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IN DEFENCE OF ENVIRONMENTAL REGULATION

We live in an era when the very concept of "the public interest" is under attack by neo-conservative voices and the corporate world. One of the important aspects of this attack is the strategy of de-regulation, or elimination of public interest laws, including in the field of environmental protection.

The de-regulatory initiatives are international, through the current round of trade agreements (FTA, NAFTA, and GATT), national and provincial. In Ontario, in this year alone, we have seen major rollbacks of environmental laws (***Public Lands Act, Mining Act, Lakes and Rivers Improvement Act, Municipal Act, Conservation Authorities Act, Game and Fish Act, Intervenor Funding Project Act, Planning Act,*** current proposals to change the ***Environmental Assessment Act,*** etc.) Proposals for more of the same are contained in the regulatory review done by the Ministry of Environment and Energy. Funding, program and staff cuts have further reduced environmental protection provincially and federally. The federal-provincial "harmonization" initiative may well devolve environmental federal powers to the provinces, many of which do not have the political will to use them.

While the rhetoric of de-regulation is sometimes stark and clear, it is now often joined with proposals for industry voluntary programs, self-regulation, and self-certification. The plethora of schemes is too large to enumerate here. Voluntary programs that provide a "challenge" to industry to exceed regulatory requirements may be useful. However, the replacement of current laws by voluntary schemes, and their use as barriers to positive law reform, raise serious concerns for the public.

Public opinion polls consistently show that citizens support strong environmental laws even in times of recession, and want regulatory action in sectors where it doesn't now exist (like action on climate change). They also support restrictions on chemical use when there is only a possibility of damage, or evidence of damage, but not definitive proof (application of the precautionary principle). Very few place faith in voluntary initiatives for environmental protection.

KPMG Management Consultants conducts annual polls of managers of over 300 institutions and businesses regarding their attitudes to environmental management. Repeatedly, the prime motivation (of 95% of enterprises) for establishing environmental management systems is compliance with regulation. Two thirds also cite potential director liability, another legal motivator.

There are specific problems with various of the proposed and current voluntary programs. However, three concerns are common to all and arise from the erosion of the rule of law.

First, voluntary programs and individual compliance agreements, applying only to some sectors, and only to some businesses within a sector, lack the equal and consistent standards characteristic of law. They may result in a system where there are as many different

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approaches and results, in controlling or eliminating a pollutant, as there are producers and users. Larger businesses with more resources (funds, lawyers and technical advisors) have an advantage over smaller ones, leading to an inherently unfair system, totally lacking the principle of equality before the law. Far from being a simpler set of rules, the system is more complex than our current legal regime for both industry and government administrators.

Second, voluntary programs lead to less accountability from industry due to serious problems of non-enforceability. It is not realistic to argue, as industry and government often do, that enforcement will come through "the court of public opinion." The public lacks the information, technical and legal advice, and funds necessary to even track company actions. Without a legal standard, there is nothing to enforce. Without mandatory reporting requirements, little relevant information will be accessible to the public. Nor is access to the media to publicize corporate actions, necessarily available, particularly given the likelihood of corporate legal reprisals.

Third, the elimination of a regulatory process removes due process from the public. It is a hallmark of public interest reform groups in Canada that citizens want more involvement in decisions with significant social, consumer, and environmental impacts. Over the past twenty-five years, various laws for environmental protection have included increased mechanisms for public participation. (The ***Environmental Bill of Rights,*** hearings before environmental tribunals, intervenor funding). The legal process of regulation-making, in itself, has provided a basic level of public notice and information, with opportunities for public involvement and accountability through reporting. Governments now are obliged to consult on major regulatory initiatives, stimulating important public policy debates.

De-regulation and self-regulation remove these hard-won current rights of public involvement in legal processes, so fundamental to our democratic legal system. For example, the vast majority of voluntary pollution prevention agreements concluded to date have been negotiated behind closed doors, with no consultation with environmental groups, unions, or health and safety organizations.

CONCLUSION

Environmentalists agree that our regulatory system can be improved, and should be. More performance-based regulations may serve the public well. Regulations are necessary to create a level playing field for industry, and, in the opinion of Michael Porter of Harvard University, frequently provide an important stimulus to corporate innovation and efficiencies.

We need to keep a strong green regulatory regime in place.

Note: This paper is a shortened version of **De-regulation and Self-Regulation in Administrative Law: A Public Interest Perspective,** by Michelle Swenarchuk and Paul Muldoon, available at the Canadian Environmental Law Association.

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