› September 2006

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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ISBN 0-88627-510-5

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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.

Acknowledgements

The authors would like to thank David Bennett, Ed Finn, Seth Klein, Mike McBain, and Scott Sinclair for their comments on this paper, and the production team of Kerri-Anne Finn and Tim Scarth. We would also like to thank two senior civil servants in the federal government who provided detailed comments but requested their names be kept anonymous. Any errors and opinions in this paper are those of the authors, and do not necessarily reflect the views of the Canadian Centre for Policy Alternatives.

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 resented 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.

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The Canadian Centre for Policy Alternatives is an independent, non-profit research institute funded primarily through organizational and individual membership. It was founded in 1980 to promote research on economic and social issues from a progressive point of view. The Centre produces reports, books and other publications, including a monthly magazine. It also sponsors lectures and conferences.

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CENTRE CANADIEN 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