The Ontario Regulation And Policy-Making Process In A Comparative Context: Exploring The Possibilities For Reform

A Report Prepared For The Environmental Commissioner of Ontario

October 1996

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Preface

In December 1994, the Environmental Commissioner of Ontario (ECO) undertook a research project concerning environmental policy and regulation making by governments in various jurisdictions in Canada and the United States. One important goal of the project was to collect baseline information about environmental policy- and regulation-making activities in the Ontario government in the early 1990s so that the ECO could try to evaluate changes to these practices after the *Environmental Bill of Rights, 1993* was implemented.

Correspondence was sent to representatives of each of the prescribed ministries requesting that they provide the ECO with information on the ministry's procedures for policy and regulation making and direct us to those statutes, regulations, orders, policies and/or guidelines that apply to environmental policy and regulation making in the ministry. All of the ministries contacted provided some information and cooperated with this study.

We also contacted officials in provincial and federal environment ministries in other Canadian jurisdictions and federal and selected officials in the U.S. and asked them to provide us with information. These government officials provided valuable information for the project and continue to exchange information with the ECO about projects and issues of mutual concern.

In addition, the ECO sent correspondence requesting input on the project to more than 300 organizations representing major industry associations, environmental non-government organizations, labour unions, and aboriginal organizations in Ontario and Canada. More than 50 different groups responded to our requests with detailed letters and submissions. The ECO appreciates the time and energy that these groups invested in their submissions for this project. The information that was provided to the ECO is referred as "confidential correspondence to the ECO" in the notes to Part Two of this report.

This paper is based on independent studies commissioned by the Environmental Commissioner of Ontario (ECO). It does not necessarily reflect the ECO's position and is provided as reference material only.

To assist with preparation of a report based on the survey, outside researchers and writers were retained. These outside researchers and writers included: Mr. Joe Castrilli, an environmental lawyer at the firm of Morris/Rose/Ledgett in Toronto; and Dr. Mark Winfield, Director of Research for the Canadian Institute for Environmental Law and Policy. In addition, a number of ECO staff worked on this aspects of this report including: Karen Beattie, Legal and Policy Analyst; Nina Lester, Policy and Legal Officer; and Cathy DeRubeis, Researcher.

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Executive Summary

The Ontario *Environmental Bill of Rights (EBR)*, enacted in December 1993, has the potential to have profound effects on the process by which environmental laws and policies are made in the province. The *EBR's* impacts are likely to be especially significant in the formulation of regulations and other, less formal, forms of subordinate legislation, such as policies and guidelines. This is critically important as, given the broad, enabling character of Ontario's environmental statutes, the bulk of the substantive content of environmental laws are provided through regulations, policies and guidelines.

This paper examines the impact of the *EBR* on the process by which regulations, policies and guidelines are made in Ontario. It will also compare the existing and emerging situation in Ontario with the approaches of the Canadian federal government, other Canadian provinces and territories, and the United States federal government. Finally, on the basis of this analysis, potential means by which the effectiveness, efficiency, fairness, and accountability of the Ontario regulation and policy-making process can be further improved are identified.

Such a study is timely in light of the current debates in Canada, the United States and other Organization for Economic Cooperation and Development (OECD) countries regarding the role of regulation as an instrument of public policy. In Ontario, deregulation was a major theme in the Progressive Conservative Party's June 1995 "Common Sense Revolution" platform. The new government's commitment to regulatory "reform" was affirmed in its Throne Speech of September 17, 1995. The Ontario Ministry of the Environment and Energy announced the launch of a review of the 78 regulations which it administers in November 1995.

Government interest in economic and social deregulation is being driven by a complex mix of factors. These include reduced government resources as a result of efforts to reduce levels of public debt, and pressures to harmonize regulations which are seen to act as non-tariff barriers to trade through the 1988 Canada-U.S. Free Trade Agreement (CUSTA), 1994 North American Free Trade Agreement (NAFTA) and the Uruguay Round General Agreement on Tariffs and Trade. Furthermore, the mobility of capital facilitated through such agreements has produced additional pressures for social deregulation, as firms seek to make investments where they can maximize the externalization of costs and the retention of profits. In addition, business interests have become increasingly vocal in their arguments that existing regulatory requirements in Canada impose non-productive costs on the affected firms, act as deterrents and barriers to innovation, investment and job creation, and thereby undermine competitiveness.

The political situation with respect to the role of the government in Western societies has been complicated by the decline of the credibility of the state as a protector of public goods over the past 30 years. This has been a result of high profile failures of regulatory systems in the areas of public health and safety, and environmental protection. In Canada, events like the Westray mine disaster, the destruction of the East Coast groundfish fishery, and the contamination of the Canadian blood supply with the Acquired Immune Deficiency Syndrome (AIDS) virus have called the capability and

competence of government regulators into question. However, members of the Canadian public continue to place strong emphasis on the role of governments in the protection of the environment, and the health and safety of their citizens.

Over the past 15 years, several studies have been undertaken with respect to the regulatory process in Canada and, more particularly, Ontario. These have identified problems in a number of specific areas regarding the regulatory process, including the means by which regulations and policies are developed, the manner in which they are made available to affected interests and the public, the uneven enforcement of regulatory requirements, and the impact of regulations on the competitiveness of the affected firms. Concerns have also been raised regarding the implications of the growing use of framework legislation for the accountability of governments.

Both the Canadian and U.S. federal governments have undertaken extensive regulatory reform exercises over the past 15 years. These efforts have included the establishment of elaborate systems for the management and oversight of the regulatory process, including requirements for formal cost/benefit analyses of proposed regulations. However, there is substantial evidence that the additional costs and delays associated with meeting these requirements have had the perverse effect of discouraging agencies from amending or withdrawing existing regulations, even when such steps are appropriate in light of changed circumstances and new information. Extensive systems of regulatory responsibility may also present barriers to the adoption of new regulations which are necessary to protect the environment or safeguard human health and safety. The U.S. experience has demonstrated the risks of judicially-driven ossification of the regulatory process as well.

Requirements for public consultation in the regulation and policy-making process vary among Canadian provinces. Quebec is currently the only province with a legal requirement for the pre-publication of all draft regulations prior to their promulgation, although there is a trend towards establishing requirements for consultation on environmental and other regulatory initiatives as a matter of policy in other provinces. However, these moves appear to be motivated as much by business concerns over the impact of regulations as by a desire to increase public participation in the process. Some provinces, particularly Alberta and Newfoundland, have undertaken large scale regulatory reviews intended to eliminate substantial proportions of their existing regulatory frameworks. Alberta's programs appear to be having a significant influence on the approach of the government of Ontario.

Based on the wide range of concerns expressed by members of the Legislature and non-governmental stakeholders, the effectiveness, efficiency, fairness and accountability of the regulation and policy-making process in Ontario needs to be improved. However, some commentators say rapid and wholesale regulatory reviews, such as those undertaken in Alberta and Newfoundland, and now under way in Ontario, are unlikely to produce such an outcome, and in fact, run the risk of weakening requirements essential to the protection of human health and safety, and of the environment.

Rather, there is a need to focus on practical changes to improve the effectiveness, efficiency, fairness and accountability of Ontario's regulation and policy making system. The experiences of other jurisdictions, and the structures provided by Ontario's *EBR,* indicate potential ways forward in this regard. One important step that the provincial government could take would be to extend the *EBR* model of establishing legal requirements for public notice and minimum comment periods to all major

regulatory and policy proposals made by the government. A basic framework of this nature, including a requirement that the government indicate how public comments were taken into account in decision-making, can be implemented without either an inappropriate expansion of the role of the courts in policy-making, or the "ossification" of the decision-making process.

In addition to the establishment of basic notice and comment requirements, there are a number of other ways in which the accessibility of regulatory information to the public and affected parties can be improved. The use of plain language drafting, the provision of summaries of the purpose and provisions of proposed and final regulations and policies, the identification of sources of additional information, and the indexing of Ontario's regulations would all be useful measures in this regard. The development of more effective mechanisms for meaningful consultations with the public and stakeholders, will also be important.

The report argues that new measures should be designed to achieve environmental, health and safety objectives while facilitating efficiency and innovation. In particular, performance, as opposed to design, standards should be employed where appropriate and environmental permitting procedures should be integrated across media (i.e. air, land and water). In addition, the consolidation of reporting requirements under different regulations should be undertaken where it is appropriate and can be achieved without the weakening of environmental protection requirements or the loss of accountability or enforceability. In the longer term, the integration of regulations dealing with different aspects of the same subject, such as the environmental and occupational health and safety aspects of toxic substances, should be considered.

The report also suggests the province seek to ensure stability in the regulatory process. In particular, recently enacted regulations and policies should not be reopened without good reason. The petition process established through the *EBR* may provide a useful model for the identification of regulations and policies in need of review. In general, regulatory review efforts should focus on older requirements which may be outdated, employ design as opposed to performance standards, or otherwise require review.

In addition, efforts should be made to strengthen the technical capacity of the province's regulators. The adoption of full-cost recovery user-pay systems for environmental approvals would provide one means of ensuring that the technical capacity of the province's regulatory agencies is maintained or even enhanced. The use of economic instruments, where appropriate, and the removal of subsidies which encourage environmentally unsustainable activities and practices, should also be pursued. Furthermore, consideration should be given to following the U.S. practice of establishing compliance assistance programs for small businesses and communities.

Finally, the report suggests that steps must be taken to strengthen the Legislature's ability to hold the cabinet to account for its regulatory decisions. In particular, a disallowance procedure, similar to that which exists for the federal House of Commons, should be established. More broadly, the Legislature should seek to give policy direction through its legislation, rather than simply authorizing the executive to act on a given subject. The use of omnibus legislation to deal with non-administrative matters should be avoided. Committees of the Legislature should also be empowered, like committees of the House of Commons, to conduct policy studies on matters under their jurisdiction on their own initiative.

The report concludes that the regulatory and policy framework which protects Ontario's environment and the health and safety of its residents has undergone significant changes over the past quarter century. It has never been easy to establish new environmental protection requirements. Those standards and requirements which have been implemented have been put in place for good reason. They should not be radically altered, or even dispensed with, without giving careful thought to the consequences for present and future generations of Ontarians.

The Ontario Regulation And Policy-Making Process In A Comparative Context:

Exploring The Possibilities For Reform

I. Introduction

The Ontario *Environmental Bill of Rights (EBR)*, enacted in December 1993, has the potential to have profound effects on the process by which environmental laws and policies are made in the province. The EBR's impacts are likely to be especially significant in the formulation of regulations and other, less formal, forms of subordinate legislation, such as policies and guidelines. This is critically important, as given the broad, enabling character of Ontario's environmental statutes, the bulk of the substantive content of environmental laws are provided through regulations, policies, and guidelines.

This paper seeks to examine the impact of the *EBR* on the process by which regulations, policies, and guidelines are made in Ontario. It will also compare the existing and emerging situation in Ontario with the approaches of the Canadian federal government, other Canadian provinces and territories, and the United States federal government. Finally, on the basis of this analysis, potential means by which the effectiveness, efficiency, fairness and accountability of the Ontario regulation and policy-making process can be further improved will be identified.

1) Regulations as Instruments of Public Policy

Regulations can be defined as rules, made and enforced by the state, restricting or specifying the nature of social and economic activity. These can take the form of formal subordinate legislation, where the executive (Governor-General or Lieutenant-Governor and federal or provincial cabinet respectively) is authorized by statute to make legally binding regulations.[1] These rules can also be imposed through less formal forms of subordinate legislation, such as policies and guidelines.[2] Although not legally binding themselves, they provide the basis for contents of other legally binding instruments,[3] such as certificates of approval issued by the province under Ontario's *Environmental Protection Act*.

In general, regulations have been grouped into two broad categories: economic and social. Economic regulation refers to the rules controlling prices that firms in an industry can charge, or the rules setting conditions of market entry or exit for producers.[4] The original rationale for such regulation, first introduced in the late nineteenth century, was that natural monopolies, such as railways and telegraph companies, where not subject to competitive price setting, and that therefore the state had to intervene to ensure reasonable prices and profits.

Social regulation deals with issues cutting across specific industries, and is usually related to the protection of public goods, such as occupational health and safety, consumer protection, environmental quality, and the conservation of natural resources, which would be threatened if left to the marketplace. Regulation of this nature is more recent than economic regulation in Canada, and underwent a significant expansion between the late 1960s and early 1990s[5] as public concern over environmental quality, public health and consumer safety grew.

2) Deregulation as Public Policy

As the twentieth century unfolded and economic regulation was applied to new industries, such as trucking and air transport, it became increasingly apparent that these industries were using regulation to restrict the ability of potential competitors to enter their fields. Furthermore, economic regulatory agencies often seemed to be captured by the industries they were intended to regulate, becoming more concerned with promoting the interests of the regulated industries than the public interest. Finally, as it became apparent that some natural monopolies could encompass competition, economic deregulation came to make sense not only to economists, but also to the public and its elected representatives.[6] As a result, over the past 20 years economic regulation has been in decline in Canada, with such fields as transportation, telecommunications and financial services all experiencing partial deregulation at the federal and provincial levels.[7]

There is no comparable rationale, however, for the relaxation of social regulation related to the protection of public goods. Indeed, in this context, regulations enjoy a number of advantages as instruments of public policy. They have the potential to provide for certainty of outcome, through the attachment of significant penalties for prohibited behaviour. This is particularly important in areas such as occupational health and safety, the protection of consumers and the environment, and the conservation of natural resources, where the intention is to ensure the health and safety of citizens, and to safeguard the sustainability of essential environmental systems.

Well-designed social welfare regulations can have additional advantages. The imposition of environmental protection or other requirements on an economy or sectoral-wide basis can ensure fairness by providing that all firms in a given sector have to meet the same requirements at the same time. Commentators consider this preferable to the application of standards on a case-by-case basis, which can result in firms in the same sector being subject to different requirements at any given time. It is for this reason that, for example, industry initially welcomed the Ontario government's Municipal-Industrial Strategy Abatement (MISA) program, which sought to replace the existing control order- based system, in which water pollution control requirements were imposed on a plant-by-plant basis,[8] with sector-wide discharge standards set through regulations.[9]

It has also been argued that well-designed public welfare regulations can enhance the competitive position of the affected firms by triggering innovation and upgrading.[10] Domestic standards that anticipate international trends are considered to be particularly beneficial, as they can assist in giving domestic firms a lead in developing products which will be valued in other markets.[11] Conversely, it has also been noted that jurisdictions which lag behind competing jurisdictions in their requirements often lose their domestic markets for the affected products to foreign suppliers.[12]

The role of both social and economic regulation in Canadian society has become increasingly controversial over the past 15 years. Deregulation and the reduction of the role of government in the economy has become a major public policy theme in Canada, the United States, and other Organization for Economic Cooperation and Development (OECD) countries.[13] Economic and social deregulation was a key component of the Republican Platform in the 1980 U.S. Presidential election, and was vigourously pursued by the first and second Reagan administrations.[14] The same direction was subsequently adopted by Canada's Progressive Conservative government following its election in 1984. More recently, deregulation and regulatory reform have been central elements of the

Republican "Contract with America" platform in the November 1994 U.S. Congressional elections, and Canadian federal Liberal government's "Jobs and Growth" strategy released the following month.[15]

In Ontario, deregulation was a major theme in the Progressive Conservative Party's June 1995 "Common Sense Revolution" platform. The Party's platform committed a Progressive Conservative government to:

> "appoint an arms-length commission on red tape to review all current regulations affecting business. Any regulation which can't be justified will be eliminated within 12 months of a Harris government taking office."[16]

This commitment was reaffirmed in the new Ontario government's Throne Speech of September 17, 1995. The Ministry of the Environment and Energy subsequently announced the launch of a review of the 78 regulations which it administers in November 1995.[17] In addition, a committee of government members of the provincial Legislature was established the following month, with a mandate to review all regulations made by the Ontario government and its agencies, boards and commissions.[18] This "Red Tape Commission" released an interim report in June 1996.[19]

3) What Drives Social Deregulation?

i) Globalization, Harmonization and Competitiveness

The making of new consumer protection, environmental quality, and occupational health and safety regulations in Canada has never been easy. The industrial sectors potentially affected by such regulations have frequently deployed, with considerable success, the wide range of economic and political resources available to them to resist regulatory initiatives by government.[20] Notwithstanding these barriers, business interests and many neo-classical economists[21] argue that many of those regulatory requirements which have been established impose non-productive costs on affected firms, act as deterrents and barriers to innovation, investment and job creation, and thereby undermine the competitiveness of Canada's economy.[22]

More broadly, interest in de-regulation has arisen due to reduced government capacity to administer regulations effectively. This has been primarily as a result of efforts to lower levels of public debt. In addition, the 1988 Canada-U.S. Free Trade Agreement (CUSTA), 1994 North American Free Trade Agreement (NAFTA) and the Uruguay Round General Agreement on Tariffs and Trade (GATT) have generated pressures to harmonize regulations which are seen to act as non-tariff barriers to trade.[23] Furthermore, the process of the "globalization" of economic activities facilitated through such agreements and, in particular, the increased mobility of capital, has produced additional pressures for social deregulation, as firms seek to make investments where they can maximize the externalization of costs and the retention of profits.[24]

ii) The Decline of the Credibility of Governments as Protectors of Public Goods

The political situation with respect to the role of government in Western societies has been further complicated by a decline of the credibility of the state as a protector of public goods. This has

been a result of high profile failures of regulatory systems in the areas of health, safety and environmental protection over the past 30 years. In Canada, the thalidomide episode in the early 1960s[25] was the first of a series of such failures. More recently, events like the St. Basil-le-grande PCB fire,[26] the Hagersville tire fire,[27] the Westray Mine disaster,[28] the destruction of the East Coast groundfish fishery,[29] the near destruction of the West Coast salmon fishery,[30] the contamination of the Canadian blood supply with the Acquired Immune Deficiency Syndrome (AIDS) virus and other diseases,[31] and the health effects of approved medical devices, such as artificial breast implants,[32] have called the capability and competence of government regulators into question.[33]

iii) Public Opinion and the Role of Government

There continues to be evidence that members of the Canadian public place a very strong emphasis on the role of government in the protection of public goods, such as the environment, and the health and safety of their citizens. Specifically regarding the environment, in a public opinion survey published by the Environics Research Group and Synergystics Consulting in September 1995, 78 per cent of the respondents said that environmental regulations should be strictly enforced even in times of recession. In comparison, only 20 per cent suggested that enforcement should be made more "flexible" under such circumstances.[34]

Similarly, in a June 1995 survey by Ekos Research, members of a general population sample placed "a clean environment" second only to "freedom" in a hierarchy of values for the federal government.[35] In the same survey, "competitiveness" and "minimal government," were ranked twentieth and twenty-second respectively on the list of twenty two values. This is consistent with the results obtained when the potential roles of government as a protector of public goods and as a promoter of private sector economic interests are juxtaposed directly in public opinion surveys. In such situations there tends to be overwhelming support for the public good protection function.[36]

4) Specific Concerns with the Regulatory Process in Canada

Over the past 10 years, a number of studies have been undertaken with respect to the regulatory process in Canada and, more particularly, Ontario. These have identified problems with respect to the regulatory process, including the means by which regulations and policies are developed, the manner in which they are made available to affected interests and the public, the uneven enforcement of regulatory requirements, and the impact of regulations on the competitiveness of the affected firms. Concerns have also been raised regarding the implications of the growing use of framework legislation for the accountability of governments. Legislation of this type permits the cabinet to make regulations in relation to a given subject, but provides no specific policy guidance or parameters with respect to the content of these regulations.

i) Processes for the Development of Regulations and Policies

There have been long-standing criticisms of the traditional processes by which Canadian governments have developed regulations and public policy, particularly in the environmental field. Many commentators have observed that the development of Canadian environmental regulations and policies has typically been characterized by bipartite bargaining processes between governments and the affected economic interests, from which other stakeholders have been excluded.[37] However, even economic interests have complained that the consultation processes associated with the development of

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regulations and policies are erratic and haphazard,[38] and frequently take place too late in the process to be meaningful.[39]

These comments have lead to observations that it is frequently not so much the content of regulations which are found objectionable, as the processes by which they are made, introduced, applied and amended. In 1993, for example, the Sub-committee on Regulations and Competitiveness of the House of Commons Standing Committee on Finance observed 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."[40]

More recently, in a February 1995 report, the Secretariat to the Standing Joint Committee of the House of Commons and Senate for the Scrutiny of Regulations, reached a similar conclusion, noting that:

> "Those critical of the use of regulations as a policy instrument typically characterize regulations as inflexible, difficult to amend, and therefore as being inefficient.
>
> ... 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 regulation *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."[41]

These comments reflect, among other things, the degree to which even basic requirements for public notice and consultation in the development or amendment of regulations have not been firmly established in Canada. The pre-publication of draft regulations and invitations for public comments prior to promulgation are currently only legal requirements in Quebec and, to a limited degree Ontario, as a result of the *EBR*. However, there is a trend toward requiring public notice and comment periods before the promulgation of new regulations as a matter of government policy in a number of Canadian jurisdictions.

ii) Form and Access

Major criticism has also been directed at the manner in which information about new or amended regulatory requirements is conveyed to the public. In Ontario, all regulations must be published in the **Ontario Gazette** within one month of their filing. Similar requirements exist at the federal level and in the other provinces. In effect, the Gazettes are governments' primary instrument for conveying information about new and amended regulations. Unfortunately, they are rarely read by those affected by new regulations, and even if one does consult a Gazette, it is often difficult to find information on specific subjects.[42]

In its 1988 report on regulatory reform, for example, the Ontario Legislature's Standing Committee on Regulations and Private Bills noted that the **Ontario Gazette** does not identify the statutes under which given regulations are made, and contains subject headings of only limited usefulness.[43] The Committee also noted that no proper subject index exists in relation to Ontario

regulations, making the identification of the requirements in place in relation to a given topic extraordinarily difficult.[44] Major concerns have also been expressed at the federal and provincial levels regarding the degree to which regulations are drafted in language which "only some lawyers can understand."[45] This is a particularly serious problem in Ontario where, unlike the **Canada Gazette**, the **Ontario Gazette** provides no explanatory notes giving plain language summaries of regulations or of the reasons for their enactment.

