Regulatory Reform: A Case Study of the Regulatory Advisory Committee (RAC) and the *Canadian Environmental Assessment Act*

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Thesis submitted to
The School of Graduate Studies and Research
in partial fulfilment of the requirements
for the LL.M. degree in Law

Université d'Ottawa/University of Ottawa

ISBN 0-612-16399-7

UNIVERSITÉ D'OTTAWA
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Abstract

This paper examines a consensus-based approach to regulation making known as "regulation negotiation" or "regneg," and pursues the question, can regneg improve the performance of the federal regulatory process? Successfully implemented by the United States Environmental Protection Agency, regneg allows parties likely to be affected by a regulation to negotiate the substance of it. Although its use is rare in Canada, a similar process was used to help develop key regulations under the *Canadian Environmental Assessment Act*. The paper argues that the performance of any regulatory process can be measured by its ability to accommodate the views of a more diverse range of interests, improve the quality of regulations, and hold regulation makers to a higher standard of accountability. Based on the U.S. and Canadian experience, the paper suggests that in certain circumstances, and with some refinements, regneg is capable of improving the regulatory process in all of these areas.

Executive Summary

In November of 1991, the Federal Environmental Assessment Review Office ("FEARO") began an experiment in regulation-making by consensus. Sixteen representatives from industry, environmental groups, aboriginal groups, and several provinces, were gathered in Ottawa to form the Regulatory Advisory Committee ("RAC") and asked to assist the Minister of Environment with the development of key regulations under the new *Canadian Environmental Assessment Act* ("*CEAA*"). As an idea and as an experiment, RAC has generated a considerable amount of interest among all of those connected to it. From a law reform perspective, this thesis pursues the question, can a process like RAC improve the performance of the current federal regulatory process?

The use of a consensus-based approach to make regulations in Canada is extremely rare, especially at the federal level. But in the United States, the Environmental Protection Agency has successfully implemented a process known as "negotiated rulemaking" which allows parties likely to affected by a regulation to negotiate the substance of it. Using the U.S. experience and interviews with RAC participants as important resources, the paper sets out to evaluate RAC by presenting it as a case study of a new process (consensus-based regulation making) in a new context (Canada).

Based on a survey of both government and non-government studies, the paper argues that the performance of any regulatory process can be measured by its ability to accommodate the views of a more diverse range of interests, improve the quality of our regulations, and hold our regulation makers to a higher standard of accountability. The current regulatory process, when measured against these criteria, is described as capable of considerable improvement. In certain circumstances and with some refinements, the paper suggests RAC is capable of improving the performance of the regulatory process in all of these areas, particularly when compared to the informal, selective and less accountable negotiation that to some degree is likely to occur in any event.

The paper suggests RAC can better respond to the expectations of those only indirectly affected, but at the same time respond to the expectations of those directly regulated. RAC provides exceptionally early notice of regulatory initiatives, and provides all participants with enhanced access not only to the information upon which decisions are based, but to the decision makers and the other competing interests. As a concept, RAC enjoys the support of virtually all participants, and the enthusiastic support of at least one person from each of the groups studied. Those participants who were least supportive tended to be those who already enjoy some level of direct influence.

In the right circumstances, RAC can result in regulations which are considered to be fairer by all participants, and to be based on a more thorough analysis of the implications of each substantive decision. The interests of all parties can be maximized to the point where disputes will be litigated less, or litigated more selectively. Compliance is likely to increase, and perhaps most importantly, relationships between traditionally adversarial parties are likely to improve. By virtue of opening up the process, and providing better access to the basis for decisions, RAC can increase the accountability of decision makers. By delegating and sharing much of the work, the government is able to get more value for the time and resources it spends on a regulation.

The Americans have found that negotiated rulemaking works best in a small but significant set of circumstances. Most importantly, the issue to be negotiated must be narrow and must involve a limited number of affected interests. Yet surprisingly, given the broad range of issues and large number of interests affected, many participants felt that far from being inappropriate RAC was the best option available. This suggests that there may be a second set of circumstances where a process like RAC can be an effective law-making tool: where there is a subject for which many months of development is necessary, where there are several interrelated policy decisions to be made, and where it is difficult for regulators acting alone to understand the full implications of their decisions.

As it was applied, however, RAC encountered a number of practical problems, each suggesting some refinements to the process are in order. As almost all participants concluded, federal department representatives should have been members of RAC from the beginning. This may have enhanced the government's commitment to the results of RAC which was considered by many to be suspect. Several RAC difficulties could be attributed to periods when the "cloak of cabinet confidentiality" had descended. As part of their commitment to the process, governments must re-examine the *de facto* policy of non-disclosure.

Yet despite these difficulties, RAC has generated a cautious optimism for the process on the strength of its achievements; and a review of the relevant law in Canada suggests there are no insurmountable legal reasons why negotiated rulemaking could not be used to assist federal government decision makers. The prevailing attitude is that something like negotiated rulemaking is coming, and the results of this study suggest it should -- at least on an experimental basis. If it does, based on this first experiment, RAC can offer some valuable lessons.

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Introduction:

In November of 1991, the Federal Environmental Assessment Review Office ("FEARO"") began an experiment in regulation-making by consensus. Sixteen representatives from industry, environmental groups, aboriginal groups, and several provinces, were gathered in Ottawa to form the Regulatory Advisory Committee ("RAC") and asked to assist the Minister of Environment in the development of key regulations under the new *Canadian Environmental Assessment Act* ("*CEAA*").[1]

As an idea and an experiment, RAC has generated a considerable amount of interest among all of those connected to it. From a law reform perspective, this thesis will pursue the question, can a process like RAC improve the performance of the current regulatory process?

The use of a consensus-based approach to make regulations in Canada is extremely rare, especially at the federal level. But in the United States, the Environmental Protection Agency ("EPA") has successfully implemented a process which allows parties likely to be affected by a regulation to negotiate the substance of it. Using the U.S. experience as an important resource, this paper will set about to evaluate RAC by presenting it as a case study of

[1] S.C. 1992, c. 37, ss. 61 to 70, 73, 75 and 78 to 80 brought into force December 22, 1994 (SI/95-3); remainder brought into force January 19, 1995 (SI/95-11). Amended S.C. 1993, c. 28, s. 78, and S.C. 1994, c. 46.

a new process (consensus-based regulation making) in a new context (Canada).

Chapter I begins this evaluation by looking at the evolution of the regulation-making process in Canada from a time when very few constraints were placed on the exercise of regulatory authority. After setting out the essentially non-statutory requirements of the current process, the Chapter will propose a set of criteria with which to measure both the performance of the process, and RAC's potential for improving it. Under this proposal, the success of a process would be measured by its ability to accommodate the views of a more diverse range of interests, improve the quality of our regulations, and hold our regulation makers to a higher standard of accountability.

Chapter II will provide descriptions of both the RAC process and the federal regulatory process. In particular, the Chapter will focus on how the substance of a proposed regulation is reviewed within government and on how government typically includes non-government interests in such a review.

Chapter III will compare RAC with the successful U.S. process, which is known as negotiated rulemaking, or "regneg" for short. Regneg will be described as RAC with a few important enhancements. Its success, particularly at the EPA, is attributed to its ability to address perceived shortcomings of the traditional U.S.

rulemaking process. The Chapter will consider whether there are perceptions of similar deficiencies in Canada which may warrant a regneg experiment here.

With all the elements of the question then assembled, Chapter IV will begin to assess whether RAC is capable of improving the performance of the regulatory process in Canada. Here the experience of the EPA will play an important role, and so will the views of RAC participants. The Chapter will present the participants' overall assessment of the process, and their views on what the government would have produced without RAC's assistance. It will then evaluate RAC's impact on the regulatory process using the criteria proposed in Chapter I relating to the openness of the process, quality of the results, and accountability of the decision makers.

Almost all RAC participants expressed support for the concept of RAC, but most had at least some concerns with respect to its application. These concerns will be presented in Chapter V when the paper considers in what circumstances RAC would be most appropriate, and what steps an initiating department could take to increase the chances of a successful RAC. The Chapter will conclude by examining the legal basis for RAC or regneg in Canada to see whether there are any legal obstacles which would prevent governments from using it.

This paper studies the activities of RAC from its inception in November of 1991 to the pre-publication on September 18, 1993 of the first four draft regulations RAC helped to develop. Although RAC continued to operate after pre-publication, the paper does not examine events that have happened since that time. Since the paper is about the *process* of making regulations, it does not discuss in any detail the substance of the *CEAA* regulations. The content of the regulations, however, is discussed in general terms when considering whether RAC was able to improve their quality.

The paper is an examination of whether RAC or regneg is a viable option now, given present conditions, and given existing legal and political structures. As a result, some parts of the paper will be descriptive only. The paper is not intended to be a critical examination of current political model.

As part of the research for this paper, interviews were conducted with thirty-six people during the months of March and April 1994. Nineteen of those interviewed were members of RAC at some time or another, either as original members, alternate members, or replacement members. All others interviewed were either federal administrators involved in the development of the regulations from the government side, representatives of interests not at the table but who wished to be, or constituents of an interest represented at the table. Some of the non-members sat in as formal observers at various times during the process.

Summaries of participant views appear throughout the paper, but detailed responses have been attached as Appendix A. Readers are urged to consult the detailed responses for a fuller understanding of the issues.

Whenever a research project that studies individuals is undertaken by a member of the University of Ottawa, the Ethics Committee of the University requires the written consent of all participants. To reduce the risk associated with participating in this study, participants were advised that all their responses would be treated as confidential and that they should not be identifiable in the presentation of the results. Participants agreed, however, that their answers could be attributed generally to the interest they represented. The interview guide and informed consent form used for the interviews has been attached as Appendix B.

As a result, the thirty-six participants have been grouped into categories representing six broad interests: FEARO as administrator of the RAC process (eight), industry (eleven), federal government departments (seven), environmental non-government organizations (six) and the provinces (four). The sixth category, made up of people from within the first five categories, is the group of participants who did not directly take part in either the RAC process or the process within government to develop the *CEAA* regulations.

In order to respect the confidentiality of those interviewed, a number of steps have been taken. The views of the RAC facilitator have been included in the FEARO responses, the views of a member representing an aboriginal interest have been added to those of environmental organizations, and the views of a member representing a territory have been combined with the provincial responses. All views, including those of the female participants, have been presented using the male pronouns.

Chapter I: The Federal Regulatory Policy and Process: Searching for a Standard to Measure its Performance.

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In the spring of 1986, the Conservative government of Brian Mulroney introduced extensive reforms to Canada's regulation-making process for making regulations. These reforms included what was described as the "first ever" federal regulatory policy.[1] While the "first ever" claim is disputable, it is clear that until recently governments have placed few constraints on the exercise of regulatory authority. Today, however, for every statute passed by Parliament, sixteen regulations on average are created by the Executive; and as a result, Canadians are more than ever before questioning whether the regulatory process is compatible with the principles of democracy and open government.[2]

This chapter aims to provide a basis for assessing the performance of the regulatory process so that it may be sensibly asked whether RAC as a model succeeds in improving it. It begins by setting out the evolution of the federal policy and process as governments attempted to address growing demands for participation and accountability.

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[1]Canada, Treasury Board Office of Privatization and Regulatory Affairs, *Regulatory Reform: Making it Work*, (Ottawa: The Board, 1988), at p. 8.

[2]Bernier, F.-R., General Counsel to the Standing Joint Committee for the Scrutiny of Regulations, forward, p. vii, in Keyes, J.M., *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992).

The result of decades of study and debate is the current *Regulatory Policy* released in 1992.[3] The goals and procedures of the *Policy* will be discussed in some detail to assist in the search for suitable performance criteria, and to provide a basis for assessing whether, even by the government's own standards, RAC can lead to improvements.

The chapter will end by proposing a set of performance criteria to be used in subsequent chapters. These criteria will be based not only on the federal *Policy* goals but on criteria suggested by others who have commented on the regulatory process.

A. The origins of the current federal regulatory policy and process

In theory, government administrators are held accountable for decisions through their minister who is responsible to Parliament for all acts of his or her subordinates.[4] In practice, however, this theoretical accountability has provided little comfort.

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[3]Canada, Treasury Board of Canada Secretariat, *Regulatory Policy: Regulatory Affairs Guide*, (Ottawa: The Board, October 1992).

[4]Kernaghan, K. "Political Control of Administrative Action: Accountability or Window Dressing?" (1976) C. de D. 927 at 930.

An early and articulate statement of concern for regulatory accountability can be found in a 1932 British Parliamentary study on the exercise of Minister's powers:

> The aggregation of power in the hands of the Crown and its servants, whether Ministers or public servants, as law making delegates of Parliament should not lead to a decrease in accountability to Parliament for law making. Delegated law making is far too wide-spread a practice to be without democratic participation, procedural safeguards and parliamentary accountability. Yet, our present practices are based on the premises that delegated legislation is abnormal, and that it is confined to matters of detail. There can be no doubt that delegated legislation is now the ordinary and indispensable way of making the bulk of the non-common law of the land. It is beyond question that subordinate legislation is not confined to detail and more often than not embodies and effects policy. The making and control of subordinate law must therefore be regularized and brought into harmony with our constitutional order.[5]

In Canada, expressions of discontent with the regulatory process began to formalize in 1943 when calls for Parliamentary review of all regulations reached the House of Commons.[6] However, it Canadian governments were looking abroad for advice during this period, they would have received conflicting messages. While the Americans were legislating a notice and comment process in 1946

[5]Committee on Ministers' Powers of 1932 (the "Donoughmore Committee"), Cmd. 4060 (1932).

[6]See Holland, D.C., and McGowan, J.P., *Delegated Legislation in Canada* (Toronto: Carswell, 1989), at p. 55.

with the *Administrative Procedure Act,*[7] the British were repealing their *Rules Publication Act*[8] which had stood since 1893.[9]

Hence, prior to 1950 there was no general statutory requirement in Canada to even publish a regulation of a legislative nature. Regulations were only published where it was required by their parent legislation.[10] A 1947 regulation outlining filing and publication procedures appears to have been largely ignored.[11] Canada's first general statutory requirement to publish a regulation in came in 1950 with the passage of the *Regulations Act.*[12] Beyond publication, however, the *Regulations Act* imposed no other significant requirements.

Little changed until late into the 1960's when two government-commissioned reports, one provincial and one federal, were issued on the subject of delegated legislation. In 1968, the Province of

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[7]Pub. L. No. 79-404, 60 Stat. 237 (1946), *repealed and replaced by* Pub. L. No. 89-554, 80 Stat. 378 (1966)(codified as amended at 5 U.S.C. §§551-59, 701-06 (1976)).

[8]*Rules Publication Act, 1893* (56 & 57 Vict. c. 66).

[9]See Mullen, D., *Rule-making Hearings: A General Statute for Ontario?* (Research Publication no. 9)(Toronto: Commission on Freedom of Information and Individual Privacy, 1979), at p. 135.

[10]Holland and McGowan, *supra*, note 6, 37.

[11]Statutory Orders and Regulations Order, 1947. See Holland and McGowan, *supra*, note 6, 38: "Judging by the number of statutory instruments actually published, it was by and large ignored."

[12]R.S.C. 1952, c. 235, s. 6.

Ontario's McRuer Commission considered a general statutory requirement for advance publication and consultation, but concluded it would cause unnecessary delay and duplicate time already spent in informal consultation.[13] A year later the federal House of Commons's MacGuigan Committee on Statutory Instruments similarly rejected a general notice and comment requirement, but strongly recommended that those affected by regulations be given an opportunity to comment on them.[14] The MacGuigan Committee also recommended that, where appropriate, regulation-making sections in future statutes should include provisions requiring formal hearing or consultation processes.[15]

At the federal level, many of the MacGuigan Committee's recommendations appear to have been well-received. Two significant developments attributed to the work of the MacGuigan Committee are the creation in 1971 of the *Statutory Instruments Act*,[16] and the formation of the Standing Joint Committee on Regulations and Statutory Instruments.[17] The *Statutory Instruments Act* replaced the *Regulations Act* of 1950. It requires that

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[13] *Royal Commission Inquiry into Civil Rights* (the "McRuer Commission") (Toronto: Queen's Printer, 1968) at p. 364.

[14] *Third Report of the Special Committee on Statutory Instruments* (the "MacGuigan Committee") (Ottawa: Queen's Printer, 1969), at p. 47-48.

[15] *Ibid.*

[16] S.C. 1970-71-72, c. 38, assented to May 19, 1971.

[17] Holland and McGowan, *supra*, note 6, 58-59.

regulations be registered within 7 days of their making,[18] and published within 23 days of registration.[19] Exemptions apply to both the registration and publication requirements.[20] With a few exceptions, registration is required before a regulation can come into force,[21] and publication is required before a person can be convicted of contravening a regulation.[22]

The *Act* also requires the Clerk of the Privy Council to scrutinize each regulation to ensure, among other things, that it is authorized, it respects existing rights, and that it is well drafted.[23] The Clerk of the Privy Council, however, only has

[18] R.S.C. 1985, c. S-22, s. 5.

[19] *Ibid.* s. 11.

[20] Regulations which are exempt from registration are outlined in the regulations; s. 7 of the regulations list, for example, all regulations made under s. 12 of the *National Defence Act*, and some of the regulations made under s. 233 of the *Railway Act*. If a regulation is exempt from registration, it may also be exempt from publication (s. 20(c)(i)); most of these regulations are apparently of a "housekeeping" nature (see Holland and McGowan, *supra*, note 6, 40). Regulations may be exempted from pre-publication where they affect only a limited number of persons or for reasons of national security (s. 20(c)(ii) and (iii)).

[21] *Supra*, note 18, s. 9.

[22] *Ibid.* s. 11(2). A regulation may be exempted from this requirement if reasonable steps had been taken to bring the regulation to the notice of persons likely to be affected by it (s. 11(2)(b)), or if exempted by regulation (s. 11(2)(b) and s. 20(c)).

[23] *Ibid.* s. 3. requires the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, to ensure that a regulation is authorized by the statute pursuant to which it is to be made; does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made; does not trespass unduly on existing rights and freedoms; and is drafted in accordance with established standards. See also Chapter II, Part

authority to bring any deficiencies to the attention of the regulation-making authority.[24]

By section 19 of the *Act*, every statutory instrument issued by the government is to stand permanently referred to a committee of either or both of the houses for the purpose of review and scrutiny.[25] In 1973, the Standing Joint Committee on Regulations and Statutory Instruments was created to perform this function.[26] However, like the Clerk of the Privy Council, the Joint Standing Committee's role in the regulatory process is limited. Though the Committee's reviewing criteria appear to allow for some review on the merits,[27] the work of the Committee appears to have been largely technical in nature,[28] and the Committee itself is granted little power to influence the overall process.[29]

B, section 1.3 below.

[24] *Ibid.* s. 3(3).

[25] *Ibid.* s. 19.

[26] *Minutes of Proceedings and Evidence of Standing Joint Committee on Regulations and Other Statutory Instruments*, First Session, 29th Parliament, Issue No. 1 at p. 3; see also Mullen, *supra*, note 9, 79.

[27] The Committee's criteria, concurred in by the Senate on November 23, 1978 and the House of Commons on November 21, 1978 are outlined in *Minutes of Proceedings and Evidence*, Fourth Session, 30th Parliament, Issue No. 1, at p. 4-6; see also Mullen, *supra*, note 9, at note 151, pp. 79-81 and at p. 79-80; and Holland and McGowan, *supra*, note 6, 83.

[28] See also Mullen, *supra*, note 9, at note 151, pp. 79-81; and Holland and McGowan, *supra*, note 6, 83.

[29] See *Fourth Report for the First Session of the Thirty-Second Parliament from the Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory*

The next significant development in the regulatory process occurred five years later when Treasury Board,[30] introduced a notice and comment procedure in 1978 for all new "major" regulations dealing with health, safety and "fairness" made under specified statutes.[31] This non-statutory policy called for the terms, authority, and purpose of any proposed regulation in these areas to be pre-published in the *Canada Gazette* along with a summary of a socio-economic impact analysis ("SEIA"), the full text of which was to be made available upon request.[32] Although

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Instruments, (Ottawa: Supply and Services Canada, 1980) at p. 9: "[Y]our Committee is granted neither power nor jurisdiction to do anything in particular with or to statutory instruments..."; and Canada, Treasury Board of Canada Secretariat, Administrative Policy Branch, Regulatory Affairs, *How Regulators Regulate: A Guide to Regulatory Processes in Canada*, (Ottawa: Minister of Supply and Services Canada, 1992), at p. 4: "[The Standing Committee] can recommend change to the government, report to Parliament on problems with regulations that members of the Committee have discovered, or propose to Parliament that a regulation be overturned...".

[30]Treasury Board is a committee of the Queen's Privy Council established under the *Financial Administration Act* (R.S.C. 1985, c. F-11) to act for the Privy Council with respect to general administrative policy in the public service, and financial management (see ss. 7 and 11).

[31]Program announced by the President of the Treasury Board and the Minister of Consumer and Corporate Affairs on December 14, 1977 and in effect as of August 1, 1978: Consumer and Corporate Affairs Canada News Release, NR-77-82; Economic Council of Canada, *Regulation Reference: a Preliminary Report to First Ministers*, (Ottawa: The Council, November 1978); See also Mullen, *supra* note 9, at p. 90-91, and the Standing Joint Committee Report, *supra* note 29, at p. 12. A "major" regulation was a regulation that may have an impact of more than $10 million on the economy. "Fairness" meant protection against fraud and deceptive practices.

[32]Economic Council of Canada, *Regulation Reference*, *supra*, note 31; and Mullen, *supra*, note 9, 91.

the basic structure of the SEIA system remains today, the SEIA requirement itself does not appear to have made any lasting impact. One commentator described the SEIA requirement as "very detailed" and "cumbersome", which may explain why only eleven were undertaken between 1979 and 1985.[33]

As the seventies drew to a close, the notice and comment issue was again beginning to attract the attention of Canadian legislators. This renewed interest is attributed in large part to the performance of the *Administrative Procedure Act* in the U.S., then more than thirty years old.[34] Policy hearings were becoming more frequent in Canada at several federal decision-making bodies such as the Canadian Radio-television and Telecommunications Commission and the National Energy Board.[35] And business groups were calling for public hearings for all new regulations in order to reduce regulatory "chaos" and frustration caused by "sudden regulatory change."[36]

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[33]Evans, J.M., et al., *Administrative Law: Cases, Text and Materials*, 3d ed. (Toronto: Emond-Montgomery, 1989), at p. 236. Evans also notes that some found the SEIA process to be "somewhat overwhelming or frustrating" (at p. 240).

[34]See Mullen, *supra*, note 9, 16: "In all recent Canadian discussions of these issues, the stimulating force has been the "notice and comment" section of the *Administrative Procedures Act*." Mullen, himself, was asked to analyse the American experience and to suggest whether there were lessons for the Province of Ontario (see *preface* of John D. McCamus, p. vi).

[35]*Ibid.* at 17-18.

[36]*Ibid.* at 174. Mullen refers to a November 21, 1978 article in the *Globe and Mail* in which the President of the Institute for Research on Public Policy advocates for a business "bill of rights."

Early in the 1980's three significant reports were issued, all of which were critical of the regulatory process. One of these was the report of a Special Parliamentary Committee on Regulatory Reform (the "Peterson Committee") which was asked by Parliament to examine government regulation and to report on how to minimize the regulatory burden imposed on the private sector.[37] Although the Committee did not support a general notice and comment requirement, it recommended better voluntary and informal opportunities for public participation:

> In our view, early consultation is the fundamental feature of regulatory reform. The key to more effective regulation involving the least possible burden on the private sector is the participation of a wide variety of interests in the process of regulation from the earliest possible stage.[38]

The Peterson Committee did, however, note that (as the MacGuigan Committee had recommended) an increasing number of statutes required pre-publication of draft regulations.[39]

In that same year, the Standing Joint Committee on Regulations and Statutory Instruments, after seven years of operation, released the results of a study it conducted to determine the means by

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[37]House of Commons, Special Committee on Regulatory Reform, *Report*, First Session of the Thirty-Second Parliament, 1980 (Ottawa: Ministry of Supply and Services Canada, 1981), at p. 1.

[38]*Ibid.* at 4.

[39]*Ibid.* at 8.

which Parliament could better oversee the government regulatory process:[40]

> Your Committee believes that the appropriate stage for the review of subordinate law as to its policy and merits is well before it is finally made. Your Committee also believes that more effective than any scheme of parliamentary scrutiny ... is an obligation to make [a] proposed law public, to state the reasons for its making and to consider representations from the public whether individuals or groups.[41]

Unlike the Peterson Committee, however, the Standing Joint Committee supported the idea of a mandatory notice and comment procedure and proposed the creation of new legislation for this purpose.[42]

Yet, perhaps the most influential of the three reports issued during this period was the 1981 report of the Economic Council of Canada (the "ECC").[43] The ECC had been asked in 1978 by Prime Minister Trudeau to suggest guidelines that governments could use to determine areas of regulation which were likely causing a significant adverse economic impact, and to suggest practical changes to public policies that could be undertaken to improve government regulation.[44] Based on the views of business and

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[40]*Standing Joint Committee*, *supra*, note 29.

[41]*Ibid*. at p. 8.

[42]*Ibid*. at p. 17.

[43]Economic Council of Canada, *Reforming Regulation*, (Ottawa: Supply and Services Canada, 1981).

[44]*Ibid*. at p. xii.

interest groups expressed during the study, the ECC found a number of "obvious problems" with the regulatory process including "inadequate consultation with interested persons during the development of proposals for new regulations."[45]

The ECC went on to make a series of recommendations, all of which were founded on three basic propositions: that government should provide advance notice of their intent to propose major new regulations and allow an opportunity for consultation; that government, before imposing major new regulations, should assess the costs and benefits of such regulations; and that governments should periodically and systematically evaluate their existing stock of regulatory programs.[46] The ECC recommended against a legislated consultation process, however, citing unresolved problems of when to consult?, how much to consult? and with whom to consult?[47]

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[45]*Ibid.* at p. 69.

[46]*Ibid.* at p. 70.

[47]*Ibid.* at p. 74-75. The ECC's "timing" concerns related to raising false hopes or fears if consultation is too early, or being seen as already committed and inflexible if consultation is too late. On the question of how much is appropriate, the ECC raised the issues of potential for excessive government demands for information, and the danger of confusing inadequate consultation with failure of governments to agree with the positions of those consulted. Finally, on the question of whom to consult, the ECC warned against the "convenient habit" of consulting only with "established" groups when new regulations may affect a large number of diverse groups.

By 1983, the first signs of the ECC's influence on the regulatory process had begun to show with the Trudeau government's introduction of an advance notice process called the *Regulatory Agendas*.[48] Published twice yearly as a supplement to the *Canada Gazette*, the *Regulatory Agendas* were apparently a welcomed addition to the regulatory process. One commentator described the them as a "significant step forward in the quest for responsible government,"[49] and by May of 1984 eleven government departments and four regulatory agencies had produced an issue that contained over 700 pages of proposed regulatory initiatives.[50]

Yet despite this development, a 1985 Federal Task Force on Program Review (the "Nielson Task Force") examining the efficiency, appropriateness and adequacy of the regulatory process concluded that, on the whole, there were still a number of significant problems.[51] Instead of a coherent regulatory system, the Nielson Task Force found "a largely unstructured, uncontrolled, highly variable, and thoroughly confusing mixture of legal requirements, policy guidelines, and *ad hoc* administrative practices."[52] In the view of the Task Force, the government had "no effective mechanism

[48]Evans, *supra*, note 33, 234.

[49]Holland and McGowan, *supra*, note 6, 14.

[50]Evans, *supra*, note 33, 234.

[51]Canada, Study Team to the Task Force on Program Review, *Management of Government: Regulatory Programs* (Ottawa: Minister of Supply and Services, 1985) pp. 631-666.

[52]*Ibid*. at 633.

to plan or control federal regulatory intervention in the private sector;"[53] arrangements for private sector consultation were inadequate,[54] and the Socio-Economic Impact Assessment process set into place a few years previous was inadequate, poorly supported and largely ignored.[55]

B. "Regulating smarter": the theme of the current regulatory process

At the core of the current policy is a process that was introduced as part of a major regulatory reform initiative in 1986. Swept into power with an unprecedented majority, the Conservative government in the spring of that year announced a *Regulatory Reform Strategy*[56] which was to be a key element of its *Agenda for Economic Renewal*.[57] Finding the existing state of regulatory management "unacceptable" and looking for a way to reduce "impediments to economic growth and obstacles to innovation," the government outlined process reforms aimed at both encouraging

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[53] *Ibid.*

[54] *Ibid.* at 642-643.

[55] *Ibid.* at 633.

[56] Canada, Treasury Board of Canada Secretariat, *Regulatory Reform Strategy* (Ottawa: The Board, 1986).

[57] Canada, Department of Finance, *The Agenda for Economic Renewal: Principles and Progress* (Ottawa: Department of Finance, 1987), at p. 10.

better regulation in the future and at improving the efficiency and effectiveness of existing regulatory programs.[58]

The goal of "across-the-board de-regulation" was specifically rejected as a basis for the *Strategy*,[59] although one of the immediate effects of the *Strategy* was a twenty-five percent reduction in the number of regulations approved by cabinet.[60] Instead the government chose to focus on what they called "regulating smarter." Regulating smarter meant "greater efficiency, greater accountability, and greater sensitivity to those affected by federal regulation."[61] Treasury Board would later describe this term as meaning a process "based on dialogue with affected parties and the public ... to be characterized by openness, transparency, accountability, and solid analysis of the impacts of regulatory proposals."[62]

However, unlike the approach taken by the Province of Quebec, which in the same year introduced a legislated notice and comment

[58]Treasury Board, *Regulatory Reform: Making it Work*, *supra*, note 1, 1.

[59]*Ibid*.

[60]Treasury Board reports that there were about 25 per cent fewer regulations in 1987 than in 1986: *Ibid*. at 11.

[61]*Ibid*. at 1.

[62]Canada, Treasury Board of Canada Secretariat, *Responsive Regulation in Canada: The Government's Reply to the Sub-committee on Regulations and Competitiveness* (Ottawa: Treasury Board of Canada, 1993), at p. 2.

process,[63] the new federal requirements were almost entirely non-statutory. In addition to appointing for the first time a Minister who would be responsible for regulatory affairs,[64] the *Strategy* called for early notice of all possible regulatory initiatives, created a *Citizens' Code of Regulatory Fairness*, required all initiating departments to prepare a Regulatory Impact Assessment Statement ("RIAS") for each regulatory proposal presented to Ministers for approval, and required the pre-publishing of all draft regulations, together with their RIASs.[65]

Early notice was still to be provided through the *Regulatory Agendas*, though this document was replaced a year later by the annually-published *Federal Regulatory Plan*.[66] The *Plan* is designed to "give interested Canadians the opportunity to make their views known before the government makes decisions."[67] In 1987, forty-two percent of over 950 regulations submitted for approval had been

[63] *Regulations Act*, S.Q. 1986, c. 22. Section 8 requires proposed regulations to be published in the Quebec *Gazette*. Section 10 requires notice of the length of comment period after pre-publication. There is no early notice procedure.

[64] The *Plan* also set up the Regulatory Affairs Secretariat in the Privy Council Office (see Treasury Board, *Regulatory Reform Strategy*, *supra*, note 56, 3).

[65] See "Regulatory Process Action Plan," *Ibid*. at 22-26.

[66] *See* Evans, *supra*, note 33, 236.

[67] Canada, Treasury Board of Canada Secretariat, *Federal Regulatory Plan 1994*, (Ottawa: Minister of Supply and Services, 1994), at p. ii.

previously included in the *Regulatory Plan*, a record Treasury Board has described as "reasonable."[68]

The *Citizens' Code* is considered by Treasury Board to be the "heart" of the 1986 policy,[69] and in it the federal government has committed to the principles of openness, fairness, efficiency and accountability through mechanisms such as full consultation and early notice.[70] One commitment of particular interest given the

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[68]Treasury Board, *Regulatory Reform: Making it Work*, *supra*, note 1, 13. Compared to the 1984 *Regulatory Agendas* which contained entries from 11 government departments and 4 agencies and ran to over 700 pages [Evans, *supra*, note 33, 234.], the 1988 edition of the *Federal Regulatory Plan* contained 916 proposals for regulation from 28 departments and 5 regulatory agencies, and was 442 pages long [Evans, *supra*, note 33, 236].

[69]Treasury Board, *How Regulators Regulate: A Guide to Regulatory Processes in Canada*, *supra*, note 29, 2.

[70]Canada, *Citizens' Code of Regulatory Fairness* (1986); and Evans, at p. 235. Provisions relevant to this discussion include:
2. The government will encourage and facilitate an opportunity for full consultation and participation by Canadians in the federal regulatory process.
3. The government will provide Canadians with adequate early notice of possible regulatory initiatives.
7. The government will ensure that officials responsible for developing, implementing or enforcing regulations are held accountable for their advice and actions.
8. The government will take all possible measures to ensure that businesses of different size are not burdened disproportionately by the imposition of regulatory requirements.
9. The government will ensure that the governments of the provinces and territories are given early notice of an adequate opportunity to consult on federal regulatory initiatives affecting their interests.
10. The government will not use regulation unless it has clear evidence that a problem exists, that government intervention is justified and that regulation is the best alternative open to the government.
14. The government will enhance the predictability of the exercise of discretionary powers by federal regulatory authorities.
15. The government will encourage the public to exercise its duty to criticize ineffective or inefficient regulatory initiatives,

theme of "regulating smarter" is the promise to "encourage the public to exercise its duty to criticize ineffective or inefficient regulatory initiatives, and to offer suggestions for better or "smarter" ways of solving problems and achieving the government's social and economic objectives."[71]

Every section of the RIAS prepared by an initiating department is said to be motivated by one or more items in the *Regulatory Policy* or the *Citizens' Code*, and it is to be pre-published in the *Canada Gazette* alongside the draft regulation. Treasury Board, therefore, describes the RIAS as playing a fundamental role in the implementation of the policy.[72] The RIAS is used by the government to "complete the public consultation process" by providing a description of what the government is going to deliver, how Canadians have been consulted, what Canadians have said, and by allowing a final opportunity for input into the regulation-making process.[73]

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and to offer suggestions for better or "smarter" ways of solving problems and achieving the government's social and economic objectives.

[71]*Ibid*. s. 15.

[72]Canada, Treasury Board of Canada Secretariat, *RIAS Writer's Guide: For Use by Writers of Regulatory Impact Analysis Statements*, (Ottawa: Ministry of Supply and Services, November 1992), at p. 4.

[73]*Ibid*. at 3-4.

Draft regulations and their RIAS are to be pre-published for at least thirty days before going to the Special Committee of Cabinet for final approval.[74] If advance notice of the regulation had not been given through the *Federal Regulatory Plan*, a sixty day pre-publication period is recommended.[75] Longer pre-publication periods may be required in certain circumstances.[76] Many exemptions, however, apply to the pre-publication requirement,[77]

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[74]Treasury Board, *How Regulators Regulate: A Guide to Regulatory Processes in Canada*, *supra*, note 29, 4.

[75]*Ibid.*

[76]Regulations that are notifiable under GATT are required to be pre-published through the GATT Enquiry Point at the Standards Council of Canada for a minimum of 75 days. Under Article 607 of the Canada-U.S. *Free Trade Agreement*, the U.S. must normally be given a minimum of 60 days to review the full texts of standards-related measures, and hence, Treasury Board recommends they be pre-published for a minimum of 75 days [Canada, Treasury Board of Canada Secretariat, *The Federal Regulatory Process -- An Interim Procedures Manual for Departments and Agencies*, (Ottawa: Treasury Board of Canada Distribution Centre, 1991) at p. 8]. Some statutes may stipulate a period of notice [see the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supplement), s. 55(2), 48(2), 62(2), 86(4) which specifies a 60 day period].

[77]The classes of regulations that may be exempted from pre-publication include omnibus regulations covering housekeeping changes; non-contentious regulatory responses to concerns of the Standing Joint Committee, and spent regulations; regulations that deal solely with internal government management; regulations in response to emergencies; regulations where the costs of pre-publication are likely to outweigh the benefits; enabling regulations that are not inherently regulatory in nature; amendments to regulations that give formal recognition to Budget measures already implemented; minor amendments to cost-recovery regulations; revocation of regulations that have not been enforced for a considerable period of time; and regulations that are economically or politically sensitive, where pre-publication would result in demonstrable adverse effects or undermine the intent of the regulation (e.g. subsidy changes or interest rate changes) [see Treasury Board, *Responsive Regulation in Canada*, *supra*, note 62, Appendix B, at p. 38].

and there is some evidence to suggest that pre-publication is more the exception than the rule. In 1987, for instance, only thirty per cent of the regulatory initiatives coming before cabinet for final approval had been pre-published.[78]

C. Goals of the current Regulatory Policy

In 1992 the Mulroney government introduced the current Regulatory Policy.[79] The new policy is said to have incorporated the principles associated with "regulating smarter," but introduced a new focus on managing regulatory programs.[80] The objective of the new policy is to "ensure that use of the government's regulatory powers results in the greatest net benefit to Canadians."[81]

In order to accomplish this objective, the 1992 policy set out six policy requirements. A problem or risk must exist, government intervention must be justified, and regulation must be the best alternative.[82] Canadians are to be consulted and to have an

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[78]Treasury Board, *Regulatory Reform: Making it Work*, *supra*, note 1, 13.

[79]Treasury Board, *Regulatory Policy: Regulatory Affairs Guide*, *supra*, note 3.

[80]Treasury Board, *Responsive Regulation*, *supra*, note 62, 2.

[81]Treasury Board, *Regulatory Policy: Regulatory Affairs Guide*, *supra*, note 3, 1.

[82]*Ibid*. s. 1.

opportunity to participate in developing or modifying the regulations.[83] The benefits of the regulatory activity are to outweigh the costs, and the regulatory "program" is to be "structured" to maximize the gains to beneficiaries in relation to the costs to Canadian governments, businesses, and individuals.[84] Steps have to be taken to ensure the regulatory activity impedes as little as possible Canada's competitiveness.[85] The regulatory burden on Canadians is to be minimized through such methods as cooperation with other governments;[86] and systems are to be put into place to manage regulatory resources effectively.[87]

The consultation requirement, according to Treasury Board, flows directly from the government's commitment to openness as expressed in the *Citizen's Code*.[88] Treasury Board describes this requirement as serving two primary purposes. The first is to legitimize the essentially legislative nature of regulatory decisions:

> Because regulators are exercising legislative power conferred by an Act of Parliament, they must find a substitute for the open Parliamentary process of lawmaking. Democratic values should always take precedence over issues of process efficiency.[89]

[83]*Ibid*. s. 2.

[84]*Ibid*. s. 3.

[85]*Ibid*. s. 4.

[86]*Ibid*. s. 5.

[87]*Ibid*. s. 6.

[88]*Ibid*. at 2.

[89]*Ibid*. at 2-3.

The second purpose of the consultation requirement is to inform regulatory decisions: "However one tries, it is hard to identify all the impacts of a proposed regulation ... [t]his can only be done by consulting with those most likely affected."[90]

The cost/benefit requirement insists that all costs and benefits be properly quantified, and that total costs do not outweigh the economic and social benefits.[91] For the competitiveness requirement, "competitiveness" is defined in terms of "efficiency, innovation and adaptation,"[92] though the Minister responsible for regulatory affairs is on record as saying the regulatory objectives of health, safety and environment are not to be compromised as a result.[93] The Minister further suggests, however, that these goals can often be met in ways that do not inhibit, or may even promote, Canada's competitiveness.[94]

Suggested ways to pursue the inter-governmental cooperation requirement include harmonizing standards and processes, mutually recognizing standards, delegating, work sharing, or exchanging

[90] *Ibid.* at 3.

[91] *Ibid.*

[92] *Ibid.*

[93] Treasury Board, *Responsive Regulation in Canada*, *supra*, note 62, 1.

[94] *Ibid.*

information.[95] The resource management requirement includes the notion that only those regulations which can be realistically enforced should be in place or retained.[96]

Today, this policy remains unchanged, although it has been the subject of further study. In 1992, the House of Commons' Standing Committee on Finance was asked to review federal regulation to determine how it affects Canadian competitiveness, and to suggest ways to improve regulation, regulatory processes, and intergovernmental collaboration.[97] The Committee made a number of recommendations to which the government formally responded in 1993.[98]

With respect to consultation, the Committee recommended that Treasury Board develop a set of standardized consultation processes. In response, the government promised to "work with government departments to develop an appropriate range of best practice models to help regulators."[99] Since then, Treasury Board has released a pair of documents entitled "Enlightened Practices

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[95]Treasury Board, *Regulatory Policy: Regulatory Affairs Guide*, *supra*, note 3, 4.

[96]*Ibid.* at 5.

[97]Canada, *First Report of the Sub-committee on Regulations and Competitiveness* (Ottawa: Supply and Services Canada, 1993), at p. xi.

[98]Treasury Board, *Responsive Regulation in Canada*, *supra*, note 62.

[99]*Ibid.* at 9.

in Regulatory Programs."[100] One of the processes outlined in these documents as an enlightened practice is the RAC.[101]

The Committee also recommended that Treasury Board be authorized to delay proposed regulations for which early notice has not been given through the *Federal Regulatory Plan*.[102] The government agreed that, as a matter of policy, major regulations that have not appeared in the *Regulatory Plan* should not be promulgated, but proposed an exemption system that is similar to the one used to exempt regulations from pre-publication in the *Canada Gazette*.[103]

D. Proposing a framework to measure the performance of the regulatory process.

As we have seen, the current federal policy seeks to legitimize the legislative nature of regulatory decisions by asking decision makers to find a substitute for the open and democratic process of Parliamentary law making. In this respect it is responding to

[100]Canada, Treasury Board of Canada Regulatory Best Practices Committee, *Enlightened Practices in Regulatory Programs, Volumes I and II*, (Ottawa: The Board, 1993/4).

[101]*Ibid*. *Volume II*, at 14.

[102]Treasury Board, *Responsive Regulation in Canada*, *supra*, note 62, 9-10.

[103]See note 77 above; and Treasury Board, *Responsive Regulation in Canada*, *supra*, note 62, 10 and Appendix C.

decades of government studies which have repeatedly called for early and broadly-based consultation.

Accordingly, the policy requires certain procedural steps to be taken: early notice of regulatory initiatives, full consultation with affected interests, and in many cases pre-publication of the draft regulation together with its cost/benefit analysis. The policy theme of "regulating smarter" is described as a process which is, among other things, efficient, accountable, sensitive, open, transparent, cooperative and fair. The desired result of the process is a regulation described as competitive, cost-effective, and enforceable.

But while these descriptions may all represent worthy objectives, they are lacking in structure and precision; and as a result, they prove to be of limited assistance when assessing the performance of any particular instance of regulation making.

With a view to finding an alternative framework, this section will begin with a brief survey of non-government perspectives on the regulatory process. It will end by proposing a specific set of performance criteria, based on both government and non-government ideas.

1. Other perspectives

The views of others who have considered the legitimacy of the regulatory process tend to support the idea that broadening input into the process would improve it.

The danger for J.R. Mallory, for instance, is not that bureaucrats are irresponsible or unethical; he sees them as essentially dedicated but overworked. The purpose of any regulatory process, in his view, is to "curb the narrow zeal of the specialist with the wider sensitivity of the politician who is the guardian not only of what the public will tolerate but of constitutional values themselves."[104]

But more helpful to the goal of finding measurable ways to assess performance, is the focus of many of these authors on the *consequences* of a process that is not perceived as legitimate.

