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Putting Canadians At Risk

How the federal government's
deregulation agenda threatens health
and environmental standards

By Marc Lee and Bruce Campbell



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**410-75 Albert Street
Ottawa, ON K1P 5E7**

TEL 613-563-1341 FAX 613-233-1458
EMAIL ccpa@policyalternatives.ca
www.policyalternatives.ca

CAW 567
OTTAWA

About the Authors

Marc Lee is a Senior Economist with the B.C. office of the Canadian Centre for Policy Alternatives. He has authored many CCPA publications, including: *Tax Cuts and the "Fiscal Imbalance," Indecent Proposal: The Case Against a Canada-U.S. Customs Union*, and *In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism*.

Bruce Campbell is Executive Director of the Canadian Centre for Policy Alternatives. He has written widely on public policy issues, including on Canada-U.S. relations. He is author or editor of several books, including (with Maude Barlow) *Straight Through the Heart: How the Liberals Abandoned the Just Society*, Harpercollins, 1995, and *Pulling Apart: The Deterioration of Employment and Income in North America Under Free Trade*, CCPA, 1999. *Living with Uncle: Canada-U.S. Relations in an Age of Empire*, CCPA/Lorimer, will be released this fall.

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Summary

Federal deregulation — euphemistically called “smart regulation” and “regulatory cooperation” — has been championed from within the federal bureaucracy and was strongly endorsed by the previous Liberal government. More troubling is that deregulation has been driven almost entirely by the very corporate interests against which regulations are supposed to protect the public.

Ideologically, regulation is almost always seen as a “burden” on companies, industries, and national “competitiveness.” It is an article of faith among proponents that deregulation will be beneficial for the Canadian economy. Certainly, it will fatten the bottom lines of companies that find regulatory measures intrusive and costly. But, when all things are considered, is there really an economic case to be made for deregulation? Or is this just a policy initiative that exclusively benefits corporate Canada, hidden from public view by deceptive language, and ultimately paid for by greater risks (or worse) borne by average Canadians? What does this mean in terms of whether governments in the future will be able to enact and enforce regulations in the public interest?

This paper examines the current federal deregulation initiative and further efforts to harmonize regulations with the United States. We review the context of regulation and deregulation in Canada, then consider the economic case for deregulation, weighing this against the risks to public health and the environment, and more generally the potentially astonishing loss of policy autonomy for the federal government.

Regulation and its Discontents

Regulations exist because history has demonstrated a need for them, and because *laissez-faire* capitalism is insufficient to achieve high levels of economic and social development. Regulation seeks to correct market failures, or shape markets in ways that better suit our values — in particular, to protect workers against unsafe working conditions, to protect consumers from technically deficient or hazardous products, and to prevent damage to the environment.

It is safe to say that most regulation is resisted by businesses that are affected by it, to the extent that it may constrain the use of their capital and their ability to increase profits. Like

their counterparts in the U.S., Canadian businesses have crusaded for decades for large-scale reduction or elimination of regulations. They have been aided and abetted by legions of lobbyists and right-wing think-tanks like the Fraser Institute, and, by and large, they have been successful. But they are still not satisfied. Like tax cuts and debt retirement, deregulation is an ongoing process that is never quite finished to the satisfaction of corporate Canada.

The major flashpoints, where corporate interests take primacy over the public interest, are:

- application of risk management, cost-benefit analysis, and international trade screens as barriers to the development of new regulations, while subordinating the precautionary principle;
- faster approvals of drugs, chemicals, and biotechnology at a cost of greater risk borne by Canadians and the environment;
- regulatory harmonization and outsourcing that undermines independence and democratic decision-making;
- promotion of “alternative” approaches to regulation in place of actual regulation; and
- further centralization of the regulatory process, with a “veto” for the Privy Council Office to override regulatory decisions.

Public interest advocates have been concerned about the ascendance of “risk management” or “risk assessment” approaches to regulation, which limit or distort “precautionary” approaches. The precautionary approach basically says that, in the face of scientific uncertainty, we should err on the side of caution with respect to health, safety, and the environment. For example, it is better to forgo the alleged health and economic benefits of a new drug than expose people to potential harm. The risk management (or risk assessment) approach demands evidence of great harm before regulations can be put into effect.

This approach places the burden of proof on the regulator, even though it may take decades for evidence to accumulate, as was the case for tobacco, alcohol, PCBs, DDT, and lead in gasoline. (Even when there is widespread consensus within the scientific community, there will always be a handful of holdouts, usually in the pay of vested interests, to argue against the consensus). The result is that risk management approaches give primacy to the very economic interests that are adversely affected by regulation.

While it is appealing to believe Canada has high standards for its regulations (and to express the concern that these are under attack), the reality is that there are many areas where we are not doing an adequate job. Indeed, a number of pressing health and environmental issues — from toxic chemicals in cleansers and cosmetics to trans-fats in the food supply — suggest a need for more stringent regulation, rather than reduced regulation.

After an initial push by both Canada and the U.S. towards regulating in the interests of human health and the environment in the 1970s, both countries have been backsliding for some time. Moreover, there are significant pressures within Canada to harmonize to the deregulatory goals of the Bush administration.

This approach is not inevitable. Canada should be moving instead in the direction of the European Union (EU), which is bringing in new regulations for toxic chemicals through its REACH (Registration, Evaluation and Authorization of Chemicals) legislation, which is in its final legislative stages and likely to be implemented in 2007. While environmentalists have criticized REACH for being watered down in response to a fierce opposition campaign led by the EU chemical industry (and bolstered by the Bush administration and U.S. chemical industry), it is still an important step forward, one rooted in European notions of precaution rather than North American risk management.

Deregulation and Harmonization

The fingerprints of corporate Canada are all over the current “smart regulation” exercise. But it is important to note that deregulation is nothing new: it has been a priority of the federal government for more than a quarter-century. The federal government’s existing *Regulatory Policy* has been criticized — by public interest lawyers and the Auditor General — for posing hurdles to the development of public interest regulation, and for putting economic objectives on equal footing with the objectives of regulation itself.

Corporate Canada’s interests are also protected by the numerous tests of the *Regulatory Policy*, in particular requirements that “benefits outweigh costs,” that “adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed,” that “international and inter-governmental agreements are respected and full advantage is taken of opportunities for coordination with other governments and agencies,” and that “federal government intervention is justified and regulation is the best alternative.”

While it would appear that the government has already accommodated corporate interests into regulation at every stage of their development, it is alarming that the government’s March 2005 *Smart Regulation Action Plan* goes even further down the deregulatory path. The proposed new regulatory policy, the *Government Directive on Regulating (GD-R)*, is much more explicit and restrictive than its predecessor, and expands the number of barriers that must be hurdled in order for a department to pass a new regulation.

The GD-R places pressure on federal departments to use non-regulatory measures wherever possible, and to bring forward regulations only to the extent necessary to achieve objectives. Departments are tasked with triaging regulatory proposals as of low, medium, or high significance. To make a new regulation, new tests

are required, including a full assessment of social, environmental, and economic impacts. The overall approach is generally hostile to regulation and is obsessed with any potential impacts on corporate Canada that may undermine “competitiveness.” The exercise is centralized through the Privy Council Office, which oversees the GD-R and has a mandate to challenge departments proposing new regulations.

The *Smart Regulation Action Plan* includes not only the drafting and implementation of the GD-R for the development of new regulations, but the same screen will also be applied to *all existing regulations* through a “whole-of-government” review process. Moreover, all regulations are to be seen as part of a “life-cycle” approach, meaning regular review of regulations and sunset clauses so that any regulations that survive the large hurdles being erected would be subject to a process where they can be attacked by those being regulated. Such a process has long been on the agenda for right-wing think-tanks and corporate Canada.

The same “competitiveness” obsession in the *Smart Regulation Action Plan* is also present at the international level, reflected in international trade treaties and in efforts to harmonize regulatory activities. Both the WTO and NAFTA place limitations on regulatory activities in the name of ensuring the freedom of traders and investors to move and operate where and when they want, with minimal interference from governments.

Canada is seeking to go even further, however, as the deregulation exercise at the federal level is being twinned with “regulatory cooperation,” another Orwellian term referring to greater harmonization of regulations, primarily with the United States, but also with Mexico (as a NAFTA partner), to reduce allegedly high costs to businesses engaging in North American trade. Use of terms such as *interoperability*, *common*, *compatibility*, and *mutual recognition* mask the reality that harmonization in most cases means Canada bending its policies and regulations, or

simply adopting U.S. policies and regulations. Given the more advanced state of deregulation in the U.S. — at least at the federal level — regulatory harmonization provides a back-door opportunity to spur deregulation in Canada.

A reading of the draft *Government Directive on Regulating* shows how international trade commitments with regard to regulation under the WTO and NAFTA are being implemented in Canada. In many ways, however, the GD-R imposes tougher tests for new regulations than required by international trade treaty commitments. It is as if the government is deliberately adopting the most intrusive interpretation of its international commitments, rather than simply seeking to meet its minimum requirements while preserving as much capacity as possible to regulate in the public interest. The GD-R is peppered with language that bogs down regulation with tests of impacts on specific regulated industries and overall “competitiveness.”

The *North American Security and Prosperity Partnership* agreement (SPP), signed by NAFTA leaders in March 2005, has replaced NAFTA as the framework under which the regulatory harmonization agenda is moving forward. The SPP established a deadline of 2007 to set up a *North American Regulatory Cooperation Framework Agreement*. In addition, numerous initiatives covering regulatory harmonization of goods and services are underway, including: financial services, motor carrier regulations, energy infrastructure, pesticides, biotechnology, and pharmaceutical products. This indicates a two-track approach to regulatory harmonization: one comprehensive and the other sectoral.

The interests of corporate Canada are well represented in the SPP. The Canadian Council of Chief Executives (CCCE) has been aggressively pushing its *Security and Prosperity Initiative* — the name is almost identical — since January 2003. They also spearheaded a tri-national business task force on North American integration, which released its final report, *Building a North American*

Community, in May 2005, less than two months after the NAFTA Leaders’ accord.

What is most striking is how tightly coordinated the deregulation agenda is among business leaders, politicians, and bureaucrats; between the domestic and the continental initiatives. Corporate Canada is driving the process and providing the policy direction, political leaders determine the precise shape and pace of policy change, and bureaucrats take the lead on policy implementation. Absent from the process is Parliamentary oversight and citizen input — in short, democratic accountability.

Harmonizing regulations to U.S. levels is even more of concern because the Bush administration has been moving the yardsticks through its own deregulation initiative. Harmonization in this context is tantamount to importing U.S. deregulation, even as American public interest lawyers and citizens’ groups have decried these moves that blatantly favour corporate interests. While corporate Canada has claimed that economic integration will not precipitate a race to the bottom, this is indeed what is being set in motion.

Deregulation Costs and Benefits

The case for “smart regulation” and “regulatory cooperation” is generally made on economic grounds: that such moves will enhance our economic performance. Many bold claims are made in favour of “smart regulation,” punctuated by breathless praise of global markets and stern rebukes of governments that dare to get in the way. But, on closer inspection, there is little evidence that regulation has negative effects on the economy and society. Indeed, cost-benefit studies in the U.S. have found that the benefits of regulation to the public greatly exceed any costs to business.

Given its repeated appearance in pro-harmonization speaking points, the notion that there is a “tyranny of small differences” undermining

Canada-U.S. trade has become a point of mythology. Certainly, to the extent that small differences do pose extra costs to business without much in the way of benefit, these issues are likely to be uncontroversial and could be addressed without much difficulty. But corporate Canada has had ample opportunities to make any such cases since the advent of Canada-U.S. free trade, and the Canadian government routinely solicits the input of business before making any decisions of importance.

Instead, the “tyranny of small differences” is like “smart regulation”: a catchy, uncontroversial PR term that diverts attention from the real issues that matter to corporate Canada, and that *are* controversial to most Canadians.

Regulatory harmonization with the U.S. is receiving a big push from deep inside the federal government. The source is a group called the Policy Research Initiative (PRI), a government think-tank until very recently housed in the Privy Council Office. A number of promotional publications on “regulatory cooperation” have appeared on the PRI web page over the past year.

Upon examination, however, it appears that the PRI’s role is not to make a balanced assessment of the pros and cons of greater regulatory harmonization, but to manufacture the economic case for an agenda that has already been approved further up the line. The PRI has geared its research to supporting its contention that positive net benefits will accrue from increased regulatory harmonization with the United States. There is a glaring absence of critical or skeptical perspectives among its publications.

The danger is that numbers and results from these studies (absent any kind of peer-review process) become “truth” when translated into Ministerial briefing notes and government documents without any of the nuances and caveats that come with the original research, much less a rigorous critique of their methodology.

One of the priority areas identified by both the Canadian and U.S. governments for regulatory harmonization is drug testing and approval — the idea of a “tested once” policy for North America — to forgo its own tests and simply accept those of the U.S. Food and Drug Administration.

Consumer groups in the U.S., however, are deeply concerned about the FDA’s safety record in the context of a number of high-profile drug recalls that have occurred as approval times have been reduced. Concerns include the FDA’s relationship with industry, which since 1992 has paid user fees to the FDA in exchange for faster approval times.

The Bush administration has been a dream come true for the decades-long corporate deregulation drive. Bush stacked his regulatory agencies with former corporate lobbyists and prominent anti-regulatory crusaders to an unprecedented degree. Years of corporate propaganda have created fertile ground among legislators that the costs of regulation are excessive. With the foxes more than ever in charge of the henhouse, the deregulation assault has moved into high gear.

While a case might be made for different regulatory agencies to cooperate internationally in the evaluation of new drugs, chemicals, and biotechnology by doing independent reviews and sharing the results, this is the opposite of the “tested once” philosophy. A straightforward alternative would be to increase the budgets of regulatory and scientific bodies, including approval agencies, so that any backlogs can be cleared, and so that they have sufficient funding to do independent research. For example, a key problem for drug approvals is that Health Canada has become almost entirely dependent on the research provided by the companies themselves.

One-size-fits-all regulation and regulatory structures may lead to policy failures that cascade across borders. Longer drug approval times in Canada mean that Canadians can learn from

what happens in the U.S. market when new drugs are approved, and can avert disasters when drugs are recalled. Due diligence is required on the part of Canadian regulators to ensure that products in the Canadian marketplace are safe.

A Better Approach

The federal government needs a deep rethink of its approach to regulation — not “smart regulation,” but *real regulation* that protects the environment and human health. Given the challenges we face, giving away the tools to set an independent course in the public interest is as foolish as it is irresponsible. When it comes to protecting public health, safety, and the environment, citizens are being asked (actually, they are *not* being asked) to bear greater risks so that corporations can increase their profits.

Government must state unequivocally that the first obligation of regulation is to protect citizens’ health, safety, and the environment, and restore the primacy of the precautionary principle. The current deregulation exercise began with the assumption that Canada is over-regulated when, in fact, there is good reason to believe that Canada is *under*-regulated. Growing incidence of cancer, rising asthma rates among children, and greater neurological disorders suggest that untested environmental toxins may be a big part of the problem. Under current regulatory methods, it could be decades before substances thought to be toxic, but not proven conclusively in a scientific sense, are banned or even restricted.