In many ways, these problems are even more serious with informal forms of subordinate legislation, such as guidelines and policies. Even the basic requirement in all Canadian jurisdictions for gazette publication of the final versions of regulations does not apply to guidelines and policies. Ontario, as a result of the *EBR*, is the only Canadian jurisdiction which requires the pre-publication and provision of public comment periods regarding draft policies, and even this requirement is limited to environmentally-related policies.

iii) Uneven Enforcement

A further complaint of regulated parties has been the uneven enforcement of regulations and inconsistent applications of policies by different agencies, and even by the same agency over time.[46] Strong and consistent enforcement efforts are widely regarded as essential to fairness among regulated firms. Firms that make efforts to comply with environmental requirements should not be placed at a competitive disadvantage with those who do not by failures on the part of governments to establish effective enforcement regimes. This need for equity among regulated parties has been highlighted in numerous parliamentary and academic reports on regulation.[47]

iv) Impact on Competitiveness

The impact of regulation on the competitiveness of individual firms has been the subject of extensive public debate over the past few years. Industry representatives have argued that regulatory requirements impose non-productive costs on the affected firms, and can act as deterrents and barriers to innovation, investment and job creation.[48] However, there is also a significant school of thought which contends that well-designed public welfare regulations can enhance the competitive position of the regulated party. A substantial body of empirical evidence exists which supports this conclusion.[49]

A recurring theme in industry criticisms of regulatory requirements relates to the cumulative effects of regulatory requirements imposed by different agencies and levels of government.[50] There are particular concerns regarding the tendency for requirements imposed by different agencies or levels of government to be piled on top of each other, rather than being applied in a coordinated fashion, even when dealing with the same subject matter.[51] Complaints have also been expressed regarding the impact of differing regulatory requirements being applied to products in each province, which make it difficult to sell into the national market.[52]

The nature of regulations that protect public goods, such as the environment, means that they may prompt negative responses from the affected industries. The implementation of environmental protection requirements either in the form of regulations or economic instruments may require the internalization of costs of production which the firm has previously externalized. In effect, the firm's access to a public resource for the purposes of waste disposal or exploitation is either limited or denied. This transfers a previously socialized cost of production back from society as a whole to the firm.[53]

v) Increasing Use of Framework Legislation

> "...delegated legislation is now the ordinary and indispensable way of making the bulk of the non-common law of the land. It is beyond question that subordinate legislation is not confined to detail and more often than not, embodies and affects policy."[54]

Many Canadian legal and constitutional scholars have commented that we now live in an age of skeleton legislation, in which not only the details of legislation, but also substantive provisions and policy, are provided through regulations and other even less formal forms of subordinate legislation such as policies and guidelines.[55] In effect, framework legislation authorizes the cabinet to make regulations in relation to a given subject. However, it provides no specific policy guidance or parameters with respect to the content of these regulations.[56]

This trend has been the subject of increasing criticism by legislative and parliamentary committees over the past twenty years. Indeed, in its January 1993 report **Regulations and Competitiveness**, the House of Commons Standing Committee on Finance concluded that, through the combination of the provision of broad delegated authority, and weak parliamentary supervision of the use of that authority, Parliament had lost control of the regulatory process, and that the executive's formal accountability to Parliament for regulation-making therefore, in practice, amounted to a "dead letter."[57] The Ontario Standing Committee on Regulations and Private Bills reached a similar conclusion in its 1988 study of the situation in Ontario.[58]

5) Conclusions

Over the past 15 years deregulation has become a major theme of public policy in Canada, the United States and other OECD jurisdictions. In Canada, criticism of the regulatory process has been focused on a number of areas. Almost all non-governmental stakeholders have been critical of the level of accessibility and openness provided by governments in the processes of developing, introducing, and applying regulations. In addition, business interests have raised major concerns regarding the economic impact of regulatory requirements, particularly with respect to environmental protection and occupational health and safety requirements. It is argued that such regulations impose unnecessary costs on businesses, and are barriers to innovation and competitiveness.

On the other hand, there is a growing school of thought which argues that the relationship between well-designed public welfare regulations and economic performance is more complex than the simple zero-sum model put forward by some economic interests. In addition, public opinion surveys indicate that the public continues to place a very high priority on the role of governments in the protection of public goods, such as environmental quality.

These criticisms suggest that there is room for improvement in the way in which regulations, and other less formal forms of subordinate legislation, such as policies and guidelines, are developed and applied in Ontario. At the same time, to be acceptable to the public, reform must proceed in a manner which in no way compromises the protection of the health, safety, or environment of Ontarians. Indeed, a strengthening of the capacity of the regulatory framework to protect these public goods should be a central theme of the process.

II. THE PRE-*EBR* REGULATION AND POLICY-MAKING PROCESS IN ONTARIO

1) The Basic Regulation and Policy-Making Process

The essential elements of the process for the making of regulations and policies in Ontario prior to the enactment of the *EBR* were fairly straightforward, and the process continues to apply to regulations and policies outside of the scope of the *EBR*. The development of the contents of new regulations and policies rests with the ministry responsible for the administration of the legislation under which a regulation is to be made, or in whose area of responsibility a given policy falls. Minor or routine administrative policies and guidelines may be put in place by the responsible minister without seeking cabinet approval.

Cabinet approval is required for regulations which are authorized by enabling legislation to be made by the Lieutenant-Governor in Council, and for policies with significant implications. Proposals for new legislation, or amendments to existing legislation also require cabinet approval. Generally, legislative drafting does not begin until after a cabinet submission has been approved by cabinet.[59] Proposed policies are considered to warrant cabinet attention in the event that they:

* seek to create a new government program, or substantially expand, eliminate or alter an existing program;

* propose to introduce a new government policy or position on an issue where none has existed before, or would change a position which has been previously stated as a government policy or position;

* are a response to a request from cabinet to develop a priority response to a public policy issue of a strategic or urgent nature; or

* involve the undertaking of a significant public consultation.[60]

In the cases of regulations and policy proposals which require cabinet approval, a cabinet submission is developed and approved by the minister and deputy minister of the originating ministry, and submitted to cabinet with a recommendation for approval. Regulations or policies with financial implications (i.e. affecting spending or revenues) also require approval from the Management Board of Cabinet before they can enter the cabinet process.

Once a proposed policy enters the cabinet process, it is usually referred for policy review to the appropriate cabinet committee. If approval is obtained at this level, policy proposals may proceed to the full cabinet for discussion. Proposed regulations, on the other hand, are initially submitted to the Regulations Committee of Cabinet. This committee may recommend or withhold approval, or recommend further discussion by the full cabinet. If approved by this committee, proposed regulations may proceed to the full cabinet.

With respect to policies, once cabinet approval is obtained, the originating ministry may announce and implement the policy. Usually a communications program is approved by the cabinet along with a major policy or program proposal. In the case of regulations, if and when the cabinet approves a regulation, the Chair signs the Order-in-Council, it is dated and numbered by the Executive Council Office, and then signed by the Lieutenant-Governor. Signed copies of the order are

filed by the originating minister with the Registrar of Regulations. Regulations come into force the day after filing. The *Regulations Act* requires that they be published in the **Ontario Gazette** within one month of filing, unless otherwise specified in the Order-in-Council.[61]

The Legislature has no direct input or involvement in the development of regulations or policies. However, the Standing Committee on Regulations is required under the *Regulations Act* to report its observations, opinions and recommendations regarding particular regulations and the regulatory process in general to the Legislature.[62] Currently, neither the Standing Committee nor the Legislature as a whole can disallow regulations. This is in contrast to the situation at the federal level, where under House of Commons rules, the House may disallow new regulations or amendments to existing regulations.[63] In its 1988 report on regulatory reform, the Legislature's Standing Committee on Regulations and Private Bills recommended that a similar procedure be introduced in Ontario.[64]

The role of Legislative committees in the development of policies is limited. Unlike Standing Committees of the House of Commons, Standing Committees of the Ontario Legislature are not permitted to undertake policy studies on their own initiative. Rather, they can only undertake such studies when issues are referred to them by the Legislature. In practice, such references have been rare, and have usually occurred during periods of minority government.[65]

2) Consultation Requirements

The development of new regulations and policies, and major amendments to existing regulations and policies, is usually accompanied by a consultation process conducted by the originating ministry. These consultations generally fall into two streams. There is an external consultation stream, which is focused on contacts with organizations and institutions outside of the provincial government structure, such as municipalities, industry associations, labour unions and other non-governmental organizations. The second, internal, stream is focused on discussions with other agencies of the Ontario government, particularly other ministries whose policies, programs, activities or clientele might be affected by a proposed regulation or policy.

i) External Consultation Processes

Statutory Requirements

Formal requirements for public consultation before the implementation of new regulations or policies were rare in Ontario prior to the enactment of the *EBR* and remain limited in those areas not affected by the *EBR*. The most significant examples include the requirements for notices in the *Ontario Gazette* and comment periods prior to the designation of substances under the *Occupational Health and Safety Act*,[66] and the development of schedules under the *Industrial Standards Act*.[67] More recently, a requirement for formal consultation processes in the development of forest management agreements by the Ministry of Natural Resources was introduced in the 1995 *Crown Forest Sustainability Act*.[68]

Informal Consultations

Beyond these requirements related to specific statutes, the nature and scope of external consultations undertaken by a ministry in the development or amendment of a regulation or policy has been at the discretion of the responsible minister. However, the current guidelines for cabinet

submissions do require evidence of consideration of the impacts of proposals on certain designated groups and regions.[69] This seems to imply a need for consultation to be able to address these issues fully. Furthermore, in practice, ministries usually undertake substantial consultation efforts in relation to the development or amendment of major regulations or policies. However, the scope and nature of these consultations varies widely from ministry to ministry, and with respect to different subject matter within ministries.

Ministry of Environment and Energy

The Ministry of Environment and Energy appears to be the only ministry which has developed a formal guideline for public consultation activities.[70] Over the past decade, the Ministry has conducted extensive public consultations on its major policy initiatives, including the 1986 Municipal-Industrial Strategy for Abatement (MISA), 1987 Clean Air Program (CAP), and 1991 Waste Reduction Action Plan (WRAP). The MISA program signalled a break with the past practice of limiting consultation to informal contacts with the affected industries. The process included the establishment of a multi-stakeholder MISA Advisory Committee (MAC) for the program, and the publication for public comment of draft policy documents, guidelines and discharge regulations for each of the nine industrial sectors to be covered by the program.[71]

In the case of the Clean Air Program, a series of public meetings were held across the province following the release of a discussion paper,[72] and a draft revised air pollution control regulation was to have been subject to a six month public comment period. The draft regulation was never published. The WRAP 3Rs regulations required major industrial, commercial and institutional generators of municipal solid wastes to conduct waste audits, develop waste reduction work plans, and implement source separation of specified materials. The proposed regulations were the subject of extensive consultation and discussion between the release of an initial discussion paper in October 1991, draft regulations in April 1993, and the promulgation of the final regulations in March 1994.

In addition to the MISA Advisory Committee, the Ministry has employed a number of other advisory bodies to assist in the development of major policies and standards. The Advisory Committee on Environmental Standards (ACES) was particularly important in this regard. In May 1990 the Committee was given a general mandate to advise the Minister of the Environment on the development of environmental standards in all media.

At the request of the Minister, the Committee could conduct reviews of proposed ministry standards, including consulting with the public by soliciting written comments, and conducting workshops or public meetings.[73] The Committee's work included public consultations on the Ministry's proposed new guidelines for the remediation of contaminated sites,[74] and on the Ministry's proposed Interim Ontario Drinking Water Objective for tritium.[75]

Both ACES and the MISA Advisory Committee were abolished by the provincial government in September 1995 as a cost-cutting measure.[76] At the time, the Minister of Environment and Energy suggested that the Committees had outlived their usefulness, stating that:

> "the foundation has been laid for the ministry to take advantage of the new EBR registry and do more direct consultation and standard setting."[77]

While some commentators suggest that the Ministry of Environment and Energy has

undertaken fairly sophisticated and elaborate consultation processes with respect to its major policy and legislative initiatives, consultations have been less structured in relation to more technical or local issues, including the granting of approvals for specific facilities. In situations of this nature, such as the recent development of policies on the confidentiality of environmental audits and on the environmental liabilities of lenders in relation to contaminated sites, the Ministry has been criticized for consulting only with a very limited range of stakeholders.[78] There also have been long-standing concerns over the use of emergency approvals under the *Environmental Protection Act* (*EPA*), particularly in relation to the extension of Certificates of Approval for municipal solid waste disposal sites.[79] Such approvals bypass requirements for public comment periods under the *EBR*, and for public hearings under the *EPA*.

Other Ministries

The approaches of other ministries to external consultations vary. The Ministries of Labour and Housing have tended to be the most active in this regard, and both deal with constituencies which are clearly identifiable, well-organized, and willing to participate in consultation processes. The Ministry of Labour's approach to the development of occupational health and safety standards for hazardous substances under the *Occupational Health and Safety Act* is noteworthy. This process is led by a committee comprising an equal number of management and labour members and is chaired by an assistant deputy minister. A subcommittee comprising an equal number of government, labour and management representatives also conducts public hearings on draft regulations. The Ministry considers these consultation processes to be essential to its work.[80]

The approaches of other ministries, such as Natural Resources, Transportation, Agriculture, Food and Rural Affairs, and Northern Development and Mines, to public consultation of major regulations, programs and policies is more *ad hoc*. While most maintain close informal contacts with their traditional clientele, public consultation exercises are undertaken on an as perceived to be needed basis, and consultation processes are designed case by case. As noted earlier, formal consultation processes are required in the development of forest management agreements by the Ministry of Natural Resources under the 1995 *Crown Forest Sustainability Act*. The Ministry also involves members of the public in its provincial parks planning process.[81] However, the Ministry of Natural Resources has been singled out for criticism by some stakeholders for being particularly heavy handed in its approach to public consultation processes.[82]

ii) Internal Consultation Processes

Consultations with organizations outside of the provincial government structure have tended to attract the most interest from parliamentarians and students of the public policy process. However, commentators suggest the consultative processes that occur among provincial government agencies in the development of new regulations or policies are equally, if not more, significant in terms of their impact on the ultimate content of public policy.

With respect to minor policies which do not require cabinet approval, some informal consultations with other ministries may occur as a courtesy. For regulations and major policy proposals, there are no formal requirements that other ministries be consulted, although the current guidelines for cabinet submissions indicate that consultation with at least those ministries present on the relevant cabinet committee is expected. It is also clear that it is expected that only major disagreements among ministries will be brought to the cabinet table for resolution.[83]

The importance of inter-ministerial consultation should not be underestimated. Ministries usually bring the perspectives of their major client groups to interministerial consultations and discussions. Indeed, some understand their role as representing the interests of their clients in discussions within the government. Natural resources and economic development agencies tend to be particularly important players in discussions around environmental policy, as they often represent the concerns of major natural resource development and industrial interests.[84] Major ministries may be in a position to effectively veto proposals from other agencies, or require major modifications to proposals before they can proceed to cabinet. This potential power is reinforced by the emphasis on the part of Cabinet Office on the need to minimize the number of issues brought to the table for resolution.

3) Criticisms of the Existing Ontario Processes

External stakeholders' perceptions of their ability to influence the regulation and policy development process vary widely. Businesses, large and small, and municipal and regional agencies, such as Conservation Authorities and utilities, suggest that the provincial government doesn't listen well, and that their advice is often ignored, while the views of ideologically-motivated special interest groups provides the basis of public policy.[85] In addition, small businesses often say they are particularly disadvantaged in the process, as they cannot afford government relations staff to deal with such matters.

Non-industry and government stakeholders suggest that the province always consults with business interests, but does not consult adequately or fairly with other stakeholders.[86] In its 1988 report on regulatory reform, the Ontario Legislature's Standing Committee on Regulations and Private Bills described the province's informal external consultative processes as "erratic," "by their (sic) very nature discretionary," and "inaccessible."[87]

Industry continues to say that consultations on new regulations and policies do not occur early enough to permit understanding and comment on the fundamental assumptions behind the introduction or modification of a regulation or policy.[88] Furthermore, concerns within the business community regarding the application of different regulatory requirements in each province,[89] and the cumulative effects of requirements applied by different agencies, appear to have increased. There are also calls for closer partnerships between government and industry,[90] more flexible applications of regulatory requirements,[91] the application of formal cost/benefit analyses to proposed regulations,[92] and a greater emphasis on the use of voluntary standards.[93]

At the same time, non-industry stakeholders continue to express concerns that governments always consult with business and industry, while either by accident or design, they are sometimes excluded.[94] It has also been observed that where non-industrial stakeholders have been included in consultations, they have found themselves outnumbered by business and municipal representatives, and their positions regarding regulatory and policy proposals are ignored.[95] This concern is reinforced by the imbalance in research resources which usually exists between non-governmental organizations and business interests.[96] Labour organizations have also said there is a failure to effectively address the cross-over in human health issues in environmental and occupational health and safety regulations, due to jurisdictional divisions between the Ministries of Labour and of Environment and Energy.[97]

Both industry and non-industry stakeholders share a number of concerns regarding the regulation and policy-making process. The need for some evidence that their comments on proposals have been considered, and some explanation as to why they have or have not been adopted has been singled out for particular attention.[98] Furthermore, many stakeholders have expressed support for the use of multi-stakeholder committees in the development of policies and regulations, provided that they include all key stakeholders, and provide them with fair and equal representation.[99]

4) Conclusions

Prior to the enactment of the *EBR*, public consultation processes in the development of regulations and policies were conducted largely on an *ad hoc*, as needed basis. This pattern continues with respect to regulations and policies whose development is not affected by the *EBR*. These approaches have prompted concern from some stakeholders regarding the accessibility and fairness of the regulation and policy development process in the province.

At the same time, there are indications that there is some potential for consensus among non-governmental stakeholders on the reform of the regulation and policy-making process in Ontario. This conclusion is reinforced by the degree to which business and environmental representatives were able to reach consensus in the development of the *EBR* itself. Commentators suggest that rather than acting on this potential consensus, and focusing on potential improvements to the regulation and policy-making process to enhance its effectiveness, efficiency, fairness and accountability, the provincial government has embarked on a rapid and sweeping regulatory review process.[100]

III. The Impact Of The *EBR* On Ontario's Regulation And Policy-Making Processes[101]

1) Introduction

The *Environmental Bill of Rights* has introduced significant changes to the environmental regulation and policy-making process in Ontario. Commentators suggest its most significant impact was to replace the previous discretionary approach to public consultation in the development and amendment of environmental regulations and policies with a standardized model which includes legally enforceable minimum requirements for public participation.

These elements, contained in Part II of the *EBR*, apply to proposals for policies and Acts for 13 ministries,[102] and to proposals for regulations and instruments by the Ministries of Environment and Energy, Natural Resources, Northern Development and Mines, and Consumer and Commercial Relations. An instrument is defined for the purposes of the *EBR* as a licence, permit, certificate of approval, control order or other legal authorization issued under an Act prescribed for the purposes of the *EBR*.[103] The provisions are scheduled to apply to the Ministry of Municipal Affairs and Housing by April 1998.[104] The *EBR* also establishes procedures for appealing issuances of environmental instruments by third parties, and permits members of the public to petition for reviews of existing laws, policies, regulations and instruments, or for new laws, policies and regulations.

2) The *EBR* Public Participation System

i) The Environmental Registry

One important element of the *EBR*'s public participation regime is the requirement for the provision of notice to the public of proposed activities within a ministry which could potentially affect the environment, by way of the Environmental Registry (ER). This is an electronic bulletin board accessible to those with a home or office computer and modem via an existing network (InterNet, GONet), or at a local public or university library or provincial government facility. To ensure consistency, the *EBR* specifies minimum standardized information requirements for notices placed on the ER.[105]

ii) Applicability of the *EBR* Public Participation System

There are four types of proposed decisions that are subject to the public participation regime of Part II: policies; Acts; regulations; and instruments.[106] Notice of proposals for these types of decisions, with certain exceptions, must be given on the ER, and are required to include a brief description of the proposal, a statement of the manner and time within which members of the public may participate in the decision-making process, information on where and when individuals may review written information about the proposal, and an address to which members of the public may direct written comments on the proposal.[107] Specific procedures exist for each of these different types of proposals.

Policies and Acts

Policies and Acts are treated identically for the purposes of Part II. There are two criteria which if satisfied, require a minister to give notice of a proposal for a policy or Act. The first

criterion (which also applies to proposals for regulations and instruments) is that the proposal "could have a significant effect on the environment." The *EBR* requires that ministers consider the following factors to determine whether a proposal, if implemented, could have a significant effect on the environment:

1) the extent and nature of the measures that might be required to mitigate or prevent any harm to the environment;
2) the geographic extent, whether local, regional or provincial, of any harm to the environment;
3) the nature of the public and private interests involved in the decision; and
4) any other matter that the minister considers relevant.[108]

The second criterion, which is only applicable to policies and Acts, requires ministers to consider whether the public should have an opportunity to comment on the proposal before its implementation. It could be argued that, in light of the philosophy and principles of the *EBR*, the section creates an implicit presumption in favour of public participation. However, ministers are granted wide discretion in this regard, although the exercise of this discretion is subject to review and public comment by the Environmental Commissioner.[109]

Once a decision is made to place a proposal for a policy or Act on the ER, comments are received for a minimum of 30 days.[110] These comments are reviewed and must be considered in the decision-making process by the ministry.[111] However, the ministry may consider a comment and decide not to act on it. Once a decision is made to implement a proposal, the minister must give notice to that effect on the ER, or by any other means the minister considers appropriate. The notice must include a brief explanation of the effect, if any, of public participation on the decision made.[112] The entire file is left on the ER at least 60 days before it is sent to archives.

Regulations

The procedure for public participation in proposals for regulations is similar to that for policies and Acts. However, there are several important differences. As with policies and Acts, Part II applies to proposals for regulations that could have a significant effect on the environment.[113] In determining significance, the minister must consider the same factors as for policies and Acts, although no general discretion is granted to the minister to determine whether the public should have an opportunity to comment, as is the case with policies and Acts. The public must be permitted a minimum of 30 days to comment on the proposal. The minister must also consider allowing a longer period in accordance with the factors set out in the *EBR*.[114]

The second important difference between proposals for regulations and those for policies and Acts is the option of the inclusion of a Regulatory Impact Statement (RIS) in the notice for a regulation. The minister shall include an RIS in a notice of a proposal for a regulation on the ER, if he or she considers it necessary to do so, to permit more informed public consultation on the proposal.[115] If included, an RIS must contain the following:

a) a brief statement of the objectives of the proposal;
b) a preliminary assessment of the environmental, social and economic consequences of implementing the proposal; and
c) an explanation of why the environmental objectives, if any, of the proposal

would be more appropriately achieved by making, amending or revoking a regulation.[116]

These provisions are similar to the federal government's requirements for publication of a Regulatory Impact Analysis Statement in the **Canada Gazette** prior to the promulgation of new regulations. However, the federal procedure includes the development of detailed cost-benefit analyses of regulatory proposals and, unlike the *EBR* process, is mandatory for all new regulations.

Instruments

Not all instruments are issued as a result of an application being submitted by a proponent. Some types of orders are issued on the initiative of the relevant ministry, and existing instruments may be amended by a ministry without an application being submitted by an applicant. The requirements of Part II of the *EBR* apply regardless of whether a proposal for a prescribed instrument is under consideration as a result of the government's or a proponent's actions.

The notification requirements for an instrument are based on the classification of the instrument. Each instrument, except for those deemed to be environmentally insignificant, is classified through regulations made under the *EBR*[117] as Class I, II, or III to specify a mandated level of notice and public participation. If a member of the public requires additional information about an application, that person may ask to view parts of the documents in question at the regional office or the issuing office of the ministry responsible for the proposal.

iii) Exceptions to the *EBR* Public Participation Requirements

There are five broad types of exceptions from the public participation requirements of the *EBR*.