H.G. Thorburn argues that a regulatory process which is perceived to operate in secret and favour particular interests is likely to erect barriers between interest groups and encourage strategies which stress confrontation not cooperation.[105] For governments

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[104]Mallory, J.R., "Curtailing 'Divine Right': the Control of Delegated Legislation in Canada," in *The Administrative State in Canada -- Essays for J.E. Hodgetts* (Toronto: U. of T. Press, 1982) 131 at 145

[105]Thorburn, H.G., *Interest Groups in the Canadian Federal System* (Toronto: University of Toronto Press, 1985) at 121.

trying to cope with complex problems and shrinking budgets, this means the entire system can become more unmanageable. In Thorburn's view, any closed system will have an inevitable bias against change which will function as "a drag on the capacity of the government to meet challenges."[106] Such a process will tend to define problems narrowly and in a technical way, further excluding non-expert members of the community.[107] By foregoing opportunities to find tradeoffs acceptable to all interests, governments are forced to make hard choices between interests.[108] The overall result can be a significant waste of scarce resources, financial over-commitment and deficit financing.[109]

Stephen Hazell argues that the bureaucracy is largely designed to react to ideas and proposals rather than generate new ideas. For Hazell, proposals which are not "tested and transformed in the fire of genuine public consultation" are unlikely to transcend what he calls "bureaucratic single vision."[110]

Similarly, Castrilli and Lax argue that by excluding viewpoints and information, the likelihood of determining the public interest

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[106] *Ibid.* at 121.

[107] *Ibid.*

[108] *Ibid.* at 122.

[109] *Ibid.*

[110] Hazell, S., "Reforming Federal Environmental Assessment 1987-1995 (Ottawa: unpublished draft paper. 1995) at 97.

decreases, and it becomes less clear who pays and who benefits.[111] A person who is aware of the costs of both acting and not acting is better equipped to understand and accept the final decision, even if she does not agree,[112] and is more likely to support the process that produced the decision.[113]

2. Proposing a Framework

The following framework combines the ideas contained in the federal policy with the ideas of the authors presented above, and is presented as a proposal for measuring the performance of the regulatory process. It is organized in terms of the openness of the process, the quality of its results, and the accountability of any decision maker for both the decision taken and the efficiency of the process.

2.1 Openness of the Process

An open process is a process that responds not only to the expectations of those directly regulated, but also to the

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[111] Castrilli, J.F. & Lax, C.C., "Environmental Regulation Making in Canada: Towards a More Open Process," in Swaigen, J. (ed) *Environmental Rights in Canada*, (Toronto: Butterworths, 1981), 334 at 337-338.

[112] *Ibid.* at 376.

[113] *Ibid.* at 338.

expectations of the many organizations, groups and individuals who are affected less directly.[114]

It can be measured by the presence of an early notification system, and by the ability of all interested parties to gain convenient access[115] to the information upon which decisions are to be based,[116] to the decision makers themselves,[117] and to the other participating interests. For some groups, this may require financial assistance.[118]

A process would be successful in this sense if it receives the support of the interests who took part in the process, and the support of those which did not.

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[114]See Kernaghan, *supra* note 4, 932.

[115]The expression "convenient public access" is the expression used to define the standard of public access to environmental assessment information in *CEAA* (see S.C. 1992, c. 37, s. 55(1)).

[116]See Kernaghan, *supra* note 4, 933. See also Chapin, H., and Deneau, D. *Citizen Involvement in Public Policy-Making: Access and the Policy-Making Process* (Ottawa: Canadian Council on Social Development, 1978) at 24.

[117]See Kernaghan, *supra* note 4, 933. See also Thorburn, *supra* note 105, 131; and Chapin and Deneau, *supra* note 116, 20.

[118]See Jackman, M., "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process," 4 Cdn. Journal of Admin. Law & Practice 23 at 41.

2.2 Quality of the Results

When assessing the performance of any process, it is often said "the proof is in the pudding." A successful regulatory process would result in a regulation which is considered to be fair by those affected by it. A fair regulation would be based on a thorough analysis of the implications of each substantive decision. If they can be appropriately quantified, the benefits would outweigh the costs. Ideas for advancing the interests of one party without compromising the interests of another would be exhausted; and parties would not continue to fight issues in the courts.

A regulatory process would be effective if it succeeds in accomplishing its stated objective. This could be measured by the degree to which the regulation achieves compliance. The process would also be effective if it was able to improve relationships between traditionally adversarial parties.

2.3 Accountability of the Decision Maker

A decision maker is accountable if each decision is accompanied by reasons for the decision and if it is clear what information was used to base the decision. Where a decision maker acts irresponsibly, this would ensure that there could be political, legal or practical consequences.

In large part, however, accountability is ensured by the existence of an open decision-making process as described above. This is especially true where there is convenient public access to information and to the decision maker.

A decision maker is also responsible for ensuring that the process is as efficient as it can be. Efficiency can be promoted by delegating responsibility, sharing work, and by exchanging information. It can be measured in terms of the amount of time spent to complete the process and by how much the process costs.

Chapter II. Can RAC Improve the Performance of the Regulatory Process?

Chapter II. Can RAC Improve the Performance of the Regulatory Process?

Given the framework proposed in the previous chapter for assessing the performance of the federal regulatory process, this chapter begins the explore the question, can a process like RAC improve the performance of the regulatory process?

To do so, the chapter will lay out the two processes side by side. It will start by introducing RAC and the *Canadian Environmental Assessment Act* ("CEAA"), and will finish by setting out in some detail the regulatory process as it exists in the absence of RAC.

A. What was RAC?

RAC was created to help put the finishing touches on a regulatory program that was itself the product of an extensive and lengthy law reform process. Canada's first environmental assessment regime was introduced by the Trudeau government by way of a series of non-binding cabinet directives in 1972, despite a task force's recommendation to legislate the process.[1] That regime was replaced in 1984 by the *Environmental Assessment Review Process Guidelines Order* ("EARP")[2] which the Trudeau cabinet introduced by Order in

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[1]Wruck, H., "The Federal Environmental Assessment Process is Alive and Well," 50 *The Advocate* 349 (May, 1992), at p. 349.

[2]SOR/84-467. (June 22, 1984), Can. Gaz. II, vol. 118, no. 14,

Council pursuant to s. 6(2) of the *Department of Environment Act*.[3] EARP entrusted the adminstration of the process to the Federal Environmental Assessment Review Office ("FEARO") which reported directly to the Minister of Environment. In 1987, consultations on EARP procedures were conducted by a study group headed by the Honourable Allison Walsh,[4] and the following year a national consultation workshop was held on the topic of reforming EARP.[5]

CEAA was first introduced by the Conservative government of Brian Mulroney as Bill C-78 in June of 1990.[6] Bill C-78 died on the order paper and *CEAA* was re-introduced the following session as Bill C-13.[7] The legislation is said to have been motivated by at least three important factors:

First, because of a widespread perception that EARP was non-binding and that few federal departments and agencies were

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11/7/84, p. 2789.

[3]R.S.C., 1985, c. E-10.

[4]See Canada, Study Group on Environmental Assessment Hearing Procedures, *Public Review: Neither Judicial, nor Political, but an Essential Forum for the Future of the Environment (A Report concerning the Reform of Public Hearing Procedures for Federal Environmental Assessment Reviews* (the "Walsh Commission"), (Ottawa: Minister of Supply and Services Canada, 1988).

[5]Andrews, W.J., and Hillyer, A., "Recommendations for Improvements to Bill C-78 the *Canadian Environmental Assessment Act* (Vancouver: West Coast Environmental Law Association, November 1990), at p. i.

[6]2d Sess., 34th Parl., 1989-90.

[7]3d Sess., 34th Parl., 1991.

following it, several groups were calling for enforceable statutory obligations,[8] and the government was looking for a way to gain credibility for its recent commitment to the notion of sustainable development.[9]

Secondly, the business community across the country was pressing the government to reduce the costly duplication of federal and provincial environmental assessment requirements.[10]

But perhaps the most influential factor was the release of a series of court decisions that, in the words of one commentator, sent "shockwaves" through the federal bureaucracy and significantly accelerated the pace of reforms already in

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[8]Gertler, F., "The Federal Law of Environmental Assessment after *Oldman*: The EARP Order and the *Canadian Environmental Assessment Act*, (unpublished, 1992) at p. 8.

[9]See Schrecker, Ted, "The *Canadian Environmental Assessment Act*: Tremulous Step Forward, or Retreat Into Smoke and Mirrors?" (1991) 5 C.E.L.R. 192 at p. 193-194. The government's commitment to sustainable development followed the widely-publicized report of the Brundtland Commission (World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987).

[10]See testimony of Ian Smyth, President, Canadian Petroleum Association, to the Special Committee to Pre-Study Bill C-13 (Issue No. 9), November 26, 1990, at pp. 5-7; testimony of David Barron, Vice-President, Canadian Pulp and Paper Association, to Legislative Committee on Bill C-13 (Issue No. 6), October 30, 1991, at p. 4; testimony of Carol Burnham, Director Environment, Ontario Hydro, Canadian Electrical Association, to Legislative Committee on Bill C-13 (Issue No. 6), October 30, 1991, at pp. 18-19; "Environmental Assessment in Canada: Two Decades of Experience," speech to Globe '90 by Ray Robinson, Executive Chairman, Federal Environmental Assessment Review Office, at p. 15.

development.[11] On April 10, 1989, the Federal Court of Appeal in *Canadian Wildlife Federation Inc. v. Canada (Minister of Environment)*[12] held that, despite the way it had been treated, the EARP Guidelines Order had the force of law.[13] Two years later this view was confirmed by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*.[14]

After heated battles in both the lower and upper houses -- including an unprecedented appearance before a Senate Committee by the Quebec Minister of Environment[15] -- *CEAA* was given Royal Assent in June of 1992.[16] Proclamation, however, was delayed until such a time as four key regulations under the Act could be ready.[17] RAC was created to help with their development.

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[11]See Jeffrey, M.I., "The New *Canadian Environmental Assessment Act* -- Bill C-78: A Disappointing Response to a Promised Reform," (1991) 36 McGill L.J. 1070, at p. 1073.

[12][1989] 3 F.C. 309 (T.D.), aff'd [1990] 2 W.W.R. 69 (F.C.A.).

[13]*Ibid*. Cullen J., at p. 322.

[14](1992), 88 D.L.R. (4th), 1, [1992] 2 W.W.R. 193 (S.C.C.). *CEAA* was created, in part, to reduce this uncertainty and to formalize the scope of the environmental assessment process.

[15]See testimony of Pierre Paradis, Minister of Environment, Senate Committee: Senate of Canada, *Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources (Tuesday, June 16, 1992, Issue No. 8)*, (Ottawa: The Senate, 1992).

[16]S.C. 1992, c. 37.

[17]See *Report of the CEAA Regulatory Advisory Committee: Report No. 1* (Ottawa: Federal Environmental Assessment Review Office, April 1993) at p. 5 ["RAC Report"]. See also Senate of Canada, *Sixth Report of the Standing Committee on Energy, the Environment and Natural Resources*, (Ottawa: the Senate, 1992), at p. 18 ["Senate Report"]: "Your Committee recommends that ... [t]he federal government give the highest priority to the development of

RAC's place in the history of *CEAA* is clear but its exact function is less so. Despite being described in the original terms of reference as an advisory committee,[18] towards the end of the process RAC participants had widely varying views of the role RAC was intended to play in the process. Although one government participant was of the view that RAC was fundamentally a public relations tool,[19] all other participants struggled to place it on a continuum between a consultative mechanism and a decision-making body. At one extreme RAC was thought to be simply an advisory committee, and intended to be only one of many sources of advice to the Minister of Environment on *CEAA* issues. At the other extreme, RAC was perceived as a negotiating committee, and RAC members were there to write the regulations if they could agree on what the regulations would say.

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the regulations that are essential to the bill's application and that these be drafted in a manner that is sensitive to the concerns of the members of the Regulatory Advisory Committee." For a description of each of these four key regulations, see "*CEAA* and the Regulations," Part A, section 2 below.

[18]*Ibid*. Appendix II: Operational Procedures, at p. 2. Section 1.1 of the Procedures states that the purpose of the Committee is "[t]o advise the Minister of the Environment on draft regulations and guidelines pursuant to the *CEAA*." The Procedures go on to say, however, that another purpose of the Committee is "[t]o develop a set of draft regulations that are effective, workable, timely, fair and conclusive."

[19]Pers. comm. Notes on file with the author, p. 2 and 3.

1. A brief history of the RAC.

Looking back to its origins, RAC appears to have grown out of a desire for consensus development of the *CEAA* regulations. When the Minister of Environment tabled drafts of two *CEAA* regulations before the House of Commons Legislative Committee in June of 1991, he committed to consult widely on their content. Workshops were then held in fifteen Canadian cities.[20]

FEARO management, however, found these consultation sessions to be expensive, cumbersome, and of little practical use. Most of the time was spent explaining the Bill and its concepts, and as a result, FEARO felt it received "little useful feedback." There was a feeling among FEARO management that they could not continue to consult in this way for each of the regulations.[21]

The idea of consensus development was suggested by one of the workshop coordinators (and eventual RAC facilitator) who recommended her experiences with a consensus process recently undertaken in Alberta called the Clean Air Strategy for Alberta ("CASA").[22] CASA was a project jointly initiated by the provincial departments of Energy and Environmental Protection but directed by

[20] *RAC Report*, *supra*, note 17, 1.

[21] Pers. comm. Notes on file with the author, p. 108-109.

[22] *Ibid.* at 34, 108-109.

an advisory committee made up of industry, government and environmental stakeholders. The advisory committee's report was ultimately endorsed by the Alberta government and has now become the basis for a comprehensive air quality management system for the province.[23]

In many ways, *CEAA* was a natural candidate for an experimental process like RAC. Environmental assessment is itself a process commited to facilitating public participation in government decisions[24] Under EARP, FEARO management and staff had developed considerable experience with public processes, and had acquired an appreciation for the benefits of public consultation. And *CEAA* contains both a statutory notice and comment requirement for all draft guidelines and agreements,[25] and an access to information requirement that is significantly stronger than the federal *Access to Information Act*.[26]

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[23]Government of Alberta, *News Release*, "Comprehensive Air Quality Management System Implemented," February 3, 1994 (No. 94-012).

[24]See S.C. 1992, c. 37, Preamble.

[25]S.C. 1992, c. 37, s. 58(3). Note however, that curiously there is no similar requirement with respect to regulations.

[26]S.C. 1992, c. 37, s. 55. This section establishes what is known as the *CEAA* public registries. In essence, *CEAA* requires for any particular document, that the government to assume someone has made an access to information request. If that request would be successful, the document must be placed in the registry.

So in November of 1991, FEARO invited representatives of various interested parties to attend an exploratory meeting in Ottawa where it was decided that a consensus approach to the development of the *CEAA* regulations was "highly desirable."[27] Parties agreed to terms of reference and a set of ground rules for the committee's operation, and although committee members would never receive formal invitations from the Minister of Environment, the Regulatory Advisory Committee began work on four regulations. From that point on, FEARO was able to use RAC's existence to encourage passage of the Bill through the Parliamentary system.[28]

At its conception, RAC consisted of sixteen members, one chair and one facilitator.[29] Six members were from industry groups, four were from provincial or territorial governments, four were from

[27]*RAC Report*, *supra*, note 17, 2.

[28]One FEARO participant suggested that in retrospect, the creation of RAC was a key strategic move. Industry was not prepared to accept the Act unless they had a heavy involvement in the development of the regulations. This participant suggests that RAC may have "saved" the Act from the Standing Committee (Pers. comm. Notes on file with the author, p. 108-109). Similarly, an ENGO participant wonders if the Act would have succeeded at all without the RAC. During the Senate process, the RAC was able to lend their weight and provide something functional for Senators to consider (Pers. comm. Notes on file with the author, p. 149). See also *Senate Report*, *supra*, note 17, at 18: "Given the existence of this Advisory Committee, we are not prepared to take issue with the way the Bill has been structured."

[29]RAC would later increase by five members as federal government departments became full members. See Minutes of the Canadian Environmental Assessment Act Regulatory Advisory Committee, No. 9, September 17, 1993. The federal departments that sent representatives were Environment Canada, Fisheries and Oceans, Industry Canada, Indian and Northern Affairs, and Natural Resources Canada.

environmental groups ("ENGOs"), and two were from aboriginal groups. RAC was chaired by FEARO. Government departments were not represented at the table, although many attended the meetings as formal observers. Meetings were attended by RAC members and formal observers only.

The RAC's formal purpose was to "advise the Minister of Environment on draft regulations and guidelines for *CEAA* and to achieve consensus, or identify different viewpoints, on their content."[30] RAC discussions were intended to assist the government in understanding the implications of various regulatory options.[31] Consensus was understood to mean that "members will allow a decision to proceed but does not necessarily mean that members have no objections to a decision."[32] Where consensus could not be reached, the different viewpoints and the constituencies expressing them were to be recorded.[33] The operational procedures were silent, however, on the question of how the government was to respond to any RAC consensus agreement.

[30]*RAC Report*, *supra*, note 17, 3; see also Appendix II: Operational Procedures, ss. 1.1 and 1.2.

[31]*Ibid*. at 3

[32]*Ibid*. See also Appendix II: Operational Procedures, s. 3.9.1; note, however, that this item was included as an amendment to the procedures in November of 1992.

[33]*Ibid*.

Each draft regulation developed by the RAC was to adhere to four general criteria. The regulation was to be legal, technically feasible, administratively practical, and the regulation was to "take into consideration practicalities of economic implications and the requirement to perform Regulatory Impact Analysis."[34]

Including the first meeting of November, 1991, RAC met a total of six times to discuss the first four regulations. All sessions were conducted over a two-day period. By February of 1993, RAC's work was taken "as far as possible," and the committee was asked to prepare a report so that government could finalize the regulations in time for an attempt to proclaim the Act that summer.[35] The RAC report was issued in April of 1993. It acknowledges that RAC was unable to achieve consensus on all issues, but where consensus was not possible, the report suggests that areas of disagreement had been identified in order to "provide the Minister with sufficient details to make an informed decision."[36] RAC continued to meet after the issuance of the report, but primarily to discuss issues unrelated to the first four regulations.

On September 18, 1993, more than four months after the issuance of the RAC report, the government pre-published draft versions of all

[34] *Ibid*. Appendix II: Operational Procedures, s. 2.

[35] *Ibid*. at 4.

[36] *Ibid*.

four regulations in *Canada Gazette, Part I.*[37] On the day before they were released, RAC members were gathered in Toronto for a preview. Although some of the RAC consensus agreements were reflected in the pre-published regulations, many RAC members, particularly the ENGO members, felt that key RAC agreements had been ignored. The result was the kind of public battle the RAC process was designed to avoid.[38] Ultimately, however, a change of government brought with it a pledge to return key parts of the regulations to the levels suggested by RAC, and in January of 1995, *CEAA* and the four regulations were brought into force.

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[37]*The Canada Gazette, Part I*, Vol. 127 (1993), at 2844.

[38]See for example WCELRF Newsletter (Vol 17:4, Oct. 20, 1994, at p. 4): "One implication is already apparent: environmentalists feel betrayed by the one-sided, pro-industry changes made to regulations recommended as a result of consensus building by environmentalists and industry representatives. This will make the environmental community sceptical of future multi-stakeholder processes." See also "New regulations gut environmental assessment law" *The Globe and Mail* (21 September 1993) A4; "Sierra Club nostalgic for Mulroney" *Ottawa Citizen* (21 September 1993) A4; "Environmental law draws fire from all sides" *Montreal Gazette* (22 September 1993) A5; "Ottawa snaps back at Sierra Club's criticism" *Victoria Times-Colonist* (22 September 1993) C9; "Green laws draw criticism" *Summerside Journal Pioneer* (22 September 1993) 1; "Cave-in threatens environment" *Montreal Gazette* (23 September 1993) B2; "Green law called step backwards" *Calgary Herald* (27 September 1993) B3; "When and where will Ottawa step in" *The Globe and Mail* (27 September 1993) A19; "Green Act sparks fight" *Calgary Sun* (4 October 1993) 24; "A law polluted" *Ottawa Citizen* (4 October 1993) A8; "Gutting of Bill C-13" *The Globe and Mail* (7 October 1993) A2; and "Oilpatch officials say federal regulations have teeth" *Calgary Herald* (8 October 1993) B5.

2. *CEAA* and the regulations.

One of the first challenges facing RAC was to begin to make sense out of a complex piece of legislation.

In general terms, *CEAA* requires federal government decision makers to consider the environmental implications of their decisions before they make them. The Act only applies to projects, as defined, and only when the federal role in the project is sufficient to "trigger" the process. The scope of this legislation, however, is potentially very broad. *CEAA* applies to all federal departments, and potentially covers every federally operated, supported or regulated industry within this country and abroad.

It is no surprise, then, that *CEAA* has attracted the keen interest of several federal government departments, central agencies, provincial governments, federally regulated or supported industries, academics, aboriginal organizations, and environmental groups. Due to the difficulty reconciling these many and at times opposing interests, *CEAA* was in development (including development of the regulations) for over four years.

RAC was asked to consider four regulations under *CEAA*: the *Exclusion List*, the *Inclusion List*, the *Law List*, and the *Comprehensive Study List*. The first three of these help to determine the scope of *CEAA*'s application. The fourth sets out certain projects for which, if the Act applies, a more thorough than usual environmental assessment is required. Each regulation consists of a list, either of projects or triggers. The notions behind the regulations are complex, and they are all interrelated. Drafts of the four regulations were first prepared by federal government departments.

The *Exclusion List* regulation and the *Inclusion List* regulation relate to the first threshold question, is there a project? The definition of project in *CEAA* distinguishes between two types of project: undertakings in relation to physical works, and physical activities not in relation to a physical work.[39] All instances of the former are considered projects under *CEAA* except where formally excluded by the *Exclusion List*.[40] In order for a project to be listed on the *Exclusion List* the Governor in Council must be satisfied that the project will cause only insignificant environmental effects.[41] By contrast, if an activity fits the second half of the project definition, i.e., it is a physical activity not relating to a physical work, it is only a project under *CEAA* if it is expressly listed on the *Inclusion List*.[42]

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[39] S.C. 1992, c. 37, s. 2.

[40] *Ibid*. s. 7(1)(a).

[41] *Ibid*. s. 59(c)(ii)

[42] *Ibid*. s. 2, 59(b).

The *Law List* regulation also addresses the issue of application, but relates to the second threshold question, when is the federal role in the project sufficient to "trigger" the process? Generally, the triggering events in *CEAA* are when a federal department is the proponent of a project, or when a department contributes funding, disposes of an interest in land, or issues a licence or permit to enable a project to be carried out.[43] The issuance of a licence or permit, however, will only trigger the process when that licence or trigger is listed on the *Law List* regulation. The *Law List*, therefore, sets out the scope of the regulatory trigger.

Once it can be determined that *CEAA* applies to a project, the *Comprehensive Study* ("CSL") regulation helps to address the question of what sort of environmental assessment is required? Most assessments will involve the preparation of a summary document called a screening report for which public participation in the assessment is at the discretion of the government department. Full public review panels will be the exception. The *CSL* sets out a middle ground. Public comment is mandatory, the process requirements are more onerous than for a screening, but the assessment stops short of a full public review. A project may be listed on the *CSL* if it is likely to cause significant adverse

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[43] *Ibid.* s. 5.

environmental effects.[44] A comprehensive study is only required where a project is listed on the *CSL*.

Given the nature of these regulations, any proposed change to one of the lists would often have significant implications for a balance struck on any of the others. The addition of a single permit to the *Law List*, for instance, may potentially trigger an entire set of projects not yet considered (one of the licences issued under the *Navigable Waters Protection Act*[45] is a good example). Some of these projects may warrant an assessment, others may not. Those that do, to the extent that they are not related to a physical work, would have to be described and added to the *Inclusion List*. Those that do not, to the extent they *are* in relation to a physical work, would have to be described and added to the *Exclusion List*. Those that merit a more thorough environmental assessment would have to be described and added to the *CSL*. For RAC members, whether they were interested in restricting the scope of *CEAA*'s application or expanding it, the challenge was the same: think through the implications of each regulatory decision.

The task, then, for the regulation maker under *CEAA* appears to have been considerably more legislative than administrative or procedural. *CEAA* itself sets out the process requirements for

[44]*Ibid*. s. 59(d).

[45]R.S.C. 1985, c. N-22.

government decision makers. The regulations, however, define the reach of those requirements: to which projects and to which federal decisions should the process apply? For the Senate committee studying the Bill, *CEAA* constituted "yet another example of legislation, the actual scope of which will be determined not by Parliament, but by executive action," and the committee expressed "strong reservations" about this regulatory approach.[46]

This observation begs a number of interesting questions, responses to which will be pursued in the rest of the paper. If RAC was a decision-making body, can such a group be entrusted with essentially legislative decisions? If RAC was not a decision-making body, who was making these decisions? and is that decision maker subject to the kinds of checks and balances appropriate for legislative decisions? By using an institution like RAC to inform those decisions, can RAC make that decision maker more accountable?

3. The parallel process: the Senior Governmental Committee on Environmental Assessment.

In addition to RAC, FEARO chaired a committee from within the government whose task was also to assist in the development of the *CEAA* regulations. This interdepartmental committee was called the

[46]*Senate Report*, *supra*, note 17, 18.

Senior Governmental Committee on Environmental Assessment ("SMCEA") and was composed of about 20 representatives from federal departments including the central agencies and departments who were expected to be major players in the environmental assessment process.[47]

As conceived, there was no direct link between the SMCEA and the RAC. FEARO was expected to bring the views of RAC members to the SMCEA, and represent the interests of federal departments at the RAC table. In practice, however, this arrangement proved to be troublesome. Participants from both the SMCEA and the RAC felt that the activities of the two committees were too isolated from each other and that FEARO was unable to effectively bridge the gap.[48] Those SMCEA members who attended RAC meetings as observers felt they were prevented from making a contribution to the RAC

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[47]As of September 21, 1994, the Senior Management Committee on Environmental Assessment (SMCEA) was composed of senior representatives from the following federal departments and agencies: Federal Environmental Assessment Review Office (chair), Indian and Northern Affairs, Justice Canada, Environment Canada, Foreign Affairs, Transport Canada, Human Resources & Labour Canada, National Defence, Government Services Canada, Finance, Privy Council Office, Fisheries & Oceans, National Transportation Agency, National Research Council, Atomic Energy Control Board, Communications Canada, Treasury Board, Bureau fédéral de développement régional (québec), Health Canada, Public Works & Government Services Canada, Natural Resources Canada, Industry and Science Canada, Veterans Affairs, Agriculture & Agri-food Canada, Atlantic Canada Opportunities Agency (ACOA), Western Economic Diversification, National Energy Board, Heritage Canada (Parks), Revenue Canada - Customs, Excises & Taxation, and the Canadian International Development Agency.

[48]Pers. comm. Notes on file with the author. See pp. 13, 83, 93, 191.

discussion, and as a result, felt no one was able to ensure that RAC agreements were, from a government perspective, realistic.[49] RAC members were frustrated when RAC agreements were rejected due to federal department opposition that was not expressed during RAC deliberations.[50]

4. Focus on two RAC "crises"

Of the many events that took place during the study period, two in particular can serve as a useful focus for the examination of RAC issues in Chapters IV and V. These two events, which relate to two of the regulations, are briefly described here.

The first is often referred to as the "*Law List* crisis". When RAC began work on the *Law List* regulation it was presented with a draft regulation that had been prepared by government departments and which consisted of 183 permits and licences drawn from a number of different federal statutes and regulations. ENGO members sought access to the pool of provisions that the 183 had been selected from, and applied formally for that information through the *Access to Information Act*.[51] Late in the RAC process,

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[49] *Ibid*. at 77.

[50] *Ibid*. at 176, 209, 226.

[51] R.S.C. 1985, c. A-1.

they received a response from the government that one ENGO member describes as consisting of "more white-out than text."[52] Dissatisfied with this result, the ENGO members hired law students to conduct some research of their own and tabled an additional 800 permits and licences to be considered by the committee. Many of the other RAC members viewed this action as an unwarranted and significant disruption to the process.[53] To address the problem, a RAC subcommittee was formed to review each of the submitted items. Given the short time available for the subcommittee to work, their analysis was considered neither "comprehensive [n]or rigorous."[54] As a result, even now RAC participants can not agree on the amount of consensus, if any, achieved in relation to the *Law List*.

The second event can be described as the negotiations for "*CSL* thresholds". These thresholds, in essence, were agreements reached by RAC members in relation to how the more onerous obligations under *CEAA* would apply to particular industries. Within a particular industry, for example, the *CSL* would apply to certain projects in excess of a certain specified size. Subsequent to the agreements reached by RAC, many non-RAC interests voiced through other channels their opposition to one threshold in particular. As a result, the threshold in dispute was reset at a level different from the one RAC had agreed to.

[52]Pers. comm. Notes on file with the author, p. 227.

[53]*Ibid.* at 40, 58-59, 169, 279.

[54]*RAC Report*, *supra*, note 17, 8.

Some RAC members, particularly the ENGO members, viewed this as a betrayal.[55]

5. Neither merely consultation nor strictly negotiation.

As mentioned at the outset, RAC participants did not all share the same view of RAC's intended role in the regulatory process. Some insisted RAC was simply an advisory committee put together so the government could consult on the regulations. Others were of the view that RAC was a negotiating committee, a group invited to negotiate the regulations. This section begins to take a closer look at this question.

At the two ends of the advisory/negotiating committee spectrum lie the notions of "consultation" and "negotiation". Dorcey and Riek, authors of a paper on negotiation-based approaches to environmental disputes in Canada, have provided useful working definitions of these two terms: consultation occurs "when an individual or organization consults with other individuals and organizations before making the trade-offs and imposing the decision." Negotiation occurs "when individuals or organizations make the trade-offs themselves and adopt an agreement."[56]

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[55]Pers. comm. Notes on file with the author. See p. 212 and p. 175.

[56]Dorcey, A.H.J., and Riek, C.L., "Negotiation-based Approaches to the Settlement of Environmental Disputes in Canada," in *The*

Consultation can take a variety of forms. In perhaps its simplest form, often called "notice and comment", consultation consists of bringing a rule-making proposal to the attention of those likely to be affected by it and providing an opportunity to comment on the proposal with a view to influencing it.[57] Some government departments, however, have taken a more sophisticated or proactive approach. The Department of Environment, for example, describes its consultation policy as "an interactive and iterative process that seriously elicits and considers the ideas of citizens and encourages their involvement in decision-making..."[58]

The benefits of consultation are seen to flow to both government and the private sector. A study by the Economic Council of Canada determined that consultation allows governments to better assess whether intervention is necessary and to gain a better understanding of the implications of their proposals. Private sector groups are better able to influence the regulations early

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Place of Negotiation in Environmental Assessment, (Ottawa: Canadian Environmental Assessment Research Council, 1987), at p. 8.

[57]Craven, G., "Consultation in Rule-Making -- Some Lessons from Australia," (1991) 4 Canadian Journal of Administrative Law and Practice 221, at p. 229. Craven cites Jorgensen, A., "The Legal Requirements of Consultation," [1978] Pub. L. 290, and Garner, J., "Consultation in Subordinate Legislation," [1964] Pub. L. 105.

[58]Department of Environment, Transition Team Steering Committee on Consultations and Partnerships, *Consultation and Partnerships: Working Together with Canadians*, (Ottawa: Environmental Canada, June 1992), at p. i.

in the process. The net result, according to the ECC, should be a more rational development of regulatory proposals, a better understanding of the problems and attitudes of all sides, and easier and more immediate compliance.[59] A poorly conceived consultation program, however, can often breed distrust or place unnecessary demands upon those consulted.[60]

Negotiation, on the other hand, implies a shared role in the decision making. Dorcey and Riek describe it as a process where "two or more parties attempt to settle what each shall give and take, or perform and receive, in transaction between themselves."[61] This notion, they say, "easily conjures images of people searching for agreement, through courteous exchange, reasoning, persuasion and forming alliances."[62]

Although the formal practice of negotiation in the regulatory process appears to be very unusual, it has been argued that informal negotiation occurs frequently. One proponent of negotiation in this context, the British Columbia Round Table on Environment and Economy, argues that "virtually every government

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[59]Economic Council of Canada, *Reforming Regulation*, (Ottawa: Supply and Services Canada, 1981), at 74.

[60]Pers. comm. Notes on file with the author. See pp. 105 and 135. See also notes 118, 119, 121 and 122 below.

[61]Dorcey and Riek, *supra*, note 56, 9.

[62]*Ibid*.

decision is the result of some form of bargaining at some level."[63] A decision-making body may choose to "modify its preferred alternative in order to achieve the support or defuse the opposition, of some other party."[64]

Opposition to the use of a more transparent negotiation process, it argues, may be the result of a number of factors including a failure to consider the degree to which bargaining is already occurring, or opposition to certain interests such as environmental groups or local governments participating in the bargaining.[65]

Views on where the RAC fell on this continuum varied even within particular interests, though most would agree there was some confusion. Some participants, especially the ENGOs, said they would not have participated if they thought it was going to be strictly advisory. Some participants, especially the industry participants, said they would not have participated if it was anything more than advisory. There is some evidence that the Minister had committed to the results of the process in conversations with individual RAC members. The provincial members, as a group, saw their role as representing the views of

[63]British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume I Consensus Processes in British Columbia* (Victoria: The Round Table, 1992), at p. 8.

[64]*Ibid.*

[65]*Ibid.*

provinces generally, and not to bring forward the positions of individual provinces. But at least one participant in each group thought they had been invited to negotiate the regulations.

If RAC was indeed a negotiating committee, one would expect to find some evidence of "bargaining" between opposing parties, or of some "bundling and trading" of issues. For the most part, RAC participants said that outside of a few instances on the *Law List* and the *CSL*, they saw very little. Much of this, however, could be attributed to the complexities of the legislation. Several participants felt that with more time to prepare for meetings, with more time to build trust within and between interests, and with more discussions in the weeks following and preceding RAC meetings, more negotiated solutions would have been possible.

But despite these barriers to agreement, there was at least one remarkable example of a negotiated solution: all members agreed that s. 35(2) of the *Fisheries Act* should be a regulatory trigger for the process.[66] This agreement, which the government accepted, is significant both because of the impact it has on environmental assessment, and because it was one of the most controversial subjects discussed. Section 35 of the *Fisheries Act* requires a permit for any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. This

[66]R.S.C. 1985, c. F-14.

section was not a trigger under EARP,[67] will potentially trigger thousands of assessments under *CEAA* (including many small projects), and in many cases represents the only form of federal involvement in a project that would otherwise be entirely under provincial jurisdiction.

It appears reasonable to conclude, then, that RAC was not strictly speaking a negotiating committee, if only because there is little evidence of trade-offs being made between parties. But given the views of participants, neither was it merely a consultation exercise. If there was a common view of where RAC would be located along the consultation/negotiation spectrum, it would appear to be considerably closer to the negotiation end. Though it was not a decision-making body, the common expectation was that if a consensus decision could be reached among its members, that consensus would only be disregarded by the government for very good and articulated reasons. None of the participants imagined RAC as ever substituting for the Parliamentary process.

RAC members were there to reach consensus where they could, and where they could not, they were to assist with the ultimate resolution of an issue by providing government decision makers with a good view of the implications of any particular choice. Given the considerable breadth and complexity of the issues on the

[67]*Friends of the Oldman River Society v. Canada (Minister of Transport* (1992), 88 D.L.R. (4th), 1, [1992] 2 W.W.R. 193 (S.C.C.).

table, RAC members were perhaps never in a position to begin to "bargain" in any responsible way. For this reason, full consensus, if it was a goal of RAC, did not appear to be achievable. Yet, for these same reasons, it could be argued that perhaps the implications of particular choices could not have been investigated as efficiently or as effectively in any other way. These issues will be examined in greater depth in Chapters IV and V.

B. Improve the Performance of What?: How Does the Current Regulatory Process Operate?

More than a dozen years have passed since the Standing Joint Committee on Regulations and Other Statutory Instruments issued this warning:

> Your Committee has reconsidered the procedure by which the substance of subordinate legislation comes into being and has found it wanting. It is truly a secret of the Crown.[68]

Given the process developments since 1986, one wonders whether the Standing Committee would draw the same conclusions today? This section begins to address the question, how does the current regulatory process work?

[68]Canada, *Fourth Report for the First Session of the Thirty-Second Parliament from the Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments*, (Ottawa: Supply and Services Canada, 1980), at 12.

In Chapter I, some of the basic steps of the regulatory process were presented. An initiating department is expected to publish an advance notice of the regulatory proposal in the *Federal Regulatory Plan*, prepare a Regulatory Impact Assessment Statement ("RIAS"), and pre-publish a draft of the regulation together with its RIAS in the *Canada Gazette*. Once the regulation has been made, it must be registered and published again in the *Canada Gazette* for thirty days. Of these requirements only final publication is required by statute (the *Statutory Instruments Act*).

Beyond these steps, however, there are only a series of general policy directives requiring greater efficiency, greater accountability, and greater sensitivity. The result can be characterized as a surprising lack of formal substantive review of regulations. This section of the paper will suggest that most, if not all, of the substantive analysis is done by an initiating department, either for its own purposes or to ensure that the proposal will pass through the central agencies and affected departments which stand between the initiating department and Cabinet. It will also suggest there is considerable room to improve participation in this review by groups outside government, especially by non-industrial interests, and that there is similar room to improve the accountability of government decision makers for substantive decisions.

1. Substantive review within government

As a federal regulatory initiative works its way through the regulatory process, it is likely to undergo a review of some kind by at least a half a dozen government bodies. Little of this review, however, appears to involve formal substantive analysis.

1.1 Treasury Board

The responsibility for ensuring that departments and agencies follow the Regulatory Policy lies with the Treasury Board Secretariat.[69] The Secretariat is to monitor regulatory proposals for consistency with government policy, and to try to help departments develop the best possible regulations or devise alternatives that meet the same objectives.[70] All regulations are reviewed against six criteria which largely reflect the

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[69] Canada, Treasury Board of Canada Secretariat, *Regulatory Policy: Regulatory Affairs Guide*, (Ottawa: The Board, October 1992), at 3. See also Canada, Treasury Board of Canada Secretariat, Administrative Policy Branch, Regulatory Affairs, *How Regulators Regulate: A Guide to Regulatory Processes in Canada*, (Ottawa: Minister of Supply and Services Canada, 1992), at 2.

[70] Canada, Treasury Board of Canada Secretariat, Administrative Policy Branch, Regulatory Affairs, *How Regulators Regulate: A Guide to Regulatory Processes in Canada*, (Ottawa: Minister of Supply and Services Canada, 1992), at 2.

requirements set out in the Regulatory Policy.[71] This review is clearly substantive, but given the volume of regulatory activity, it is virtually assured that the Secretariat will not review every proposal.

1.2 The initiating department and the RIAS

The department that originates the regulation is responsible for drafting it (often with the help of Department of Justice lawyers), summarizing the results of consultations with interested parties, and outlining the department's responses to concerns raised through that process.[72] Throughout this process, Treasury Board encourages interdepartmental discussions.[73]

It is evident that the bulk of any substantive review is done at this stage by the intiating department through discussions with

[71]The regulation must not impede the government's operations; the regulation must contribute to meeting the government's objectives, rather than merely adding to the proliferation of regulations; alternatives have been considered; the benefits clearly outweigh social and economic costs; there has been adequate consultation with the public to allow people to understand the proposed regulation and participate in the process; the originating department has cooperated with the provinces to help ensure that federal and provincial regulations do not duplicate and overlap with each other, so that the regulator burden on Canadians is kept to a minimum: *Ibid.* at 3.

[72]*Ibid.*

[73]*Ibid.* at 4.

central agencies and other departments affected by the proposal. The formal mechanism for recording this analysis is intended to be the RIAS. According to a former Assistant Deputy Minister of Privatization and Regulatory Affairs, the RIAS has been designed to meet three layers of objective: better analysis of what the costs and benefits of a regulation proposal may be, clear-cut identification for ministers of who gets hurt and who wins, and some pressure against the use of regulation by requiring that it be made clear why a regulatory proposal is necessary.[74]

Reactions to the RIAS system appear to have been mixed. Treasury Board reports that since the new regulatory process became fully operational in 1987, "experience has shown that RIASs are used and valued by members of the public."[75] One commentator, however, does not share this view:

> Objectives are frequently unduly narrow or vague; alternatives are either not identified or peremptorily dismissed; cost-benefit analysis is often superficial; and there is an abundance of jargon and pat phrases.[76]

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[74]Tony Campbell, Assistant Deputy Minister of Privatization and Regulatory Affairs to the Fleet Committee [*Second Report 1988* of the Ontario Standing Committee on Regulations and Private Bills] on March 22, 1988 (*Transcript* p. T-6) as recorded in Evans, J.M., et al., *Administrative Law: Cases, Text and Materials*, 3d ed. (Toronto: Emond-Montgomery, 1989), at 236-237.

[75]Canada, Treasury Board of Canada Secretariat, *RIAS Writer's Guide: For Use by Writers of Regulatory Impact Analysis Statements*, (Ottawa: Ministry of Supply and Services, November 1992), at 3.

[76]Craven, *supra*, note 57, 259.

RIASs have proven to be especially controversial in the areas of health, safety and environment. Both government and private sector witnesses appearing before the Peterson Committee on Regulatory Reform questioned the merit of attempting to quantify health and environmental values and expressed fears that such a requirement could impose a narrow, technocratic view on decision making.[77] In a recent report, Treasury Board attributed the difficulty of quantifying such benefits to the difficulty in acquiring data on those benefits in a timely or cost-effective manner.[78] Regardless of whether they can be quantified or not, government policy is that all benefits are to be taken into account in a transparent way so that all decisions can be defensible before the public and affected parties.[79]

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[77]Canada, House of Commons Special Committee on Regulatory Reform, *Report*, First Session of the Thirty-Second Parliament, 1980 (Ottawa: Ministry of Supply and Services Canada, 1981), at 10. The Committee was hearing testimony about the Socio-Economic Impact Analysis ("SEIA") process, which pre-dated the RIAS.

[78]Canada, Treasury Board of Canada Secretariat, *Responsive Regulation in Canada: The Government's Reply to the Sub-committee on Regulations and Competitiveness* (Ottawa: Treasury Board of Canada, 1993), at 8.

[79]*Ibid.*

1.3 Privy Council Office and the Department of Justice

Section 3 of the *Statutory Instruments Act*,[80] requires the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, to examine each proposed regulation to ensure that it meets four basic criteria. The regulation must be authorized by its parent statute, must not constitute an unusual or unexpected use of that authority, must not trespass unduly on existing rights and freedoms, and the form and draughtsmanship of the proposed regulation must be in accordance with established standards.[81]

There is some suggestion, however, that this authority has not proven to be particularly useful for substantive review. One commentator suggests that with few exceptions "legality and language rather than the substantive merits of the regulation are to be the concern of those scrutinizing."[82] The Standing Joint Committee was more categorical: "[t]here is ... no check or control as to merits or policy."[83] Furthermore, where a regulation

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[80] R.S.C. 1985, c. S-22.