A better approach would be for Canada to first address shortcomings in ensuring protective measures. The federal government could do a lot more to safeguard health and safety and the environment in its areas of jurisdiction aiming to increase the standards of health and environmental protection over time, and it should

be more aggressive in using the precautionary principle to mitigate harm in cases where scientific evidence is not yet available.

The federal government must provide the additional resources and staffing so that existing regulations can be properly enforced, and so that independent research can be undertaken to inform decision-making. Another innovation would be to enhance public participation in the regulatory process to increase the transparency, accountability, and legitimacy of the process and provide a counter-weight to the tremendous corporate influence.

Canada should also be looking at places where it can cooperate with other nations to raise environmental and health and safety standards upwards. But we should not be afraid to be leaders: there may even be economic advantages to being first movers in, say, environmental technologies. The federal deregulation approach, in contrast, destines us to be followers. There is benefit to regulatory diversity — regulation that meets to specific economic and social circumstances of where it is being implemented. Regulatory differences between Canada and the United States reflect our different cultures, identities, and institutions.

The bottom line is that regulation, accompanied by strong enforcement, works. An effective regulatory system is much needed as the economy becomes more complex and new technological developments pose challenges to health and the environment.

Finally, language matters: the resort to the Orwellian language of “smart regulation” demonstrates that this corporate-driven agenda is unpalatable to most Canadians. Citizens should be engaged in making regulation better, not deceived into accepting deregulation by a different name.

1 Introduction: Deregulation by Another Name

Canadians expect federal and provincial governments to take measures to ensure public health, protect the environment, and make workplaces safe. The details of how governments do this are of little interest, but there is a strong belief that such measures are necessary. Regulation, the means by which these objectives are realized, is boring topic for most people, who just want the job to get done and place their trust in government to make it so.

The need for regulation only comes up in popular thinking when a major public emergency occurs and government fails in its task: Walkerton, mad cow, tainted blood, “tuna-gate,” e-coli in the food supply, the recall of an approved drug such as Vioxx. At these moments, especially when death and sickness are involved, we realize why we need governments to develop and enforce regulations on our behalf. Individuals and families alone cannot do it; a guardian of the public interest is necessary.

With some tragic examples fresh in the public mind, it is troubling that one of the most important policy initiatives of the federal government in recent years has been deregulation, the stripping of these protective measures, and har-

monization, or aligning of Canadian regulatory structures with the more deregulated structures of the United States. Canadians might well ask whether we need more and stronger protective measures throughout our regulatory system given pressing health and environmental concerns — such as climate change, toxic chemicals, and air quality — and rapidly advancing new technologies — from Internet-related possibilities to new drugs to biotechnology applications on food and humans.

A new round of federal deregulation will do nothing to address these challenges; rather, it inhibits our ability to respond in an effective manner. Preventive measures are being further subsumed to a wait-and-see approach biased in favour of industry. Some limited hearings and consultations with “stakeholders” have occurred, but deregulation is not on the Parliamentary agenda, nor has it received the thorough public discussion it deserves.

The key federal initiatives:

- The soon-to-be-finalized Government Directive on Regulating (GD-R) will fundamentally change the government’s

approach to regulation. It will establish new policy requirements for all government regulators, placing large obstacles to the development of new regulations, bringing Canada's regulatory framework in line with international trade commitments, and placing "competitiveness" at the heart of policy objectives.

- The Smart Regulation Action Plan (SRAP), which includes a top-to-bottom review of existing regulations to ensure compatibility with the dictates of the GD-R, and a series of Sector Sustainability Tables composed of senior bureaucrats and industry representatives.
- The "regulatory cooperation" initiative, connected to the SRAP and proceeding under the umbrella of the North American Security and Prosperity Partnership Agreement (SPP), signed in March 2005 by NAFTA leaders. The SPP aims to streamline and harmonize regulations by 2007 through a North American Regulatory Cooperation Framework Agreement and through sectoral initiatives.
- The GATS (General Agreement on Trade in Services) negotiations at the World Trade Organization, which is seeking new and tougher disciplines on domestic regulation activities by governments. These negotiations may proceed whether or not the Doha Round is revived from its current stalemate.

Federal deregulation — under the euphemistic moniker of "smart regulation" and "regulatory cooperation" — has been championed from within the federal bureaucracy through the Privy Council Office, and was strongly endorsed by the previous Liberal government.¹ More troubling is that deregulation has been driven almost entirely by the very corporate interests against

which regulations are supposed to protect the public. Ideologically, regulation is almost always seen as a "burden" on companies, industries, and national "competitiveness." While economic objectives are legitimate considerations, the confluence of ideology and vested interests has warped federal priorities when it comes to public interest regulation.

Any lip service paid to protecting the public interest in federal documents is trumped by the federal government's obsession with the vaguely defined concept of "competitiveness." Periodically reviewing regulations and associated policies governing the development of regulations need not be controversial, but the process undertaken by the federal government has not centred around public interest questions: whether, for example, Canada may in fact be under-regulated and in need of stronger environmental or health and safety regulation. On the contrary, recommendations from public advocacy groups to strengthen federal regulations, the regulatory process, and enforcement have all too often fallen on deaf ears.

It remains to be seen what position the new Conservative government will take on federal deregulation, although, as a pro-business party, it is reasonable to assume that they will continue the same course and perhaps even go further than their predecessors. The Conservatives have inherited the *Smart Regulation Action Plan*, underway since March 2005, and the key international negotiations relating to regulation. If the Conservatives are serious about enhancing the accountability of the federal government, creating a more transparent and democratic process in this area would be a good place to start.

It is an article of faith among proponents that deregulation will be beneficial for the Canadian economy. Certainly, it will fatten the bottom lines of companies that find regulatory measures intrusive and costly. But when all things are considered, is there really an economic case to be made for deregulation? Or is this just a pol-

› Framing the Debate: Regulation, Deregulation and “Smart Regulation”

An important influence on the current federal deregulation initiative is the External Advisory Committee on Smart Regulation (EACSR). A corporate-dominated advisory body,² the EACSR made detailed recommendations to the federal government in 2004 that target approval processes in controversial areas such as energy, pharmaceuticals and biotechnology, while promoting greater use of “voluntary approaches” and “self-regulation” in place of actual regulation.

This EACSR document reads like a report from the foxes on henhouse security. It states upfront that: “Smart Regulation, as defined by the Committee, is not deregulation” (this is the only time the term “deregulation” appears in the EACSR report). This claim is not reassuring as the EACSR defines regulation in an unconventional and excessively broad manner: “Regulation encompasses a range of instruments that include formal rules, such as statutes, subordinate legislation (regulations) and ministerial orders, as well as *less formal instruments, such as standards, guidelines, codes, and education and information campaigns.*”³

In contrast, the Oxford English Dictionary defines regulation concisely as “a rule or directive made and maintained by an authority.” The federal government itself comments that: “Regulations are a form of law, often referred to as delegated or subordinate legislation. Like Acts, they have the same binding legal effect and usually state rules that apply generally, rather than to specific persons or things.”⁴

Environmental lawyers Michelle Swenarchuk and Paul Muldoon define deregulation as “those initiatives that seek to repeal or diminish regulatory requirements in various regulated communities, or to diminish the capacity of government agencies to develop, administer and enforce regulatory programs.”⁵

Given that this is an apt description of most of the EACSR’s recommendations, the term deregulation is conspicuous by its absence. As we will see in Section 3, the EACSR’s call for “less formal instruments” such as voluntary codes are not, in fact, regulation. The reason for the deft spin lies in public opinion. Research on public attitudes to regulation commissioned by the EACSR reported that “Canadians have become wary of the language of deregulation.”⁶ It would appear that that EACSR’s response is not to back away from deregulation, but instead to ban its usage in favour of the more user-friendly “smart regulation.” After all, who could object to being smart?

icy initiative that exclusively benefits corporate Canada, hidden from public view by deceptive language, and ultimately paid for by greater risks (or worse) borne by average Canadians? What does this mean in terms of whether governments in the future will be able to enact and enforce regulations in the public interest?

This paper examines the current federal deregulation initiative, which to date has only caught the attention of a handful of environmental lawyers and social activists concerned about conflicts of interest between defending the public interest and promoting “competitiveness.” We add to this by carefully considering the economic case for

deregulation (who benefits and how much), and weighing this against the risks to public health and the environment, and more generally the potentially astonishing loss of policy autonomy for the federal government.

We avoid the government’s terms “smart regulation” and “regulatory cooperation,” and instead deem deregulation and harmonization to be more accurate terms (*see box*). The re-framing of deregulation by the federal government only serves to divert attention away from the important issues at stake. But Canadians rightly view deregulation with suspicion, and if anything

would like to see higher standards for public interest regulation.

The paper proceeds as follows. In the next section, we offer a primer on regulation: what it is and why we have it. We follow this in Section 3 with the recent history of deregulation in Canada, with an emphasis on the *Smart Regulation Action Plan*. Section 4 reviews the international context: Canada's commitments under international trade agreements, and recent initiatives related to regulatory harmonization with the United States and Mexico.

In Sections 5 and 6, we undertake a cost-benefit analysis of the federal program. First, we consider the potential benefits, the economic case for deregulation and harmonization, by reviewing the relationship between regulation and key economic indicators such as productivity. We contrast this with the exaggerated claims made in favour of deregulation and harmoniza-

tion. Next, we consider the potential costs, including the downside of the shifting of risk onto consumers and the general public arising from deregulation, as well as the political cost — the loss of policy autonomy — associated with regulatory harmonization.

We conclude with some clear and sensible alternatives: increasing Canada's regulatory capacity after a quarter-century of cuts, restoring the autonomy of regulators, ensuring that the federal government can implement precautionary "made in Canada" regulations that put health, safety, and environmental protection above efficiency and competitiveness considerations, and removing the pernicious influence of corporate money and lobbyists in shaping policies. Finally, we offer some thoughts on how Canadian regulators can cooperate with other nations without surrendering essential policy autonomy.

2 A Primer on Regulation in the Canadian Context

While a popular pejorative description of regulation is of “red tape,” the fact of the matter is that the economy cannot function without regulation. Regulations are the infrastructure of commerce, the rules of the game that shape how business is conducted and how activities by business relate to society at large. Regulations are also the means by which laws passed by Parliament or provincial legislatures are put into effect. The *deification* of markets and competition — “market fundamentalism” in the words of Nobel laureate Joseph Stiglitz⁷ — can be a large obstacle to clear thinking about regulation.

Regulations exist because history has demonstrated a need for them, and because *laissez-faire* capitalism is insufficient to achieve high levels of economic and social development. Regulation seeks to correct market failures, or shape markets in ways that better suit our values — in particular, to protect workers against unsafe working conditions, to protect consumers from technically deficient or hazardous products, and to protect against damage to the environment. To guard against their destructive tendencies, markets must be embedded in systems of social — preferably democratic — regulation.

The real question is not *whether* intervention in markets is required, but *how* to intervene. Laws and regulations are one means of achieving social objectives. Others include: changing incentives through spending or taxation; education; advertising; and moral suasion. But because regulation compels behaviour, as long as appropriate sanctions for non-compliance exist and enforcement is adequate, history has demonstrated that regulation works.

The major areas of regulation include:

- environmental protection;
- labour codes and employment standards;
- consumer protection;
- health and safety;
- urban planning;
- corporate governance;
- competition policy;
- monopolies and state enterprises;
- foreign ownership and investment restrictions;
- industrial policy; and
- intellectual property and innovation.

This is clearly a far-reaching list. Some of these areas are of provincial jurisdiction, others fed-

eral. Attempts to harmonize provincial regulations have been made through the *Agreement on Internal Trade*.⁸ And, more recently, the federal government and the provinces agreed in 1998 to the *Canada-wide Accord on Environmental Harmonization*, which devolved much responsibility for environmental protection to the provinces, even though the Supreme Court had just ruled that the federal government had the authority to set national environmental standards.⁹ This has taken place in the context of provincial deregulation in recent decades, which raises a number of concerns. This paper does not attempt to tackle the provincial dimension of (de-)regulation, and focuses exclusively on the federal effort.

Another distinction often made in the literature is between “economic” regulation aimed at setting the rules of engagement for commerce, and “social” or “public interest” regulation that is about controlling commercial behaviour that has negative social or environmental impacts. In practice, the lines between the two are blurry, as most social regulation has an economic aspect.

Finally, regulations are only as good as their enforcement. Public servants are needed to be the eyes and ears of Canadians to ensure that companies are meeting legal requirements. In the wake of budget cuts in the mid-1990s and the current program review seeking to cut costs by several billion dollars, there is good reason to be concerned that not enough public servants are being employed to ensure reasonable standards in the interests of Canadians. Environmental groups have been concerned that provisions of the *Canadian Environmental Protection Act* have been undermined due to insufficient resources attached to enforcement.¹⁰ Similarly, health advocates have been worried about cuts at Health Canada and proposed changes to the *Food and Drug Act*.

The idea that federal budget surpluses might be used to reinvigorate the capacity of federal regulators to undertake research and enforce reasonable standards is not on the table in the

present exercise. Data are scarce, but it is safe to say that federal spending on regulation is a relatively small part of the federal budget. According to calculations by Statistics Canada, the federal government spent \$3.4 billion on regulatory activities in 1997/98, the last year for which data are available.¹¹ While this number sounds large, it represents only about 3% of program expenditures. Relative to the economy, federal regulatory expenditures amounted to about 0.4% of GDP. Better and more recent data are required to assess the trends in federal support for public interest regulation; it is striking that so little information is available as the government moves its sweeping *Smart Regulation Action Plan* forward.

Corporate Opposition to Regulation

It is safe to say that most regulation is resented by businesses that are affected by it, as it poses a constraint on the use of their capital and their ability to increase profits (at the expense of the environment, human health, or society as a whole). Because there can be economic benefits to specific actors, or to the economy as a whole, from regulation — non-health and environment examples include controlling the adverse effects of monopoly power through price regulation or ensuring a stable banking system — it should not be viewed as a just another cost to be avoided, although too often this is the case for companies looking at quarterly financial statements.

None of this means that all regulations are perfect just as they are, nor does it mean that changing or removing a given regulation should always be avoided. Periodic reviews make sense to assess whether regulations are achieving their objectives. But the starting point should not be to review regulations with an aim of increasing “competitiveness,” but rather addressing public interest objectives, including the need for new regulations in response to new technology and health or environmental challenges.

Public interest advocates have been concerned with the ascendancy of “risk management” or “risk assessment” approaches to regulation, which limit or distort “precautionary” approaches. The precautionary approach basically says that, in the face of scientific uncertainty, we should err on the side of caution with respect to health, safety, and the environment. For example, it is better to forgo alleged health and economic benefits of a new drug than expose people to potential harm. The risk management (or risk assessment) approach demands evidence of great harm before regulations can be put into effect.

