CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

Publication #476
ISBN # 1-897043-12-0

Remarks to the
External Advisory Committee on Smart Regulation (EACSR)
July 21, 2004

About CELA

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms at all levels. It is also a free legal advisory clinic for the public, and will act at hearings and in courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance. Funded by Legal Aid Ontario, CELA also undertakes additional educational and law reform projects funded by government and private foundations.

At the federal level, CELA chairs the toxics caucus of the Canadian Environmental Network, and participates in all aspects of implementation of the *Canadian Environmental Protection Act, 1999*, and is in involved in preparations for the legislative review of that Act. We made extensive submissions to PCO's consultations on the implementation of the precautionary principle in federal law and policy, and our submission on changes to the *Canadian Environmental Assessment Act* in Bill C-9 was among the most detailed. CELA is engaged in the consultations on the proposed *Canadian Health Protection Act*, made submissions during the development of the *Species at Risk Act*, and has expertise with hazardous products and food and drug regulation as well as pesticides legislation.

CELA also recognizes the consequences of globalization on environmental protection. The expansion of international trade regimes has made it more difficult for countries to develop new and more progressive laws and policies. CELA remains a leader in recognizing and documenting the influence of trade agreements on governments' and citizens' ability to protect the environment.

CELA and regulatory reform

CELA made a detailed submission to the EACSR in April 2004,[1] met with staff of the EACSR and of the Regulatory Affairs and Orders in Council Division, Privy Council Office (PCO) on April 13, and followed up with a letter to the members of the EACSR on May 17.

Despite these efforts, the EACSR's consultation document is markedly different than the approach to regulatory reform envisioned by CELA.

In embracing the complexity of the field of regulation, it should be noted that CELA's remarks are widely applicable to the range of what we have called "public good regulation"[2] in our April 2004 submission to the EACSR. Consistent with the EACSR's frame of reference, our scope continues to be what was traditionally called social regulation (as opposed to economic regulation - markets and competition, for

[1] Available in PDF at http://62.44.8.131/publications/cardfile.shtml?x=1879.
[2] CELA resists adopting the "smart regulation" language. We have yet to hear the meaning of the term articulated coherently (or consistently by any two constituencies), and we see the potential for the phrase to be emptied of any meaning.

example). We believe that our recommendations are widely applicable to the subject-matter of protective (health, safety and environment as well as other consumer protection) regulation, and to a wide range of policy areas ranging from climate change and energy policy, to hazardous product and pharmaceuticals regulation, to endangered species protection and other natural resource management.

➔ **CELA's main messages from our April 2004 submission to the EACSR are reproduced here in bold.**

Overarching themes

In our May letter to M. Lussier and the members of the External Advisory Committee, CELA emphasized three main themes.

1. Increased investments in scientific and regulatory capacity

CELA agrees with the consultation draft insofar as it *implies* the need for greater investment in government capacity. For example,

> *The challenge is for the federal government to have in place coordinated approaches to scanning, assessing and comparing risks as well as implementing and evaluating policy and related regulatory programs.*[3]
>
> *Proposed Recommendation 17:The federal government should develop and publish federal guidelines for risk communication that provide: …*
> - *a strengthened role for the federal government as a reliable provider of scientific and other relevant information to consumers, parliamentarians and the media.*[4]
>
> *Proposed Recommendation 14: The government should develop and publish a federal strategy to systematically and strategically access the best scientific information and knowledge to support regulatory decisions.*

The best strategy for accessing the best scientific information and knowledge is to strengthen capacity within government, including the capacity to communicate and share information with counterparts in other countries. The consultation document does not go far enough in advocating greater government capacity to assess information (as opposed to merely communicating it as implied by Recommendation 17).