[81] *Ibid.* at s. 3(2).

[82] Mullen, D., *Rule-making Hearings: A General Statute for Ontario?* (Research Publication no. 9)(Toronto: Commission on Freedom of Information and Individual Privacy, 1979), at 79.

[83] *Standing Joint Committee*, *supra*, note 68, 9. The Standing Joint Committee went on to suggest that the effectiveness of this scrutiny is "severely hampered" because both the legal advisors at this stage "are bound by the very traditions of drafting and received legal opinions of the Department of Justice which your Committee has found to be among the chief causes of objectionable

fails to meet any of these tests, the Clerk of the Privy Council can, at most, bring it to the attention of the regulation-making authority, and only then if the Deputy Minister of Justice agrees.[84]

The Privy Council Office, however, also plays a non-statutory role in the regulatory process. Like Treasury Board, as a central agency the Privy Council Office is expected to review the proposed regulation, its RIAS,-and its communications plan.[85] In particular, the Privy Council Office is to ensure that each proposal will mesh with government initiatives in the broad sense, that the originating department has adequately considered the communications aspects of the proposed regulations, and that the proposals will be considered by the appropriate committee of cabinet.[86] In this non-statutory role, at least, the Privy Council Office appears to engage in some substantive review.

1.4 Cabinet

In Canada, most regulations are made by Order in Council of the Governor in Council. Although it is commonly said that a decision

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provisions in regulations" [at p. 8-9].

[84]*Statutory Instruments Act*, *supra*, note 120, s. 3(3).

[85]Treasury Board, *How Regulators Regulate*, *supra*, note 70, 3.

[86]*Ibid.*

of the Governor in Council is a decision of Cabinet, this is not strictly speaking true. In fact, in this respect the Standing Joint Committee drew three surprising conclusions: that very few draft regulations are actually considered by Cabinet as a deliberative body, that there are no automatic safeguards in vesting subordinate law making powers in the Governor in Council rather than individual ministers, and that Governor in Council approval does nothing to satisfy the need for scrutiny of subordinate laws.[87] The Governor General does not actually preside at this council, and the Governor's assent will most often follow an earlier approval by the Special Committee of Council which consists of ten ministers with a quorum of four. According to the Standing Joint Committee, "the extent to which draft regulations are scrutinized as to policy, legality and propriety by the Special Committee will depend on its membership."[88]

1.5 Standing joint committee

By section 19 of the *Statutory Instruments Act*, every newly issued regulation is to stand permanently referred to what is now the Standing Joint Committee on Regulations and Other Statutory Instruments.[89] According to the Standing Joint Committee's 1980

[87] *Standing Joint Committee, supra*, note 68, 9.

[88] *Ibid*.

[89] *Supra*, note 120, s. 19.

report, however, although the Committee has had some success securing changes with cooperative departments, it is granted "neither the power nor the jurisdiction to do anything in particular with or to statutory instruments."[90] The only sanction open to the Standing Committee's is a report to one or both of the Houses.[91] In one early study, of three thousand Orders in Council issued over a three year period, the Committee queried or objected to approximately twelve hundred.[92]

Some commentators, however, have suggested that the Committee's operating criteria contain several opportunities for substantive review, but that it is the Committee members themselves who have taken a limited view of their own function.[93] In support of this view, Holland and McGowan, for instance, point to the Committee's consideration of whether the regulation would make the rights and

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[90] *Standing Joint Committee, supra*, note 68, 9. See also Canada, *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Supply and Services, 1989), at p. 357 for examples of successful and not so successful attempts by the Standing Joint Committee to influence the development of regulations.

[91] *Standing Joint Committee, supra*, note 68, 9.

[92] Mullen, *supra*, note 82, 177, referring to an article by Jed Baldwin, MP, in the Toronto Star, January 9, 1979, "Orders-in-Council: Is Canada Ruled by Fiat?"

[93] The Committee's criteria, concurred in by the Senate on November 23, 1978 and the House of Commons on November 21, 1978 are outlined in *Minutes of Proceedings and Evidence*, Fourth Session, 30th Parliament, Issue No. 1, at p. 4-6; see also Mullen, *supra*, note 82, at note 151, pp. 79-81 and p. 79-80; and Holland, D.C., and McGowan, J.P., *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 83.

liberties of the subject dependent on administrative discretion, would appear to infringe the rule of law, would amount to a substantive legislative power, or would not be in conformity with the *Charter of Rights and Freedoms*.[94] In practice, however, it appears that even where the Committee does decide to challenge a regulation on the merits, it has been largely ineffective.[95]

1.6 House of Commons

There is no general requirement in the Parliament of Canada that a regulation be tabled in either of the houses for affirmation before it comes into force,[96] A small number of Acts, however, contain specific requirements of this kind. In a 1989 study, Holland and McGowan found one regulation-making authority that required an affirmative resolution by Parliament,[97] and five that

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[94]Holland and McGowan, *supra*, note 93, 83.

[95]See Mallory, J.R., "Curtailing 'Divine Right': the Control of Delegated Legislation in Canada," in *The Administrative State in Canada -- Essays for J.E. Hodgetts* (Toronto: U. of T. Press, 1982) 131 at 138: "In practice, what the committee has done is engage in a series of battles with departments and agencies which persist in drafting regulations which are sloppy, lacking in apparent statutory authority, or are in other ways defective."

[96]*Ibid*. at 51.

[97]*Unemployment Insurance Act*, R.S.C. 1985, c. U-1, ss. 4(2) and 6(7) [Holland and McGowan, *supra*, note 93, 53]. See also s. 39(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which states that in every Act the expression "subject to affirmative resolution of Parliament" when used in relation to any regulation means that such regulation shall not come into force unless and until it is affirmed by a resolution of both Houses. In their survey, the Standing Joint Committee referred to one other example: s. 18 of the *Government Organization Act*, R.S.C. 1970 2nd Supplement, c. 14

contained the expression, "subject to the negative resolution of Parliament."[98]

In June of 1985, however, the McGrath Special Committee on Reform of the House of Commons recommended the adoption of a mandatory procedure for the affirmative resolution or disallowance of delegated legislation.[99] As a consequence, a new chapter was added to the Standing Orders of the House which empowers a committee to "make a report to the House containing a proposed motion which, if the report is concurred in, would be an Order of [the] House to the Ministry to rescind one specified regulation..."[100] Only one report can be received by the House during any sitting. The only reported use of this power resulted in the House sending the report back to the Committee for further consideration.[101]

[*supra*, note 68, 10].

[98]*Safe Containers Convention Act*, R.S.C. 1985, c. S-1; *Old Age Security Act*, R.S.C. 1985 c. O-9; *James Bay and North Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32; *Electricity and Gas Inspection Act*, R.S.C. 1985, c. E-4; *Clean Air Act*, R.S.C. 1985, c. C-32 [Holland and McGowan, *supra*, note 93, 53].

[99]Canada, *Report of the Special Committee on Reform of the House of Commons (the "McGrath Committee")* (Ottawa: Queen's Printer, 1985), at p. 36.

[100]Standing Orders of the House, chapter V, "Review of Delegated Legislation by the House," standing orders 44-51.

[101]Holland and McGowan, *supra*, note 93, 81, referring to 1987, Thirty-third Parliament, Second Session, Third Report; S.I. #37, p. 5:8. Holland and McGowan report in 1989 that this report is still "in limbo." Note recent disallowances in Keyes, J.M., *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992), at p. 117, note 34.

2. Participation of outsiders in substantive review

Since the sixties, departments have been experimenting with different ways to involve the public in the substantive review of regulations. At that time, the preference was for informal and unstructured consultation.[102] Over the past twenty years, however, especially with respect to natural resource issues, consultation methods have become more sophisticated, more formal and more permanent.[103]

2.1 Across Departments

Although some departments appear to have been better at it than others, no department has escaped criticism. In 1980, the Peterson Committee heard favourable reports about consultative programs run by the Departments of Consumer and Corporate Affairs, Environment, and Health and Welfare, but concluded that all departments were not consulting early enough, often enough, or widely enough.[104] In 1989, the Auditor General concluded that

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[102]Evans, *supra*, note 74, 228.

[103]Dorcey and Riek, *supra*, note 56, 9.

[104]House of Commons, Special Committee on Regulatory Reform, *supra*, note 77, 5.

departments do not always provide equal and consistent opportunities for consultation on proposed regulations.[105]

Others have been far more critical. A 1978 report examining the nature, scope and effectiveness of citizen involvement in the development of social policies concluded that

> "[t]he policy-making process is largely dominated by government ministers, senior bureaucrats and their elite counterparts in the private sector who are content to maintain the status quo as long as it continues to serve their social, economic and political interests."[106]

A 1985 study of interest groups in the federal system reached a strikingly similar conclusion.[107]

Governments have been criticized for providing only the affected industries -- and sometimes not even them -- with early notice of

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[105]*Report of the Auditor General*, *supra*, note 90, 339. In 1989, the Auditor General conducted a special audit to determine the extent to which selected branches of four departments complied with the new regulatory process. Those branches were: the Environmental Protection Directorate of Environment Canada, the Canadian Coast Guard, Transport Canada; the Occupational Health and Safety Branch, Labour Canada; and the Bureau of Radiation and Medical Devices, Health and Welfare Canada.

[106]Chapin, H., and Deneau, D. *Citizen Involvement in Public Policy-Making: Access and the Policy-Making Process* (Ottawa: Canadian Council on Social Development, 1978) at 37.

[107]See Thorburn, H.G., *Interest Groups in the Canadian Federal System* (Toronto: University of Toronto Press, 1985), at 121: "Policy making has remained largely in the hand of a circumscribed socioeconomic policy community composed of senior government officials, leading politicians (mainly ministers), and the leaders of the major economic interests groups (large corporations and some other organized interests)."

a regulatory initiative.[108] Government deliberations have been characterized as cloaked with a "shroud of secrecy,"[109] especially during the discussions which led up to Cabinet meetings.[110] And even within Government, initiating departments have been criticized for withholding important information from other government bodies.[111]

When there has been consultation, a common theme to the criticism is the desire for more government accountability for the advice it receives. For example, following a transportation of dangerous goods discussion, a Canadian Trucking Association representative warned that consultation can become frustrating if there is no understanding of how the government or any of the other participants will respond to comments. This participant recommended that a mechanism be designed to assure participants that their submissions are having some discernible impact, even

[108]See Castrilli, J.F. & Lax, C.C., "Environmental Regulation Making in Canada: Towards a More Open Process," in Swaigen, J. (ed) *Environmental Rights in Canada*, (Toronto: Butterworths, 1981), at 334.

[109]See Chapin and Deneau, *supra* note 106, 24.

[110]Hazell, S., "Reforming Federal Environmental Assessment 1987-1995 (Ottawa: unpublished draft paper. 1995) at 72.

[111]See Mallory, *supra* note 95, 138: "It is not unusual for an agency to state that it is armed with an opinion from the Department of Justice that it is acting legally, and then invoke a long constitutional tradition by refusing to disclose the opinion to the [Standing] Committee."

though the final legislative act will be based on an evaluation of the total situation.[112]

2.2 Environment Canada

Environment Canada is clearly one of the more active departments in the government with over 120 consultation initiatives reported underway or planned in a November 1993 publication.[113] Just over a quarter of the these consultation initiatives relate to the development of legislation or regulations.[114] Mailouts, information sessions, workshops and stakeholder meetings are far more common than formal advisory groups and committees.[115] Besides the RAC, there appear to be very few other initiatives that begin to approach the negotiation end of the spectrum. But even among the stakeholder forums there appears to be no common format or structure: the latest consultation calendar lists 17 stakeholder initiatives described using 13 different terms.[116]

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[112]See Evans, *supra*, note 74, 240.

[113]Department of Environment, *Environmental Consultations Calendar*, (Ottawa: Environment Canada, November 1993), at p. i.

[114]*Ibid*.

[115]Multi-stakeholder meetings and workshops are reported to be the mechanism used in almost 60% of all consultations. Formal advisory groups or committees are used to a much lessor extent and tend to be associated with more complex and longer term consultation processes: *Ibid*. at ii.

[116]*Ibid*. The 17 multistakeholder groups referred to using 13

A recent Department of Environment study states that the department has received "much praise" from Canadians for its partnership and consultation activities.[117] The Department has also, however, been criticized. Both industry and ENGO RAC participants reported discouraging experiences with Environment Canada consultations, especially where there was a perception that minds had already been set, or where the consultation appeared to be a simply a guise for "schmoozing and speeches."[118] A participant on a multi-stakeholder task force studying state of environment reporting has publicly questioned the credibility of the Department's consultation techniques:

> Despite the fact that Environment Canada was represented at the table on an equal basis with other stakeholders, it virtually ignored the task force's recommendations. See if I waste my time trying to be helpful to them again![119]

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different descriptions are: multistakeholder working group; multistakeholder taskgroup; national advisory committee; multistakeholder meetings; multistakeholder committee; stakeholder panel; consultative committee; multistakeholder consensus decision-making process; citizen advisory committee; permanent stakeholder working group; multistakeholder group; advisory committee; and multistakeholder workshop. RAC is described as an advisory committee [at p. 43].

[117]Department of Environment, *Consultations and Partnerships*, *supra*, note 58, 1.

[118]Pers. comm. Notes on file with the author. See p. 201 referring to consultations on Global Warming and the Green Plan; and p. 244 referring to Projet Societé.

[119]Isaacs, C.F.W., "Commentary II," in *The Place of Negotiation in Environmental Assessment*, *supra*, note 56, 67.

The Auditor General found evidence within the Conservation and Protection Branch of a tendency to "actively solicit the views of industry or technical advisors earlier than those of other groups, if not exclusively."[120] And among federal government departments there appears to be a perception that the Department of Environment consults too much.[121]

The Department's own review suggested a number of trouble areas including a growing risk of "consultation fatigue" among a relatively small community of interest groups, and a concern that lessons learned through particular initiatives were generally unexploited.[122]

3. Use of consensus/negotiation in Canada

When RAC was proposed as a consensus process for the *CEAA* regulations in 1992, it was thought by FEARO and by RAC

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[120] *Report of the Auditor General*, *supra*, note 90, 351. Note that Environment Canada's response was "It is recognized that there is room for improvement in consulting with non-governmental organizations. It is nevertheless of utmost importance to consult industry promptly and in-depth on scientific and technical aspects to ensure that feasible and effective regulations are created..." (at p. 352).

[121] *Ibid.* at 32.

[122] Department of Environment, *Consultations and Partnerships*, *supra*, note 58, 6-7.

participants to be one of the first attempts in Canada to do so.[123] Certainly, at the federal level, this claim appears to be supportable. A brief survey has identified only two other federal processes which could be described as similar, none of which were cited by RAC organizers as influences.

In February of 1988, the Minister of Agriculture announced that the pesticide registration system at the time was no longer acceptable, and this led to the formation of an "independent, multi-stakeholder consultative team that was mandated to conduct a thorough review."[124] After eighteen months of study, the review team submitted a final report to the Minister which contained a comprehensive blueprint for revising the entire regulatory program. Eleven of the twelve stakeholders signed the agreement. Like RAC, participants in the Pesticide Registration Review remarked that they had "very few precedents and virtually no comprehensive "how to" manuals/case studies to assist them in planning their process."[125]

Around the same time, the Minister of Agriculture asked a British Columbia forest industry group to see if it could generate a

[123] *RAC Report*, *supra*, note 17, 3.

[124] Versteeg, H., *A Case Study in Multi-stakeholder Consultation: the Corporate History of the Federal Pesticide Registration Review or How We Got From There to Here: Volume I General Principles for Decision Makers*, (Ottawa: Canadian Centre for Management Development, March 1992), at p. v.

[125] *Ibid*.

consensus among B.C. interest groups on a preferred course of regulatory action for the elimination of PCP as a anti-sapstain chemical.[126] All interests wanted PCP banned altogether, but industry was requesting registration of other promising chemicals despite a lack of knowledge of the health and environmental implications. The unions were concerned about health effects and monitoring, and environmental groups were lobbying for more testing and greater safety. The Minister took the position that it could not register any new chemicals for anti-sapstain treatment until comprehensive testing was complete, unless B.C. stakeholders could reach a consensus for some alternate course of action. After six months a "framework consensus agreement" was reached and signed by eight of the eleven representative organizations.[127] In August of 1990, the Minister of Agriculture announced the withdrawal of PCP and temporary registration of a number of alternative products.[128]

At the provincial and municipal levels, however, consensus processes appear to be far more common. Until recently, each province in Canada had a Round Table on Environment and Economy,

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[126]British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume I Consensus Processes in British Columbia, Appendices 1, 2, and 3*, (Victoria, The Round Table, 1992), at p. 2-8.

[127]The two ENGO representatives and one union did not sign because they could not agree to the use of any new chemicals for which their was insufficient data to justify the conclusion that they may be safer than existing ones: *Ibid.* at 2-10.

[128]*Ibid.*

and these Round Tables collectively believe that consensus processes can work and have worked.[129] The Clean Air Strategy for Alberta is an example, and one that did inspire the organizers of RAC to try a consensus process.[130] Another notable provincial effort is the process used by the Ontario government to create the Environmental Bill of Rights.[131] In one municipal example a B.C. community decided to take development matters into its own hands by negotiating a foreshore bylaw with local government, logging and fish farming interests.[132]

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[129]Canadian Round Tables, *Building Consensus for a Sustainable Future: Guiding Principles*, (Ottawa: National Round Table on the Environment and the Economy, 1993), p. 2.

[130]See "A Brief History of the RAC," Part A, section 1 above. CASA was a project jointly initiated by the provincial departments of Energy and Environmental Protection but directed by an advisory committee made up of industry, government and environmental stakeholders. The advisory committee's report was ultimately endorsed by the Alberta government and has now become the basis for a comprehensive air quality management system for the province: Government of Alberta, *News Release*, "Comprehensive Air Quality Management System Implemented," February 3, 1994 (No. 94-012).

[131]See Ontario *An Introduction to the Environmental Bill of Rights* (Toronto: Ministry of Environment and Energy, 1993), at p. 2; and "Presentation by Michael G. Cochrane, former chair of the task force on the Ontario Environmental Bill of Rights, on the Consensus, History and Overview of the Environmental Bill of Rights," in *Canadian Institute for Environmental Law and Policy Environmental Bill of Rights Course: Course Materials* (Toronto: CIELAP, 1994).

[132]British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume I, supra*, note 63, 12.

The Round Tables across the country believe that conventional decision-making mechanisms do not cope well with the issues of sustainability because they tend to exclude rather than include diverse interests.[133] The review of such mechanisms in this Chapter would tend to support this view. Substantive review of regulatory proposals is largely left to the discretion of the initiating department. The RIAS process, especially in the contexts of environment, health and safety, does not appear capable of ensuring a broad analysis of regulatory impacts. Government consultation practices have been soundly criticized as exclusive, secretive, and unaccountable, and although Environment Canada's record appears to be better than most, there appears to be room for significant improvement.

The terms "sustainability" and "sustainable development," the Round Tables argue, "embrace the concept that environmental, economic, and social needs are complex and require integrated decision making."[134] The remainder of the paper is an examination of whether RAC, or a process like RAC, can promote this integrated decision making.

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[133]Canadian Round Tables, *Building Consensus*, *supra*, note 129, 5.

[134]*Ibid.*

Chapter III: The Negotiated Rulemaking Model in the U.S.

Chapter III: The Negotiated Rulemaking Model in the U.S.

In the United States, regulatory authorities have had considerable experience with statutory notice and comment requirements. But in response to the perceived shortcomings of that process, they have recently experimented with a process called "negotiated rulemaking", commonly referred to as "regneg".[1]

This Chapter will examine the American regneg model, and in particular, the regneg experiences of the Environmental Protection Agency ("EPA"), Environment Canada's U.S. counterpart,. The regneg model will be described as bearing a substantial resemblance to the RAC model except for three important differences: the regneg model is expressly a negotiation process, it enjoys the firm commitment of all parties to the results of the

[1]The expressions "negotiated rulemaking" and "regulatory negotiation" (or its abbreviated form "regneg") are often used interchangeably, and not much effort is made to distinguish between the two. One writer suggests, however, that the former is a specific application of the latter. See Perritt Jr., Henry H., "Administrative alternative dispute resolution: the development of negotiated rulemaking and other processes (Symposium Issue on Alternative Dispute Resolution)", (1987) 14 Pepperdine Law Review 863, at note 1, p. 865: "Negotiated rulemaking is a specific application of regulatory negotiation. It refers to the use of negotiation in the decision-making process associated with rulemaking. Regulatory negotiation refers to the use of negotiation in any decision-making process by an administrative agency..." The term "rulemaking" is defined in the *Administrative Procedure Act* as "agency action that regulates the future conduct of persons, through formulation and issuance of an agency statement (a "rule" or "regulation") designed to implement, interpret, or prescribe laws or policy." See also 5 U.S.C. §§ 551-559. For ease of reference, I have used the term "regneg" throughout the paper.

process, and it has enjoyed most of its success in relation to narrower issues. The Chapter will also describe some of the deficiencies which inspired use of the regneg process in the U.S., and will suggest that similar deficiencies exist in Canada, at least to the extent that they would warrant a regneg experiment here.

Supporters of regneg say it has the capacity to reduce the likelihood of litigation, produce faster and less costly rulemaking, and create objectively better rules.[2] Critics argue regneg may contribute to unlawful proposals, and has the tendency to obscure the public interest.[3] These claims will be examined in the next chapter when the RAC process is evaluated using the criteria proposed in Chapter I to see if it is capable of improving the performance of the regulatory process in Canada.

The American authorities have also found that not all proposed regulations will be suitable candidates for regneg, and that the selection of an appropriate rule will play an important part in

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[2]See for example the comments of Marshall Breger, Chairman of the Administrative Conference of the United States, in United States, Administrative Conference of *Negotiated Rulemaking Sourcebook*, prepared by David M. Pritzker and Deborah S. Dalton, (Washington, D.C.: Administrative Conference of the United States, Office of the Chairman, 1990), at p. xv ["Sourcebook"].

[3]See for example, Funk, William, "When smoke gets in your eyes: regulatory negotiation and the public interest - EPA's woodstove standards", (1987) 18 Environmental Law 55. I will examine his and other objections in more detail in chapter IV (see Part A, section 5).

the success of the process. Once an appropriate rule is chosen, the American experience suggests an agency can take certain steps to enhance the chances for a negotiated resolution. These issues will be discussed in Chapter V when RAC is to see in what circumstances the process may be capable of improving the regulatory process.

A. What is regneg?

By the beginning of the 1980s in the U.S., the process of making regulations in the areas of environment, health, and occupational safety had come to be regarded as an interest group battleground.[4] Parties could expect that each new regulation would take several years to complete and, in the likely event that someone would challenge it, one or two additional years would be spent in the courts.[5] Regneg was one of the alternatives to traditional rulemaking which emerged in response to this condition. In contrast to the agency-manufactured regulations of traditional U.S. rulemaking, regneg brings to a negotiating table all parties

[4]Testimony of Marshall J. Breger, Chairman, Administrative Conference of the United States on H.R. 3052, before the Subcommittee on Administrative Law and Governmental Relations House Committee on the Judiciary, August 10, 1988, in *Sourcebook, supra*, note 2, 369.

[5]Harter, Philip J., "Negotiating regulations: a cure for malaise", (1982) 71 Georgetown Law Journal 1 at p. 21.

who have an interest in a regulation and allows those parties to negotiate the substance and text of that proposed regulation.

The goal of "negotiation" used in this context is for all negotiators to reach a "consensus" agreement on the proposed substance and text of a regulation. "Consensus' in this sense does not usually mean that every party agrees to every provision in the regulation, but simply that each party concurs in the overall result, and by implication, agrees not to challenge the final regulation if it is consistent with the agreement reached.[6]

The Administrative Conference of the United States ("ACUS") was the first organization to consider the potential for using negotiation to develop federal regulations.[7] ACUS is an independent agency of the U.S. federal government which has been working with other agencies since the sixties to improve their administrative practices.[8] In 1982, ACUS adopted a set of recommendations for agencies entitled, *Procedures for Negotiating Proposed Regulations*.[9] These recommendations were based in large

[6]*Sourcebook, supra*, note 2, 99, quoting from the testimony of Philip J. Harter on S. 1504, before the Senate Committee on Governmental Affairs, May 13, 1988.

[7]Testimony of Marshall J. Breger, Chairman, Administrative Conference of the United States on H.R. 3052, before the Subcommittee on Administrative Law and Governmental Relations House Committee on the Judiciary, August 10, 1988, in *Sourcebook, supra*, note 2, 371.

[8]*Ibid*. 368.

[9]1 C.F.R. §§ 305.82-4.

part on a research report prepared by Washington lawyer Philip J. Harter.[10] In 1985, after some experience with the process, ACUS refined and supplemented these recommendations.[11]

As Harter points out, consensus standards have provided the basis for regulation many times before the 1980s. He refers to the National Electric Code as one of the most successful examples.[12] But the first agency to attempt an ACUS-style regneg was the Federal Aviation Administration ("FAA") which in 1983 assembled a committee to negotiate a revision of flight and rest time requirements for domestic airline pilots.[13] The old rules had been in effect for 30 years but during this period the FAA had been forced to issue over 1000 pages of interpretations.[14] The resulting regulation has not been challenged in court.[15]

The Occupational Safety and Health Administration ("OSHA") has also attempted to use regneg on two occasions: to develop proposed standards for worker exposure to benzene and to develop similar

[10]Harter, "Negotiating regulations," *supra*, note 5, 1.

[11]Recommendation 85-5, 1 C.F.R. §305.85-5; Testimony of Breger, in *Sourcebook*, *supra*, note 2, 371-372.

[12]*National Electric Code*, National Fire Protection Association 1975, referred to in Harter, "Negotiating regulations," *supra*, note 5, 35. Harter claims this code is the "most widely adopted model code in the world."

[13]*Sourcebook*, *supra*, note 2, 8.

[14]*Ibid*.

[15]Testimony of Breger, p. 5, in *Sourcebook*, *supra*, note 2, 372.

standards for a chemical known as "MDA."[16] OSHA was less successful, however, as neither process resulted in a consensus-based regulation.[17]

Since then, the EPA, the Nuclear Regulatory Commission, the Federal Trade Commission, and the Departments of Transportation, Labor, Interior, Agriculture, and Education have all experimented with regneg.[18]

With very few exceptions, participants to the process (including the agencies themselves) have assessed their regneg experiences as positive, and now regard its potential as a regulation-making alternative with cautious optimism.[19] In fact, the favourable responses have been so widespread that two critics of the process, Rena Steinzor and Scott Strauss, remarked in 1987 that regneg was well on its way to becoming a "sacred cow" in Washington:

> A speaker who expresses anything short of effervescent enthusiasm is suspected of prolonging controversy for personal gain.[20]

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[16]*Sourcebook*, *supra*, note 2, 9.

[17]The MDA committee, did however, reach consensus on a set of recommendations to OSHA, which ultimately served as the basis for a regulation: *Ibid*.

[18]Marshall Breger, Chairman's Foreword, in *Sourcebook*, *supra*, note 2, xvi.

[19]See "Support of Participants to the Process," Chapter IV, Part B, s. 3.

[20]Steinzor, Rena, and Strauss, Scott, "Building a consensus: agencies stressing 'reg neg' approach: the EPA's highly touted strategy of regulatory negotiation has proved disappointing as a tool for resolving two major issues", Legal Times, Aug 3, 1987, in

Steinzor, a former staff counsel to the House Committee which has jurisdiction over some EPA programs,[21] and Strauss, a lawyer who represented a labour interest at one of the EPA's regnegs, are two of only a handful of outspoken critics of the process.[22] Two other notable dissenting voices are William Funk, a law professor at an Oregon law school,[23] and the Office of Management and Budget ("OMB"), the body authorized by the White House to review the cost-effectiveness of proposed regulations.[24] The OMB has been described as the "leading sceptic" of the regneg process.[25]

Sourcebook at p. 885.

[21]House Energy and Commerce Subcommittee on Commerce.

[22]Brief biographies are included in the Legal Times article in *Sourcebook*, *supra*, note 2, 885.

[23]Professor of Law, Northwestern School of Law of Lewis and Clark College. For a discussion of Funk's views, see Chapter IV, Part B, s. 5.1.

[24]See Executive Orders 12, 291 (3 C.F.R. 127 (1982)) and 12, 498 (50 Fed. Reg. 1036 (1985)). Wendy Gramm, an administrator with the OMB is on record as saying "[y]ou have to very careful that you don't end up with something that is a product of the special interests but opposed to the interest of the average taxpayer" [see Stanfield, Rochelle L., "Resolving Disputes," (1986) National Journal 2764 at 2766].

[25]Stanfield, *supra*, note 24, 2765.

B. How did regneg come about?

Regneg appears to have emerged as a response to a general dissatisfaction with the way federal regulations are normally developed in the U.S. One clearly dissatisfied participant described the conventional public comment process as the equivalent of "shouting into a hurricane."[26] This section briefly reviews the events that lead up to the introduction of regneg as an alternative process.

The "modern" history of regulation making in the U.S. appears to have started in the 1930s with the "New Deal" notion of agencies as experts in their fields. Discomfort with that model contributed to the addition of some limits on agency action through the introduction in 1946 of the *Administrative Procedure Act*.[27] But discomfort appears to have given way to suspicion, as both the courts and Congress continued to add procedural constraints. Regulation-making today is described as both excessively procedural and excessively adversarial, casting a shadow of illegitimacy on the whole process and the regulations it produces.

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[26]Fiorino, Daniel J., "Regulatory negotiation as a policy process", (1988) 48 Public Administration Review 764, at p. 768.

[27]See note 33 below.

1. Birth of the Administrative Procedure Act

Harter suggests that the origin of the current regulatory process can be traced to a concept of regulation and regulatory agencies popular in the 1930s around the time of President Roosevelt's "New Deal." According to Harter, the attitude of Congress during this period was to assign broad legislative powers to agencies through the use of vague and general standards.[28] Agency staff were perceived to be detached, neutral, and technocratic experts, fully capable of making the detailed decisions necessary to implement a particular program.[29] Courts would support an agency decision simply if they could find a "rational basis" for that decision.[30]

Not everyone, however, appears to have shared this deference to agency expertise. Proponents of a more formal administrative process eventually produced a bill calling for publication of notice and public hearings,[31] but President Roosevelt refused to

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[28]Harter, "Negotiating Regulations," *supra*, note 5, 8-9.

[29]*Ibid.* at 9.

[30]See *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145-146 (1939) in which the Supreme Court stated: "So long as there is warrant in the record for the judgment of the expert it must stand ... 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'." (quoting *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-87 (1934). See also *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

[31]Walter-Logan Bill, H.R. 6324, 76th Cong., 3d Sess. §2(a), 84

support the bill fearing it would eventually destroy the informal and non-judicial nature of administrative proceedings.[32]

Within this debate, the *Administrative Procedure Act* ("APA")[33] emerged as a compromise position. For most rules it requires few procedures; but for more significant rules, agencies are expected to provide opportunities for oral and written consultation, advisory committees, and informal hearings.[34] Reviewing courts are instructed to set aside any agency action, finding, or conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Any person suffering legal

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Cong. Rec. 5561 (1939).

[32]See *Cong. Rec.* 13, 942 (1940) where President Roosevelt expresses the concern that "powerful interests" opposed to the social reforms made effective through administrative tribunals would through their legal counsel seek to "sterilize" the process with rigid and formal pleadings and processes. See also Perritt, "Administrative Alternative," *supra*, note 1, 607; and Harter, "Negotiating Regulations," *supra*, note 5, 3 at footnote 10.

[33]Pub. L. No. 79-404, 60 Stat. 237 (1946), *repealed and replaced by* Pub. L. No. 89-554, 80 Stat. 378 (1966)(codified as amended at 5 U.S.C. §§551-59, 701-06 (1976)).

[34]For "informal" rulemaking, section 553 of the *APA* sets out the basic requirements. A notice of the proposed rulemaking must be placed in the *Federal Register*, some level of opportunity for public participation must be given to interested persons, and the rule must be published for a certain period before it becomes effective. "Public participation" in this context means the opportunity to submit written data, views, or arguments, but oral presentations are also permitted. The published rule must contain a general statement of the its basis and purpose. See Harter, "Negotiating Regulations," *supra*, note 5, 9-10, and *Sourcebook*, *supra*, note 2, 49-50.

wrong because of agency action, or adversely affected or aggrieved by agency action, is eligible to seek judicial review.[35]

Advocates on both sides of the expert model debate continue to claim the better of the deal. Harter insists that the *APA* was built fundamentally on the notion of agency expertise. Although it imposed some limits on agency activity, Harter argues its primary function was to "provide an outreach by the agency for information that would help it exercise its discretion in shaping the rule."[36] Funk, on the other hand, suggests the *APA* signaled the end of a "naive faith" in expert bureaucrats, though he stops short of suggesting it was a rejection of a legitimate agency role in policy-making:

> The [*APA*] is much like the Constitution, it does not indicate a rejection of the need for strong government for the proper functioning of modern society, but rather a healthy disrespect for the motives and abilities of men placed in power. And much like the Constitution, the APA uses procedural mechanisms to check the power granted, while not denying the need for the power.[37]

The *APA* lasted an entire generation before being significantly amended.[38] Harter is quick to point out, however, that its endurance was not a symbol of widespread support.

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[35]*Administrative Procedure Act*, *supra*, note 33, §702.

[36]Harter, "Negotiating Regulations," *supra*, note 5, 9.

[37]Funk, *supra*, note 3, 90.

[38]Harter, "Negotiating Regulations," *supra*, note 5, 4.

2. Expert model challenged

By the late sixties, more and more interested parties had begun to challenge the notion of agency expertise. The issues were changing; the newer regulatory programs were attempting to directly regulate technology or regulate broad, complex economic matters.[39]

Environmental advocacy organizations were emerging,[40] and these groups together with groups representing consumer, aesthetic and other similar interests were joining those groups with economic stakes as active participants.[41]

The result was what many call "hybrid rulemaking": a combination of the informal procedures of the APA and more stringent ones recently imposed by Congress and the courts.[42] For their part, the courts began to grant private parties a more active role in rulemaking.[43] Agencies were forced to respond to the comments

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[39]*Ibid.* at 10.

[40]Susskind, Lawrence, and McMahon, Gerard, "The theory and practice of negotiated rulemaking" (1985) Yale Journal on Regulation 133, at p. 134.

[41]Testimony of Marshall Breger, in *Sourcebook*, *supra*, note 2, 369.

[42]See DeLong, "Informal Rulemaking and the Integration of Law and Policy," (1979) 65 Va. L. Rev. 257, at 257-276, and Perritt, "Administrative Alternative," *supra*, note 1, 904-906.

[43]Harter, "Negotiating Regulations," *supra*, note 5, 11.

submitted to them,[44] and were directed to supply far more factual information in support of the regulation.[45] The standard of judicial review also changed; courts began to conduct careful reviews of data and methodology, effectively replacing the "rational basis" test with a "hard look" standard for review.[46]

Congress used legislation to achieve the same result. New statutes were created which augmented the notice and comment process by requiring substantial evidence to support a rule.[47] New controls were implemented through the *Federal Advisory Committee Act*,[48] the *U.S. Government in the Sunshine Act*,[49] and the *Freedom of*

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[44]See *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) in which the court ordered EPA to respond to industry's technical objections with respect to promulgated standards.

[45]Harter, "Negotiating Regulations," *supra*, note 5, 10-11.

[46]Susskind and McMahon, *supra*, note 40, 136.

[47]For a description of statutes requiring that agencies justify rules with "substantial evidence" see DeLong, *supra*, note 42, 290-292.

[48]Pub. Law 92-463, 5 U.S.C. App. The *FACA* was enacted in 1972 in order to provide uniform standards for the operation of advisory committees within the executive branch of government, to monitor the number and activities of committees, and to ensure that members of the public would have access to their deliberations [see *Sourcebook*, *supra*, note 2, 52]. Section 9(c) of the Act prohibits a committee from meeting until a charter is filed with the General Services Administration ("GSA"). Formal requirements for chartering are in GSA regulations 41 C.F.R. §101-6.1013 and §101-6.1015. Establishing the committee must be in the public interest, its membership must be fairly balanced, and meetings must be open to the public. A concern that the open meeting requirement could inhibit parties from candidly exploring options, lead to the GSA adopting a rule in 1987 that listed a number of advisory committee gatherings that the GSA would interpret to be "excluded" from the coverage of the Act (41 C.F.R. §101-6.1004(k)). Included are "[m]eetings of two or more advisory

Information Act.[50] Politically, the White House took a more activist role in influencing the exercise of agency discretion,[51] and Congress began more frequently to invoke a legislative veto to invalidate agency rules.[52]

With the advent of hybrid rulemaking, as Harter aptly concludes, "[t]he New Deal "expert" model of administrative agencies was repudiated in fact, if not expressly."[53]

3. The current "malaise"

Although procedural reforms have produced safeguards against irresponsible agency activity, the increased formalization of the essentially "informal" process of the *APA* may have come at a

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committee or subcommittee members convened solely to gather information or conduct research, analyze relevant issues and facts, or to draft proposed position papers for deliberation by the full committee or a subcommittee..." [see *Sourcebook*, *supra*, note 2, 53].

[49]5. U.S.C. §552(b). The *Sunshine Act* requires the agency to hold open meetings for most types of meetings [see also Susskind and McMahon, *supra*, note 40, at note 14, p. 135].

[50]5 U.S.C. §552 (1982 & Supp. II 1984). The *FOI* requires agencies to make available to the public agency rules, opinions, records and proceedings [see also Susskind and McMahon, *supra*, note 40, at note 16, p. 135].

[51]Harter, "Negotiating Regulations," *supra*, note 5, 12-13.

[52]See for example the *Federal Trade Commission Improvements Act*, 15 U.S.C. §57a-1 (Supp. IV 1980); see also Harter, "Negotiating Regulations," *supra*, note 5, 13.

[53]Harter, "Negotiating Regulations," *supra*, note 5, 12.

significant cost. Many question the legitimacy of both the process and the regulations produced by the process; and in any event, feel that the process has become unnecessarily adversarial.

Harter argues that the hybrid system "fails to provide a mechanism for deciding inherently political issues in a politically legitimate way."[54] The result for Harter and others, is a "crisis of legitimacy that is the current malaise."[55] Parties have no means of direct participation short of limiting agency choices by influencing the record.[56] Henry Perritt, a law professor at Villanova University, suggests there might be at least two reasons for this condition. The first is that an agency in exercising essentially legislative discretion lacks the "institutional attributes" of accommodation and compromise that bring legitimacy to the legislature and other elected bodies.[57] The second is that there is no assurance that even a multi-member agency can represent the many conflicting interests on any issue before it.[58] The result, for both Harter and Perritt, is there is no generally accepted reason to have faith in a decision made by an agency.[59]

[54]*Ibid.* at 18.

[55]See *Ibid.* at 17; Perritt, *supra*, note 1, 608; and Freedman, J., *Crisis and Legitimacy* (New York: Cambridge University Press, 1978) at p. 6-7; Lowi, T., *The End of Liberalism(2d ed.)* (New York: Norton, 1979) at pp. 92-126.

[56]Harter, "Negotiating Regulations," *supra*, note 5, 18.

[57]Perritt, "Administrative Alternative," *supra*, note 1, 868.

[58]*Ibid.* at 868.

[59]See, for example, Harter, "Negotiating Regulations," *supra*,

Hence, frequently a regulation issued by an agency is simply the "opening round in the inevitable courtroom litigation to follow."[60] In an article for an industry journal, William Millar suggests lawsuits have become so common that they are now considered "virtually another step in the already-protracted rule making process."[61]

In anticipation of judicial review, parties participate at the notice-and-comment stage "as though they were already litigation adversaries."[62] They tend to take extreme positions, withhold information from each other, and attack the legitimacy of the positions opposing theirs.[63] It is rare that participants actually meet face to face to discuss their differences.[64]

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note 5, 17-18.

[60]Testimony of Marshall J. Breger, in *Sourcebook, supra,* note 2, 369.

[61]Millar, William H., "Bypassing the lawyers: "regulatory negotiation" gets test in agencies (negotiating changes in rules before they become law to avoid lawsuits)", Industry Week, June 23, 1986 v229 20 at p. 20.

[62]Written Statement of the Chemical Manufacturers Association before the Senate Governmental Affairs Committee on S. 1504, the Negotiated Rulemaking Act, May 13, 1988. in *Sourcebook, supra,* note 2, 396 at 399.

[63]*Sourcebook, supra,* note 2, 50.

[64]*Ibid.*

The adversarial process breeds specialists whose expertise is the process itself; specialists then sell conflict which makes the process even more adversarial.[65] Several environmental statutes provide for the payment of legal fees when organizations sue over regulations.[66]

Once in the courtroom, the issues which actually separate the parties often fall outside the jurisdiction of the forum, and hence the debate is at times unable to address the root of the problem.[67]

4. The Search for a Solution

Harter argues, and his claim has been endorsed by ACUS, that a better process would be one which can force agencies to develop reasonable analytical support for their decisions, but at the same

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[65] Harter, "Negotiating Regulations," *supra*, note 5, 21.

[66] Stanfield, *supra*, note 24, 2766.

[67] See for example, Harter, "Negotiating Regulations," *supra*, note 5, 20 where he discusses a legal challenge to a proposed dam in *Tennessee Valley Authority* v. *Hill* [437 U.S. 153 (1978)]: "[O]ne wonders whether the challenge to the Telico Dam ... was prompted by a grave concern for the endangered snail darter or by a broader opposition to the adverse effect on the environment and human life. If parties are unable to define the true issues of concern, the decision maker and the other parties will have difficulty in addressing the parties' positions and in making informed trade offs when developing the factual basis of a rule and striking the inherently political choice embodied therein."

time, provide a method that "enables the affected interests to participate in developing a rule by sharing in the decision."[68]

Regneg, for Harter and others, can potentially provide this method:

> Since [it] is closely akin to a political process by which competing interests are accommodated, it addresses not only the rule in question, but also the underlying political controversy. As a result, the end result is usually more than just a rule, and also includes a means for taking difficult political issues into account in a way that still meets the mandates of the underlying statute.[69]

After a decade of experimentation by a few U.S. federal agencies for a handful of regulations, Congress endorsed the process by passing the *Negotiated Rulemaking Act of 1990* ("NRA").[70] Enacted by the Bush Administration, the *NRA* is intended to establish a framework for the conduct of regneg and to encourage agencies to use the process where it would enhance the informal rulemaking process.[71] A Congressional findings section states that regneg had not been widely used in part because agencies were unfamiliar with the process or uncertain about the authority for such a process.[72]

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[68]Harter, "Negotiating Regulations," *supra*, note 5, 27.

[69]Harter, Philip J., "Experienced Practitioner Offers Guidance to Participants in Negotiated Rulemaking," BNA's Alternative Dispute Resolution Report, vol. 2, pp. 62-64 (2/18/88), in *Sourcebook*, *supra*, note 2, 544.

[70]Public Law 101-648, 104 Stat. 4969.

[71]*Ibid*. at s. 2, Congressional findings.

[72]*Ibid*.