This approach places the burden of proof on the regulator, even though it may take decades for evidence to accumulate, as was the case for tobacco, alcohol, PCBs, DDT, and lead in gasoline. (Even when there is widespread consensus within the scientific community, there will always be a handful of holdouts, usually in the pay of vested interests, to argue against the consensus). The result is that risk management approaches give primacy to the very economic interests that are adversely affected by regulation.

In the same vein, businesses have pressed for non-regulatory measures, such as voluntary codes or “self-regulation” (i.e., no regulation) to free themselves from social and environmental obligations. These approaches, despite being fashionable in policy circles, are largely ineffective. Another weak form of regulation is labelling on products to provide information to consumers without changing the essential product or underlying production process. While a step in the right direction, these measures place the burden back on consumers and assume that they have the know-how and desire to use the information provided. Labelling only works to the extent that consumers are well-informed and demand products that are green or healthy, and even then they work poorly in achieving policy objectives.

How is Canada doing?

While it is appealing to believe Canada has high standards for its regulations (and to express the concern that these are under attack), the reality is that there are many areas where we are not doing an adequate job, especially in regard to the environment. A review of OECD countries by the David Suzuki Foundation across 29 environmental indicators found Canada to be the worst performer on three indicators (volatile organic compound emissions, carbon monoxide emissions, generation of nuclear waste) and the second worst performer on five indicators (intensity of energy use, water consumption, sulfur oxide emissions, environmental pricing, distance travelled by vehicle). Overall, Canada ranked 28th out of 30 OECD countries (the U.S. ranked 30th). Thus, the issues at stake include not just defending reasonable standards where they already exist, but ensuring that we have the capacity to enhance those standards where we may be under-regulated.

The number of outstanding health and environmental issues suggests that we should not forgo the tools of regulation in a bid for “competitiveness,” nor should we place the burden of proof on governments. When industry is engaging in activities that are likely to have adverse consequences for human health and the environment, they should be required to prove their safety through appropriate approval processes. It is beyond the scope of this paper to review the waterfront of health and environmental issues as they pertain to regulation, but some examples are worth noting.

In terms of environmental concerns, among the most pressing issues is climate change. While the previous Liberal government rhetorically embraced the Kyoto Protocol, it shied away from using regulatory tools to cut back Canada’s carbon emissions in favour of voluntary processes that have been a failure. At a time when the need is high for regulation to address this crisis, the

economic clout of industry has impeded action beyond token non-regulatory measures.

Another major issue that has received little attention from policy-makers is pollution. This includes air pollution and smog that plague cities year-round but most acutely in the summer. A large body of evidence has accumulated to show that air pollution leads to adverse health outcomes (like asthma) and premature death. More insidious is the presence of 23,000 chemicals in the environment that were “grandfathered” under the *Canadian Environmental Protection Act* (CEPA). Of these, the federal government has now short-listed 4,000 chemicals for more detailed safety assessments — almost two decades after the CEPA was first promulgated in 1988. And it will still take several years before any of these chemicals will be banned. This makes the need for prevention clear: these chemicals have been in the environment for decades, have caused harm, and only now are in the process of being regulated because scientific evidence (i.e., a “body count”) has become conclusive.

Meanwhile, the Canadian Cancer Society reports that 38% of Canadian women and 44% of Canadian men will develop cancer during their lifetimes, and approximately one out of every four Canadians will die from cancer.¹² A number of studies have tested Canadians in all parts of the country and found a stew of toxic chemicals and carcinogens in their blood.¹³ Pesticides, chemicals in consumer products including cookware, cleansers and cosmetics, and chemicals released in manufacturing processes all contribute to a highly polluted environment that is suspected of increasing cancer rates, as well as higher incidences of allergies and other diseases and problems such as autism, learning disabilities, hyperactivity disorders, low sperm counts, altered thyroid function, and Parkinson’s disease.¹⁴

The lesson is that translating reasonable suspicions into conclusive scientific evidence can take decades as a result “risk management” ap-

proaches. While there is a great deal of scientific research that links toxic chemicals to adverse human health, the chemical industry frequently claims that amounts are too small to have any health consequences. A little apparently goes a long way: in 2002 (the last year for which we have data), over 4 billion kilograms of pollutants were released in Canada, of which 2.7 billion kilograms are considered toxic under the CEPA. Total release of pollutants was up 49% over 1995 levels.¹⁵

On the food front, an interesting case is that of trans fatty acids (trans fats) in food. In June, 2006, the Trans Fat Task Force, a panel reporting to Health Canada, recommended new regulations to slash the amount of (but not eliminate) trans fats in Canada’s food supply. The report notes that concerns about the detrimental effects of trans fats were first expressed by the scientific community in 1990. By the mid-1990s, Canadians were found to have among the highest intakes of trans fats in the world. Only because time has allowed for substantial evidence of negative health effects has any action been taken: the opposite of a precautionary approach.

Canada’s initial response was to require labelling of trans fats, which became mandatory by the end of 2005, although labelling requirements have been delayed until 2007 for smaller companies. The report comments on the relative effectiveness of voluntary measures versus actual regulation. After reviewing the experience with voluntary labelling in Canada and the experiences in regulating trans fats in other countries, the report notes:

All these considerations point away from voluntary compliance and toward regulations limiting the trans fat content of foods as being most effective at the population level. Benefits would accrue even to people who do not read labels, including those with lower incomes or lower literacy skills. As these groups are at a higher than

average risk of coronary heart disease, this intervention would better support Canada's national health objectives. The regulatory approach would also provide a clear signal all along the food supply chain and reduce the uncertainty experienced by the food and edible oil industry. In addition, it would help create a more level playing field for all players.¹⁶

Despite the recommendations of the task force, consensus in the scientific community, and other examples of action around the world, it may still be some time before restrictions on trans fats come into force. The Minister of Health has promised to review the recommendations and consult with "stakeholders." During the Task Force's process, industry stakeholders, while seeing the writing on the wall, voiced concerns that new measures would compromise "taste" for consumers.

All of these cases suggest a need for more vigorous regulation, rather than reduced regulation. After an initial push by both Canada and the U.S. towards regulating in the interests of

human health and the environment in the 1970s (many argue that the U.S. regulatory system that came out of this was in fact superior to Canada's in terms of standards), both countries have been backsliding for some time. In later sections of the paper, we go into more detail about developments in Canada and the U.S., and pressures within Canada to harmonize to the deregulatory target of the Bush administration.

It is worth noting that this approach is not inevitable. Canada should be moving instead in the direction of the European Union (EU), which is bringing in new regulations for toxic chemicals through its REACH (Registration, Evaluation and Authorization of Chemicals) legislation, which is in its final legislative stages and likely to be implemented in 2007. While environmentalists have criticized REACH for being watered down in response to a fierce opposition campaign led by the EU chemical industry (and bolstered by the Bush administration and U.S. chemical industry), it is still an important step forward, one rooted in European notions of precaution rather than North American risk management.

3 Deregulation and the Smart Regulation Action Plan (SRAP)

Like their counterparts in the U.S., Canadian businesses have crusaded for decades for large-scale reduction or elimination of regulations. They have been aided and abetted by legions of lobbyists and right-wing think-tanks like the Fraser Institute. By and large, they have been successful in pressing for deregulation. And, like tax cuts and debt retirement, the work of deregulation is an ongoing process that is never quite finished to the satisfaction of corporate Canada.

The fingerprints of corporate Canada are all over the current exercise. In this section, we provide a short history of deregulation at the federal level and an overview of the current *Smart Regulation Action Plan*, including the proposed *Government Directive on Regulating*. We also review two major reports commissioned by the federal government (by the Organization for Economic Cooperation and Development and the External Advisory Committee on Smart Regulation) that have set the table for the present deregulation push.

Federal Regulatory Policy

Deregulation is nothing new: it has been a priority of the federal government for more than a quarter-century. Business groups blamed regulation in the 1970s as the cause of high inflation and slow economic growth (even though these problems also plagued other industrialized countries). Federal governments responded to the business deregulation agenda with the Neilson Task Force in the mid-1980s and the Prosperity Initiative in the early 1990s.

In 1986, the Mulroney government established a formal policy to govern the process of developing regulations. It has since undergone several reviews and modifications, the latest in 1999. As part of the Chrétien government's Growth and Jobs Agenda, a Deputy Ministers' committee was set up in 1996 to advance "regulatory reform." In 1998, a regulatory affairs secretariat was established at the Privy Council Office (PCO), the central agency responsible for approving regulations. Regulatory control was further centralized with the transfer to the PCO of control over the regulatory implementation process. (This mirrors the centralization of U.S. regulatory control within the Bush White House.)

In 2000, the Deputy Ministers' committee recommended a regulatory reform agenda focusing on "promoting Canada's international competitiveness," risk management approaches, alternative instruments such as voluntary codes, and regulatory compliance measures that ensure transparency and (business) stakeholder engagement. This led to a review of Canada's regulatory system by the Organization for Economic Cooperation and Development (OECD), a forum of the major industrialized countries known for its pro-liberalization views, and a second review by the External Advisory Committee on Smart Regulation (a panel composed largely of corporate appointees), and culminating in the March 2005 *Smart Regulation Action Plan*.

Before we look at the SRAP, it is worth pausing to take stock of the existing process for developing regulations. The federal government's *Regulatory Policy* has been criticized for posing hurdles to the development of public interest regulation, and for putting economic objectives on equal footing with the objectives of regulation itself. The Canadian Environmental Law Association states:

The expression of assumed values and preferences in the current *Regulatory Policy* such as competitiveness, wealth maximization, cost-benefit analysis, business impacts and equivalent means work against the likelihood of environmental and health protection regulations coming into force.¹⁷

These remarks echo a 2000 review of federal health and safety programs by the Auditor General. Noting that Canadians strongly believe that health and safety must take precedence over economic and other considerations, the Auditor General criticized attempts by the government to simultaneously balance health and safety regulatory demands with economic objectives, and recommended that:

The federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs, particularly the balance that the government has reached to protect Canadians and address budget, social, economic and trade objectives. The government should revise its regulatory policy and other policies to reflect this emphasis.¹⁸

In addition to the federal *Regulatory Policy*, the federal government's *Guide to Making Federal Acts and Regulations* sets out the process for making regulations, from proposals through to implementation. The process ensures that affected companies and industries have ample opportunity to express concerns with proposed regulations. Corporate Canada's interests are also protected by the numerous tests of the *Regulatory Policy*, in particular requirements that "benefits outweigh costs," that "adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed," that "international and inter-governmental agreements are respected and full advantage is taken of opportunities for coordination with other governments and agencies," and that "federal government intervention is justified and regulation is the best alternative." Thus, it would appear that the government has already accommodated corporate interests into regulation at every stage of their development.

The *Smart Regulation Action Plan* builds on this foundation, with a proposed new regulatory policy, the *Government Directive on Regulating (GD-R)*, that is much more explicit and restrictive than its predecessor, and that expands the number of hurdles that must be passed in order for a department to pass a new regulation.¹⁹ The exercise is also centralized through the PCO, which oversees the GD-R and has a mandate to

“review regulatory proposals, challenge departments and agencies on the quality of regulatory analysis, and advise them when the directions set out in the Directive have not been met.”

A key feature of the GD-R is to bring Canada’s regulatory regime into line with the government’s international commitments as reflected in the NAFTA and WTO Agreements (see next section for an overview). Departments contemplating new regulations are obliged to consult with International Trade Canada to ensure compliance with these agreements. Regulations must also be designed in a way that does not restrict trade “any more than necessary to fulfill the intended policy objectives.”²⁰ And international cooperation is mandated, with an objective of “limiting the number of specific Canadian regulatory requirements or approaches to instances where they are merited by specific Canadian circumstances.”²¹

Interestingly, while the GD-R makes explicit mention of the WTO and NAFTA, it does not mention other international treaties to which Canada is a signatory. These include treaties such as the Biosafety Protocol, the Kyoto Protocol, the Montreal Protocol, Basel Convention, and the Cultural Diversity Treaty, not to mention numerous United Nations charters. While environmental concerns are at least given a passing mention in the GD-R, cultural objectives are completely absent.

The GD-R places pressure on federal departments to use non-regulatory measures wherever possible, and to bring forward regulations only to the extent necessary to achieve objectives. Departments are tasked with triaging regulatory proposals as of low, medium, or high significance. To make a new regulation, new tests are required, including a full assessment of social, environmental, and economic impacts. The overall approach is generally hostile to regulation, with the onus on regulators to “demonstrate that regulation should be part of the mix

of government instruments used to manage public policy issues.”²²

The GD-R is obsessed with potential impacts on corporate Canada that may undermine “competitiveness.” Putting specific economic interests on an equal footing with public interest considerations is embedded in this process. The GD-R states that departments and agencies are expected to “limit the administrative burden and impose the least possible cost on Canadians and business that is necessary to achieve the intended policy objective”²³ and must “take measures to prevent or mitigate the adverse and enhance the positive impacts of regulation on competitiveness, trade and investment, and the ability of the economy to generate jobs and wealth.”²⁴

The GD-R is the central text of the broader *Smart Regulation Action Plan* (SRAP), announced in March 2005 by then-Treasury Board President Reg Alcock, as a “reform that will fundamentally change how we approach regulation in this country.” It is organized around five themes: health; environmental sustainability; safety and security; Aboriginal prosperity and northern development; and innovation, prosperity, and business environment. It has an inter-governmental working group and an international regulatory cooperation working group. The Plan features an (as-yet-to-be-named but likely business-dominated) external Regulation Advisory Board, and is committed to providing regular progress updates.

The launch of SRAP focused on enhancing competitiveness and efficiency. Although careful to say that protection would not be sacrificed, the emphasis was on cutting and streamlining regulatory processes. There was no mention of tightening regulations where necessary, or expanding regulations to protect Canadians, for example, to deal with new environmental threats to health.

While the *Smart Regulation Action Plan* includes the drafting and implementation of the GD-R for the development of new regulations, the

same screen will be applied to *all existing regulations* through a “whole-of-government” review process. The *Report on Action and Plans* accompanying the release of the SRAP notes:

We will review certain statutes and regulations in existence to ensure that duplication and redundancy are minimized, regulatory needs are rationalized, processes are improved and, where possible, simplified, and that Smart Regulation principles in the areas of innovation and competitiveness are balanced with our health, security, and environmental well-being.²⁵

In addition, regulations are to be seen as part of a “life-cycle” approach, meaning regular review of regulations and sunset clauses so that any regulations that survive the large hurdles being implemented would be subject to a process where they can be attacked by those being regulated. Such a process has long been on the agenda for right-wing think-tanks and corporate Canada.

The *Report on Action and Plans* is also clear that a “new regulatory approach will involve classifying risk in terms of probability and impact, and developing risk thresholds below which government would not intervene through regulation.” In other words, the government will triage potential risks, and areas where risk is *perceived* to be low (in the context of available scientific evidence) will not be subject to regulation. Moreover, the Report adds: “Focusing regulatory attention on areas that pose the greatest risk can help reduce the overall regulatory burden. This will also apply to reviewing the existing stock of regulations.”