Emergency Situations

The *EBR* recognizes that there may be situations where the public participation requirements of Part II are impractical because of an emergency. Specifically, the *EBR* provides that the requirement of public notice of proposals for policies, Acts, regulations or instruments does not apply where, in the minister's opinion, the delay involved in giving notice to the public, in allowing time for public response to the notice, or in considering the response to the notice would result in:

a) danger to the health or safety of any person;
b) harm or serious risk of harm to the environment; or
c) injury or damage or serious risk thereof to any property.[118]

If a decision is made to rely on the emergency exception and dispense with the public participation requirements, the minister must give notice of the decision, with reasons, to both the public and the Environmental Commissioner as soon as possible after the decision is made.[119]

EBR-Equivalent Public Participation Process

Section 30 of the *EBR* provides that the requirement for public notice of proposals for

policies, Acts, regulations or instruments does not apply where, in the opinion of the minister, the environmentally significant aspects of a proposal have already been considered in a process of public participation that was substantially equivalent to the requirements of the *EBR*. The following criteria must be met for such an exception to be granted:

a) the public notice was province-wide;
b) the public had an opportunity to comment; and
c) the comments were considered in the proposal.[120]

As with emergencies, the minister must give notice of the decision, with reasons, to the public and the Environmental Commissioner as soon as possible after the decision is made.

Proposals for Instruments to Implement an Environmental Assessment Act or Public Tribunal Decision

The *EBR* provides that the notification requirements for instruments do not apply where, in the opinion of the minister, the issuance, amendment or revocation of the instrument would be a step towards implementing an undertaking or other project approved by:

a) a decision made by a tribunal under an Act after affording an opportunity for public participation; or
b) a decision made under the *Environmental Assessment Act (EAA)*.[121]

The intent of this exception is to ensure that public participation processes are not duplicated. However, the effect of this provision in relation to the *Environmental Assessment Act* is to exempt all provincial and municipal public sector undertakings from the public participation requirements of the *EBR*, as all public sector undertakings are either reviewed under the EAA, or exempted from it. Notice would have to be provided for orders-in-council granting public sector exemptions from the *EAA*.[122]

Predominantly Financial or Administrative Measures

The *EBR* does not require public notice of proposals for policies,[123] Acts[124] or regulations[125] which are predominantly financial or administrative in nature. While on the surface, this appears to be intended to avoid filling the Registry with administrative proposals which may be of little interest beyond the government, commentators suggest it could permit the exemption from the *EBR*'s basic public participation requirements of decisions of considerable environmental significance. Reductions in the budgets of environmental programs may be exempted through these provisions, as may be the introduction of economic instruments, such as environmental taxes or charges. Administrative policies, which have significant environmental implications, such as purchasing requirements related to paper and other materials,[126] could be exempted as well.

Environmentally Insignificant Amendments or Revocations

The *EBR* does not require that a minister give notice of a proposal to amend or revoke an instrument, Act, policy or regulation, if the minister considers that the potential effect of the amendment or revocation on the environment is insignificant.[127] For its part, the Ministry of Environment and Energy has suggested that the types of proposals that could fall under this exception

might include amendments to correct typing, name or ownership changes, minor revisions where there will not be any impact on the environment, or requests for revocations of approvals where a process, system or equipment will no longer be used.[128] However, the determination of environmental insignificance is at the discretion of the responsible minister. The only oversight on exemptions of this nature provided for by the *EBR*, is through the Environmental Commissioner's mandate to review and report on ministers' exercises of discretion in relation to the *EBR*.[129]

iv) Enforceability of the *EBR* Public Participation System

Failure to comply "in a fundamental way" with the public notice and comment requirements of the *EB*R does not invalidate the new Act, policy, regulation or instrument. However, such failure in relation to an instrument may be judicially reviewed.[130] This provision is the one exemption provided to the "privative" clause contained in section 118 of the *EBR*, which otherwise exempts decision making related to the *EBR* from judicial review. Applications for judicial review with respect to compliance with the requirements of Part II of the *EBR*, must be made no later than 21days after the day on which the minister gives notice of a decision on the proposal.[131]

3) Right of Third Party Appeal under the *EBR*

Part II of the *EBR* also establishes a new procedure whereby certain individuals can appeal decisions made about proposals for Class I or II instruments.[132] Once notice of a decision with regard to a proposal for such an instrument is placed on the ER, an individual may seek leave to appeal the decision within fifteen days if the following conditions are satisfied:

a) an appeal process already exists for that instrument under another Act; and
b) the person seeking leave to appeal "has an interest" in the decision.[133]

These provisions permit third parties to appeal decisions on prescribed environmental instruments in any situation where those subject to a decision (e.g. the applicant for a certificate or approval) have a right to appeal the decision. Subsection 38(3) provides that any person who has exercised his or her right to comment on a proposal constitutes evidence that the person has an interest in the decision.

On the surface, these provisions represent a significant step forward in public participation in environmental decision making in Ontario. In the past, under many Ontario environmental laws, including the *Environmental Protection Act*, only those having a direct interest in a decision, such as the applicant for an approval, or the person subject to a control order, had the right to appeal a decision to an appellate body.

However, the *EBR* appeal provisions are subject to a very significant limitation. Leave-to-appeal will only be granted if:

a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
b) the decision in respect of which an appeal is sought could result in significant harm to the environment.[134]

This is a stringent test for granting leave to third party appeals. Indeed, several commentators noted at the time of the passage of the *EBR* that the test established a "virtually insurmountable" barrier to third party appeals of environmental decisions.[135] However, by July 1996 leaves to appeal had been granted to third parties on two occasions.[136]

The relevant appellate body is responsible for deciding whether leave-to-appeal will be granted. If leave is granted, the appeal is heard by the appellate body, in accordance with the current procedures of the body. Notice of appeals of Class I and II instruments will appear on the Environmental Registry as well, so that the public may participate in the appeal hearings.

Where leave-to-appeal is granted, the decision under appeal is stayed until the disposition of the appeal, unless the appellate body granting leave orders otherwise.[137] Notice of applications for appeal must be provided to the Environmental Commissioner by the appellant. The Commissioner places notices of appeal on the Environmental Registry.[138]

Instructions on how to appeal decisions subject to the *EBR* are provided on the approval, order or other instrument issued to instrument holders. If members of the public wish to participate in the appeal, they will have to contact the relevant appellate body.[139] In the case of decisions made by the Ministry of Environment and Energy, the Ministry has indicated that if the Ministry and the instrument holder are negotiating the appeal, members of public who have advised the Environmental Appeal Board that they wish to participate in the appeal may be given the opportunity to participate in the discussions.[140] Where the appeal cannot be resolved through negotiations among the parties involved, appeal proceedings will have to be conducted before the Environmental Appeal Board.[141]

4) Requests for Reviews of Laws, Regulations, Policies and Instruments Through the *EBR*[142]

A formalized procedure for requesting reviews of existing laws, regulations, and policies has been a long-standing component of proposals for environmental bills of rights in Canada.[143] A procedure for this purpose is set out in Part IV of the *EBR*. All decisions of ministries prescribed for the purposes of the *EBR* establishing Acts, policies, regulations and instruments are potentially subject to a request for a review,[144] except for decisions made in the last five years and in a manner consistent with the intent and purpose of Part II of the *EBR*.[145] There is also a process for requesting reviews of the need for new statutes, policies and regulations.[146]

The request for review process applies to decisions made by the Ministries of Environment and Energy, Agriculture, Food and Rural Affairs, Consumer and Commercial Relations, Natural Resources, and of Northern Development and Mines. The Ministry of Municipal Affairs and Housing will become subject to the right in April 1998.[147]

Two persons resident in Ontario may submit an application for review to the Environmental Commissioner.[148] The request is then referred to the appropriate minister(s).[149] The minister must acknowledge receipt of the application within 20 days.[150] Within 60 days of receiving the application for review, the minister must decide whether to undertake the review and provide a brief statement of his/her reasons to the applicants, the Environmental Commissioner, and any other person who might be directly affected by the decision.[151]

Section 68 of the *EBR* requires the minister not to review a decision made within the last five years that was consistent with the *EBR*'s public participation process,[152] unless there is social, economic, scientific or other evidence to suggest that a failure to undertake the review could result in significant harm to the environment.[153]

If the minister decides to proceed with a proposal for a policy, Act, regulation or instrument as a result of a review, such a proposal must be treated in a manner consistent with the *EBR* Part II system for public participation in decision making.[154] The review must be completed "within a reasonable time".[155] Finally, upon completion of the review, the minister must give notice of the outcome to those persons who received notice of the decision to undertake the review.[156] The notice must state what action has been, or is to be, taken as a result of the review.[157]

5) Conclusions

Commentators observe that the *EBR*'s provisions for public participation in environmental decision making are complex. They point out that understanding the elements of the system created by the *EBR* presents a significant challenge to professionals in the field, to say nothing of the situation of the ordinary citizens whose participation in decision making the *EBR* is intended to facilitate.

The *EBR*'s provisions also grant ministers a great deal of discretion in deciding what constitutes an environmentally significant decision. At the same time, the *EBR* does not permit ministers to provide formal hearings in situations where there are currently no provisions for such hearings, as is the case for granting approvals for air emissions under the *Environmental Protection Act*.

Failure to comply with the public notice and comment requirements of the *EBR* does not invalidate the new Act, policy, regulation or instrument, except that such failure in relation to an instrument may be appealed or judicially reviewed.[158] The only sanction otherwise available for exemptions of environmentally significant decisions from the *EBR*'s requirements, or for failures to follow those requirements fully, is in the form of a negative comment from the Environmental Commissioner in her annual report, or in a special report.

The *EBR*'s provisions for the possibility of third party appeals of environmental decisions opens the possibility of a new avenue for public participation in decision making. However, this opening is limited by the establishment in the *EBR* of a stringent test for leave-to-appeal.

The public participation regime created by the *EBR* may prove to be the most significant aspect of the *EBR*. The *EBR*'s basic notice and comment requirements, in combination with the Environmental Registry, should provide members of the public with a comprehensive window on environmental decision making in the province. The potential long-term effects of these requirements on environmental decision making in the province should not be underestimated.

The extent of the application of the *EBR*'s public participation provisions remains a major issue. On November 29, 1995 the government promulgated a regulation permanently exempting the Ministry of Finance from the *Environmental Bill of Rights*, as well as exempting measures related to financial restructuring from the public notice and comment requirements of the *Environmental Bill of*

Rights for 10 months. The exemptions from the *Environmental Bill Rights* prompted the Environmental Commissioner to make a special report to the Ontario Legislature, highly critical of the government's action, in January 1996.[159]

The Minister of the Environment and Energy has indicated the Ministry's intention to minimize its use of the financial restructuring exemption from the notice and comment provisions of the *Environmental Bill of Rights*.[160] The Ministry of Natural Resources, on the other hand, has interpreted the financial restructuring exemption widely. In particular, Ministry staff have stated that the Ministry views changes to permitting procedures as a result of fiscal reductions, such as the Bill 52 amendments to the *Aggregate Resources Act*, *Petroleum Resources Act*, and the *Mining Act* introduced into the Legislature in May 1996, as being excused from the notice and comment provisions of the *EBR* by the financial restructuring exemption regulation.[161]

IV. Regulation And Policy Development In The Canadian Federal Government

1) Introduction

The federal government has established elaborate procedures for the development and amendment of regulations in Canada. The federal regulatory process has been the subject of extensive reform efforts over the past two decades. These reform efforts have taken place in several distinct phases.

2) The Trudeau Era - 1972-1983[162]

The first steps to reform the federal regulatory process began in 1972, when the Standing Joint Committee of the House of Commons and Senate on Regulations and Other Statutory Instruments was established. This Committee was authorized to review all regulations after they had been made and registered, to ensure that they were appropriately authorized by legislation, did not trespass unduly on personal rights and liberties, and did not contain material that should be dealt with by Parliament through legislation. In 1988 the name of this committee was changed to the Standing Joint Committee for the Scrutiny of Regulations.

The establishment of the Standing Joint Committee was followed by a flurry of activity on the reform of regulation, starting in 1977. In that year, a Treasury Board Circular requiring the evaluation of all programs, including regulations, at least once every three to five years was issued.[163] The following year, the newly-created Office of the Comptroller-General was given the responsibility of overseeing the evaluation of all government programs, including regulatory programs.[164]

In December 1977, the President of the Treasury Board and the Minister of Consumer and Corporate Affairs announced the establishment of a requirement for Socio-Economic Impact Analyses (SEIA) for all major new regulations[165] in the areas of health, safety and fairness (HSF). Departments and agencies were required to identify major new HSF regulations, prepare the SEIA, and pre-publish the terms of the legal authority for, and the purpose of, these regulations. Summaries of the results of the SEIAs were to be published in Part I of the **Canada Gazette** at least 60 days before their promulgation. Departments and agencies were also required to make the complete analyses available to the public, and to respond to public comments.[166]

The SEIA requirements were intended to promote a more thorough and systematic analysis of the socio-economic impacts of new health, safety and environmental protection regulations, to improve the allocation of resources and the information available to decision-makers. The process was also designed to provide an opportunity for increased public participation in the regulation-making process. In practice, however, between 1978 and 1986 only a small number of SEIAs were produced relative to the number of new regulations introduced in that period.[167]

The establishment of the SEIA requirement was followed in July 1978 by a reference by the Prime Minister of the question of regulatory reform to the Economic Council of Canada. This reference arose out of the February 1978 First Minister's Conference. The Council released an interim report in November 1979,[168] and a final report in 1981.[169] Both reports focused primarily on the reform of economic regulation.

With respect to the environment, the Council identified the need for a strengthened legislative and regulatory framework in a number of areas.[170] The Council also stressed the potential for the use of economic instruments in environmental policy.[171] More generally, the Economic Council called for advanced notice of new regulations, opportunities for consultation on their content, assessments of the costs and benefits of major new regulations, and periodic reviews of regulatory programs and agencies.[172] The importance of governments providing funding to public interest groups to ensure fairness in the regulatory process was also emphasized.[173]

In the meantime, in December 1979, an Office of the Coordinator, Regulatory Reform was established within the Treasury Board Secretariat. The Office, with a staff of about 10 people, was the first entity within the federal government whose primary mandate was regulatory reform. The Office had two principle objectives: to improve public administration through reforms to the regulatory process; and to reduce the regulatory burden on the Canadian economy.[174]

In addition, in May 1980 a Parliamentary Task Force on Regulatory Reform was appointed. The Task Force delivered its report in December of that year.[175] Its recommendations were similar to those presented by the Economic Council. The Task Force called for improved consultation processes, the development of regulatory agendas by regulatory agencies, the pre-publication of proposed regulations, regular reviews of existing regulations, a strengthened role for parliamentary committees in overseeing the regulatory process, and increased federal government support to public interest groups to assist their participation in the regulatory process.[176]

The delivery of the Economic Council and Parliamentary Task Force reports was followed in May 1983 by the publication by the government of the first **Regulatory Agenda.** This document was intended to provide early notice of proposed major changes in federal regulatory activities. These Agendas were to be published twice annually and were intended "to provide the earliest possible notice of proposed or contemplated regulatory initiatives" for the purpose of fostering "constructive consultation" so as to produce "improved and less onerous regulation."[177]

3) The Mulroney Era - 1984-1993

The election of a Progressive Conservative government under Prime Minister Brian Mulroney in September 1984 marked the beginning of a new era in regulatory reform at the federal level. The reform of regulation was identified as one of the major themes in the Minister of Finance's November 1984 "Agenda for Economic Renewal". The "Agenda" stated that government:

> "intrudes too much in the marketplace and inhibits or distorts the entrepreneurial process. Some industries are over-regulated. Some are over protected, not just from imports, but also from domestic competition."

The impetus towards the reform of the federal regulatory process was reinforced in 1985 when the Task Force on Program Review released its report on the regulatory process. The Task Force noted that the reforms put in place by the previous government had resulted in some improvements in the regulatory process, but concluded that:

> "overall, little has been attempted, and even less accomplished. The 'system' is neither efficient nor adequate."[178]

The Task Force went on to describe the system as:

> "a largely unstructured, uncontrolled, highly variable, and thoroughly confusing mixture of legal requirements, policy guidelines and *ad hoc* administrative practices."[179]

In response, the government announced the first elements of a Regulatory Reform Strategy in February 1986. These included:

* the appointment of a Minister for Regulatory Affairs;

* a set of **Guiding Principles of Federal Regulatory Policy** intended to help government "regulate smarter;"

* the introduction of a *Citizens' Code of Regulatory Fairness*; and

* a Regulatory Program Improvement Package comprising 43 specific reform initiatives affecting regulatory programs in 16 federal departments and agencies.

These measures were followed in March 1986 by the introduction of a **Federal Regulatory Process Action Plan** by the newly established Regulatory Affairs Branch of the Office of Privatization and Regulatory Affairs. The Plan included five key elements:

* a requirement that all departments or agencies submit an annual regulatory plan to Cabinet. Once approved, proposed initiatives were to be consolidated and published in a new annual **Federal Regulatory Plan**, which would replace the previous bi-annual **Regulatory Agendas**.

* a requirement for the preparation of a Regulatory Impact Analysis Statement (RIAS) for each regulatory proposal submitted to ministers for approval, and its pre-publication in the **Canada Gazette** to solicit comments from the public. The elements of the RIAS were to include:

    * a description of why the regulatory proposal is being made, what is being proposed, and how it will be accomplished;
    * a description of the alternatives considered in the development of the regulatory proposals, including the status quo, and other governing instruments such as economic instruments and consensus standards, and the rationale for their rejection;
    * a substantiation of the consistency of the proposal with the *Citizens' Code of Regulatory Fairness*;
    * a description of the anticipated impact of the proposal, including costs and benefits, where the regulation is expected to have a major impact;
    * a proposed strategy for ensuring enforcement and compliance;
    * the name of a contact person for more information;
    * a consideration of paper-burden and small business impacts; and
    * a description of the consultation process undertaken in the development of the proposed regulation.

* a requirement for all departments to adhere to a consultation process including early notice, pre-publication of all proposed regulations amendments, and republishing new regulations as

amended;

* a requirement for the review of all regulatory statutes over a 10-year cycle by parliamentary committees, a review of all regulations over a seven-year period by a committee of cabinet, and evaluations of all regulatory programs for efficiency and effectiveness at least every seven years; and

* a strengthening of the role of parliament by ensuring that all statutory instruments were within the scope of the *Statutory Instruments Act*.

A number of further changes followed the introduction of the **Regulatory Process Action Plan**. Among the most important was the 1986 amendment of the Standing Orders of the House of Commons to incorporate a negative resolution procedure. This procedure is initiated by the Standing Joint Committee for the Scrutiny of Regulations. Where the Committee considers that a regulation should be annulled, it can make a report to the House containing a resolution to the effect that the particular regulation be revoked. Unless the House considers the report and votes against it, the House is deemed to have concurred with the resolution contained in the Report at the end of 15 sitting days after the motion for concurrence with the report is placed in the Order Paper.[180] This disallowance procedure has been used four times since its introduction.[181]

In February 1991, the Office of Privatization and Regulatory Affairs was dissolved. The Regulatory Affairs function was transferred to the Treasury Board Secretariat, and the President of the Treasury Board was designated as the Minister Responsible for Regulatory Affairs. This designation was continued when the Liberal government of Jean Chrétien came to power in October 1993.

4) The Current Federal Regulatory Process[182]

The federal process for the development and amendment of regulations is complex, and contains a number of steps which do not exist at the provincial level in Canada.

The formal process for developing a new regulation begins with the publication of a proposal by the originating department in the government's annual **Federal Regulatory Plan**. A **Notice of Intent to Regulate** may also be published in the **Canada Gazette**, Part I. It is expected that this will be followed by consultation with potentially affected parties. In the case of major environmental initiatives, such as Environment Canada's current Strategic Options Process (SOP) regarding the management of substances found to be toxic for the purposes of the *Canadian Environmental Protection Act (CEPA)*, consultation usually takes place through groups of non-governmental stakeholders formally established by the government. Other government departments also usually are consulted in the development of regulatory proposals. As at the provincial level, the originating department is responsible for drafting the proposed regulation and the accompanying RIAS.

Once the draft regulation and RIAS have been completed, the deputy minister of the originating department sends the proposed regulation and supporting documentation to the head of the Privy Council Office Section of the Department of Justice (PCOJ). Copies are also sent to the Regulatory Affairs Directorate (RAD) of the Treasury Board Secretariat (TBS), and to the Privy Council Office (PCO). Proposed regulations must also be submitted to the Treasury Board if they

have direct financial implications, such as introducing or changing a fee for a government service.

The PCOJ examines proposed regulations to make certain that they have a proper legal basis. This includes ensuring that they are authorized under enabling legislation, conform to the *Canadian Charter of Rights and Freedoms*, do not constitute unusual or unexpected use of enabling authority, and meet established style and drafting standards.[183]

The RAD reviews proposals to ensure compliance with the government's regulatory policy. In particular, it reviews proposals against the following criteria:

* the regulation must not impede the government's operations;
* the regulation must contribute to meeting the government's objectives, rather than merely adding to the proliferation of regulations;
* alternatives must have been considered;
* benefits must clearly outweigh social and economic costs;
* there has been adequate consultation with the public; and
* there has been adequate consultation with the provinces to ensure that federal and provincial regulations do not duplicate and overlap with each other.[184]

The PCO review is intended to ensure that regulatory proposals are consistent with overall government policies, and that there is an adequate communications plan accompanying the proposed regulations. The PCO also can play a major role in negotiations among departments over the contents of proposed regulations and policies, as it seeks to minimize the number of substantive issues brought to the cabinet table for resolution. As at the provincial level, this can have the effect of granting some major departments an effective veto over the contents of regulatory and policy proposals. In this context, natural resources and economic development agencies, such as Natural Resources Canada, Agriculture and Agri-Food Canada and Industry Canada tend to be particularly powerful voices on behalf of their industrial clients in discussions of environmental initiatives.[185]

Following the completion of the central agency reviews and consultations with other government departments, the originating department's minister approves the regulation and supporting documentation, including the RIAS and a communications plan, and submits both to the PCO (Order-in-Council Section) for consideration by the Special Committee of Council. If approved by the Special Committee of Council, the regulation and the RIAS are then pre-published in draft form in the **Canada Gazette**, Part I, with a minimum 30-day public comment period. Regulations subordinate to the 1988 Canada-US Free Trade Agreement or the *Canadian Environmental Protection Act (CEPA)* must be pre-published with a minimum 60-day comment period. Regulations affecting product standards must be pre-published with a minimum 75-day comment period.[186]

After pre-publication, the sponsoring department's minister submits the final regulation and the RIAS to the PCO for final approval by the Special Committee of Council. If the Special Committee approves it, the regulation is registered, and both the regulation and the RIAS are published in the **Canada Gazette**, Part II. Finally, the Standing Joint Committee for the Scrutiny of Regulations reviews all regulations and can propose to Parliament that a regulation be overturned.

