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THE USE OF VOLUNTARY POLLUTION PREVENTION AGREEMENTS IN CANADA:

An Analysis and Commentary

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THE USE OF VOLUNTARY POLLUTION PREVENTION AGREEMENTS IN CANADA: AN ANALYSIS AND COMMENTARY

I. INTRODUCTION

This report analyses agreements between government and industry the stated purpose of which is to achieve environmental protection through voluntary action on the part of industry (Voluntary Pollution Prevention Agreements, or VPPAs). The first section of this analysis will review the context of this comparatively new interest in finding alternatives to regulation as a means to achieve environmental protection. This report will then examine four agreements that have been recently initiated in the province of Ontario. Using the four agreements as a touchstone, this report will outline the chief areas of controversy regarding voluntary programmes.

The discussion will then look to the experience with voluntary initiatives in the United States and in Europe. The report will provide an analysis of the similarities and differences between the Canadian, American and European approaches to voluntary agreements in order to establish whether the experience in the foreign jurisdictions can helpfully address some of the questions arising in the Canadian context. The report concludes that the experience in other jurisdictions indicates that, in order for voluntary agreements to be successful in Canada, there must be in place first a guiding regulatory structure for voluntarism. As there is presently no such regulatory structure in Canada, the ability of such agreements to achieve real gains in environmental protection is doubtful.

II. THE CONTEXT OF VOLUNTARISM

The political and economic context in which the question of pursuing voluntary environmental protection initiatives arises is complex, and multi-layered. It will assist this discussion to locate voluntary agreements in this broader context.

Although voluntarism has been identified as a solution to the perceived failings of current environmental regulations, it would be inaccurate to conclude that an interest in voluntarism has arisen solely because of those failings. It appears as well that the presumption that voluntarism is the way to address regulatory shortcomings arises from a number of factors, perhaps the most significant of which is the recent trend toward de-regulation.

> In the majority of OECD Member countries there is a trend toward deregulation and less state intervention.[1]

Government interest in de-regulation itself arises from a complex mix of factors: strain on government finances and the burden of the deficit, pressures to harmonize regulations because of international trade agreements, the perception that regulation is politically unpopular, and a shift away from the social welfare state.

Another factor contributing to interest in alternatives to regulations is the concern with the efficacy of government regulation generally, and not only with environmental regulations. The Canadian government has undertaken studies of the problems with the federal regulatory approach.[2] These reports identify a series of flaws in the federal regulatory system:

> problems with the drafting and preparation of regulations, problems of overlapping between federal regulations, problems of inconsistency in the exercise of discretionary powers conferred by regulations and in the interpretation and application of regulations by public servants, and the failure to consider the cost

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1. M. Mathieu Glachant, "Voluntary Agreements in Environmental Policy", OECD Environment Directorate, February, 1994, at 1.

2. In 1979, the Economic Council of Canada published an interim report titled "Responsible Regulation." In 1980, the Special Committee on Regulatory Reform tabled its Report in the House of Commons. Five years later, the Task Force on Program Review published its Report on Regulatory Programs. In 1993, the Standing Committee on Finance tabled the Report of its Sub-committee on Regulations and Competitiveness.

of regulation.[3]

The Task Force on Program Review was somewhat pointed in its description of the federal regulatory system: "a largely unstructured, uncontrolled, highly variable, and thoroughly confusing mixture of legal requirements, policy guidelines and ad hoc administrative practices."[4] Ten years later, the Sub-committee on Regulations and Competitiveness found some improvements, but also noted that "One of the strongest themes to emerge from the hearings was that it was not the regulations themselves that people found objectionable, but the manner in which they are introduced, made known and applied."[5] A very recent report prepared for the Standing Joint Committee for the Scrutiny of Regulations argues that the failings attributed to regulations arise from factors other than the regulations themselves:

> Those critical of the use of regulations as a policy instrument typically characterize regulations as inflexible, difficult to amend, and therefore as being inefficient. Although it seems trite, it must be pointed out in response to such criticisms that none of these attributes are capable of being possessed by regulations themselves. In fact, such criticisms relate not to regulations *per se*, but rather to the process by which regulations are made and amended. There is no inherent reason why the regulatory process cannot be more responsive to changing circumstances. In the end any process, including the regulation-making process, can only be as effective as those in charge of it.[6]

Another argument made against regulations is that they constitute a heavy burden on industry. This criticism must be placed in the Canadian context where, in comparison with other jurisdictions, there is a sparsely populated environmental regulatory landscape, especially at the federal level.

The final element in this discussion of the context of voluntarism is the history of federal environmental regulation and enforcement in Canada. Prior to the passing of the Canadian Environmental Protection Act in 1988, Environment Canada pursued a "promotional approach", preferring to negotiate voluntary compliance agreements with polluting industries rather than to strictly enforce the law. There were some serious

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3. Secretariat of the Standing Joint Committee for the Scrutiny of Regulations, Report on Bill C-62, February 16, 1995.

4. Task Force on Program Review, Regulatory Programs, Ottawa (1986), p. 633.

5. Sub-committee on Regulations and Competitiveness, First Report, 3rd Session, 34th parliament, p. 79.

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

problems associated with this approach:

> In 1987 the Canadian Environmental Advisory Council (CEAC) ...identified a pattern of almost two decades of systematic non-enforcement of the antipollution provisions of the *Fisheries Act* in Quebec, despite the existence of a number of land-based sources of continuous discharge of highly toxic substances which seem to enjoy complete immunity from prosecution....An internal memorandum by a Department of Fisheries and Oceans official leaked in December, 1989, was bitterly critical of the federal 'negotiate and compromise at all costs philosophy' of non-enforcement of *Fisheries Act* violations against a number of large firms in British Columbia.[7]

While CEPA was supposed to enact a stricter regime, prosecutions under the Act are still comparatively rare,[8] and the voluntary compliance model is still used by the department.[9]

This review of the context of voluntarism supports the conclusion that circumstances surrounding the new interest in voluntary agreements are more complicated than arguments for voluntary agreements normally acknowledge.[10] At the very least, the

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7. Ted Schrecker, "Of Invisible Beasts and the Public Interest: Environmental Cases and the Judicial System" in Robert Boardman (ed.) Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1992) 83 at 91.