The Report also sets in motion several processes to review and coordinate the SRAP. This includes interdepartmental “theme” tables to “ensure greater coherence across regulatory regimes, minimize unintended effects of regulation, and find better ways to provide effective protec-

tion.” And, under the auspices of Environment Canada, four Sector Sustainability Tables were created in late 2005 to advise on “smart regulations and beyond” in four areas: forestry, mining, energy, and chemicals. Originally conceived of as government-industry collaborative mechanisms (co-chaired by one CEO and one Deputy Minister), they have more recently been “weakened” (from the perspective of industry) by the presence of NGO participants.

External Reviews of the Federal Regulatory System

The *Smart Regulation Action Plan* and the GD-R take the lead from two major reports on Canada’s federal regulatory system, from the Organization for Economic Cooperation and Development (OECD) and the External Advisory Committee on Smart Regulation (EACSR). They grew out of the 2002 Throne Speech, which first announced that the government would undertake a “smart regulation” initiative — an apparent repackaging of its failed 1994 *Regulatory Efficiency Act* (C-62), which proposed giving companies non-regulatory options in meeting policy objectives. The initiative’s stated purpose was to contribute to innovation and growth by reducing the regulatory “burden” on business.

As part of the initiative, the government commissioned the OECD to review Canada’s regulatory regime. The 2002 OECD report recommended avenues for “enhancing market openness through regulatory reform,” calling such reforms “the unfinished business of trade liberalization.”²⁶ The OECD wagged its finger most sternly at Canada’s foreign ownership restrictions in the telecommunications, air transport, and fisheries sectors, the “old-style” regulatory practices of Health Canada, and “cultural industries” such as broadcasting, book publishing, and distribution and film sectors.²⁷

The OECD recommended that there be greater coherence between trade and regulatory policy

as part of a “pro-competitive” regulatory framework. The OECD also recommended a move towards performance-based regulation, an extensive regulatory harmonization with other countries, and an accelerated implementation of the Agreement on Internal Trade (which aims to harmonize regulations across the provinces).

Building on the OECD recommendations, the government then turned to a panel of hand-picked business representatives, the External Advisory Committee on Smart Regulation (EACSR), to advise it on how to implement its smart regulation initiative. The Committee accepted submissions from interested parties, but did not hold any public hearings. Meetings were held behind closed doors with only a handful of PCO officials present. After 15 months of deliberations, the EACSR submitted its 150-page, 73-recommendation report to the government in September 2004.

The EACSR report predicted large economic gains if its recommendations were adopted, and dire consequences if they were not. The Committee embraced the business case in ways that represented a major shift in regulatory philosophy. It reaffirmed and strengthened the concept that regulations should be both protecting and “enabling” — giving equal weight to business cost considerations — thereby diluting the “primacy of protection” tradition. It strongly advocated replacing the protection-first approach with a risk-management approach to regulation.

It strongly supported — over the objections of citizens’ groups and public preferences — flexible, or non-regulatory approaches such as voluntary codes, self-regulation, and tax incentives. It recommended further centralization and control of the regulatory process (departments were deemed to be resistant to change), and the creation of external “swat teams” to examine and presumably — as implied by the military jargon — obliterate unnecessary existing regulations.

The EACSR also placed a major emphasis on what it called increased international regulatory cooperation, especially with the United States.

Recommending its incorporation as a component of Canadian foreign policy, the Committee said that the government should actually limit its regulatory activities to areas where “its national goals and values are significantly different from those of key trading partners.”²⁸ Its key recommendations were:

- eliminate small regulatory differences and reduce regulatory impediments to an integrated North American market; capitalize on the greater resources of the U.S. regulators by accepting their procedures and outcomes in many areas;
- move toward a single review and approval of products and services for all jurisdictions in North America; and
- put in place integrated regulatory processes to support key industries.²⁹

But, in looking to “cooperation,” the EACSR appears to have little interest in raising Canadian standards. A submission from Environment Canada, for example, reported on its ideas for a “convergence analytical framework” that would see Canadian environmental regulations converge to U.S. equivalents “in cases where it appears that U.S. environmental performance is better and where matching this performance could have strategic business benefits for Canada.”³⁰ The EACSR report disregards this advice.

One area highlighted by the Committee was the creation a more effective federal process to facilitate the development of Alberta tar sands oil for export to the U.S., and the building of pipelines to bring natural gas down from the Arctic. Drug approvals were also highlighted. Citing the delays in Health Canada’s approval process, the economic costs to companies, and alleged health costs to the public from being denied access to new drugs, it advocated taking advantage of what it called the superior scientific and regulatory capacities of the U.S. Food And Drug Administration and focusing its scarce

resources on strategic priorities. In other words, Canada should implement measures to outsource drug reviews [mainly] to U.S. authorities “when an independent Canadian process does not add to the quality of outcomes.”³¹

Canadian business enthusiastically embraced the “smart regulation” committee’s report. With

the work of the EACSR in hand, the federal government responded — without further public input or review by Parliament — by making it a priority for departments to implement the EACSR’s recommendations. The result has been the new GD-R and associated “smart regulation” and “regulatory cooperation” initiatives.

4 International Trade Agreements and Regulatory Harmonization

The same “competitiveness” obsession in the *Smart Regulation Action Plan* is also present at the international level, reflected in international trade treaties and in efforts to harmonize regulatory activities. The SRAP embodies the Canadian policy elite consensus on restricting regulatory actions by government, and harmonizing regulations across borders to the greatest extent possible, in order to facilitate trade and investment by global corporations. Both the WTO and NAFTA place limitations on regulatory activities in the name of ensuring the freedom of traders and investors to move and operate where and when they want, with minimal interference from governments.

Canada is seeking to go even further, however, as the deregulation exercise at the federal level is being twinned with “regulatory cooperation,” another Orwellian term referring to greater harmonization of regulations, primarily with the United States, but also with Mexico (as a NAFTA partner), to reduce allegedly high costs to businesses engaging in North American trade. Use of terms such as *interoperability*, *common*, *compatibility*, and *mutual recognition* mask the reality that harmonization in most cases means

Canada bending its policies and regulations, or simply adopting U.S. policies and regulations. Given the more advanced state of deregulation in the U.S. — at least at the federal level — regulatory harmonization provides a back-door opportunity to spur deregulation in Canada.

In this section, we review the international context for deregulation, starting with existing international commitments in trade agreements, then moving to the proposals for greater regulatory harmonization within North America.

Regulation, the WTO and NAFTA

There is an old saying that “a child with a hammer views everything as a nail.” A review of the history of international trade agreements demonstrates that trade negotiators tend to view all government policy measures as barriers to trade. Because trade negotiators represent offensive corporate interests by seeking greater market access abroad, they can be blind to defensive interests, like protecting public services and regulation, that may be of concern to Canadians. Political economy scholars, in contrast, have identified international trade agreements

as quasi-constitutional in effect, because they serve to constrain domestic policy-making options.³² In the earlier decades, these agreements (sometimes called “conditioning frameworks”) were more tolerant of diverse policy choices at the national level, but have become less tolerant and more intrusive over succeeding rounds of negotiation.

International trade agreements in modern times go well beyond “trade” issues. In the post-war era of the General Agreement on Tariffs and Trade (GATT), the focus was on a steady reduction of trade barriers at the border (tariffs, quotas and bans) through successive rounds of negotiations, with most of the attention on trade in manufactured goods. As the liberalization process evolved, more attention began to be paid to measures “inside the border” (non-tariff barriers) that may be restricting trade.

The transformation of the GATT into the World Trade Organization in 1995 changed the terrain of this exercise by expanding its scope to cover new areas like services, intellectual property, and agriculture, thereby pushing international trade disciplines on governments further inside the border. This was accompanied by diminished flexibility for individual nations to exempt themselves from disciplines, and the creation of a binding dispute settlement mechanism to give the rules “teeth.”

With regard to regulation, the key WTO restrictions are in the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), and the domestic regulation section of the General Agreement on Trade in Services (GATS). The TBT Agreement, which applies to trade in goods, allows for regulation in the public interest provided that “technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective” (2.2). Political scientist Stephen McBride comments:

The provision that regulations should not be more trade-restrictive than necessary opens the door to a variety of challenges to national systems of regulations. The text privileges trade above legitimate policy goals. For example, the least trade-restrictive health or environmental regulations may not be the best regulations as viewed from health or environmental value systems.³³

The TBT Agreement also requires that regulations be non-discriminatory, respect the national treatment principle, and pursue international harmonization wherever possible.

The SPS Agreement contains similar language with regard to measures relating to food, animal and plant safety, and including areas such as pesticides and genetically-modified organisms. The SPS Agreement, however, is less balanced than TBT in that it has a much stronger emphasis on international harmonization, with deviations (higher national standards) permitted only when there is scientific justification. Thus, the effect of the chapter is to create a minimalist floor based on international consensus that greatly restricts precautionary approaches in favour of “risk assessment.”

These new trade rules, as interpreted by dispute panels of international trade lawyers, have been used to successfully attack even those public interest regulations that are applied in a completely non-discriminatory manner, i.e., that treat local and imported products the same. This was evident in the WTO dispute panel ruling against the EU’s ban on hormone-treated beef in 1997 because it was not justified by a scientific risk assessment. More recently, a WTO panel ruled that an EU ban on genetically-modified food was also illegal under WTO rules (the EU removed the ban in 2004 in favour of an approval procedure). It is also worth noting that the U.S. opposition to the EU’s REACH regulatory program for toxic chemicals argued violations of

WTO rules, suggesting that a challenge may be coming once the regulatory regime comes into effect in 2007.

Last, but certainly not least, in the WTO's deregulatory arsenal is the WTO General Agreement on Trade in Services (GATS), which qualifies and restricts member governments' ability to regulate measures (i.e., laws, regulations, standards, etc.) "affecting trade in services" (Article I).

GATS Article VI(4) is the most controversial. It authorizes member states to negotiate new restrictions on *non-discriminatory* domestic regulations — that is, well beyond what is required to ensure equivalent treatment of foreign service suppliers. It mandates the development of "any necessary disciplines" to ensure that "measures relating to qualification requirements and procedures, technical standards, and licensing procedures do not constitute unnecessary barriers to trade in services," with the added condition that regulatory measures are "not more burdensome than necessary to ensure the quality of the service" — in other words, the imposition of a necessity test that would be adjudicated under GATS.³⁴ The proposed restrictions could adversely affect a broad swath of regulations from licensing of waste dumps, broadcasters and universities to standards to ensure water quality, pipeline safety, sustainable forestry management, and more.³⁵

This negotiation is currently proceeding as part of the Doha Round of WTO negotiations, but is considered to be part of the "built-in agenda" arising out of the previous Uruguay Round. Thus, despite the recent collapse of the Doha Round due to an impasse among key countries, negotiators still have a mandate to move forward on the GATS. The deregulatory bias of the Canadian government seems to extend to its GATS negotiators. Unlike many other governments, which have objected strongly to the inclusion of a necessity test in the new rules, Canadian negotiators have been conspicuously silent on this issue.

The NAFTA language around regulation is, in some senses, more deferential to regulatory authority than that of the WTO. The NAFTA chapter on TBT contains similar language to the WTO's, but NAFTA does not have as aggressive language around SPS. This may be because the 1994 NAFTA predates the 1995 WTO, and because U.S. and Canadian regulatory agencies were better able to assert themselves during the negotiations. Interestingly, the NAFTA TBT chapter commits the three governments to "work jointly to enhance the level of safety and of protection of human, animal, and plant life, and health, the environment and consumers."³⁶ This provision has apparently been ignored.

However, NAFTA's investment chapter — in particular, the investor-to-state dispute settlement mechanism — provides a major deterrent to regulatory action by governments. For example, a legal challenge by Ethyl Corp to the Canadian government's ban on the import of MMT, a neuro-toxic gasoline additive, caused the government to reverse its ban and compensate the company. The threat of onerous compensation payments that governments must pay to successful litigants for anticipated lost profits, together with the right of individual investors to take cases directly to NAFTA arbitration, acts as a much more powerful instrument of regulatory chill than provisions of the WTO.

The NAFTA TBT chapter, like the WTO, also states a preference for the development of international standards. Moreover, Article 906 promotes mutual recognition of standards from other Parties, but only to the satisfaction of the importing Party. And, finally, the labour and environmental side-agreements of NAFTA, while generally regarded as toothless, aim to ensure that Parties are enforcing their own regulations.

A reading of the draft *Government Directive on Regulating* shows how international trade commitments with regard to regulation under the WTO and NAFTA are being implemented in Canada. In many ways, however, the GD-R im-

poses tougher tests for new regulations than required by international trade treaty commitments. It is as if the government is deliberately adopting the most intrusive interpretation of its international commitments, rather than simply seeking to meet its minimum requirements while preserving as much capacity as possible to regulate in the public interest. The GD-R is peppered with language that bogs down regulation with tests of impacts on specific regulated industries and overall “competitiveness.”

Regulatory Harmonization and North American Deep Integration — The Security and Prosperity Partnership

While lowest-common-denominator harmonization of regulations is, for large corporations and market fundamentalists, an ideal at the global level, “progress” is more likely to be made on a bilateral or regional basis. As the EU’s REACH program demonstrates, some governments may still seek to place a higher priority on human health and the environment.

The *North American Security and Prosperity Partnership* agreement (SPP) has replaced NAFTA as the framework under which the regulatory harmonization agenda is moving forward. The SPP was signed by the NAFTA leaders in March 2005. Under the “Improve Productivity” heading of the Leaders’ Statement, the first bullet point reads, “regulatory cooperation to generate growth,” followed by “lower costs for North American businesses, producers and consumers, and maximize trade in goods and services across borders by striving to ensure compatibility of regulations and standards and eliminating redundant testing and certification requirements.” Though the standard PR cover phrase “while maintaining high standards for health and safety” was inserted in the press release, it was clear that cost-cutting, not protection, is the priority.

The SPP established nine Ministerial working groups with concrete implementation targets — among them a deadline of 2007 to set up a *North American Regulatory Cooperation Framework Agreement*. Three months later, the first SPP implementation report released work plans for nearly 100 initiatives — many of which are regulatory in nature — to be implemented by trilateral working groups on an ongoing basis, with regular progress updates. Many of these initiatives cover regulatory harmonization of goods and services, including: financial services, motor carrier regulations, energy infrastructure, pesticides, biotechnology, and pharmaceutical products. What this indicates is a two-track approach to regulatory harmonization: one comprehensive and the other sectoral. (It should be noted that public information about the SPP is almost nonexistent.)