In certain cases, legislation authorizes ministers to prescribe regulations without Governor-in-Council approval. However, PCOJ and TBS reviews are still required for ministerial regulations. Minor regulatory amendments to implement routine corrections with no policy implications, such as

minor errors in format, syntax, spelling, punctuation, and inconsistencies between English and French versions of regulations, may be made without the development of RIASs, communications plans, or pre-publication. Outdated[187] regulations or provisions of regulations may also be repealed in this way.[188]

In the case of major policies, these are usually referred for policy review to the appropriate cabinet committee when they enter the cabinet process. If approval is obtained at this level, policy proposals may proceed to the full cabinet for discussion. Once cabinet approval is obtained, the originating ministry may announce and implement the policy. Usually communications programs are approved by the cabinet along with major policy or program proposals.

Parliamentary committees tend to play a stronger role in the development of policies than those of the Ontario Legislature. This is a consequence of their right, established in 1986, to undertake inquiries and policy studies on their own initiative.[189] On occasion, over the past decade, standing committees of the House of Commons have called witnesses and presented reports and recommendations at odds with the direction of the government of the day.[190] Under House of Commons rules, the government is required to respond to committee recommendations within 150 days of their tabling when requested to do so by the committee.[191]

5) Criticism of the Current Federal Process

The regulatory program review process and implementation of the 1986 regulatory reform package were followed by the launch of a government-wide review of regulations and competitiveness in the government's February 1992 budget. This included the review of regulations administered by individual departments against the following criteria:

* was the problem which led to regulation sufficiently large to justify government intervention;

* was regulation the best choice in that case, with benefits examined in relation to costs;

* could the government intervention be carried out with existing or realistically anticipated resource levels; and

* was the government intervention consistent with the aim of enhancing the competitiveness of the private sector.[192]

The first departments targeted for such reviews were Transport, Consumer and Corporate Affairs, and Agriculture.[193] These initial reviews were completed in the fall of 1992. Environment Canada completed its regulatory review in November 1993.[194] The results of these reviews were largely inconclusive. Environment Canada, for example, stated that:

> "The review did not raise any significant competitiveness issues."
>
> "Due to the complexity of competitiveness, and to shortcomings in available data, conclusions on whether Environment Canada's environmental protection regulations impact on competitiveness are not yet possible."[195]

Despite ongoing complaints from industry,[196] only six of the 36 regulations administered by

Environment Canada were found to overlap with provincial requirements, and in two of the six cases, the overlap was only partial. The other four cases dealt with three older federal regulations dealing with toxic air emissions which had been rolled over into *CEPA* from the 1970 *Clean Air Act* and the Potato Processing Plant Effluent Regulations made under the *Fisheries Act*.[197] This conclusion regarding the very limited actual extent of duplication and overlap between federal and provincial environmental requirements has been confirmed by a number of other studies.[198]

In addition, between May and November 1992, the Subcommittee on Regulations and Competitiveness of the House of Commons Standing Committee on Finance conducted public hearings on the impact of regulations on the competitiveness of the Canadian economy. In its January 1993 report the subcommittee reported continuing concerns over the impact of federal regulatory requirements on Canada's competitiveness,[199] the adequacy of consultation processes in the development of new regulations,[200] the adequacy of cost/benefit analyses of new regulations,[201] and the inconsistent application and enforcement of regulatory requirements.[202] However, it is important to note that of the 42 non-governmental witnesses heard by the Committee, only one, the Consumers' Association of Canada, represented non-business interests.[203]

6) The Liberal Government and Current Reform Initiatives, 1993-1995

Many of the themes identified in the January 1993 report of the Subcommittee on Regulations and Competitiveness were subsequently adopted by the new Liberal government which came to power in October 1993. This was despite very strong commitments to strengthen the federal regulatory framework, particularly in the environmental field, contained in the Liberal Party's 1993 election platform.[204]

i) De-Regulation and the "Jobs and Growth" Agenda

The federal government announced a major package of regulatory reform proposals in December 1994 in a document entitled **Agenda: Jobs and Growth - Building a More Innovative Economy**. The document outlined seven major reform initiatives including:

* improving regulatory cooperation with the provinces to reduce obstacles to domestic trade caused by differences, duplications and overlaps in regulatory measures or regimes among governments under the Agreement on Internal Trade;

* improving management standards and processes and the consistency of regulatory proposals in the Departments of Agriculture and Agri-Food, Environment, Fisheries and Oceans, Health, Industry, National Revenue and Transport;

* requiring federal departments to resolve complaints according to generally accepted management principles to be developed in consultation with the public;

* the drafting of regulations in plain language;

* requiring federal departments to apply a Business Impact Test, developed by the Canadian Manufacturers' Association, or an equivalent analysis, when introducing major regulatory changes;

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* requiring federal departments to apply a Business Impact Test, developed by the Canadian Manufacturers' Association, or an equivalent analysis, when introducing major regulatory changes;

* improved access to information regarding the applicability of federal regulations to specific activities; and

* improved training in the formulation of cost-effective regulations, and in communications for federal officials.[205]

The government targeted six sectors: biotechnology; health, food and therapeutic products; mining; automotive production; forest products; and aquaculture, as priorities for regulatory reform to help create jobs and promote economic growth.[206] The precise nature of the proposed reforms is unclear, although in the areas of health, food, and therapeutic products, mining, biotechnology and aquaculture, it seems likely to involve the weakening of health and environmental protection requirements.[207]

ii) Bill C-62 - the *Regulatory Efficiency Act*

The government's December 1994 regulatory reform package also included the introduction of Bill C-62, the *Regulatory Efficiency Act*. This Bill would have enabled firms and individuals to enter into compliance agreements with designated regulatory authorities. Such agreements would have suspended the application of the relevant federal regulations to the affected firm.[208] The Bill would also have provided authority to delegate the administration of any federal regulation to any person, including other (i.e. foreign) governments.[209] Consultation related to the development of compliance and administrative agreements was to be limited to those directly affected by a proposed agreement.[210]

The Bill's introduction prompted a very strong negative response from environmental, labour, public health, consumers' and professional organizations, who described it as a threat to the principle of the rule of law and Canadians' health, safety and environment. These concerns were apparently widely shared within the government caucus as well. The Bill's prospects were further weakened by a February 1995 report from the Secretariat to the Standing Joint Committee for the Scrutiny of Regulations, which described it as "reviving the power of dispensation declared illegal by the (British Parliament's) 1689 *Bill of Rights*,"[211] and amounting "to a denial of the rule of law and contravention of the associated principles of equality and fairness."[212] The report also noted that both the Bill's compliance plan scheme and its administrative agreement scheme would have "a negative impact on the principle of government accountability."[213]

As a result of these widespread criticisms and concerns, the Bill was permitted to die on the order paper at the end of the Parliamentary session in December 1995.

iii) Bill C-84/C-25 - the *Regulations Act*

In April 1995 the federal government introduced Bill C-84, the *Regulations Act*. The Bill would reform and rename the *Statutory Instruments Act*, permitting the publication of regulations on a electronic registry, and requiring plain language drafting. The Bill would also permit the use of a simplified regulatory review process for the amendment of lists of persons, places, products, substances or other things in regulations or technical amendments to regulations. Finally, the Bill would permit the incorporation into regulations of materials produced by persons or bodies other than regulatory authorities.

Concerns have been expressed regarding the Bill's provisions for a simplified review process for amending lists and technical matters in regulations. The proposals for the incorporation of materials by reference into regulations has been the subject of criticism as well. Concerns have been raised regarding the accessibility of such materials to the public at large, and the processes by which they have been developed.[214] The Bill has also been criticized for its failure to introduce basic public notice and comment provisions into the federal regulation-making process.[215] Bill C-84 was not enacted prior to the end of the Parliamentary session in December 1995. However, it was re-reintroduced in the spring of 1996 as Bill C-25.

iv) Government of Canada Regulatory Policy

In November 1995, the federal government adopted a new federal regulatory policy. The policy requires that when regulating, regulatory authorities must ensure that:[216]

* they can demonstrate that a problem or risk exists, federal government intervention is justified, and regulation is the best alternative;

* Canadians are consulted, and that they have an opportunity to participate in developing or modifying regulations and regulatory programs;

* benefits outweigh costs to Canadians, their governments and businesses. In particular, when managing risks on behalf of Canadians, regulatory authorities must ensure that the limited resources available to government are used where they do the most good;

* adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed. In particular, regulatory authorities must ensure that:

    * information and administration requirements are limited to what is absolutely necessary and that they impose the least possible cost;

    * the special circumstances of small businesses are addressed; and

    * parties proposing equivalent means to conform with regulatory requirements are given positive consideration;

* intergovernmental agreements are respected and full advantage is taken of opportunities for coordination with other governments and agencies;

* systems are in place to manage regulatory resources effectively. In particular, regulatory authorities must ensure that:

    * the Regulatory Process Management Standards are followed;

    * compliance and enforcement policies are articulated, as appropriate; and

    * resources have been approved and are adequate to discharge enforcement responsibilities effectively and to ensure compliance where the regulation binds the

government.

It has been observed that these new requirements reinforce the previous government's move to establish barriers to the introduction of regulations which may adversely affect private sector economic interests.[217] Indeed, the new policy may make it difficult, if not impossible, to introduce significant new regulatory requirements related to environmental quality, consumer protection or public health.

v) Voluntary Initiatives and Standards

In addition to these explicit regulatory reform initiatives, over the past few years the federal government has placed increasing emphasis on non-regulatory approaches to the establishment of standards and guidelines, particularly in the environmental field. This theme of voluntary standard-setting by industry was recognized in the Subcommittee on Regulations and Competitiveness' January 1993 report.[218] Environment Canada, for its part, has stressed the promotion of voluntary industry initiatives to reduce emissions of toxic substances, particularly through the Accelerated Reduction/Elimination of Toxics (ARET) program.[219] In addition, over the past two years, the department has entered into a series of voluntary pollution prevention agreements in the Great Lakes basin with major industrial sectors such as automobile assembly and automotive parts manufacturing.[220]

Governments and industry argue that these programs and agreements are more cost-effective and more accommodating of innovation than regulations.[221] They may also present an attractive option to regulatory agencies faced with barriers within the government to the adoption of new regulatory initiatives. However, non-industry stakeholders have been critical of governments' promotion of voluntary measures as an alternative to regulations, and of governments' participation in industry-government voluntary pollution prevention agreements. Environmental and labour organizations have argued that, while they have no objections to voluntary industry pollution prevention initiatives, they are concerned by the implications of governments entering into formal, signed agreements in relation to such initiatives.

Critics of the agreements argue that such arrangements represent a return to closed, bilateral industry-government policy-making practices, are unenforceable, are unlikely to be cost-effective, and are being employed as a substitute for, rather than a supplement to, a federal regulatory framework for toxic substances.[222] These concerns also have been expressed by some industry representatives,[223] and were reflected in the House of Commons Standing Committee on Environment and Sustainable Development's June 1995 report on the review of the *Canadian Environmental Protection Act*.[224]

The evidence regarding the effectiveness of voluntary environmental initiatives in Canada to date is limited. However, in a 1996 survey by KPMG Management Consultants, only 25 per cent of respondents indicated that voluntary programs had been a factor in the establishment of environmental management systems within their organizations. In contrast, more than 90 per cent cited regulatory requirements as a motivating factor.[225] These results were consistent with the outcomes of the firm's earlier 1994 survey.[226] In addition, more formal evaluations of major voluntary initiatives, such as the Voluntary Challenge and Registry Program, which is the centrepiece of Canada's carbon dioxide emissions control strategy, and the National Packaging Protocol, which is intended to reduce packaging waste by 50 per cent by the end of the century, have revealed disappointing results.[227]

Furthermore, the Canadian federal government's use of voluntary agreements is inconsistent with the approach taken by other Organization for Economic Cooperation and Development (OECD) jurisdictions. In the United States, voluntary pollution prevention programs are employed as a supplement to a comprehensive environmental regulatory framework. The Environmental Protection Agency's 33/50 industrial toxics substances release reduction program, for example, is based on statutory reporting requirements related to the Toxics Release Inventory and does not involve formal industry-government agreements.[228] In the Netherlands, individual firms' voluntary commitments are written into their formal environmental approvals.[229]

vi) Environmental Management Systems/ISO 14000

The federal government has also shown increasing interest in the potential role of environmental management systems and standards in enhancing the environmental performance of private and public sector organizations.[230] The Canadian Standards Association has taken a lead role nationally in this area, and has provided the Secretariat role for the development of International Standards Organization ISO 14000 range of environmental management system documents.

The ISO 14000 standards are intended to provide guidance in the development and implementation of environmental management systems, and the basis for third party certification of such systems. However, commentators point out that the ISO standards will not set out minimum levels of environmental performance in terms of air or water emissions or waste amounts, nor actually guarantee the achievement of any level of performance.[231] Concerns have also been expressed regarding the openness and accessibility of the ISO standards development process, and the program's potential implications for environmental standards under international trade law.[232]

7) Conclusions

It is important to note the major differences between federal and provinical regulatory processes. The substantive review of regulatory and policy proposals by central agencies is a phenomenon unique to the federal government. In addition, within the federal system, there is much greater emphasis placed on finding consensus among different departments whose constituencies or clientele might be affected before a regulatory or policy proposal can proceed. In effect, both the TBS and PCO and each department has a virtual veto over a proposed regulation and policy. This can make moving significant policy initiatives forward difficult.

Despite the strong commitments made in the Liberal Party's 1993 election platform to strengthen the federal environmental protection regime, the federal government's recent regulatory reform initiatives appear to be moving in the opposite direction. The government's flagship regulatory reform initiative, Bill C-62, the *Regulatory Efficiency Act*, has died on the Order Paper, due to strong resistance within the government caucus and from environmental, labour, public health, consumers' and professional associations. However, other elements of the government's **Agenda: Jobs and Growth** regulatory reform package are moving forward.

The government's shift in orientation has been particularly evident in areas such as the environmental regulation of mining. A new federal regulatory policy which presents major barriers to the adoption of new environmental or other public welfare regulations has also been adopted. In addition, the federal government has shown growing enthusiasm for voluntary measures by industry, despite the absence of any significant empirical evidence regarding the effectiveness of such measures.

V. Regulation And Policy Development In Other Provinces

1) Introduction

The process for developing and adopting new regulations and policies in other Canadian provinces is generally similar to that in Ontario. Originating departments are responsible for the development of proposed regulations or policies. The Attorney-General's department is usually consulted on technical legal drafting issues with respect to regulations. Proposals are then presented to an appropriate cabinet committee by the sponsoring minister and then, on approval, to the full cabinet. Following cabinet approval regulations are published in the provincial government gazette. Approval by the provincial Treasury Board or its equivalent is usually required where the regulation has financial implications.

2) Current Provincial Requirements and Initiatives

Although all of the provinces adhere to the foregoing basic structure for the development and approval of new regulations and policies, a number of provinces have introduced specific requirements related to public consultation in the process. Others have recently embarked on more ambitious regulatory reform projects.

i) Quebec

Quebec is the only province where there is a statutory requirement for the pre-publication of all proposed regulations, followed by a minimum 45-day public comment period. This requirement was established through the 1986 *Regulations Act*.[233] In the case of regulations proposed by the Minister of Environment and Wildlife, section 124 of the *Environmental Quality Act* extends this period to 60 days. This period may be shortened in situations of urgency or in cases of proposed regulations of a financial nature. The Ministry of Environment and Wildlife has no formal rules regarding consultations with external stakeholders beyond these requirements, although it is normal to hold informal consultations on major initiatives.[234]

In March 1996, the Ministry of Environment and Wildlife made public a series of documents entitled **Vision Stratégique 1996-2001.**[235] The documents proposed a re-orientation of the Ministry to respond to budgetary reductions, regionalize environmental management responsibilities and establish partnerships with waste generating industries. This is to be achieved through the delegation of environmental decision-making authority to the municipal level, the repeal of unenforced or unenforceable environmental regulations, reductions in reporting requirements by regulated firms, and an increased emphasis on voluntary actions by the private sector. The government's proposed direction has been criticized by public interest groups[236] and in the media.[237]

ii) Alberta

Section 14 of the 1992 Alberta *Environmental Protection and Enhancement Act* (*AEPEA*) requires the Minister of the Environment to engage in public consultation in the development of ambient environmental quality objectives. However, no such quality objectives have been developed. Beyond this requirement, there are no formal requirements for public consultation in the development of regulations and policies in Alberta.

The Alberta Department of Environmental Protection published "Public Involvement Guidelines" in 1991. In addition, the development of regulations under *AEPEA* included:

* the distribution of draft regulations to the public and stakeholders and requests for written comments;
* consultation with key stakeholder groups to develop the public consultation process;
* the conduct of information sessions for stakeholders and members of the public in different venues around the province;
* workshops on outstanding issues identified in written responses; and
* final drafting and registration of regulations.

Multi-stakeholder task forces have been employed by the Alberta government to assist it in the development of regulations and policies around major policy issues.[238] At the same time, however, Alberta has moved towards limiting by statute standing in formal environmental hearing processes to those directly affected by the decisions in question. This has been particularly evident in the 1990 *Natural Resources Conservation Board Act*,[239] and the 1992 *Environmental Protection and Enhancement Act*.[240]

Following the 1993 election, the Alberta government embarked on a regulatory reform strategy in conjunction with its efforts to reduce the province's budget deficit. In November 1994 the Alberta Legislature enacted Bill 41, *The Government Organization Act*. This Act permits ministers to fulfil their mandates and responsibilities as they see fit.[241] In particular, it enables any minister from any department to delegate "any power, duty or function" imposed by any Act to "any person," except the power or duty to make regulations.[242] Person in this context means anyone, including individuals and private corporations.[243] A parallel piece of legislation, *The Delegation of Administration Act* (Bill 57) was introduced by the government as well, although it was subsequently withdrawn in the face of public protests. Many of the provisions of Bills 41 and 57 appear to have served as models for the provisions of the federal government's Bill C-62, *The Regulatory Efficiency Act*.

The Alberta government is already making wide use of the provisions of Bill 41. Responsibility for the registration of underground petroleum storage tanks, for example, has been transferred from the provincial government to the Petroleum Tank Management Association. The Association has also taken responsibility for conducting inspections to ensure compliance with the *Alberta Fire Code*. The Association is permitted to collect registration fees and to impose service charges.[244]

In addition to the enactment of the *Government Organization Act*, a Regulatory Reform Task Force was established in April 1995. The Task Force is chaired by a government member of the Legislative Assembly,[245] and includes representatives from the Department of Economic Development and Tourism, the Alberta Chamber of Commerce, the Alberta Economic Development Authority, and the Canadian Federation of Independent Business. The Task Force delivered its initial report in August 1995.[246]

The Regulatory Reform Task Force's report sets out the government's regulatory goals and the actions which will be undertaken to meet these goals. The four key goals are: regulatory reduction, streamlining, and efficiency; integration and coordination of departmental strategies;

elimination of duplication and overlap; and alternatives to regulation. The report also sets out a plan for reviewing and assessing the government's regulations over the next three years against the criteria developed by the Task Force.[247]

Regulations which are not determined to be essential for the maintenance and enhancement of:

* public health, order or safety;
* the environment;
* sustainable development;
* private sector competitiveness;
* the promotion of innovation;
* business efficiency; or
* the effective internal administration of government

are to be rescinded.

Regulations which are:

* currently relevant;
* the only way to achieve their objective;
* unique among departments/levels of government;
* a one-window process;
* enhancing economic or other values;
* written in plain language;
* efficient for administration;
* cost-benefit effective;
* regionally flexible; and
* written with a sunset clause,

will be retained unamended. Otherwise regulations will be amended to conform with the reform criteria.[248]

With respect to the environment, the Department of the Environment experienced a 30 per cent cut to its budget in February 1994. In response, the Department has entered into a range of self-monitoring agreements with major industries in the province. These require plants to monitor their own effluent and emission levels and report the results to the province.

In addition, in November 1995, the Department of the Environment proposed to eliminate requirements for specific approvals for a range of minor activities, including the addition of chemicals to municipal waste water systems, the establishment of asphalt paving plants, concrete producing plants, small meat processing and poultry processing plants, electroplating plants, coal and oil sands exploration programs, small oil production sites, and the construction and operation of oil pipelines. In some cases, compliance with standards established by regulation will continue to be required for these activities under a permit-by-rule structure. In others, compliance with non-binding Codes of Practice or Guidelines will be sought. Approvals are to be eliminated completely for the retail sale of domestic pesticides, and applications of pesticides by local governments and leaseholders of public lands.[249]

The Department has also established a Regulatory Approvals Centre to provide a one-window approach to approvals required under the *Environmental Protection and Enhancement Act*.[250] In addition, the Alberta government has pushed strongly for the harmonization of federal and provincial environmental protection requirements to provide for one-window enforcement mechanisms and approval processes. In particular, Alberta has sought the delegation of federal enforcement and approval responsibilities to the province.[251]

Commentators note that problems have emerged with the industrial self-monitoring program, both in terms of the quality of the data obtained, and the admissibility of self-monitoring data as evidence in prosecutions. In March 1994, for example, 124 charges under the Alberta *Clean Water Act* against the Proctor and Gamble Pulp Mill in Grande Prairie were dropped due to doubts about the quality of the self-monitoring data generated by the company.[252] Major concerns have been raised regarding the likely effects of other elements of the province's regulatory reform initiatives as well, including the implications of privatized regulation and certification systems in terms of effectiveness,[253] liability for regulatory negligence,[254] and public accountability.[255] Concerns have also been expressed by industry stakeholders and others regarding the instability in the regulatory system implicit in the Regulatory Reform Task Force's proposals for sunset clauses in all regulations.[256]

iii) Saskatchewan

Saskatchewan has established elaborate requirements for the review of proposed regulations. **Guidelines for Regulatory Fairness** were introduced in 1989 by the Progressive Conservative government. These were updated by the NDP government in 1993 into a *Regulatory Code of Conduct*. The *Code* includes the following requirements:

* advance notice to members of the public of proposed regulations;
* public consultation on proposed legislation and regulations;
* the identification of the major costs and benefits associated with proposed regulations;
* a uniform drafting approach for regulations; and
* intra-jurisdictional comparisons of proposed regulations to address interjurisdictional competitiveness issues.

The *Code* also commits the Saskatchewan government to a regular review of statutes and regulations to ensure their continued relevancy and the establishment of a Legislative and Regulations Review Committee of Cabinet to review all legislative and regulatory proposals.[257]

iv) Manitoba

The Manitoba government has established substantial requirements for the review of proposals for new regulations. These requirements arose from the July 1994 Report of the Advisory Panel on Business Regulations.[258] They include revisions to the existing requirement for the development of Regulatory Impact Statements (RIS) to place greater emphasis on alternatives to regulation, impacts on small businesses and consultation processes. A requirement that all new regulations, except where inappropriate, have sunset or review dates of five to seven years, has been introduced as well.

