CROSSING THE LINE
A Citizens' Inquiry on Canada-U.S. Relations

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DISCUSSION PAPER 6.2

DEEP INTEGRATION AND SMART REGULATION: IS DEEPER SMARTER?

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Introduction

This paper explores the relationship between "smart regulation" (the current name for regulatory reform in Canada) and Canada-U.S. integration. In the first section I explore the intended and evolving meaning of the two terms, and discover the intimate connection between them. The section on "smart regulation" describes how the concept was articulated by a federally-appointed "external advisory committee" that reported to the prime minister in September 2004. Finally, I review the current status of "smart regulation". It appears to have gone "deep underground" for implementation by various federal departments and institutions. It seems probable that it will re-emerge in the form of further legislative and policy threats to Canadian regulatory capacity.

Defining terms

Deep integration: Before exploring the relationship between deep integration and so-called "smart regulation", it is necessary first to explore their meaning. It strikes me that both terms drift in a sea of relativism. Debate on these terms will be meaningless in the absence of some consensus on why we might want integration to be deeper, why regulation should be smarter, and relative to what standards. [1]

Deep integration appears to have its foundation in the context of regional trade agreements. In turn, I place regionalism in the larger context of globalization. [2] Robert L. Lawrence is a prominent explorer of "deep" and "deeper integration" in the context of regional and global trade. [3] Lawrence and his colleagues describe the process of integration in bloodless, sterile language: gradually lowered "separation fences" between countries, and smaller "economic distances", have blurred the distinction between international and domestic policies, requiring both "national governments and international negotiations increasingly [to] deal with "deeper" – behind-the-border – integration." Deeper integration, they write, "requires analysis of the economic and political aspects of virtually all nonborder policies and practices." [4] It seems that everything previously thought of as "nonborder" is now about the border; as a result, the very notion of a border loses its meaning. In a similar vein, Thomas d'Aquino of the Canadian Council of Chief Executives claims "ever closer social interaction and trade, investment,

[1] Janice Gross Stein makes similar remarks about "efficiency", a favourite term of economists that, not surprisingly, is a prominent assumed value in both the "deep integration" and "smart regulation" discourses. See *The Cult of Efficiency* (Toronto: Anansi Press, 2001). Efficiency, she writes, is often mistaken for an end in itself, when it is properly a means to greater (and perhaps more tangible) ends. Moreover, "In our post-industrial age, efficiency is often a code word for an attack on the sclerotic, unresponsive, and anachronistic state." Stein, at 7. Complaints about inefficiency can thus be thus be seen as integral to thinly-veiled attacks on the state's public protection roles, which are my focus when I look at regulatory reform.

[2] Economists debate whether regional arrangements on trade and investment facilitate or impede increased global liberalization (here again, I note the unquestioned objective of liberalization, regardless of whether proponents wish to achieve it regionally or globally): see Arvind Panagariya, "The Regionalism Debate: An Overview," *World Economy*, June 1999, 477-511.

[3] Robert L. Lawrence, *Regionalism, Multilateralism, and Deeper Integration* (Washington, D.C.: The Brookings Institution, 1996).

[4] Henry J. Aaron, Ralph C. Bryant, Susan M. Collins and Robert Z. Lawrence, "Preface to the Studies on Integrating National Economies" in Lawrence (*ibid*), at xvii-xviii.

technology, environmental and military co-operation between Canada and the United States"[5] both as a reality and as a rationale for further integration. Although there are many reasons to dispute this claimed reality, d'Aquino asserts as "fundamental principles" that "North American economic integration is irreversible", and that "North American economic and physical security are indivisible." As part of reinventing the notion of the border, d'Aquino promotes the elimination of "anachronistic regulatory … barriers" at the Canada-U.S. border.

Lawrence offers pollution standards as a typical source of conflict: where one state has more stringent standards than another, companies in the first country competing with companies in the state that has less stringent standards "are likely to complain that foreign competitors enjoy unfair advantages[,] and to press for international pollution standards." [6] Not only does this example suggest a familiar reality, wherein large industry actors "press for" policy change (and are heard); it also implies strongly in which direction such actors are likely to press. The combined result, where the lobbying effort succeeds, is diminished autonomy and sovereignty[7] for Canadians, lower standards, and more pollution.