8. According to the Environment Canada "Office of Enforcement Legal Activities (CEPA and the Fisheries Act) of May, 1994, enforcement of the Acts has resulted in an average of less than five prosecutions per region per year under CEPA and the *Fisheries Act*, and a cumulative national average of approximately ten prosecutions per year under CEPA.

9. "Within Environment Canada, recent policy statements have created the perception among many of the enforcement staff that official policy has moved away from the relatively strict approach outlined in the Enforcement and Compliance Policy." Resource Futures International. Evaluation of the Canadian Environmental Protection Act (CEPA) Final Report. (Ottawa: Environment Canada, December, 1993) p. 78.

10. For example, a recent discussion by Energy Pathways for Environment Canada identifies the failings of the command and control model of pollution prevention, and blames regulations for their inability to deal with complex problems such as non-point source pollution, but it does not address the matter of the failure of the regulatory process, nor does it acknowledge the weaknesses in Environment Canada's existing "voluntary" strategies.

listed failings of the current regulatory regime are an under description of the problem. They do not include, in particular, the failure of government to adequately address the failings of the regulatory process. Nor does the description of problems with the present regime address the fact that, in Canada, the comparatively few "command and control" regulations that do exist are already often implemented through voluntary programmes. If there has been a shortfall in environmental protection, it would appear to be at least in part attributable to voluntarism itself.

This is not to say that a new approach to voluntarism cannot overcome these problems. But the goals of the "new voluntarism" must be more than just to overcome the failings of command and control regulation, because that is only part of the problem. In order to be a palpable improvement, new voluntary agreements must achieve more than could be accomplished simply by changing the relevant regulations, should not add to the problem of "ad hoc administrative practices" and should accomplish greater environmental protection than what is being accomplished under current practices. Finally, voluntary agreements must do all of the above and not result in greater expenditure of public funds than do current practices. The interests of the public, industry and the environment all need to be adequately addressed in the current climate of de-regulation.

III. FOUR CANADIAN VOLUNTARY POLLUTION PREVENTION AGREEMENTS

Now that this discussion has identified what should be the goals of the new voluntarism, it will review four current agreements. The focus in this section, after a general description of how the agreements are negotiated and implemented, will be on their legal character, or, more accurately, their non-legal character and the legal implications of this.

The four agreements that are the subject of this study are:

(1) the Automotive Manufacturing Pollution Prevention Project (the MVMA project), dated June 1993;
(2) the Automotive Parts Manufacturing Pollution Prevention Project (the APMA project), dated December 1993;
(3) the Dry-Cleaning Pollution Prevention Project, dated September, 1994 (draft); and
(4) the Canadian Chemical Producer's Association Environmental Protection Agreement (the CCPA project), dated July 1994 (draft).[11]

Three of these four agreements follow a general pattern in their creation and implementation. They are negotiated between industry associations and at least one level of government, usually two (the provincial and federal governments). Once an agreement has been signed, there is usually notice to the public by way of a press release and press conference.[12]

Another element the agreements have in common is the general, non-target-setting, descriptive nature of the Agreements themselves. There are some differences between

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11. There is represented, in the four agreements studied, a spectrum of government involvement in and government control of the projects. At the end of the spectrum involving the greatest degree of government control is the Dry Cleaning Agreement (DCA). At the other end of the spectrum of government control is the Canadian Chemical Producers' Association agreement, which was entirely initiated by industry. The two other agreements, the Motor Vehicle Manufacturers' Association agreement, and the Automotive Parts Manufacturing Pollution Prevention Project, arose from a combination of interest and initiatives on the part of both government and industry and sit in the mid-range of the spectrum.

12. Comments by the industries involved in three of the four agreements studied here (the exception is the Dry Cleaning Project) indicate that the absence of involvement by the public or environmental non-governmental organizations was a key element in their being able to sit down and negotiate with the government.

the four agreements, but, generally, each agreement contains the following:

1) Purpose, Goals and Objectives Statements;
2) a section creating a Task Force or Steering Committee;
3) a section outlining the responsibilities of the Steering Committee or Task Force;

4) appendixes which include detailed work plans for the VPPA, time frames, workshop plans, and so on.

The general pattern of behaviour prescribed by these agreements is that the Task Force/Steering Committee will set up a generalized plan for information sharing with members of the industry/association. The members of the industry/association, once informed of the general plan by the Task Force, will undertake studies of their own facilities, usually draft an inventory of substances on their premises and used in their production processes, and then voluntarily propose a project to reduce the use of some or all of these substances through a variety of means, such as substituting one substance for another, changing procedures, recycling, and so on. The non-prescriptive nature of VPPAs permits shop-by-shop strategies to control and reduce the use of toxics.

On the terms of each of these agreements, some clearer than others, none are legally binding.[13] In other words, they are not contracts between the parties. None of these

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13. "This MoU is not intended to be legally binding and is not intended to replace, limit or preclude the participation in, development or implementation of environmental protection initiatives by any of the signatories," CCPA MOU, s. 1.2.