Guidelines for Business Regulations have been introduced. The Guidelines commit the

government to:

* work with business in the identification of problems and the establishment of the need for regulation;
* work with business to explore alternatives to regulation;
* provide advance information to business groups affected by proposed business regulations so that consultation may take place;
* identify the costs and benefits of proposed regulations to individuals, business and government;
* employ uniform drafting styles and standards, and communicating new and amended regulatory requirements in understandable and concise language; and
* minimize the paper burden by avoiding duplication and complication of regulatory forms.

In addition to these general requirements for consultation and assessment of the impact of new regulations, Manitoba's *Environment Act* requires that:

> "Except in circumstances considered by the minister to be of an emergency nature, in the formulation or substantive review of regulations incorporating environmental standards, limits, terms or conditions on development under this Act, the minister shall provide opportunity for public consultation and seek advice and recommendations regarding the proposed regulations or amendments."[259]

The *Waste Reduction and Prevention Act* contains a similar provision regarding public consultation in regulatory development.[260] Furthermore, over the past two years, the Manitoba Department of the Environment has begun to make extensive use of stakeholder advisory committees in the development of new regulations and statutes.[261]

v) Newfoundland and Labrador

In April 1994 the Newfoundland and Labrador government announced the establishment of a Regulatory Review Commission. Regulations which were not necessary to protect the public interest in terms of:

* the maintenance of public health, order or safety;
* the maintenance or enhancement of the environment or contribution to sustainable development;
* the competitiveness of the private sector; or
* which were necessary for the effective administration of the government,

were to be identified and recommended for repeal.[262]

The Commission delivered its report to the Newfoundland government in the fall of 1995. It recommended that 49 per cent of the province's 2,358 existing regulations be kept as they are. Five percent were recommended to be kept subject to substantial change to make them more effective, and 46 per cent were judged unnecessary.[263] The government is currently considering its response to the Commission's recommendations. It has also introduced a regulatory reform Bill entitled *An Act Respecting the Revision and Consolidation of Subordinate Legislation* (Bill 7) to facilitate the

implementation of the Commission's recommendations. A consolidation of Newfoundland and Labrador's regulations is to be produced as well.[264]

vi) Nova Scotia

Section 26 of the January 1995 Nova Scotia *Environment Act* makes a commitment to consultation on any new regulations and any substantive amendments to the Act or existing regulations. Further, section 174 of the Act requires that an independent review of the Act take place within five years of its proclamation.

3) Conclusions

Requirements for public consultations vary from province to province. Quebec is currently the only province with a legal requirement for the pre-publication of all draft regulations prior to their promulgation. Some provinces, including Saskatchewan and Manitoba, have introduced "Codes of Regulatory Fairness" as government policy which require public consultation in the development of new regulations. Recently enacted environmental protection statutes in Nova Scotia and Manitoba also include requirements for public consultation in the development of major new policies and regulations. In a number of provinces, such as Nova Scotia, Manitoba and Alberta, environment departments have made use of multi-stakeholder task forces and large public consultation exercises in the development of major environmental initiatives.

However, commentators note these trends appear to be driven at least as much by business concerns over the impact of regulations, as by a desire to increase public participation in governmental decision making. Indeed, the goal of the current trend towards consultation requirements may be as much to slow the process for making new regulations as to increase public participation in the process.

The significance of this point is reinforced by the consideration that a number of provinces, particularly Alberta and Newfoundland, have undertaken large scale regulatory reviews intended to eliminate substantial portions of their existing regulatory frameworks. The fact that business interests have been the only non-governmental stakeholders involved in the design of the regulatory reform processes in Alberta and Manitoba must also be taken into account. Alberta's programs appear to be having a significant influence on the approach of the Ontario government.

It is also important to note some important differences between the approaches of the provincial governments to regulatory reform, and that of the federal government. Among the most significant are the absence of central agency reviews of the substance of new regulatory or policy proposals. Rather, provincial Cabinet Offices and equivalent agencies limit themselves to facilitating and managing the cabinet approval process. Second, no province requires formal cost/benefit analyses of regulatory proposals. This appears to be a function of both the availability of the resources necessary to conduct such analyses, and of the added complexity to the regulatory process which they impose in relation to their perceived added value.

VI. Regulation And Policy Development In The U.S. Federal Government

1) Introduction

Procedures for the development and adoption of regulations, rules, and policies in the United States are highly formalized in comparison to Canadian practices. Most federal environmental regulations are actually promulgated as rules, a form of formal policy. The procedures for making rules are governed by section 4 of the *Administrative Procedure Act* (*APA*),[265] first enacted in 1946. This requires that there be public notice in the *Federal Register* of a proposed rule-making action, an opportunity for the public to submit written comments, and publication of final rules in the *Federal Register* accompanied by a concise statement of their basis and purpose. The *Act* also provides that "a person suffering legal wrong because of agency action within the meaning of a relevant statute is entitled to judicial review thereof."[266]

In addition to these basic requirements, a number of U.S. federal environmental laws specify further rule-making requirements of their own. The *Clean Water Act*, for example, contains requirements for the maintenance of rule-making dockets by the Environmental Protection Agency (EPA) for rule-makings under the Act.[267] Under the *Resource Conservation and Recovery Act* (*RCRA*), public hearings must be held before certain major decisions are made.[268] With respect to the *Toxic Substances Control Act*, detailed procedures for rule-making under the *Act* are specified. These include the provision of opportunities to provide oral testimony to the EPA, and the authorization of the submission of rebuttal testimony and cross-examination if the EPA Administrator determines that it is necessary to resolve disputed issues of material fact.[269] Similarly, public hearings by Occupational Safety and Health Administration are required under the *Occupational Safety and Health Act* if written objections are filed to a proposed rule.[270]

The *Administrative Procedure Act* and most U.S. federal environmental laws also provide citizens with the right to petition for the initiation of rule-making proceedings. Furthermore, in contrast to the typical structure of Canadian environmental statutes that provide broad authority to the environment ministers and cabinets to take action to protect the environment, the U.S. legislation includes action-forcing provisions, requiring the executive branch to undertake particular actions within set time-frames. In addition, in the U.S. statutes, citizens are usually authorized to pursue civil actions, or citizen-suits, to obtain court orders that would bring government agencies and private firms into compliance with regulatory requirements.[271] In many cases, these provisions were enacted by the U.S. Congress for the deliberate purpose of requiring regulatory agencies to include a wider range of stakeholders in their decision-making processes than they had in the past.[272]

The significance of these kinds of provisions has been enhanced by the general willingness of U.S. courts to set aside administrative decisions not only on issues of jurisdiction and natural justice, but also where a decision has not been based on sufficient substantive evidence. This approach has been in contrast to the Canadian experience, where judges have not traditionally attempted to review cases on the basis of the facts, but rather have focused almost exclusively on issues or errors of law.[273] Finally, the U.S. courts have been more open to granting public interest standing to individuals or groups that had not suffered some special or particular damage as a result of the activities in question.[274]

2) The Problem of Ossification

There has been growing concern over the effectiveness of the U.S. federal rule-making processes in the past 15 years. The so-called ossification of the rule-making process of a number of key U.S. federal agencies has been of particular concern. Ossification refers to a situation in which rules remain in place unchanged, even when the circumstances or evidence on which they were based has altered significantly.[275]

In its 1993 report **Risk and the Environment: Improving Regulatory Decision-Making,** the Carnegie Commission, for example, noted that:

* U.S. federal agencies increasingly tend to skirt formal rule-making processes, and are turning to even less formal methods of promulgating policies such as providing informal opinions, negotiations with regulated parties, operating manuals, and even press releases;[276]

* the development of a single rule by certain agencies can take over a decade, and cost millions of dollars.[277] As a result, the Occupational Safety and Health Administration, for example, has only been able to issue rules applicable to 24 of the hundreds of toxic substances to which workers may be exposed in the past 22 years;[278] and

* certain agencies were increasingly reluctant to revisit rules when the factual and or policy predicates which underlay them changed, leaving rules frozen in place once promulgated.[279]

It has been observed that this problem tends to be most serious in cases of major rules predicated on assumptions concerning complicated factual and scientific relationships, such as those in the environmental and occupational health and safety fields.[280] U.S. government agencies continue to issue hundreds of rules annually in other contexts expeditiously and at a relatively low cost.[281]

The causes of the ossification of the environmental and occupational safety and health rule-making processes are complex. Commentators suggest that each of the three branches of the U.S. federal government - executive, legislative, and judicial, has contributed to the ossification in the rule-making process in the environmental and occupational health and safety fields.

i) Executive Branch Responsibility

Commentators suggest the executive branch has contributed to ossification in a number of ways. Among the most significant has been the direct and indirect effects of the Office of Management and Budget's (OMB) methods for implementing President Reagan's 1982 Executive Order 12,291.[282] That order required agencies to:

* evaluate the costs and benefits of any proposed major rule;
* evaluate alternatives to each proposed rule;
* select the option which maximizes benefits to society;
* submit proposed major rules to OMB for review before they are issued in final form; and
* delay the issuance of a rule if OMB concludes that further consultation with it or any other agency is necessary to ensure that the rule complies with the order.

It has been observed that these requirements have had three major effects on the rule-making

process: increased costs; increased delay; and increased inter-branch friction.[283] In particular, it is argued that the OMB used the regulatory review process to displace agency decision making by dictating substantive changes in regulations, often in ways inconsistent with statutory standards, and which served the interests of regulated industries. In addition, it is contended that the requirements for complicated and costly economic analyses reduced the resources available to enforce regulations and introduced further delays in the process. The degree to which the process put OMB desk officers in the position of making judgements in areas where they had much less technical expertise than the agencies whose regulations they were to review has also been criticized strongly.[284]

Agencies responded to this situation in two ways. Rather than making and announcing formal policy decisions, they preferred to state broad reasons for decisions reached in adjudicating individual disputes, and to issue what became known as non-rule rules. These were putatively non-binding statements of policy contained in operating manuals, staff instructions and similar documents.[285]

ii) Legislative Requirements

As noted earlier, commentators suggest the U.S. Congress has contributed to ossification as well. In the process of creating new agencies and amending existing statutes, the Congress has added numerous mandatory procedures to the basic requirements of the *Administrative Procedure Act*. The impacts of the creation of statutory rights to limited cross-examination in rule-makings conducted pursuant to the *FTC Improvement Act* (*FTCIA*),[286] the *Consumer Product Safety Act* (*CPSA*),[287] and the *Toxic Substances Control Act* (*TSCA*)[288] have been particularly significant in this regard. Reviewing courts have converted the statutory right to limited cross-examination into a judicially enforced right to unlimited cross-examination.[289] This has, in turn, made it almost impossible for an agency to issue a major rule to implement one of these statutes against well-financed opposition in less than a decade.[290]

iii) The Judicial Branch

Notwithstanding the contributions of executive branch oversight requirements, and Congress's expansion of the right of cross-examination in the rule-making process, many scholars have concluded that the courts have been responsible for most of the ossification in the U.S. federal rule-making process.[291] It is argued that through their interpretation of the *APA,* the courts have transformed the basic notice and comment process into a lengthy, complex and expensive process of uncertain results.[292]

In particular, it is contended that the courts have rewritten the *APA* requirement for the incorporation into a rule of a "concise general statement of (its) basis and purpose." To have any chance of being upheld, an agency's statement of basis and purpose must now discuss in detail each of the policy disputes, data disputes and alternatives to the rule adopted considered in the development of the proposed rule. Some commentators say that this has created a situation in which any gap in the data or stated reasoning with respect to any issue can provide the predicate for judicial rejection of the rule on the basis that the agency failed to engage in reasoned rule-making.[293] Even after an agency has devoted many years and millions of dollars to a rule-making, there is an 80 to 85 per cent chance that the rule will be challenged in court,[294] and a greater than 50 per cent risk that a reviewing court will find the challenged rule invalid.[295]

In light of these factors, agencies have become unwilling to make or amend formal rules. Indeed, as one American scholar has noted:

> "If an agency expects a rulemaking to require five to ten years and tens of thousands of staff hours to complete, with only a fifty per cent probability of judicial affirmance of the resulting rule, it will use rulemaking infrequently."[296]

This observation applies to the amendment and updating of existing rules as well as the promulgation of new rules, as the same procedural requirements, and consequent risks of judicial review, apply.[297]

3) Recent Efforts at Reform

Over the past five years a number of reforms have been undertaken by the Executive Branch and Congress to address rule-making ossification.

i) Reconsidering the Role of Judicial Review

In light of the problem of judicially generated rule-making "ossification", a number of American scholars in the fields of administrative law and public administration recently have begun to argue for limitations on the potential scope of judicial review of administrative action. They note that the courts often lack the expertise and resources to deal with disputes involving disciplines about which they have little knowledge, and that it often takes years to complete the process of judicial application of duty to engage in reasoned decision making. This permits well-financed interests to potentially delay rule-making indefinitely. Furthermore, while it is acknowledged that rule-making is a political process in that it involves the distribution of costs and benefits among different societal interests, no political accountability structures exist for consequences of judicial interventions in the rule-making process.[298]

For these reasons, it is argued that the scope of judicial review of agency rules should be limited to determining whether they violate clear statutory or constitutional constraints on agency discretion. Standing would remain open to anyone adversely affected by the rule.[299] Effectively, this would move the United States closer to the Canadian model where judges have tended not to attempt to review cases on the basis of the facts, but rather to focus almost exclusively on issues or errors of law.[300]

The United States Supreme Court indicated some willingness to move in this direction in its 1984 Chevron U.S.A. v. Natural Resources Defense Council decision.[301] There it held that if the intent of Congress is clear in a statute, the Court must give effect to the unambiguously expressed intent of Congress. This meant that where there is an explicit grant of statutory authority to the agency to promulgate rules on the matter, then judicial review is only available if the agency's actions are arbitrary or capricious. However, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's interpretation is based on a permissible construction of the statute.[302]

ii) Negotiated Rule-Making

Negotiated rule-making has become increasingly popular in the United States. The practice was explicitly endorsed by the Congress in 1990 when it enacted the *Negotiated Rulemaking Act (NRA)*.[303] The *Act* confirms federal agencies' authority to conduct negotiated rule-making, but does not require it to be employed.

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Over the past five years a number of reforms have been undertaken by the Executive Branch and Congress to address rule-making ossification.

i) Reconsidering the Role of Judicial Review

In light of the problem of judicially generated rule-making "ossification", a number of American scholars in the fields of administrative law and public administration recently have begun to argue for limitations on the potential scope of judicial review of administrative action. They note that the courts often lack the expertise and resources to deal with disputes involving disciplines about which they have little knowledge, and that it often takes years to complete the process of judicial application of duty to engage in reasoned decision making. This permits well-financed interests to potentially delay rule-making indefinitely. Furthermore, while it is acknowledged that rule-making is a political process in that it involves the distribution of costs and benefits among different societal interests, no political accountability structures exist for consequences of judicial interventions in the rule-making process.[298]

For these reasons, it is argued that the scope of judicial review of agency rules should be limited to determining whether they violate clear statutory or constitutional constraints on agency discretion. Standing would remain open to anyone adversely affected by the rule.[299] Effectively, this would move the United States closer to the Canadian model where judges have tended not to attempt to review cases on the basis of the facts, but rather to focus almost exclusively on issues or errors of law.[300]

The United States Supreme Court indicated some willingness to move in this direction in its 1984 Chevron U.S.A. v. Natural Resources Defense Council decision.[301] There it held that if the intent of Congress is clear in a statute, the Court must give effect to the unambiguously expressed intent of Congress. This meant that where there is an explicit grant of statutory authority to the agency to promulgate rules on the matter, then judicial review is only available if the agency's actions are arbitrary or capricious. However, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's interpretation is based on a permissible construction of the statute.[302]

ii) Negotiated Rule-Making

Negotiated rule-making has become increasingly popular in the United States. The practice was explicitly endorsed by the Congress in 1990 when it enacted the *Negotiated Rulemaking Act (NRA)*.[303] The *Act* confirms federal agencies' authority to conduct negotiated rule-making, but does not require it to be employed.

Negotiated rule-making is similar to the multi-stakeholder consultation models widely employed in the environmental field in Canada.[304] Major stakeholders are appointed by the rule-making agency to a negotiating committee to attempt to resolve their differences prior to the issuance of a proposed rule. Negotiations among interest groups take place with the assistance of an agency-appointed mediator, and agency officials may also participate in the discussion. If the negotiations are successful and consensus is reached, the proposed rule is issued by the agency for public comment.

The *NRA* specifies that agencies should consider whether there are a limited number of significantly affected interests that can be adequately represented in a negotiation, and whether there is a reasonable likelihood of reaching consensus within a fixed period of time. This indicates some recognition that negotiated rule-making may not succeed in controversial rule-makings. In fact, some commentators have suggested that only rules and regulations that involve a small number of issues, that affect a limited number of interests, and that have firm deadlines requiring that some action be taken by the agency even if consensus is not reached, are appropriate candidates for regulatory negotiation.[305]

iii) President Clinton's Executive Order 12,886 (1993)

President Clinton's Executive Order 12,886[306] of September 1993 repealed the Reagan Administration's Executive Orders Nos. 12,291 and 12,498. The Order sought to enhance planning and coordination with respect to both new and existing regulations, to reaffirm the primacy of federal agencies in the regulatory decision-making process, to restore the integrity and legitimacy of regulatory review and responsibility, and to make the process more accessible and open to the public.[307]

The Order also articulated 12 principles of regulation:

1) Each agency shall identify the problem that it intends to address (including, where applicable, the failure of private markets or public institutions that warrant new agency action) as well as assess the significance of the problem.

2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to the problem that a new regulation is intended to correct, and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

3) Each agency shall identify and assess available alternatives to direct regulations, including providing economic incentives to encourage the desired behaviour, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

4) In setting regulatory priorities each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts and equity.

6) Each agency shall assess both the costs and benefits of the intended regulation, and recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behaviour or manner of compliance that regulated entities must adopt.

9) Wherever feasible, agencies shall seek views of appropriate state, local and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities.

10) Each agency shall avoid regulations that are inconsistent, incompatible or duplicative with its other regulations or those of other federal agencies.

11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities) consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from uncertainty.[308]

The Executive Order established a planning process for regulatory actions, requiring agencies to prepare agendas of all regulations under development or review, and to prepare a regulatory plan of the most significant regulatory actions that the agency reasonably expects to issue in proposed or final form in a given fiscal year as well.[309] In addition, the Order required agencies to submit programs for the periodic review of their existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities.[310]

Furthermore, the Order required each agency to provide for meaningful public participation in the regulatory process,[311] and to make available to the public draft texts or proposed regulations, explanations of the need for proposed regulations and the analyses of the benefits, costs, and available alternatives to proposed regulations.[312] Finally, Office of Management and Budget personnel, with the exception of the Administrator or the Office of Information on Regulatory Affairs (OIRA), were prohibited from receiving oral communications from persons outside of the executive branch of the U.S. federal government regarding the substance of a regulatory action under OIRA review, and were required to disclose to the public any other such communications.[313]

iv) EPA's Common Sense Initiative

In the fall of 1994, the Environmental Protection Agency launched its own regulatory reform initiative entitled the "Common Sense Initiative." The Initiative is intended to bring affected stakeholders together to find "cleaner, cheaper, smarter" environmental management solutions. The Initiative is lead by a multi-stakeholder advisory council with representation from industry, state environmental agencies, national and local environmental groups, and other stakeholders such as labour organizations, local regulatory agencies, environmental justice organizations, and the federal government.

The Initiative is proceeding on a sectoral basis, with specialized sub-committees being established for the automobile assembly, electronics and computers, iron and steel, metal finishing and plating, petroleum refining, and printing sectors. The sub-committees are to focus on opportunities for reform in the following areas:

* reviewing existing regulations for opportunities to get better environmental results at less cost, and to improve new rules through increased coordination;
* promoting pollution prevention as a standard business practice and a central ethic of environmental protection;
* improving the provision, use and public dissemination of relevant pollution and environmental information;
* finding innovative ways to assist companies that seek to comply and exceed legal requirements while consistently enforcing the law for those that do not achieve compliance;
* improving permitting procedures so that they work more efficiently, encourage innovation, and create more opportunities for public participation; and
* giving industry incentives and flexibility to develop innovative technologies that meet and exceed environmental standards while cutting costs.[314]

The sectoral sub-committees are to develop recommendations which are presented to the full Initiative Council. If approved they are then passed on to the EPA Administrator. The Initiative has resulted in agreement on reform proposals in a number of sectors, such as petroleum refining.[315]

v) Reinventing Environmental Regulation

The Clinton Administration followed the introduction of the "Common Sense Initiative" with the release in March 1995 of a document entitled **Reinventing Environmental Regulation**. The document articulated 10 principles for reinventing environmental regulation in the United States including:

1) protecting public health are important national goals, and individuals, businesses and government must take responsibility for the impact of their actions;

2) regulations must be designed to achieve environmental goals in a manner that minimizes costs to individuals, businesses and other levels of government;

3) environmental regulations must be performance based, providing maximum flexibility in the means of achieving environmental goals, but requiring accountability for the results;

4) preventing pollution, not just controlling or cleaning it up, is preferred;

5) market incentives should be used to achieve environmental goals, whenever appropriate;

6) environmental regulations should be based on the best science and economics, subject to expert and public scrutiny, and grounded in values shared by Americans;

7) government regulations must be understandable to those who are affected by them;

8) decision-making should be collaborative, not adversarial, and decision-makers must inform and involve those who must live with the decisions;

9) federal, state, tribal and local governments must work as partners to achieve common environmental goals, with non-federal partners taking the lead when appropriate; and

10) no citizen should be subjected to unjust or disproportionate environmental impacts.[316]

The document also identified 25 priority action areas for the administration. These included:

* the promotion of air emissions trading and effluent trading in watersheds;

* focusing efforts on high risk hazardous wastes and water contaminants;

* the identification of candidate regulations for negotiated rulemaking;

* the development of a consolidated system for the routine reporting of emissions to the EPA;

* the consolidation of federal air pollution control rules for individual industry sectors, beginning with the chemical industry;

* the targeting of enforcement efforts against significant violations that present the greatest risks to human health and the environment;

* the provision of compliance incentives for small businesses and communities, through the allowance of periods of up to one hundred and eighty days for small businesses to correct violations identified through federal or state technical assistance programs;

* the provision of small business compliance assistance through national customer centres for six small business sectors (including printing, metal finishing, and auto service stations) that face multiple environmental requirements. The centres are to support trade associations and state small business associations through plain language guides to compliance, electronic access to information linking pollution prevention and compliance opportunities, and by reducing paperwork and consolidating reporting requirements;

* improved public access to environmental information, data and statistics;

* the use of industry covenants and other forms of enforceable agreements to demonstrate how adjustments and modifications to environmental regulatory requirements can achieve more

cost-effective environmental results;

* the exploration of the use of independent, certified, private sector firms to audit industry compliance with environmental requirements; and

* demonstration projects for multi-media permitting.[317]

At the same time that it released the **Reinventing Environmental Protection** document, the Administration announced Project XL. Under Project XL, a limited number of companies are to be given the flexibility to replace the requirements of the current regulatory system at specific facilities with an alternative strategy developed by the company if the following conditions are met:

1) the alternative strategy must produce environmental performance superior to that which would be achieved by full compliance with current laws and regulations;

2) the alternative strategy must be "transparent" so that citizens can examine assumptions and track progress toward meeting promised results;

3) the alternative strategy must not create worker safety or environmental justice problems;

4) the alternative strategy must enjoy the support of the community surrounding the facility; and

5) the alternative strategy must be enforceable.[318]

As of May 1996, 13 facility projects and one community project had been initiated.[319] There have been expressions of concern from U.S. environmental non-governmental organizations, particularly regarding the number of projects planned and the Environmental Protection Agency's commitment and ability to manage them in a manner that is responsive to environmental and environmental justice priorities.[320]

vi) Regulatory Reform and the Contract With America

The significance of the Clinton administration's environmental regulatory reform initiatives has been greatly enhanced by the results of the November 1994 Congressional elections. These resulted in Republican majorities in both the U.S. House of Representatives and Senate. Regulatory reform, particularly with respect to environmental regulation, formed a central element of the House Republicans' platform, entitled the "Contract with America".