Arvind Panagariya, surveying Lawrence's work, contrasts deep integration with the "shallower" preliminary endeavour of liberalizing trade only. Deeper integration involves

> coordination, if not complete harmonisation, of other policies including competititon policies, product standards, regulatory regimes, investment codes, environmental policies, labour standards and so on. He [Lawrence] argues that such integration may confer gains on member countries by lowering the costs of production and improving efficiency in general. [8]

Indeed, Lawrence views freer trade (followed if not accompanied by freer access for investment) and customs union [9] as "shallow integration": freer trade and investment are merely preliminary steps toward full integration.

Panagariya points out that the almost subliminally positive language of deep integration (both are "good" words, he writes) suggests that it must be a good thing. Panagariya does not agree, but his disagreement is still based in the language of the economist: "harmonisation is … not a welfare-enhancing proposition"; "optimal pollution and labour standards depend on income levels." [10] This may be true; as a devout non-economist, I simply don't know (although I confess

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[5] Thomas d'Aquino, Security and Prosperity: *The Dynamics of a new Canada-United States Partnership in North America* (Presentation to the Annual General Meeting of the Canadian Council of Chief Executives, January 14, 2003).
[6] Aaron et al., at xviii.
[7] These are the second and third "sources of tension" that Aaron et al. identify as resulting from "behind-the-border" debates and negotiations between states; the first is "cross-border spillovers", such as transboundary pollution, the impact of non-tariff barriers or "lax rules in one nation [that] erode the ability of all other nations to enforce banking and securities rules": pages xviii-xxvii. Failures in economic regulation involving Enron, WorldCom, Arthur Anderson, Nortel and other corporate giants come to mind in the latter context.
[8] Panagariya, at 505-506.
[9] In free trade areas, members have no internal barriers to trade, and differential external tariffs; in customs unions there is the added dimension of a common external tariff for non-members: Lawrence, at 7.
[10] Panagariya, at 506.

suspicion about "optimizing" peoples' health and the environmental quality upon which it depends).

So, although the deep integration concept has a foundation in the language of the dismal science, it can neither be explained nor its implications understood in economic terms alone. My perspective is that regulatory mandates are often a reflection (albeit imperfect and sometimes contradictory) of broader contemporary political and social preferences. Regulatory policies are thus at the heart of the theory of "deeper" integration. [11] In the following section, I consider the regulatory reform currently underway in Canada under the banner of "smart regulation". In the final pages I begin to explore its relationship with deepening Canada-U.S. integration.

Smart regulation: As with deep integration, it is difficult to embrace all the roots of "smart regulation" [12] at the same time. A key record in the debate is a book called Smart Regulation: Designing Environmental Policy.[13] It rather comprehensively considers innovative combinations of policies and instruments, actors and institutions, using case studies from several countries and focussing on the environmental effects of the chemical and agriculture industries.

By contrast, the larger body of recent Canadian regulatory chatter, and I count the report of the External Advisory Committee on Smart Regulation (EACSR) as exemplary in this respect, is largely unempirical and ungrounded in context. To the extent that the EACSR report relies even implicitly on Gunningham and Grabosky, it lacks even a small measure of that book's substantive content. Instead, it relies almost exclusively on the complaints it heard from industry about the heavy burden of existing Canadian regulations. [14]

Like deep integration, "smart regulation" suggests something positive that ought to be embraced without question, but my experience with the federal government's initiative suggests otherwise. The following narrative is an overview of the status of "smart regulation" in Canada. While the term is not easily defined, it can be explained.

For almost two years I followed the activities of the so-called External Advisory Committee, which was appointed by the former prime minister in 2003 and reported to the current government in September 2004. The committee held no public meetings. The majority of its membership was drawn from the private sector.

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[11] Lawrence, at 7. Although he notes elsewhere that national autonomy and political sovereignty are threatened or at least implicated by "behind-the-border" changes to regulatory regimes, here Lawrence understates the significance of issues triggered by regulatory differences, referring benignly to "complex problems [that] remain because of differing regulatory policies among nations."

[12] I will insist on the quotation marks around "smart regulation" for a couple of reasons. First, it is intended as a reminder that the term is another empty vessel into which is poured items such as "fewer regulatory barriers" and "less regulatory duplication", again (as with efficiency or liberalization) as ends in themselves. I do not wish to suggest that such goals are never desirable but rather, that the EACSR did not adequately evaluate them against other goals.