These initiatives mirror the *Smart Regulation Action Plan*, which references the goal of the *North American Regulatory Cooperation Framework*: “to reduce the compliance burden and duplication for business and create a division of labour allowing regulators to specialize in areas where they have expertise.”³⁷

The energy sector was singled out as a priority for regulatory harmonization: to facilitate U.S. access to energy resources from both Canada and Mexico. The SPP June 2005 Update reported that the three national energy regulators were establishing a tri-national regulators expert group to coordinate regulatory efforts, and, among other things, to collaborate on ways to increase Alberta tar sands and natural gas production by examining infrastructure and refining bottlenecks, regulatory issues, and environmental impacts.

At the second SPP meeting in March, 2006, the NAFTA leaders (with Stephen Harper as Prime Minister) reaffirmed their commitment to completing the regulatory framework agreement by 2007, stating that “regulatory cooperation advances the productivity and competitiveness

of our nations and helps to protect our health, safety, and the environment.”³⁸

The three leaders reasserted energy as a top priority, announcing a *North American Energy Security Initiative*, which will “strengthen the North American energy market by improving transparency and regulatory compatibility, promoting the development of resources and infrastructure, increasing cooperation on energy efficiency standards, and supporting other efforts aimed at addressing challenges on the demand side” — in other words, securing access to energy resources in Mexico and Canada for the domestic needs of the U.S.³⁹

Significantly, where U.S. interests demand unrestricted free trade, as in energy, all stops are pulled out — with Canada’s compliance — to meet U.S. import demands and to facilitate its control over an increasingly large share of Canada’s hydrocarbon reserves. However, where U.S. interests demand restrictions, as in softwood lumber, free trade rules are thrown overboard. Incredibly, the current Canadian government is willing to go along and acquiesce to this flouting of NAFTA rules.

Accompanied this time by big business representatives, the NAFTA Leaders also announced the creation of a *North American Competitiveness Council* (NACC) comprised of business leaders from each of the three countries, to make recommendations on North American competitiveness.

The NACC was launched on June 15, 2006, at a meeting presided over by industry (called “prosperity”) ministers from the three countries. Each country has 10 CEO representatives (although 15 were listed on the U.S. section). The U.S. section includes: General Motors, Ford, Wal-Mart, Lockheed Martin, General Electric, FedEx, UPS, Merck, and Chevron. The Canadian section is made up almost entirely of members of the CCCE, including: Canfor, Power Corp., BCE, Manulife, Suncor, Home Depot Canada, CN, and Scotiabank. The NACC has already be-

gun meeting and will draw up a list of recommendations to present to ministers at their next meeting in October. The U.S. section (backed by a secretariat comprised of the U.S. Chamber of Commerce and the Council of the Americas) has already drawn up its five priorities. Its No. 1 priority is energy integration, and No. 3 is regulatory and standards harmonization and best practices sharing.

The interests of corporate Canada are well represented in the SPP. The Canadian Council of Chief Executives (CCCE) has been aggressively pushing its *Security and Prosperity Initiative* — the name is almost identical — since January 2003. They also spearheaded a tri-national business task force on North American integration, which released its final report, *Building a North American Community*, in May 2005, less than two months after the NAFTA Leaders’ accord.

Like the SPP, it called for the rapid implementation of a *North American Regulatory Action Plan* “to eliminate existing regulatory differences as quickly as possible.” Consistent with the 2004 EACSR report, it identified “regulatory efficiency as an important way to improve North American competitiveness and [also with the standard PR cover clause] find new ways of enhancing protection of people and the environment...” It called for analysis of the cost of regulatory differences and the benefits of regulatory convergence, though costs are framed as business costs of unnecessary regulatory differences and delays in product approval, and benefits are framed as quicker access by consumers and higher profits by companies. It also proposed — like the EACSR report — a North American default principle: no country-specific regulation unless an international or North American standard does not exist, where there are unique national circumstances, or where there is a lack of trust among the partners.

Citing the Policy Research Initiative’s research (see Section 5) showing the corporate benefits of such a policy, the report proposed that govern-

ments immediately adopt a “tested-once” policy for biotech products and pharmaceuticals, whereby a product tested in one country would automatically be accepted as meeting standards in the others. The need to speed up regulatory approval of energy infrastructure projects (e.g., the Mackenzie Valley natural gas pipeline) and a North American alternative to Kyoto were also identified.

What is most striking is how tightly coordinated the deregulation agenda is among business leaders, politicians, and bureaucrats; between the domestic and the continental initiatives. Corporate Canada is driving the process and providing the policy direction, political leaders determine the precise shape and pace of policy change, and bureaucrats take the lead on policy implementation. Absent from the process is Parliamentary oversight and citizen input — in short, democratic accountability.

For Canadians, it should not take long to figure out who will be doing the harmonizing. “Cooperation” implies (incorrectly) that Canadian regulations might be raised in certain areas where U.S. levels are higher, such as envi-

ronmental standards for the discharge of waste by the cruise ship industry. But any such examples are never made in federal documents. The reality of the asymmetric power imbalance between Canada and the U.S. means that Canada would sacrifice its policy autonomy and regulatory philosophy, and unilaterally adopt U.S. regulatory standards and approaches. And that is what “smart regulation” proponents want: a back-door way of achieving their deregulation objectives when the front-door approach meets with resistance.

Harmonizing regulations to U.S. levels is even more of concern because the Bush administration has been moving the yardsticks through its own deregulation initiative (see Section 6). Harmonization in this context is tantamount to importing U.S. deregulation, even as American public interest lawyers and citizens’ groups have decried these moves that blatantly favour corporate interests. While corporate Canada has claimed that economic integration will not precipitate a race to the bottom, this is indeed what is being set in motion.

5 A Flawed Economic Case

The case for “smart regulation” and “regulatory cooperation” is generally made on economic grounds: that such moves will enhance our economic performance. The External Advisory Committee on Smart Regulation (EACSR) argues: “An outdated system is an impediment to innovation and a drag on the economy because it can inhibit competitiveness, productivity, investment, and the growth of key sectors. Other countries are reforming their systems, and Canada cannot afford to be left behind.”

There are many such bold claims made in favour of “smart regulation,” punctuated by breathless praise of global markets and stern rebukes of governments that dare to get in the way. In this section, we consider the evidence about regulation, the economy, and society. We also look critically at work done by the Policy Research Initiative, a think-tank within the federal government, to make the economic case for regulatory harmonization with the U.S.⁴⁰

Costs and benefits of regulation

There are both costs and benefits of regulations, with costs for governments to develop, monitor,

and enforce regulations, and for industries that must comply, while benefits tend to be more widespread across the population. Costs are identifiable in a quarterly financial statement, while benefits can be spread over decades. Opponents of regulation tend to focus on the costs to industry, and, to the extent that costs and benefits are considered together, to exaggerate costs and downplay benefits.

In recent years, economists and other regulation policy analysts have endorsed the use of cost-benefit analysis in the design and assessment of regulations. As mentioned above, this test for regulations is part of Canadian federal regulatory policy. In the abstract, cost-benefit analysis sounds like a reasonable approach, but in practice it has proven to be controversial. Empirical estimates of costs and benefits are very hard to come by, plagued by gaps in data and differences in methodological approaches and assumptions.

On the cost side, estimating costs often requires accepting estimates from the very industry being regulated — not an unbiased source of information because companies have an incentive to overstate their compliance costs. Num-

bers can be hard for governments to verify, and anticipated costs of complying with regulation, as stated by companies, have been found, in hindsight, to be frequently much higher than the actual costs incurred.

In many cases, the purpose of regulation is to internalize an externality (a cost imposed on a third party to the market transaction) — as incorporated, for example, into the principle of “polluter pays.” From this perspective, regulation is not imposing additional costs on business, but making markets work more efficiently by ensuring that all costs of production are built into market prices. But because the beneficiaries of regulation are generally not the same group as that implementing regulation, there are distributive issues at play.

There have been no serious studies of the compliance costs of regulation to Canadian business. This has led to some mischief on the part of the Fraser Institute, which estimated the cost to business of complying with regulations at about 12–13% of Canadian GDP, an astonishingly large figure.⁴¹ To “estimate” the private sector cost of complying with regulation, the methodology employed is to take estimates of the *administrative cost to governments* of regulation (they cite the same Statistics Canada source mentioned in Section 2), then multiply them by a factor of 20. This multiple of 20 is based on a study by a right-wing U.S. think-tank, the Competitive Enterprise Institute, which in 1976 purported to estimate the cost of regulation to the U.S. economy. The factor of 20 was not empirically derived by the authors; it was simply made up.⁴²

So the case for a high regulatory burden in Canada, which has been repeated uncritically in several government publications, rests on a three-decade-old study from another country whose numbers were determined in a completely arbitrary fashion. And, of course, the Fraser Institute study makes no attempt whatsoever to estimate the benefits accruing to regulation.⁴³

A 2005 study of the “regulatory burden” by the Canadian Federation of Independent Business (featuring the same lead author as the Fraser Institute report), based on a survey of its member companies, found the cost of regulation to be in the order of \$33 billion per year.⁴⁴ At 2.5% of GDP, this is a much smaller number than the previous Fraser Institute estimate. While the CFIB considers this to be a conservative estimate, their methodology suggests they are counting many activities, such as legal and accounting costs, that are just the cost of doing business. The report does not provide any data to distinguish between these costs and actual costs associated with complying with public interest regulation. Surveys reported in the study suggest a confusion between regulations and angst about taxes, as the most “burdensome” federal regulations cited were the GST (71%), payroll taxes (60%), and income taxes (57%), whereas only 11% of respondents cited environmental regulations.

On the other side of the ledger, benefits of regulation can be extremely difficult to quantify in dollar terms, such as the benefit of clean air and water, additional years of life, or better health. Some commentators argue that it is immoral and impossible to assign dollar amounts to death and reduced quality of life, that estimates of the value of human life are often derived from questionable methodologies, and pit human lives against potential costs to business from complying, thereby putting an artificial constraint against regulation.⁴⁵ It could also be argued that regulations may save companies potential future clean-up or liability costs.

While cost-benefit analysis may be a useful tool if applied properly, it lends itself to abuse and distortion that may compromise public health and environmental objectives. Regulators may also be too conservative in estimating costs and benefits prior to implementation. In an opinion piece for the *Washington Post*, a former administrator with the U.S. Environmental Protection Agency (EPA) argued that the agency has

consistently overestimated economic costs and underestimated benefits.⁴⁶

Even with the appropriate caveats about measurement, detailed reviews in the U.S. context have shown the benefits of regulation to far exceed costs. Responding to requests by Congress in the 1990s, the Office of Management and Budget (part of the Executive Office of the President of the United States) now performs an annual study of the costs and benefits of regulation, based on reviews of the academic literature, coupled with detailed department-level data. In the 2003 report, for example, the OMB estimated benefits of regulation at between \$147 and \$231 billion, compared to costs of regulation of \$37 to \$43 billion — that is, benefits exceeded costs by a factor of three to six times.

No such cost-benefit exercise has been undertaken for the Canadian regulatory system as a whole. But, given the U.S. example, it is likely that in Canada benefits also greatly exceed costs, even with the difficulties mentioned above in making estimates. Deregulation itself thus risks failing the cost-benefit test. The loss of benefits to Canadians arising from deregulation probably exceeds the cost savings for particular companies and industries.

Regulation and Economic Performance

For economists and policy analysts, productivity is a central barometer of the standard of living. Although some may fear that productivity is a buzzword for making workers' lives more difficult, it is merely a measure of economic output. Productivity is the total income of a country (GDP) divided by the number of workers or the total number of hours of work (the latter is generally deemed to be a better measure). Unlike the vague term "competitiveness," productivity can be measured and gives us a sense of the size of the economic pie relative to the work required to make it.

Canadian policy-makers have long been concerned about the gap between Canadian and U.S. productivity levels. The original motivation for the *Canada-U.S. Free Trade Agreement* was to close the productivity gap. A number of other business-led initiatives at the federal level in recent decades have justified themselves on the grounds of enhancing productivity and competitiveness. This includes tax reforms (such as the GST) and tax cuts (personal and corporate), deregulatory initiatives (as mentioned in the previous section), privatization of Crown corporations, and the Bank of Canada's ongoing war on inflation.

Yet, in spite of the major concessions made by government to the claim that these measures would spur Canadian productivity, the gap between Canada and the U.S. remains, and has even grown somewhat. Record profits relative to GDP in recent years have not prompted Canadian businesses to meaningfully increase new capital investment (also relative to GDP) that increases productivity; in fact, new capital investment has declined as a share of GDP.⁴⁷

We should thus be extremely skeptical about claims made for "smart regulation" this time around (as well as other deeper integration initiatives emanating from corporate Canada). Even if there was some truth to the notion that economic integration tends to equalize productivity, there is a wide range of productivity levels among U.S. states. It is not obvious that integration would raise Canadian productivity levels to that of leading U.S. states, or even to the U.S. average.

Careful research on the Canada-U.S. productivity gap has found that it is rooted in differences in industrial structure between Canada and the U.S. The U.S. has a greater share of its output in high-productivity information and communications technology sectors, thus pulling up its overall productivity level. A statistical analysis by Gu and Ho finds that:

[T]he productivity growth gap in Canadian manufacturing after 1979 was mainly due to the relatively poor productivity performance of the two high-tech industries: industrial machinery & equipment, and electronic & electrical equipment. The slower productivity growth of these two high sectors accounts for about 85% of productivity growth gap in Canadian manufacturing for the 1979–1995 period.⁴⁸

A report by the Bank of Montreal echoes this point:

In other words, very far from being afflicted by widespread, endemic productivity deficiencies, the possible problems Canada may have are, at most, confined to two specific industry sectors where statistics are difficult to compute. This is thus a very flimsy basis for concern about a serious slippage in Canadian productivity, nor for radical changes in Canadian economic policies.⁴⁹

Interestingly, in comparable industrial sectors, Canadian productivity is as good or better than the U.S. In certain sectors, such as chemical products and pulp and paper industries, Canadian manufacturers have outperformed their American counterparts. Still, overall comparisons suggest that Canada needs to continue to shift its industrial mix away from traditional resource areas (particularly outside Ontario and Quebec), and toward higher value-added production areas, like information and communications technology.⁵⁰

And yet, the Canadian economy is as dependent on natural resource exports as ever. Part of the problem is that Canada has been pulling back from active industrial policies — in favour of tax cuts, deregulation, and privatization — for two decades. It is important to recognize that resource industries can be high-productivity industries. The challenge with resource indus-

tries, however, remains the volatility of commodity prices leading to boom-and-bust cycles. Environmental sustainability is also a concern, especially in a more deregulated environment. Recommendations from the EACSR and others, as noted in the previous section, with regard to energy will only serve to reinforce our role as suppliers of natural resources to the U.S.