The preamble also states that traditional procedures may have contributed to expensive and time-consuming adversarial conflict.[73]

The *NRA* incorporates the basic provisions of the ACUS recommendations,[74] builds on the regneg experiences of agencies, clarifies the applicability of the *Federal Advisory Committee Act*, and authorizes funds to assist agencies in implementing the regneg process.[75] With the exception of some allocation of resources, the *NRA* does not appear to add anything substantive to the process beyond clarification of existing requirements. It does, however, deny judicial review of any decision relating to establishing or conducting a regneg;[76] and it contains a sunset provision which terminates the Act after six years for systematic review.[77]

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[73] *Ibid.*

[74] 1 C.F.R. §§305.82-4.

[75] *Sourcebook*, *supra*, note 2, 346.

[76] *Supra*, note 70, §590: "any action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review..." It does not, however, bar judicial review if otherwise provided by law, and in fact, specifically states that regulations developed through the regneg process are not to be accorded any deference by a court.

[77] *Supra*, note 70, s. 5.

C. The EPA and regneg

Environmental Protection Agency officials have estimated that a full 80% of the regulations the Agency issues are challenged in court, and that 30% of the Agency's rules are changed as a result of litigation.[78] Consequently, in the 1980's, the EPA was one of the first agencies to turn to regneg as an alternative to *APA* rulemaking, and also one of the few pioneers who followed all the key prescriptions for regneg set out by Harter, ACUS, and others.[79] After several experiments, the EPA have now institutionalized the process,[80] and are looking to apply the concept to policy development and enforcement areas as well.[81] This section summarizes the experiences of the EPA before and after the emergence of regneg.

[78]Former Administrator of the EPA William Ruckelshaus quoted in Susskind and McMahon, *supra*, note 40, 134.

[79]Susskind and McMahon, *supra*, note 40, 138.

[80]*Sourcebook*, *supra*, note 2, 40. The EPA have full-time staff to evaluate candidates and manage the process.

[81]Former administrator of the EPA, Lee Thomas, in Thomas, Lee M., "The successful use of regulatory negotiation by EPA" (1987), Administrative Law News 13(1):2-4, and in *Sourcebook*, *supra*, note 2, 20.

1. Traditional rulemaking at EPA

The EPA's authority is incorporated in a dozen statutes.[82] At any time it has about 200 to 250 rulemaking activities underway, most of which are conducted under the notice-and-comment procedures of the *APA*.[83] Each regulation, on average, takes three to four years to complete, and some have taken as many as ten.[84]

At one point in the mid-eighties, the EPA was involved in more than 350 lawsuits.[85] Each year this litigation was estimated to consume over 150 government person-years and 175 person-years on the plaintiff side.[86] During this period, negotiations between

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[82]Thomas, *supra*, note 81, 20. When the EPA was created by executive order in 1970, it was assigned responsibility for administering environmental laws previously disbursed among the Departments of Agriculture, the Interior, and HEW [see Mashaw and Merrill (eds) *Administrative Law: The American Public Law System, Cases and Materials* (2d ed.) (Minnesota: West Publishing Company, 1985), at p. 70.

[83]United States, Environmental Protection Agency, Program Evaluation Division, Office of Management Systems and Evaluation, Office of Policy, Planning and Evaluation, "An assessment of EPA's negotiated rulemaking activities," (December 1987) in *Sourcebook, supra* note 2, at p. 23. ["EPA Assessment"].

[84]Thomas, *supra*, note 81, 21.

[85]Millar, *supra*, note 61, 20.

[86]Former Administrator of the EPA William Ruckelshaus quoted in Susskind and McMahon, *supra*, note 40, at note 8, p. 134: Ruckelshaus broke down the government-side estimate into 50 person-years from EPA's Office of General Counsel, 75 person-years from the EPA program offices, and 25 person-years from the Department of Justice.

individual parties and the EPA were quite common, but almost always to the exclusion of other parties. The party who filed the complaint would agree to withdraw it in exchange for the agency modifying the existing rule.[87] For example, in *Environmental Defense Fund, Inc. v. Costle*,[88] several environmental groups brought suits alleging the EPA had failed to implement certain provisions of a federal pollution statute. An agreement was negotiated between the environmental groups and the EPA, and a proposed settlement agreement was submitted to the court. Four industrial companies "vigorously intervened" but their concerns were rejected at both trial and appeal.[89]

2. The EPA and regneg

As a consequence, the EPA began to look for an alternative to traditional rulemaking. It wanted to reduce the amount of time it was taking to develop regulations, the amount of resources it was spending on litigation, and it wanted a better way to solicit technical input.[90] So in 1983, it began to consider candidates for

[87]Perritt, "Administrative Alternative," *supra*, note 1, 870.

[88]636 F.2d 1229 (D.C. Cir. 1980)

[89]See Perritt, "Administrative Alternative," *supra*, note 1, 870-871: "The *Costle* district court could have given the companies greater opportunity to negotiate with the EPA and NRDC about the strategy to be used in regulating toxic pollutants. However, instead of involving the companies in the initial settlement negotiations, the court simply heard opposing arguments to the agreement which had been worked out between the EPA and NRDC."

[90]Thomas, *supra*, note 81, 21.

a regneg. The EPA's first suggestion -- a rule concerning the disposal of low-level radioactive waste -- was rejected by the environmental community,[91] so in response, the EPA asked for other suggestions.[92] In December of 1983, the environmental community formally proposed a rule concerning procedures for determining penalties to be paid by manufacturers of heavy-duty engines that could not meet EPA standards under §206(g) of the *Clean Air Act*.[93] In four months, consensus was reached on all issues. A final rule has been issued, and has not been litigated.[94]

Since the nonconformance regneg, the EPA has conducted at least seven additional regnegs. In total, five have produced a consensus-based regulation;[95] but in three cases the regneg has

[91]Although industry, state and local government representatives expressed an interest [see Fiorino, Daniel J. and Kirtz, Chris, "Breaking Down Walls: Negotiated Rulemaking at EPA," (1985) 4 Temple Environmental Law & Technology Journal 29, at p. 32.], David Doniger, a spokesman for the environmental community, described the rule as "totally unsuitable" for negotiation, because members of that community were being asked to "buy off on "acceptable" levels of death and illness" [see "Regulatory Negotiation: Four Perspectives," *DR Forum*, National Institute for Dispute Resolution, p. 8, January 1986, in *Sourcebook*, *supra*, note 2, 10-11].

[92]Susskind and McMahon, *supra*, note 40, 143.

[93]42 U.S.C. §7525(g). See Susskind and McMahon, *supra*, note 40, 144.

[94]For more detailed information, see Notice of Proposed Rulemaking, 50 fed. Reg. 9204 (March 6, 1985); Final Rule, 50 Fed. Reg. 35374 (August 30, 1985); Fiorino and Kirtz, *supra*, note 91; Susskind and McMahon, *supra*, note 40, and Perritt Jr., Henry H., "Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States," (1986) 74 Georgetown Law Journal 1625.

[95]In addition to the regneg on nonconformance penalties [see

ended with limited agreement or with negotiations breaking down.[96] A recent EPA regneg involved the successful negotiation of a

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note 94], and the regneg on cleaner burning gasoline [see note 97], see (1) Pesticide emergency exemptions under §18 of the *Federal Insecticide, Fungicide and Rodenticide Act* (Notice of Proposed Rulemaking, 50 Fed. Reg. 13944 (April 8, 1985); Final Rule, 51 Fed. Reg. 1896 (January 15, 1986)) which involved procedures for EPA approval of State requests for emergency use of unregistered pesticides. Consensus was reached on exact language of the proposed rule. Rule has not been litigated [For more information see Fiorino and Kirtz, *supra*, note 91; Perritt, "Negotiated Rulemaking," *supra*, note 94, and Susskind and McMahon, *supra*, note 40]. (2) *Resource Conservation and Recovery Act* permit modifications (Notice of Proposed Rulemaking, 52 Fed. Reg. 35838 (September 23, 1987); Final Rule, 53 Fed. Reg. 37912 (September 28, 1988)) which involved procedures for State/EPA approval of modifications to *RCRA* permits for hazardous waste facilities. Consensus was reached on all issues, except that one member dissented on one issue [For more information see Fiorino, *supra*, note 26]. (3) New Source Performance Standards for Woodburning Stoves (Notice of Proposed Rulemaking and Public Hearing, 52 Fed. Reg. 4994 (February 18, 1987); Final Rule, 53 Fed. Reg. 5860 (February 26, 1988)) which involved developing a new source performance standard and testing requirements for wood heaters. Committee reached consensus on the exact language of the proposed rule [For more information see Fiorino, *supra*, note 26, and Funk, *supra*, note 3].

[96]See (1) Worker Protection standards for Agricultural Pesticides (Notice of Proposed Rulemaking, 53 Fed. Reg. 25970 (July 8, 1988)) which involved requirements for protective clothing and equipment, warning of hazards, re-entry intervals, and other items related to farmworkers. Negotiations broke down [For more information see Perritt, "Administrative Alternative," *supra*, note 1, 896]; (2) Deepwell injection of hazardous wastes (Notice of Proposed Rulemaking, 52 Fed. Reg. 32446 (August 27, 1987), Final Rule, 53 Fed. Reg. 28118 (July 26, 1988)) which involved rules for siting, construction, operation, monitoring, and closure of hazardous waste injection wells. Informal agreement was reached on some of the issues. EPA has published proposed rule [For more information see Fiorino, *supra*, note 26; and Steinzor and Strauss, *supra*, note 20]. (3) Asbestos-containing Materials in Schools (Notice of Proposed Rulemaking, 52 Fed. Reg. 29228 (August 6, 1987); Final Rule, 52 Fed. Reg. 41826 (October 30, 1987)) which involved requirements for identification and mitigation of asbestos hazards in public and private elementary and secondary schools. Limited accord -- with reservations -- was achieved on many issues. About 150 public comments were submitted; many were critical of key provisions of

program required under an amendment to the *Clean Air Act* to supply cleaner-burning gasoline to the smoggiest U.S. cities. Chaired by Harter, a committee consisting of oil industry officials, clean-fuel manufacturers, and national environmental and consumer groups was able to reach full consensus in six months.[97]

D. How is Regneg Different from RAC?

The EPA is considered to have the status of a "quasi-independent agency" in the U.S.[98] Like a fully independent agency, it is regulatory in character and not located within any other agency or department.[99] But unlike a fully independent agency, the EPA is not completely free from the influence of the President's office.

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the proposal [For more information see Fiorino, *supra*, note 26; Bureau of National Affairs, "EPA Negotiates Proposed Rule on Asbestos in Schools, Part of Continuing Reg-Neg Project," Alternative Dispute Resolution Report, vol. 1, pp. 133-135 (7/9/87); and Steinzor and Strauss, *supra*, note 20].

[97]Weisskopf, M., "Rare Pact Reached to Fight Smog: Environmentalists, Oil Firms Agree on Gasoline Standards," The Washington Post, August 16, 1991.

[98]Olsen, E.D., "The quiet shift of power: office of management and budget oversight of environmental protection agency rulemaking under executive order 12, 291," (1984) 4 Va. J. Nat. Res. L. 1, at p. 18-19.

[99]V Study on Federal Regulation: Regulatory Organization, United States Senate Committee on Governmental Affairs, 95th Cong., 1st Sess. 1, 21-22 (1977), in Mashaw and Merrill, *supra*, note 82, 68.

Congress has not "staggered" the tenure of the EPA's top administrator so that it would not coincide with that of the President's;[100] and Congress has not exempted the EPA from mandatory review by the Office of Management and Budget ("OMB"), the body charged with reviewing the cost-effectiveness of proposed regulations.[101] By vigorously enforcing executive orders and legislation relating to budgets, staff and paperwork,[102] the OMB had been accused of introducing non-statutory criteria into EPA decision making.[103]

Environment Canada and its environmental assessment office FEARO, on the other hand, do not possess any of the attributes of an independent agency. In most cases the statutory authority to make regulations is vested in the Governor in Council and not the Minister. Hence, for a regulatory initiative to succeed, the Minister must address the concerns of other Ministers and the concerns of central agencies which control the Cabinet agenda.

But despite these structural differences, the two institutions appear to have enough features in common to permit a general comparison of the EPA's regneg process and the RAC process. Both

[100]*Ibid.*

[101]Olsen, *supra*, note 98, 17.

[102]See Executive Orders 12, 291 (3 C.F.R. 127 (1982)) and 12, 498 (50 Fed. Reg. 1036 (1985)); *Paperwork Reduction Act*, 44 U.S.C. §§3501-3520.

[103]Olsen, *supra*, note 98, 12.

organizations have roughly the same statutory responsibilities, namely, protection of the environment. Regulatory development for each of them involves roughly the same interests and issues. And regulatory processes are guided by the same general principles of open and accountable government.

Hence, this section will examine the primary distinctions between the two processes. One initial difference, but one which will not be examined further, is the fact that the EPA has had far more experience with its process than Environment Canada has had with the RAC. The EPA has been running regnegs for more than ten years now; RAC is thought to be one of the first of its kind.

A few other differences, however, merit further discussion. Unlike RAC, the regneg committees were clearly given the task of negotiating the substance of a proposed regulation. Unlike RAC, all parties to the regnegs including government decision makers made certain formal commitments to the results of the process. And finally, the successful EPA regnegs appear to have involved narrower issues and fewer interested parties.

1. Express purpose and formal commitment

In contrast to the confusion that surrounded the role of negotiation in the RAC process,[104] participants to the EPA regnegs

[104] see Chapter II, Part A, s. 5.

were expressly invited to negotiate a proposed regulation.[105] To sharpen their negotiation skills, participants were often assembled prior to the regneg for training sessions.[106]

Furthermore, unlike RAC, the decision maker and all participants were expected to commit their organizations formally to the results of the process. For the EPA as decision maker, this has meant promises at both the start and at the conclusion of a regneg. In an organizational protocol developed at the beginning of a regneg concerning woodburning stoves, for example, the EPA committed to "using any consensus reached in these negotiations as the basis of a proposed rulemaking."[107] And in the formal agreement signed at the end of that process, the EPA agreed to "draft a preamble consistent with the recommended proposed rule and to publish that preamble and the recommended proposed rule as a Notice of Proposed Rulemaking..."[108] The final agreement, however,

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[105]See for example the *Notice of Intent to Form an Advisory Committee to Negotiate New Source Performance Standards for Residential Wood Combustion Units* (51 Fed. Reg. 4800 (Feb. 7, 1986) reproduced in *Sourcebook, supra* note 2, 117) in which the Committee's purpose is described as "to negotiate issues leading to a *Notice of Proposed Rulemaking...*"

[106]*Sourcebook, supra,* note 2, 161.

[107]Organizational Protocols, Environmental Protection Agency Negotiating Committee for NSPS for Residential Wood Combustion Units, March 20, 1986, reproduced in *Sourcebook, supra,* note 2, 187 at p. 188.

[108]Environmental Protection Agency Negotiating Committee for New Source Performance Standard for Residential Wood Heaters, *Agreement,* November 7, 1993, reproduced in *Sourcebook, supra,* note 2, 207.

clearly states that the EPA will still consider public comments submitted in response to the Notice of Proposed Rulemaking, and if necessary make modifications before issuing a final rule.[109]

In exchange, regneg participants were also expected to make a number of commitments. Each party to the woodburning stove regneg, for example, agreed not to file negative comments in response to the Notice of Proposed Rulemaking if the proposed rule and preamble were consistent with the recommended proposed rule. They agreed to file a memorandum stating that they participated in the negotiations and that they concurred in the recommended proposed rule when considered as a whole. They agreed not to challenge the final rule in court if the final rule and its preamble were consistent with the recommended proposed rule; and they agreed that if the rule is challenged by someone else, they would file a memorandum informing the court that they participated in the negotiations and that they concurred in the recommended proposed rule when considered as a whole.[110]

There is no record, however, of any similar commitments made during the RAC process by RAC members or by federal government decision makers.[111] It is certainly not clear whether all RAC

[109] *Ibid.*

[110] *Ibid.* at 207-208.

[111] There is some suggestion, however, that some of the RAC members received informal assurances by the Minister of Environment that the government was committed to the results of the process [Pers. comms. Notes on file with the author. See p.

members would have been willing to make such a commitment, or that the government would have been able to commit in this way.[112] As a loose equivalent to the EPA's promise to publish the regneg results as a Notice of Proposed Rulemaking, the Minister of Environment would have to agree to pre-publish any consensus agreement in the *Canada Gazette, Part I*. And since *CEAA* is essentially an Act that regulates government departments, the Minister would probably have been unable to commit in this respect without the full support of his or her colleagues.

2. Scope/breadth of issues

One practical difference between the EPA regnegs and RAC was the nature of the issues on the table. The EPA regneg issues, at least the ones that have been resolved successfully, tended to be well focused and involve a limited number of affected interests. The task for the woodburning stove committee, for example, was to set performance standards for residential woodburning stoves, and this was accomplished by a committee of representatives from the wood heating industry, state governments, environmental groups and consumer groups.[113] The committee developing a schedule to

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261 and 190-191].

[112]See Chapter V, Part C, "The Legal Basis for Regneg in Canada."

[113]See *supra*, note 95.

introduce cleaner burning fuel into U.S. cities involved only the oil industry and the clean-fuel manufacturers in addition to environmental and consumer organizations.[114] RAC, by contrast, was attempting to define the class of projects and federal decisions which will attract the federal environmental assessment process. More than a dozen federal departments had a significant stake in the outcome, and the industry side of the RAC table included representatives from the oil and gas industry, the nuclear industry, the mining industry, the pulp and paper industry, and the electrical utilities.

E. Are there similar deficiencies in Canada to warrant regneg?

If regneg grew out of a dissatisfaction with conventional rulemaking in the U.S., this section considers to what extent we have these same deficiencies in Canada? As we have seen, the two strongest motivating factors for regneg in the U.S. have been avoiding habitual litigation and legitimizing the inherently political nature of regulatory decisions. If the RAC experiment was simply regneg without clear instructions to negotiate or a formal commitment by all parties to the results of the negotiation, any evidence of similar deficiencies could support an argument for an full or adapted regneg experiment in Canada.

[114]See *supra*, note 97.

1. Avoidance of litigation?

Perhaps the strongest factor motivating the search for alternatives to traditional rulemaking in the U.S. was the desire to avoid what had become habitual litigation in the regulatory process. As described above, rulemaking under the *Administrative Procedure Act* had become so adversarial in some areas that all parties had come to regard the issuance of a regulation as simply the first step in a lengthy and expensive regulatory battle.[115] This was especially true for an agency like the EPA where eighty percent of the over two hundred regulations it issued each year were challenged in court.[116]

The volume of litigation in Canada may never approach recent American levels, but avoidance of litigation may still be characterized as a significant and growing concern, particularly with respect to environmental issues.

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[115]See testimony of Marshall J. Breger, Chairman of the Administrative Conference of the United States, in *Sourcebook*, *supra*, note 2, 369; and Millar, *supra*, note 61, 20. See also "The EPA and regneg," Part C, introduction, and s. 1, above.

[116]See "The EPA and regneg," Part C, introduction, and s. 1, above.

1.1 Judicial review in the U.S.

In the U.S., because of the many statutory and judicially-imposed requirements for notice, consultation, hearings, access to information, and opportunities to respond in writing, there appears to be no need to argue the principles of natural justice at common law. With the requirements of the *APA*, related statutes such as the *Federal Advisory Committee Act*, and the additional requirements imposed by the courts, many statutory opportunities appear to exist to challenge regulations based on procedural grounds.[117]

Substantively, section 706 of the *APA* sets out the basic grounds for judicial review. It provides that a reviewing court shall set aside any agency action, finding, or conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[118] Any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, can seek judicial review.[119] Since 1970, courts have

[117]See "Expert model challenged," Part B, s. 2, above, for a discussion of what is described as "hybrid rulemaking" -- a combination of the procedures of the *APA* and more stringent ones imposed by Congress and the courts.

[118]*Supra*, note 33, §702. See also McDonald, Derek Raymond, "Judicial review of negotiated rulemaking", (1993) 12 Review of Litigation 467, at p. 484.

[119]*Ibid*.

expressed a willingness to take a "hard look" at the reasonableness of proposed regulations,[120] although there is some indication that this view may be softening.[121]

A regulation can be invalidated as arbitrary and capricious if the agency has relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[122]

Other grounds for judicial review include alleged *ex parte* communication between the decision-maker and parties to a

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[120]See Susskind and McMahon, *supra*, note 40, 136. Susskind and McMahon refer to the decision in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d. 1 (D.C. Cir. 1976) in which the court while reviewing a rule phasing out lead additives in gasoline, took a "hard look" at the statement that lead in auto emissions endangers the public health or welfare [at note 22, p. 136].

[121]In a 1993 study of judicial review in a regulatory context, Derek McDonald refers to *Chevron v. Natural Resources Defense Council* (467 U.S. 837 (1984)), a 1984 U.S. Supreme Court decision which, according to McDonald, stands for the proposition that "where Congress has not considered and decided the issue in the context of the regulatory scheme, it has implicitly delegated the authority to the agency to make that determination, and the agency's decision on that issue is to be upheld as long as it is "based on a permissible construction of the statute."" [See McDonald, *supra*, note 118, 486, referring to *Chevron* at p. 843].

[122]*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). See also Perritt, "Administrative Alternative," *supra*, note 1, 909-910.

dispute,[123] unauthorized delegation,[124] and *ultra vires* agency action.[125]

1.2 Judicial review of regulations in Canada

Historically, Canadians have not been drawn to the courtroom in the same numbers Americans have, although there is some indication this may be changing.

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[123]In *Home Box Office, Inc. v. FCC* (567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978)), the court condemned *ex parte* contacts between the Federal Communications Commission and industry representatives. In *Moss v. CAB* (430 F.2d 891 (D.C. Cir. 1970)), fare increases approved by the Civil Aeronautics Board were disallowed because the agency held *ex parte* meetings with industry. [see also Harter, "Negotiating regulations," *supra*, note 5, at note 182, p. 34]. This line of reasoning has been criticized by ACUS and others as being inconsistent with informal rulemaking and the realities of agency decision-making [see Perritt, "Administrative Alternative," *supra*, note 1, 907]. Harter suggests, however, that *Home Box Office* can be restricted to circumstances where an agency has struck an agreement with only a few parties [Harter, *supra*, note 5, 33-34]. See also *Sierra Club v. Costle* (657 F.2d 298 (D.C. Cir. 1981)) where the court refused to apply *Home Box Office* to invalidate a rule because EPA officials and coal industry representatives met after the end of the comment period.

[124]Perritt suggests that, in the early days, courts were "preoccupied" with the administrative law doctrine of delegation, which prohibits politically accountable officials from delegating policy-making authority to persons who are not accountable politically (see Perritt, "Administrative Alternative," *supra*, note 1, 900). Perritt also suggests, however, that most delegation problems are avoided if a rule can meet the judicial review requirements of the *APA* (at p. 902).

[125]Inherent in the modern delegation doctrine is the notion that an agency must act within the statutory authority delegated to them (see Perritt, "Administrative Alternative," *supra*, note 1, 902).

A recent study by Stuart Elgie shows that during the seventies, for example, Americans filed nearly forty times as many public interest environmental lawsuits as Canadians.[126] Many commentators, including Elgie, have attributed at least part of this difference to the belief that Canadians are by nature less litigious or less confrontational than Americans.[127]

Due to the differences in government structure between the two countries, however, the level of litigation in Canada is not expected to approach that of the U.S. In the U.S., the power to make policy is fragmented among Congress, the president, the executive agencies and the courts. Overlapping jurisdictions are said to create a climate of "robust competition" with each body undercutting the authority of the other.[128] Since Congress cannot use internal party mechanisms to control the actions of the

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[126]Elgie, S.A.G., "Environmental Groups and the Courts: 1970-1992," in Thompson, G., McConnell, M.L., and Huestis, L.B., *Environmental Law and Business in Canada* (Aurora: Canada Law Book, 1993), at p. 195-196: "My survey reveals that nearly fifty [public interest environmental lawsuits ("PIEL")] were reported in Canada in the 1970's. In the U.S., by comparison, nearly 2000 PIEL suits under federal statutes alone were reported during the same period, and many more were filed under state laws."

[127]See *ibid*. at 209; and Dorcey, A.H.J., and Riek, C.L., "Negotiation-based Approaches to the Settlement of Environmental Disputes in Canada," in *The Place of Negotiation in Environmental Assessment*, (Ottawa: Canadian Environmental Assessment Research Council, 1987), at 20. At least one commentator, however, believes this to be a "myth": Cormick, G.W., "Commentary II," same source, at 39.

[128]Brickman, Jasonoff, Ilgen, *Controlling Chemicals: The Politics of Regulation in Europe and the United States* (Ithica: Cornell University Press, 1985), at p. 303-304.

others, especially the president, it is suggested that litigation is often the only effective way to compel the executive to follow the legislated wishes of Congress.[129] In Canada, by contrast, the Prime Minister and the Cabinet are chosen from the same party, so when conflicts between the legislative and the executive do arise, internal party mechanisms can often be used to reconcile them.[130]

Elgie, however, suggests that the gap may be closing as some of the barriers to environmental litigation begin to fall in Canada. Courts may now be more sympathetic to environmental concerns;[131] and with the recognition in 1986 of public interest standing, environmental groups now have more direct access to the courts.[132] The recent growth of litigation in the area of environmental assessment would appear to lend support to Elgie's arguments; since *CEAA*'s predecessor, the *Environmental Assessment Review Process Guidelines Order*[133] was introduced in 1984, over seventy environmental assessment disputes have been litigated, including

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[129]Elgie, *supra*, note 126, 208-209.

[130]*Ibid.*

[131]*Ibid.* at 193: "In one case, an Alberta judge reasoned that wetlands are "nuisance waters which may, in fact, have counter productive effects on society, for instance, when they become breeding grounds for insects." [*Re the Queen in right of Alberta and Very* (1983), 149 D.L.R. (3d) 688 at p. 709].

[132]See *Finlay v. Canada (Minister of Finance)* (1986), 33 D.L.R. (4th) 321 (S.C.C.). See also Elgie, *supra*, note 126, 194-195 and 201-202.

[133]SOR/84-467. (June 22, 1984), Can. Gaz. II, vol. 118, no. 14, 11/7/84, p. 2789.

two that have reached the Supreme Court of Canada.[134] If Canadian statutes begin to impose more procedural or substantive obligations on administrative authorities, Elgie argues, the volume of litigation may increase even further.[135]

When one looks at the litigation of regulations in Canada, there certainly appears to be the opportunity for growth in this area. A survey the grounds for judicial review in Canada suggests that although there are few procedural grounds relative to the U.S., there are a number of substantive grounds upon which to challenge the validity of a regulation.

1.2.1 Procedural Grounds for Judicial Review

Unlike the U.S. regulatory process as codified by the *APA* and *Federal Advisory Committee Act*, the general participatory

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[134]See Appendix I for a list of all the disputes that have been or are being litigated under EARP as of April, 1994. A recent study by John Moffet of judicial review under the American equivalent of *CEAA*, the *National Environmental Policy Act* (42 U.S.C. 4321), suggests that this trend can only hurt the development of environmental assessment policy in Canada (see Moffet, J., "Judicial Review and Environmental Policy: Lessons for Canada from the United States," (Spring 1994) 37 (No. 1) Canadian Public Administration 140). Moffet encourages the development of alternative mechanisms which promote collaboration over conflict.

[135]Elgie, *supra*, note 126, 191-192: "Administrative suits, by definition, challenge government authorities who fail to follow their statutory authorities. It is axiomatic to add that if statutes impose very few requirements on administrative decision-makers, there will be few opportunities for administrative actions."

requirements of the Canadian regulatory process are non-statutory.[136] In the absence of specific statutory provisions imposing notice and comment obligations, proponents of procedural fairness are left to seek relief from the common law. With a few small exceptions, however, government decision makers do not appear to be under any common law duty to adhere to the rules of natural justice when acting in a legislative capacity.

The authority most commonly used to support this proposition is the decision of Megarry, J. of the Chancery Division in *Bates v. Lord Hailsham*.[137] Megarry acknowledges the importance of natural

[136] See Chapter I, Part B. See also Evans (*Administrative Law: Cases, Text and Materials*, 3d ed. (Toronto: Emond-Montgomery, 1989), at 247) where he refers to a recent Federal Court decision as indication that the courts may be willing to view the requirements of the RIAS as something like a statutory obligation. In his view, *Teal Cedar Products (1977) Ltd. v. Her Majesty the Queen et al.*, (1988), 19 F.T.R. 35, [1989] 2 F.C. 135 (F.C.T.D.) could be authority for the proposition that where a RIAS overlooks a disproportionate impact of a regulation on an individual undertaking, an injunction may be sought to prevent that regulation's enforcement. A closer look, however, suggests that the RIAS was only relevant in this case as evidence that Cabinet may have exceeded its authority to regulate on the matter in question. Since the trial court was persuaded that the information in the RIAS may have been incorrect, and that with more accurate information Cabinet would not have had the authority to regulate, an interlocutory injunction was granted. See also Milligan, E., "Federal Regulatory Process Reforms Take on New Legal Significance," (June, 1988) 9 *Can. Comp. Policy Record*, no 2, p. 21. In any case, this decision has since been overturned on appeal. The appeal court made no mention of the RIAS, and held that when determining the validity of an Order in Council, the Governor in Council's opinion cannot be challenged ((1988), 92 N.R. 308; [1989] 2 F.C. 158 (F.C.A.)).

[137] [1972] 3 All E.R. 1019 (Ch.D.). For a recent Canadian restatement see *Re Groupe des Eleveurs de Volailles de l'Est de l'Ontario and Chicken Marketing Agency* (1984) 14 D.L.R. (4th) (F.C., T.D.).

justice in a quasi-judicial setting, and of a general duty of fairness in an administrative or executive setting, but is not willing to extend either to the process of making legislation.[138] The Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat of Canada*[139] reached a similar result but instead of relying on an administrative/legislative distinction, the Court simply refused to look beyond the relevant statutory framework for procedural obligations.[140]

Limited exceptions to the general common law rule may exist, however, where property rights are involved,[141] or where a combination of proclaimed practice and resulting legitimate expectation may create a legally binding right to consultation.[142]

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[138] *Supra*, note 137, at p. 1024: "Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated."

[139] 115 D.L.R. (3d) 1 (S.C.C.).

[140] In *Inuit*, the Inuit Tapirisat had used an appeal provision in the *National Transportation Act* (R.S.C. 1970, c. N-17) to appeal a decision of the Canadian Radio-television and Telecommunications Commission to the Governor in Council. Bell Canada had replied to the appeal, and without giving the Inuit Tapirisat an opportunity to respond to Bell's submissions, the Governor in Council dismissed the appeal. In refusing to set aside the Governor in Council's action on the basis of procedural fairness, the Supreme Court would not look beyond the *National Transportation Act* for procedural standards binding on the Governor in Council.

[141] See *Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414; and *Durayappah v. Fernando* [1967] 2 All E.R. 152 (P.C.). See also Holland, D.C., and McGowan, J.P., *Delegated Legislation in Canada* (Toronto: Carswell, 1989), at 145.

[142] See Keyes, J.M., *Executive Legislation: Delegated Law Making*

With success at common law unlikely, at least one commentator has looked to the *Charter* to support an argument for procedural fairness in the making of regulations. Professor Martha Jackman of the University of Ottawa has argued that to do justice to the affirmative language in section 7 of the *Charter*, "fundamental justice should be read to include the notion that regulatory decisions which threaten section 7 interests are constitutionally unacceptable unless the persons or groups affected have had a meaningful opportunity to participate in the decision-making process."[143] A recent decision of the Supreme Court of Canada, however, suggests that the courts may be reluctant to accept Professor Jackman's argument.[144]

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by the Executive Branch (Toronto: Butterworths, 1992), at 95-96. Keyes states that the doctrine of legitimate expectation has been principally invoked in the United Kingdom, although there are signs of its acceptance in Australia and Canada (*National Anti-Poverty Organization v. A.-G. Canada* (1989), 36 Admin. L.R. 197 (Fed. C.A.), at 224). Keyes suggests, however, that although the doctrine has been accepted in relation to highly discretionary authority affecting large numbers of people, and has provided a basis for implying requirements to consult and give advance notice, it's future in relation to executive legislation in Canada appears to be "bleak." See also Evans, *supra*, note 136, 245-246.

[143]See Jackman, M., "The Cabinet and the Constitution: Participation Rights and Charter Interests," (1990) 35 McGill Law Journal 943, at p. 946. See also Jackman, M., "Rights and participants: the Use of the *Charter* to Supervise the Regulatory Process" (1990) 4 Canadian Journal of Administrative Law and Practice 23-56, at p. 28.

[144]See Keyes, *supra*, note 142, 97, where he refers to the recent Supreme Court of Canada decision in *Reference re Criminal Code, Sections 193 and 195.1(1)(c)* [1990] 4 W.W.R. 481 (S.C.C.), at p. 525.

1.2.2 Substantive Grounds for Judicial Review

On the substantive side, however, there are several grounds for judicial review of regulations in Canada. What follows is a brief discussion of some of these grounds including review based on the constitutional grounds, the wording of enabling provisions, consistency with other legislative provisions, improper purpose and bad faith, discrimination, uncertainty, and subdelegation or transformation of authority.

Constitutional Grounds

Any regulation, of course, must fall within the Constitutional jurisdiction of the government enacting it. But if a regulation can be characterized as a basis for "government action," it can also be challenged as infringing upon any of the rights and freedoms guaranteed in the *Charter*.[145]

Enabling Provisions

A regulation must remain within the limits authorized by its enabling provision. An enabling provision may limit the regulation to certain matters ("with respect to"), or to certain purposes ("for the purpose of"). J.M. Keyes describes the law in this way:

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[145]See *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.* (1986), 38 C.C.L.T. 184 (S.C.C.), and Keyes, *supra*, note 142, 174 and 179.

> Authority limited only by certain matters may be used to accomplish any purpose, as long as it applies to the authorized matters. Authority granted only in terms of certain purposes may apply to any matter, as long as it is directed to the authorized purposes.[146]

If an enabling provision contains words such as "prescribe" or "regulate," it may require a more particular link to the authorized matters.[147] If it is an omnibus provision ("for carrying out the purposes and provisions of") its scope appears to depend on judicial discretion;[148] and in the rare instance it contains subjective wording ("in the opinion of") its scope is described as "unquestionably" broader.[149]

In the end, however, there appears to be considerable room for judicial creativity, especially where the subject of the dispute is controversial. In *Re Lexogest Inc. et al. and Attorney-General of Manitoba*,[150] for example, the Manitoba Court of Appeal was asked to decide whether an enabling provision in a health insurance statute was broad enough to permit the exclusion by regulation of

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[146]Keyes, *supra*, note 142, 181. See also *CKOY Ltd. v. Canada*, [1979] 1 S.C.R. 2, and *Quebec v. Fortier*, [1990] R.J.Q. 1280 (C.A.).

[147]See *Re Mid-west By-Products Co. and Clean Environment Commission* (1979), 102 D.L.R. (3d) 208 (Man.Q.B.).

[148]Keyes, *supra*, note 142, 197.

[149]*Ibid.* at 198.

[150](1993), 101 D.L.R. (4th) 523.

therapeutic abortions in private clinics. The purposes of the legislation were not expressly set out.

Chief Justice Scott, who dissented, saw the abortion exclusion as conforming to the overall scheme of the statute as justified by some broad wording in the statute's general provisions.[151] The majority, however, interpreted the enabling provision narrowly. Huband J.A. decided one of the purposes of the statute was to maintain reasonable control over insurance costs, and found the abortion exclusion to be an attempt to increase costs not to control them.[152] Helper J.A. looked for express wording in the statute that would authorize restrictions on insurable services and did not find any.[153] Helper's decision noted, however, that the dispute had arisen immediately following the Supreme Court of Canada decision in *R. v. Morgentaler*.[154]

Consistency with other Legislative Provisions

In the absence of express legislative direction on how to resolve conflicts, if a regulation is inconsistent with its enabling legislation or with other coordinate legislation, the regulation must give way.[155] If a regulation is in conflict with its enabling

[151] *Ibid.* at 540.

[152] *Ibid.* at 553.

[153] *Ibid.* at 559.

[154] *Ibid.* at 561.

[155] Keyes, *supra*, note 142, 202.

legislation, it is invalid.[156] Conflicts with other regulations under the same enabling legislation may be resolved by applying the rules "specific over general" and "later over earlier";[157] and conflicts with regulations made under other legislation are likely to be resolved by determining the priority of the two enabling authorities.[158]

Improper Purposes and Bad Faith

It is not clear whether improper purpose and bad faith are grounds for judicial review in Canada. *Roncarelli v. Duplessis*[159] is a long-standing Canadian authority for the principle that statutory powers may only be used for the purposes intended by the legislature.[160] But in 1983, the Supreme Court of Canada in *Thornes' Hardware Ltd. v. R.*,[161] declared "it is neither our duty nor our right to investigate the motives which impelled the

[156] *Reference as the Validity of Regulations in Relation to Chemicals*, [1943] S.C.R. 1.

[157] Keyes, *supra*, note 142, 207.

[158] *The King v. Williams*, [1944] S.C.R. 226 at 235.

[159] [1959] S.C.R. 122.

[160] *Ibid*. at 140: ""Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. See also Holland and McGowan, *supra*, note 141, 216. For instances of delegated legislation being invalidated for reasons of bad faith or improper purposes before *Thornes' Hardware*, see *Boyd Builders Ltd. v. Ottawa*, [1964] 2 O.R. 269 (C.A.); *Re Doctors Hospital and Min. of Health* (1976), 68 D.L.R. (3d) 220 (Ont. Div. Ct.); and *Heppner v. Alberta* (1977), 6 A.R. 154 (Alta. C.A.).

[161] (1983), 143 D.L.R. (3d) 577 (S.C.C.).

federal cabinet to pass the Order in Council."[162] While some courts have followed *Thornes' Hardware*,[163] a number of Canadian courts continue to consider challenges based on these grounds.[164] Most of these challenges, however, have failed.[165]

Discrimination

Challenges to regulations based on discrimination are now generally presented as s. 15 *Charter* arguments,[166] but some challenges have been tied to a form of review known as "administrative law discrimination." Where a regulation expressly distinguishes among the persons to whom it applies, administrative law discrimination provides a basis for invalidating the regulation unless the discrimination is clearly authorized by the enabling legislation.[167] Although it has been applied in some

[162] *Ibid.* at 581.

[163] See *Saskatoon Criminal Defence Lawyers Assn. v. Saskatchewan*, [1984] 3 W.W.R. 707 (Sask. Q.B.); and *Investment Property Owners' Assn. of N.S. v. Nova Scotia* (1984), 65 N.S.R. (2d) 319 (C.A.).

[164] See *Re Min. of the Environment and Cacchione* (1987), 35 D.L.R. (4th) 196 (N.S.S.C.); *Falardeau v. Town of Hinton* (1983), 50 A.R. 120 (Q.B.); *Sanders v. Milk Board* (1990), 43 B.C.L.R. (2d) 324 (S.C.); and *Re Apotex* (1984), 47 O.R. (2d) 176 (H.C.). See also, the decision of the Ontario Divisional Court in *Aluminum Co. of Canada v. Ont. (Min. of the Environment)*, which Holland and McGowan describe as implicitly declining to the follow *Thornes' Hardware* decision [Holland and McGowan, *supra*, note 141, 218-219].

[165] See Keyes, *supra*, note 142, 224.

[166] *Ibid.* at 225.

[167] *Forget v. Quebec*, [1988] 2 S.C.R. 90.

cases,[168] and rejected in others,[169] there is some recent indication that it has been replaced by a test requiring rational assessment of the purposes of the enabling legislation.[170]

Unreasonableness

Unreasonableness may not exist as a basis for review in Canada.[171] In any event, it does not appear to have ever been used to invalidate a regulation.[172] There are however, two British sources to support the arguments that Parliament never intended to give authority to make such rules,[173] or that the conclusion reached is so unreasonable that no reasonable authority could have ever come to it.[174]

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[168]See, for example, *Transportbec Inc. v. Quebec*, [1986] R.J.Q. 2089 (C.S.).

[169]See, for example, *Aer Lingus v. Canada* (1990), 68 D.L.R. (4th) 220 (Fed. C.A.).

[170]See *Forget v. Quebec*, [1988] 2 S.C.R. 90, and Keyes, *supra*, note 142, 228.

[171]See Keyes, *supra*, note 142, 229-232. Keyes suggests that "unreasonableness is perhaps best characterized in terms of review that depends more on judicial creativity than on the text of enabling legislation. It is less a basis for review, than a measure of judicial deference to delegates of legislative authority" [at p. 231]. See also Holland and McGowan, *supra*, note 141, 223.

[172]Keyes, *supra*, note 142, 232.

[173]*Kruse v. Johnson* [1898] 2 Q.B. 91 at 99-100.

[174]*Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.). See also *Council of Civil Service Unions v. Minister for Civil Service*, [1984] 3 W.L.R. 1174 (H.L.) at 1196.

Uncertainty

A regulation may be uncertain because it is vague, ambiguous or because it contains grammatical errors.[175] Uncertainty is also discussed together with "overbreadth," the notion that legislation goes beyond what is necessary or reasonable to accomplish its authorized objectives.[176] As a result of uncertainty a regulation may be declared beyond the scope of its enabling authority, and invalidated.[177]

The Supreme Court of Canada has also developed a doctrine of vagueness based no ss. 1 and 7 of the *Charter*.[178] A law may be so uncertain as to be incapable of constituting any restraint on governmental power. In such circumstances, there is no "limit prescribed by law" and hence, no s. 1 analysis because the threshold requirement has not been met.[179] Even where a law can pass the threshold test, its language may fail to confine the invasion of a *Charter* right within reasonable limits.[180] With one

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[175]Keyes, *supra*, note 142, 235.

[176]*Ibid*. at 235.

[177]In Canada, uncertainty has primarily been used to strike down municipal by-laws. See *ibid*. at 241.

[178]See *Nova Scotia Pharmaceutical Society* (1992), 139 N.R. 241 (S.C.C.).

[179]See *Osborne v. Canada* (1991), 125 N.R. 241 (S.C.C.).

[180]*Ibid*.

exception, however, courts have not struck down executive legislation on this basis.[181]

Subdelegation and transformation of authority

A regulation may also be challenged as involving an unauthorized subdelegation or a transformation of authority. At common law there is a requirement that legal instruments be made only by those who are authorized to make them.[182] It has often been said that the legality of a subdelegation depends on the character of the subdelegated authority: if it is "administrative", it is permissible, if it is "legislative", it is not.[183]

Most commentators, however, appear to have rejected the administrative/legislative distinction as a basis for determining the validity of a subdelegation.[184] At best this distinction is said to merely provide a pair of convenient labels for a conclusion that a particular subdelegation is or is not valid.[185]

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[181]See Keyes, *supra*, note 142, 249 and *Wilson v. Medical Services Commission*, [1989] 2 W.W.R. 1 (B.C.C.A.) at 28.

[182]*R. v. Feraco* (1964), 49 D.L.R. (2d) 208 (Ont. H.C.). See also Holland and McGowan, *supra*, note 141, 122; and Keyes, *supra*, note 142, 253.

[183]*R. v. Lampe* (1963), 5 F.L.R. 160 (S.C.N.T.) at 171-172; *Hawke's Bay Raw Milk Producers' Co-operative Co. Ltd. v. New Zealand Milk Board*, [1961] N.Z.L.R. 218 (C.A.) at 223; *Desrosiers v. Thinel*, [1962] S.C.R. 515 at 519. See Keyes, *supra*, note 132, 256.