[13] Neil Gunningham, Peter Grabosky with Darren Sinclair (Oxford: Clarendon Press, 1998).

[14] External Advisory Committee on Smart Regulation, *Smart Regulation: A Regulatory Strategy for Canada (Report to the Government of Canada)* (Canada, 2004) [EACSR Report]. The report and background materials are online at <http://www.pco-bcp.gc.ca/smartreg-regint/en/index.html>.

I coordinated a series of submissions to the EACSR for the Canadian Environmental Law Association (CELA). In our initial submission to the EACSR,[15] we defined the purposes of social regulation, as opposed to direct market regulation [16] (a distinction that the EACSR also made in defining its work plan). We defined our starting-point in the traditional linkages among a representative democracy, the regulations it produces and the rule of law,[17] and we reviewed both historic and current public opinion research, including that commissioned by the EACSR itself, that consistently confirms Canadians' preference for regulatory health, safety and environmental protections over reliance on the free market for protecting these public goods. [18]

From this foundation, we remarked on "the central and essential place of regulation in our legal, economic and social systems" and concluded that "smart regulation", if it is to have any meaning, must mean "government acting in a manner that effectively protects the environment and public health," and all of the capacity within government that that responsibility entails. [19]

From the beginning of the process, I looked for signals of the direction the EACSR would eventually take. What advice on regulatory reform would the Committee give? In the 2000 report of the federal Auditor General I found a recommendation, to which the government has never adequately responded, that symbolizes both the key weakness of the current Canadian system of social regulation, and a sore point for both the EACSR and the government. In a chapter entitled "Federal Health and Safety Regulatory Programs", the Auditor General wrote:

> The federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs, particularly *the balance that the government has reached to protect Canadians and [simultaneously] address budget, social, economic and trade objectives*. The government should revise its regulatory policy and other policies to reflect this emphasis. [20]

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[15] *CELA Submission to External Advisory Committee on Smart Regulation* (April 2004), available at http://62.44.8.131/coreprograms/detail.shtml?x=2017. [CELA submission]

[16] CELA submission, at 9.

[17] It is worth reproducing these linkages here:

> Above all, regulation is a fundamental element of the "rule of law" (or the "supremacy of law"), meaning our system of democratic governance. The rule of law … depends on the role of and authority residing in the state, in return for the understanding that actions of the state are authorized by the elected representatives of the public. Implicit in this is representative and responsible government; that is to say, a government that is responsible to citizens. For regulation to have meaning in this context, it must be distinguished from non-binding instruments and approaches that lack regulatory reinforcement. In the past, CELA has discussed regulation in terms of its democratic characteristics, namely fair and consistent decision-making (including equality before the law); public accountability; and due process. These elements suggest the need, where relevant, for regulation that meets the requirements of natural justice and procedural fairness. … [R]egulatory regimes that allow decision-making without public scrutiny, and those whose mandates imply a service and promotion relationship concurrently with an oversight relationship, need to be revisited." CELA submission, at 5-6.

[18] CELA submission, at 3-4.

[19] CELA submission, at 10.

[20] Chapter 24, 2000 Report of the Auditor General, paragraph 24.94 (emphasis added). In the same chapter, the Auditor General noted unease reported by senior regulatory officials about the growth of a "client-service" culture that the officials saw as conflicting with their legislative responsibilities.

In short, the Auditor General was concerned that regulators were required to take into account economic considerations (including weighing the economic benefits of a proposed course of action against its anticipated costs, with all the familiar attendant problems of cost-benefit analysis) at several stages during the regulatory process, but that no preference was expressed in the *Regulatory Policy* between consideration of the regulatory protection responsibility and economic factors in this "balancing" process.

I have written elsewhere [21] that the *Government of Canada Regulatory Policy* [22] fails to make explicit the favoured considerations in this "balancing" exercise, allowing excessive discretionary decision-making, beyond the scrutiny of the Canadian public (and beyond what is justified for the smooth operation of a national bureaucracy), with the result that it fails to reflect, let alone address, the inequality of power in decision-making. The *Regulatory Policy* has undergone periodic review and overhaul on several occasions, usually every five to seven years, since its introduction in 1986. The last version was in place from 1995 to 1999, and the EACSR recommends in its report that it be amended again. [23] The EACSR's emphasis is on timeliness (once again, means are mistaken for ends) and on transparency for "stakeholders" rather than for the public. The committee's proposed "Smart Regulatory Policy" [24] retains the existing policy's emphasis on achieving the elusive "greatest net benefit" for society. There is no mention of the specific, existing legislative obligations of the individual departments.