"The Project is voluntary in nature, is consistent with existing federal and provincial regulatory initiatives and is intended to be supportive of participating member company management plans, and federal and provincial strategies and long term competitiveness in an overall North American economic environment. This MOU in no way diminishes or varies a participant's responsibilities under federal, provincial or municipal laws, either existing or coming into effect after this MOU is entered into." APMA. The MOU also describes the projects as a "collaborative agreement."

"The purpose of the Automotive Manufacturing Pollution Prevention Project (the MVMA Projects is to actively contribute towards the bi-national commitments on multi-media pollution prevention between the federal government of Canada and the United States and the Ontario Ministry of the Environment's pollution prevention strategy...It is not the intent of this project to supplant any existing or future regulatory measures." MVMA.

"It is not intended that this MOU create legal obligations for any of the parties." DCA.

agreements describes a quid pro quo relationship; rather, they describe common goals that all signatories will cooperatively work to achieve. There are no provisions for penalties should a party renege on the agreement; rather, the term "voluntary" in each strongly suggests that there will be no consequences.

On the one hand, the non-binding nature of the agreements appear to offer a high degree of flexibility and freedom within the bounds of the agreements. On the other hand, however, the non-binding nature of the agreements creates a high degree of uncertainty regarding the actual, or perceived, commitments of the signatories. The legal problems created by this uncertainty would likely become apparent in the event there is a dispute.

Disputes could conceivably arise around the practices and substitutions undertaken under voluntary agreements. Industry signatories should be concerned that the non-binding terms of voluntary agreements may expose companies to increased liability. Prosecutions could arise for, for example, substitutions made under an agreement. On the other hand, government should be concerned that an agreement may give rise to the defence of "officially induced error."

The non-binding nature of the agreements is a two-sided legal coin, then. Flexibility is also uncertainty; the former is a desirable characteristic of voluntary agreements, the latter is undesirable. One question that needs to be addressed is how much can the uncertainty in the agreements be reduced without their becoming inflexible. However, other questions have to be asked as well in determining how well the new voluntarism can meet the goals identified above. These questions are discussed in the next section of this report.

IV. PROBLEMS WITH VOLUNTARISM

Three general concerns regarding voluntary agreements have been raised.[14] The first concern is with the role of government in these agreements. The second concern is with the claim that voluntarism stimulates innovation. The third concern questions whether voluntarism really does present a better use of scarce government resources than simply focussing on revising and updating outmoded regulations.

1. The Role Of Government

As noted above, the participation of government is not the same among the four agreements studied here.

The Dry Cleaning Agreement (DCA) features a dominant government role. It involved very little negotiation with industry in its creation, and is rather a demonstration project of "wet-cleaning" processes to the dry-cleaning industry to test industry and consumer response to alternatives to the use of perchlorethylene. Unlike the other agreements studied here, the DCA did involve consultation beyond government and industry.[15] Furthermore, unlike the other agreements, the DCA arose from a preconceived code of conduct for dry cleaners prepared by the Canadian Council of Ministers of the Environment (CCME), and, as such, was based on policy formulated by elected and publicly accountable members of the provincial legislatures and federal parliament.

The other agreements feature a very different government role. Two of the four industry signatories to the agreements – the MVMA and the CCMA – had already formulated fairly extensive association policies regarding voluntary pollution prevention measures. That is, they have determined their own "public policy" framework for the agreements. The CCMA Responsible Care® Programme is quite detailed, and parts of it apparently influenced the federal government in enacting its own policies.[16]

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14. The concerns expressed in this section of the report have been distilled from comments and criticisms made by spokes people for environmental organizations and labour unions.

15. Members of the Green Clean Project included, among others, participants from Environment Canada, the Ontario Fabricare Association, the Ontario Ministry of Environment and Energy, the U.S. Environmental Protection Agency, Greenpeace, Pollution Probe, various municipalities and the Conservation Council of Ontario.

16. "Preceding this was CCPA's development of the National Emission Reduction Masterplan (NERM) to assist members in the reduction and public disclosure of emissions of all substances of environmental or health concern. This became a

A number of questions arise when government signs voluntary agreements with sophisticated industrial associations, particularly when the industry has a more clearly defined set of goals for itself than government has. The first question is, if the association already has set a policy for its members, why does it need to enter into an agreement with government? The second question, related to the first, is what does government agree to when it signs one of these documents? One suggested response to these questions is that industry wants government's signature to ensure that government will not make new regulatory requirements that would compete with the terms of the agreement. This response, in other words, suggests that government agrees not to regulate the behaviour within the terms of the agreement. If this response is right, then government and industry, by way of these agreements, establish a process by which industry is given the opportunity to set its own regulations.

Another response to the questions posed above is that the agreements do not in any way abrogate government's powers to regulate. Indeed, it is standard term of the agreements that they in no way "limit or preclude the participation in, development of or implementation of environmental protection initiatives by any of the parties."[17] This response does not really answer the questions, however. Furthermore, if government and industry associations somewhat naively believe that entering these agreements does not coopt government powers to regulate, past experience indicates otherwise. This report has already noted the failures of previous attempts to gain compliance through cooperation between government and regulated industries.

The concern with voluntary agreements is that they substantially increase industry opportunity to influence the process by which government controls pollution. Three of the four agreements discussed here were negotiated behind closed doors, with little or no consultation with the public, ENGOS, unions, or health and safety organizations. This is contrary to "the multi-stakeholder, consensus-based process that has become a mainstay of environmental policy making in Canada."[18]

The disproportionate power of industry in negotiating voluntary agreements makes the position of government problematic.

> This method of decision-making is far removed from the traditional view of an administration taking a unilateral decision in the name of the common good. The

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template for the National Pollutants Release Inventory (NPRI) of Environment Canada... from The Canadian Chemical Producer's Association A Primer of Responsible Care(r) & Sustainable Development, December 1994, at 16.