Following the elections, Republican members of both Houses introduced a large number of environmental regulatory reform bills which would weaken or repeal significant provisions of major federal environmental statutes, including the *Clean Water Act*, *Clean Air Act*, and *Endangered Species Act*.[321] Riders were also introduced on budget bills for the Department of the Interior which would have severely limited the activities of the Environmental Protection Agency and other federal agencies with environmental mandates.[322]

As of July 1996, none of the regulatory reform Bills had been enacted. The small number which did pass both Houses of Congress were vetoed by President Clinton. Furthermore the

Administration has mounted a major campaign against the Republican initiatives and has made environmental protection a centrepiece of its 1996 presidential election platform. However, the Republican majority did succeed in enacting a number of riders on budget bills. Among other things, these permitted salvage timber operations in National forests, effectively repealing environmental laws that limit logging in those forests, prohibited the listing of new superfund sites, blocked the listing of new endangered species under the *Endangered Species Act*, and reduced the Environmental Protection Agency's budget by 30 per cent.[323]

Public opinion in the United States now appears to have turned decisively against the Republican efforts to weaken or repeal federal environmental laws. This is strongly reflected in public opinion surveys over the past year.[324] The shift in public opinion appears to be having a significant impact on the behaviour of the Republican majorities in both Houses of Congress. Strongest evidence of such a change was provided by the passage of amendments to the *Safe Drinking Water Act* in July 1996, strengthening its provisions related to municipal sewage treatment.[325]

4) Conclusions

The United States has traditionally provided the model for the improvement of environmental regulation and policy-making processes in Canada. However, over the past 15 years, concerns have begun to be expressed within the United States over the complexity, cost, and length of the federal rule-making process, particularly in the areas of environmental protection and occupational health and safety. Central agency requirements for cost/benefit analyses, extensive White House review of agency decision making, combined with overzealous judicial review of agency decisions have been identified as the major factors in the ossification of the federal rule-making process.

In response to this situation, the Clinton Administration has introduced extensive reforms to the regulation and rule-making process. These have been intended to provide direction to operating agencies in the shaping of their policy-making, as opposed to after the fact central agency review of line agency policy decisions. Requirements to improve the planning process for new regulations, and to review existing regulations have also been introduced. Increased opportunities for public access to information in the regulatory process have been provided, and a greater emphasis has been placed on the primacy of federal agencies, as opposed to the White House Office of Management and Budget, in regulation-making as well.

With respect to the environment, the administration has launched a significant regulatory reform initiative, which includes increased use of economic instruments, the consolidation of reporting requirements, the use of performance standards, multi-media permitting, and the provision of compliance incentives and compliance assistance to small businesses and communities. In addition, there is to be an increased emphasis on negotiated rule-making and the redesign of the application of environmental requirements to individual sectors and facilities through the Environmental Protection Agency's Common Sense Initiative and Project XL.

The November 1994 Congressional elections were followed by the introduction of a number of bills by the new Republican majority in the House of Representatives intended to block possibility of the development of new, and more stringent, rules in the areas of environmental protection, occupational health and safety and consumer protection. The Republican majority also attempted to weaken or repeal a number of key federal environmental statutes. However, these initiatives have

been opposed by the Clinton administration and although some riders have been placed on budget bills, none of the major Republican initiatives have been enacted. In the meantime, public opinion appears to have turned against the environmental agenda of the Republican majorities in both Houses of Congress.

VII. Conclusions

1) Introduction

The reform of regulatory and policy-making processes has become a major theme in public policy in North America over the past 15 years. During this period, governments in Canada and the United States have implemented a wide range of reform initiatives. These have included efforts to improve public participation in the regulation and policy-making process, to impose cost/benefit analysis requirements for regulatory proposals, the initiation of wholesale regulatory reviews, and the employment of alternatives to regulation such as economic instruments, compliance agreements, and voluntary standard-setting. There have also been efforts to improve the design of regulatory requirements to facilitate and encourage innovation and, in Canada, to strengthen the oversight of the regulatory process by Parliament. These efforts have met with varying degrees of success, and each option should be examined carefully before being adopted in Ontario.

2) Regulatory Reviews

Some jurisdictions, including the U.S. federal government and the governments of Alberta and of Newfoundland and Labrador, have undertaken wholesale reviews of their regulatory requirements. A similar review was promised by the Progressive Conservative Party of Ontario in its June 1995 "Common Sense Revolution" platform. This was affirmed in the government's September 1995 Speech from the Throne. A review of the 78 regulations administered by the Ministry of Environment and Energy was initiated in November 1995. In addition, a committee of government members of the provincial Legislature was established in December 1995, with a mandate to review all regulations made by the Ontario government. This Red Tape Commission delivered an interim report in June 1996.

If not well designed, the value of such reviews may be limited. The available time-frames and processes typically do not allow for a particularly thoughtful analysis of the regulatory requirements under review. The U.S. federal government's recent efforts under President Clinton's Executive Order 12,886 may be a noteworthy exception. In most cases, however, the primary goal seems simply to be the removal regulatory requirements, rather than the targeting of requirements which are archaic, outdated, or which can be amended to deal with unnecessarily costly administrative procedures. Commentators suggest that without appropriate safeguards, there is a risk of repealing or weakening requirements which are essential to the protection of the environment and of the health and safety of citizens.

There is also a trend towards requiring sunset clauses in new and existing regulations. This is particularly evident in Alberta and Manitoba. However, commentators suggest such an approach may again, create more problems than it solves. Requiring that regulations be automatically reviewed and renewed every few years will place a substantial burden on governments, stakeholders, and the public, and could introduce significant instability into the regulatory process.

A petition process, such as that contained in the *EBR* request for review procedure, and in a number of U.S. federal environmental statutes, may provide a better model for reviewing existing regulations and policies, and identifying the need for new ones. Petition processes permit the resources available for reviews to be focused on regulations and policies which are actually of concern to stakeholders and the public. Multi-stakeholder committees might be employed to lead

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review processes where they occur. Non-governmental stakeholders would require some form of support in order to be able to participate effectively and to ensure fairness.

3) Cost/Benefit Analysis and Central Agency Responsibility for the Regulatory Process

The Canadian and U.S. federal governments have introduced requirements for formal cost/benefit analyses of regulatory proposals as part of their efforts to reform the regulatory process. They have also added requirements for the review of such proposals by central agencies, such as the Treasury Board Secretariat and the White House Office of Management and Budget, prior to their approval. In Ontario, a cost/benefit test for proposed regulatory measures, entitled the "Less Paper/More Jobs Test" which had been recommended by the Red Tape Commission,[326] was adopted by the provincial government in July 1996.[327]

Many students of public administration and administrative law in the United States and Canada have raised questions about the value of such requirements. In his 1988 testimony before the Ontario Standing Committee on Regulations and Private Bills, for example, Professor Hudson Janisch of the University of Toronto, stated:

> "I am not persuaded that the massive process of evaluation, the cost-benefit analysis of regulation-making and the whole bureaucracy that has been set up in the federal sphere is what the province needs at all."[328]

These concerns are based on a number of factors. The U.S. and, to a certain degree, Canadian federal experiences suggest that extensive review and evaluation requirements may actually reinforce the ossification of the regulatory process. This is a result of the additional costs and delays associated with meeting central agency review and evaluation requirements. These have had the perverse effect of discouraging agencies from amending or withdrawing existing regulations even when such steps are appropriate in light of changed circumstances and new information.

In addition, there are concerns regarding the competence of central agency officials to second-guess the expert judgement of officials in the agencies sponsoring regulatory proposals, particularly in highly technical fields such as environmental protection or occupational health and safety. Furthermore, traditional models of cost/benefit and risk/benefit evaluation have been widely criticized for failing to give appropriate value to social and environmental costs and benefits, and for ignoring the question of the appropriateness of the distribution of costs and benefits resulting from a given activity.[329] Finally, requirements for cost/benefit analysis may introduce significant delays into the adoption of new regulations which are needed to protect the environment and public health and safety. Indeed, the need to ease formal cost-benefit analysis requirements and to place greater emphasis on the fairness of the distribution of costs and benefits arising from regulatory initiatives was reflected in U.S President Clinton's 1993 Executive Order 12,886.

Based on the research conducted for this report, it is apparent tha many of the issues intended to be addressed by cost/benefit analysis processes may be better dealt with through properly structured consultation procedures. These should lead, in conjunction with the efforts of sponsoring agencies to provide appropriate background information on the potential effects of regulatory proposals, to the identification of major cost and distributional issues at the policy and regulation development stage. Consequently, it may be better to invest the limited public resources available for regulatory reform in the establishment of effective public notice, comment and consultation

requirements for all major proposals, rather than in the creation of complex and costly systems for cost/benefit analysis and regulatory process management.

4) Compliance Agreements, Self-Monitoring Agreements and Permit-by-Rule Systems

Compliance agreements permit regulated parties to negotiate agreements with regulators that apply in place of regulatory requirements. Such agreements have been considered by the Canadian federal government through its proposed *Regulatory Efficiency Act* (Bill C-62), the Alberta government as part of its regulatory reform efforts and the U.S. Environmental Protection Agency in its Project XL initiative. Self-monitoring agreements and permit-by-rule standards are already widely employed by the Alberta government. Permit-by-rule systems are also being implemented by the government of Ontario.[330]

The appeal of compliance agreements is that they provide a means of altering regulatory requirements without having to go through the full procedural requirements for amending regulations. However, such arrangements have been strongly criticized on legal, constitutional and policy grounds. It has been argued that such arrangements undermine the principle of the rule of law, and associated principles of equal and fair application of the law, effectively creating a parallel system of private public law.[331]

From a policy perspective, it seems likely that such arrangements may result in a less efficient, effective and fair regulatory process, as regulated parties engaged in the same activities could find themselves subject to completely different regulatory requirements. In addition, as was pointed out by the secretariat to the Standing Joint Committee for the Scrutiny of Regulations in its report regarding the federal government's proposed Bill C-62, arrangements of this nature would undermine traditional parliamentary accountability mechanisms for the exercise of executive authority.

Concerns are emerging regarding the effectiveness of self-monitoring and permit-by-rule arrangements as well. Major questions have been raised, for example, regarding the quality and admissibility in prosecutions of the data gathered through the Alberta government's industrial self-monitoring programs.[332] Similar problems related to liability in the event of harm to individuals or the environment may emerge with the permit-by-rule systems in place in Alberta and being adopted in Ontario.

5) Formal Requirements for Public Consultation in Regulation and Policy-Making

Among the most important themes in the reform of regulation and policy-making in Canada over the past decade has been a trend towards more formalized processes for public participation in decision making. The federal government and a number of provinces now have in place policies which require public notice and consultation in the development of new regulations. In addition, Quebec has a statutory requirement for pre-publication of all proposed regulations, and in Nova Scotia and Manitoba there are requirements in environmental legislation for consultation on major initiatives. However, these requirements do not go as far, and are not articulated in as much detail, as those contained in Ontario's *Environmental Bill of Rights*.

This trend towards requirements for consultation on environmental and other regulatory initiatives appears to be driven at least as much by business concerns over the potential impact of new regulations as a desire to increase public participation in governmental decision-making. In fact, in

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some Canadian provinces participation in the regulatory reform process by non-governmental stakeholders has been limited to business interests. For its part, the Ontario Red Tape Commission recommended requirements for consultation with business, including small business, in the development of new regulations, in its June 1996 interim report. It made no reference to consultation with other, non-business, stakeholders.[333]

A move towards more firmly establishing basic requirements for full public notice and consultation on major initiatives offers significant advantages in terms of accountability and the quality of the resulting decisions. However, concerns remain over the possibility of over-formalizing, or even legalizing the process for developing new policies and regulations. The U.S. experience with the phenomenon of judicially driven ossification of decision making is of particular concern in this regard. Access to the courts is essential to ensuring that basic procedural requirements for public notice and comment periods, such as those contained in the Quebec *Regulations Act* and the Ontario *EBR*, are upheld. At the same time, concerns often have been expressed that judicial intervention in the policy-making process is anti-democratic, or at least non-democratic. When non-elected judges second-guess the policy decisions of elected legislatures affecting the distribution of risks, costs and benefits within society, such criticism has substantial validity.[334]

As a result, there appears to be an emerging consensus among U.S. and Canadian commentators on the appropriate role of judicial review in administrative decision making. There is a growing recognition of the need to focus opportunities to seek judicial review on the constitutionality and legality of proposed regulatory measures, and on the degree to which the basic procedural requirements established through administrative procedure and other statutes, such as the provision of public notice and comment periods, have been adhered to. This approach addresses concerns regarding technical capability and political accountability associated with substantive judicial review of administrative decisions, while guaranteeing that basic requirements for public participation in decision making are followed.

Broad public interest standing for individuals or groups which have not experienced some special (usually economic) damage as a result of the alleged activities is essential to the success of this approach.[335] Consequently, commentators suggest the moves towards limiting standing in decision-making processes to those directly affected by the decisions in question, contained in some recent provincial legislation, particularly in Alberta,[336] and the federal government's proposed *Regulatory Efficiency Act*,[337] should be resisted.

i) Public Notice and Comment

In light of these considerations, the *EBR*'s model of a statutory requirement for public notice and comment periods should be extended to the introduction, amendment or repeal of regulations and significant policies, by all Ontario government agencies. This could be achieved through an amendment to the *Regulations Act*. Following the *EBR* model, notices should be required to be published in the **Ontario Gazette**, and be posted on the Environmental Registry for all significant proposed regulatory and policy proposals. The establishment of such requirements would be consistent with the 1988 recommendations of the Ontario Legislature's Standing Committee on Regulations and Private Bills.[338] The expansion of the *EBR* Environmental Registry, if appropriately structured, might also complement the more effective use of subject headings in the **Gazette** proposed by the legislative committee,[339] particularly if it is designed in such a way that it can be employed as a

database.

In addition, to address long-standing concerns regarding the accessibility of regulatory and policy proposals, commentators suggest a number of the Standing Committee's other 1988 proposals should be adopted. These include the recommendations that notices of proposed regulations and policies be accompanied by:

* plain language summaries of proposed regulations or policies;
* statements of the reasons for proposed regulations or policies;
* citations of the relevant statutory authorities for proposed regulations; and
* the designation of officials to whom requests for more information can be directed.

Furthermore, when regulations are promulgated commentators suggest they should be accompanied by an explanatory note. These notes would:

* summarize the content of new regulations;
* summarize the reasons for their enactment; and
* designate contact persons to whom requests for more information can be directed.

The development of a cumulative subject index for regulations in Ontario, as proposed by the Standing Committee, should be considered as well.[340]

ii) Responses to Comments Received

Many stakeholders have expressed concerns that even when they file comments in response to proposed regulations and policies, they receive no indication of how their comments were considered in the development of the measure adopted by the government. A requirement for the development and release of a report by the sponsoring agency at the conclusion of the public comment period for proposed regulations and major policies, summarizing the comments received and addressing the concerns which were raised, could address this concern.

6) Multi-Stakeholder Consultation Processes

In both the United States and Canada there is increasing use of multi-stakeholder committees in the drafting of major regulatory and policy proposals. Examples include the U.S. Environmental Protection Agency's "Common Sense Initiative," the Canadian federal government's current Strategic Options Process in relation to substances found to be toxic for the purposes of CEPA, the drafting of Ontario's *EBR*, and the recent development of environmental regulations in Manitoba and Alberta.

Multi-stakeholder processes offer a number of advantages to governments. By involving all of the major stakeholders in reaching a consensus, governments are able to co-opt the most important potential sources of criticism in the regulation or policy development process. This minimizes the potential expenditure of political capital required to move a given proposal forward. In addition, if a multi-stakeholder process fails, government is provided with some justification for inaction. Similarly, if a government were to choose to act in the face of a failed multi-stakeholder process, the opportunity it provided to stakeholders to participate in the development of the measure may minimize potential challenges to the legitimacy of the outcome.[341]

The disadvantage of multi-stakeholder processes from the perspective of governments is that if a consensus is reached, the final product may be seen as inviolable. Attempts by government to amend the result may lead to criticism, and to threaten the legitimacy of the entire initiative.[342] This may be a particular problem if the outcome is not consistent with the government's overall direction. More broadly, consensus-based processes tend to favour those interests who support the status quo, by effectively granting them vetos over proposed changes. Furthermore, non-economic interests may be disadvantaged in terms of the availability of expertise and research resources to support participation in the multi-stakeholder process.

Other limitations of multi-stakeholder processes are also becoming apparent with experience. Generally, multi-stakeholder processes have a reasonable chance of success where the subject matter is fairly narrow, and where there is general agreement on the desirability of the goals of the exercise. However, where there are fundamental disagreements about goals and values among the participating interests, the multi-stakeholder model may fail.

7) Regulatory Program Design

Commentators identify a number of factors in the design of regulatory requirements as potential barriers to effectiveness, efficiency and innovation. These may be addressed through the application of the following principles.[343]

i) Design vs. Performance Requirements

The Clinton Administration is stressing the use of performance-, as opposed to design-based environmental regulations as part of its efforts to reinvent environmental regulation.[344] Performance standards establish required outcomes, but do not prescribe the technology to be used to achieve those results. Design standards, on the other hand, prescribe the use of particular, usually end-of-process pollution control, technologies.[345] The use of performance standards is to provide technological flexibility to industry in its responses to new environmental regulations. This is intended facilitate the development and adoption of innovative pollution prevention technologies.[346]

The use of performance standards is also intended to help to overcome the tendency of regulatory authorities to favour the approval of known and proven technologies over the use of new technologies for which there may be a significant risk of failure. This can provide a significant incentive to firms to adopt well-known end-of-process technologies over new pollution prevention approaches.[347]

In Canada, most recent Ontario and federal environmental regulations, such as the provincial MISA and Countdown Acid Rain program regulations, and the federal Pulp and Paper Chlorinated Effluent[348] and Ozone Depleting Substances Regulations[349] made under *CEPA*, have been drafted as performance rather than design standards. It may be appropriate to review older regulations to identify those which may impose unnecessary barriers to innovation through the imposition of design standards. At the same time, design standards may be required to ensure the protection of safety, health or the environment in some cases.

ii) The Enactment of Strict Rather than Lax Requirements

Commentators have identified stringent environmental protection requirements as the most

critical factor in the development and adoption of pollution prevention technologies.[350] Industries subject to weak environmental regulations tend to respond in an incremental fashion, often through the use of end-of-pipe solutions or secondary treatment solutions.[351] Regulations need to be strong enough to promote real innovation.[352]

iii) The Employment of Phase-in Periods

Reasonable, but well-defined, phase-in periods allow firms to develop and adopt pollution prevention technologies, rather than compelling them to employ end-of-process technologies to meet requirements immediately.[353] Most recently adopted environmental regulations in Canada, such as Ontario's Countdown Acid Rain and MISA Regulations and the federal government's *CEPA* Pulp and Paper and Ozone Depleting Substances Regulations, have provided for substantial phase-in periods.

iv) The Consolidation of Regulations in Single Fields and Integration of Regulations in Associated Fields

In some cases, it may be possible to reduce the paper burden on both governments and regulators by consolidating reporting requirements under different regulations which are duplicative, where this can be done without compromising the quality of data, accountability or enforcement. In the United States, such consolidations are a major component of the Clinton administration's efforts to reinvent environmental regulation.[354] In the longer term, it may be possible to integrate related requirements in different fields, such as environmental and occupational health and safety requirements related to the use of toxic substances.[355]

v) Integrated Permitting

Integrated multi-media environmental permitting involves the integration of all of the environmental approvals required for a given facility into a single process. The concept is under investigation in a number of U.S. states,[356] and as part of the U.S. Environmental Protection Agency's Common Sense Initiative and Project XL programs. It was also recommended by the House of Commons Standing Committee on Environment and Sustainable Development in its June 1995 report on the *Canadian Environmental Protection Act*.[357]

Integrated permitting arrangements may provide a number of advantages.[358] Bringing the different elements of the approval process together may help to avoid results which promote the transfer of pollutants between media, rather than preventing their generation or release. From the viewpoint of regulated parties, there are potential advantages in terms of establishing the nature of the full range of required approvals and ensuring a consistent response from regulators.

One-Window Approvals

A number of jurisdictions are considering the possibility of consolidating the management of regulatory approval requirements for undertakings in a single office or location. The government of Alberta, for example, has established a Regulatory Approvals Centre in its Department of the Environment to coordinate provincial environmental approvals for new undertakings.

There have also been proposals for one-regulator approaches to environmental approvals where more than one level of government is involved in the approval process.[359] In effect,

responsibility for the administration of one of the two government's approvals would be delegated to the other. This raises a number of questions, particularly if the level of government in which approval authority is vested fails to carry out its responsibilities effectively, or where it is in a conflict of interest. Such a situation could arise, for example, where a province which had been delegated administrative responsibility for granting approvals under federal environmental legislation is reviewing a provincially-sponsored resource development project.

vi) Ensuring Stability in the Regulatory Process

The need for stability in the regulatory process was recognized by all stakeholders involved in the development of Ontario's *Environmental Bill of Rights*. This resulted in the inclusion of a provision that requests for reviews of regulations and policies which have been in place for less than five years should only be granted when there is clear justification for doing so.[360]

The adoption of pollution prevention approaches to meeting new environmental requirements may entail significant commitments of capital on the part of the affected firm. This implies a need for a degree of clarity and predictability in terms of environmental standards, and consistency in efforts to ensure compliance. Stability is required to justify major investments to meet new standards.[361] In addition, once firms have begun to make investments to meet the requirements of recently enacted regulations, it becomes unfair and disruptive to alter such standards in the short term.