[184]See Keyes, *supra*, note 142, 256-257.

[185]*Ibid.*

Instead, courts may be more willing to consider balancing the interests of those who are affected by delegated authority, with the ability of government to realize complex social objectives.[186] As determining factors, courts have looked for the degree of interference with individual interests, the presence of standards or criteria governing the subdelegation, and the personal limits and abilities of the subdelegates.[187] Courts may find that "the complexity of the regulatory subject matter may warrant subdelegation to persons who have expertise in the matter."[188]

The issue of subdelegation has been raised on occasion to challenge the use of ambulatory or "rolling" references."[189] Although a number of cases and commentators have appeared to be sympathetic to the challenge,[190] there is a Supreme Court of Canada decision on the subject of constitutional inter-delegation which may prevent an ambulatory reference from being struck down on this basis.[191]

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[186]*Ibid.* at 257.

[187]*Ibid.* at 257-265.

[188]*Ibid.* at 265.

[189]Ambulatory references are provisions which incorporate by reference rules and standards made by other bodies which may be "amended from time to time" by that other body.

[190]*R. v. Ciarniello* (1979), 12 B.C.L.R. 394 (Prov. Ct.) at 398; *R. v. Board of Commissioners of Public Utilities* (1964), 51 M.P.R. 4 (N.B.S.C.A.D.). See Keyes, *supra*, note 142, 283.

[191]See Keyes, *supra*, note 142, 283, referring to *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, affirming [1966] 1 O.R. 191n (C.A.), affirming [1966] 1 O.R. 183 (H.C.).

2. Legitimacy of inherently political decisions?

Another motivating factor for regneg in the U.S. has been the perception that conventional rulemaking fails to provide a mechanism for deciding inherently political issues in a politically legitimate way. As discussed above, many Americans appear to have lost faith in agency decision making, and regneg has emerged as a way to address the problem by allowing affected parties to share in the decision.[192]

The search for a mechanism to lend legitimacy to the regulatory process also appears to be one of the primary reasons why participants were attracted to the idea of RAC.[193] The views of participants on this question have been set out in detail in Appendix A, but a sample of comments are presented here to suggest that, like the Americans, RAC participants see the legitimacy problem primarily in terms of government's insular approach to decision making.

Government's prevailing attitude was described by a FEARO participant as "we know best," but this participant was quick to

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[192]See Part B, ss. 3 and 4 above.

[193]See Appendix A, Chapter II, "Was legitimacy a motivating factor for RAC?"

point out "we didn't know best." There was some indication that Departmental staff felt that they could do a responsible job of the regulations without outside help. A Provincial participant warned that deferring to government expertise carries a real risk of inappropriate regulatory response, and saw the promise of RAC as its ability to reduce this risk. An Industry representative suggested it is often only the proponent who is willing to carry the policy debate, and felt that RAC was capable of encouraging government to undertake more thorough policy analysis. Many ENGO members felt that although governments often possess impressive information resources, these resources are seldom tapped. In their view, RAC forced the government to take advantage of these resources. Participants from all interests see themselves as capable of contributing to a better solution, and RAC appears to hold some promise of not only encouraging these contributions but also treating them in a manner that will be perceived as legitimate by all.

These issues and other issues of openness, quality of the results, and accountability of the decision maker will be examined in Chapter IV.

Chapter IV: Evaluating RAC -- Can it Improve the Performance of the Regulatory Process?

Chapter IV: Evaluating RAC -- Can it Improve the Performance of the Regulatory Process?

This Chapter uses the performance criteria proposed in Chapter I to assess whether RAC has the potential to improve the performance of the federal regulatory process.

Chapter I looked at the evolution of the federal regulatory process, and set out the few, almost entirely non-statutory, procedural requirements of the current process: An initiating department is expected to publish an advance notice of the regulatory proposal in the *Federal Regulatory Plan*, prepare a Regulatory Impact Assessment Statement ("RIAS"), and pre-publish a draft of the regulation together with its RIAS in the *Canada Gazette*. When the regulation has been made, it must be registered and again published in the *Canada Gazette*. Departments are not given any formal direction on how to include non-government interests in a regulation's development.

It was argued in Chapter I that the performance of the regulatory process could be measured in terms of how open the process is, the quality of its results, and the accountability of its decision makers for both decisions taken and the efficiency of the process.

Chapter II provided descriptions of both the RAC experiment and the federal regulatory process. RAC members were described as a dedicated group of people who, although unclear about their precise role in the process, had strong expectations that government would implement any agreements reached unless good and articulated reasons were provided. The regulatory process was described as capable of considerable improvement, especially with respect to including non-governmental interests in substantive review. Overall management of the regulatory policy is the responsibility of Treasury Board, but much if not most of the substantive analysis appears to be conducted by the initiating department in consultation with other departments. This analysis is to be documented in the RIAS for Cabinet and public review, but the RIAS process has had difficulty capturing the costs and benefits of environmental regulatory initiatives to the satisfaction of all parties.

Consultation programs vary across departments, but common criticisms are that they favour elite interests, and that they are secretive. Where there is broader consultation, participants often feel that key issues have already been decided or that good advice is ignored for unarticulated reasons. Environment Canada appears to be a department with a more active consultation program than most, but it too has been the target of these criticisms. In addition, Environment Canada's approach appears to be leading to a consultation fatigue among the groups it regularly consults with.

This Chapter will examine RAC's potential to improve the regulatory process by first setting out how RAC participants felt the process performed relative to what they would have expected without RAC. It will then evaluate RAC according to the criteria proposed in Chapter I: openness, quality of results, and accountability of decision makers. The analysis that follows is in all cases based on summaries of RAC interviews, the American experience with regneg,[1] and the author's own observations. Detailed RAC responses to many of these questions can be found in Appendix A.

A. Assessment of RAC Participants

All RAC participants were asked to comment generally on the merits of the process, but also on what sort of regulations they would have expected the government to produce in the absence of a process like RAC. At the time of the interviews, the specific content of the regulations was unknown to RAC participants because they were once again in the Cabinet system. As a result, RAC participants were asked to use as a reference point the draft regulations as pre-published in the *Canada Gazette, Part I*, on September 18, 1993.

[1]The most comprehensive evaluation was conducted by Susskind and McMahon in 1985 based on only two of the EPA's regneg experiments (Susskind, Lawrence, and McMahon, Gerard, "The theory and practice of negotiated rulemaking," (1985) Yale Journal on Regulation 133). I have borrowed, in a loose sense, some of their framework for evaluation.

1. Overall Assessment

With few exceptions, participants expressed support for the RAC concept, but most also expressed strong concerns about how the experiment fared in practice. Although the level of enthusiasm for the process varied among participants, at least one participant from each of the five groups interviewed could be described as an enthusiastic supporter.

Described at times by FEARO participants as the "only alternative" and "the way of the future", the RAC process also provoked the strong view that the process could not be justified in terms of time or expense, and that in the end the "traditional lobbying" model prevailed anyway. As we will see, however, the American experience with regneg shows that concerns about time, expense, and lobbying can be mitigated if not completely addressed.[2]

Industry descriptions of the process ranged from "groundbreaking" to "a bit disappointing," the latter because it made the process more complicated. As was true for all participants, however, those who were least supportive of RAC tended to be those who already enjoy some level of direct influence. Common concerns were the amount of work demanded by the process and its ability to

[2]See Part D below, and Chapter V.

account for the cost of proposed initiatives. If there was a general theme to industry's assessment of the process, it was captured by the member who felt there is no magic to the process but felt it could be made to work.

Departments also raised concerns about increased workload and the ability to assess economic consequences, but in general supported the principle of RAC. The strongest supporter saw considerable promise in RAC's ability to improve relationships between traditional adversaries ; the weakest felt the whole project was simply too big.

ENGO participants were perhaps the least favourable of the five groups, although they were still generally supportive. This result is perhaps not surprising given that the ENGOs were the ones who lost the most ground when the Government chose not to implement RAC agreements. It was also an ENGO who contributed the most damning assessment of RAC based, in large part, on a perceived lack of government accountability.

Provincial members were given the same status on the committee as every other member, and this caused some discomfort. Provincial governments normally enjoy a sort of preferred status through the Canadian Council of Ministers of the Environment. In the end, however, provincial members favoured the "team approach" and endorsed RAC as a concept.

These overall findings are perhaps the most significant indication that there may be value to the RAC process and that, with some refinement, another experiment or two is warranted.

2. *CEAA* Regulations without RAC

As a standard for comparison, RAC participants were asked to speculate as to what would have happened to the regulations without RAC. Here, once again, there were signs that most participants considered RAC to be capable of adding value to the regulatory process. Participants felt that without RAC, the process would likely have unduly favoured the interests of industry and the provinces, would likely have lacked transparency and accountability, and would likely have allowed for only limited policy analysis. Parties would likely have spent substantial resources on lobbying, and fought at least some battles in the media. The resulting regulations may not have been workable and may have attracted significant resistance from stakeholders.

FEARO participants felt that not only would the environmental interest have been completely lost, the strategic interests of all parties would have been overlooked. Given the complexity of the subject and the legislation, many felt a general consultation approach would have generated more confrontation and less useful information.

While at least one Industry participant would have been comfortable with a more traditional approach, others speculated that the regulations would have been "disastrous" because parties would have taken random and unsupportable positions and because the regulations would have been based on an inadequate understanding of their implications.

One departmental participant described his department's traditional practice as "you consult lots, but you do what you want." But for departments that are not initiating the proposal, the status quo is seen as an extremely limited last minute opportunity to comment on a proposal before it is sent to Cabinet.

ENGO participants also used the expression "disaster" to describe what might have been, and felt generally that without the focus RAC provided, the regulations may not have even been developed. Provincial members were generally satisfied with traditional federal-provincial mechanisms, but thought RAC may have reduced the likelihood of a "media circus" for other participants.

These results suggest that because participants have such low expectations for the traditional process, they are in appropriate circumstances willing to experiment with anything that offers a better solution.

B. Openness of the Process.

In Chapter I, an open process was described as a process that responds not only to the expectations of those directly affected, but also to the expectations of the many organizations, groups and individuals who are less directly affected. It was argued the "openness" of a process could be measured by the presence of a early notification system, and by the ability of all interests to gain access to information, to the decision maker, and to the other participants. A successful process in this respect would receive the support of both participants and non-participants. This Part evaluates RAC against each of these standards.

1. Early Notification?

RAC clearly did well to provide early notification to interested parties. In addition to regular notices in the Federal Regulatory Plan, RAC by definition informed these parties of regulatory initiatives well before the regulations were pre-published.

2. Convenient Access to Information, Decision Makers, and to Other Interests?

Curiously, the question of access was both one of RAC's major strengths, and its biggest weakness. In one sense, RAC could be described as accomplishing unprecedented information sharing, direct "first name" access to government decision makers, and candid face to face interaction between opposing viewpoints. In another sense, however, many RAC problems -- including the *Law List* crisis[3] -- could be attributed to periods when, as one participant described it, the "cloak of cabinet confidentiality had descended."[4]

Discussions on the *Law List*, for example, commenced with a draft list of 183 licences and permits selected by government departments but presented without information on which licences and permits had been considered but not selected. When ENGO participants felt their requests for this information, including an application through the *Access to Information Act*, had been virtually denied,[5] they compiled and presented a list of an additional 800 provisions for consideration by the Committee.

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[3]See Chapter II, Part A, s. 4 for details.

[4]Pers. comm. Notes on file with the author, p. 256.

[5]*Ibid*. at 227.

Faced with this proposal, some industry members felt trapped: either they were to condone the preparation of a list they felt may have been a breach of process by joining in the review, or they stood the risk of being left out of the discussions.[6] One industry member ultimately hired the services of several law firms to review the list and then fed the results back into the process.[7] One member felt that the ENGO members, by acting as they did, had created some mistrust.[8]

At least one departmental participant also thought the ENGO proposal created mistrust, but felt disclosure of the secret *Law List* information would have been useful for RAC members. In this participants view, the proposal contributed to an "us" vs. "them" attitude and failed to recognize the years of work departments had put into the regulation already. As a result, this participant felt reluctant to contribute to a review of the new list.[9]

ENGO participants, on the other hand, felt they were not getting the whole story. They thought that either the government list was a result of a culling procedure which was cloaked in cabinet secrecy,[10] or that government had failed to do its "homework."[11]

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[6]*Ibid.* at 169.

[7]*Ibid.* at 169.

[8]*Ibid.* at 278-279.

[9]*Ibid.* at 58.

[10]*Ibid.* at 151.

One member suggested the incident had shaken his confidence in the openness of the process.[12]

FEARO participants, as a result, were left in a bind. As one participant said, the original *Law List* was "developed in a box" and the government had no way of explaining how it came up with it.[13] Although, in this participant's view, the government list was reasonably well prepared, he felt the ENGO participants would not be convinced without some sort of participatory "process."[14] Another FEARO participant described RAC at this point as having one foot in the old way and one foot in the new way. For this participant, RAC was challenging a notion of government secrecy that may have outlived its usefulness.[15]

Government confidentiality descended again at the end of the RAC period under study. Non-governmental participants were not aware of the decisions government was making with respect to the regulations until more than four months after the RAC report had been issued. When the decisions were revealed, some felt it was difficult to determine on what basis some of the decisions had

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[11] *Ibid.* at 91.

[12] *Ibid.* at 91.

[13] *Ibid.* at 112.

[14] *Ibid.* at 111.

[15] *Ibid.* at 6.

been made.[16] One industry member described this period as a "black hole" and thought that members' reactions would have been far less disruptive if the regulations had been pre-published earlier.[17]

Interestingly, events that took place during these "cabinet confidentiality" periods provide further evidence that in practice the confidentiality rule does not apply equally to all participants in the process.[18] For example, one government employee reported that on two occasions, both within hours of a Cabinet decision, he received telephone inquiries from an industry member and from a law firm representing an industry member, asking about the implementation of the Cabinet decision.[19] It is probably fair to say, however, that all interests had access somehow to confidential information during this period. The RAC experience shows that the challenge is to reduce as much as possible these confidential periods so that all information and all participants are treated equitably.

Finally, it was noted in Chapter I that regulatory problems tend to be defined narrowly and that this has the effect of making the

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[16] *Ibid.* at 256-257.

[17] *Ibid.* at 45.

[18] For a general discussion of the status quo, see Chapter II, Part B, section 2.

[19] See Hazell, S., "Reforming Federal Environmental Assessment 1987-1995 (Ottawa: unpublished draft paper. 1995).

debate inaccessible to the non-expert part of the community.[20] *CEAA* was a classic example of this because attempts to accommodate all interests during the legislative process had produced a statute that was far from intuitive. RAC, however shows potential to address the problem not be reducing it, but by providing the opportunity for all interests to become experts on the subject matter. But to do so, it was necessary for the government to provide access to financial support for the primarily volunteer organizations which offer this perspective.[21]

3. Support of Participants to the Process?

A study of two early EPA regnegs reported that every participating group had become an advocate of further regnegs.[22] Harter quotes one participant as saying "there is no "magic" in the process, but it was better than going through the traditional battle."[23] Several other participants have placed their support for the process on the record.[24] Most, however, express caution. Two

[20]See Chapter I, Part D, section 1.

[21]See also M. Jackman, "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process," 4 C.J.A.L.P. 23 at 41.

[22]Susskind and McMahon, *supra*, note 1, 163.

[23]Harter, Philip J., "Negotiating regulations: a cure for malaise", (1982) 71 Georgetown Law Journal 1, at 112.

[24]A representative from Ford Motor Company has stated, "..more than any other process, [regneg] gave us the opportunity to explore every option and to come up with a whole range of ideas; we ended up keeping the best pieces of everyone's ideas." (See

participants in particular suggest regneg is suitable only for a small, but potentially significant, subset of regulatory issues.[25]

This support, however, has come primarily from participants in relatively *successful* regnegs. Despite apparent efforts by the EPA to stress the positive in the aftermath of an unsuccessful regneg on asbestos in the schools, Steinzor and Strauss report that many comments were filed by participants who "sought to dispel the Agency's rosy view of the regneg process and its outcome."[26]

With some qualifications, all but one RAC participant said they would be interested in future experiments with a RAC process. One participant has even recommended certain aspects of the RAC

"Regulatory Negotiation: Four Perspectives," DR Forum, National Institute for Dispute Resolution, p. 8, January 1986, in *Sourcebook*, *supra*, note 82, 860). A spokesman from the Chemical Manufacturers Association has suggested "Negotiated rulemaking makes it possible to explore and compare the interests of the participants. It makes it possible to identify novel solutions in a manner that cannot take place in the notice and comment context." (See Written statement of the Chemical Manufacturers," in United States, Administrative Conference of, *Negotiated Rulemaking Sourcebook*, prepared by David M. Pritzker and Deborah S. Dalton, (Washington, D.C.: Administrative Conference of the United States, Office of the Chairman, 1990) ["Sourcebook"], at 399).

[25]See Written statement of the Chemical Manufacturers," in *Sourcebook*, *supra*, note 24, 397; and Testimony of David Doniger, in *Sourcebook*, at 386. See also Chapter V, Part A, below.

[26]Steinzor, Rena, and Strauss, Scott, "Building a consensus: agencies stressing 'reg neg' approach: the EPA's highly touted strategy of regulatory negotiation has proved disappointing as a tool for resolving two major issues," Legal Times, Aug 3, 1987 at 888.

process tc a provincial government. The one exception was an ENGO participant who felt that if the regulations continued to look like the ones pre-published in the *Gazette* and not like the ones in the RAC report, a more public or political route may be preferable. One strong measure of support for the process is the fact that all members are still at the table working on *CEAA*-related initiatives.

4. Support of Government Decision Makers?

Regneg has attracted the full support of the EPA who have institutionalized the process. The EPA now have full-time staff to manage regnegs and to evaluate candidates for new ones,[27] and it is considering expanding the process to assist in policy development and enforcement areas.[28] According to a Director of EPA's regneg activities, the EPA expects that between five and ten percent of EPA regulations may be appropriate candidates for the regneg process.[29]

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[27] *Sourcebook*, *supra*, note 24, 40.

[28] Thomas, Lee M., "The successful use of regulatory negotiation by EPA," (1987) Administrative Law News 13(1):2-4.

[29] Christopher Kirtz, quoted in Millar, William H., "Bypassing the lawyers: "regulatory negotiation" gets test in agencies (negotiating changes in rules before they become law to avoid lawsuits)", Industry Week, June 23, 1986, v229, p. 20, at 20.

FEARO participants expressed support for continued use and refinement of RAC as a process.[30] Departmental participants, who are now full members of RAC, expressed similar support.[31] From a government perspective, RAC offers greater ability to generate new ideas and to meet today's complex regulatory challenges. With refinements, it also offers the opportunity to find tradeoffs acceptable to all interests, and to avoid making hard choices between interests.

5. Support of Non-participants?

A more open regulation-making process would receive the support of all interested parties, and not just the parties who are chosen to represent particular interests at the negotiating table. As a review of both the U.S. and Canadian experiences will show, however, this issue has proven to be a troublesome one for both regneg and RAC. The issue is often characterized as the ability of a process to serve the "public interest," but this section will argue that when measured against what would occur anyway, both regneg and RAC can offer improvements.

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[30]Pers. comm. Notes on file with the author. See pp. 29, 35, 37.

[31]*Ibid.* at 63, 75, 192.

5.1 The U.S. Experience

In the U.S., it has been suggested that general public approval of a regulatory process could be measured by the absence or limited number of unfavourable comments received by an agency during the conventional notice-and-comment period after the regneg process. For the E.P.A., at least two regnegs produced no critical responses. In the regneg on nonconformance penalties for manufacturers of heavy-duty engines, for example, only thirteen comments were received; all were from participants, all comments were in support of the proposal, and three in particular requested additional negotiations.[32] Nineteen comments were received after a regneg on pesticide exemptions; three were from participants, and the rest, in Perritt's view, raised "relatively minor points."[33]

These two sets of comments would appear to support the proposition that in the U.S. regneg is serving the interests of the general public as well as its own participants. However, it is on this particular point that American critics of the process are most vocal. Funk, for instance, using the regneg on residential woodburning stoves as an example, argues that regneg may not serve

[32]Perritt Jr., Henry H., "Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States," (1986) 74 Georgetown Law Journal 1625, at 1679.

[33]*Ibid.* at 1681.

interests beyond the negotiating table for two reasons: the process is more capable of producing a rule that is unauthorized by statute, and the process tends to obscure what he perceives as "the public interest" to the benefit of private interests.

Funk would support the premise that the woodstoves regneg is perceived by most people as a successful exercise. In fact, as he points out, all participants formally agreed at the end of the process not only to refrain from criticizing the proposed regulation, but also not to challenge in court any final regulation that is consistent with the proposed regulation.[34]

Funk believes, however, there is strong evidence which suggests the EPA chose to regulate not because of a concern over woodstove emissions, but because of the pressure to do so by interest groups who had a stake in the outcome.[35] And since regulating 12 million woodstoves was out of the question, the EPA was left with the sole option to regulate the manufacturers of woodstoves using a provision of the *Clean Air Act*[36] that was not designed for such a purpose.[37] The result, Funk argues, is a consumer product

[34]Funk, William, "When smoke gets in your eyes: regulatory negotiation and the public interest - EPA's woodstove standards", (1987) 18 Environmental Law 55, at 78-79. See also Chapter III, Part D, section 1 above.

[35]Funk, *supra*, note 34, 81.

[36]42 U.S.C. §7525(g).

[37]Funk, *supra*, note 34, 81.

regulation "shoe-horned" into a statutory scheme not designed for it.[38]

Funk suggests, however, that the problem of statutory authority was "surmountable" because the participants were given licence to agree for whatever reason on the outcome. The formal agreement not to challenge the regulation served to "minimize the likelihood that the deficiencies will have legal consequences." Funk concludes therefore, that the "authority" of the regulation derives less from the statute than from the private agreement between affected parties.[39]

Funk goes on to argue that because regneg relies on consensus for the legitimacy of a regulation, a "premium" is placed on ensuring that the participants adequately reflect all affected interests. But Funk suggests it is not sufficient to rely on the *Federal Advisory Committee Act*[40] to balance the interests, and he refers again to the woodstoves regneg to support this conclusion. In the woodstoves regneg, the interests of consumers were represented by

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[38] *Ibid.* at 82. Funk argues: "..first, it is questionable whether mass-produced consumer items, such as woodstoves, are within the meaning of stationary source under section 111 of the Act; second, it is exceptionally doubtful that the requirements imposed on manufacturers and retailers are authorized under the Act." [at p. 66-67]. Section 111 appears only to apply to "owners and operators" of sources, no mention of manufacturers or importers.

[39] *Ibid.* at 84.

[40] Pub. Law 92-463, 5 U.S.C. App.

the Consumer Federation of America. Funk argues that while this particular group may have been qualified to act in the interests of "*Consumers Reports*" readers, it was not acting on behalf of the rural woodstove users who in exchange for little benefit would suffer significant burden as a result of the regulation.[41] Here, Funk is clearly talking about both process and outcome. Presumably if woodstove manufacturers had participated in the regneg, the result would have been more acceptable.

The result for Funk is a "fundamental alteration" of administrative rulemaking:

> [B]y reducing disputes over what is in the public interest to disputes between various private interests, and by substituting private agreement for public determinations made according to legal norms, [regneg] transforms administrative rulemaking into an area of private law ... [I]t is hardly surprising that what emerged from that process is a proposed rule with which the parties are happy but which bears scant resemblance to what was contemplated by statute.[42]

Funk is not the only one to hold the view that there may be something inherently dangerous with the regneg process. Steinzor and Strauss accuse the EPA, in two other regnegs, of offering to "ignore its statutory mandate in an all-out campaign to promote consensus."[43] They also report that many of the participants to the

[41]Funk, *supra*, note 34, 95.

[42]*Ibid*. at 96.

[43]Steinzor and Strauss, *supra*, note 26, 886. They refer to the regneg on deepwell injections of hazardous materials (Notice of

regneg on asbestos in the schools -- which failed to reach agreement on the most central issues -- filed comments alleging the proposal was illegal under its authorizing statute.[44] An officer of the Office of Management and Budget has expressed concern that regneg may be serving special interests at the expense of the average taxpayer.[45] And Patricia Wald, a U.S. appeal court judge, wants to see the courts take a closer look at regneg. She worries "about individuals being bound by "interest" group surrogates so as to preclude their challenging a rule on appeal, notwithstanding their participation in the notice and comment phase."[46]

The EPA, in response, candidly acknowledges that it could have done a better job at participant selection. In the woodstoves regneg it concedes that no one represented the interests of small

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Proposed Rulemaking, 52 Fed. Reg. 32446 (August 27, 1987), Final Rule, 53 Fed. Reg. 28118 (July 26, 1988)), and the regneg on asbestos-containing materials in schools (Notice of Proposed Rulemaking, 52 Fed. Reg. 29228 (August 6, 1987); Final Rule, 52 Fed. Reg. 41826 (October 30, 1987)).

[44] *Ibid.* at 888. The statute in question was the *Asbestos Hazard Emergency Response Act of 1986*, 15 U.S.C. §2641 *et seq.*

[45] Stanfield, Rochelle L., "Resolving Disputes," (1986) National Journal 2764, at 2766. The body referred to is the Office of Management and Budget which is authorized to undertake such a review through Executive Orders 12,291 (3 C.F.R. 127 (1982)) and 12, 498 (50 Fed. Reg. 1036 (1985)).

[46] Wald, Patricia M., "Negotiation of environmental disputes: a new role for the courts?", (1985) 10 Columbia Journal of Environmental Law 1, at p. 21. See also McDonald, Derek Raymond, "Judicial review of negotiated rulemaking", (1993) 12 Review of Litigation 467 at 487.

woodstove manufacturers.[47] Similarly, representatives of State Attorneys-General did not get involved in the regneg on asbestos in the schools until the process was well underway.[48]

But the issue of representing the views of "ordinary citizens" or "average taxpayers" persists. And at least one American commentator has suggested the solution is not to defer to organized interest groups but to appoint a random group of citizens who would be expected to devote a portion of their time to public policy decision making.[49] Harvard Professor Jerry Frug describes his suggestion as a "modified form of jury," drawn by lot to ensure its members are a "microcosm of the public at large," and he recommends that such a group be authorized to debate the recommendations of government employees and to "reject them when they think it is appropriate to do so."[50]

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[47]United States, Environmental Protection Agency, Program Evaluation Division, Office of Management Systems and Evaluation, Office of Policy, Planning and Evaluation, "An assessment of EPA's negotiated rulemaking activities," (December 1987), in *Sourcebook*, *supra*, note 24, 31. In fact, the EPA did identify someone to fulfil this role, but the selected company went out of business before the regneg process began.

[48]*Ibid*.

[49]Frug, J., "Administrative Democracy," (1990), 40 U. of T. L. J. 559, at pp. 570-573.

[50]*Ibid*.

5.2 The Canadian Experience

In Canada, similar issues have arisen, particularly in the context of environmental assessment. Here, the Funk-like argument has been made that a dispute-resolution process like negotiation can fail to fully consider the broader public interest where it may lie outside the specific interests of parties involved.[51] In response to such an argument, Osgoode Hall Law Professor Paul Emond suggests that "if all persons affected, however remotely, are afforded an opportunity to participate in an open, public negotiating process, then surely the public interest is at least as well served by this process as it is by any other process and perhaps better."[52] Emond also thinks the argument fails to take into account the way in which decisions are actually made, and that it may overestimate the ability of our current processes and decision makers to determine what is in the "public interest."[53] Emond is concerned, however, about finding effective ways to bring to the bargaining table the interests of future generations and

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[51]See for example the views summarized in Emond, P.D., "Accommodating Negotiation/Mediation Within Existing Assessment and Approval Processes," in *The Place of Negotiation in Environmental Assessment*, (Ottawa: Canadian Environmental Assessment Research Council, 1987) at 49.

[52]*Ibid*. at 49-50.

[53]*Ibid*. at 50.

other groups who are not normally or cannot easily be represented.[54]

Canadian courts and tribunals have also struggled to find a workable definition of the "public interest." Michael Jeffery, a former chair of the Ontario Environmental Assessment Board, has written that "perhaps no concept has sparked more consternation, debate, and general disagreement among those involved in environmental regulatory/approval processes."[55] Jeffery suggests that Canadian courts are disposed to taking a "flexible approach" to the issue that will "vary from situation to situation yet at the same time accommodate a variety of conflicting interests."[56]

Community organizations do not appear interested in carrying the burden. Consumer and public interest groups appearing in front of the Peterson Committee, for example, argued they were incapable of defending the "public interest." These groups did, however, insist that they were representing interests which have not traditionally had access to regulatory decision makers.[57]

[54] *Ibid.*

[55] Jeffery, M.I., "Commentary I," in *The Place of Negotiation in Environmental Assessment*, *supra*, note 51, 56.

[56] *Ibid.* Jeffery refers to *City of Portage La Prairie and Inter-City Gas Utilities Ltd.* (1970) 12 D.L.R. (3d) 388; *Re: Loiselle and Town of Red Deer* (1907) 7 W.L.R. 42; *State v. Crockett*, 86 Okl. 124; and *Re: Mississippi River Fuel Corporation* (1946 65 PUR (N.S.) 184.

[57] Canada, House of Commons Special Committee on Regulatory Reform, *Report*, First Session of the Thirty-Second Parliament, 1980 (Ottawa: Ministry of Supply and Services Canada, 1981), at

But is Frug's jury model the answer? University of Toronto Professor Carolyn Tuohy does not think so. For Tuohy, the appropriate response lies not in selecting random citizens but in strengthening the representatives of the divergent but identifiable community interest groups.[58] The jury model lends itself only to bi-party disputes with clear winners and losers, she argues, and public policy decisions are best resolved by balancing interrelated interests through negotiation and mediation. Hence for Tuohy, citizen representatives participating in these processes must have an organizational base because, without one, they may have no identifiable stake in the outcome, few information resources, no resources of organized political support, and most importantly, they are accountable to no one.

Among RAC participants, there was no suggestion that any of the RAC agreements fell outside the authority of *CEAA*, but many raised concerns about whether RAC was able to effectively serve the public interest. Departmental participants, in particular, questioned the ability of the ENGO members to represent the public interest, preferring instead to leave that role to our elected members of Parliament.

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[58]See Tuohy, C., "Bureaucracy and Democracy," (1990), 40 U. of T. L. J. 598, at pp. 602-603.

This criticism, however, appears to be in at least one sense unfair; no other interest is expected to fulfil such an enormous responsibility. The ENGO members, like the other members, represent a particular component of the public interest, namely protection of the environment. In this light, it seems odd that we have chosen to fracture the public interest into sections and to appoint advocates for each. For surely every Industry member has an interest in protecting the environment, and likewise every ENGO member has an interest in a healthy economy. One of the interesting aspects of Frug's jury model is that the public interest is not fragmented in this way.

Of the non-RAC participants interviewed, one industry group expressed a preference for full membership, but otherwise found it still had opportunities to bring concerns to the RAC process either through the government or through sympathetic members. One ENGO felt the RAC model could never benefit the public good, but mostly for philosophical reasons and not because he had no opportunity to contribute.[59]

[59]Pers. comm. Notes on file with the author, p. 285-290. This participant felt that in the absence of a strong legislative direction, industry members would never agree to anything that will inconvenience them, and that since industry's agreement was necessary for any "consensus decision," the best that can be achieved in a process like RAC is the "status quo" or slightly better. Where environmental groups enter into agreements in such settings, this participant argued, the whole environmental community is placed in a weaker position because it can no longer "agitate for something better."

The government did get many letters from non-RAC participants but these were about decisions taken by the government in the regulations and not about the RAC process. Following the pre-publication of the draft regulations in September of 1993, for example, the government received ninety-one comments. Approximately forty-five percent of these comments were from RAC participants or their constituents. Comments were for the most part critical of the regulations in some way, and almost all argued for changes that would favour the interest promoted by the writer.[60] The volume and content of comments is not surprising, however, given the controversial nature of the regulations, the many areas where RAC had not reached consensus, and most importantly the government's decision not to implement some areas where a RAC consensus was reached.

When providing reasons to the RAC as to why the draft regulations did not reflect some areas of RAC consensus, the government cited "input of stakeholders and expert federal departments since submission of [the] RAC report."[61] This could indicate that the government did not view the RAC as representing the public interest, although it begs the question, why the missing input could not have been presented and debated at the RAC. For some,

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[60]FEARO document, "Responses to Gazetted Regulations under *CEAA*," no date.

[61]RAC Document 9.2.1, "Comparison of Gazetted Comprehensive Study List and RAC proposed Comprehensive Study List," (Ottawa: FEARO, September, 1993).

these interests were simply not present at the RAC, and perhaps this can be addressed by a more careful selection of participants.[62] In the view of others, however, these issues were either discussed at RAC, or had the opportunity to be discussed at RAC. Hence the changes to the regulations after the RAC process simply meant the government had allowed particular groups a second chance at influencing the regulations.

A number of interesting observations flow from this discussion. First of all, the challenge of serving the "public interest" appears to be a formidable one, and it is a challenge for any process not just RAC. Secondly, the pre-publication of draft regulations appears to be an essential test of public acceptance no matter what process is used. Thirdly, it becomes apparent that participant selection will play a crucial role in the struggle against this danger. And finally, as Emond suggests, given evidence which suggests negotiation is carried on in any event, perhaps the more appropriate test of performance is not "does the process serve the public interest?" but "does the process serve the public interest any better than the status quo?" In this respect, both regneg and RAC show promise because they open the negotiations to public scrutiny, and because they allow broader participation in the negotiations themselves.

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[62]See Chapter V, Part B, section 3.2.

C. Quality of the Results

Chapter I described a successful regulatory process as one which is considered fair by all those affected by it. A fair regulation would be based on a thorough analysis of the implications of each substantive decision. Ideas for advancing the interests of one group without compromising the interests of another would be exhausted; and parties would be less likely to pursue conflicts through the courts.

A regulatory process would effective if it succeeds in accomplishing its stated objective. This could be measured by the degree to which the regulation achieves compliance, and by any improvement in the relationships between traditionally adversarial parties. This Part assesses the performance of the RAC in these terms.

1. Considered More Fair by those Affected by it?

In the U.S., for example, some of the regneg-produced regulations have been described as "fairer" and "wiser" than they would have been otherwise. Participants in two of the EPA's early regnegs concluded that the regulations produced were more legitimate,[63] better than what the standard rulemaking process would have

[63] Susskind and McMahon, *supra*, note 1, 163-164.

produced,[64] and far better than what would have resulted had they gone to court.[65]

RAC responses were mixed, and many participants felt uncomfortable with the speculative nature of the question. There was some confusion as to the distinction between being "fair" and being "wise." Overall, however, some themes have emerged. Many participants felt the regulations were "greener" than they would have been, but this view was more prevalent among FEARO and departmental representatives. "Greener" in this context meant reflecting more of the views of the ENGO members. Several ENGO participants did not share this view, based on the substance of the regulations as pre-published. Presumably not every participant would consider "greener" to be "fairer" or "wiser."

Many measured fairness and wisdom in terms of workability and clarity, and found the regulations to be more favourable in these respects. Some departmental representatives, however, failed to see much substantive difference in the end product at all.

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[64]Fiorino, Daniel J. and Kirtz, Chris, "Breaking Down Walls: Negotiated Rulemaking at EPA," (1985) 4 Temple Environmental Law & Technology Journal 29, at 39.

[65]Susskind and McMahon, *supra*, note 1, 151.

2. More Thorough Analysis of the Implications?

The Administrative Conference of the U.S. believes one of the weaknesses of traditional American rule making is that the agency is frequently the only party generating solutions to regulatory problems; other parties simply state their most favourable positions and then, without offering practical alternatives, criticize the agency proposal.[66] When a regneg is working, however, as one EPA regneg participant said, "twenty creative minds are bound to come up with something better than three EPA staff."[67]

An in-house study of the EPA's regnegs concluded the agency was a major beneficiary of information about "'real world' practices and conditions that helped guide the committees toward pragmatic regulatory requirements."[68] The result in some cases, especially from the perspective of industry members, was a regulation with a better technical and scientific foundation.[69]

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[66] *Sourcebook*, *supra*, note 24, 4.

[67] See Fiorino, Daniel J., "Regulatory negotiation as a policy process", (1988) 48 Public Administration Review 764, at 768.

[68] "EPA Assessment," *supra*, note 47, 28.

[69] See for example, Written statement of the Chemical Manufacturers Association, in *Sourcebook*, *supra*, note 24, 398: "Far too often agencies propose a rule without having an adequate technical or scientific understanding of what it is they are regulating. The result: regulations don't fit the problems they are attempting to solve. The agency proposes requirements that are unnecessary or poorly suited to the agency's objectives, or else, an agency may overlook an opportunity to economize."

In two early regnegs, technical staff at the EPA felt that from their perspective the "wisest possible rules emerged."[70] During negotiations to establish national emission standards for residencial woodstoves, all parties were able to benefit from information brought to the table by representatives from two states who had already established regulatory requirements for woodstoves.[71]

In Canada, the experiences of our round tables on environment and economy have been similar. In a collective paper, round tables across the country concluded that consensus processes "encourage creative and innovative solutions to complex problems by bringing a diversity of knowledge and expertise together to resolve issues."[72] The Round Table in Ontario found that "[i]ntegrating a consensus process into sustainable development planning is more likely to result in decisions that integrate economic, social, and environmental goals."[73]

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[70]Susskind and McMahon, *supra*, note 1, 151.

[71]Fiorino, *supra*, note 67, 767.

[72]Canadian Round Tables, *Building Consensus for a Sustainable Future: Guiding Principles*, (Ottawa: National Round Table on the Environment and the Economy, 1993), at 5.

[73]Ontario Round Table on Environment and Economy, *Restructuring for Sustainability*, (Toronto: The Round Table, 1992), at p. 39.

RAC participants as a whole thought that while the regulations were generally better informed as a result of RAC in terms of identifying their implications, there was a particular lack of technical information. Some participants felt, however, that both government and non-government participants could have stepped in to provide the technical support.

In addition, several participants, mostly from industry, were critical of the cost-benefit analysis that was conducted during the RIAS process.

Clearly improvements are warranted in the way the RAC information is collected and evaluated, but it is important to note that in terms of the hours and efforts RAC members contributed to the process, the potential of RAC to address information issues will be difficult to match.

3. No Joint Gains Unrealized?

A better regulation could be one where the interest of all competing interests are well reconciled. If the interests of parties are well reconciled, no possible joint gains should be left unrealized. Supporters of regneg in the U.S. point to the aftermath of two successful EPA regnegs where the notice-and-comment period failed to produce any suggestions that would have helped one party but not at the expense of the others.[74]

Not many RAC participants expressed views on this point, and those that did generally felt that the regulations had not yet reached this point. Within FEARO, some participants thought yes and some thought no. One FEARO participant suggested RAC simply ran out of time before members could get to the point where they could trade issues.

One industry participant felt RAC provided the maximum opportunity to find joint gains. Another industry member, however, felt that although parties were closer to this goal than they would have been without RAC, they may not have come that far because members were only recently beginning to reach a level of knowledge which would allow them to negotiate effectively. One ENGO member also thought a few extra months pre-RAC report may have helped in this respect.

4. Less Litigation?

In the U.S., the EPA has concluded that regneg has significantly reduced its own litigation activities.[75] The only regulation

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[74]Susskind and McMahon, *supra*, note 1, 151.

[75]Testimony of Marshall Breger, in *Sourcebook*, *supra*, note 24,

produced using regneg that has been challenged in court was a rule that resulted from the EPA's less-than-successful regneg on asbestos-containing materials in schools.[76] Because complete consensus was not reached in that case the court was reviewing a rule that was drafted only in part by negotiation. Ultimately the rule was upheld, but on the basis of rule content alone; the issues of procedure were not addressed.[77] Perritt suggests this lack of judicial challenge is perhaps the strongest endorsement of regneg as a process.[78]

Harter had predicted that regneg would bring a reduction in litigation because those who would most likely bring suits would actually participate in the regulation's development.[79] Furthermore, the concept of "consensus" implies that parties will

370. See also Thomas, *supra*, note 28, 3.

[76]In *Safe Bldgs. Alliance v. EPA* (846 F.2d 79 (D.C. Cir.), *cert. denied*, 488 U.S. 366 (1988)), the court was asked to review a rule produced in part by a regneg on Asbestos-containing Materials in Schools (Notice of Proposed Rulemaking, 52 Fed. Reg. 29228 (August 6, 1987); Final Rule, 52 Fed. Reg. 41826 (October 30, 1987)). This regneg involved requirements for identification and mitigation of asbestos hazards in public and private elementary and secondary schools. See also Fiorino, *supra*, note 67; Bureau of National Affairs, "EPA Negotiates Proposed Rule on Asbestos in Schools, Part of Continuing Reg-Neg Project," Alternative Dispute Resolution Report, vol. 1, pp. 133-135 (7/9/87); and Steinzor and Strauss, *supra*, note 26.

[77]McDonald, *supra*, note 46, 480.

[78]Perritt Jr., Henry H., "Administrative alternative dispute resolution: the development of negotiated rulemaking and other processes (Symposium Issue on Alternative Dispute Resolution)", (1987) 14 Pepperdine Law Review 863, at 899.

[79]Harter, *supra*, note 23, 102.

not challenge the agreed-upon rule, and some participants formally agree at the end of the process to honour any agreement reached by consensus.[80]

Most RAC participants interviewed are expecting *CEAA* to be litigated in any event. Many felt the Act itself is the source of this conflict and that RAC could do nothing to prevent it. Some thought that litigation is a healthy practice and should not be discouraged. Others felt that, by flagging issues and by making all interests more knowledgeable, RAC was in fact making it easier to find grounds for legal challenge.

But on the whole, most participants thought RAC may have a mitigating effect on the volume or nature of the disputes. Disputes would not focus on areas already in agreement, the government would have a "paper trail" to demonstrate good intentions, and RAC may have helped encourage dialogue between parties as an alternative to litigation. Even where there will be litigation, RAC will have contributed to a more informed conflict: litigants will know exactly where to "hit" to get problems solved. With more of an acceptance of the purpose and principles of environmental assessment among interests, there may not be as much resistance to the process, and because the Act is now more "workable," fewer administrative errors can be expected.

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[80]See Chapter III, Part D, section 1 above.

Environmental assessment processes will be litigated as long as there are people who will do anything to avoid applying the process, and as long as there are people who wish to use the process in an effort to stop a particular project. CEAA will be no exception. RAC, however, may have been able to reduce the number of conflicts, and the scope of those conflicts.

5. Better Compliance?

The EPA believes compliance is "very high" with its regneg regulations because there is a feeling of "ownership" among participants, and because the regulated community understood what was meant by the regulation, and what was expected of them.[81] Harter suggests that under hybrid rulemaking one party is inevitably pitted against the other parties, and those who do not win may question the legitimacy of the decision, and as a result, may be less inclined to comply voluntarily.[82] Congress has also found that regneg can increase the acceptability of rules, making it less likely that parties will resist enforcement.[83]

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[81]Thomas, *supra*, note 28, 3.

[82]Harter, "Negotiating regulations," *supra*, note 23, 22.

[83]*Negotiated Rulemaking Act*, Public Law 101-648, 104 Stat. 4969, s. 2.