17. CCPA Voluntary Pollution Prevention Partnership MOU, at 2.

18. Environment Canada, "The EPA Changes Course," in Vol. 2. No. 1 Terrascope at 2.

> legitimacy of this latter approach based on law is clear enough: on the grounds of democratic legitimacy, the administration is invested with a coercive power which is uses to ensure the collective good.
> In the case of voluntary agreements, however, the social benefit is defined through an interactive process involving the administration and private interests...In this process the administration seems temporarily to abandon its coercive power. This often leads to problems of public accountability... which is considered to create an occasion for collusion between the administration and the industrial interests to the detriment of the environment. This feeling is in fact based on an objective danger, that of regulatory capture by individual interests.[19]

The "objective danger" of government involvement in agreements such as the MVMA is that it puts itself in a position where it is seen to favour the concerns of the industry it regulates over the interest of the general public.

A close look at some of the provisions in the agreements raises other questions about what process industry signatories are being given the opportunity to influence. The MVMA agreement contains provisions for the "resolution of regulatory barriers." These provisions outline how the MVMA will identify potential regulatory barriers which may impede introduction of product substitutes and technology or other voluntary pollution prevention efforts.[20] The Task Force will also address potential impediments in general and in relation to specific plant plans.[21] The Task Force will, on a case-by-case basis "reach an understanding on regulatory considerations and offer consensus recommendations as appropriate."[22] These provisions raise the question: will the Task Force resolve the issue of regulatory barriers by making a consensus recommendation that the regulations that cause a barrier will not apply to them? If the answer to this question is "yes", the government should be aware that what these provisions allow for is called a "dispensation," and dispensations are illegal in Canada.[23] Furthermore, if the answer to this question is yes, other industries within the sector who are not signatories to the agreement should be concerned that the "playing field" could at any moment, and with no notice to them whatsoever, suddenly become uneven.

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19. M. Mathieu Glachant, "Voluntary Agreements in Environmental Policy", OECD Environment Directorate, February, 1994, at 10-11.

20. MVMA, s. 5(a).

21. MVMA, s. 5(b).

22. MVMA, s. 5(c).

23. The 1869 Bill of Rights declared illegal the exercise of a power of dispensation by the Crown. A dispensation occurs when government sets aside any subordinate law or regulation made pursuant to enabling powers granted by Act of Parliament.

Moreover, if the answer to the question posed above is "yes", then the provisions give a signatory the opportunity to secretly arrange to escape its legal obligation to follow regulations it finds to be inconvenient. This is contrary to the constitution of Canada, which is founded on the rule of law, and contrary to the public process regulatory reform is normally subject to. Finally, if the answer is "yes", these provisions appear to provide a good example of what can result when government abandons its coercive power over industry.

Within the terms of three of the four agreements studied here are at least two other examples of how "cooperation" between government and industry has favoured the interests of regulated industries: the definition of the term "pollution prevention," and the "lists" compiled under the voluntary agreements.

The term "pollution prevention" came into currency on the North American continent with Canada/U.S. discussions about the ongoing problems with toxic chemicals in the Great Lakes Basin, beginning in 1978 when Canada and the United States signed the Great Lakes Water Quality Agreement. Through studies initiated by the IJC and other organizations, knowledge grew about bioaccumulation and biomagnification of some toxic chemicals in animals and humans living in the Great Lakes region. The studies supported the conclusion that there could be no "safe levels" for some toxic emissions. From this discovery came the idea of "zero discharge" and the idea that sustainable industry must not only not release toxic chemicals into the environment, but must ultimately eliminate the use of toxics from production processes.

"Pollution prevention" has been defined by the program for Zero Discharge as:

> avoiding the generation of toxic pollutants by reducing their use, rather than by capturing pollutants at the end-of-the-pipe. Pollution prevention programs require an examination of why the chemicals are being used or generated. Because of this focus on the use of toxic chemicals, the term, "toxics use reduction" is preferred.
>
> When referring to "pollution prevention," the emphasis must always be prevention of the use and generation of pollutants. Hence, the term does not mean efforts to treat or recycle wastes.[24]

Since its coming into usage, the definition of "pollution prevention" has been a hotly disputed issue. In its *Final Report*, the Pollution Prevention Legislative task Force made these observations about the fundamental differences of opinion regarding the definition

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24. National Wildlife Federation and the Canadian Institute of Environmental Law and Policy. *A Prescription for Healthy Great Lakes: report of the Program for Zero Discharge*. February, 1991, at 18.

of the term:

> The Task Force could not agree on whether the definition of pollution prevention should focus on the creation and use of potentially harmful substances (the environment/labour perspective) or on the release of potentially harmful substances (the industry perspective)...The disagreement within the Task Force revolved around attempting to clarify where pollution prevention "ends" -- and where pollution control begins. As a generalization, the industry members insisted that the definition of pollution prevention should include all activities that minimize or prevent releases of harmful substances, including activities that promote on-site, out-of-loop recycling, reuse and reclamation as well as off-site recycling, reuse and reclamation. Combustion and incineration activities that involve energy or product recovery should thus be considered a component of pollution prevention. Environmental and Labour members did not agree that these activities constitute pollution prevention. They believe that a focussed definition of pollution prevention that excludes out-of-process recycling would help ensure a thorough rethinking of all processes rather than merely consideration of "add on" technology such as recycling. Moreover, a focused definition would help eliminate the risks to workers, consumers and the environment that are associated with activities such as out of process recycling. Industry, on the other hand, believes that businesses should be able to evaluate all options and their attendant risks before deciding on any particular course of action.[25]

The Task Force could not reach final agreement on a definition of "pollution prevention." However, in the agreements studied here, government and industry signatories have done just that. Without public review, or public debate, or with any acknowledgement whatsoever that the definition is controversial, government and industry signatories have agreed that "pollution prevention" means whatever is achieved under voluntary pollution prevention agreements. In other words, government, in order to enter into these agreements, appears to have capitulated to the interests of industry so that "businesses [will] be able to evaluate all options and their attendant risks before deciding on any particular course of action" and that "all activities that minimize or prevent releases of harmful substances, including activities that promote on-site, out-of-loop recycling, reuse and reclamation as well as off-site recycling, reuse and reclamation" will be called "pollution prevention."