The consultation document's ambivalence about the appropriateness of Canadian leadership in setting international standards (e.g. Proposed Recommendation 8 *"Canada should target areas where it wants to be an international leader"*) is vague and therefore unhelpful. Greater reliance on international standards tends to lead to lowest common denominator levels of protection. Decisions of other countries may reflect different levels of capacity and rigour of assessment from those undertaken in Canada, and may reflect value choices about the acceptability of risks that do not accord with Canadians' values. The tendency not to lead on regulatory initiatives may also discourage proactive and innovative behaviour on the part of potentially regulated parties in Canada.

➔ **In order to ensure protection of the public and other public goods, government must have the necessary involvement, capacity and ability to exercise its powers.**

[3] Page 33 of the consultation document.
[4] Recommendation 17 (Page 38) of the consultation document.

➔ **Significant regulatory capacity and demonstrated willingness to enforce regulations are the primary motivators for regulatory compliance, and must be maintained by the Government of Canada in areas of public good regulation.**

2. Instrument choice

CELA's submission refers to several well-documented examples where regulation has protected human health and the environment[5], and lists failures of voluntarism[6]. To these, we add the following compelling conclusions from a recent report of the Northeast States for Coordinated Air Use Management (NESCAUM):

> … innovation in control technologies has consistently occurred only after regulatory drivers with well-defined targets and deadlines were adopted. …
>
> … early estimates consistently overstated actual compliance costs, often by a factor of two or more. … A recent study by researchers at Carnegie Mellon University concurs with NESCAUM's conclusion that environmental regulations stimulate innovations in control technology. …
>
> Costs almost always decline substantially once regulatory mandates are introduced …
> … technological innovation follows, rather than precedes, regulatory requirements.[7]

By contrast, the consultation document cites several examples of innovations in alternative instruments and other areas [8] but it rarely, if ever, reports on the successes of these initiatives. In some cases, empirical evidence may not be available. Where evidence does exist, indications are that regulation is both effective, and forms the essential backbone to most regulatory strategies.

The consultation document generally lacks empirical substantiation, and fails to consider the reasons for recent major failures in public goods regulation. The experiences of the blood supply, Walkerton, North Battleford and SARS have all been subject to detailed independent analysis. The results have shown that putting values other than protection of health, safety and the environment at the forefront of regulatory objectives and decision-making tends to lead to major failures.

➔ **Regulation (as defined to include public accountability features) in the environmental protection field has proven effective. Empirical evidence suggests actual regulation is more effective than mere threat of regulation, which in turn is more effective than mere ability to regulate.**

➔ **Where so-called voluntarism is employed, real regulation is therefore needed as a backstop**.

➔ **The supposed efficiencies of alternatives to regulation may be illusory.**

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[5] See footnotes 21, 25, 42, 50, 61, 62, 65 and accompanying text, and the bullets on pp. 15 and 16, CELA submission.
[6] Footnotes 39 and 40 and accompanying text, CELA submission. See also footnote 41 and accompanying text.
[7] NESCAUM, "Effect of Regulatory Drivers on Technology Development and Costs". Chapter 5 in *Mercury Emissions from Coal-Fired Power Plants: The Case for Regulatory Action*. October 2003.
[8] For example, the boxes on pages 10, 13, 18, 20, 21, 26, 32, 34, 37, 38, 39, 53, 54, 82,91 and 103 of the consultation document offer no empirical evaluations of the initiatives they describe.

➔ **Regulation has a positive correlation with competitiveness.**

This is not to deny the potential effectiveness of various policy instruments (the "optimal policy mix" said to characterize "smart regulation"). CELA is a member of the Green Budget Coalition, which has advocated a variety of tax changes and other ecological fiscal reform (EFR) measures, as well as enhanced conservation programs:

> All of the Green Budget Coalition proposals comprise sound "public good regulation"
> All of the proposals will require foreground or background conventional regulation
> All require sophisticated administrative, monitoring, compliance and enforcement machinery
> All evidence points to the likelihood that effective "alternatives to regulation" require the same and sometimes higher infrastructure and administrative costs as conventional regulation.[9]

What needs to be re-emphasized is that legal sanctions, combined with the present ability to enforce them, are the best motivator for changed behaviour, and that regulation – one of a mixture of tools needed to influence behaviour – is a government function. The cooperation – regulation dichotomy is a false one. Moreover, regulatory instruments combine accountability and transparency in ways that alternatives do not.