Andrew Sharpe, Executive Director of the Centre for the Study of Living Standards (which focuses a major part of its research program on productivity in close collaboration with academic and government researchers), examines competing explanations of the Canada-U.S. productivity gap based on extensive study of the productivity issue. He states:

It is often asserted that the degree of labour market and product market regulation is greater in Canada than the United States. Since regulations can have a negative effect on productivity, it is sometimes argued that this situation contributes to the Canada-U.S. labour productivity gap. But it is very difficult to quantify the wide range of regulations that affect economic activity in the two countries and to conclude that Canada is more regulated than the United States. Indeed, environmental regulation is considered by many to be more stringent in the United States. In addition, certain regulations can have a positive effect on labour productivity (though possibly a negative effect on total factor productivity) by forcing firms to invest in capital-intensive machinery and equipment that is both pollution-reducing and labour-saving. Consequently, it is unlikely that differences in the regulatory environment can account for much of the gap between U.S. and Canadian aggregate labour productivity levels.⁵¹

Given the extensive study the productivity gap has received over the past decade, the basis

for claims that reducing Canadian regulations to U.S. levels would generate huge economic benefits, much less close the productivity gap, is rather thin.

It may also be the case that certain environmental regulations effectuate increases in productivity, especially if a country is a first-mover (a view that goes back to “competitiveness guru” Michael Porter). Interestingly, the annual World Competitiveness Report, produced by the World Economic Forum, does not include regulation in its Global Competitiveness Index. In the summary of the 2005 report, the term “regulation” appears exactly once, and in the context of regulations spurring competitiveness, not detracting from it:

There is significant consensus [from the Executive Opinion Survey], even among low-income respondents, that complying with environmental standards improves long-term competitiveness, that lack of clean water hinders business expansion, and that clean production and waste reduction are important to company success.⁵²

“The Tyranny of Small Differences”

This background makes for an interesting comparison with the astonishing claims of supporters of deregulation and harmonization that current regulatory practices are impeding Canada’s productivity performance, and that there are huge gains to be had from deregulation and greater harmonization of regulations and regulatory practices with the U.S.

In testimony before a House of Commons committee in the fall of 2004, Canadian Council of Chief Executives Vice-President David Stewart-Patterson argued for eliminating “the tyranny of small differences” in regulations between Canada and the United States, asking: “Is the health of Canadians better protected because we define ‘cheddar-flavoured popcorn’ as having less than

49% real cheese instead of 53% as in the United States?” But, while this is a clever and colourful quip, the cited difference is merely a labelling issue that basically has no cost implications for popcorn makers.

In fact, there are only seven real examples (including popcorn) that were pointed out by the External Advisory Committee on Smart Regulation, and it is not obvious that these differences actually pose more than a negligible cost to producers.⁵³ For example, another case cited is that, in Canada, aluminum content in deodorant requires a Drug Identification Number, but not in the U.S. Is this really costly to deodorant producers? How exactly does this “tyranny” put Canada at an economic disadvantage? Presumably, Canadian labelling requirements that products be bilingual in French and English have a greater economic cost than the measures cited by the EACSR.

Given its repeated appearance in pro-harmonization speaking points, the notion that there is a “tyranny of small differences” undermining Canada-U.S. trade has become a point of mythology. Certainly, to the extent that small differences do pose extra costs to business without much in the way of benefit, these issues are likely to be uncontroversial and could be addressed without much difficulty. As noted above, corporate Canada has had ample opportunities to make any such cases since the advent of Canada-U.S. free trade, and the Canadian government routinely solicits the input of business before making any decisions of importance.

Instead, the “tyranny of small differences” is like “smart regulation”: a catchy, uncontroversial PR term that diverts attention from the real issues that matter to corporate Canada, and that *are* controversial to most Canadians.

In a paper full of breathless praise for regulatory harmonization, pro-integration advocate Michael Hart also invokes the “tyranny of small differences,” producing almost verbatim the list from the EACSR report.⁵⁴ There is good reason

for the repetition: advocacy for “smart regulation” and “regulatory cooperation” is limited to a small group of like-minded business lobbyists, politicians, senior bureaucrats, and academics (who, like Hart, used to be senior bureaucrats).

Moreover, Hart asserts that: “Complex and lengthy product- or provider-approval procedures can slow down innovation, frustrate new product launches, operate to protect domestic producers from foreign competitors, and create a drag on competitiveness, productivity, investment, and growth.” Hart goes so far as to bemoan “Canada’s misguided decision to go metric in the 1970s” because the U.S. did not.

Ultimately, though, Hart must concede that:

little systematic research has been done on the economic costs and harmful trade effects of differing regulations, nor is there *prima facie* evidence that regulations are necessarily economically harmful or trade distorting. Indeed, there is much evidence that well-conceived regulations can be trade-promoting and facilitating. There is also no evidence to suggest that regulatory competition is necessarily harmful.⁵⁵

Policy Research Initiative Studies

Regulatory harmonization with the U.S. is receiving a big push from deep inside the federal government. The source is a group called the Policy Research Initiative (PRI), a government think-tank until very recently housed in the Privy Council Office. A number of promotional publications on “regulatory cooperation” have appeared on the PRI web page over the past couple of years.

But, upon examination, it appears that the PRI’s role is not to make a balanced assessment of the pros and cons of greater regulatory harmonization, but to manufacture the economic case for an agenda that has already been ap-

proved further up the line. The PRI has geared its research to supporting its contention that positive net benefits will accrue from increased regulatory harmonization with the United States. There is a glaring absence of critical or skeptical perspectives among its publications.

The danger is that numbers and results from these studies (absent any kind of peer-review process) become “truth” when translated into Ministerial briefing notes and government documents, such as the PRI’s Interim Report, without any of the nuances and caveats that come with the original research, much less a rigorous critique of their methodology.

The basis of these claims comes mainly from two internal PRI studies, Ndayisenga and Downs, and Blair, the findings of which have been elaborated in a number of spin-off publications such as the PRI’s *Horizons* magazine, proceedings of a conference organized by the PRI, and the December 2004 Interim Report. The two studies have been used to support the proposition that regulatory convergence with the U.S. is the path forward for Canada. These studies have also been used to bolster arguments coming from industry lobbyists for further deregulation.

The first paper, Ndayisenga and Downs (2005), purports to show empirically that, if Canada were to reduce its “regulatory burden” to U.S. levels, investment, productivity, and per capita income in Canada would be much higher than current levels. The paper itself is problematic in terms of its methodology, but nonetheless forms the basis for some astonishing claims made by the PRI in its Interim Report. The paper does not begin well, as the authors make a case for the economic burden of regulation by drawing on the flawed work of the Fraser Institute (see the previous section).⁵⁶

In contradiction to their conclusions, the authors list initiative after initiative at the federal level with attention on deregulation and more efficient regulation. Moreover, the authors then note that: “A number of OECD studies dem-

onstrate that, compared to many other OECD economies, Canada's regulatory regime is internationally competitive.⁵⁷ The authors show the trend in regulation, based on the OECD's Regulatory Restrictiveness Index, over the 1975–98 period to be distinctly in the direction of deregulation (a drop from 4.2 to 2.4 in the index value, which ranges from zero to six), although the index shows that the U.S. has deregulated by relatively more over the same period (a drop from 4.2 to 1.4).⁵⁸

In the empirical part of the paper, the authors ask what the impact on Canadian per capita income would have been had Canada deregulated as much as the U.S. (i.e., it is assumed that deregulation enhances economic performance). Their empirical work is riddled with methodological problems, nor are their tests grounded in the research questions at hand. First, their regression analysis is not about “regulatory cooperation,” but deregulation in Canada to U.S. levels.

Secondly, their use of the OECD index is problematic in that it is limited to a subset of regulation that includes: (1) “state control” regulations, such as public ownership controls and price-setting restrictions; and (2) “barriers to entry,” such as foreign investment restrictions. Both of these regulatory areas decrease competition, and, since “competition is good,” they necessarily impede economic performance, according to the OECD view.

Third, the authors do not use the index for the entire Canadian economy, but limit it to six industries (telecommunications, electricity, gas, postal, railways, and airlines) that have traditionally been considered natural monopolies, but in recent decades have experienced deregulation.⁵⁹

Fourth, the choice of indicator for regulation is vital to the outcome. The authors note that using the number of regulations or pages of regulations did not lead to significant results for regressions on income per capita. Also important are what other variables are included in

the regressions as controls to isolate the impact of regulations, or the variable of interest. Here, the authors do not include other variables that might have greater explanatory power, given the empirical literature. It could be that the regulatory index is estimated to be significant because it is proxying for other things. For example, the time trend for the regulatory index would look the same for the price of oil or the cost of computing power. This is why these types of empirical approaches are fraught with difficulties around methodology.

The second report, Blair (2004), purports to establish the economic gains from “regulatory cooperation.” This paper looks at five product markets where product approvals are dependent on regulation (human drugs, veterinary drugs, medical devices, pest control products, and new chemical substances). This is, of course, a very limited study given the broad scope of regulatory harmonization.

By estimating the gain to sellers of faster product approvals, Blair finds economic gains from “enhanced regulatory cooperation,” which in his paper means Canada accepting new products when approved (earlier) in the U.S. (i.e. regulatory outsourcing). However, Blair assumes not only that companies receive the benefit of increased sales by getting the product to market faster; in the comparator (the “regulatory delay model”), it is also assumed that, for a decade after introduction, sales are lower than they would have been had the product been introduced sooner. That is, the delay by one year of Viagra onto the Canadian market means not just one year of lost income, but lower sales in each year the product is on the market. This seems an unusual assumption in the model, and one that is biased toward increasing the gains of faster product approvals.

It is remarkable that the economic gains accrue exclusively to the companies selling these products. Because they are protected by patents, earlier product approvals do not lower prices to consumers, but merely increase the total amount

of profits that are earned by the company. Thus, it is fairly obvious why these companies would be interested in faster product approvals. In the case of pharmaceutical drugs, one of the most profitable sectors worldwide, the case is being made that they need to be even more profitable.

Missing is any assessment of the risk that may be borne by consumers as a result of faster approvals. It is not uncommon for drugs to be recalled even after passing a product approval process (see next section). This risk must be weighed against the benefits to consumers of being able to access a product sooner, but this point is often exaggerated by industry.

Instead, the paper claims — contrary to the glaring reality of higher U.S. drug prices — that lower company costs will lead to lower prices and greater choice, and (dubiously) that faster drug approvals could lower health care spending or provide long-term health benefits such as longer life expectancy or higher quality of life.⁶⁰

Blair cautions that the impact of increased regulatory cooperation with the United States

on approvals and regulatory “burden” can only be assessed on a case-by-case basis. Nevertheless, he sets aside this rather large proviso, and concludes — from highly abstract extrapolations from empirical reality — that positive net benefits would accrue. And all without actually examining any Canada-specific data, or considering the increased risks to consumers from faster approvals.

It is astonishing why this is a policy matter of such major importance. Blair concedes in his paper that, in the case of human drug approvals, the much-hyped regulatory delay amounts to a mere four months.⁶¹ It is also odd that alternative approaches are ignored in this exercise. If Canada wants to reduce product approval times to U.S. levels, we need not outsource the job to the U.S. The federal government could simply increase the resources provided to regulatory bodies so that they can do their jobs faster. This option, however, if not even considered.

6 The Downside of Deregulation and Harmonization

In this section, we consider the negative consequences of deregulation and harmonization. The previous Liberal government embraced the External Advisory Committee on Smart Regulation report as the basis for moving forward its deregulation agenda. Thus, it is important to put this initiative to some scrutiny in terms of effects on public interest regulation.

The principal concern with the federal deregulation initiative is that it is being driven by corporate interests. Even more problematic is the desire for federal officials to outsource Canada's legal obligations to ensure reasonable standards. The U.S. situation is a moving target due to deregulation by the Bush administration. Harmonization with the U.S. is tantamount to importing that deregulation. Instead, Canada needs to maintain its policy autonomy in order to meet its legal obligations and ensure that regulation is well suited to the Canadian context.

Corporate Interests vs. the Public Interest

Simply put, the general public does not trust business to protect public health and the environment. The public is apprehensive in light of

regulatory failures such as Walkerton, tainted blood, and mad cow, and wants government to strengthen regulations and enforcement in these areas. A paper commissioned (and subsequently ignored) by the External Advisory Committee on Smart Regulation (EACSR) concluded that government must be in the driver's seat:

From a citizens' perspective, it is unrealistic to expect industry to self-regulate its behaviour so as to ensure a safe environment and protect the country's natural resources. And the same argument was applied to the companies that produce pharmaceuticals and other health products and services.⁶²

The major flashpoints, where corporate interests subsume the public interest, are:

- application of risk management, cost-benefit analysis, and international trade screens as barriers to the development of new regulations, while subordinating the precautionary principle;

- faster approvals of drugs, chemicals, and biotechnology at a cost of greater risk borne by Canadians and the environment;
- regulatory harmonization and outsourcing that undermines independence and democratic decision-making;
- promotion of “alternative” approaches to regulation in place of actual regulation; and,
- further centralization of the regulatory process, with a “veto” for the PCO to override regulatory decisions.

Canadian business interests want regulatory processes that suit their bottom lines: faster regulatory approval for substances not currently in the marketplace that are potentially hazardous; but when it comes to establishing regulations in the public interest, the opposite is the case. As set out in the draft *Government Directive on Regulating*, a number of barriers would be erected to slow and water down new regulatory measures that place requirements on business. These recommendations essentially replace the precautionary principle with a wait-and-see approach to human health and the environment.

The GD-R pays lip service upfront to the concept of the precautionary principle, the bedrock “better-safe-than-sorry” principle of health and safety and environmental law. Yet, the tests for a new regulation set out in the GD-R work in the opposite direction: a suspected toxin must be proven guilty by the government, rather than being proven innocent by the producer. The new GD-R is arriving just when the *Canadian Environmental Protection Act (CEPA)* is undergoing a review. While environmentalists see this as an opportunity to enhance Canada’s regulatory system by correcting numerous shortcomings, our ability to act may be hampered by the hurdles of the GD-R.

The move to place additional restrictions on regulation also comes at a time when concern is

growing about the impacts of thousands of toxic chemicals — most of which have not been tested — on the environment and human health. By the standards of the GD-R, it could take decades before the Canadian government removed a dangerous substance from the marketplace because it takes a long time for the bodies to pile up. This was the case for lead in gasoline, the pesticide DDT, and PCBs. Eventually, there was rock-solid evidence that these substances were harmful to human health. But science lags technology by decades, and in cases such as chemicals, where there are thousands already in the environment, it may be impossible to prove guilt.

Industry generally argues that, even if a chemical is known to be toxic, the amounts in use are so small that they do not pose a danger to health. This ignores the accumulation of these chemicals in the body over long periods of time, as well as the unknown interactions among these chemicals. Even if they are eventually banned, certain toxic chemicals can be persistent (they do not easily break down in the environment), thereby posing a danger decades after being taken off the market. The “too small” argument also ignored the scientific evidence on endocrine disruptors, chemicals that mimic hormones in the body. Very low levels of endocrine disruptors may not be toxic *per se*, but have been associated with reproductive and developmental abnormalities.⁶³

The danger is that effective regulation will be thwarted, and, to the extent that action is taken at all, that measures will be non-regulatory, such as voluntary compliance by producers, or will be the weakest possible regulatory measures, such as product labelling. Bans of suspected carcinogens, for example, will be next to impossible under the GD-R. Moreover, the GD-R framework as part of the government’s “smart regulation” review of existing regulations, may challenge the existing measures that form Canada’s “weak and ineffective regulation of toxic chemicals” (according to the NGO Environmental Defence).