Noting the central objective of the current *Regulatory Policy* that regulatory powers should be exercised in a manner that "results in the greatest net benefit to Canadian society", and that this may result in economic interests being favoured over others, CELA urged the EACSR, echoing the Auditor General, to recommend that the government clarify the policy's equivocal "balance" between protection of public goods and the promotion of economic growth. This was CELA's central recommendation in an August 2004 letter to the members of the EACSR, signed by 45 other national and local groups and individuals. [25] As I noted earlier, the committee's final report included few if any substantive changes compared to the draft version, let alone any changes to the "balance".

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[21] "From a policy to democracy is but a step: Democratic administration and the Government of Canada Regulatory Policy" (unpublished paper written for *Democratic Administration*, a graduate course in law and political science, York University, December 2003)

[22] *Government of Canada Regulatory Policy* (Privy Council Office, 1999). Although regulation encompasses much more than a single policy (and includes practice, convention and culture), all indications are that the Policy has both symbolic power and is reflective of the larger federal regulatory environment. A Treasury Board manual identifies the Regulatory Policy as the "key policy governing regulation in Canada": see *A Guide to the Regulatory Process for TBS Program Analysts* (Treasury Board Secretariat, no date), online at http://www.tbs-sct.gc.ca/ri-qr/processguideprocessus_e.asp (accessed 1 December 2003, "Modified: 2002-12-09"). The EACSR report calls it "the central government policy for regulatory intervention" (at 50).

[23] EACSR Report, Annex III, "A Proposal for a new Regulatory Policy for Canada", at 133-136.

[24] EACSR Report, at 50-52, and Annex III.

[25] The letter can be found online at <http://62.44.8.131/coreprograms/detail.shtml?x=2017>. In addition to asserting that "protection" deserves higher status than "innovation", "competition" and "strategic advantage" in the regulatory process, the letter also urged the committee to recommend that the government reinstate adequate scientific, regulatory and enforcement capacity in its regulatory departments and agencies, that voluntary non-regulatory initiatives are no substitute for real regulation, and that precautionary measures must be more fully injected into existing risk assessment and risk management processes.

The proponents of "smart regulation" seem to be motivated by a desire to sell the concept as something new, rather than as new packaging for old objectives: less government intrusion on economic activity, less public scrutiny of the safety of products, and fewer restraints on development projects. For example, one of the few changes that was made to draft versions of the EACSR report, was the deletion of the following sentence from the final version:

> The Committee believes that, in the 21st century, 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. [26]

The general thrust of the *status quo* approach remains, however: the final report pays lip service to protection of public goods, and places a clear priority on the need for promotion of "important new industries like biotechnology" and the importance of not inhibiting "competitiveness, productivity, investment and the growth of key sectors." [27] The preservation of this thrust in the EACSR report is best exemplified by the assertion (under the heading "What is Smart Regulation?") that "Smart Regulation is both protecting and enabling" [28] (that is, "simultaneously"). This normative statement about the "objective" of regulation ignores the concerns of both the Auditor General (and senior government officials mentioned in the 2000 report) and of public interest groups participating in the EACSR's consultations.

Many of the principles of "smart regulation" are a reformulation of the problematic "balancing act" and a repackaging of efficiency and competitiveness objectives. Consider the following, from a letter to the editor of *The Hill Times* newspaper by the senior vice-president, policy, of the Canadian Chamber of Commerce:

> The recommendations put forth by the EACSR will lead Canada's regulatory system in a new direction, supporting both Canada's economic and social interests.
>
> Smart regulation is not deregulation; it is an approach to regulation that strengthens the regulatory system by eliminating inefficiencies, cooperating with international efforts, increasing intergovernmental cooperation, undertaking transparent consultation, using a risk management approach, giving more attention to compliance and enforcement, and better monitoring regulatory impacts. The status quo approach to regulation is not an option for Canadians who want an economy that will increase their standard of living over time and that will afford [sic] government programs to increase their quality of life. [29]

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[26] *Smart Regulation in Canada: A Consultation Document* (EACSR, July 2004), at 9 (emphasis in original). After I noted at a consultation meeting in July 2004 that there was nothing new about this balance, and that this was the core of the Auditor General's objection in the 2000 report, this sentence did not appear in the EACSR's final report. See CELA's *Remarks to the EACSR* (July 21, 2004), at http://62.44.8.131/coreprograms/detail.shtml?x=2017.