More evidence of government capitulation to the interests of industry is found in the "lists" that are the fundamental element of three of the four voluntary agreements studied here. The Province of Ontario has a list of candidate substances for bans, phase-outs or

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25. *Final Report of the Pollution Prevention Legislative Task Force*, September 1993, at 2.

reductions.[26] The federal government has, under the *Canadian Environmental Protection Act*, a Toxic Substances List which sets out which substances will be banned or regulated in Canada. There is as well the list of "critical pollutants" compiled in the Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem.[27] In spite of these existing provisions at the provincial and federal level, the agreements establish that the election of substances to lists will be negotiated by the Task Force. Government signatories to these agreements are therefore agreeing to leave the formulation of what is fundamentally a question of public policy to unelected, unaccountable and unreviewable Task Forces, created by way of a non-binding agreement. More than this, they appear to be setting aside lists they have already developed.

The objective danger of regulatory capture by industry has been grave enough in Canada under the voluntarism of the past; the danger appears more acute under the new voluntarism. How governments might lessen this objective danger is discussed below.

2. Voluntarism and Innovation

Proponents of voluntarism argue that regulations inhibit and voluntary agreements encourage innovation. Critics of voluntarism argue the opposite view: regulation drives innovation.

> The relationship between environmental policy and innovation has become particularly contentious, with strongly conflicting claims made. On the one hand, environmental policy, especially in the form of regulation, is seen to stifle innovation by increasing production costs, decreasing profitability and reducing the propensity to innovate. On the other hand, environmental regulations are seen as a source of change that have had a positive effect on innovation, forcing the development and introduction of new technologies that are often not only more resource- and energy-efficient and hence generally more environmentally efficient, but also more economic.[28]

One of the difficulties in resolving the two ends of this debate is that the terms are used a little carelessly. As already noted, "regulations" often take the blame -- as they do in

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26. Ministry of Environment and Energy, *Candidate Substances for Bans, Phase-Outs or Reductions - Multimedia Revision*, October, 1993.

27. *The Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem*, 1994.

28. The Impact of Environmental Policies on Industrial Innovation, OECD, Paris, 1985, Transcripts for the International Conference on Environment and Economy, 18-21 June, 1985, at 109.

this particular debate -- for the failings of the regulatory process. Regulations themselves are no more flawed than the people who make them. If old regulations get in the way of innovation, then the regulations should be changed. It does not follow, because old regulations impede innovation, that no new regulation could solve the problem.

The other carelessly used term in the debate is "innovation." "Innovation" can mean a lot of things, not all of them good.[29] And if regulations prevent some innovation, that is not in and of itself necessarily a bad thing. Not every innovative response is desirable; one of the legitimate purposes of regulation is to control behaviour -- including innovative behaviour -- not deemed to be in the public interest. The debate should, therefore, not be focussed on how to achieve "innovation" as a value-laden and unqualified goal, but on how to achieve innovation in technologies that protect the environment.

Studies on the question of the effect of regulation on innovation in environmental technologies show convincingly that regulation drives innovation:

> Well-designed, aggressive environmental policies to protect and promote environmental quality are the principal factor in forging the market for environmental technologies.[30]

Demand for environmental services and technologies is almost entirely driven by stringent and certain regulatory requirements, accompanied by strong expectations of enforcement.[31] Jurisdictions with the most stringent environmental requirements tend to have the strongest environmental industry sectors.[32] Environmental regulation and the anticipation of stricter environmental policies stimulates innovation and diffusion of

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29. For example, it would be an "innovative" response to the problem of the disposal of nuclear waste to chop it up into small pieces, put the pieces in lead-lined envelopes and mail them to fictitious addresses all over the world. The little pieces of nuclear waste would while their half-lives away in dead-letter rooms scattered over the face of the planet. The "regulatory barrier" in the way of this "innovative response" is that it is completely illegal, and well it should be.

30. Interagency Environmental Technologies Exports Working Group, Environmental Technologies Exports, p. 16.

31. See Ashford, "Understanding Technological Responses," p. 294, and CAEPT, Permitting and Compliance Policy, p. 12.

32. GIMAC, Green Industry Sector Strategy, citing Sentar Consultants Ltd., Western Provinces Environmental Industries Business Development Study (Prepared for the Governments of Canada, British Columbia, Alberta, Saskatchewan, and Manitoba, 1993). See also OTA, Industry, Technology and Environment, p. 13.

pollution prevention and resource conserving technologies and skills.[33] In the United States, the voluntary 33/50 program announced in 1991 garnered strong response from industry because it provided an opportunity to change production processes before new regulations under the Clean Air Act were announced. "It is hoped the effort will stimulate companies to make earlier reduction in their emissions of highly toxic chemicals – before statutory deadlines call for such cuts."[34] The success of the 33/50 programme arose from the expectation of strong regulatory measures coming down the pipe.