3. Precaution

In discussing risk assessment and risk management, the consultation document attempts to justify ever deeper integration of conventional risk management techniques into regulatory processes.

"An environment characterized by complexity and uncertainty" facing regulators (p. 30), for example, is nothing new; in fact it is emblematic of scientific and technological advancements, and of the human condition itself.

Similarly, that "*regulators can never rely on a complete or perfect understanding of a problem or policy issue"* (p. 30) is a trite statement that does not advance consideration of how to proceed in the face of uncertainty about a hazard.

The consultation document also advocates further layers of guidelines for officials to follow ("*the federal government must develop a risk management framework that would serve as a guide for departments when they prepare specific risk management approaches for their regulatory programs"*: p. 33), not describing what is wrong with the existing guidance available, such as the Treasury Board's 2001 Integrated Risk Management Framework [10].

CELA prepared a submission to the Privy Council Office in 2002 recommending greater implementation of the precautionary principle in federal law and policy, in the context of the principle's emergence internationally as a response to the shortcomings of conventional risk-based approaches.[11] In adopting a

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[9] See footnotes 45-47 and accompanying text, CELA submission.
[10] Treasury Board of Canada, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/riskmanagement/rmf-cgr_e.asp (last accessed on-line 17 July, 2004).
[11] "Implementing Precaution: An NGO Response to the Government of Canada's Discussion Document 'A Canadian Perspective on the Precautionary Approach/Principle'" (CELA Publication #419, April 2002).

"framework" policy in July 2003[12] the government declined to make precaution the basis of its approach to managing hazards, instead choosing to identify *"the application of precaution [a]s a legitimate and distinctive decision-making approach within risk management"*.[13] Moreover, the framework expressed the government's denial that the precautionary principle is an emerging rule of customary international law.

For a recent discussion of the shortcomings of risk assessment and recommendations for improvement, see sections 4.3 "The Critique of Risk Assessment" and 4.4 "International Convergence in Approaches" in Kathleen Cooper, *Toxic Substances – Focus on Children: Developing a Canadian List of Substances of Concern to Children's Health* [14].

The consultation document describes precaution in a manner that further undermines common understandings about its application, and overlooks all formulations that we have seen to date:

> *"Precaution" is applied in instances where there is a risk of serious or irreversible harm and the regulator cannot count on full scientific certainty[15] to make the decision, but officials believe that the risk of action is lower than the risk of no action. …*
> *"The Committee believes that the ability of the regulator to use precaution wisely, as a risk management option in those cases where potential risks are so high or severe that normal decision-making processes should not apply, is an important measure to reduce overall risks to Canadians."*[16]

This novel formulation suggests that complex scientific and regulatory problems with opportunities for multiple coordinated responses will present binary ("yes/no", "either/or") choices (for example, "action / no action"). It also incorrectly positions the precautionary principle as a tool to be used only in exceptional circumstances. In short, it sets the threshold for implementing precaution unjustifiably high.

➔ **In keeping with the recommendations in 2000 of the Auditor General, the federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs. The government should revise its Regulatory Policy and other policies to reflect this emphasis.**

➔ **Regulatory failures affecting the blood supply, food safety, energy supply, water and air quality, food and drug and product safety and others make immediate attention to the regulatory process and Policy absolutely necessary. Among other recommendations, regulatory hurdles should be removed, not increased, and a "fast track" process provided for, where public health, safety and the environment are at immediate risk.**

➔ **CELA recommends that precaution and protection be made the express priorities of the Regulatory Policy for health and safety regulatory programs.**

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[12] "A Framework for the Application of Precaution in Science-Based Decision Making About Risk" (Privy Council Office, July 2003) (accessed 17 July 2003).
[13] "A Framework …", section 4.1
[14] June 2004, CELA and Pollution Probe; available at http://www.cela.ca/publications/cardfile.shtml?x=1910.
[15] As already noted, the realization of "full scientific certainty" is very difficult, if not impossible.
[16] Page 35 of the consultation document (emphasis added).