[27] EACSR report, at 10.

[28] EACSR report, at 12.

[29] Michael Murphy, "Smart regulation is not deregulation" (Letter to editor in The Hill Times, October 11-17, 2004, at 5). The letter was published in response to one by two colleagues and me (Hugh Benevides, Paul Muldoon and Mark Winfield, "Safety

The final EACSR report does emphasize the importance of using a broad combination of instruments to achieve legislative objectives, although considerable emphasis is given to reliance on market mechanisms and removing legislative constraints, by further centralizing regulatory decisions (for example, by "increasing the challenge function" – already considerable but not publicly transparent – of the Privy Council Office), and by extending the reach of the *Regulatory Policy* to legislation [30] (potentially further impairing Parliamentarians' ability to influence the content of bills).

Where deeper integration and "smart regulation" collide: Canada-U.S. relations

"Smart regulation" implicates three main categories of the Canadian government's relationships with other governments. The first category is regulatory relationships with countries outside North America. Of course, very different and important issues are raised depending on whether the subject is relations with the developing world, Japan or the European Union. The second main category is within the federation. At issue here are federal dealings among the provincial, territorial and aboriginal governments. [31]

Canada-US relations is the third category. Although the EACSR report offers few prescriptions relating specifically to the Canada- U.S. relations, the general direction gives some clues of the policy direction. First, the committee proposes to add to the already ambiguous tests in the *Regulatory Policy* (benefits should outweigh costs; adverse impacts on the capacity of the economy to generate wealth and employment should be minimized; and no unnecessary regulatory burden should be imposed) a supposedly "strategic" approach, characterized by such unhelpful guidance as the following:

- "Canada should develop its own regulatory requirements only when they are necessary in order to meet national goals or values"
- In the absence of international consensus on a standard, "if the approach of key trading partners meets Canadian standards for protection, their approach should be adopted"
- "The government should focus on those areas where standards are necessary for the health and safety of Canadians, where Canada is a leading innovator and host to significant R&D investments, or where Canada has important national policy objectives to pursue." (Here the committee emphasizes the promotion of sectors "having significant innovation potential, such as biotechnology.")
- "Canada should identify and target the areas where it wants to be an international leader." [32]

First? Ottawa sends mixed signals on regulations" (Letter to editor in *The Hill Times*, October 4-10, 2004, at 15)). Nowhere in our letter did we assert that "smart regulation" was equivalent to deregulation.

[30] EACSR report, at 50.

[31] For example, the Mackenzie Valley gas pipeline received particular attention in the EACSR report. This project is a major factor behind the government's commitment in the last Speech from the Throne to "consolidate federal environmental assessments and [to] work toward a unified and more effective assessment process." [*Speech from the Throne to open the First Session of the Thirty-Eighth Parliament of Canada* (Canada, October 5, 2004), at 12.] Federal environmental assessment is a particularly pesky bugbear for the mining and oil and gas industries.

[32] EACSR report at 19, 24 and 25.

This "strategic policy framework" is to be applied to all international regulatory relationships, and not just those between the US and Canada. If followed, this advice would inspire little public confidence in Canada's own readiness for threats to human health and the environment arising from new technologies, products, pharmaceuticals and water- or food-borne disease. It would also chip away at what few linkages remain between Canadians and their regulators.