On the other hand, negotiated voluntary agreements may actually result in less innovation:

> As regards the collective objective, the administration's motivation is to set an "economically reasonable" level, ie a level which establishes a balance between the benefits connected with the improvement in the environment with the total cost that the firms have to bear. One of the problems here is that the administration often only has fragmentary information on these costs, whereas the firms themselves are well-informed....Since they are the only ones to have information on their costs, they are likely to tend to adopt a strategy of announcing exaggerated costs to the administration. With this biased information, the administration will in fact set a less ambitious objective.[35]

In the Canadian context, the question of what innovation will occur under VPPAs is an especially problematic issue because, as noted, what changes are implemented will be determined by individual shops. This procedure is not far removed from the previous practice of voluntary compliance agreements, which, as also noted, has netted few environmental gains. In an examination – undertaken more than a decade ago – of the practice of government and industry to negotiate control orders, Gibson noted that while individual industries "know their systems best" the easiest and most obvious changes in pollution control practices do not necessarily result in the best changes for the environment.

> From a scientific and environmental viewpoint there is little reason to presume that...immediately evident damages are the most serious...it is now more likely than it once was that many of the most pernicious remaining pollutant discharges are those containing contaminants that are difficult to identify and have delayed

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33. Kemp, "An Economic Analysis of Cleaner Technology," p. 89.

34. Ember, Lois R., "Strategies for Reducing Pollution at the Source Are Gaining Ground," (1991) 69 Chemical and Engineering News 7 at 8.

35. Glachant, ibid, at 6.

synergistic or otherwise obscure effects.[36]

Furthermore, as these industry-chosen shop-by-shop strategies will be based on a list determined by the Task Force, as opposed to government, the chances of environmentally-significant innovation appear remote.

How other jurisdictions address the question of innovation is discussed below.

3. Cost-effective Use of Scarce Government Resources

It is argued that voluntary agreements are less costly than regulatory measures.

> It is often asserted that since the contractual approach is less formal it can lead to lower administrative costs of environmental protection. This is no doubt a somewhat hasty conclusion. The negotiations are often long and costly and they can be just as formal as those of traditional regulatory approaches. On the other hand, once the contract has been signed, its implementation involves lower control and support costs, etc., by the administration.[37]

There has been no study undertaken in Canada comparing the cost of regulations to voluntary programmes, so no conclusion one way or the other can be drawn here. However, arguments can be raised against the purported "efficiency" of voluntary agreements.

There are indications that the agreements studied here have required, and will continue to require, a significant expenditure on the part of government. The costs associated with the agreements arise from:

> 1) Initial meetings and negotiations; one spokesperson estimates that ten to fifteen meetings are required to establish "trust" between the parties; no figure was provided for how many more meetings are required to forge the agreement.
>
> 2) Drafting of the agreements themselves. All of the agreements share certain structural similarities. Each, however, displays small differences in wording and emphasis; it appears reasonable to conclude that these differences arise from negotiations of some length.

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36. Dr. Robert B. Gibson. Control Orders and Industrial Pollution Abatement in Ontario (Toronto: The Canadian Environmental Law Research Foundation, 1983) at 131.

37. Glachant, ibid, at 12.

3) Implementation of the agreement. Government representatives equal or surpass the number of industry representatives on the Task Force/Steering Committee created by each agreement. The tasks established by these agreements for government representatives include, among other things, attending a number of meetings each year, reviewing targets agreed upon under the MOU, reporting, creating strategies for public communication, creating strategies for determining local concerns, overseeing the development and evaluation of training tools for pollution prevention, developing monitoring protocols, and so on.

4) Staffing. The Automotive Parts Manufacturing Pollution Prevention Agreement provides that the government will supply funding for two staff positions: a Project Manager, and an unspecified number of Pollution Prevention Assistants (although the agreement appears to contemplate at least one PPA per plant). Figures regarding the funds required to staff these positions are not available.

There is no evidence to indicate whether this list of demands on government resources is more or less costly than normal regulatory methods. However, efficiency is measured by more than just money spent. There is, as well, the measure of what is achieved from the expenditure.

Another argument questioning the efficiency of voluntary agreements relates to the fact that, as no signatory is bound to either follow or verify the terms of the agreements, it is difficult to determine what environmental benefits have arisen from the agreement. This report has already described how voluntary agreements may result in less rather than more green technological innovation. In this respect, these agreements already appear to provide less efficient results than what could be achieved by regulation.

The question is also asked of how efficiency can arise under agreements that include only a portion of a given industrial sector. Regulations may be time-consuming and expensive to implement and enforce, but regulations apply to everyone. The agreements studied here were negotiated with industry associations that represent only a portion of the given industrial sectors. For example, the Metal Finishers Agreement applies to only five of literally hundreds of metal finishing shops in the Great Lakes region.

There is as well the contentious issue among signatories of verification of results under voluntary agreements. Industry spokes people indicated a general unease regarding the potential for surveillance of industrial activity. These concerns range from the need to protect confidential information to the worry about "bad press" if industry makes its targets public and then fails to meet them. Several spokes people identified verification as a barrier to negotiating the agreements. Finally, while all the agreements include as a responsibility of the Task Force the creation of a strategy for verification, the clear terms of the agreements also provide that any compliance with these strategies is entirely voluntary. Industrial resistance to verification appears to be high, then, and it is unclear whether the plans for verification under the agreements will overcome this resistance.

Related to the issue of verification under voluntary agreements is the question of how shop-by-shop strategies are an improvement over negotiated voluntary compliance agreements of the past. Gibson's findings, noted above, are relevant here as well. It would appear that without clear directives based on a broader public policy perspective, shop-by-shop voluntary initiatives, although they result in net reduction of emissions, may not result in environmental improvement.