Health Canada proposed to implement “smart regulation” by replacing the *Food and Drugs Act* with a new *Health Protection Act* that would in turn replace the primacy of health protection with a risk management approach that puts economic factors on an equal footing with protection. The OECD regulatory review had criticized the *Food and Drugs Act* as representing “an old-style approach, ill-suited to the dynamics of good regulatory practice in general and trade and investment-friendliness in particular.”⁶⁴

The proposed legislation would shift the burden of proof from the company having to demonstrate that the product is safe, to the regulator having to prove that the product is harmful.⁶⁵ Furthermore, the current *Food and Drugs Act* prevents direct-to-consumer drug advertising because of safety risk and the vulnerability of sick people, something the new legislation would revoke and bring it into line with the U.S., which allows such advertising (U.S. drug ads are already visible in Canada on feeds from U.S. TV stations).

Due to strong resistance from civil society organizations, the Liberal government backed down from introducing the new legislation. However, the Conservative government could well bring it forward in the Fall session of Parliament.

This latest proposal comes on the heels of a number of Health Canada changes in recent years that have weakened its capacity to regulate drugs. It dismantled the Bureau of Drug Research, implemented a cost-recovery program in which much of the drug evaluation budget now comes from companies; it dismantled food safety research programs and investigative labs, and broke up the Health Protection Branch. Knowing the public sensitivity to health and safety issues, the government insists that “smart regulation” will not compromise health, but there is clearly a serious conflict of interest when government is both a promoter and regulator of new technologies and products.

A good example of this new risk-management approach is the recently passed amendment to

the *Food and Drugs Act* (C-28) which allows the Health Minister to exempt maximum residue limits on pesticides, agricultural chemicals, and veterinary drugs in certain food products — called interim marketing authorizations — without consultation and without full scientific consideration, for up to two years. Officials have testified that this amendment is consistent with the regulatory harmonization agenda that is proceeding under the SPP umbrella. It represents a fundamental change in the prevailing regulatory philosophy of health protection.

It is impossible in the scope of this report to consider all of the potential consequences of federal deregulation. It is safe to say, however, that a better approach would be for Canada to first address shortcomings in ensuring protective measures. The federal government could do a lot more to safeguard health and safety and the environment in its areas of jurisdiction. It should provide the resources and staffing so that existing regulations can be properly enforced, and so that independent research can be undertaken to inform decision-making. It should also increase the standards of health and environmental protection over time, and it should be more aggressive in using the precautionary principle to mitigate harm in cases where scientific evidence is not yet available.

Outsourcing Legal Responsibilities

As stated previously, one of the priority areas identified by both the Canadian and U.S. governments for regulatory harmonization is drug testing and approval — the idea of a “tested once” policy for North America recommended by big business, the EACSR, and the PRI — to forgo its own tests and simply accept those of the U.S. Food and Drug Administration.

But how wise would it be to entrust such a vital government responsibility to a U.S. body that has been widely criticized as under the sway of the U.S. pharmaceutical lobby? How

can government be accountable to its citizens when its vital role is being outsourced to a foreign government? It is especially disturbing in light of the unprecedented politicization of the regulatory process under the Bush administration. According to Canadian bio-ethicist Janice Graham, the practices of the U.S. Food and Drug Administration (FDA) do not set an acceptable standard for either licensing or review, especially for pharmaceuticals and biologics.⁶⁶

Consumer groups in the U.S. are deeply concerned about the FDA's safety record in the context of a number of high-profile drug recalls that have occurred as approval times have been reduced. Concerns include the FDA's relationship with industry, which since 1992 has paid user fees to the FDA in exchange for faster approval times. A 1999 survey by consumer advocacy group Public Citizen of FDA medical officers found that many felt pressured to approve new drugs, and that standards had been lowered such that safety has been compromised. *The Journal of the American Medical Association* called for the creation of a new independent agency to monitor drugs already approved by the FDA to avoid conflict of interest between those approving drugs and those monitoring them in the marketplace.⁶⁷

Companies have a powerful incentive (some would say a "fiduciary responsibility") to fight against regulations that would adversely affect their profit streams. Drug companies managed to keep the FDA from taking PPA, a decongestant and appetite suppressant, off the shelves for two decades despite strong evidence that it caused strokes — 200–500 a year, according to the FDA itself.

Another example is the FDA approval of the arthritis pain reliever Vioxx in 1999, despite independent evidence (and evidence within the company) that it increased the risk of heart disease. Its manufacturer, Merck, after five years, finally took it off the market in September 2004 when a trial reported that users had twice as many heart attacks as non-users. Senior FDA analyst David

Graham estimated that Vioxx caused between 88,000 and 139,000 heart attacks, 30–40% of them fatal, in the five years it was on the market. Graham testified before Congress in November 2004 that the FDA is incapable of protecting the public against another Vioxx disaster. He said the corporate culture of the agency "views the pharmaceutical industry it is supposed to regulate as its client, overvalues the benefits of drugs it approves, and seriously undervalues, disregards and disrespects drug safety." Moreover, he added, "the scientific standards it applies to drug safety guarantee that unsafe and deadly drugs will remain on the U.S. market."⁶⁸

When it comes to drug approvals, there is good reason to have "redundancy" built into the system by having reviews by multiple bodies. As Dr. Raymond Woosely, MD and Vice-President of the University of Arizona's Health Sciences Center, remarks:

When a drug goes on the market, only about 3,000 patients have ever been given that drug. We will never know the toxicity that can occur, especially at the one-in-10,000 or the one-in-20,000 that could be seriously harmed. Our detection of that will only happen after the drug is on the market and exposed to huge numbers of patients.⁶⁹

In making its case for faster drug approvals by adopting FDA rulings in Canada, the External Advisory Committee on Smart Regulation (EACSR) emphasizes the benefit to consumers from access to new drugs. However, in the EACSR report, the terms "recall," "side-effects" and "death" — the potential downsides to faster approvals — are not mentioned even once. Yet the drug approval process in Canada is only about six months slower than in the U.S.⁷⁰; the PRI's Blair put it at four months. This begs the question: why is this such an important policy issue when the only benefit would appear to be increasing drug company profits?

The PRI cites economic gains from new innovation in the pharmaceutical industry that would come to Canada should approval processes be faster. This is a puzzling claim, provided without any evidence, especially since they note a couple paragraphs later that Canada represents only 2% of the world pharmaceutical market. Why, then, would the approval process in Canada have any impact whatsoever on the location for R&D investments made with a view to global markets? It is worth recalling that, when the Mulroney government withdrew compulsory licensing of drugs in 1989, the companies promised to increase their R&D investment to 10% of sales. They have never met this promise, and their R&D — which consists mainly of clinical trials, not original research — is still at 1989 levels.⁷¹

A similar lapse of logic underpins the EACSR's recommendation on the introduction of new chemicals and biotechnology. The emphasis is on improving outcomes from the industry's perspective. They note that the approval process for new chemicals ranges from 5 to 90 days, and yet this minor delay is apparently too much for the industry to bear.⁷² Biotechnology innovations pose some enormous challenges in terms of health and safety, not to mention ethics, and yet the EACSR approach is to streamline regulation to ensure speedy approval of new biotechnology, and even goes so far as to chastise Canada for not allowing the patenting of higher life-forms.⁷³

While there may be a case to be made for different regulatory agencies to cooperate internationally in the evaluation of new drugs, chemicals and biotechnology by doing independent reviews and sharing the results, this is the opposite of the "tested once" philosophy. A straightforward alternative would be to increase the budgets of regulatory and scientific bodies, including approval agencies, so that any backlogs can be cleared, and so that they have sufficient funding to do independent research. For example, a key problem for drug approvals is that Health Canada has become almost entirely de-

pendent on the research provided by the companies themselves.

Moreover, relying on cost recovery from the companies being regulated compromises regulatory independence. Since the EACSR complains that regulatory processes and approvals are too slow, and that limited resources are available, the obvious option (not recommended by the EACSR) is to increase those resources. It is bizarre that, in all of the thousands of pages of documents by business lobbies and the federal government itself in favour of "smart regulation," the notion of increasing regulatory resources scarcely merits a nod.

Canada and the U.S. are different countries, and the cultural, social, and environmental context in which regulations are developed, and the issues they are meant to address, are different. Laws and regulations, as a result, will differ, reflecting the democratic choices made in those differing contexts. Diversity of regulations, then, should not be dismissed as something to be gotten rid of in the name of harmonization, but something to be encouraged. Indeed, such differences may create comparative advantages that enhance the gains from trade. This is really about what the proper role of government is in shaping/influencing the economy and society, regulation being one of many tools to that end. There may be good reasons for regulations to differ across jurisdictions to reflect local or national circumstances and priorities. Diversity of policy responses is a good thing; at the least, there is a trade-off between diversity and harmonization that must be recognized.

Instead, one-size-fits-all regulation and regulatory structures may lead to policy failures that cascade across borders. Longer drug approval times in Canada mean that Canadians can learn from what happens in the U.S. market when new drugs are approved, and can avert disasters when drugs are recalled. Due diligence is required on the part of Canadian regulators to ensure that products in the Canadian market-

place are safe. We should not aim to free-ride off of work done in the U.S. (where there have also been issues around quality due to the extensive corporate presence).

More importantly, importing regulatory decisions from the U.S. forecloses on independent policy responses in the future. A current example is that Canada is a signatory to the Kyoto protocol, and that one of the main instruments for meeting the Kyoto targets is regulation. But, in a harmonized regime, Canada would essentially forgo one of the most effective means of achieving the Kyoto targets. It is impossible to say how many future issues will demand a different response in Canada than in the U.S. Suffice it to say, lots. Why would Canada willingly tie its hands to respond as Canadians would like it to when confronted with future threats and challenges?

Kyoto is also an excellent example of how the current voluntary compliance regime has failed. As resource and environmental management professor Mark Jaccard (2006) commented:

For 15 years, Canadian governments have layered one GHG [greenhouse gas] policy over another — the 1990 Green Plan, the 1995 National Action Program on Climate Change, Action Plan 2000 on Climate Change, the 2002 Climate Change Plan for Canada and Project Green in 2005. The names changed, but not the approach — information and subsidies to encourage emission reductions, but no restrictions or charges for using the atmosphere as a free waste receptacle.⁷⁴

For Jaccard, the emission management burden must be shifted back to fossil fuel producers. He supports regulations such as requiring the development and adoption of non-emitting technologies, or, for tar sands producers, a tightening cap-and-trade system.

What are we harmonizing to?

The Bush assault on regulation

The Bush administration has been a dream come true for the decades-long corporate deregulation drive. Bush stacked his regulatory agencies with former corporate lobbyists and prominent anti-regulatory crusaders to an unprecedented degree. Years of corporate propaganda have created fertile ground among legislators that the costs of regulation are excessive. With the foxes more than ever in charge of the henhouse, the deregulation assault has moved into high gear.

The Union of Concerned Scientists released a statement in February 2004 based on their investigation of the Bush administration's misuse of science. Signed by 60 renowned scientists, including 20 Nobel Laureates, it charged that the scope and scale of the manipulation and suppression and misrepresentation of science by the Bush administration is unprecedented.

When scientific knowledge has been found to be in conflict with its political goals, the Bush administration has often manipulated the process through which science enters into its decisions. This has been done by placing people who are professionally unqualified, or have clear conflicts of interest, in official posts and on scientific advisory committees; by censoring and suppressing reports by the government's own scientists; and by simply not seeking independent scientific advice.

One of Bush's most pernicious appointments has been industry-sponsored anti-regulation crusader John Graham as director of the White House's Office of Information and Regulatory Affairs. OIRA is an obscure and powerful body that — like its counterpart in Canada — reviews all regulation proposals from government agencies.

Graham, with help from the American Petroleum Institute, the American Chemistry Council and the right-wing Mercatus Center

› *Special Interest Takeover*

In May, 2004, the Centre for American Progress and OMB Watch, a group that monitors the White House's Office of Budget Management (within which the regulatory affairs office is located), produced a report, *Special Interest Takeover*, documenting the dismantling of public safeguards by the Bush administration. The report identified 123 examples of White House roll-backs, weakened standards, problems ignored, enforcement undermined, information withheld, and science thwarted. It says there are many more.

Examples of White House malfeasance include:

- gutted air standards for aging power plants;
- gutted environmental protections for hard rock mining;
- allowed extensive drilling on public land;
- extended driving hours for truckers;
- relaxed standards for nursing home care;
- weakened standards to prevent runoff from factory farms;
- blocked efforts to protect drinking water from excessive levels of manganese;
- ignored recommendation of the Chemical Safety Board to address reactive chemical accidents in the workplace;
- refused to take action to stop SUV rollovers;
- issued 58% fewer environmental violation notices than the previous administration;
- reduced inspections, penalties for violation, and prosecution of environmental crime;
- reduced penalties for willful violations of the Occupational Safety and Health Administration by 25%;
- proposed to cut meat inspection funding by \$90 million and rely on user fees to pay inspectors;
- reduced action against improper drug advertising by 80%;
- prevented EPA staff from speaking out about contamination of drinking water from rocket fuel; and
- attempted to discredit a USDA inspector who faulted the agency for not acting on listeria contamination in foods.

established a “hit list” of existing regulations to be weakened or eliminated, forcing regulatory agencies to spend their diminished resources on re-evaluating existing regulations instead of putting in place new regulations mandated by law. OIRA published in March 2005 a final hit-list of 76 regulations for “reform.” A month later, the Bush administration unveiled plans to accelerate the elimination of “unproductive” regulatory programs and further centralize regulatory powers within OIRA. Under its proposed *Sunset Act*, regulatory agency mandates would expire

automatically after 12 years unless judged to be producing results by an “independent” five-member commission, forcing regulatory agencies to repeatedly justify their existence.

Graham also provided corporations with additional tools to assist and institutionalize their strategy of manufacturing scientific uncertainty—the most powerful is the 2001 Data Quality Act (DQA). According to David Michaels, former assistant U.S. Secretary of Energy for Environment, Safety and Health:

The law gives corporations an established procedure for killing or altering government documents with which they do not agree. It has been used by groups bankrolled by the oil industry to discredit the National Assessment on Climate Change, a federal report on global warming; by food industry interests to attack the World Health Organization's dietary guidelines, which recommend lower sugar intake to prevent obesity; and by the Salt Institute to challenge the advice of the National Institutes of Health that Americans should reduce their salt consumption.⁷⁵

Finally, just prior to his resignation in January 2006, Graham issued a directive requiring that every risk assessment performed by every government agency meet a series of expensive and onerous tests guaranteeing regulatory paralysis, while exempting corporate risk assessments for pesticide registrations, drug approvals, and nuclear facilities.