No new vision

Other proposals in the consultation document present the *status quo* as new innovations or ideas. A central example is the document's proposals for the (continued co-existence) of antagonistic pillars in Canada's Regulatory Policy. The EACSR's proposed approach to "Smart Regulation" as *"both protecting **and** enabling"* (p. 12) represents the *status quo* approach.

> **➔ The expression of assumed values and preferences in the current Regulatory Policy such as competitiveness, wealth maximization, cost-benefit analysis, business impacts, and equivalent means, work against the likelihood of environmental and health protection regulations coming into force. Other, more ambiguous tests in the Policy are silent about public health and environmental protection or any other values. Such ambiguity and ill-defined objectives violate basic fairness and rule of law principles.**

The CELA submission identifies further connections between regulation, accountability and the rule of law.[17]

The CELA submission also describes the importance in our Parliamentary democracy of respecting the legislated – that is, regulatory – mandates of departments like Environment Canada and Health Canada.[18] The imposition by central agencies like Treasury Board and Privy Council Office of myriad policies and guidelines on regulators in these departments detracts from the transparency of process demanded by the public.

> **➔ Existing legal duties and responsibilities required by health, safety and environmental protection legislation should take precedence over non-legislated priorities. Any exceptions should be reviewed by Parliament, and not only by Cabinet.**

The consultation document implicitly encourages continued dual mandates for federal departments and agencies, and the pursuit of (potentially) antagonistic objectives using the regulatory process:

> ***Examples**: " … regulation must protect the health and safety of Canadians and the natural environment **and** promote an innovative economy. This is a fundamental and critical shift in perspective which the government must embrace to achieve its goals for Canada."* (p. 9)
>
> *"INNOVATION: The regulatory system must enhance market performance and support innovation, competitiveness, entrepreneurship and investment in the Canadian economy." (p. 14)*

In many cases, proposals for "change" -- for example, the vision from page 9 quoted above -- would in fact perpetuate the *status quo* tendency for the government to present potentially antagonistic objectives as part of a unified approach, with conflict to be resolved using a "balancing" approach.

Some departments have significant industry partnership or promotion programs. Some agencies have dual regulatory - promotional mandates. The government as a whole consistently sends out mixed signals through the Regulatory Policy and other policy statements, and when regulatory decisions reach the central agencies and/or Cabinet, the innovation agenda tends to win out over public good protection.

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[17] See pages 5-6, and footnote 18, CELA submission.
[18] See page 13, CELA submission.

For example, the presentation of (potentially) antagonistic approaches as a unified policy likely explains why *"The Committee heard that cooperation with one federal department is often undermined by the actions of another."* (p. 26) The reason is less likely conflict between two regulatory obligations, than conflict between a regulatory responsibility – that is, having the legal-democratic consent of the Canadian people – and a non-regulatory policy direction.

Conflict between the government's clear mandate for protecting the public interest and other, client-centred or industry promotional roles, was identified by senior officials as a serious problem in 1999 and noted by the Auditor General in 2000.[19]

Similarly, in their paper for the EACSR, Pal and Maxwell write "neither the federal government's Regulatory Policy nor the Regulatory Impact Assessment Statement explain[s] or define[s] what the public interest is."[20]

> **➔ In keeping with the recommendations in 2000 of the Auditor General[21], the federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs. The government should revise its Regulatory Policy and other policies to reflect this emphasis.**

The consultation document also cites *" … the government's inability to accurately assess whether its international initiatives have helped to meet Canadian policy objectives."* [22] Perhaps inconsistent policy objectives are the source of this confusion as well.

Lack of empirical data / information

The consultation document is striking in its failure to back up its various assertions with empirical evidence.