Finally, past experience with voluntary initiatives indicates that the end result of some of these projects is regulation in any case, which raises the question of where the claimed efficiency lies. The progression of events from an attempt to promote voluntary compliance among industry players to the formulation of regulations tends to occur most often when government attempts to achieve voluntary compliance in sectors of the economy where regulated industries are small, independent and diverse in location and activity. The problems faced by these initiatives – examples of which are the Ontario Multi-Materials Recycling Incorporated (OMMRI) recycling programme, and the Canadian Petroleum Producers Institute Stage 1 Vapour Control project – relate to the matter of cost. Simply put, when proposed voluntary initiatives are too costly to be supported by individual companies, the companies opt out of their voluntary obligations, and the initiative collapses. After the initiative collapses, government will resort to regulation, sometimes at the request of industry. In order to deal with free-riders on the Ontario Blue Box programme, OMMRI asked the Ontario government to legislate the obligations companies would not otherwise voluntarily comply with. Similarly, after meeting wide-spread resistance from small, independent gasoline distribution companies to the voluntary Stage 1 vapour control project, the Ontario Ministry of Environment and Energy introduced a regulation.

The unproven claims of the greater efficiency of voluntary programmes require careful scrutiny. How other jurisdictions have dealt with the questions of costs of implementation, sector coverage, verification, successful implementation of voluntary initiatives in different industrial sectors, and the issues of innovation and the role of government will be discussed in the next section of this report.

V. CANADA IN A COMPARATIVE CONTEXT: "VOLUNTARY" POLLUTION PREVENTION PROGRAMS IN THE NETHERLANDS AND THE UNITED STATES

It is not the purpose of this report to provide a detailed description of environmental regulation in the United States and the Netherlands. Rather, it will focus on the one significant difference between these jurisdictions and Canada: voluntary agreements in the United States and the Netherlands exist in an extensive, comprehensive environmental legislative framework, and, in Canada, they do not. It is this fundamental difference that makes voluntary agreements less problematic in these other jurisdictions, and more problematic in Canada.

1. The Legal Nature of the Agreements

As noted above, none of the Canadian agreements studied here are legally binding. This creates the problem of uncertainty regarding the expectations and responsibilities of the signatories and what happens if a dispute arises under an agreement. This same debate has arisen in the Netherlands, where "government and industry have made many agreements designed to achieve environmental objectives."[38] One proposed solution has been to draft a code of conduct relating to these agreements.

> The environmental covenants to which this code of conduct applies can generally be regarded as agreements under private law. It will therefore be possible in principle to institute proceedings in a civil court to enforce them.[39]

It seems clear that if such a code were to be introduced in Canada, the procedures undertaken to negotiate the agreements and their contents would need to be substantially changed from the procedures and terms of the agreements studied here.[40]

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38. Dr. J. A. Peters, "Provisional Code of Conduct for Concluding Environmental Covenants", (1994?), publisher unknown, at 1.

39. Ibid, at 4.

40. Dr. Peters' report outlines the procedures attendant to the creation of covenants under the proposed code of conduct:
a) If a Minister intends to conclude a covenant, he must inform both Houses of the States General in good time. He may decide to submit the draft covenant to both Houses if there are grounds for doing so in view of its content.
b) before a covenant is concluded, notice must be given of the draft covenant if this is required in EC law.
c) The finalized covenant must be published in the Government Gazette. the Minister concerned may decide to announce the draft of the covenant in the

As described above, three of the four agreements set out goals and objectives and the responsibilities of the Task Force created by the agreement. Only these responsibilities appear to create obligations, and they are very generally described:

> The Task Force will be responsible for developing training tools for pollution prevention planning including courses, guidance manuals, workshops, and on-site technical assistance, and establishing a strategy for ranking research and development needs and getting new technology developed an on-stream. The Task Force will also be responsible for the promotion of voluntary pollution prevention programs through technology transfer and the sharing of information with the APMA member companies and other sectors.[41]

Even if it were not the case that these agreements make it more-or-less clear that their

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Government Gazette and invite comments if there are grounds for doing so in view of its content.
d) The Minister concerned must send a copy of the finalized covenant to both House of the State General. The parties will decide whether it should be sent to the EC Commission.

Dr Peters also sets out what would be the necessary minimum requirements for the contents of the agreements: Definitions, the scope of the agreement, who the parties are, provisions for the voluntary accession of persons who are not a party to the agreement when it is concluded; the objective of the agreement; the obligations created by the agreement including deadlines and enforcement provisions; the term of the agreement; provisions for consultation, monitoring, evaluation; contingency plans in the case of uncertainties arising from altered circumstances; provisions for unilateral termination, settlement of disputes, measures in the event of non-compliance or if an objective is not being met; access to information, consultations with third parties on the drafting of the covenant, and a provision that:

Arrangements made in the covenant should not contravene legislation and regulations. The relationship between the covenant and the system of legislation and regulations should be explained in detail in the covenant of the explanatory notes. In certain circumstance the covenant may play a role with regard to regulations on the matter to be drawn up subsequently. The legal system dictates that the other parties to the covenant must be given an opportunity to make known their views regarding the content of any proposed regulations. Ibid, at 7-13.

41 Memorandum of Understanding on the Automotive Parts Manufacturing Pollution Prevention Project, p. 3.

terms are entirely voluntary, it would be difficult to say what would be enforceable under these terms. Those concerned about the "enforceability" of voluntary agreements should note that the behaviour one would perhaps most like to see enforced -- measures taken to prevent pollution -- are not, in fact, in the terms of the agreements at all.