In Canada better compliance has been attributed to the use of consensus approaches in the setting of industrial standards.[84] And having found that non-compliance with regulations is "the norm" in some sectors, the British Columbia Round Table on Environment and Economy feels that non-compliance is one of the strongest reasons to try a regneg approach in that province.[85]

RAC participants who had an opinion on the subject all felt that RAC had made some contribution to better compliance with *CEAA* and the regulations. As one FEARO participant said, after RAC nobody can claim ignorance or be vague about the intentions of the Act, but there is always going to be "good guys and bad guys." Some industry representatives felt that with still more certainty and clarity, more compliance could be encouraged.

On the whole, the primary advantage of RAC with respect to compliance has been the increase in understanding across all interests of *CEAA* and the practice of environmental assessment.

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[84]House of Commons, Special Committee on Regulatory Reform, *supra*, note 57, 35: "An advantage ascribed to consensus approach to standards setting is that a higher degree of compliance will be achieved. When those who have to meet the standards are involved in the process by which they are developed, there may be a greater psychological incentive to comply. There is likely to be more input from the private sector than in other consultation situations. Mutual understanding and refinement of the standard to produce the least burden should lead to more willing compliance."

[85]British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume II Implementing Consensus Processes in British Columbia*, (Victoria: The Round Table, 1992), at 8.

Dozens of government, industry, provincial, and environmental representatives are now fully versed in the legislation despite its complexities. By all appearances, compliance with the EARP process has been minimal,[86] and improvements in CEAA compliance should be obvious and early.

As a surprising spin-off, RAC discussions appeared to have led to a better understanding of related federal government legislation. Several participants mentioned that as a result of the RAC process, they now had a better understanding of both the *Fisheries Act*,[87] and the *Navigable Waters Protection Act*.[88] Based on this newly acquired knowledge, one industry member estimated that the current level of compliance with the *Navigable Waters Protection Act* is around one percent.[89] Also because of RAC, a departmental participant is now of the view that full compliance with the *Fisheries Act* is not achievable.[90]

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[86]The public reporting mechanism under EARP was a quarterly publication called the *Initial Assessment Bulletin*. Despite the fact that by applying to government "proposals," EARP was in theory extremely broad in scope, only a few dozen assessments were ever reported in the *Bulletin* at any time.

[87]R.S.C. 1985, c. F-14.

[88]R.S.C. 1985, c. N-22. Pers. comm. Notes on file with the author. See pp. 53, 86, 214.

[89]*Ibid.* at 53.

[90]*Ibid.* at 86.

6. Improved Relationships?

An improved rule making process could be one which improves the relationships between traditionally adversarial parties.

The EPA regnegs appear to have had some success in this area. In a study of two early regnegs, Susskind and McMahon report that relationships "improved markedly" between certain participants who had a long history of "harsh adversarial" relations.[91] Some of these relationships have continued beyond the regneg, and have helped foster agreements in other settings.[92] One of the industry participants found that instead of creating more knowledgeable opponents, the regneg dialogue tended to decrease the inclination of his adversaries to automatically oppose any industry proposal.[93]

Participants also appear to have benefited from better relations with the EPA. One industry spokesman suggested, "[o]ne of the problems in the traditional rule-making process is nobody's listening ... this is a priceless opportunity to pitch your wares

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[91]Susskind and McMahon, *supra*, note 1, 151.

[92]EPA Assessment, *supra*, note 47, 29: "[I]n the RCRA permit modifications .. a public interest law firm and one who represented a chemical company .. are working together to find a mutually satisfactory means of enabling the chemical company to undertake an activity that the public interest law firm ordinarily would have opposed."

[93]Written statement of the Chemical Manufacturers Association, in *Sourcebook*, *supra*, note 24, 398.

to someone who is actively trying to understand you."[94] Other industry participants have stressed the value of access to senior EPA program managers.[95]

Even where parties have not reached substantial agreement, some assessments of the process have been positive, if only because of improved relationships. Although one of the environmental participants warns of the potential to set back relations by forcing parties to negotiate inappropriate issues,[96] the environmental team that walked out of the regneg on deepwell injection of hazardous wastes because it felt the issue was inappropriate for negotiation still found merit in the process for this reason.[97]

Canadian round tables on environment and economy have had similar experiences. Collectively they have concluded that in terms of results, consensus processes can improve the working relationships between all interests participating in the process, and help build

[94]David E. Menotti, lawyer for the Wood Heating Alliance trade organization, as quoted in Lavelle, M., "'Reg-neg' revving up in D.C. (regulatory negotiation on nuclear waste)," (1988) 10 The National Law Journal 1.

[95]Fiorino, *supra*, note 67, 768.

[96]Testimony of David Doniger, in *Sourcebook*, *supra*, note 24, 387.

[97]See EPA Assessment, *supra*, note 47, 29, where it quotes the Natural Resources Defence Council as saying: "We believe that the negotiations have been worthwhile, have increased understanding of the issues and of the various parties' perspectives, and have stimulated communication among all involved."

respect for and a better understanding of different viewpoints among the participants.[98]

Better relationships is one unquestionable product of the RAC process. Although one industry participant recalled having a few unpleasant encounters, another said he would now not hesitate to phone any RAC participant especially the government representatives, and felt he had gained a lot of respect for the ENGO and FEARO participants in particular. One member said relationships built through the RAC process have allowed for the first face-to-face meeting ever between his industry and two government departments.

Departmental participants reported "definite bonding among federal departments," better working relationships with industry participants, and increased respect for ENGO participants. ENGO members felt that RAC allowed for better communication with senior governmental officials, and felt better relationships overall could be attributed the fact that participants were no longer "abstract enemies." A provincial member felt that RAC was successful primarily because members "met long enough to meet as human beings and not as letter writers."

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[98]Canadian Round Tables, *supra*, note 72, 7.

D. Accountability of the Decision Maker

In Chapter I, it was argued that a decision maker is accountable if each decision is accompanied by reasons for the decision and if it is clear what information was used to base the decision. Where a decision maker acts irresponsibly, this would ensure that there could be political legal or practical consequences.

It was also argued, however, that accountability is in large part ensured by the existence of an open decision-making process, particularly a process that offers convenient access to information, the decision maker, and to other interested parties.

Accountability can also be measured in the efficiency of the process. In these days of scarce government resources, administrators are expected to account for every dollar spent and to ensure each is spent wisely. Chapter I suggested that efficiency can be promoted by delegating responsibility, sharing work, and by exchanging information. It can be measured in terms of the time and money spent on the process. This Part assesses RAC according to these criteria.

1. Clear Basis for Decisions?

As we have seen above, many RAC participants felt betrayed by the government after draft regulations which did not reflect some areas of RAC consensus were released following many months of internal government activity. Explanations that other stakeholders and expert departments had added input were not well received.

This could suggest that the process ultimately failed to provide the accountability that participants were searching for. Yet, the opposite could also be argued. As a result of their decisions, the government would face political consequences through the media and within the regulated communities. Ultimately, the subsequent government took steps to re-draft the regulations to reflect RAC-report agreements. Perhaps, by knowing the regulations well, and by knowing the views of various parties, RAC participants were in a better position to determine in whose interests the final decisions were made. Arguably this transparency was made possible by the advances in open decision making described above. Further advances, however, are both possible, and from the perspective of most RAC participants, desirable.

2. Efficiency

A decision maker is also responsible for ensuring that the process is as efficient as it can be in terms of workload, time and money.

2.1 More Delegating, Work Sharing, and Exchange of Information?

Almost all participants commented on the enormous amount of work RAC demanded. But given the work demands, government was successfully able to depend on the capable work of RAC members and their constituencies. Although many RAC members would be troubled by this idea, the net effect for government was to expand their policy staff by more than thirty people.

2.2 Less Time?

In the U.S., the EPA reports that negotiation has shortened the total process time for each one of the regulations developed through regneg.[99] Susskind and McMahon suggest the "upfront" time invested into the regnegs reduced the overall time spent on litigation and "subsequent administrative wrangling."[100] Congress has reported similar findings.[101]

RAC views were divided on this point. Many felt RAC had the opposite effect. One industry participant thought time was wasted re-visiting some issues, and felt that the government should have

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[99]Thomas, *supra*, note 28, 21.

[100]Susskind and McMahon, *supra*, note 1, 151

[101]*Negotiated Rulemaking Act*, Public Law 101-648, 104 Stat. 4969, Section 2.

cut off the discussion at some point. Departmental participants felt that before RAC, the government was essentially "ready to go," and that RAC "threw two years of work out the window."

In contrast, several participants saw time advantages. One industry member thought that without RAC the time to proclamation of *CEAA* may have been shorter, but that the time for any other process that would have been as good as RAC would have been longer. Another industry participant estimated that RAC would save his industry many days that would have otherwise been spent in court. One ENGO member thought that the existence of RAC created a work schedule which forced people to turn their minds to the problems, and felt that without RAC, there would have been more "slippage."

On the whole, it will be difficult to measure whether RAC saved the government any time. It may be easier, however, to argue that the government received more value for the time that they did spend on the regulations.

2.3 Less Expense?

The EPA estimated that the regneg on residential woodburning stoves cost the agency half of what it would have spent collecting data and responding to public comments.[102]

For regneg participants, the process appears to offer cost savings as well. ACUS has found that without the uncertainty of a litigated result, business can better determine how a regulation will affect them, and the planning of capital expenditures and production changes can take place much earlier.[103] One industry association predicted that, taking into account the costs of the process, likelihood of litigation, and costs associated with compliance and enforcement, the cost of rules produced by hybrid rulemaking "is *likely* to be greater for *all* participants than is the cost of rules produced through negotiation" [emphasis in original].[104]

In Canada, the British Columbia Round Table on Environment and Economy has found that "the long-term environmental, economic and

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[102]EPA Assessment, *supra*, note 47, 29. The total cost of the Woodstoves regneg was $61,000 which was less than the seven regneg average of $74,000. The EPA has published the full costs of all their regnegs in *Sourcebook*, *supra*, note 24, 239.

[103]*Sourcebook*, *supra*, note 82, 3.

[104]Written statement of the Chemical Manufacturers, in *Sourcebook*, *supra*, note 24, 404.

social costs of continuing with appeals, court cases, and public disobedience may be higher than the short-term financial costs of resolving conflicts by consensus."[105]

RAC participants were not so sure. Many participants thought that RAC was likely to be more expensive than any other process. One industry member, however, felt there may be cost savings in the reduction of "potential messes." Another industry participant expected an overall savings based on litigation costs saved at $15 000 per day. One ENGO member suggested government saved money by externalizing a lot of research to industry and to the environmental community, and felt that government "got a real deal" on the legal work done by the environmental community for the *Law List*.

FEARO participants estimated that RAC had cost approximately 150 to 200 hundred thousand dollars per year, but felt the cost of cross-Canada consultation would have been comparable yet far less rewarding. A significant portion of this funding went to support the mostly volunteer efforts of the ENGO members. One FEARO participant expected a reduction in "back-end problems" to offset "front-end costs," but felt it was difficult to measure the value of some things such as keeping the issue out of the newspapers.

[105]British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume II*, *supra*, note 85, 5.

As with time, it is difficult to measure whether RAC will result in any cost savings. Like the RIAS process, it would be a struggle to identify and quantify increased compliance, reduced litigation, better environmental assessment, and a reduction in environmental degradation. Yet, it could be argued that by increasing the likelihood of all these things, RAC may prove to offer cost savings in the long term.

E. Conclusions

This Chapter has considered the question, does RAC have the potential to improve the performance of the federal regulatory process? Accordingly, it has been assessed to determine whether it offers a more open process, whether it can improve the quality of the regulations produced, and whether it can increase the accountability of the decision makers in the process.

The analysis, in large part, shows that RAC did improve or is capable of improving performance in all of these areas. Although RAC showed many deficiencies when measured against what could be described as ideal standards, the results are much stronger when RAC is measured against the status quo. RAC was an experiment, many of its deficiencies can be addressed, and most importantly, the vast majority of participants are interested in trying it again.

Chapter V: Appropriate circumstances for the RAC model.

Chapter V: Appropriate circumstances for the RAC model.

Chapters I through IV have been pursuing the question, "can RAC improve the performance of the federal regulatory process?" Chapter IV reached the conclusion that RAC has the potential to improve the openness of the process, improve the quality of results, and enhance the accountability of the decision makers in the process -- particularly when measured against what would typically happen in an unstructured process. To the extent RAC offers improvements in these areas, this Chapter considers in what circumstances the RAC process would be most appropriate, what steps could be taken to increase the likelihood of achieving a negotiated solution, and what legal barriers, if any, exist which may prevent its use in Canada. The framework for this analysis has been borrowed, in part, from the U.S. review of the regneg model.[1]

Drawing from his experiences with dispute resolution generally, Harter had predicted certain conditions would have to exist in order for regneg to have a realistic chance for success.[2] ACUS

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[1]The most comprehensive evaluation was conducted by Susskind and McMahon in 1985 based on only two of the EPA's regneg experiments (Susskind, Lawrence, and McMahon, Gerard, "The theory and practice of negotiated rulemaking," (1985) Yale Journal on Regulation 133). I have borrowed, in a loose sense, some of their framework for evaluation.

[2]Harter, Philip J., "Negotiating regulations: a cure for malaise"; (1982) 71 Georgetown Law Journal 1, at 42-112.

endorsed Harter's analysis and presented it as a set of recommendations for its administrative clients.[3] After some experience with regneg under the ACUS model, the EPA published some criteria for selecting regneg candidates.[4] Perritt, Susskind and McMahon, have each drawn their own conclusions with respect to the appropriate circumstances for regneg,[5] and Congress has set out some formal guidance in the *Negotiated Rulemaking Act* based mostly on the ACUS recommendations.[6]

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[3]*Procedures for Negotiating Proposed Regulations*, 1 C.F.R. §§305.82-4.

[4]United States, Environmental Protection Agency, Program Evaluation Division, Office of Management Systems and Evaluation, Office of Policy, Planning and Evaluation, "An assessment of EPA's negotiated rulemaking activities," (December 1987), in United States, Administrative Conference of, *Negotiated Rulemaking Sourcebook*, prepared by David M. Pritzker and Deborah S. Dalton, (Washington, D.C.: Administrative Conference of the United States, Office of the Chairman, 1990), at 24 ["EPA Assessment"].

[5]See Perritt Jr., Henry H., "Administrative alternative dispute resolution: the development of negotiated rulemaking and other processes (Symposium Issue on Alternative Dispute Resolution)", (1987) 14 Pepperdine Law Review 863, at 875-893; Perritt Jr., Henry H., "Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States," (1986) 74 Georgetown Law Journal 1625, at 1642-1646; and Susskind and McMahon, *supra*, note 1, 138-164.

[6]See *Negotiated Rulemaking Act*, Public law 101-648, 104 Stat. 4969, §583.

A. Appropriate circumstances for RAC?

The American literature suggests that not all proposed regulations will be suitable candidates for regneg, and that the selection of an appropriate rule will play an important part in the negotiation's success. Important factors to consider are: is there countervailing power among participants? Do the alternatives look worse for all parties? Is the issue "ripe" for negotiation? Is the issue purely objective? Does the issue amount to a debate over fundamental values? and Are there multiple issues to debate? This Part examines each one of these factors based on both the U.S. and RAC experiences.

1. Countervailing power

Harter argues that a regneg is more likely to be successful when, for the rule chosen, "no single party can dictate the results without incurring an unacceptable sanction from the other parties."[7] This countervailing power, Harter suggests, can take a variety of forms, including the ability to inflict serious costs or delays.[8]

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[7]Harter, "Negotiating regulations," *supra*, note 2, 51.

[8]*Ibid.* at 45. Harter points to the common example of an environmental group challenging an environmental impact statement.

Traditional power relations, however, can be altered at the bargaining table itself. Susskind and McMahon suggest that in both the regneg on nonconformance penalties and the one on pesticide exemptions, environmentalists were perceived as exerting substantial influence even though they were outnumbered by industry interests.[9] They attribute this to, among other things, individual negotiating skills, the availability of a resource pool for technical information, the EPA's fear of failure, the ability of environmental groups to coalesce behind issues, and the "impact of momentum."[10] Perritt suggest that it may be more difficult for multiple representative interests like industry to be forceful because they must first obtain consensus among themselves.[11]

RAC participants generally felt that no single party at the table could dictate results without incurring an unacceptable sanction from the other parties. But many participants also felt that the

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[9]Susskind and McMahon, *supra*, note 1, 154.

[10]*Ibid*. With respect to negotiating skills, David Doniger the representative of the Natural Resources Defense Council at some of the EPA regnegs, suggests that environmental disputes now involve sophisticated parties: "Both industry and the environmental community have been around long enough to have developed a sense for when to fight and when to negotiate. They also have developed considerable skills in negotiation..." [Testimony of David D. Doniger, Senior Attorney, Natural Resources Defense Council, on S. 1504, before the Committee on Governmental Affairs, United States Senate, May 13, 1988, in United States, Administrative Conference of, *Negotiated Rulemaking Sourcebook*, prepared by David M. Pritzker and Deborah S. Dalton, (Washington, D.C.: Administrative Conference of the United States, Office of the Chairman, 1990), at 386].

[11]Perritt, "Negotiated rulemaking," *supra*, note 5, 1678.

influence of ENGO members over the results was considerably stronger at RAC than it would have been under more traditional circumstances. As outlined in the previous chapter, this view led several participants to conclude that the RAC process made the regulations "greener."[12]

Many RAC participants felt that the ENGO members enjoyed an advantage over the other members primarily at the beginning of the process. The ENGO members were described as being better prepared, more accustomed to RAC-like processes, and as having a superior understanding of the legislation and its implications. The ENGO community was also the only group that sent exclusively lawyers as representatives. This last fact in particular caused many participants to express concerns about balance.

Most of the ENGO members would agree they fared well at the beginning of the process, but they would also agree that as soon as the process went behind closed doors a more traditional power balance prevailed. To be more effective, organizers of future experiments should encourage all parties to send their strongest representatives. The decision to send lawyers or people with other backgrounds should be made by the parties themselves, but a balance of views may be most appropriate. To encourage parties to take the process seriously, and to send their strongest

[12] See Chapter IV, Part C, s. 1.

representatives, the government must respect the process by eliminating opportunities for negotiation members to make additional submissions to government outside or after the RAC process.

2. Alternatives look worse

American commentators suggest that any party to a negotiation will not seriously negotiate unless the alternative to negotiation looks worse.[13] That alternative is often called a "BATNA," as in "people will be guided by their "BATNAs," and it stands for "best alternative to negotiated agreement."[14] Hence, a rule may be appropriate for regneg only if all parties to the controversy believe they can win through negotiation.

This theory appears to be well supported by the EPA experience. David Doniger, a lawyer with the National Resource Defense Council, and an EPA regneg participant, says the key from an environmental perspective is "how to give industry a reason to prefer action to delay."[15] Doniger suggests industry

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[13]See Harter, "Negotiating regulations," *supra*, note 2, 48; and Susskind and McMahon, *supra*, note 1, 153.

[14]See for example, Perritt, "Administrative alternative," *supra*, note 5, 876-881. The expression originates from a book on the negotiation process by Fisher and Ury: *Getting to Yes* (1981).

[15]Testimony of David D. Doniger, Senior Attorney, Natural Resources Defense Council, on S. 1504, before the Committee on Governmental Affairs, United States Senate, May 13, 1988, in *Sourcebook*, *supra*, note 10, 389.

representatives came to the woodstoves regneg because they "wanted a federal standard so badly they were even willing to accept a good one."[16] In the regneg on nonconformance penalties, he says that without a regulation, the truck makers might not have been able to sell their non-conforming engines if plans to meet new emission standards went wrong.[17] Doniger is less certain, however, why industry came to the regneg on pesticide exemptions, though he wonders whether it was to gain enough goodwill and credibility to win concessions in other areas.[18]

Steven Schatzow, a former director of EPA's Office of Pesticide Programs, has another theory. Schatzow suggests that the benefit to industry, when dealing with the EPA, is access to the decision maker. Contrary to the popular view that industry has regular access to all federal agencies, Schatzow says it is the environmentalists that historically have had better access to the EPA.[19]

Similarly, Susskind and McMahon suggest that since the courts have not yet indicated whether or not they will take a "hard look" at a

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[16] *Ibid.* at 390.

[17] Olpin, Owen, et al., "Applying Alternative Dispute Resolution to Rulemaking," (1987) 1 Administrative Law Journal 575 at p. 580.

[18] *Ibid.* at 580-581.

[19] *Ibid.* at 583.

regneg rule, the uncertainty of a hold out strategy makes cooperation seem more attractive.[20]

With respect to incentives for environmental groups, on the other hand, Schatzow suggests that although environmental groups have been "very successful" with judicial review in the past,[21] circumstances may be changing. According to Schatzow, agencies are now devoting more resources to creating "paper trails" to better insulate their decisions; and furthermore, successful lawsuits can inadvertently add years to the process if, as is often the case, the challenged rule is simply thrown out, and the agency is forced to begin again.[22]

Bill Rodgers, an American commentator who has approached this issue from the perspective of game theory, suggests a more general explanation:

> [W]hen the prospects of passing a piece of legislation jump from the remote to the probable ... the process is likely to capture and hold players whose commitment to a "consensus" means only that they would rather be included then excluded from negotiations that are going to happen anyway. In other words, you can take the only train to New Haven, or you can walk. This means that participants in the game include not only those who prefer legislation to no legislation but also those who,

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[20]Susskind and McMahon, *supra*, note 1, 153. They also suggest convenors can work behind the scenes to manipulate parties' uncertainty about costs and benefits in order to get them to the table.

[21]Olpin, *supra*, note 17, 582.

[22]*Ibid*.

> if faced with the prospect, prefer "influenced" legislation over "uninfluenced" legislation. Here are groups with clear incentives to work towards legislation that is "better" for them while being perfectly content with the prospect that the entire structure may come tumbling down.[23]

Rodgers goes on to suggest that the environmental participants in the EPA's regnegs were classic examples of "the phenomenon of being reluctant to defect from a game that can proceed without you," although clearly they would be the kind of players that would prefer legislation to no legislation. The decision to participate becomes understandable if quitting means that you get nothing rather than a chance at something.[24]

In some situations, however, a compromise could be worse that no agreement at all. In the unsuccessful regneg on worker protection standards for agricultural pesticides, for example, Stanfield reports that the labour participants walked out of the negotiations because they had better alternatives in litigation and legislation.[25]

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[23]Rodgers, "The lesson of the red squirrel: consensus and betrayal in the environmental statutes," (1989) 5 J. Contemp. Health L. & Pol'y 161, at note 13, p. 164.

[24]*Ibid.* at 164-165.

[25]Stanfield, Rochelle L., "Resolving Disputes," (1986) National Journal 2764, at 2767. She quotes a lawyer for the farm workers as saying the proposed program was so inadequate that it would offer "the appearance but not the reality" of change, and that "sometimes that kind of change is not for the better because it takes away the incentive to make the changes that are necessary."

For RAC members, each had a different but compelling reason to participate in the RAC process. Although some parties may have on occasion taken advantage of other channels of influence, all parties to a significant extent did stay at the RAC table. Industry members feared the ENGO community's ability to raise public pressure. Provincial representatives appeared willing to try out the process and to suspend for a period of time their traditional entry points into federal affairs.

One ENGO participant believed it was a mistake for the environmental community to participate in RAC because, to use Rodgers' train metaphor, there was no indication that the government had any intention of driving the train out of the station. In this participant's view, once the environmental community enters into any agreement which fails to bring industry much distance from the status quo, it is prevented from agitating for anything further. Most ENGO members, however, generally perceived the RAC as their best opportunity to influence the regulations.

Federal departments, on the other hand, not being members of RAC, had limited access to the process and as a result were reluctant to make their views known outside of interdepartmental forums. As we shall see, the absence of federal departments from the RAC process was viewed by most participants to be a major mistake.[26]

3. Issue must be "ripe"

Perritt suggests that a negotiation is likely to be successful in the U.S. if the subject of the rule has been exposed to enough political debate that interested parties can be identified, their positions and strengths identified, and potential sources of support identified.[27] Susskind and McMahon, however, warn against placing much importance on such a condition.[28]

Two kinds of issues in particular are suggested to be inappropriate for regneg. Susskind in an article on state-level regneg suggests that if there is little or no controversy, an issue is not "ripe" and there is probably no need to mount an elaborate negotiation.[29] Harter argues that an issue is not ripe enough if parties are still "jockeying for position by filing

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[26]See Part B, section 3.1 below.

[27]Perritt, "Administrative alternative," *supra*, note 5, 889.

[28]Susskind and McMahon, *supra*, note 1, 156-157: "Most public dispute resolution efforts are likely to involve a changeable and expandable agenda and a shifting set of interest groups who are not quite clear why they are at the table."

[29]Susskind, Lawrence, "Regulatory negotiation at the state and local levels," (January 1986) DR Forum, National Institute for Dispute Resolution, in *Sourcebook*, *supra*, note 10, 326.

lawsuits or threatening lawsuits, building media campaigns, [or] lining up political support."[30]

As discussed above, however, successful EPA regnegs also appear to have involved a limited number of affected parties focusing on a relatively narrow issue. In the woodstoves regneg, for example, representatives from the wood heating industry, state governments, and environmental/consumer groups developed a performance standard for residential woodburning stoves. The regneg on cleaner-burning fuels involved participants from the oil industry, clean-fuel manufacturers, and environmental/consumer groups, who drafted a schedule to introduce cleaner burning fuel into U.S. cities.[31]

In Canada, the experiences of our round tables on environment and economy suggest that issues relating to the notion of sustainable development are especially well-suited for consensus-based processes. The Ontario Round Table argues that achieving sustainability will require an unprecedented degree of innovation from all parts of society, innovation that could come from a "multi-sectoral debate that engenders creativity and permits a wider range of viewpoints, ideas, knowledge, and experience to be considered."[32] All round tables in Canada believe that

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[30]Harter, "Negotiating regulations," *supra*, note 2, 47.

[31]See Chapter III, Part C, s. 2, above.

[32]Ontario Round Table on Environment and Economy, *Restructuring for Sustainability*, (Toronto: The Round Table, 1992), at 38.

conventional decision-making mechanisms "tend to exclude rather than include diverse interests and do not cope well with the complexity that issues of sustainability represent."[33]

Unlike the U.S. regnegs, however, the Canadian round tables have tended not to focus on limited regulatory issues involving limited numbers of affected parties. Hence, we are faced with an apparent contradiction. On the one hand is the suggestion that a consensus-based process is appropriate only for disputes that are narrow enough to stand a chance of a negotiated solution. But on the other hand, government's are urged to use consensus to resolve complex public policy issues involving the goal of sustainable development.

This is a tension that was clearly felt during the RAC process. Generally there was a sense, especially among departments, that the RAC would stand a better chance of achieving consensus if there were fewer issues and fewer players. However, given the breadth, interrelationship and complexity of the issues involved, many participants felt that RAC was the best option available.

Perhaps there are two sets of circumstances where RAC can be effective: The first, based on the U.S. experience, is a narrowly-

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[33]Canadian Round Tables, *Building Consensus for a Sustainable Future: Guiding Principles*, (Ottawa: National Round Table on the Environment and the Economy, 1993), at 5.

defined subject with few, identifiable interests. The second, based on the Canadian experience, is a controversial but statutorily-limited subject for which many months of investigation is necessary and for which several interrelated policy issues are to be made. One essential difference between these two sets of circumstances is that, unlike the first, the second promises little chance that all issues will be successfully negotiated. The advantage of the process, then, is not that all parties will walk away and not contest the results, but that for complex issues dealing with sustainable development, government acting alone may not otherwise be in a position to understand the full implications of their decisions.

4. Not purely objective

If parties to the dispute think that science can provide the proper answer, Perritt suggests the regneg has little chance of succeeding. Perritt argues the failure of a regneg conducted by the Occupational Safety and Health Administration's ("OSHA") to develop worker standards for exposure to benzene can be attributed to the fact that at least some participants thought a standard for worker exposure could be objectively determined rather than bargained.[34] It is Harter's view that an issue must involve some

[34]Perritt, "Negotiated rulemaking," *supra*, note 5, 1689.

element of competing values for which there is no right or wrong in order for it to be an appropriate candidate.[35]

For RAC, this factor did not appear to be an issue. Only one participant, and industry representative, expressed the view that some of the *CEAA* regulatory issues could have been solved by science.

5. No fundamental values

American commentators have found that a rule that involves a dispute over fundamental values is unlikely to be negotiable.[36] This was a problem the EPA encountered when it suggested, as its first regneg candidate, a rule concerning the disposal of low-level radioactive waste. Although industry, state and local government representatives expressed an interest,[37] David Doniger, a spokesman for the environmental community, described the rule as "totally unsuitable" for negotiation, because members of that

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[35]Harter, "Negotiating regulations," *supra*, note 2, 42.

[36]See Harter, "Negotiating regulation," *supra*, note 2, 49; Susskind and McMahon, *supra*, note 1, 152; EPA Assessment, *supra*, note 4, 24; and Testimony of Doniger in *Sourcebook*, *supra*, note 10, 389.

[37]Fiorino, Daniel J. and Kirtz, Chris, "Breaking Down Walls: Negotiated Rulemaking at EPA," (1985) 4 Temple Environmental Law & Technology Journal 29, at 32.

community were being asked to "buy off on "acceptable" levels of death and illness."[38]

Doniger also suggests that "straight-up" questions of statutory construction are also inappropriate for regneg. The central issue in the regneg on the deepwell injection of hazardous waste was the statutory requirement of "no migration" of hazardous wastes from the injection zone. Doniger says the negotiations broke down because the environmental community believed that each of the proposals on the table would effectively repeal this statutory requirement.[39]

In Canada, however, the British Columbia round table warns that differences between parties may not be as irreconcilable as they first appear, and that consensus building can often lead to an exchange of information and ideas that result in innovative solutions.[40] Emond, on the other hand, appears to share Doniger's first concern that negotiation could be used to erode matters of principle where "the only relevant question that lies behind the

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[38]David Doniger quoted in, "Regulatory Negotiation: Four Perspectives," DR Forum, National Institute for Dispute Resolution, p. 10-11, January 1986, in *Sourcebook, supra*, note 10, 860-861.

[39]Testimony of David Doniger, in *Sourcebook, supra*, note 10, 389.

[40]British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume II Implementing Consensus Processes in British Columbia*, (Victoria: The Round Table, 1992), at 7.

decision to negotiate is "how much development and degradation?" and not "should there be any development or any pollution at all?""[41]

Once again, RAC on the whole did well to avoid clashes of fundamental values, and only a few RAC participants expressed views on the issue. One industry member felt that during *Exclusion List* discussions there was a fundamental conflict between industry and ENGO members on the question of whether projects should be excluded from the application of the Act on the basis of size alone.[42] Another thought a general ideological dispute between one hundred percent protection and a process that was "workable" prevented more resolution. One departmental participant also felt there were clear fundamental conflicts with respect to nuclear issues, especially on the *CSL*.

One industry participant, however, felt that given time, goodwill, and intelligent people, the RAC process would have been capable of resolving all but five percent of the issues.

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[41]Emond, P.D., "Accommodating Negotiation/Mediation Within Existing Assessment and Approval Processes," in *The Place of Negotiation in Environmental Assessment*, (Ottawa: Canadian Environmental Assessment Research Council, 1987), at 51.

[42]Please note, however, that in the view of the author, *CEAA* does not provide authority to exclude a project based on its size alone (see s. 2 definition of "project," s. 7, and s. 59(c)).

6. Multiple issues

Harter suggests that if regneg is to be successful, the chosen rule must involve more than just a single issue.[43] Multiple issues allow parties to bundle and trade issues in order to maximize their overall interests. In support of this principle Susskind and McMahon point to the regnegs on nonconformance penalties and pesticide exemptions which both involved a range of sub-issues to which each party attached different degrees of importance; all parties were able to make trades that led to "win-win packages."[44] As Doniger said, "there were a number of acceptable solutions."[45]

Too many issues on the table, however, can be counterproductive. Steinzor and Strauss suggest the regneg on asbestos in the schools broke down because "there were far too many issues for the committee to address and resolve."[46]

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[43]Harter, "Negotiating regulations," *supra*, note 2, 50.

[44]Susskind and McMahon, *supra*, note 1, 152. The Nonconformance issues were application of non-conforming permits ("NCPs"), penalty structure and rate setting, and NCP administration and enforcement [at p. 145]. In the Pesticide regneg, the issues primary issues were definition of emergency, health and safety, and implementation [at p. 149].

[45]"Regulatory Negotiation: Four Perspectives," *supra*, note 38, 860. One of the EPA's rule selection criteria is "limited number of interrelated issues to be resolved," and "[t]here are several ways in which they can be resolved." [EPA Assessment, *supra*, note 4, 24.

[46]Steinzor, Rena, and Strauss, Scott, "Building a consensus: agencies stressing 'reg net' approach: the EPA's highly touted strategy of regulatory negotiation has proved disappointing as a tool for resolving two major issues," Legal Times, Aug 3, 1987, at

As discussed above, many RAC participants felt that like the regneg on asbestos there may have been too broad a range of issues to allow the process to be effective. Yet, just as many felt RAC was still the best alternative available.

While the number of issues on the RAC table offered the potential for "bundling and trading," outside of a few instances on the *Law List* and the *CSL*, RAC participants said they saw very little of this being done. But as some RAC members noted, with more time to prepare for meetings, with more time to build trust within and between interests, and with more discussions in the weeks following and preceding RAC meetings, more negotiated solutions would have been possible. And despite these barriers, there was at least one remarkable example of a negotiated solution: all members agreed in exchange for other things, that s. 35(2) of the Fisheries Act should be placed on the *Law List*.[47]

B. Increasing the likelihood of success

Once an appropriate rule is chosen, the EPA experience suggests the agency or initiating department can enhance the chances for a

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[47]See Chapter II, Part A, section 5.

negotiated resolution by committing to the process, by carefully selecting the participants and facilitator, and by providing a resource pool, a clear deadline and a set of clear rules. Each of these steps are examined in this Part.

1. Commitment

Agency commitment to the process appears to be essential because, as Harter argues, negotiations will not produce results if the negotiators do not believe the agency will use the negotiated agreement.[48] In order to commit, however, the agency may need to enlist the ongoing support of key government departments and other affected agencies.[49]

For the woodstoves regneg, the EPA expressly committed itself in both an organizational protocol developed at the beginning of the process,[50] and in a formal agreement signed at the end.[51] The

[48]Harter, "Negotiating regulations," *supra*, note 2, 51.

[49]*Sourcebook*, *supra*, note 10, 182.

[50]Organizational Protocols, Environmental Protection Agency Negotiating Committee for NSPS for Residential Wood Combustion Units, March 20, 1986, in *Sourcebook*, *supra*, note 10, 187: "EPA is committed to using any consensus reached in these negotiations as the basis of a proposed rulemaking." [at p. 188].

[51]Environmental Protection Agency Negotiating Committee for New Source Performance Standard for Residential Wood Heaters, *Agreement*, November 7, 1993, in *Sourcebook*, *supra*, note 10, 207: "EPA agrees to draft a preamble consistent with the recommended proposed rule and to publish that preamble and the recommended

failure of the regneg on deepwell injection of hazardous wastes, however, has been blamed in part on the EPA's reluctance to commit to any negotiated agreement.[52]

RAC participants were asked to assess the level of commitment shown to the process by FEARO, federal departments, and the Cabinet. Generally, participants had favourable views of FEARO's commitment, but questioned the degree to which government departments and the Cabinet were committed.

Of course, this begs the question, why did the government choose not to implement some of the RAC agreements? As noted previously, one written response indicated the controversial changes were based on the "input of stakeholders and expert federal departments since submission of [the] RAC report."[53] Government departments, quite understandably, were having a difficult time buying into a process that they were not formally part of.[54] This was later corrected. Perhaps there were other "stakeholders" who should

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proposed rule as a Notice of Proposed Rulemaking for a New Source Performance Standard for Residential Wood Heaters..."

[52]Steinzor and Strauss, *supra*, note 46, 888-889: "..the agency reserved its right to modify the deal prior to publication, and EPA negotiators acknowledged that any consensus proposal could be modified when the OMB reviewed the rule."

[53]RAC Document 9.2.1, "Comparison of Gazetted Comprehensive Study List and RAC proposed Comprehensive Study List," (Ottawa: FEARO, September, 1993).

[54]See section 3.1 below.

have been members of RAC but were overlooked.[55] Hence, one line of reasoning is that by not having the complete range of interests involved in the RAC, the government was forced once again to make a hard choice between competing interests.

But what if, as several RAC participants allege, these interests were represented at RAC and simply did not want to abide by agreements made with or by other RAC members if they did not have to? In this case it could be a case of a government responding to interests who are applying the most pressure after the process was complete. By all accounts, the ENGOs had decided for the most part to forgo alternative forms of pressure and to rely on the agreements reached during the process.

Finally, it is possible that some government decision makers did not feel it was necessary to fully respect the RAC process, and were quite comfortable using their status within government to influence a change in the regulations. If this was the case, then there may have been some surprise when RAC members were able to hold the government accountable for those decisions. Perhaps the reason for the government decision includes a combination of these three factors.

[55]See section 3.2 below.

Yet, considering the political distractions of the day, the government's commitment could also be described as remarkable. At various times the process had to endure Constitutional negotiations, the Minister of Environment's unsuccessful run for the leadership of the Party, Cabinet restructuring including a new Minister of Environment, a federal election, and then a new government.

In the final analysis, however, if the government wants to able to entice extremely capable like the RAC members to spend hours of their time contributing to the regulations, then the government must take a more responsible attitude towards the results of the process.

2. Facilitator

ACUS suggests the careful selection of a qualified and "truly neutral" facilitator or convenor is crucial to the success of the negotiation.[56] Susskind and McMahon credit the perceived success of the regnegs on nonconformance penalties and pesticide exemptions, in part to EPA's decision to give the facilitator substantial latitude and independence.[57] In the latter case, the

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[56] *Sourcebook, supra*, note 10, 103.

[57] Susskind and McMahon, *supra*, note 1, 160.

EPA experimented with the process by choosing a facilitator from inside the organization.[58]

Almost all RAC participants expressed support for the work of the facilitator. Only three participants, all from industry, raised concerns about the facilitator's neutrality. RAC participants found the strengths of the facilitator to be her ability to be at ease with participants, to build relationships, to keep members on track, and her ability to "weather" the process.

RAC participants also thought the process could be improved if the facilitator could avoid "forcing" consensus, become better versed on substantive issues, encourage more brokering and trading, set the rules earlier, and be tougher on people who change their views.

Many, however, found it confusing that a FEARO representative acted as chair for the RAC meetings in addition to having a facilitator.

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[58]Perritt, "Negotiated rulemaking," *supra*, note 5, 26. The facilitator chosen was the General Counsel of the EPA.

3. Participants

EPA's experience suggests that strong agency representation at the negotiating table, careful selection of a limited number of other participants, and some pre-regneg training can all contribute to the success of a regneg.

3.1 Strong federal representation

Perritt suggests that part of the reason regnegs at the OSHA failed was that OSHA themselves did not have a negotiator at the table.[59] As Steinzor and Strauss, argue, an agency presence in the process may be necessary to keep the discussion from wandering outside what is permissible by statute, and if parties do not know where the agency stands on disputed matters, they will find it difficult to determine how much to push certain proposals.[60] In fact, Steinzor and Strauss suggest that uncertainty about EPA's "real agenda" in the regneg on deepwell injection of hazardous wastes may have been responsible for the implosion of that process.[61] Doniger reports that one of the first agreements between environment and industry representatives on the regneg on

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[59]Perritt, "Negotiated rulemaking," *supra*, note 5, 1690-1691.

[60]Steinzor and Strauss, *supra*, note 46, 890.

[61]*Ibid*. at 889.

nonconformance penalties was that "the EPA had to come out of its shell and be a full partner in the discussions."[62]

One of Doniger's general concerns about the regneg process is that it may convert agencies into "mere brokers" between interest groups.[63] The EPA, in the view of the environmental participants, was created to be an activist advocate for protection of health and environment, and should bring that mandate to the negotiating table.[64] In spite of this general fear, however, Doniger gives much of the credit for the success of the Woodstoves regneg to the "active and hard headed" attitude taken by EPA negotiators.[65]

It may also be important to clarify regneg roles within the agency. Susskind and McMahon, for example, attribute some of the EPA's success to a decision to split the agency duties of managing and negotiating. One section of the agency managed the regnegs while another section represents the agency's interests at the table.[66]

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[62]Testimony of David Doniger, in *Sourcebook*, *supra*, note 10, 390.

[63]*Ibid.*: "[Regneg] may further encourage agencies to withdraw from the fray and leave environmental groups and industry to fight things out and "let us know who wins.""

[64]*Ibid.*

[65]*Ibid.*

[66]Susskind and McMahon, *supra*, note 1, 160.

Curiously, in one of the few Canadian examples of consensus used in a federal regulatory process, the role of the federal government representatives switched from team members to advisors as the process progressed. In Agriculture Canada's review of its pesticide registration system, organizers found that it was highly unrealistic to expect that the three federal representatives "could fulfil the role of members with the power to sign off for their departments at the end of the day."[67]

All RAC participants, however, felt that certain federal government departments should have been members of the RAC table from the beginning. One FEARO participant described the lack of a direct role in RAC for departments as a "big mistake." Representatives from key government departments have now been added to RAC as full members.[68]

One industry member suggested that had the departments been at the table from the beginning, the process would not have "erupted"

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[67]Versteeg, H., *A Case Study in Multi-stakeholder Consultation: the Corporate History of the Federal Pesticide Registration Review or How We Got From There to Here: Volume I General Principles for Decision Makers*, (Ottawa: Canadian Centre for Management Development, March 1992), at 34. See Chapter II, Part B, s. 3 for more details.

[68]See for example, Minutes of the *Canadian Environmental Assessment Act* Regulatory Advisory Committee, Meeting 10.0, January 25-26 and Minutes of the Canadian Environmental Assessment Act Regulatory Advisory Committee, Meeting 9.0, September 17, 1993. The federal departments that sent representatives were Environment Canada, Fisheries and Oceans, Industry Canada, Indian and Northern Affairs, and Natural Resources Canada.

after the draft regulations were pre-published. Industry participants felt that departments would have brought expertise to the table, and a familiarity with balancing issues, but stressed that in addition to being at the table, departmental representatives must have authority to make decisions and to speak frankly.

Some of the departmental participants thought problems could be expected because public and intergovernmental consultation were taking place on two separate tracks. Several participants felt that, in the absence of federal departments, FEARO was unable to speak on their behalf.

Some ENGO members felt that departments were assuming they could have one last chance to change the regulations, and that there was no incentive for them to test the waters to see if their positions would survive examination by RAC members. One participant, however, wondered how easy it will be for departments to see themselves as just one interest among many, and perhaps even an interest that ought to give way in some situations.

Clearly, key federal departments -- especially those departments with large responsibilities under *CEAA* -- should have been RAC members from the beginning. If they had been, it is likely that both departments and Cabinet would have found it easier to make the necessary commitment to the process.

3.2 Selection of representatives

With respect to the rest of the non-government participants, ACUS suggests that they must be able to speak for their constituency and must be authorized to accept an agreement on behalf of that constituency in the event that consensus is reached.[69]

Some U.S. writers have expressed concern that *ad hoc* processes of selection may not be able to produce sufficient or credible representation.[70] Susskind and McMahon, however, suggest that use the *Federal Register* notice procedures and a thorough nation-wide effort by convenors should be able to eliminate most of this concern.[71] Furthermore, they argue that the EPA has had considerable success bringing effective organization spokespersons to the process.[72]

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[69] *Sourcebook, supra*, note 10, 102.