In addition to this general direction, in the context of North American cooperation the committee recommended "the removal of regulatory impediments to an integrated North American market and the elimination of the tyranny of small differences [between regulatory systems]." While conceding the obvious point that "some of these regulatory variations arise from differences in policy objectives," the committee expressed concern that "the cumulative impacts can significantly affect a company's ability to do business and, thus, can impede trade and investment." [33]

In the second half of its report, the EACSR explored particular sectors or "areas of regulation" including "manufacturing and product approval" (automotive manufacture and assembly, the drug review process, and new substances notification under the *Canadian Environmental Protection Act, 1999*); biotechnology and life sciences; "enabling First Nations economic development"; the environmental assessment process; and oil and gas exploration and development both offshore and in northern Canada. Review of the committee's recommendations in these areas is beyond the scope of the current paper. It is sufficient to say here that the committee recommends similarly equivocal formulae for deciding when it is in Canadians' interest to regulate. Improved "timeliness" and "efficiency" are leading criteria. Again, the public protection demands of the particular policy areas are largely neglected. The report focuses on "trade irritants" [34] rather than the possibility that some regulatory difference between sovereign nations is inevitable or desirable.

In summary, the committee appeared to be more concerned with "Canadian competitiveness" and incentives to trade and investment by multinational corporations in Canada, than by the need to protect against threats. The committee mentions the protection imperative, but the overall tone suggests further, incremental abdication by Canada of its regulatory responsibilities.

I should emphasize that in the context of defining appropriate directions for regulatory reform, I do not take the position that the Canadian system is to be preserved "at all costs" against an American or any other system. Demonstrating that either Canadian or U.S. standards, procedures and institutions are stronger than the other country's is a very tricky proposition. Each country has a highly developed series of regulatory systems, designed to fit particular circumstances, context and culture. I am purposely not referring here to the efficacy of these systems; we are all aware of the weaknesses of various regimes and political systems.

[33] EACSR report at 21.
[34] For example, see table: "Examples of Canada / U.S. Regulatory Differences". EACSR report at 76.

Similarly, I am not promoting protectionism in opposition to liberalization. I'm suggesting, instead, that a debate on regulatory reform must seriously consider contexts of individual regulatory areas. What do we want from toxic substances regulation? From pesticide regulation? Pharmaceuticals? Herein lies the connection to the rule of law and the knowledge of departments like Environment Canada: traditional regulations, namely subordinate legislation made by specific authority given in Acts of Parliament, have the necessary attributes of accountability that the rule of law requires. Not only is the scientific and other expertise of departments such as Environment Canada indispensable; their ministers and not the central agencies are legally accountable for implementing laws and regulations.

Accountability problems arise where decisions are made at the inter-departmental or cabinet levels, or where decision-making power is made, with limited transparency, in the Prime Minister's Office, the Privy Council Office, the Department of Finance or the Department of Justice. A central problem is how to resolve complex regulatory problems requiring input from the many agencies within and outside the federal government (for example, in consultations with provincial and other national governments), without weakening the statutory ties that bind citizens to Parliament.

Are we smart yet?

Very few signs of "smart regulation" are evident since the EACSR issued its report and was disbanded:

- Even as "smart regulation" got a promotion – to "smart government" – in the October 2004 Speech from the Throne, the EACSR's recommendations have been assigned, for the most part, to various federal departments for implementation. There is no sign that the government is willing to have a public debate on "smart regulation" before implementing it.

- The significance of new cabinet committees (Canada-U.S., Global Affairs, and Security, Public Health & Emergencies, for example) is not yet clear. Although his department enacts and is responsible for probably more regulations than any other in the government, the Minister of the Environment is neither a member of the Operations committee nor the Treasury Board, the cabinet committee that approves new regulations and Orders in Council.

- The House of Commons Standing Committee on Industry, Natural Resources, Science and Technology has launched a study of Canada's industrial strategy, regulatory and foreign investment frameworks, including a review of "progress in implementing its "Smart Regulation" initiative and responding to the recommendations of the EACSR." [35]

[35] See "Study on Canada's Industrial Strategy …", online: <www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=91690>.

- At Environment Canada, the new minister and deputy minister have been consulting representatives of industry and environmental groups on a proposed new "Competitiveness and Environmental Sustainability Framework", and a proposed consultation process for achieving the framework. [36] The desired objective of the proposed framework is, at best, both competitiveness and environmental quality at the same time. At worst, "enhanced well-being" for Canadians and enhanced competitiveness are the real objectives. The proposed consultation is expressed as a mechanism "for industry-government collaboration" (and there is the typical, parenthetic reference to "stakeholders" elsewhere in the document). NGOs are identified as having the potential to "bring expertise" and "enhance transparency." This is reflective of the conventional, relatively weak role of public interest groups in the prevailing industry-business compact. The implication that the presence of NGOs alone will somehow "enhance transparency" does not take into account the responsibility of government to prevent economic activity from threatening the environment, health and safety. The presence of NGOs may ultimately give some false legitimacy to the consultation process. Without further resources to boost the capacity for public interest groups, aboriginal organizations and others to participate, alongside comparatively well-resourced government and industry groups, in what promises to be a long and gruelling process, the public interest could be left behind.