Compare this with provisions in the "Declaration of Intent on the Implementation of Environmental Policy for the Chemical Industry" signed at The Hague on 2 April, 1993, which provide, inter alia that company environmental plans will

> - involve preliminary consultations between the company and the relevant authorities[42]
> - at least meet requirements set out in a model that enables "monitoring of progress in the implementation of the IETP within the chemical industry as a whole and at the same time provides insight at chemical industry level into problem areas of a general nature..."[43]
> - submit a draft of its environmental plan to the relevant authorities for their approval prior to signing.[44]

The terms of the voluntary agreements become conditions on the licence issued to each company. If a company does not meet the requirements listed above, the "relevant authorities ... will ... unilaterally impose stricter conditions on the licences applicable to the companies ..."[45]

The terms of the Declaration of Intent have a legal character that, importantly, lends certainty to the process:

> The target group policy and its implementation...takes concrete form in the licensing duties, responsibilities and powers of the State...in respect of the chemical industry as a direct source of environmental pollution. It intends to give added value to the process by means of a coordinated and structured approach to environmental problems and the phasing in of measures in such a way that individual companies are afforded certainty over a longer period.[46]

Certainty also arises from "baselines" established by the "Declaration of Intent."

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42. "Declaration of Intent" s.8(b)

43. "Declaration of Intent" s. 8(d).

44. "Declaration of Intent" s. 8(f).

45. "Declaration of Intent", s.9(c).

46. "Declaration of Intent" s. 5(b).

> ...the starting point should be "Best Available Control Technology," hence also the latest version of guidelines which describe Best Available Control Technology, such as the Dutch Emission Guidelines and the guidelines of the Coordination Committee for the Implementation of Surface Waters Act.[47]

It would appear that at least these kinds of approval and monitoring requirements and baselines would be required before voluntary agreements in Canada could be drafted and entered into with the understanding that they are legally enforceable.

2. The Role of Government

As argued above, the voluntary agreements studied here, and the experience with voluntarism in Canada to date both give rise to the concerns of industry capture of the regulatory process, and governments incapacity to bargain equally with industry.

In the United States and the Netherlands, these concerns have at least in part been addressed by the fact that government takes a leadership role in voluntary initiatives, and relies on, as the foundation of the initiatives, a strong and comprehensive regulatory framework. Of the four agreements studied here, the DCA appears to share some of these characteristics in that it was proposed by government, and arose from a proposed code of practice instituted by the Canadian Council of Ministers of the Environment.

In other jurisdictions, government establishes the objectives and goals of voluntary programmes. For example, in the United States, the EPA set out the list of target chemicals in its 33/50 initiative.[48] In the agreements studied here, the lists of target chemicals are left to the determination of each agreement's Task Force.

In the Canadian agreements (excepting the DCA), the government has no greater or lesser role than the other signatories. Aside from participation on the Task Force, the government retains no coercive authority. In the Netherlands "Declaration of Intent" with the chemical industry, the role of government to set the standards of voluntary programmes, to approve company environmental plans, and to monitor the results of the

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47. "Declaration of Intent" s.7(1).

48. The 17 chemicals are: benzene, carbon tetrachloride, chromium & compounds, lead & compounds, methyl ethyl ketone, methylene chloride, tetrachloroethylene, trichloroethane, xylene, cadmium & compounds, chloroform, cyanide, mercury & compounds, methyl isobutyl ketone, nickel & compounds, toluene, trichloroethylene. It should be noted that, of these 17 substances (out of the thousands emitted by industry every year) Canada has prohibitions or regulations dealing only with lead, cyanide and mercury.

plan are clearly set out. The "Declaration of Intent" is not a "partnership" as the term has been used to describe some of the Canadian agreements, and appears to better provide for ensuring the government retains its coercive power over regulated industries.

The experience of other jurisdictions indicates that the role of government is to set out legislative and regulatory boundaries, and clear policy directives to provide a framework for voluntary programmes. Without regulatory boundaries or policy framework, voluntary programmes will not have the focussed purpose necessary to make them effective in environmental protection.

3. Provisions Regarding Innovation

The Netherlands "Declaration of Intent" with the Chemical Industry contains a specific provision for innovation:

> If it becomes apparent for the further development of Best Available Control Technology...that a more extensive result can be achieved in the future for certain section of the IETP than that stipulated in the plan, these enhanced possibilities may give rise to an adjustment of that section of the IEPT. Any such adjustment will take into account the overall effort of the chemical industry to achieve the IETP and the priorities to be set in that connection. Only after such adjustment existing companies must takes these new technologies as a starting point.[49]

This provision not only permits a company to flexibly respond to changes in technology, but it also provides notice to the rest of the industry, and raises the standard of what is "Best Available Control Technology."

4. The Use of Scarce Government Resources

Under its National Environmental Policy Plan, the Netherlands attempted to assess the cost of achieving environmental targets by 2010 under voluntary programmes.[50] It is clear that a similar study needs to be undertaken in Canada before more time and resources are spent on voluntary programmes.

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49. "Declaration of Intent" s.7(4).

50. "Achieving Long Term Environmental Objectives" Prepared for the Ministry of Housing, Physical Planning and Environment in the Netherlands by Environmental Resources Limited, September 1991.

5. Sector Coverage

The Netherlands National Environmental Policy Plan and National Environmental Policy Plan Plus provides for study of the viability of creating environmental policy for particular target groups including industry and particular industry sectors.[51] The study provides for a preliminary analysis about which different sectors will best respond to a specified implementation plan. The study acknowledges that declarations of intent must take account of the nature and size of various sectors of industry.

Planning for differences in industrial sectors of this sort will help establish whether or not voluntary initiatives will be a better method of environmental protection. Furthermore, with a clear legislative, regulatory and policy framework to back up these different kinds of voluntary agreements, the "playing field" will stay more level within individual sectors.

6. Verification

Reporting is a central part of voluntary programmes in the United States and the Netherlands. It seems clear that voluntary agreements in Canada will have to provide for regular, verified reporting in order to make them an improvement over current regulations, or what could be achieved under regulatory reform.

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51. See "Memorandum on Implementation of Target Group Environment Management Policy for Industry" (1992?) Author, publisher unknown.