The absence of evidence about the ***effectiveness*** of non-regulatory initiatives is discussed above on page 3. On the subject of ***public opinion*** about the need for protection against hazards, the consultation document also ignores some of the clear and compelling messages in studies commissioned by the EACSR (and/or quoted in those studies):

> All dialogues reached the same unequivocal conclusion: *when it comes to protecting the environment and public health, government must be in the driver's seat*. From citizens' perspective, *it is unrealistic to expect industry to self-regulate its behaviour* so as to ensure a safe environment, and protect the country's natural resources. And *the same argument was applied to the companies that produce pharmaceuticals and other health products and services*.
>
> *Governments must move the yardstick higher* to help ensure future well-being. Citizens recognized and accepted the possibility that stricter environmental and health protection regimes would likely lead to higher consumer prices for goods and services and a narrowing of choice of some consumer goods and services. This is a trade-off they were willing to make. …

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[19] See Chapter 24, *2000 Report of the Auditor General of Canada*, "Federal Health and Safety Regulatory Programs", paragraphs 24.90 – 24.93 (quoted in CELA submission at page 27).

[20] Leslie Pal and Judith Maxwell, "Assessing the Public Interest in the 21st Century: A Framework" (paper prepared for the EACSR and posted at http://www.smartregulation.gc.ca/en/06/01/su-10.asp (accessed July 18, 2004).

[21] Chapter 24, *2000 Report of the Auditor General of Canada*, "Federal Health and Safety Regulatory Programs", paragraphs 24.54 - 24.59, and 24.86 – 94 (quoted in CELA submission at page 27).

[22] At p. 17.

> *Governments have a fundamental responsibility* to protect the environment *that cannot be delegated to markets*. [A]t the same time citizens saw value for governments to identify, develop and implement effective market-based incentives to influence behaviour change at the industry, institution and individual level. … *Governments retain an inalienable responsibility to set and enforce standards and regulatory regimes*, but can provide flexibility in how standards are met, using the market whenever possible. … *Citizens supported the use of stronger means if needed*.
>
> In considering access to new health products, drugs and technologies most citizens argued that *high standards and rigorous testing must be maintained and strengthened*.
>
> Citizens agreed that *drug and health products/services testing must not be left to industry*.[23]

This public opinion information complements the EACSR's commissioned report by Matthew Mendelsohn[24], and earlier public opinion cited by CELA at page 3 of our April 2004 submission: "the public supports and expects enforcement of environmental regulation"; overwhelming support of "government regulation, tax incentives and public reporting," to the absolute exclusion of voluntary compliance.[25]

The elevation of "innovation" to co-equal status with public health, safety and environmental protection as a goal of the regulatory system is not in alignment with the values of Canadians.

> ➔ **"Smart regulation" may imply a combination of instruments that includes so-called "voluntary" measures, but if both public accountability and performance are to be achieved, will almost invariably include some element of conventional "regulation" as defined in this submission.**

In Conclusion

The consultation document asserts that "Canadians still generally trust their regulatory system to protect their health and safety" (p. 11). The statement would probably be correct if the word "expect" were substituted for "trust": William Leiss says as much in his paper for the EACSR.[26] The other central messages of Dr. Leiss's contribution are the need for optimal policy instrument mix, and the need for government capacity to assess their application. Such an expectation seems to be borne out by the EACSR's commissioned research, particularly in light of regulatory failures and public health problems in recent years.

Hugh Benevides
July 2004

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[23] Mary Pat MacKinnon, Judith Maxwell, Steven Rosell, Nandini Saxena, Citizens' Dialogue on Canada's Future: A 21st Century Social Contract, April 2003, p. 26, cited in Pal and Maxwell (emphasis added).
[24] Cited at p. 4 of CELA submission.
[25] See footnotes 7, 8, 9 and accompanying text, CELA submission.
[26] "Canadians expect a high level of protection from risks to health and the environment": William Leiss, "Smart Regulation and Risk Management: a paper prepared at the request of the Privy Council Office and EACSR" (http://www.smartregulation.gc.ca/en/06/01/su-06.pdf, November 27, 2003), at p. 15.