By the time he resigned, Graham had inflicted unprecedented damage on the U.S. federal regulatory system. Regulatory policy expert Rena Steinzor of the University of Maryland summed his legacy thus:

[He] has developed so-called reforms that make it easier for industry to gum up the works and harder for the public to know what is going on, and he's used a mortally flawed method of cost-benefit analysis as cover for a pro-polluter and anti-consumer agenda.⁷⁶

Michaels adds: "Never in our history have corporate interests been as successful as they are today in shaping science policies to their desires."⁷⁷ Michaels chronicles the long-standing corporate practice of scientific disinformation campaigns against regulations that threaten their interests. Pioneered by the tobacco company Brown and Williamson, whose strategy of "doubt is our product" delayed tobacco health protections and compensation for decades, it is now standard practice. Companies vilify threatening research as "junk science" and industry-commissioned research as "sound science." The practice of manufacturing uncertainty has greatly enhanced their ability to prevent, delay, or reverse "adverse" regulations; it has enabled them to challenge research documenting the health hazards of exposure to an array of chemicals, from mercury to lead.

7 Conclusion

The federal government needs a deep rethink of its approach to regulation — not “smart regulation,” but *real regulation* that protects the environment and human health. Given the challenges we face, giving away the tools to set an independent course in the public interest is simply foolish. When it comes to protecting public health, safety, and the environment, citizens are being asked (actually, they are *not* being asked) to bear greater risks so that corporations can increase their profits.

The benefits of regulation generally exceed the costs. And regulation can be an ounce of prevention that saves money relative to not regulating. Risk assessment processes that are heavily biased in favour of corporate interests should not supplant the precautionary principle in protecting the public interest. Regulation should reflect the gist of the 2001 Royal Society Expert Panel recommendation: err on the side of caution, identify potential risks, don't deploy until risk uncertainties are greatly reduced, and place the primary burden of proof on producers to demonstrate that their products do not pose unacceptable risks.

Expediency for corporations and protection for citizens are irreconcilable regulatory values. Proponents claim that “smart regulation” can balance and reconcile the two. It cannot, and in practice it favours expediency, which could jeopardize protection. “Smart regulation” stands the precautionary principle on its head, by not acting until there is overwhelming scientific evidence of harm.

Government must state unequivocally that the first obligation of regulation is to protect citizens' health and safety, and the environment, and restore the primacy of the precautionary principle. The current deregulation exercise began with the assumption that Canada is over-regulated when, in fact, there is good reason to believe that Canada is *under*-regulated. Growing incidence of cancer, rising asthma rates among children, and greater neurological disorders suggest that untested environmental toxins may be a big part of the problem. Under current regulatory methods, it could be decades before substances thought to be toxic, but not proven conclusively in a scientific sense, are banned or even restricted.

Canada's regulatory system needs to be shored up after a quarter-century of erosion through de-

regulation and budget cuts. Ensuring that Canadians have confidence in their regulatory system cannot be accomplished by market-based incentives, voluntary or self-regulatory approaches. It cannot be accomplished when regulators are not independent of the industries they regulate.

The federal government must provide the additional resources and staffing so that existing regulations can be properly enforced, and so that independent research can be undertaken to inform decision-making. Regulation should be funded out of general revenues, not on a cost-recovery basis from regulated companies. Government should also establish clear conflict-of-interest rules, including mandatory disclosure by persons involved in the regulatory process of their ties to industry and the products under review. Whistleblower protection is required to enable scientists to speak out against regulatory abuses, and prevent situations such as the shameful reprimands and dismissal of scientists at Health Canada who spoke out about being forced to approve drugs without sufficient evidence of safety.

Another innovation would be to enhance public participation in the regulatory process to increase the transparency, accountability, and legitimacy of the process and provide a counter-weight to the tremendous corporate influence. This requires going beyond the perfunctory hearings and consultations with “stakeholders” that have become cynically viewed by the public. Real engagement will require an increase in resources, but this price is worth it if it leads to policies that better reflect the needs and concerns of the public. An independent body could engage citizens, through focus groups up to constituent assemblies, to assess the balance of risks and rewards.

Canadian regulators have long shared information, knowledge and expertise, and participated in a vast array of formal and informal agreements with U.S. and other foreign regulators. Canadian scientists and officials have been at the forefront

of developing international regimes and protocols for global health, safety, and environmental threats. There is no reason why we cannot continue to cooperate with other countries’ domestic regulators to ensure better protection for Canadians, while raising the floor of environmental and health safety standards globally.

There is room for international cooperation among regulatory authorities, but real cooperation is different from harmonization. Canada should not get involved in any harmonization initiatives with countries that do not share the basic regulatory principles of precaution and primacy of protection. Nor should Canada be outsourcing this vital public function to other jurisdictions. Canada needs to strengthen its regulatory and scientific capacity in order to provide a check on the political might of business in both the U.S. and Canadian regulatory processes. This is especially important in light of the unprecedented damage inflicted by the Bush administration on the U.S. regulatory system.

Canada should also be looking at places where it can cooperate with other nations to raise environmental and health and safety standards upwards. Examples include: emissions standards for the cruise ship industry, regulation of government hazardous waste disposal, California’s auto emission standards, EU standards for food safety, and the new EU standards for toxic chemicals in the environment.

But we should not be afraid to be leaders — there may even be economic advantages to being first movers in, say, environmental technologies. The federal deregulation approach, in contrast, destines us to be followers. There is benefit to regulatory diversity — regulation that meets to specific economic and social circumstances of where it is being implemented. Regulatory differences between Canada and the United States reflect our different cultures, identities, and institutions.

The bottom line is that regulation, accompanied by strong enforcement, works. An effective

regulatory system is much needed as the economy becomes more complex and new technological developments pose challenges to health and the environment. Finally, language matters: the resort to the Orwellian language of “smart regu-

lation” demonstrates that this corporate-driven agenda is unpalatable to most Canadians. Citizens should be engaged in making regulation better not deceived into accepting deregulation by a different name.

Notes

- 1** As July 1, 2006, bureaucratic responsibility for the smart regulation initiative has shifted to the Treasury Board.
- 2** Represented on the ten-member EACSR were Shell Canada, Teck Cominco, Abitibi Consolidated, Stelco and (due to directorships held by members) other companies who face regulation. No environmental, health or labour organizations were included. One corporate-friendly First Nations representative was included. See <http://www.pco-bcp.gc.ca/smartreg-regint/en/01/mb-01.html>
- 3** EACSR, p.9, italics added.
- 4** PCO Regulatory Affairs and Orders in Council Secretariat website, www.pco-bcp.gc.ca/raoics-srdc/
- 5** Swenarchuk and Muldoon, 1996, p.1.
- 6** Mendelsohn, 2003.
- 7** Stiglitz, 2000.
- 8** For an overview, see Lee, 2001.
- 9** See articles by Stewart Elgie and Kathryn Harrison in Drache and Monahan, 1998.
- 10** See CELA, 2005.
- 11** Data from Paul Reed, 2005, Office of the Chief Social Scientist, Statistics Canada.
- 12** Canadian Cancer Society, 2006.
- 13** Environmental Defence, 2005.
- 14** A series on chemicals by Mittelstadt, 2006, in The Globe and Mail reviews many recent cases of the interaction between regulators and toxic chemicals.
- 15** Data from Pollution Watch, 2004, drawn from the federal National Pollutant Release Inventory (July 2004 version).
- 16** Health Canada, 2006, p. 31.
- 17** Canadian Environmental Law Association, 2004, p. 22.
- 18** Auditor General of Canada, 2000, 24.94.
- 19** These comments are based on the draft GD-R, version 5.2, tabled in January 2006 to the Reference Group on Regulating, an ad hoc advisory group on the GD-R. Version 5.2 is considered to be a penultimate draft, but there may be some

changes in the final version to be released later in 2006.

20 Government Directive on Regulating, version 5.2, lines 274–5.

21 Ibid, lines 391–2.

22 Ibid, lines 254–5.

23 Ibid, lines 471–2.

24 Ibid, lines 477–9.

25 Government of Canada, 2005a, p. 9.

26 OECD, 2002, p. 60.

27 While ownership restrictions have not formed part of the subsequent “smart regulation” agenda (perhaps being dealt with elsewhere, such as recent rumblings about telecommunications deregulation), other elements have been incorporated into the government’s plan.

28 EACSR, 2004, p. 19.

29 Ibid, p. 22.

30 Environment Canada, 2002, forward.

31 EACSR, 2004, Recommendation 45.

32 See, for example, Clarkson 2002, Gill 2000, and McBride 2001.

33 McBride, 2001, p. 116.

34 Sinclair and Grieshaber-Otto, 2002, p. 63.

35 Scott Sinclair, Crunch time in Geneva: Benchmarks, Plurilaterals, Domestic Regulations, and Other Pressure Tactics in the GATS Negotiations, CCPA, June 2006

36 NAFTA, article 906(1)

37 The PCO and International Trade Canada have the lead players here. As of July 1, 2006 PCO’s lead role on smart regulations file has been handed over to Treasury Board.

38 White House, press release, available at: <http://www.whitehouse.gov/news/releases/2006/03/20060331-1.html>

39 Ibid

40 In May 2006, the Harper government announced that it was moving the PRI over to the Ministry of Human Resources and Social Development

41 Jones and Graf, 2001, and Milhar, 1996.

42 McGarity and Ruttenberg, 2002.

43 The Fraser Institute’s views on regulation are often extreme and easily dismissed. It would be unwise to do this, however, given that Fraser is an ideological touchstone for the Harper government. For example: *on cancer and pollutants*: its book *Misconceptions About Cancer*, shows—according to the news release—that “synthetic chemicals at levels found in the environment have not been shown to be an important cause of cancer” [and] “the current regulatory policy of low hypothetical risks is not effective in advancing public health.” [and in conclusion] “Since there is no risk-free world and resources are limited, set priorities in order to save the greatest number of lives [per dollar].” *On global warming*: its 2001 *Global Warming: Guide to the Science*, “increased levels of atmospheric carbon dioxide...during the twentieth century have produced no deleterious effects upon global climate or temperature.”

44 Jones et al, 2005.

45 See Ackerman and Heinzerling, 2004.

46 Reilly, 2003.

47 Jackson, 2005.

48 Gu and Ho, 2000, p. 3.

49 O’Neill 1999, p. 6.

50 CSLS, 1998.

51 Sharpe, 2003, p. 20.

52 World Economic Forum, 2005, p. xxiv.

53 EACSR, 2004, p. 76.

54 This is not surprising since Hart was commissioned by the EACSR to write a paper on “regulatory cooperation.” He was also a member of the May 2005 big business task force on North American integration, *Building a North American Community*.

55 Hart, 2006.

56 Of note, a recently-released paper by Ndayisenga and Blair (2006) argues that the twenty-to-one multiple for private sector compliance costs over government regulatory costs holds up for the US. They rely on data from a questionable source, Hopkins (1996) published by a pro-business group called The Center for the Study of American Business. The data were ostensibly derived from the US Environmental Protection Agency. The authors were not able to verify the source of the data.

57 Ndayisenga and Downs, 2005, p. 6.

58 Moreover, indices can be highly problematic in that they are dependent on what data is available and subjective judgements about what should be included and with what weight.

59 Rather than being misguided in their choice of indices, the authors may be telegraphing a priority of this exercise: reducing foreign ownership restrictions in key areas such as telecommunications that have traditionally been tightly regulated as natural monopolies.

60 Underpinning this conclusion is a misrepresentation of economic theory by assuming perfect competition when the products are actually monopolistic in nature due to patent protection, and by assuming increasing marginal costs of production, which are unlikely to be present (these industries will be characterized by con-

stant or decreasing average costs because much of the cost of development is upfront fixed cost, and the production side is associated with tremendous economies of scale).

61 Blair 2004, p. 18.

62 Maxwell and Pal, 2003.

63 For an overview and the associated linkage with “risk management” approaches by the US Environmental Protection Agency, see Souder, 2006.

64 OECD, 2002, p. 59.

65 Placing the burden of proof on the regulator is already the status quo for toxic chemicals in Canada and most other countries; the EU’s REACH legislation would shift to industry the responsibility to demonstrate safety.

66 Graham, 2005, p. 1470.

67 Fontanarosa et al, 2004.

68 Graham, testimony before the US Senate, excerpted in the CCPA Monitor, September 2005.

69 Cited in PBS Frontline special, Dangerous Prescription, Nov. 13, 2003.

70 EACSR, p. 80.

71 Gold, 2006.

72 EACSR, p. 85.

73 EACSR, pp. 91-92.

74 Jaccard, 2006.

75 Michaels, 2005.

76 Steinzor, 2006.

77 Michaels, 2005, p. 101.

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CANADIAN CENTRE
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de POLITIQUES ALTERNATIVES

www.policyalternatives.ca

► NATIONAL OFFICE

410-75 Albert Street, Ottawa, ON K1P 5E7
TEL 613-563-1341 FAX 613-233-1458
ccpa@policyalternatives.ca

BC OFFICE

1400-207 West Hastings Street, Vancouver, BC V6B 1H7
TEL 604-801-5121 FAX 604-801-5122
ccpabc@policyalternatives.ca

MANITOBA OFFICE

309-323 Portage Avenue, Winnipeg, MB R3B 2C1
TEL 204-927-3200 FAX 204-927-3201
ccpamb@policyalternatives.ca

NOVA SCOTIA OFFICE

P.O. Box 8355, Halifax, NS B3K 5M1
TEL 902-477-1252 FAX 902-484-63441
ccpans@policyalternatives.ca

SASKATCHEWAN OFFICE

105-2505 11th Avenue, Regina, SK S4P 0K6
TEL 306-924-3372 FAX 306-586-5177
ccpasask@sasktel.net

► BUREAU NATIONAL

410-75 rue Albert, Ottawa, ON K1P 5E7
TÉLÉPHONE 613-563-1341 TÉLÉCOPIER 613-233-1458
ccpa@policyalternatives.ca

BUREAU DE LA C.-B.

1400-207 rue West Hastings, Vancouver, C.-B. V6B 1H7
TÉLÉPHONE 604-801-5121 TÉLÉCOPIER 604-801-5122
ccpabc@policyalternatives.ca

BUREAU DE MANITOBA

309-323 avenue Portage, Winnipeg, MB R3B 2C1
TÉLÉPHONE 204-927-3200 TÉLÉCOPIER 204-927-3201
ccpamb@policyalternatives.ca

BUREAU DE NOUVELLE-ÉCOSSE

P.O. Box 8355, Halifax, NS B3K 5M1
TÉLÉPHONE 902-477-1252 TÉLÉCOPIER 902-484-63441
ccpans@policyalternatives.ca

BUREAU DE SASKATCHEWAN

105-2505 11e avenue, Regina, SK S4P 0K6
TÉLÉPHONE 306-924-3372 TÉLÉCOPIER 306-586-5177
ccpasask@sasktel.net