These considerations suggest that Ontario's recently enacted standards, such as those contained in Ontario's MISA, Waste Reduction, Reuse and Recycling Regulations, and Ozone Depleting Substances Regulations should not be revisited without good reason. Except were inappropriate, these regulations have been drafted in the form of performance rather than design standards, and are the result of extensive consultations with industry and other stakeholders.

vii) The Development of Strong Technological Capabilities Among Regulators

Regulators need to understand an industry's economics and competitiveness to be able to design and implement cost-effective environmental protection requirements while facilitating innovation.[362] Adequate staffing levels are also necessary to ensure that applications can be adequately reviewed within reasonable time-frames, and that standards are enforced once they are established.

Environmental agencies are experiencing significant reductions in their budgets and staffing levels throughout Canada. The operating budget of the Ontario Ministry of Environment and Energy, for example, is scheduled to be reduced by $58 million/year by 1997/98 and more that 30 per cent of the Ministry's staff are to be laid off.[363] Similar reductions in capacity have occurred within Environment Canada.[364]

One way the technical capacity of Canadian environmental protection agencies could be maintained would be through the adoption of full-cost recovery, user-pay requirements for environmental approvals.[365] Such an approach would be consistent with the widely accepted principle of polluter pays, and is being adopted by the federal government.[366]

viii) Compliance Assistance for Small Businesses and Communities

The provision of compliance assistance to small businesses and communities has been a major feature of many U.S. state environmental programs and identified as a major priority by the Environmental Protection Agency as part of its regulatory reform efforts. Compliance assistance to small businesses to be provided by the EPA is to include the provision of plain language guides to compliance, and electronic access to information linking pollution prevention and compliance opportunities. Similar compliance assistance programs for small businesses and small municipalities might be considered in Ontario to address the long-standing concerns of these sectors regarding environmental regulation.

xi) The Use of Economic Instruments

The increased use of economic instruments in Canada has been a longstanding environmental policy recommendation, dating at least as far back as the Economic Council of Canada's reports on regulatory reform of 1979[367] and 1981.[368] Economic instruments may be used to complement direct regulatory requirements by altering the costs and benefits of different behaviourial options to the affected firms. The key idea is to bring about the internalization of the previously externalized environmental costs of particular products and activities.

Economic instruments may include the use of environmental taxes and charges, deposit-refund systems and emission trading systems.[369] An important corollary to the use of economic instruments, particularly in the current period of fiscal restraint in Canada, is the need to remove subsidies which encourage environmentally unsustainable activities.[370]

8) Legislative Responsibility for the Regulatory Process

Concern has been expressed over the degree to which Parliament and the provincial legislatures have lost control over the regulation-making process. Indeed, the House of Commons Standing Committee on Finance has described the executive's formal accountability to Parliament for regulation-making as being, in practice, a dead letter.[371] In its 1988 report, the Ontario Legislature's Standing Committee on Regulations and Private Bills reached a similar conclusion, and made a number of recommendations to strengthen the Legislature's oversight of the regulatory process.

i) Disallowance Procedures

The Standing Committee on Regulations and Private Bill's recommendations included a proposal for the addition of procedures for the disallowance of regulations by the Legislature to the *Regulations Act*. The Committee's recommendations are similar to the disallowance procedure which exists at the federal level through the Standing Joint Committee for the Scrutiny of Regulations, and included the following provisions:

* the empowerment of the Standing Committee on Regulations and Private Bills to make reports to the Legislature containing a resolution that a specified regulation or part thereof or amendment to existing regulation, be disallowed;

* once such a report has been tabled, a vote would be required to be held within twenty sitting

days. Otherwise at the expiry of the twenty days, the report would be deemed to be adopted; and

* upon the adoption, or deemed adoption, of a report, the regulation in question would cease to have effect.[372]

The Committee also recommended that before submitting a disallowance report to the House, the Standing Committee on Regulations and Private Bills would be required to afford officials of the Ministry concerned the opportunity to appear before the Committee to explain the regulation in question. Motions for the adoption of a disallowance report were not to be considered questions of confidence in the government.[373]

ii) Curtailing the Use of Framework Legislation

The reports of parliamentary and legislative committees on regulatory reform over the past 15 years have also emphasized the need to curtail the use of framework legislation. Rather, they have stressed the need for Parliament and the Legislature to seek to give policy direction through its legislation, rather than simply authorizing the executive to act on a given subject.[374]

The Ontario government has moved in the opposite direction in the drafting of its legislation over the past year. Major concerns were raised, for example, about the *Savings and Restructuring Act* (Bill 26) which was enacted in January 1996. Among other things, the Bill replaced a wide range of statutory requirements for approvals with provisions permitting the Lieutenant-Governor in Council to make regulations describing when approvals will be required. In effect, the Legislature's judgements of when provincial approvals were necessary is to be replaced by decisions of the cabinet.[375]

This approach contradicted the recent recommendations of committees of the Ontario Legislature and of Parliament regarding the use of framework legislation. The shift of power from the Legislature to the executive contained in the Bill was heavily criticized by opposition members of the Legislature,[376] witnesses before the legislative committee considering the Bill,[377] and by legal and constitutional scholars.[378]

The government of Ontario is continuing in the direction of seeking to expand executive discretion under the province's legislation. Bill 57, *The Environmental Approvals Process Improvement Act*, introduced by the Minister of Environment and Energy in June 1996, for example, would permit the Lieutenant-Governor in Council to exempt any person from any requirement of the *Environmental Protection Act* or *Ontario Water Resources Act*, and to establish regulations prohibiting or controlling any matter addressed by the *Acts*.[379] The Bill passed second reading in September 1996 and was referred to the Standing Committee on Resource Development. It is expected to be brought forward for consideration in the fall of 1996.

iii) Policy Studies by Committees of the Legislature

Based on the research conducted, it could be argued that the role of the legislature in the regulatory process could be strengthened in a number of ways in addition to the establishment of a disallowance procedure and the limiting of the use of framework legislation. Ontario, could, for example, follow the federal practice, established in 1986, of permitting committees of the Legislature

to undertake policy studies of subjects under their jurisdiction on their own initiative.[380] As is the case at the federal level,[381] Committees should be permitted to request comprehensive responses to their recommendations from the government.

9) Conclusions

The effectiveness, efficiency and fairness of the regulation and policy-making process in Ontario can be improved. However, the goals of protection of health, safety and the environment should take precedence in these efforts if public confidence in government is not be undermined. Commentators suggest that rapid, wholesale regulatory reviews, such as those undertaken in Alberta and Newfoundland, and now underway in Ontario, are unlikely to produce such an outcome. They fear such projects run the risk of weakening requirements essential to the protection of human health and safety, and the environment.

Elaborate mechanisms to manage the regulatory process, complete with requirements for full cost/benefit analysis of proposals, may not address the concerns of the public and regulated parties. The U.S. and Canadian federal experiences suggest that extensive review and evaluation requirements may actually reinforce the ossification of regulations by introducing additional costs and delays into the system. Such requirements may actually have the perverse effect of discouraging agencies from amending or withdrawing existing regulations even when such steps are appropriate in light of changed circumstances and new information. Such requirements also present barriers to the adoption of new regulations which may be needed to protect the environment, conserve natural resources or ensure public health and safety.

There is a need to focus on practical changes to improve the effectiveness, efficiency, fairness and accountability of Ontario's regulatory and policy-making system. Among the most important steps that the provincial government might take in this regard would be to extend the *EBR*'s model of establishing legal requirements for public notice and minimum comment periods to all major regulatory or policy proposals made by the government. A basic structure of this nature, including a requirement that government indicate how comments were taken into account in decision making, could be implemented without an inappropriate expansion of the role of the courts in the policy-making, or the ossification of the process.

In addition to the establishment of basic notice and comment requirements, there are a number of other ways in which the accessibility of regulatory information to the public and affected parties can be improved. The use of plain language drafting, the provision of summaries of the purpose and provisions of proposed and final regulations and policies, the identification of sources of additional information and the indexing of Ontario's regulations would all be useful measures. The development of more effective mechanisms for meaningful consultations with the public and stakeholders will also be important.

Regulatory measures should be designed to achieve environmental, health and safety objectives while facilitating efficiency and innovation. In particular, performance, as opposed to design, standards should be employed where appropriate and environmental permitting should be integrated across media. In addition, reporting requirements under different regulations should be consolidated where appropriate, and where this can be achieved without the weakening of environmental protection requirements or the loss of accountability or enforceability. In the longer term, the integration of regulations dealing with different aspects of the same subject, such as the

environmental and occupational health and safety aspects of toxic substances, should be considered as well.

Based on the research conducted, it could be argued that the province should also seek to ensure stability in the regulatory process. In particular, recently enacted regulations and policies should not be reopened without good reason. The petition process established through the *EBR* may provide a useful model for the identification of regulations and policies in need of review. In general, regulatory review efforts should focus on older requirements which may employ design as opposed to performance standards, or otherwise require updating.

In addition, efforts should be made to strengthen the technical capacity of the province's regulators. The adoption of full-cost recovery, user-pay requirements for environmental approvals would provide a means of ensuring that the technical capacity of the province's regulatory agencies is maintained or even enhanced. The use of economic instruments, where appropriate, and the removal of subsidies which encourage environmentally unsustainable activities and practices, should be pursued as well. Consideration should also be given to the establishment of compliance assistance programs for small businesses and municipalities.

Finally, this report recommends strengthening the Legislature's ability to hold the cabinet to account for its regulatory decisions. In particular, a disallowance procedure similar to that which exists for the federal House of Commons should be established. More broadly, the Legislature should seek to give policy direction through its legislation, rather than authorizing the executive to act on a given subject. The use of omnibus legislation to deal with non-administrative matters should be avoided. Consideration should also be given to permitting standing committees of the Ontario Legislature to undertake policy studies on their own initiative, in a manner similar to standing committees of the House of Commons.

The regulatory and policy framework which protects Ontario's environment and the health and safety of its residents has undergone significant changes over the past 25 years. The establishment of new environmental protection requirements has never been easy. Standards and requirements should not be radically altered, or even dispensed with, without giving careful thought to the consequences for present and future generations of Ontarians.

ENDNOTES

1.A "regulation" is defined in the Ontario *Regulations Act* (RSO 1990 Ch. R.21) as " a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant-Governor in Council, a minister of the Crown, an official of the government or a board or commission all members of which are appointed by the Lieutenant-Governor in Council" (s.1).

2.A "policy" is defined in the *Environmental Bill of Rights* as "a program, plan or objective, and includes guidelines or criteria to be use in making decisions about the issuance, amendment, or revocation of instruments, but does not include an Act, a regulation or an instrument."(s.1).

3.An "instrument" is defined in the EBR as "any document of legal effect issued under an Act and includes a permit, license, approval authorization, direction, or order issued under an Act, but does not include a regulation." (s.1).

4.House of Commons Standing Committee on Finance, Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness (Ottawa: Queen's Printer, 1993), p.1.

5.Ibid.

6.D.Macdonald, "Environmental de-regulation in Canada," in Canadian Environmental Journal, Spring 1996. See also J.C. Strick, The Economics of Government Regulation (Toronto: Thompson Educational Publishing, 1990).

7.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, pg.1.

8.For a detailed discussion of the "control order" regime, see R.Gibson, Control Orders and Industrial Pollution Control in Ontario (Toronto: Canadian Environmental Law Research Foundation, 1983).

9.On MISA, see Municipal-Industrial Strategy for Abatement: A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges to Surface Waters (Toronto: Ontario Ministry of the Environment 1986).

10.See, for example, M.Porter, The Competitive Advantage of Nations (New York: The Free Press, 1991), pp.647-649.

11.M.Porter and the Monitor Co., Canada at the Crossroads (Ottawa: Business Council on National Issues and Minister of Supply and Services, 1991), p.244.

12.Ibid.

13.See, for example, M.Mathieu Glachant, "Voluntary Agreements in Environmental Policy," (Paris: OECD Environment Directorate, February 1994), p.1.

14.On the Reagan administration and environmental regulation, see, for example, G.Hoberg, Pluralism by Design: Environmental Policy and the American Regulatory State (New York: Praeger, 1992).

15.Industry Canada, Agenda: Jobs and Growth - Building a More Innovative Economy (Ottawa: Minister of Supply and Services, November 1994).

16.See The Common Sense Revolution (Toronto: Ontario Progressive Conservative Party, June 1995), p.14.

17.H.Tosine, Director, Program Development Branch, Ontario Ministry of Environment and Energy, "Regulatory Review in Ontario," presentation to Ontario Ministry of Environment and Energy Research Conference, November 1, 1995.

18.J.Rusk, "Tories sifting through operations: Sweeping changes to system sought," The Globe and Mail, December 22, 1995.

19.Interim Report of the Red Tape Review Commission, (Toronto: Government of Ontario, June 1996).

20.On this point see, for example: T.Schrecker, The Political Economy of Environmental Hazards (Ottawa: Law Reform Commission of Canada, 1984); I.Bernier and A.Lajoie, eds., Consumer Protection, Environmental Law and Corporate Power (Toronto: University of Toronto Press, 1985); and J.Wilson, "Wilderness Politics in B.C.: The Business Dominated State and the Containment of Environmentalism," in W.D. Coleman and G.Skogstad, Policy Communities and Public Policy in Canada: Structural Approach (Mississauga: Copp Clark Pitman Ltd., 1990).

21.For a classical statement of this position, see Sub-committee on Regulations and Competitiveness, Regulations and Competitiveness, Chapter 3.

22.This view was strongly reflected in the testimony received from industry representatives by the House of Standing Committee on Finance in its Fall 1992 hearings on regulations and competitiveness.

23.On the issue of the implications of global "harmonization" of environmental standards, see J.Kirton and S.Richardson, eds., Trade, Environment and Competitiveness (Ottawa: National Round Table on Environment and Sustainable Development, 1992).

24.On these dynamics of globalization see, for example, H.E. Daly and J.B. Cobb, For the Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future (Boston: Beacon Press, 1989), chapter 11.

25.On the Thalidomide issue see generally, for example, Suffer the Children: The Story of Thalidomide (London: Deutsch, 1979).

26.Canadian Press and staff, "Toxic fire forces 3,000 from homes," The Globe and Mail, August 25, 1988.

27."Stigma of disaster clings to region affected by tire fire," The Globe and Mail, March 5, 1990.

28.See Dean Jacob, Calculated Risk: Greed, Politics and the Westray Tragedy (Halifax: Nimbus, 1994).

29.K.Cox, "A calamity of biblical proportions," The Globe and Mail, December 21, 1993.

30.Miro Cernetig, "Scaling back to save salmon," The Globe and Mail, July 8, 1995.

31.See Johanne McDuff, The Blood that Kills (Toronto: 1995). See also André Picard, "Health Canada put cost before safety, files show," The Globe and Mail, July 22, 1995 and Canadian Press, "Regulator skirted tough decision," The Globe and Mail, October 31, 1995.

32.Nicholas Regush, "Medical Devices That Can Kill or Maim You," Saturday Night, April 1991.

33.A number of these failures have been attributed to confusion among government officials as to their role in relation to the industries with which they dealt. This has been particularly evident within the federal government over the past decade. Officials whose traditional focus was on the protection of public health and safety, and public resources, have found themselves instructed to remove regulatory requirements which were seen to be barriers to efficiency and innovation, and to focus on the promotion of the industries which they regulated. These problems have been additionally compounded by the reduced resources available to regulatory agencies as a result of the efforts of governments to reduce their expenditures. For a detailed case study of this phenomena, see Regush, "Medical Devices That Can Kill or Maim You." Similar arguments have been made with respect to the role of the federal Department of Fisheries and Oceans and the East and West Coast fishing industries. See, for example, Cox, "A calamity of biblical proportions."

34.The Environment Monitor - September 1995 (Toronto: Environics Research Group and Synergystics Consulting, 1995).

35.Rethinking Government - 1994: An Overview and Synthesis (Ottawa: Ekos Research Associates Inc., 1995), Exhibit 6.

36.See, for example, Optima Consultants, Understanding the Consumer Interest in the New Biotechnology (Ottawa: Industry Canada, November 1994), Table 14.

37.See, for example, G.Hoberg, "Environmental Policy: Alternative Styles," in M.Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993).

38.Standing Committee on Regulations and Private Bills, Second Report (Toronto: Legislative Assembly of Ontario, 1988), p.8.

39.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.42.

40.Ibid., p. 79.

41.Report of Bill C-62, pp.15-16.

42.Standing Committee on Regulations and Private Bills, Second Report, Chapter VI.

43.Ibid.

44.Ibid.

45.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.5.

46.Ibid., p.88.

47.Ibid., p.5.

48.This view was strongly reflected in the testimony received for industry representatives by the House of Standing Committee on Finance in its Fall 1992 hearings on regulations and competitiveness.

49.M.E.Porter and C.van der Line, "Toward A New Conception of the Environmental-Competitiveness Relationship," Journal of Economic Perspectives Vol. 9, No.4., (Fall 1995). See also C.Moore and A.Miller, Green Gold: Japan, Germany, the United States and the Race for Environmental Technology (Boston: Beacon Press, 1994), and C.Fussler, "The Development of Eco-efficiency in Industry," UNEP Industry and Environment, October-December 1994.

50.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.4.

51.Ibid., pp.6-7.

52.Ibid., p.92, also confidential correspondence to the Environmental Commissioner of Ontario.

53.See generally B.Heidenreich and M.Winfield, "Sustainable Development, Public Policy and the Law," in J.Swaigen and D.Estrin, eds., Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers, 1993), pp.xxv-xxviii.

54.Standing Joint Committee on Regulations and Other Statutory Instruments, Fourth Report, 1st. Session, 32nd Parliament, June 17, 1980, p.6.

55.See, for example, Prof. Hudson Janisch, Testimony to Standing Committee on Regulations and Private Bills, Ontario Legislature, March 24, 1988.

56.The federal *Pest Control Products Act*, R.S.C. 1985, c.P-10, for example, authorizes the Governor-General in Council (the federal cabinet) to make regulations establishing a process for the registration of new pesticides in Canada, but the Act contains no provisions of its own regarding the nature of the process, the evaluative criteria to be employed in it, or who might participate in the process.

57.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.7.

58.Standing Committee on Regulations and Private Bills, Second Report.

59.Government of Ontario, Cabinet Office, Cabinet Submission Guidelines (Toronto: Queen's Printer, May 1994), p.16.

60.Ibid., p.10.

61.This summary is based on: Cabinet Office, Cabinet Submission Guidelines, May 1994, and Treasury Board of Canada, How Regulators Regulate: A Guide to Regulatory Processes in Canada (Ottawa: Minister of Supply and Services, 1992), pp. 14-15.

62.*Regulations Act*, R.S.O. 1990, s.12(3).

63.House of Commons, *Standing Orders 123-128.*

64.Standing Committee on Regulations and Private Bills, Second Report, Recommendations 8 and 9.

65.For examples of such reports, see Standing Committee on Resources Development, Final Report on Acidic Precipitation, Abatement of Emissions from the International Nickel Company Operations at Inco and Pollution Control in the Pulp and Paper Industry (Toronto: Legislative Assembly of Ontario, 1979); and Select Committee on the Environment, Acid Rain in Ontario (Toronto: Legislative Assembly of Ontario, 1987).

66.*Occupational Health and Safety Act*, R.S.O. 1990. Ch.O.1, s.22.

67.R.S.O., 1990, Ch.I.6.

68.S.O. 1994, Ch.25.

69.Cabinet Office, Cabinet Submission Guidelines, May 1994, p.20. The current list includes women, persons with disabilities, francophones, visible minorities, aboriginal persons, seniors, youth, economic sectors, employers, small and large businesses, consumers, labour, geographic regions, other governments, and municipalities.

70.Guideline H-5.

71.See MISA: A Policy and Program Statement of the Government of Ontario. On the significance of MISA as a policy development model see M.S.Winfield, The Ultimate Horizontal Issue: Environmental Politics and Policy in Alberta and Ontario 1970-1992 (Toronto: Ph.D. Thesis, Department of Political Science, University of Toronto, 1992), Ch.IV.

72.Ontario Ministry of Environment, Stopping Air Pollution at its Source: Clean Air Program - Discussion Paper (Toronto: 1987).

73.Memorandum of Understanding Between the Advisory Committee on Environmental Standards and the Ministry of Environment and Energy, September 1993.

74.Advisory Committee on Environmental Standards, Proposed Guidelines for the Clean-up of Contaminated Sites in Ontario (Toronto: Ministry of Environment and Energy, November 1994).

75.Advisory Committee on Environmental Standards, A Standard for Tritium: A Recommendation to the Minister of the Environment and Energy (Toronto: Ministry of Environment and Energy, May 1994). A complete table of references to ACES between 1990 and 1994 is provided in the ACES Annual Report: July 1993 to July 1994. pp.8-9.

76.The Environmental Assessment Advisory Committee and the Ontario Round Table on the Environment and Economy were also abolished in September 1995.

77."Environment and Energy Minister sunsets three committees," News Release, Ontario Ministry of Environment and Energy, September 29, 1995.

78.Ibid.

79.Ibid.

80.Correspondence from Thea Herman, Deputy Minister, Ontario Ministry of Labour, to Eva Ligeti, Environmental Commissioner of Ontario, March 20, 1995.

81.On parks planning in Ontario, see K.MacNamee, "Preserving Ontario's Natural Legacy," in Estrin and Swaigen, eds., Environment on Trial, (3rd. ed.), pp.302-309.

82.Confidential correspondence to the Environmental Commissioner of Ontario.

83.Cabinet Office, Cabinet Submission Guidelines, May 1994, p. 15.

84.See generally, M.Winfield, "The Ultimate Horizontal Issue: Environmental Policy and Politics in Alberta and Ontario, 1970-1992," Canadian Journal of Political Science, XXVI, March 1994.

85.Confidential correspondence to the Environmental Commissioner of Ontario.

86.Ibid.

87.Standing Committee on Regulations and Private Bills, Second Report, p.8.

88.Confidential correspondence to Environmental Commissioner of Ontario.

89.Ibid.

90.Ibid.

91.Ibid.

92.Ibid.

93.Ibid.

94.Ibid.

95.Ibid.

96.See, for example, Morgan Gardner, Importance of Public Participation Funding: A Study of Non-Litigation Funding for the Proposed Ontario Environmental Bill of Rights (Guelph: Ontario Environment Network, November 1993).

97.Confidential correspondence to the Environmental Commissioner of Ontario.

98.Ibid.

99.Ibid.

100.See, Red Tape Review Commission, Interim Report, (Toronto: Government of Ontario, June 1996).

101.This summary is adapted from: M.Winfield, G.Crann and G.Ford, Achieving the Holy Grail? A Legal and Political Analysis of Ontario's Environmental Bill of Rights (Toronto: Canadian Institute for Environmental Law and Policy, 1995).

102.The provisions originally applied to fourteen ministries. The Ministry of Finance was exempted in November 1995. See *Ontario Regulation 482/95*. In addition, the Ministries of Municipal Affairs and Housing were combined on June 26, 1995.

103.Ibid., s.1(1).