[70] See Susskind and McMahon, *supra*, note 1, 157, referring to a conversation with Professor Stewart at Harvard University. See also Chapter IV, Part B, s. 5.1 above.

[71] Susskind and McMahon, *supra*, note 1, 157.

[72] *Ibid.*: "Since there was so much at stake for the organizations involved, they did not have to be persuaded to send top-level people."

Many RAC participants found the representation around the table to be acceptable,[73] although almost all had suggestions as to how it could have been improved.

Representatives from the Province of Quebec and many Aboriginal groups were notably missing, but given the political climate of the day it was not realistic to expect them to attend. There may have been too much focus on Alberta and the resource industries, and there could have been better representation from small business, exporters, municipal governments, the northern perspective, labour organizations and international groups. Yet, on the whole, the balance was sufficient, and many of these groups appeared to find some access to the discussions through a "buddy system" that developed along the way. Recent advances in electronic communications such as the internet may facilitate development of a more sophisticated "buddy system" which could allow some of these indirect interests to participate more actively.

RAC organizers were particularly successful in convincing provincial representatives to join the process, and in attracting the extremely capable individuals who represented all groups in the process. With more interest in the process and more

[73]Pers. comm. Notes on file with the author. See pp. 31, 62, 153, 170, 177, 221, 228, 236, 247, 262.

commitment, RAC is more likely to attract participants from the highest decision-making levels in each organization.

3.3 Number of negotiators

ACUS began in 1982 by recommending that the number negotiators at any regneg table should not exceed fifteen. But after some experience with the process, ACUS has revised that estimate to twenty-five.[74] Susskind and McMahon suggest that with skilful facilitation and through the use of delegation, and subcommittees, the EPA in the Nonconformance and Pesticide regnegs was able to effectively work with more than twenty-five.[75]

RAC during the period of study had sixteen members, eight alternates, and a number of regular observers.[76] Of the seven RAC participants who had views on this subject, all had concerns about the size of RAC.[77] Some participants encouraged the use of more subcommittees to address this concern.[78]

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[74] *Sourcebook*, *supra*, note 10, 100.

[75] Susskind and McMahon, *supra*, note 1, 155.

[76] Canada, *Report of the CEAA Regulatory Advisory Committee: Report No. 1* (Ottawa: Federal Environmental Assessment Review Office, April 1993), Appendix I.

[77] Pers. comm. Notes on file with the author. See pp. 14, 40, 49, 75, 221, 230, 261.

[78] *Ibid*. at 40, 230.

Clearly, there is a conflict between this size concern and the concern raised previously about ensuring all appropriate interests are included as members. With good issue selection, the challenge appears to be finding a suitable balance between number and representation.

3.4 Training

The EPA has reported that orientation and training of participants at the pre-negotiation stage has made a significant difference in the operation and success of its regnegs.[79]

Several RAC participants felt some pre-RAC training would have been helpful. Suggested topics included negotiating skills, getting constituent views to the table, and alternate dispute resolution techniques.

4. Resource Pool

In the regnegs on nonconformance penalties and pesticide exemptions, the EPA established a resource pool for scientific and technical information that was managed by the participants

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[79] *Sourcebook, supra*, note 10, 163.

themselves.[80] The EPA was the only agency to use this concept,[81] and Susskind and McMahon attribute some of its regneg success to this decision.[82]

The EPA has not, however, compensated negotiators for anything beyond travel costs.[83] The effect, some claim, is that the burden for researching and developing regulatory alternatives has been shifted from the agency to the non-governmental participants.[84] Regnegs tend to be expensive for participants,[85] and as a result, this shift of burden may threaten the effectiveness of regnegs in the future. California has addressed this problem by setting

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[80]Susskind and McMahon, *supra*, note 1, 160. Both pools were for $50 000, but only $10 000 of the Nonconformance pool was ever used [at p. 145].

[81]Perritt, "Negotiated rulemaking," *supra*, note 5, 1691-1692.

[82]Susskind and McMahon, *supra*, note 1, 160.

[83]See McDonald, Derek Raymond, "Judicial review of negotiated rulemaking", (1993) 12 Review of Litigation 467, at 477; and Testimony of David Doniger, in *Sourcebook*, *supra*, note 10, 391.

[84]See Steinzor and Strauss, *supra*, note 46, 889; and Testimony of David Doniger, in *Sourcebook*, *supra*, note 10, 391.

[85]See comments of Kelly Brown, manager of Ford Motor Company, in "Regulatory Negotiation: Four perspectives...," in *Sourcebook*, *supra*, note 10, 860: "In the very near term, the time and cost factor is going to be important, even to industry people and even if the economy stays good;" See also Written Statement of the Chemical Manufacturers Association before the Senate Governmental Affairs Committee on S. 1504, the Negotiated Rulemaking Act, May 13, 1988. in *Sourcebook*, at p. 401; and Testimony of David Doniger, in *Sourcebook*, at p. 387: "..."reg negs" are extremely expensive for the public interest sector..."

aside a pool of money for lawyers who are participating in an air pollution regneg.[86]

In Canada, both the Economic Council of Canada and the Peterson Committee recommended public funding of public interest groups as an integral part of any regulatory reform.[87]

RAC imposed an extraordinary responsibility and workload on its participants. Most participants felt "stretched" by the work and time demands of the process, but many felt the volume of work was necessary in order for each interest to take a responsible position. Government funding of the ENGO members and their constituents was generous and essential. Industry for the most part insisted on paying its own costs. One industry member felt *per diem* funding could create professional advisors who would perpetuate the process in their own self interest.

If the government is going to expect these groups to share the burden of developing appropriate regulatory responses, then clearly some sort of resource pool is required.

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[86]Stanfield, *supra*, note 25, p. 2766.

[87]See Economic Council of Canada, *Reforming Regulation*, (Ottawa: Supply and Services Canada, 1981), at 82; and Canada, House of Commons Special Committee on Regulatory Reform, *Report*, First Session of the Thirty-Second Parliament, 1980 (Ottawa: Ministry of Supply and Services Canada, 1981), at 30. See also Jackman, M., "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process," 4 Cdn. Journal of Admin. Law & Practice 23 at 41.

5. Clear deadline

Harter and others suggest the most favourable climate for negotiation occurs "when all parties believe there is an urgency for reaching a decision."[88] Without such a deadline, negotiators may purposefully delay or fail to focus on reaching an agreement. ACUS suggests that in a typical regneg, 90% of the progress tends to occur in the last 10% of allotted time.[89] In the regneg on pesticide exemptions, much of the agreement was reportedly finalized during the last meeting.[90]

Deadlines can be imposed by the agency, by statute or by the courts. Doniger suggests that the two successful regnegs he participated in were conducted under court-imposed deadlines arising from prior agency failures to meet statutory deadlines.[91] According to the EPA, the regneg on Farm worker protection standards failed in part because there were no unacceptable

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[88]See Harter, "Negotiating regulations," *supra*, note 2, 47; Susskind and McMahon, *supra*, note 1, 157 (though Susskind and McMahon argue good faith and energy are just as significant); and EPA Assessment, *supra*, note 4, 24.

[89]*Sourcebook*, *supra*, note 10, 180.

[90]Susskind and McMahon, *supra*, note 1, 149.

[91]Testimony of David Doniger, in *Sourcebook*, *supra*, note 10, 393.

consequences for participants if the agency-imposed deadline was missed.[92]

The deadline for RAC, indeed the deadline for proclamation of *CEAA*, continued to move for the entire period of time under study. Many deadlines were set and then abandoned. One industry participant described the moving deadline as a source of ongoing disappointment. Another industry participant felt, however, that despite the moving target, FEARO was capable on engendering a constant state of crisis which kept everybody working hard. One FEARO participant felt the result was unlimited opportunity for detractors of the process to pressure FEARO. To address the problem, one industry member suggested the implementation of an "off-line" process of communication between members so that the first day of face-to-face meetings is not spent "getting acclimatized."

The slipping deadline was beyond the control of FEARO as RAC administrators, but given the political climate, perhaps it was largely beyond the control of Cabinet too. A firm deadline, however, provided it allows enough time to get the work done, can only help the process.

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[92]EPA Assessment, *supra*, note 4, 31.

6. Clear rules

Several RAC participants felt that the process would have been more successful if certain issues had been clarified right at the beginning. Several thought more of a discussion on the meaning of "consensus" would have been helpful, or on whether issues could be revisited. Some participants felt more discussion was needed on the role of RAC in the regulatory process, and on what to expect during the transition from RAC to government. Two participants thought the government could have mentioned the potential for a balance problem if one side decides to send all lawyers to the process. Three participants would have liked to have seen more discussion on the time and work that expected. One participant thought the discussion of goals could have been done earlier; and two participants felt discussions between meetings could have been encouraged.

All of these suggestions are good ones, and could easily be accommodated.

C. The Legal Basis for Regneg in Canada

In 1990, the U.S. Congress passed the *Negotiated Rulemaking Act* in part to assure reluctant or cautious agencies that they had authority to conduct a regneg.[93] At least some U.S. commentators, however, believed there was authority to do so without the statute.[94]

This paper has argued that in some circumstances RAC can contribute to achieving improvement in the regulation-making process roughly comparable to the U.S. experience with regneg. But can regneg be done in Canada? This section suggests that potential legal obstacles are not insurmountable. In particular, it will consider: To what extent the Minister can bind herself? To what extent is the Minister prevented from sharing government information because it is in the "Cabinet system"? Would the RAC process amount to an inappropriate delegation of the Minister's authority? Can someone challenge the process if they are not chosen to participate as a member? If the process is formalized, is there an increased risk someone will challenge a regulation? and finally, How could the federal government go about establishing such a process?

[93]Public Law 101-648, 104 Stat. 4969, s. 2.

[94]In Harter's seminal paper on regneg, he argued that genuine negotiation could be implemented within the current legislative framework (see Harter, "Negotiating Regulations," *supra*, note 2, 33.). In 1987, Perritt concluded the same thing (see Perritt, "Administrative Alternative," *supra*, note 5, 899.).

1. To what extent can the Minister bind herself?

In the successful EPA regnegs, the EPA committed to using any negotiated solution as the basis for a proposed rule. Can a federal Minister bind herself in the same way?

It is important to note, first of all, that the regneg process does not require the Minister to fetter her discretion. Consensus-based regulation making does not seek to remove ultimate authority for decisions from the government which must still ensure that any proposed regulations are consistent with the law and with public policy.[95] Even the most ardent RAC supporters did not propose to transfer to RAC any of the government's decision-making authority. The commitment necessary from decision makers is better described as a presumption that any consensus agreement is to be considered favourably unless reasons can be articulated as to why it should not be.[96] In practice, this could simply mean

[95]This is one of the reasons why Perritt describes the delegation concerns in the U.S. related to regneg as "superficial." Perritt also argues that because a regneg provides a standard of political accountability which is greater than conventional rulemaking, regneg "escapes the problem of unaccountable decision-making which the delegation doctrine is intended to avoid." [See Perritt, "Administrative Alternative," *supra*, note 5, 900-902].

[96]See British Columbia, Round Table on the Environment and Economy, *Reaching Agreement: Volume II, supra*, note 40, 6. See also Brickman, Jasonoff, Ilgen, *Controlling Chemicals: The Politics of Regulation in Europe and the United States* (Ithica: Cornell University Press, 1985), at 315: "[T]he European experience suggests that such groups will be most likely to reach genuine accommodations if they are pluralistic in structure and

committing to pre-publish any agreement in the *Canada Gazette*, but would also mean reserving the right to adjust the results (and provide reasons), based on any concerns raised during the formal notice and comment period. The most difficult problem is going to be a political one: persuading other departments and central agencies to allow the pre-publication of a negotiated solution without first giving them a second chance to modify it.[97]

But even if the Minister does want to fully bind herself to the negotiated solution, there is authority to suggest she could not be prevented from doing so. In *Western Pulp Inc. v. Roxburgh*, the Federal Court was asked to decide whether fisheries officers, authorized under the *Fisheries Act* and regulations to issue a fisheries closure order, can be said to be improperly exercising that power if they are instructed to do so by others.[98] In his decision, Strayer J. treated the exercise of delegated authority in the same way the courts have treated the exercise of legislative authority:

> If a legislator approves a legislative measure within his jurisdiction, it is not open to the courts to question the motivation of the legislator in doing so. Judges could not, for example, refuse to give effect to

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are granted real decision-making authority, for example, through a legal presumption of validity for their recommendations."

[97]See Chapter IV, Part B, Section 4, "Support of government decision makers.

[98](1990), 39 F.T.R. 134 (F.C.T.D.). *Roxburgh* was affirmed on appeal without really commenting on this particular issue ((1990), 122 N.R. 156 (F.C.A.)).

> acts of Parliament simply because the majority of members voted as they were told to do by party whips and not out of personal conviction. Similarly it is irrelevant that the respondents issued the impugned orders because they were directed to do so by those having broader responsibilities or more expertise in respect of the health hazards.[99]

Like the legislator "towing the party line," or the fisheries officer following the directions of her superiors, if the Minister decides to be "directed" to regulate in a certain way by a committee of experts she has appointed and agreed to be bound by, then *Roxburgh* suggests she cannot be challenged on the basis that she did not exercise her regulatory powers "herself." *Roxburgh* has been criticized, however, for ignoring the subordinate character of executive delegates and the greater restrictions placed on the exercise of their authority.[100]

2. To what extent is the Minister prevented from sharing government information with participants because it is in the "Cabinet system"?

As we have seen, convenient public access to information is considered to be an essential component of open and accountable decision making,[101] yet the regulatory process has been criticized as secretive especially during the discussions which lead up to

[99] *Ibid.* at 141.

[100] Keyes, J.M., *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992), at 223-224.

[101] See Chapter I, Part D.

Cabinet meetings.[102] Is there any legal reason why the Minister would be prevented from sharing more government information with regneg participants?

A review of both the common law and the *Access to Information Act*[103] suggests the government's reluctance to share information is based more on policy than in law. The Supreme Court of Canada held recently in *Carey v. Ontario*[104] that non-disclosure of Cabinet documents[105] is not a Crown privilege, but something called a public interest immunity. One of the issues in *Carey* was public access to a Cabinet document for the purpose of proving a legal claim against the government. The court held that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest.[106]

Carey is also an indication, however, of a general movement away from the idea that Cabinet documents should be absolutely

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[102]See Chapter II, Part B, Section 2.

[103]R.S.C. 1985, c. A-1.

[104][1986] 2 S.C.R. 637, *applied* in *Workers Compensation Board v. Dimitrijevic*, [1989] 6 W.W.R. 186 (Sask.C.A.); and *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marshall Prosecution)* (1988), 42 C.C.C. (3d) 129 (N.S.S.C.,T.D.).

[105]The term "Cabinet documents" is defined broadly by the S.C.C. to be any document "prepared by government departments and agencies in formulating government policies, decisions made by Cabinet, and the like..." (*Ibid.* at 654).

[106]*Ibid.* at 659.

protected from disclosure.[107] LaForest, who wrote the opinion in *Carey,* was prepared to give some weight to the argument that disclosure prevents Cabinet ministers from candidly discussing policy issues which in turn affects public policy and the public interest.[108] But in LaForest's view the purpose of secrecy in government is to "promote its proper functioning, not to facilitate improper conduct." Disclosure, he writes, serves to reinforce public faith in government institutions, has important implications for the administration of justice, and is especially important today because the public is demanding more open government decision making.[109]

Turning to the federal *Access to Information Act* ("AIA"), it is apparent that there are few clear statutory restrictions on the release of government information. The *AIA* sets out some categories of information which the government is prohibited from releasing,[110] but many more sections are simply permissive.[111] An

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[107]See *Ibid.*

[108]*Ibid.* at 657.

[109]*Ibid.* at 673.

[110]For example, the *AIA* requires the government to protect from disclosure trade secrets, personal information, and information which a specific section or sections of an Act of Parliament prohibit the disclosure of.

[111]For example, information subject to solicitor-client privilege; information obtained "in confidence" (with consent); information concerning federal-provincial affairs, international affairs, defence, and national security; information concerning law enforcement, investigations and security of penal

extremely critical report recently issued by the federal Information Commissioner has suggested that the federal governments disclosure practices are in serious need of improvement.[112]

3. Would the RAC process amount to an inappropriate delegation of the Minister's authority?

One common concern expressed is that regneg would amount to a inappropriate "delegation" of power. By agreeing to base the proposed rule on agreements reached by regneg members, would the government be abdicating its responsibility?

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institutions; information which could threaten the safety of individuals; information concerning the economic interests of the Government of Canada or the operations of Government; information relating to testing or auditing procedures; and information that will be published within 90 days.

[112]Canada, Annual Report Information Commissioner 1993 - 1994 (Ottawa: Supply and Services Canada, 1994). Reviewing the first decade under the *Act*, the Information Commissioner writes, at p. 4: "Alas, guided by often hostile ministers and foot-dragging bureaucracy, some departments began to manage exemptions rather than promote openness. Access to some information previously routinely available was shut down, ostensibly to protect the privacy of individuals or private corporations ... To this day, some officials have no hesitation in admitting, even advocating, that important matters simply be not written down or preserved. too often, the influential voices of the Justice department and the PCO are raised in support of what the Act can keep secret, not what should be made accessible. Indeed, in 1992, the .. Information Commissioner had to sue Prime Minister Mulroney in order to compel disclosure of public opinion poll results..."

As we have seen above,[113] when considering challenges based on subdelegation or transformation of authority, the courts have looked for the degree of interference with individual interests, the presence of standards or criteria governing the subdelegation, and the personal limits and abilities of the subdelegates. Courts may find, as a result, that the complexity of the regulatory subject matter warrants subdelegation to persons who have expertise in the matter. Even ambulatory references are not clear cases of subdelegation.

Hence, there is some authority to suggest regneg could survive a court challenge. RAC could be described as a group of experts, carefully constrained by a statute (*CEAA*), and particularly suited to the job of achieving the complex social goal of designing a federal environmental assessment process. Or it could be argued that any dangers inherent in the process would surely fall short of the concerns associated with ambulatory references.

Like the question of the Minister binding herself, however, it is far from clear that regneg requires her to delegate any authority. Her commitment would be to pre-publish a negotiated solution, after which a formal notice and comment process would begin, and the Minister would reserve her right to make changes based on

[113] See Chapter III, Part E, section 1.2 above.

comments she receives provided she formally articulates the reasons for any change.

4. Can someone challenge the process if they are not chosen to participate as a member?

Clearly the government cannot invite every interested party to participate in a regneg, and must make choices as to which groups are going to be represented. Can someone challenge the government if they are not chosen?

A recent Supreme Court of Canada decision suggests that that they could not: If the government chooses to fund or consult with a certain group, it must do so in a manner consistent with the *Charter*, but it is under no general obligation to fund or consult with a group purporting to represent the opposite view. In *Native Women's Assn. of Canada v. Canada*,[114] the court was asked whether the federal government violated ss. 2(b) and 28 of the *Charter*[115] when it refused to invite a group of Aboriginal women to a discussion on constitutional reform. The government had already invited other Aboriginal groups alleged by the women's group to be

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[114] [1994] 3 S.C.R. 627; [1992] 3 F.C. 192 (C.A.) *reversing* (1992), 90 D.L.R. (4th) 394. See also *Haig v. Canada*, [1993] 2 S.C.R. 995.

[115] The effect of s. 2(b) in combination with s. 28 is freedom of expression guaranteed equally to male and female persons. Sopinka did note, however, that he thought the argument would have been better framed as a s. 15 equality argument (see *Ibid.* at 664).

male-dominated. Sopinka, who wrote most of the opinion, stated that only in extreme circumstances will providing a platform or funding to one group have the effect of suppressing the freedom of speech of another group.[116] He and L'Heureux-Dubé both agreed, however, that such circumstances could place a positive duty on the government to provide equal opportunities of expression.[117] After noting the Aboriginal women had opportunities to express their ideas both directly to the government and through the chosen Aboriginal organizations, Sopinka held that their freedom of expression had not been infringed.[118] McLachlin, who dissented on this point, held that the freedom of governments to choose and find their advisors on matters of policy is not constrained by the *Charter*.[119]

5. If the process is formalized, is there an increased risk someone will challenge a regulation?

The primary grounds for review on procedural grounds in the U.S. is the *Administrative Procedure Act* ("*APA*") and the *Federal Advisory Committee Act* ("*FACA*").[120] The volume of U.S. litigation

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[116] *Ibid.* at 656, 657 and 664.

[117] *Ibid.* at 664 for Sopinka, and 667 for L'Heureux-Dubé.

[118] *Ibid.* at 664 and 665.

[119] *Ibid.* at 668.

[120] See Chapter III, Part B for a discussion of these two American statutes.

under the *APA* especially is one reason why Canadians appear to be wary of an *APA* for Canada. In the absence of an *APA* or a *FACA*, there is very little opportunity in Canada to challenge a consultation process procedurally. Therefore, any procedural rights or obligations imposed by a formalized regneg process would increase the risk of someone challenging it.

However, since one of the primary advantages of regneg is purported to be its ability to reduce the inclination of parties to litigate their disputes, increasing the opportunities for litigation would not appear to be as pressing a concern as it could be. In addition, as set out below, there appears to be no compelling reason at the moment to formalize the process through legislation or otherwise until or unless a few regneg experiments prove to require formalization. And finally, even if the process is formalized through a statute, it does not necessarily have to add procedural obligations. The U.S. *Negotiated Rulemaking Act of 1990*[121] for instance, although encouraging the use of regneg by legitimizing the process, stops short of adding procedural rights. A privative clause in the statute expressly denies judicial review of any decision relating to establishing or conducting a regneg.

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[121]See Chapter III, Part B for a discussion of this statute.

6. How could a government go about establishing such a process?

Since there are no clear legal barriers regneg in Canada, no statutory authorization is required. The Minister must simply be willing and politically able to give her firm commitment to participants, and take the other steps necessary to increase the likelihood of process succeeding.[122]

In order to conduct a few regneg experiments in the short term, the better course would be to build on existing consultation mechanisms. The federal government, and particularly Environment Canada, have had a long history of consultation practices. Relationships have been formed, and in many cases the groups involved are well known to each other. Rosters could be selected from existing lists, and supplemented by publishing a notice inviting anyone interested to contact the Agency.

D. Conclusions

To the extent RAC is able to improve the performance of the federal regulatory process, this Chapter has considered in what circumstances the RAC process would be most appropriate, and also

[122]See Parts A and B above for a discussion of appropriate circumstances for regneg and steps an initiating department can take to increase the likelihood of a negotiated solution.

what steps could be taken by an initiating department to increase the likelihood of achieving a negotiated solution.

From the discussions in the Chapter it is apparent that RAC participants had no shortage of opinions with respect to RAC's shortcomings. This was no *post mortem*, however, and it would be a mistake to interpret this volume of criticism as an indication that the RAC experiment has failed. The process has clearly generated a significant amount of frustration among participants, but suggestions were almost always offered in the spirit of improving the process, or "getting it right."

The RAC experience, together with the regneg experience of the EPA, suggests that a successful process will have a number of basic elements. Careful rule selection appears to be a key; the power of each party must have some kind of check, each party must believe they can benefit from the process, and issues must be numerous, "ripe" for negotiation, not purely objective, and must not involve a fundamental value. Furthermore, the chances for success are enhanced if the initiating agency is able to fully commit to both the process and the results of the process (while staying within its statutory mandate), play a strong role in the negotiations, make a careful selection of participants, provide financial and other resources to participants especially volunteer organizations, convince all parties to work towards a firm deadline, and is able to be upfront with all participants with respect to the demands and pitfalls of the process.

So how did RAC fare against these standards? RAC itself achieved an adequate balance among interests, although there could have been more variety in the professional backgrounds of representatives. The issues selected for discussion were broader and more complex than any of the regneg issues, but were not clearly inappropriate for such a process. Participant selection and participant commitment was strong enough, but government commitment -- especially Cabinet commitment -- needed to be a lot stronger. Key federal departments should have be included as formal members from the beginning; but the government's financial support for the ENGO members contributed significantly to the success of the process.

Conclusions:

This paper has examined the experimental Regulatory Advisory Committee as a process that may improve the performance of the federal process for making regulations in Canada. The performance of the federal process, and RAC's potential to improve it, have been measured in terms of their ability to include the participation of a diverse set of viewpoints, produce quality regulations, and hold the regulation makers to a high standard of accountability. Although it would be premature to pass final judgment on RAC, the results of this study suggest that, in certain circumstances and with some refinements, the model can improve the performance of the process in each of these areas.

Decades of government and non-government studies have argued that if the regulatory process is to be compatible with the principles of democracy and open government, it must include more than simply a procedure for notice and comment. Strictly advisory committees can work but have been problematic for a number of reasons. Participants often feel their considerable time and effort is wasted, there is evidence that departments do not provide equal and consistent consultation opportunities to all groups, and there is evidence of consultation fatigue among those consulted. The end result in many cases may be advice of limited value because bargaining positions have not been challenged and trade-offs have not been considered.

Although there was considerable confusion among RAC participants as to the committee's precise role in the decision-making process, RAC was clearly much more than simply an advisory committee. There was a common expectation that if a consensus decision could be reached, government would disregard that consensus only for very good and articulated reasons. Where RAC members could not reach consensus, they were to assist with the ultimate resolution of an issue by providing decision makers with a good view of the implications of any particular choice.

But while RAC was not strictly an advisory committee, neither was it a negotiating committee -- at least not in the sense of a regneg committee in the U.S. Perhaps due to the range and breadth of issues, the steepness of the learning curve, or because agreements with respect to any one regulation carried important implications for the others, there is little evidence of trade-offs being made between RAC members. But an examination of the regneg model suggests that RAC could benefit from becoming more like regneg in several respects.

Regneg has been a success in the U.S. primarily because it has been able to reduce the volume of litigation associated with American rulemaking, and because it has added legitimacy to the inherently political decisions of American rulemakers. Although the level of litigation in Canada is not expected to ever approach that of the U.S., the subject of environmental assessment has recently attracted an uncommon amount of litigation, and the existence of several substantive grounds for review suggest litigation is a growing concern in this country. Hence, the potential for reducing litigation is an equally important, though perhaps not equally forceful, motivating factor here. The search for legitimacy, however, appears to be one of the principal reasons why participants were attracted to the RAC. Almost all participants speculated that, without RAC, the regulations would have been unworkable. A review of the relevant law in Canada suggests there are no insurmountable legal reasons why regneg could not be used to assist federal government decision makers.

Borrowing from the regneg model, RAC could benefit from a clearer statement of purpose and a commitment from all participants, including government, to both the process and the results of the process. Many RAC participants, especially federal department representatives, raised strong concerns about fettering the discretion of Ministers. But there was not a single RAC participant who proposed transferring to RAC any part of the government's decision-making authority. The challenge appears to be finding a way for the government to show respect for the process without binding itself.

In the U.S. one important part of the government's commitment is to publish any agreement reached as a Notice of Proposed Rulemaking. The decision maker, however, is still expected to consider public comments submitted in response to this notice and reserves the right to make modifications before issuing a final rule. In Canada a similar commitment could be to publish any agreement as a proposed regulation in the *Canada Gazette, Part I*, and by imposing an appropriate period for public comment to test the results.

As the critics of the regneg model point out, however, there is something inherently dangerous in the process. And as RAC moves closer to this model, Canadian decision makers must take certain precautions. Negotiated solutions which serve the interests of essentially private parties may not always fall within the limits of the relevant statutory authority or take into account the interests of the broader "public." These fears can be addressed for the most part with strict attention to the legal framework, by carefully selecting participants, by providing a notice and comment period, and by requiring Governor in Council approval. RAC begins to show its strength, however, when measured against the current practice of informal, selective, and less accountable negotiation.

The Americans have found that regneg works best in a small but significant set of circumstances. Most importantly, the issue to be negotiated must be narrow and must involve a limited number of affected interests. Similarly, there was a sense among RAC participants that RAC would have stood a better chance of achieving consensus if there had been fewer issues and fewer players. Yet surprisingly, given the considerable reach of the issues and their complexity, many participants felt that far from being inappropriate, RAC was the best option available.

This suggests that there may be a second set of circumstances where a process like RAC can be an effective law-making tool: where there is a subject for which many months of development is necessary, where there are several interrelated policy decisions to be made, and where it is difficult for regulators acting alone to understand the full implications of their decisions. Over time, as participants develop mutual respect, it becomes increasingly difficult to take unsubstantiated or disruptive positions. Once in place and informed, RAC has the ability to focus quickly on an issue without having to spend time understanding the context.

And if applied to this second set of circumstances, RAC's inability to reach a negotiated solution for every issue is not necessarily a failure. Two of the primary advantages of the process -- fuller understanding of the implications of each decision and better relationships between adversarial parties -- are quite likely to occur even in the absence of a total agreement.

As it was applied, however, RAC encountered a number of practical problems, each suggesting some refinements to the process are in order. It was the view of many participants, especially those in industry and government, that the process failed to adequately examine the cost implications of many decisions. A more rigorous application of the RIAS process has been proposed, but serious difficulties remain with respect to accounting for environmental benefits. Participants also felt that debates were sometimes conducted without adequate technical information.

A number of mistakes were made. As almost all participants concluded, federal department representatives should have been members of RAC from the beginning. This may have enhanced the government's commitment to the results of RAC which was considered by many to be suspect. Several RAC difficulties could be attributed to periods when the "cloak of cabinet confidentiality" had descended. As part of their commitment to the process, governments must re-examine the *de facto* policy of non-disclosure. A review of the relevant law suggests there are fewer legal barriers than what is suggested by government practice.

RAC imposed an extraordinary responsibility and workload on its participants, and many members felt their resources had been stretched to the limit. The considerable effort required should be an important factor in the decision whether or not to use the process.

Yet despite these difficulties, RAC has generated a cautious optimism for the process on the strength of its achievements. RAC members were able to reach consensus in some areas. The implications of *CEAA* regulatory decisions are better understood as a result of RAC. RAC led to an improved understanding of a complicated statute and of environmental assessment in general. RAC led to identification of administrative problems in other federal regulatory regimes. Participants generally acted in good faith, and RAC led to improved working relationships between them.

Hence, in limited situations, and with appropriate refinements, RAC can better respond to the expectations of those only indirectly affected, but at the same time respond to the expectations of those directly regulated. It provides exceptionally early notice of regulatory initiatives, and provides all participants with enhanced access not only to the information upon which decisions are based, but to the decision makers and the other competing interests. RAC as a concept enjoys the support of virtually all participants, and the enthusiastic support of at least one person from each of the groups studied. Those participants who were least supportive tended to be those who already enjoy some level of direct influence.

In the right circumstances, RAC can result in regulations which are considered to be fairer by all participants, and to be based on a more thorough analysis of the implications of each substantive decision. The interests of all parties can be maximized to the point where disputes will be litigated less, or litigated more selectively. Compliance is likely to increase, and perhaps most importantly, relationships between traditionally adversarial parties are likely to improve.

By virtue of opening up the process, and providing better access to the basis for decisions, RAC can increase the accountability of decision makers. By delegating and sharing much of the work, the government is able to get more value for the time and resources it spends on a regulation.

Two years after the end of the period under study, RAC members are still at the table, RAC is still uncertain about its role in the regulatory process, and RAC is still a controversial subject especially among federal departments. But the prevailing attitude is that something like regneg is coming, and the results of this study suggest it should -- at least on an experimental basis. If it does, based on this first experiment, RAC can offer some valuable lessons.

Appendix A:

Detailed Responses from RAC Study Participants

CHAPTER II

What was RAC?

Views on where the RAC fell on this continuum varied even within particular interests, though most would agree there was some confusion. Within FEARO, one participant saw RAC's role as originally and fundamentally political.[1] Another suggested that although public relations was a favourable aspect, the original idea was to get better regulations so the government in power could not say no.[2] There were conflicting versions of RAC's original marching orders. One participant suggested RAC's "advisory function" was well set out at the beginning, though RAC may have lost sight of this as the process continued.[3] Another recalled that it was made "very very clear" at the first meeting that RAC members were there to write the regulations; and that if RAC could reach consensus, the government would take it very seriously.[4]

Among industry participants, a similar divergence of views existed. Two participants firmly held the view that RAC was strictly advisory, and said they would have difficulty

[1] Pers. comm. Notes on file with the author, p. 3.
[2] *Ibid.* at 35.
[3] *Ibid.* at 117.
[4] *Ibid.* at 261.

supporting a process that was anything more than advisory.[5] RAC, in the view of one of the two, worked on a single issue unlike Cabinet which must be free to balance this issue with a number of other issues of equal or greater importance.[6] By contrast, one industry member had the clear impression that RAC members had been assembled not to advise but to write the regulations. This member expressed disappointment that the government chose to "meddle [with the RAC agreements] simply for the sake of meddling."[7] The views of the remaining industry participants fell somewhere in between. One member described RAC as an advisory committee taken to a "higher level," but was unsure about more of a decision-making role for RAC because of a concern that public interest groups may not be well informed.[8] One member thought that although RAC was advisory only, where there was consensus, it should be very hard to ignore.[9] One member felt RAC was in reality both an advisory committee and a negotiating committee.[10] Another member also chose to describe RAC in more practical terms as an "understanding-building process."[11] One member preferred to think of RAC as a partner in a shared decision-making process: politicians would make the final decisions, but RAC was there to help find solutions.[12]

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[5]*Ibid.* at 97, 248.
[6]*Ibid.* at 248.
[7]*Ibid.* at 158.
[8]*Ibid.* at 219-220.
[9]*Ibid.* at 167.
[10]*Ibid.* at 275-276.
[11]*Ibid.* at 53.
[12]*Ibid.* at 205.

The views among ENGO members were relatively more consistent, but not entirely. Two members said that had they believed that RAC was going to be purely advisory, they would not have participated.[13] For public interest groups, consultation programs are often a waste of time, one member said, and government must be sensitive to this. The expectation for these ENGO members was that although RAC fell short of a decision-making body, a RAC consensus was to be disregarded only for very good and articulated reasons.[14] Another member preferred to describe RAC as an advisory body but with a strong mandate: consensus should be strong in Cabinet, but where there is no consensus on an issue it would be "fair game". The RAC report, in the view of this member, was not treated very well.[15] One member recalled that RAC had been originally promoted as a negotiating committee, and remembers insisting that the notion of "advisory" be included in the terms of reference.[16] An ENGO member who was unclear about RAC's origins, felt that by the end of the process RAC was clearly a negotiating committee, and there was an assumption that any consensus reached would be followed.[17]

Provincial members saw their position in RAC as slightly different from the other RAC members. One member suggested

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[13] *Ibid.* at 93, 229.
[14] *Ibid.* at 229.
[15] *Ibid.* at 239.
[16] *Ibid.* at 150.
[17] *Ibid.* at 176.

that the provinces agreed as a group not to advance provincial positions, but to represent provincial positions generally. As a result, this member felt the provinces played less of a negotiating role than an information role, although this may have evolved over time.[18] Another member recalls receiving a letter of invitation that did not set out any clear role, but which suggested RAC was to be an advisory committee only.[19] But one member suggests the provinces "got beyond observing quite quickly" and had been in "negotiating mode" for the last year.[20]

As only observers to the process, federal department participants had the benefit of being some distance from the proceedings on this question. Many of the these participants felt there was a misguided perception, especially among the ENGO members, that a RAC consensus would be accepted unconditionally.[21] As one participant said, "the creature created a life of its own and nobody said no."[22] One participant blamed the rising expectations in part on certain "off the cuff" remarks made by the Minister of Environment to some of the ENGO members, and suggested the Minister was not receiving good advice on the subject.[23] Another suggested that although the ENGO members could have been mislead at the beginning, "everyone on the industry side knew that the RAC

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[18]*Ibid*. at 143.
[19]*Ibid*. at 119.
[20]*Ibid*. at 198.
[21]*Ibid*. at 60, 77, 190.
[22]*Ibid*. at 71-72.

advice was one of many pieces of advice that the government was going to get."[24] As for the actual role of RAC, there was some divergence of opinion. One participant described RAC as a "highly sophisticated stakeholder advisory committee developing basic public policy," although in this person's view it was inevitable that RAC was not able to make decisions on all things.[25] One participant thought RAC was purely consultative.[26] Another felt that if RAC conclusions were reasonable, they should be accepted in the absence of a good reason.[27]

Evidence of Bargaining?

If RAC was indeed a negotiating committee, one would expect to find some evidence of "bargaining" between opposing parties, or of some "bundling and trading" of issues. For the most part, RAC participants said that outside of a few instances on the *Law List* and the *CSL*, they saw very little. Within FEARO, some participants felt that RAC members simply were not able to develop a good enough understanding of the linkages between the regulations to allow bundling and trading. With more discussions among members between

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[23] *Ibid.* at 190.
[24] *Ibid.* at 77. See, however, note 7 above.
[25] *Ibid.* at 181.
[26] *Ibid.* at 77.
[27] *Ibid.* at 60.

meetings, and with more time, these participants thought more would be possible.[28]

Similarly, one industry member suggested the complexities of the Act lead to a lack of understanding of what was to be gained and what was to be lost; and as a result everything had to be viewed as a package.[29] This member felt, in addition, that there was no mechanism for making a deal "stick" -- no third party that he really believed would understand what was being traded.[30] Another member felt on occasion that RAC members could agree but FEARO could not, and that this tended to dampen members' enthusiasm for compromise.[31] One member suggested that more give and take would have been possible only with fewer issues and more preparation time.[32] One participant attributed the lack of bargaining to inexperience, suggesting that even within industry it took a long time to build the necessary trust.[33] One member objected to the very idea of a compromise, saying that such a compromise often lacks any defendable rationale.[34] One member suggested philosophical differences may have prevented a lot of give and take, although this member

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[28] *Ibid.* at 117, 262.
[29] *Ibid.* at 45.
[30] *Ibid.* at 45.
[31] *Ibid.* at 156.
[32] *Ibid.* at 167.
[33] *Ibid.* at 207.
[34] *Ibid.* at 219.

suggested an "off-line" process encouraging more dialogue between meetings would have facilitated more.[35]

At least one of the ENGO members saw no bundling and trading at all. Describing the general RAC attitude as "butt heads until everybody is exhausted," this member felt that an historical distrust between the parties sometimes forced the ENGO members to push for assessments of projects that did not need to be assessed.[36] Other ENGO members, however, saw some bundling and trading, even if it was less than explicit. One member suggested that where one group felt it had prevailed on an issue, it appeared to be more flexible on other issues.[37] Another member noted some "pragmatic compromises" which he described as the attitude "they'll get it anyway," or "that sounds reasonable."[38] One member found it was much easier working in a three-person environment, and noted some trading that had gone on in such circumstances after one meeting in particular.[39] Similarly, one member pointed to some discussions of the five-member *Law List* subcommittee, and suggested ENGO members may have stopped pursuing some *Law List* candidates in order to secure the listing of section 35 of the *Fisheries Act*.[40]

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[35] *Ibid*. at 278.
[36] *Ibid*. at 92.
[37] *Ibid*. at 151.
[38] *Ibid*. at 226.
[39] *Ibid*. at 175.
[40] *Ibid*. at 241. Section 35 of the *Fisheries Act* R.S.C. 1985, c. F-14 requires a permit for any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Federal department participants were also able to point to a few instances of bundling and trading but on the whole did not see much of it happening. One participant attributed this to the reluctance of all parties to look beyond their own narrow perspectives to the "big picture." This participant wondered whether FEARO should have been providing the larger perspective.[41] Another participant felt that the ENGO members did not appear willing to compromise on anything.[42] One participant objected to some instances of negotiation on the *CSL* because they appeared to be negotiated "behind closed doors" and without the input of important constituencies.[43] Section 35 of the *Fisheries Act* was once again used as an example of something that resembled a compromise but this time exchanged not for other *Law List* items but for a concession on the *CSL* related to nuclear facilities used for research.[44]

CHAPTER III

Was legitimacy a motivating factor for RAC?

The search for a mechanism to lend legitimacy to the process also appears to be one of the primary reasons why participants were attracted to the idea of RAC. Within

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[41] *Ibid.* at 56.
[42] *Ibid.* at 82.
[43] *Ibid.* at 71.
[44] *Ibid.* at 82.

FEARO, participants reported a sense that public trust in government decision making is waning, and that people are now "knocking on the doors of government power."[45] One FEARO representative described the attitude of the government with respect to the *Law List* as "we know best," but added, "we didn't know."[46] Even one participant who feels the government is capable of making legitimate decisions without outside help, expressed the view that bureaucrats and consultants could be made more accountable.[47]

Some federal department participants questioned whether the expertise provided by government was accepted by all RAC members.[48] One departmental participant felt that the expertise of RAC members was in many cases equivalent to that of government departments.[49]

A RAC member from one of the provinces noted a general sense of dissatisfaction with government, but thought government was capable of making enlightened decisions on its own.[50] Another provincial representative felt that deferring to government expertise was a real "danger" and thought that RAC may have the potential to address this problem.[51]

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[45] *Ibid.* at 15 and 38.
[46] *Ibid.* at 112.
[47] *Ibid.* at 3.
[48] *Ibid.* at 71.
[49] *Ibid.* at 192.
[50] *Ibid.* at 144.
[51] *Ibid.* at 129.

Many of the strongest views were expressed by industry members. One member felt that far from offering the solution, "government tends to be the problem," and felt that often the proponent ends up carrying the policy debate.[52] Another categorically stated "there is no way government can do it on its own."[53] One member said that 26 million people are a good resource, and suggested that if we are going to be able to come up with "something better," government must begin to share power.[54] All industry participants, however, were not of this view. One industry participant, preferred the views of public servants to the views of public interest groups because they were perceived as more reasonable and informed.[55] Another felt that the government had all it needed to know four years previous to RAC.[56]

ENGO members felt that government could have had enough expertise and knowledge to regulate on its own, but that without RAC these resources would not have been tapped.[57] One member felt that time pressures often prevent government from assessing implications, begging questions, and seeking solutions.[58] Another member felt that our political structure sometimes discourages adventurous or controversial views from surfacing within government, and pointed to examples where it

[52] *Ibid.* at 46.
[53] *Ibid.* at 137.
[54] *Ibid.* at 206.
[55] *Ibid.* at 219-220.
[56] *Ibid.* at 249-250.
[57] *Ibid.* at 150, 176, 232.
[58] *Ibid.* at 150.

appeared the views of government scientists had been silenced for political reasons.[59] ENGO members also felt the environmental community had significant expertise to contribute to the process. One member suggested that *CEAA* goes right to the heart of the concerns and expertise of the environmental community: "*CEAA* is an environmental regulation, not an oil and gas regulation."[60] Another felt that the ENGO members had an environmental law expertise that no other RAC participants could match; and referred in particular to two ENGO members who had been invited to assist the Parliamentary committee entrusted with the clause by clause review of *CEAA* when it was still before the House of Commons.[61]

CHAPTER IV

A. Assessment of RAC Participants

Overall Assessment

With few exceptions, participants expressed support for the RAC concept, but most also expressed strong concerns about how the experiment fared in practice. Although the level of enthusiasm for the process varied among participants, at least one participant from each of the five groups

[59] *Ibid.* at 241.
[60] *Ibid.* at 229-230.

interviewed could be described as an enthusiastic supporter. These findings are perhaps the most significant indication that there may be value to the process and that it may be something to pursue and perfect in the future.