- Privy Council Office has been assigned the task of implementing the EACSR recommendations concerning the *Regulatory Policy*. A preliminary information meeting I attended with a PCO official in February 2005 suggested that PCO is taking the EACSR report as just one source of input, not the sole starting-point, for its review, which is a good sign. However, the public good protection – efficiency/competitiveness tension identified by the Auditor General appears not to be on the agenda for resolution as part of the PCO's process, which likely means that a new regulatory policy will emerge with the problematic public protection – economic efficiency "balance" at its core.

None of this tells us much about the current status of "smart regulation", except that it appears to have gone "deep": underground, that is. It shares with deep integration the characteristics of unelaborated principles and platitudes, and assumptions about common objectives that are unjustified because they have not been verified through real public discourse.

Disappointed that the EACSR virtually ignored the submissions of the public interest environmental community, CELA wrote a detailed letter to the Prime Minister to advise him of our concerns.[37] Instead of a substantive response, we received (from the prime minister's manager of correspondence) an acknowledgment of receipt and an assurance that our comments "have been carefully reviewed." Instead of either referring our letter to any one minister responsible for implementing "smart regulation", or indicating that a substantive reply

[36] Competitiveness and Environmental Sustainability Framework (Environment Canada presentation deck, November 3, 2004), and Sector Sustainability Tables: Smart Regulations and Beyond (Environment Canada presentation deck, November 17, 2004) (author's files).
[37] The letter can be found online at <http://62.44.8.131/coreprograms/detail.shtml?x=2017>.

is forthcoming from the prime minister himself, the official expressed his certainty that other ministers "will wish to give your views on this matter every consideration."

At this particularly frenetic moment in Canada-US relations, one has the feeling more than ever that our government's true policy intentions must be looked for at a deeper level than the headlines allow. Mainstream media analysis of politics often does little justice to the context of complex regulatory matters, in which many actors are at work behind the scenes. For example, the Canada-US "joint statement on common security [and] prosperity" signed by President Bush and Prime Minister Martin in late November 2004 resolved, under the heading "Prosperity", to "pursue joint approaches to partnerships, consensus standards and smarter regulations that result in greater efficiency and competitiveness, while enhancing the health and safety of our citizens". Without exploring the implications for Canadian public protection regulations, John Ibbitson of the Globe and Mail referred to this efficiency-focussed joint statement as setting "an agenda of steady-as-she-goes agreements to improve security, bilateral trade and the environment". In the same column he wrote that both countries hope to

> expand an agreement that authorizes teams of customs officials to work on the other's territory to preclear goods and people crossing the border. There might also be progress in harmonizing some of the *redundant regulatory frameworks that have each country conducting the same tests of the same products and separately reaching the same results*. [38]

Rarely do such media accounts delve more deeply into policy substance, preferring instead to focus on capital-P "Political" developments or on single, high-profile issues, with the result that mad-cow disease or softwood lumber becomes emblematic of more nuanced relationships.

Nor does a review of the "smart regulation" discourse alone tell us where the government wishes to take us. To the extent that proponents of "smart regulation" are also seeking deeper integration with the United States, parliamentarians and members of the public will have to keep a vigilant eye on a wide range of policy areas, in order to ensure that Canadians' interest in preserving domestic capacity to protect public goods is not further diluted.

What do I propose instead of the EACSR's – and presumably, the government's – vision for "smart regulation"? How about a sincere public debate on "the fundamentals": what do we mean by "enhancing our quality of life"? What are the real ends of improving "efficiency" for business? And how do these objectives relate to the trade-offs, in terms of the body burden of chemicals each of us now carries, and in terms of skyrocketing cancer rates and greenhouse gas emissions? What do we want from government? And how can government deliver? Only through open, transparent deliberations will Canadians discover the implications of deeper integration or "smarter regulation."

[38] John Ibbitson, "Tensions are easing, and that's a good thing". Globe and Mail (1 December 2004), A1 [italics added].