104.See *Ontario Regulation* 73/94.

105.As of the end of December 1995, 9,000 user accounts had been established on the Registry, and there had been 22,328 user sign-ons. Ontario Environment Network, EBR Registry Update, December 1995. In her first annual report, the Environmental Commissioner for Ontario reported that notice of one Act, 45 policies, 31 regulations and 2393 instruments had been posted on the registry between August 1994 and December 1995 (Environmental Commissioner for Ontario: Annual Report 1994-1995/ Opening the Doors to Better Environmental Decision-Making (Toronto: Environmental Commissioner for Ontario, June 1996).

106.Public participation rights apply to all of the Acts prescribed by the Implementation Regulation (Ontario Regulation. 73/94), as well as the regulations made pursuant to those prescribed Acts.

107.EBR., s.27.

108.Ibid., s.14.

109.Ibid., s.57(g).

110.Ibid., s.15(1). This subsection does not apply to a policy or Act that is predominantly administrative or financial in nature (s.15(2)). The public comment period may be extended in cases of complex decisions or decisions which attract a high level of public interest (s.17).

111.EBR, s.35(1).

112.Ibid., s.36.

113.Ibid., s.16(1). Part II does not apply to regulations that are predominantly financial or administrative in nature. (s.16(2)).

114.Ibid., s.17.

115.Ibid., s.27(4).

116.Ibid., s.27(5).

117.See *Ontario Regulation* 681/94, which classifies proposals for instruments into Class I, II or III.

118.EBR, s.29(1).

119.Ibid., s.29(2).

120.Ministry of Environment and Energy, Requirements of the Environmental Bill of Rights for Prescribed Instruments (Toronto: Ministry of Environment and Energy, November 1994), p.12.

121.EBR, s.32.

122.*Environmental Assessment Act*. s.29.

123.EBR, s.15(2).

124.Ibid.

125.Ibid., s.16(2).

126.For a discussion of the impact of government purchasing requirements on markets for recycled materials, see for example, P.Vopni and M.Winfield, A Review of the Greater Toronto Area 3Rs Analysis EA Input Document (Toronto: Canadian Institute for Environmental Law and Policy, August 1994), pp. 35-37.

127.EBR, s.22(3).

128.MoEE, Requirements of the Environmental Bill of Rights, pp.13-14.

129.EBR, s.57(g).

130.Ibid., s.37.

131.Ibid., s.118(3).

132.There is no procedure for appealing decisions made on proposals for Class III instruments, as a full hearing already will have been held.

133.EBR, s.38(1).

134.Ibid., s.41

135.J.Swaigen, Chair, Ontario Environmental Appeal Board, "The Role of Appellate Bodies under the EBR," Environmental Bill of Rights Course: Proceedings (Toronto: Canadian Institute for Environmental Law and Policy, March 1994).

136.See R. Lindgren, "CELA Clients Set Appeal Precedent Under Ontario's Environmental Bill of Rights," The Intervenor, Vol.21, No. 3, May/June 1996, and J.Rusk, "Residents appeal plan to open new oil refinery," The Globe and Mail, July 3, 1996.

137.EBR, s.42(1).

138.Ibid., s.47(3). The Environmental Commissioner has decided, as a matter of policy, to place notices of leave to appeal applications under section 38 of the EBR on the Environmental Registry. The Environmental Commissioner must do this for notices of appeal by actual parties to decisions pursuant to s.47(3) of the EBR.

139.MoEE, Requirements of the EBR, p.30.

140.Ibid.

141.Ibid.

142. For a more detailed discussion of this topic, see R.Northey, "The Right to a Review and the Right to an Investigation" in P.Muldoon, R.Northey, G.Crann and G.Ford, Environmental Bill of Rights Workshop "Putting the New Regime Into Practice (Toronto: Canadian Environmental Defense Fund, 1993).

143.See, for example, Estrin and Swaigen, Environment on Trial (2nd ed.), ch. 21.

144. EBR., s.61(1).

145. Ibid., s.68(1).

146. Ibid., s.61(2).

147.Between February 1 1995 and December 31, 1995, 313 requests for review were forwarded to the Ministry of Environment and Energy, dealing with 16 different topics. Environmental Commissioner for Ontario, Annual Report 1994-1995.

148. EBR., s. 61(1).

149. Ibid., s. 62(1).1.

150. Ibid., s.65.

151. Ibid., s.70.

152. Ibid., s.68(1).

153. Ibid., s.68(2).

154. Ibid., s.73.

155. Ibid., s.69(1).

156. Ibid., s.71(1).

157. Ibid., s.71(2).

158.Ibid., s.37.

159. See Ontario Regulation 482/95 and the *Environmental Bill of Rights*: A Special Report to the Legislative Assembly of Ontario (Toronto: Environmental Commissioner of Ontario, January 17, 1996).

160. Correspondence from the Hon. B. Elliot, Ontario Minister of Environment and Energy, to Anne Mitchell, Executive Director, Canadian Institute for Environmental Law and Policy, May 6, 1996.

161. Personal Communication, Randy Pickering, Ontario Ministry of Natural Resources, to Cathy Taylor, EBR Registry Resource Person, Ontario Environment Network , June 3, 1996.

162.This summary is drawn from: Subcommittee on Regulations and Competitiveness, Regulations and Competitiveness, pp.9-11.

163."Evaluation of Programs by Departments and Agencies," (Ottawa: Treasury Board of Canada, September 30, 1977 (Circular 1977-47).

164.Treasury Board Secretariat, Guide on the Program Evaluation Function (Ottawa: Treasury Board, Office of the Comptroller General, 1981).

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166.Treasury Board Secretariat, Administrative Policy Manual (Ottawa: Treasury Board Secretariat, 1977). The policy applied to: Agriculture Canada; Consumer and Corporate Affairs Canada; Energy, Mines and Resources; Environment Canada; Fisheries and Oceans; Health and Welfare Canada; Indian and Northern Affairs; Labour Canada; Transport Canada; the Atomic Energy Control Board; the Canadian Transport Commission; and the National Energy Board.

167. W.T. Stanbury, Reforming the Federal Regulatory Process in Canada, 1971-1992, paper prepared for the Sub-Committee on Regulations and Competitiveness (Ottawa: December 1992), Appendix 2.

168.Economic Council of Canada, Responsible Regulation (Ottawa: Minister of Supply and Services, 1979).

169.Economic Council of Canada, Reforming Regulation (Ottawa: Minister of Supply and Services, 1981).

170.Ibid, pp. 83-91.

171.Ibid., p.92.

172.Economic Council of Canada, Synopsis and Recommendations: Responsible Regulation (Ottawa: Minister of Supply and Services, November 1979), Recommendations 1-8.

173.Ibid., Recommendation 10.

174.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.11.

175.Special Committee on Regulatory Reform, Report, (Ottawa: House of Commons, December 1980).

176.Ibid.

177.Office of the Coordinator, Regulatory Reform, Regulatory Agenda, Supplement to the *Canada Gazette*, Part I, May 31, 1983.

178.Task Force on Program Review, Regulatory Programs, (Ottawa: Government of Canada, 1986), p.633.

179.Ibid.

180.House of Commons *Standing Orders 123-128.*

181.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, pp.16-17.

182.Summarized from: Treasury Board Secretariat, How Regulators Regulate, pp.3-5; and Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, pp.18-19.

183.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.15.

184.Treasury Board of Canada Secretariat, How Regulators Regulate, p.3.

185.See, for example, R.Matas, "Bureaucrats pan MP's environmental law proposals," The Globe and Mail, October 16, 1995.

186.Treasury Board Secretariat, How Regulators Regulate, p.5.

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188."Miscellaneous Regulatory Amendments" Treasury Board Secretariat, June 13, 1995.

189.House of Commons, *Standing Order 108(2).*

190.See, for example, House of Commons Standing Committee on Agriculture and Agri-Food, rbST in Canada (Ottawa: House of Commons, April 1994) and Government Response to the Report of the Standing Committee on Agriculture and Agri-Food "RbST in Canada" (Ottawa: Government of Canada, August 1994).

191.House of Commons, *Standing Order 109*.

192.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.97.

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265.5 U.S.C., ss.553.

266.*Administrative Procedure Act*, s.10(a).

267.42 U.S.C., 7607(d), s.307(d).

268.ss.3001(a) and 3004(a), 42.U.S.C. 6921(a) and 6924(a).

269.ss.6(a) and 6(c), 15, U.S.C. s.2605(c).

270.29 U.S.C., ss.651.

271.On "citizen suits," see generally, G. Block, "Public Participation in Environmental Enforcement," North American Conference: Phase II Proceedings, (Washington, D.C.: Environmental Law Institute, Canadian Institute for Environmental Law and Policy, and Fundacion Mexicana para la Educacion Ambiental, 1993) pp.143-153.

272.See generally, Hoberg, Pluralism by Design. See also M.W. McCann and H.Silverstein, "Social Movements and the American State: Legal Mobilization as a Strategy for Democratization," in G.Albo, D.langille, and L. Panitch, A Different Kind of State? Popular Power and Democratic Administration (Toronto: Oxford University Press, 1993), pp.131-143.

273.M. Howlett, "The Judicialization of Canadian Environmental Policy 1989-1990: A Test of the Canada-U.S. Convergence Thesis," Canadian Journal of Political Science XXVII: March 1994, pp. 120-121.

274.Ibid.

275.The term "ossification" was coined by Thomas McGarity. See, T.O. McGarity, "Some Thoughts on Deossifying the Rulemaking Process," 1992, Duke L.J., 1385.

276.Carnegie Commission, Risks and the Environment: Improving Regulatory Decision-Making (Washington, D.C.: 1993), p.107.

277.Ibid., pp.56-57.

278.Ibid., p.57.

279.Ibid., pp.107 and 110.

280.Richard J. Pierce, Jr., "Seven Ways to Deossify Agency Rulemaking," 47 Administrative Law Review, (1994) p.62. See also McGarity, "Some Thoughts on Deossifying the Rulemaking Process," p.1462, and Carnegie Commission, Risk and the Environment, pp.107-109.

281.Ibid.

282.3 C.F.R., 127 (1982).

283. Pierce, "Seven ways to Deossify," p.62.

284.See, for example, Erik D. Olson, "The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291," 4 Virginia Journal of Natural Resources Law pp.49-50 (1984). See also Robert Percieval, "Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency," 54, Law and Contemporary Problems 127, pp.150-151 (1991).

285.Pierce, "Seven Ways to Deossify," p.62.

286.15 U.S.C. 57a (Supp 1993).

287.15 U.S.C. 2051 (Supp. 1993).

288.15 U.S.C. 2601 (Supp. 1993).

289.See, for example, *Corrosion Proof Fittings v. EPA*, 947 F/2d. 1201, 1211 (5th Cir. 1991).

290.Pierce, "Seven Ways to Deossify," p.64.

291.Ibid., p.65.

292.See Peter H. Schuck and E. Donald Elliot, "To the Chevron Station: An Empirical Study of Federal Administrative Law," 1990 Duke Law Journal, 984, 1022. Schuck and Elliot report that during 1965, 1975 and 1984-85 reviewing courts upheld only 43.9% of proposed agency rules.

293.Pierce, "Seven Ways to Deossify," p.65 and note 44.

294.Richard J. Lazarus, "The Tragedy of Distrust in the Implementation of Federal Environmental Law," 54 Law & Contemporary Problems, 311, 324 (1991).

295.Shuck and Elliot, "To the Chevron Station," p.1022.

296.Pierce, "Seven Ways to Deossify," pp.66-67.

297.Ibid., p.61.

298.See, for example, Pierce, "Seven Ways to Deossify," pp. 69-71, and note 24.

299.Ibid., p.95.

300.See Howlett, "The Judicialization of Canadian Environmental Policy 1989-1990: A Test of the Canada-U.S. Convergence Thesis," pp.120-121.

301.467 U.S. 837 (1984).

302.Ibid., pp. 842-43. See also Pierce, "Seven Ways to De-ossify," pp.72-71.

303.5. U.S.C. s.581.

304.See, for example, Hoberg, "Environmental Policy: Alternative Styles," pp.316-321.

305.P.J.Harter, "Negotiating Regulations: A Cure for Malaise, 71 Georgia Law Journal 1, (1982).

306.58 *Federal Register* 51,735 (1993).

307.Ibid., p.51,735.

308.Ibid., s.1(b).

309.Ibid., s.4.

310.Ibid., s.5.

311.Ibid., s.6(a).

312.Ibid., s.6(3)(E)(i).

313.Ibid., s.6(4).

314.United States Environmental Protection Agency, Advisory Committee Charter: Common Sense Initiative Council (Washington, D.C.: 1994).

315.Personal Communications, U.S. Environmental Protection Agency staff, July 1995.

316.Reinventing Environmental Regulation (Washington, D.C.: Executive Office of the President, March 1995), p.6.

317.Ibid.

318.Ibid.

319.Project XL Information Package (Washington D.C.: May 1996).

320.Pollution Prevention Alliance Newsletter Vol.6/No.1. February/March 1996, pp.5-6.

321.In February 1995, for example, the House of Representatives passed the *Risk Assessment and Communication Act*. This Bill would vastly expand the role of judicial review in the regulatory process, extending it to before new rules or regulations are issued. Many of the steps in the analytic process could be challenged in court as they are completed, making it possible for affected companies to delay introduction of most rules and regulations almost indefinitely. The proposal seems intended, in effect, to completely ossify the rule-making process, and render it impossible for the U.S. federal government to enact new rules in the environmental, consumer protection, and occupational health and safety fields. For a detailed summary of the House Bill, see D.Mahoney, "The Environment and the "Contract with America: Risk Assessment and Cost-Benefit Analysis," The Great Lakes United, Vol.9, No.3, Winter 1994-95.

322.For a detailed overview of these initiatives see The Year of Living Dangerously: Congress and the Environment in 1995 (Washington D.C.: The Natural Resources Defense Council, December 1995).

323.Ibid.

324.Survey results have consistently shown Americans favour protecting the environment over cutting regulations by factors of two to one or greater. For a summary of recent U.S. public opinion surveys regarding the environment, see NRDC, The Year of Living Dangerously.

325.This bill was signed into law by Mr. Clinton on August 6, 1996.

326.Red Tape Commission, Interim Report, June 1996, pp 6-7. The test requires that all new legislation and regulations impacting business or institutions be justified according to the following criteria:

* the need to intervene;
* alternatives to regulation that have been explored;
* the kind of consultation that has occurred with business, including small business;
* the costs to business and to government, and evidence that benefits outweigh the costs;
* efficiencies and customer service; and
* assurances that new regulation does not duplicate or overlap existing regulations or other Ministries or other levels of government.

327.J.Rusk, "Ontario to fight red tape with controls on regulations," The Globe and Mail, July 18, 1996.

328.Hudson N. Janisch, Testimony to the Standing Committee on Regulations and Private Bills, Legislative Assembly of Ontario, March 24, 1988, p.T-6.

329.For detailed critiques of the risk-benefit approach see, for example: J. Castrilli and T. Vigod, "Pesticides," in J. Swaigen ed., Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers 1993), pp 624-625; W. Leiss, Risk Management Approaches: Concepts, Issues and Choices (Paper Presented to the Federal Pesticide Review Team) (Vancouver: William Leiss and Associates Ltd., 1989); and United States Congress, Senate and House of Representatives, Risk Benefit Analysis in the Legislative Process: Summary of a Congress-Science Joint Forum (96th., Congress, 2nd. Session, March 1980)(Prepared by the Congressional Research Service and Library of Congress).

330.Bill 26, *The Savings and Restructuring Act, 1995*, Schedule O (amendments to the *Mining Act*) established a permit-by-rule system for the approval of mine closure plans.

331.Secretariat to the Standing Joint Committee, Report on Bill C-62.

332.See, for example, Thomas, "Whistle-Blower," The Edmonton Journal, March 26, 1994 See also Environmental Law Centre News Brief, Vol.9, No.2, 1994.

333.Red Tape Commission, Interim Report, pp.6-7.

334.I.Green, "The Courts and Public Policy," in Atkinson, ed., Governing Canada, p.203.

335.See *Thorson v. A.G. Canada*, (1975) 1 S.C.R. 138 and *Findlay v. Minister of Finance of Canada*, (1986) 2 S.C.R. 607 on the development of the "public interest standing doctrine" in Canada.

336.For example, the 1990 Alberta *Natural Resources Conservation Board Act*, and the 1992 *Environmental Protection and Enhancement Act*.

337.Ss.7 and 13(1).

338.Standing Committee on Regulations and Private Bills, Second Report, recommendations 1(a)-(f).

339.Ibid., Recommendation 27.

340.Ibid.

341.M.Howlett, "The Round Table Experience: Representing and Legitimacy in Canadian Environmental Policy-Making," Queen's Quarterly 97 (1990), pp.580-601.

342.Ibid.

343.These principles are partially adapted from: Porter and Van der Linde, "Toward a New Conception of the Environmental-Competitiveness Relationship," and other sources.

344.Reinventing Environmental Regulation, pg.6.

345."More effective and efficient environmental policies," in Environment and Economics (Paris: Organization for Economic Cooperation and Development, 1985), p.171. See also Office of Technology Assessment, Industry, Technology and the Environment: Competitive Challenges and Business Opportunities (Washington, D.C.: United States Congress, 1993) p.23. In Ontario, specific design elements were incorporated into Control Orders and other instruments to ensure compliance by setting timetables for the construction of pollution control facilities. See R.Gibson, Control Orders and Industrial Pollution Control in Ontario (Toronto: Canadian Environmental Law Research Foundation, 1983).

346.See: OECD, "More efficient and effective environmental policies," p.171; P.Ph.Barde and P.F. Teneire Buchot, "The Promotion and Diffusion of Clean Technologies in Industry" (Paris: Organization for Economic Cooperation and Development, Environment Secretariat, 1987), pp.22-24; and N.A.Ashford, "Understanding Technological Responses of Industrial Firms to Environmental Problems: Implications for Government Policy," in K.Fischer and J.Schot, eds., Environmental Strategies for Industry (Washington D.C.: Island Press, 1992), p.294.

347.See, for example, Pollution Prevention Legislative Task Force Final Report (Ottawa: Environment Canada, 1993), p.47. See also Technology Innovation and Economics Committee of the National Advisory Council for Environmental Policy and Technology (NACEPT), Permitting and Compliance Policy: Barriers to U.S. Environmental Technology Innovation (Washington, D.C.: Environmental Protection Agency, 1991). See also Barde and Buchot, "The Promotion and Diffusion of Clean Technologies in Industry," pp.12 and 14.

348. *Pulp and Paper Mill Defoamer and Wood Chip Regulations*; SOR/92-268 (Gaz. 20/5/92, p. 1955) and *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations*; SOR/92-267 (Gaz. 20/5/92, p. 1940).

349.*Ozone-depleting Substances Regulations No.1,2,3 and 4.*
No. 1; SOR/89-351 (Gaz. 19/7/89, p. 3425).
No. 2; SOR/90-583 (Gaz. 12/9/90, p. 3735).
No. 3; SOR/90-584 (Gaz. 12/9/90, p. 3720).
No. 4; SOR/93-214 (Gaz. 19/5/93, p. 2243).

350.See, for example, M.Winfield and J. Rabantek, Putting the Environment in Green Industry Strategies: The Role of Environmental Industries in Restructuring for Sustainability (Toronto: Canadian Institute for Environmental Law and Policy, April 1995), pp.17-18.

351.Porter and Van der Linde, "Toward a New Conception."

352.Ibid.

353.Ibid.

354.Reinventing Environmental Regulation, pg.11.

355.This has been suggested in confidential correspondence to the Environmental Commissioner of Ontario.

356.See, for example, B.G.Rabe, "Environmental Regulation in New Jersey: Innovations and Limitations," (Ann Arbor: University of Michigan, 1990). The New Jersey Department of Environmental Protection issued its first facility-wide permit in May 1995. See Pollution Prevention Alliance Newsletter Vol.5/No.2, May/June 1995.

357.House of Commons Standing Committee on the Environment, Its About Our Health, Recommendation 45.

358. Winfield, *supra* note 326.

359.Canadian Council of Ministers of the Environment, Environmental Management Framework Agreement Discussion Draft, October 1995, Schedule VI (Policy and Legislation), Article 3.1. It should be noted that the studies conducted to date indicate that actual cases of duplication between federal and provincial environmental requirements are very rare. See, for example, Environment Canada, Environmental Regulatory Review Discussion Document, and KPMG Environmental Services, Resource Impacts Assessment Study: Environmental Management Framework Agreement.

360.EBR, s,68(s).

361.Porter and Van der Linde, "Toward a New Conception."

362.Porter and Van der Linde, "Towards a New Conception."

363.For a detailed description of recently announced reductions to the Ministry of Environment and Energy budget see W.Winfield and G.Jenish, Ontario's Environment and the "Common Sense Revolution:" A First Year Report (Toronto: Canadian Institute for Environmental Law and Policy, June 1996), Appendix 2.

364.Environment Canada Business Plan 1995/96-1997/98 (Ottawa: Environment Canada, June 1995).

365.See, for example, M.Winfield and G.Jenish, Brief to the Standing Committee on General Government Regarding Bill 26: The Savings and Restructuring Act (Toronto: Canadian Institute for Environmental Law and Policy, December 1995), for an example of a proposal of this nature.

366.1995 Budget Plan (Ottawa: Department of Finance, 1995), pp.40-41.

367.Economic Council of Canada, Responsible Regulation.

368.Economic Council of Canada, Reforming Regulation.

369.For a detailed discussion and critique of these instruments see B.Heidenreich and M.Winfield, "Sustainable Development, Public Policy and the Law," in Estrin and Swaigen, ed., Environment on Trial, (3rd.ed.), pp.xxx-xxxiv.

370.See Task Force on Economic Instruments and Disincentives to Sound Environmental Practices, Final Report (Ottawa: Department of Finance, November 1994).

371.Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness, p.7.

372.Standing Committee on Regulations and Private Bills, Second Report, Recommendation 8.

373.Ibid., Recommendation 9.

374.See, for example, Sub-Committee on Regulations and Competitiveness, Regulations and Competitiveness and Standing Joint Committee of the Senate and House of Commons on Regulations and Other Statutory Instruments, Fourth Report (1980).See also, Standing Committee on Regulations and Private Bills (Ontario), Second Report.

375.See, for example, the amendments to: *The Public Lands Act*, *The Forest Fires Prevention Act*, and *The Lakes and Rivers Improvements Act* contained in Schedule N of Bill 26.

376.See, for example, the comments of Liberal and New Democratic Party members of the Legislature on the occasion of the Second Reading of Bill 26, Legislative Debates, December 12, 1995.

377.See, for example, Winfield and Jenish, Presentation on Bill 26.

378.R.C. Vipond, "Mike Harris, imperial Premier," The Globe and Mail, December 11, 1995.

379.See Bill 57, *The Environmental Approvals Process Improvement Act*, Sections 2 and 7.

380.House of Commons, *Standing Order 109.*

381.Ibid. .