the redefinition of public and private in the context of environmental management. The role of law and legal practitioners in this strategy could be to claim and defend a broad space for democratic experimentation in the face of the homogenizing tendencies of global trade liberalization (as evidenced, for instance, in the TBT Agreement) and government "reinvention". Just how this might be done is a question for further research.

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BIOGRAPHICAL NOTE

Stepan Wood is an assistant professor at Osgoode Hall Law School where he teaches environmental, international and property law. He participates actively in EMS standardization work as a member of the Standards Council of Canada's national advisory committees on EMS standards, ISO expert working groups on ISO 14001 and 14004 and Canadian delegations to recent annual meetings of ISO Technical Committee 207. He has published on international law and international relations theory, international fisheries disputes and Canadian environmental law. The opinions stated in this chapter are his own and do not necessarily reflect those of the Standards Council of Canada or ISO.