Among FEARO participants, the views were mixed, but mostly positive. One supporter felt that because *CEAA* was so complex and far reaching, RAC was the only alternative.[62] Another felt the end result was better regulations and more information.[63] One described RAC as the "way of the future," but cautioned the process is still in its genesis.[64] One felt without RAC, it would have been impossible to develop the regulations.[65] One said "it wasn't perfect, we made mistakes, but the proof is we're still at the table with renewed interest."[66] Two participants, however, were not so favourable. One felt that the cost of RAC in terms of timing and delay could not be justified.[67] Another thought that RAC failed in many senses because "lobbying went on when the crunch came," and because expectations were too high.[68]

The views expressed by industry participants were also divided but generally favourable. One member felt that there was no magic to the process, but thought it could be made to

[61] *Ibid.* at 239.
[62] *Ibid.* at 19.
[63] *Ibid.* at 29.
[64] *Ibid.* at 42.
[65] *Ibid.* at 111.
[66] *Ibid.* at 268.
[67] *Ibid.* at 3.

work; this member warned not to "throw the baby out with the bath water."[69] One member suggested that RAC was the right approach, but felt that since resources are scarce for everybody, the committee should be pushed only as far as it can go, and government should deal with the "leftovers."[70] One member said that despite "hard knocks and dreary stretches," RAC was ultimately a rewarding experience.[71] Another described RAC as a "valuable process" and a good personal experience, but hoped to see the process modified in the future.[72] One participant called it a good experiment, but thought it needed to be better balanced, more manageable, realistic, focused, and conducted in a shorter time.[73] One participant described RAC as "ground breaking," and an "honest first attempt to really prove that consultation can work," but considered the ultimate reaction of politicians and departments to the work of RAC to be a "slap in the face."[74] One member felt that RAC was both frustrating and challenging, and suggested that although it did not fail, it may be more successful with better cost/benefit analysis and a more limited issue.[75] Two industry participants, however, were not so favourable. One felt "a bit disappointed overall" because he thought RAC made the process more complicated and made the regulations too complicated; this

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[68] *Ibid.* at 18.
[69] *Ibid.* at 54.
[70] *Ibid.* at 135.
[71] *Ibid.* at 165.
[72] *Ibid.* at 173.
[73] *Ibid.* at 224-225.
[74] *Ibid.* at 201, 206.

participant also expressed a concern about the work load demanded.[76] The other was willing to give "passing marks for the concept," but not for the process, although this participant attributed much of the problem to deficiencies within the legislation.[77]

Federal department participants were also more comfortable with the idea of RAC than with its application. One participant said RAC is the "right idea," but was concerned about increased demands on bureaucrats as a result.[78] Another thought the basic principle behind the RAC was sound, but felt "the creature was way too big."[79] One participant described RAC as a very useful forum for generating information and for learning, and expected that it should be easier to try the process in the future.[80] One participant described himself as one of the strongest supporters of the process and felt confident "we will get it right," primarily because all participants begin to get to know each other and appreciate the integrity of each other's opinions.[81] This participant, however, was also concerned about RAC's ability to factor in economic consequences.[82]

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[75] *Ibid.* at 283.
[76] *Ibid.* at 105.
[77] *Ibid.* at 252, 254.
[78] *Ibid.* at 55.
[79] *Ibid.* at 67, 75.
[80] *Ibid.* at 76, 87.
[81] *Ibid.* at 189.
[82] *Ibid.* at 188.

ENGO participants were perhaps the least favourable of the five groups, although still generally supportive. One member expressed support for the process, but felt ENGO representatives should be extremely demanding about financing and timelines.[83] One member described his experience as "painful, but ultimately positive."[84] Another expressed his assessment of the process as "strong ambivalence."[85] One participant felt that a lack of government disclosure and resources enabled only a "shotgun" approach to regulation making, but recommended not to "scrap the engine" but to tune it up.[86] One member described RAC as "somewhat frustrating, but ultimately useful," and suggested the central problem was lack of agreement on purpose.[87] One significant exception to the generally favourable assessment by RAC participants, and perhaps the most critical response of all, was the view of an ENGO representative who described RAC as "a public policy disaster of epic proportions."[88] This participant felt RAC was not accountable, not transparent, not inclusive, and did not serve the public interest.[89]

Provincial members also generally endorsed the RAC as a concept. One member felt the process is a good one, but thought there were some problems with the size of the group,

[83] *Ibid.* at 95.
[84] *Ibid.* at 154.
[85] *Ibid.* at 179.
[86] *Ibid.* at 227, 235.
[87] *Ibid.* at 245.
[88] *Ibid.* at 290-291.

and that the unique concerns of the provinces may require a different status from that of other RAC members.[90] Another member thought the process showed some potential.[91] One member suggested that although RAC was a useful process, roles were unclear, the scope of the regulations was difficult to deal with, and that RAC was not necessarily a better process for the provinces than a forum like the Council of Canadian Ministers of Environment ("CCME").[92] Another member, however, felt "the team approach is the only way to go," and thought that although more work was needed "at the front end," he would encourage other provinces to support the process.[93]

CEAA Regulations without RAC

As a standard for comparison, RAC participants were asked to speculate as to what would have happened if the government had not decided to experiment with the RAC process. Here, once again, there were signs that most participants considered RAC to be capable of adding value to the regulatory process. Participants felt that without RAC, the process would likely have unduly favoured the interests of industry and the provinces, would likely have lacked transparency and accountability, and would likely have

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[89]For more discussion on these issues, see Chapter IV, Part B, section 5.

[90]Pers. comm. Notes on file with the author, p. 128.

[91]*Ibid*. at 141.

[92]*Ibid*. at 146, 147.

allowed for only limited policy analysis. Parties would likely have spent substantial resources on lobbying, and fought at least some battles in the media. The resulting regulations may not have been workable and may have attracted significant resistance from stakeholders.

FEARO participants generally thought a more conventional process would have favoured the interests of industry and the provinces. One participant thought that in the absence of RAC the environmental interest would have been "completely lost" and that cost/administrative issues would have totally dominated.[94] One participant thought that although the provinces would have been consulted directly, and the concerns of industry would have been raised during interdepartmental discussions by government departments who expressly represent its interests, it is unclear how the views of ENGOs would have been represented.[95] One participant felt the strategic interests of all groups may have been overlooked.[96] One participant suggested that without RAC, development of the regulations would have been impossible because the criteria and legal framework crucial to getting a fundamental understanding of the regulations would not have been done.[97] This participant also felt that even where the government has taken into account the interests of all

[93] *Ibid.* at 199.
[94] *Ibid.* at 14-15.
[95] *Ibid.* at 20.
[96] *Ibid.* at 35.
[97] *Ibid.* at 11.

groups, it is difficult to convince those groups without a transparent process.[98] Another participant thought that during the cross-Canada consultations that preceded and inspired RAC, most people failed to have a sufficient understanding of the Act to debate particular issues. This participant suggested that without RAC people may still be arguing at an abstract and uninformed level.[99]

Most of the industry members felt that for *CEAA* a more conventional process would have been unsatisfactory. One member felt that it would have been "disastrous" if the government had written the regulations on its own because parties would have taken random positions, and without being "steeped in it," the government decisions would not have reflected an adequate understanding of the Act and its implications.[100] Another member thought that the worst possible consultation method is for parties to submit random briefs, and felt that processes like the RAC allow for more frank discussion.[101] One member thought that without RAC the development of the regulations would have been more "political."[102] One member felt that regular "lobbying" was not a fair airing of the issues.[103] One participant predicted that without the dialogue that RAC allows, government would have faced "fantastic resistance" from the provinces and from

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[98] *Ibid.* at 11.
[99] *Ibid.* at 265.
[100] *Ibid.* at 43, 45, 51.
[101] *Ibid.* at 164.
[102] *Ibid.* at 138.

individual stakeholders and pointed to the more than seventy court cases that have been litigated under *CEAA*'s predecessor.[104] One member said he would expect the media to be used more.[105] Two industry participants, however, expressed more comfort with traditional processes. One preferred a more "adjudicative" model where government drafts a proposal, invites comments, and convenes one large meeting before making the final decision.[106] The other participant felt that government can achieve the same things that RAC can achieve through bilateral discussions.[107]

One departmental participant described his department's traditional practice as "you consult lots, but do what you want."[108] Another participant felt that for departments who are not the initiators of a regulation, RAC provides a better opportunity to influence the regulatory regime; the alternative, in this participants' view, is to sit on the sidelines until a memorandum to cabinet comes along, and attempt to address the issues within a limited response time.[109]

ENGOs participants generally felt that results would have been worse from their perspective without the RAC. One

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[103] *Ibid.* at 171.
[104] *Ibid.* at 203. See also Appendix C.
[105] *Ibid.* at 279.
[106] *Ibid.* at 23.
[107] *Ibid.* at 252.
[108] *Ibid.* at 61.
[109] *Ibid.* at 181.

member said he is ordinarily suspicious of conventional rulemaking.[110] Another suggested that the existence of RAC created a work schedule that forced participants to turn their minds to the problems, and felt that without RAC, there would have been far more slippage.[111] Another member described typical consultations as "black holes" and suggested that the environmental community usually does not fare as well as industry in those situations.[112] One participant thought that with no face to face meetings, there would have been a feeling of having won or lost, although this participant felt that the government's response to the RAC report produced these feelings anyway.[113] One member suggested that a government-drafted set of regulations would have been a "disaster" because they would have been unworkable, in the courts for years, or because they would have borne little resemblance to environmental assessment, environmental planning or environmental protection.[114]

"Business as usual" for the provincial members of RAC was suggested by one participant to be access through formal CCME channels.[115] This participant described the traditional rulemaking as involving a discussion paper distributed for comment, invitation for written comments which are taken into

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[110] *Ibid.* at 88.
[111] *Ibid.* at 149.
[112] *Ibid.* at 175.
[113] *Ibid.* at 229.
[114] *Ibid.* at 242.
[115] *Ibid.* at 144.

account during final production, or simply "here it is."[116] Another provincial member thought that without RAC, the *CEAA* regulations would have been a "media circus."[117]

B. Openness of the Process.

Support of Participants to the Process?

With some qualifications, all but one RAC participant said they would be interested in future experiments with a RAC process.[118] One participant has even recommended certain aspects of the RAC process as a model for a provincial process he had been involved in.[119] One ENGO participant, however, felt that if the regulations continued to look like the ones pre-published in the *Gazette* and not like the ones in the RAC report, then a more public or political route may be preferable.[120]

Support of Government Decision Makers?

FEARO participants expressed support for continued use and refinement of RAC as a process.[121] Departmental participants, who are now full members of RAC, expressed similar support.[122]

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[116] *Ibid.* at 143.
[117] *Ibid.* at 142.
[118] *Ibid.* at 290-291.
[119] *Ibid.* at 100-101.
[120] *Ibid.* at 233.
[121] *Ibid.* at 29, 35, 37.
[122] *Ibid.* at 63, 75, 192.

Support of Non-participants?

Among RAC participants, there was no suggestion that any of the RAC agreements fell outside the authority of *CEAA*, but many had thoughts about whether RAC was able to effectively serve the public interest. At least one of the FEARO participants felt confident that the public interest was well represented by the parties at the RAC table.[123] One of the industry members felt that any concerns about representing the public interest could be overcome with broad representation at the table and with a public comment period.[124] One departmental participant, however, questioned whether the ENGO members were necessarily the "guardians of the public interest," and suggested this was the proper role only for elected officials.[125] Similarly, another departmental participant felt that RAC ultimately reflected only the opinions of individuals and wondered how the ENGO members could be expected to represent the public good.[126]

ENGO participants also had views on this point. One member described RAC as a band of thirty people assimilating masses of information at an incredible speed, and added "the rest of the world didn't have a clue."[127] Another suggested that

[123] *Ibid.* at 41.
[124] *Ibid.* at 52.
[125] *Ibid.* at 65.
[126] *Ibid.* at 195.
[127] *Ibid.* at 94.

environmental groups did not always agree with many of the compromises reached by ENGO RAC members, and were frustrated with not having "their day to fight it out."[128]

One ENGO participant had stronger views and did not think the RAC model could ever benefit the public good. This participant felt that in the absence of a strong legislative direction, industry members would never agree to anything that will inconvenience them, and that since industry's agreement was necessary for any "consensus decision," the best that can be achieved in a process like RAC is the "status quo" or slightly better. Where environmental groups enter into agreements in such settings, this participant argued, the whole environmental community is placed in a weaker position because it can no longer "agitate for something better."[129]

Following the pre-publication of the draft regulations in September of 1993, the government received ninety-one comments. Approximately forty-five percent of these comments were from RAC participants or their constituents. Comments were for the most part critical of the regulations in some way.[130]

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[128] *Ibid.* at 234.
[129] *Ibid.* at 285-290.
[130] FEARO document, "Responses to Gazetted Regulations under *CEAA*," no date.

C. Quality of the Results

Considered More Fair by those Affected by it?

RAC responses were mixed, and many participants felt uncomfortable with the speculative nature of the question. There was some confusion as to the distinction between being "fair" and being "wise." Overall, however, some themes have emerged. Many participants felt the regulations were "greener" than they would have been, but this view was more prevalent among FEARO and departmental representatives. "Greener" in this context meant reflecting more of the views of the ENGO members. Several ENGO participants did not share this view, based on the substance of the regulations as pre-published. Presumably not every participant would consider "greener" to be "fairer" or "wiser."

Many measured fairness and wisdom in terms of workability and clarity, and found the regulations to be more favourable in these respects. Some departmental representatives, however, failed to see much substantive difference in the end product at all.

Within FEARO, participants generally felt the regulations were better as a result of RAC. Three participants described the regulations as being "greener."[131] One of those, however,

[131] Pers. comm. Notes on file with the author. See pp. 18, 40, 265.

felt they did not place enough emphasis on the concerns of industry.[132] One participant felt RAC had made the *CSL* a better regulation in terms of precision, appropriateness of thresholds, scope of application, and "fairness" to industrial sectors.[133] Another felt that in terms of thinking of things the government may not have, the *CSL* was incredibly improved, that the *Law List* was marginally improved, but that all four regulations were based on a much cleaner policy framework.[134]

One industry member described the regulations in terms of being more disciplined because of the influence of RAC on the government.[135] Another member thought that RAC had helped to create a more certain regulatory program.[136] One member thought RAC brought clarity to the process, and made the regulations "the way we see it."[137] One participant thought they were fairer, because all the views were on the table, but not wiser, because some compromises yielded senseless results.[138] Another thought they were wiser, because they are more workable and the understanding of the implications has grown, but not fairer, because *CEAA* could be making things very difficult for smaller companies.[139]

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[132] *Ibid.* at 36.
[133] *Ibid.* at 21.
[134] *Ibid.* at 111, 113.
[135] *Ibid.* at 164.
[136] *Ibid.* at 281.
[137] *Ibid.* at 138.
[138] *Ibid.* at 222.
[139] *Ibid.* at 50.

Among government departments, one participant felt the regulations were very close to what they were like prior to RAC, only with refinements around the edges.[140] Another participant thought they reflected the fact that interest groups had managed to get a lot out of the process.[141] One participant felt the government was still fighting to reach fairer and wiser, suggested the *Law List* may not have changed at all, but thought that everybody was much more educated.[142] One participant thought that a process like RAC ought to produce objectively better rules in the long run.[143] Another participant felt that RAC had some influence where there was not much value, but thought that by keeping the government honest, RAC was successful to some extent in "greening" the regulations.[144]

Some ENGO members thought the regulations were fairer and wiser, some did not. One ENGO member described the regulations as fuller and more complete because they had received a lot more scrutiny, and because players had learned more about the Act.[145] Another suggested if the regulations continued to look like the ones pre-published in the *Gazette*, then they were neither fairer nor wiser.[146] One participant

[140] *Ibid.* at 62.
[141] *Ibid.* at 73.
[142] *Ibid.* at 85.
[143] *Ibid.* at 186.
[144] *Ibid.* at 194.
[145] *Ibid.* at 153.
[146] *Ibid.* at 177.

described the regulations as a "decent product" but suggested they could have been more comprehensive and defensible.[147] One member thought that RAC helped the substance of the regulations because it forced members to look at them in detail, something they would not have done otherwise until "it hit them."[148]

One provincial member suggested a true assessment can only take place four or five years down the road, but thought that RAC was a successful exercise in raising the level of awareness regarding the circumstances of environmental assessment.[149] Another member thought that the regulations may have been better in that all stakeholders have had their say, but suggested it may have been better for provincial interests if more had been done through the CCME.[150]

More Thorough Analysis of the Implications?

RAC participants as a whole thought that while the regulations were generally better informed as a result of RAC in terms of identifying their implications, there was a particular lack of technical information. In addition, several participants, mostly from industry, were critical of the cost-benefit analysis that was conducted during the RIAS process.

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[147] *Ibid.* at 228.
[148] *Ibid.* at 242.
[149] *Ibid.* at 125.

With respect to the general issue of whether the *CEAA* regulations were better informed as a result of the RAC, among FEARO participants, one person felt that RAC brought to the table a lot of expertise, more information, and different perspectives, and thought that the regulations were better as a result.[151] Another suggested that the *CSL* thresholds were better informed, and that great ideas were generated within the group.[152] Two participants, however, felt in certain respects that the debate could have been better informed. One participant thought that "the technical element" was missing, especially on the *CSL* thresholds;[153] and another felt RAC needed more scientific, economic, legal, and policy support.[154]

Views among industry participants were similar. One member suggested that only after many months of RAC were participants beginning to understand the implications of the decisions they were making; this member also questioned whether MPs and Senators fully understood the Act and its implications.[155] One participant, referring to the *CSL* thresholds, thought that it was important to get the views of people who know something of real practical implications, but felt the ENGO members were not able to contribute in this

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[150]*Ibid.* at 146.
[151]*Ibid.* at 29.
[152]*Ibid.* at 113.
[153]*Ibid.* at 15.
[154]*Ibid.* at 39-40.

way.[156] Three participants felt that as a result of RAC's work, more informed decisions were possible.[157] Another felt all participants increased their knowledge because members were not afraid to be frank, and because there was a high degree of sharing between ENGOs and the business community.[158] Two participants, however, felt more scientific or practical input was needed, one suggesting this could have come from industry in the form of written reports.[159]

This theme was evident among departmental participants as well. One participant felt overall that RAC was a very useful forum for generating information, for learning, and for informing the regulations, but also thought there was an "appalling lack of data" to work with, especially on the *CSL*.[160] One participant thought that with the concerns of industry generally represented by government departments, the ENGO members brought more new perspectives to the debate, but were only able to contribute in a public policy, and not a scientific sense.[161] Another participant felt that because federal departments were not represented at the RAC table,

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[155] *Ibid.* at 44.
[156] *Ibid.* at 99, 102.
[157] *Ibid.* at 171, 218, 222, 279, 282.
[158] *Ibid.* at 161.
[159] *Ibid.* at 23, 133.
[160] *Ibid.* at 76, 81, 85. This participant described one event dealing with dam heights on the *CSL* where a RAC member asked the government for data on the relationship between dam height and power. As it turned out, one government department had the data but didn't know it, and this data suggested that dam height multiplied by dam volume was a much better indicator of power than simply dam height.
[161] *Ibid.* at 62.

discussions were lacking in substance, and an appropriate depth was missing; RAC members, this participant suggested, needed more education on what a screening actually involved.[162] One provincial government member thought that RAC was useful to inform the federal process of provincial views, particularly on the *CSL*.[163]

One ENGO member said it was striking how little people knew about the Act when it was time to draft the regulations, and thought that one of the benefits of RAC was that all players involved learned the legislation.[164] Another member felt the draft regulations that were pre-published in the *Gazette* showed the post-RAC government decisions were not well informed.[165] ENGO participants tended to agree, however, that RAC was deficient when it came to technical matters. One member felt although the level of information generated by the RAC was "amazing," there was not much good technical information, and that ENGOs had to bring some to the table themselves.[166] Two participants suggested that on technical issues RAC did not have the resources to do a good job, and that government could have provided the relevant data for things like dam heights, but did not.[167]

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[162] *Ibid.* at 68, 73.
[163] *Ibid.* at 143.
[164] *Ibid.* at 153.
[165] *Ibid.* at 178.
[166] *Ibid.* at 93. This participant is referring to the idea of using the Standard Industrial Classifications for the *CSL*.
[167] *Ibid.* at 227, 243.

Besides technical information, the other subject that attracted some criticism was the cost-benefit analysis conducted during the preparation of the RIAS. While there was at least one participant within FEARO who expressed concern about the RIAS process,[168] most of the criticism came from industry and federal government departments.

One industry member called the RIAS process a "real boondoggle," but added he was not sure the cost-benefit model could be adapted for such a complex process.[169] Another industry member felt that the RIAS did not address key issues like the cost of screening or extraterritoriality, and further suggested that it was "reckless" to proceed with the regulations in the absence of such analysis.[170] One participant felt that the RIAS produced did not deserve the dignity of the name, and suggested that the problem originated with the data that was plugged into the cost/benefit model.[171] This participant also suggested that although it may not be possible to do a rigorous cost/benefit analysis in this area, it is possible to do a quantitative analysis of the costs and a qualitative analysis of the benefits.[172]

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[168] *Ibid.* at 260.
[169] *Ibid.* at 279.
[170] *Ibid.* at 163.
[171] *Ibid.* at 251.
[172] *Ibid.* at 251.

Two departmental participants, in particular, had similar concerns. One felt RAC as a committee showed a "remarkable indifference" to the economic implications of the regulations.[173] This participant suggested a subprocess could assist in the assessment of economic impacts, and felt that RAC should seek a less "perfect" and more "affordable" solution.[174] The other described the model as fine, but the input as "useless." This participant added that the circumstances called for something that was less than "state of the art," and that RIASs often fail, but that it was important that RAC members use more than "assertions" when discussing economic implications.[175]

No Joint Gains Unrealized?

Not many RAC participants expressed views on this point, and those that did generally felt that the regulations had not yet reached this point. Within FEARO, some participants thought yes and some thought no.[176] One FEARO participant suggested RAC simply ran out of time before members could get to the point where they could trade issues.[177]

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[173] *Ibid.* at 180-181.
[174] *Ibid.* at 184-186.
[175] *Ibid.* at 273.
[176] *Ibid.* at 41, 16.
[177] *Ibid.* at 264.

One industry participant felt RAC provided the maximum opportunity to find joint gains.[178] Another industry member, however, felt that although parties were closer to this goal than they would have been without RAC, they may not have come that far because members were only recently beginning to reach a level of knowledge which would allow them to negotiate effectively.[179] One ENGO member also thought a few extra months pre-RAC report may have helped in this respect.[180]

Less Litigation?

Most RAC participants interviewed are expecting *CEAA* to be litigated in any event. Many felt the Act itself is the source of this conflict and that RAC could do nothing to prevent it.[181] Two participants, one from FEARO and one ENGO, thought that litigation is a healthy practice and should not be discouraged.[182] One industry member felt that by flagging issues, RAC was in fact making it easier to find grounds for legal challenge.[183] One departmental participant felt that the *CSL*, especially, will act as a target for litigation because people will be able to acquire knowledge about controversial projects.[184]

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[178] *Ibid.* at 222.
[179] *Ibid.* at 51.
[180] *Ibid.* at 243.
[181] *Ibid.* at 16, 33, 95, 102, 163, 253, 281.
[182] *Ibid.* at 16, 90.
[183] *Ibid.* at 281.
[184] *Ibid.* at 187-188.

Some participants thought, however, that RAC may have some mitigating effect on the volume or nature of the disputes.[185] One FEARO participant felt that as a result of RAC there will not be any litigation on what is or is not on the regulations, and that even where there is litigation, the government would have a "paper trail" to demonstrate good intentions.[186] One industry member expected less litigation, especially with respect to the issue of discretion, which in his view, normally only serves those who are "politically connected."[187] Another industry participant thought RAC would reduce litigation because under the traditional process nobody would be discussing solutions to problems.[188]

One ENGO member felt that even where there will be litigation, at the very least RAC will have contributed to a more informed conflict.[189] Similarly, one departmental participant felt there might be fewer challenges because participants will know exactly where to "hit" to get problems solved.[190] One ENGO participant expected less litigation for issues that made it on the RAC table, and thought that as a result of RAC there may be more of an acceptance of the purpose and principles of environmental assessment within

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[185] *Ibid.* at 85, 172.
[186] *Ibid.* at 264.
[187] *Ibid.* at 51.
[188] *Ibid.* at 203.
[189] *Ibid.* at 153.
[190] *Ibid.* at 85.

departments.[191] Another ENGO member felt that because the Act became more "workable," fewer administrative errors can be expected.[192]

Better Compliance?

RAC participants who had an opinion on the subject all felt that RAC had made some contribution to better compliance with *CEAA* and the regulations. As one FEARO participant said, after RAC nobody can claim ignorance or be vague about the intentions of the Act, but there is always going to be "good guys and bad guys."[193] Another FEARO participant, however, felt that it will be difficult to isolate the contribution of RAC to compliance because there will still be strong resistance to the Act.[194]

One industry member suggested that better compliance will depend on government departments but should be possible because people will understand what they are supposed to do.[195] Another industry member felt that because of the certainty achieved through RAC, *CEAA* is now easier to comply with.[196] One industry participant thought that with still more clarity and certainty, further compliance could be encouraged, but felt that RAC had already placed him in a

[191] *Ibid.* at 233.
[192] *Ibid.* at 243.
[193] *Ibid.* at 265.
[194] *Ibid.* at 32.
[195] *Ibid.* at 53.

position to offer valuable advice to his industry on the application of the Act.[197]

Several departmental participants thought that RAC had increased their understanding of the legislation as well as that of the public,[198] and one participant expected that a more informed public could mean more informed pressure on government departments to comply.[199]

Many ENGO participants said they expected to see some increased compliance. One member predicted there will be more departments doing environmental assessment,[200] another member felt RAC had forced a lot of key people to understand the Act and the regulations.[201] One participant thought that many people did not take to heart the system that was in place before *CEAA*, and felt that the RAC discussions had made the environmental assessment process more real to those people.[202]

One provincial member suggested that federal compliance with environmental assessment has always been "extremely low," but

[196] *Ibid*. at 172.
[197] *Ibid*. at 223.
[198] *Ibid*. at 62, 86, 194.
[199] *Ibid*. at 65.
[200] *Ibid*. at 94.
[201] *Ibid*. at 147, 154.
[202] *Ibid*. at 233.

felt that this situation may improve because the rules are clearer, and because there may be more public vigilance.[203]

RAC discussions on environmental assessment appeared to have the additional spin-off benefit of a better understanding of related federal government legislation. Several participants mentioned that as a result of the RAC process, they now had a better understanding of both the *Fisheries Act*,[204] and the *Navigable Waters Protection Act*.[205] Based on this newly acquired knowledge, one industry member estimated that the current level of compliance with the *Navigable Waters Protection Act* is around one percent.[206] Also because of RAC, a departmental participant is now of the view that full compliance with the *Fisheries Act* is not achievable.[207]

Improved Relationships?

RAC participants reported many instances of improved relationships as a result of the RAC process. One FEARO participant felt that RAC had improved the dynamic between the ENGO participants and the provincial participants, and thought that all participants ended up with a more favourable view of FEARO than they had before RAC.[208]

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[203] *Ibid.* at 127.
[204] R.S.C. 1985, c. F-14.
[205] R.S.C. 1985, c. N-22. Pers. comm. Notes on file with the author. See pp. 53, 86, 214.
[206] *Ibid.* at 53.
[207] *Ibid.* at 86.
[208] *Ibid.* at 265.

The experiences of industry participants in this respect were mostly positive, although one participant recalled having a few unpleasant encounters.[209] One member said he would now not hesitate to phone any RAC participant especially the government representatives, and felt he had gained a lot of respect for the ENGO and FEARO participants in particular.[210] Another member said relationships built through the RAC process have allowed for the first face-to-face meeting ever between his industry and two government departments.[211] One member felt he had made contacts "on all three fronts" which were useful not only for *CEAA* but in other areas as well.[212]

Departmental participants reported "definite bonding among federal departments,"[213] better working relationships with industry participants,[214] and increased respect for ENGO participants.[215] One participant felt optimistic that RAC's shortcomings could be worked out primarily because "we all get to know each other and appreciate the integrity of each others' positions."[216]

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[209] *Ibid.* at 104, 224.
[210] *Ibid.* at 214.
[211] *Ibid.* at 43.
[212] *Ibid.* at 283.
[213] *Ibid.* at 75.
[214] *Ibid.* at 87.
[215] *Ibid.* at 87.
[216] *Ibid.* at 189.

One ENGO member felt that RAC allowed for better communication with senior governmental officials.[217] Another ENGO participant referred to better relationships as an "undoubted benefit" of the process and attributed much of the credit to the fact that participants were no longer "abstract enemies."[218]

Provincial members also found better relationships to be an advantage of the RAC process. One member suggested the best opportunities to make contacts were during coffee breaks, lunches and dinners.[219] One member felt that RAC was successful primarily because members "met long enough to meet as human beings and not as letter writers."[220]

D. Accountability of the Decision Maker

Less Time?

RAC views were divided on this point. Many felt RAC had the opposite effect.[221] One industry participant thought time was wasted re-visiting some issues, and felt that the government should have cut off the discussion at some point.[222] Departmental participants felt that before RAC, the

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[217] *Ibid.* at 95.
[218] *Ibid.* at 234.
[219] *Ibid.* at 125.
[220] *Ibid.* at 196.
[221] *Ibid.* at 3, 17, 172, 253.
[222] *Ibid.* at 223.

government was essentially "ready to go," and that RAC "threw two years of work out the window."[223]

In contrast, several participants saw time advantages. One industry member thought that without RAC the time to proclamation of *CEAA* may have been shorter, but that the time for any other process that would have been as good as RAC would have been longer.[224] Another industry participant estimated that RAC would save his industry many days that would have otherwise been spent in court.[225] One ENGO member thought that the existence of RAC created a work schedule which forced people to turn their minds to the problems, and felt that without RAC, there would have been more "slippage."[226]

Less Expense?

RAC participants were not so sure. Many participants thought that RAC was likely to be more expensive than any other process.[227] One industry member, however, felt there may be cost savings in the reduction of "potential messes."[228] Another industry participant expected an overall savings based on litigation costs saved at $15 000 per day.[229] One

[223] *Ibid.* at 63, 68.
[224] *Ibid.* at 52.
[225] *Ibid.* at 213.
[226] *Ibid.* at 149.
[227] *Ibid.* at 3, 63, 147, 172, 187.
[228] *Ibid.* at 52.
[229] *Ibid.* at 213.

ENGO member suggested government saved money by externalizing a lot of research to industry and to the environmental community, and felt that government "got a real deal" on the legal work done by the environmental community for the *Law List*.[230]

FEARO participants estimated that RAC had cost approximately 150 to 200 hundred thousand dollars per year, but felt the cost of cross-Canada consultation would have been comparable yet far less rewarding.[231] One FEARO participant expected a reduction in "back-end problems" to offset "front-end costs," but felt it was difficult to measure the value of some things such as keeping the issue out of the newspapers.[232]

CHAPTER V

A. Appropriate Circumstances for RAC?

Countervailing Power?

RAC participants generally felt that no single party at the table could dictate results without incurring an unacceptable sanction from the other parties. But many participants also felt that the influence of ENGO members over the results was considerably stronger at RAC than it would have been under

[230] *Ibid.* at 245.
[231] *Ibid.* at 37, 113.

more traditional circumstances. As outlined in the previous chapter, this view lead several participants to conclude that the RAC process made the regulations "greener."[233]

Many RAC participants felt that the ENGO members enjoyed an advantage over the other members primarily at the beginning of the process. The ENGO members were described as being better prepared, more accustomed to RAC-like processes, and as having a superior understanding of the legislation and its implications. The ENGO community was also the only group that sent exclusively lawyers as representatives. This last fact in particular caused many participants to express concerns about balance.

Among FEARO participants, one person thought the ENGO members may have been too much stronger than the industry members for the good of the process. This participant felt, however, that the disparity could be attributed to the ENGO members having a better idea of what they wanted and a better idea of how to perform.[234] Another participant also felt concerned about balance, especially early on, but felt that the industry members were caught "flatfooted" because they seriously underestimated the strategic intelligence, commitment and skill of the ENGO members.[235] Using a metaphor that was often used by RAC participants, one FEARO

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[232]*Ibid.* at 255.
[233]See Chapter IV, Part C, s. 1.
[234]Pers. comm. Notes on file with the author, p. 36, 39.

participant said the environmental community sent its "A" team and industry did not, but felt that the process would have benefited if the ENGO members would have been able to contribute more practical environmental assessment experience.[236]

Industry participants described their members as engineers[237] or staff from industry associations,[238] and many felt this made it difficult to talk with the ENGO lawyers in practice because discussions did not always take place on the "same level." Industry participants thought that the ENGO members focused on process while the industry members talked content,[239] that none of the ENGO members had any appreciation of technology,[240] and that the ENGO members were not sanctionable because only industry was at the mercy of the impending government decisions.[241] One member felt that by not thinking through the issue of who to send to the table, industry had made a strategic and practical mistake, and suggested some industry members were highly frustrated because they felt they had performed badly.[242] One member, however, described the ENGO members as "embarrassingly" well prepared, and suggested that industry is always "flatfooted"

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[235] *Ibid.* at 115.
[236] *Ibid.* at 262.
[237] *Ibid.* at 159.
[238] *Ibid.* at 277.
[239] *Ibid.* at 159.
[240] *Ibid.* at 247.
[241] *Ibid.* at 166.
[242] *Ibid.* at 159.

in these situations because they are used to dealing with facts and do not tend to be philosophical.[243]

One departmental participant felt that the ENGO members may have obtained more concessions at the beginning than they might have otherwise because industry members had an "abysmal" understanding of *CEAA*, did not work together effectively, and were not as comfortable with the process as the ENGO members.[244] Another participant described the RAC power balance as the exact reverse of traditional circumstances because the industrial community did not take it as seriously as the ENGO community who sent its "top guns," and because unlike the industry members, ENGO members had a "natural point around which they could coalesce."[245] One departmental participant felt that overall, RAC was driven by environmentalists.[246]

ENGO participants generally agreed that the environmental community had sent its most qualified people, but at least one participant challenged the idea that industry had sent its "B" team.[247] One member felt the ENGO members may have had an advantage because of their environmental law expertise,[248] and another member thought they were able to

[243] *Ibid.* at 204.
[244] *Ibid.* at 79.
[245] *Ibid.* at 73.
[246] *Ibid.* at 271.
[247] *Ibid.* at 229-230, 239.
[248] *Ibid.* at 239.

take the industry members by surprise.[249] One member suggested, however, that while the ENGO members did well around the table, they did not fare as well "behind the doors."[250] In contrast to the general attitude, one ENGO participant felt it was a mistake to send exclusively lawyers to represent environmental issues because they tend to get caught up in small or unimportant details and often do not recognize when the process is becoming counter-intuitive.[251]

Provincial participants generally thought that a balance of power existed around the table, and felt that both industry and ENGO members recognized the power that the other had.[252]

Alternatives Look Worse?

For RAC members, each had a different but compelling reason to participate in the RAC process. Although some parties may have on occasion taken advantage of other channels of influence, all parties to a significant extent did stay at the RAC table. ENGO members generally perceived the RAC as their best opportunity to influence the regulations. Industry members feared the ENGO community's ability to raise public pressure. Provincial representatives appeared willing to try out the process and to suspend for a period of time their traditional entry points into federal affairs. Federal

[249] *Ibid.* at 89.
[250] *Ibid.* at 175.
[251] *Ibid.* at 290.

departments, on the other hand, not being members of RAC, had limited access to the process and as a result were reluctant to make their views known outside of interdepartmental forums.

Most of the ENGO members were at the RAC table because they felt it may be their best opportunity to influence the process. One member said that he does not like to be at the same table with certain industries, but added "where government is captured by them, a seat at the table is better than nothing."[253] Another member said the traditional alternatives were weak during this period: EARP litigation had been deteriorating and media coverage would have been difficult without an "event."[254] One ENGO participant thought that the environmental members pursued other avenues less than other RAC participants, but wondered in retrospect whether they should have done more.[255] Another member questioned whether the alternatives to RAC were worse for some industry members and federal departments, and wondered whether this could explain a perceived lack of commitment by those parties.[256]

One ENGO participant believed, however, it was a mistake for the environmental community to participate in RAC because, to

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[252] *Ibid.* at 121, 145.
[253] *Ibid.* at 88.
[254] *Ibid.* at 175.
[255] *Ibid.* at 230.
[256] *Ibid.* at 241.

use Rodgers' train metaphor, there was no indication that the government had any intention of driving the train out of the station. Once the environmental community enters into any agreement which fails to bring industry much distance from the status quo, he argued, it is prevented from agitating for anything further.[257]

One industry participant suggested that industry members always thought they could do pretty well without RAC, but feared the power of the environmental community to raise public or media pressure.[258] Another wondered whether the ENGO members could ever afford full compatibility because controversy is what feeds their funding base.[259] With respect to industry incentives to stay at the table, one participant suggested that major interests will always keep the right to make their views known directly.[260] Another felt that it was commonly accepted in his industry that the only sensible way to get a good project is to get public stakeholders involved very early.[261] One member recalled one point in time when industry members did not think that their views were being heard in the RAC forum and chose to raise them directly with a government department they consider to be a "partner."[262]

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[257] *Ibid.* at 285-290.
[258] *Ibid.* at 219.
[259] *Ibid.* at 252.
[260] *Ibid.* at 132.
[261] *Ibid.* at 203.
[262] *Ibid.* at 132.

Departmental participants generally had the view that the train was, in fact, leaving the station and thought this was the primary reason participants wanted to take part.[263] Departments were, of course, not members of RAC during this period, and had their own forum in which to influence the regulations.[264] As non-members, however, departments were unable or reluctant to ensure their concerns were raised at RAC, and this quickly became a significant problem.[265]

One provincial member thought RAC represented the "best chance" for ENGO members, but felt that complete incentive may not have existed for industry members who traditionally had political connections or for provinces who usually worked through the CCME.[266] Another provincial member, however, suggested that while some provinces and the CCME wanted a direct pipeline in addition to RAC, as the process evolved it became clear that they "couldn't have their cake and eat it too," so they all decided to "roll up their sleeves."[267]

Issue must be Ripe

Generally there was a sense, especially among departments, that the RAC would stand a better chance of achieving

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[263] *Ibid.* at 73, 195.

[264] See the description of the Senior Management Committee on Environmental Assessment in Chapter II, Part A, section 3.

[265] See "Commitment" (Chapter V, Part B, s. 1) and "Strong Federal Representation" (Chapter V, Part B, s. 3.1).

[266] Pers. comm. Notes on file with the author, p. 121.

[267] *Ibid.* at 198.

consensus if there were fewer issues and fewer players. However, given the breadth, interrelationship and complexity of the issues involved, many participants felt that RAC was the best option available.

Among FEARO participants, one person felt the *CEAA* issues were too broad and value-laden for the RAC, and suggested that such a process is best suited for standards, technical matters or carefully delineated policy issues.[268] Another participant, however, said that because the Act was so complex and far reaching, "RAC was the only way."[269] One participant thought environmental assessment was the perfect issue.[270] One participant felt that although the issues themselves were appropriate, the task for RAC was complicated by the fact that each regulation involved the making of a list, which invited participation in far too much detail.[271]

Industry participants were more evenly split on the issue. One member said that given the complexity of the legislation and the regulations, RAC was not appropriate, but there was no better alternative.[272] Similarly, another member said that the RAC model was appropriate for the *CEAA* regulations and any other complex issues where the views or parties seem to

[268] *Ibid.* at 1, 3-4.
[269] *Ibid.* at 19.
[270] *Ibid.* at 39.
[271] *Ibid.* at 116.
[272] *Ibid.* at 43.

be far apart but not for clear or good reasons.[273] One member felt that the issues were so interlinked the government could not have done it any other way, but suggested RAC was appropriate only for major legislation with serious implications as to the way the country is run.[274] Several industry participants, however, thought the issues were too broad.[275] One participant felt the questions for RAC should have been more carefully framed, focusing on the "science of environmental assessment" and not on policy.[276] Another thought that the breadth of issues left insufficient time to consult with constituents and prepare for meetings, and suggested as a consequence, members in many cases did not have authority to make decisions.[277] One member felt that a narrower topic would have allowed for more meaningful discussions.[278] Another thought the issues were too broad, but attributed part of the problem to legislation that was "bad, too ambitious, and virtually unworkable."[279]

Departmental participants who responded to this question were all of the view that the issues were too broad. One described the subject matter of RAC debates at times to be impractical and impossible, and expressed frustration at not being able to contribute to the discussion in order to

[273] *Ibid.* at 139.
[274] *Ibid.* at 202, 205.
[275] *Ibid.* at 26.
[276] *Ibid.* at 99.
[277] *Ibid.* at 166.
[278] *Ibid.* at 275.
[279] *Ibid.* at 247.

prevent "wild goose chases."[280] Another felt that because of the diverse nature of the subject matter, discussion of each issue at RAC was underdeveloped.[281] One thought that it was a problem when RAC members were given "free reign" and that the government must be able to tailor the issues better.[282]

ENGO participants generally found the issues to be "suitable."[283] One member felt the issues were "ok" but required significant time and resources.[284] Another thought that although there were not too many issues, there may have been too much detail in the discussions.[285] One participant suggested it would not have been possible to ask RAC to debate only selected issues because the issues were so interrelated.[286]

Provincial members felt that although RAC discussions got bogged down in "technical difficulties" at times,[287] environmental assessment at the time was a "hot topic" across Canada, and that the issues were generally not inappropriate.[288]

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[280] *Ibid.* at 57.
[281] *Ibid.* at 67.
[282] *Ibid.* at 192.
[283] *Ibid.* at 236.
[284] *Ibid.* at 91.
[285] *Ibid.* at 152.
[286] *Ibid.* at 231.
[287] *Ibid.* at 144.
[288] *Ibid.* at 121.

Not Purely Objective

Only one RAC participant expressed a view on this point. A representative from industry felt that some of the *CEAA* regulatory issues could have been solved by science.[289]

No Fundamental Values

Only a few RAC participants expressed views on the issue of fundamental values and the RAC process. One industry member felt that during *Exclusion List* discussions there was a fundamental conflict between industry and ENGO members on the question of whether projects should be excluded from the application of the Act on the basis of size alone.[290] Another industry member thought a general ideological dispute between one hundred percent protection and a process that was "workable" prevented more resolution.[291] One departmental participant felt there were clear fundamental conflicts with respect to nuclear issues, especially on the *CSL*.[292] One industry participant, however, felt that given time, goodwill, and intelligent people, the RAC process is capable of resolving all but five percent of issues.[293] One other industry member reported previous discussions with

[289] *Ibid.* at 217.

[290] *Ibid.* at 278. Note that arguably there is no authority in *CEAA* to exclude a project based on size alone (see sections 7, and 59(c)(ii)).

[291] *Ibid.* at 217.

[292] *Ibid.* at 85.

[293] *Ibid.* at 204.

environmental groups where he had been surprised at the commonality between industry and ENGO interests.[294]

Multiple Issues

Many RAC participants felt that like the regneg on asbestos there may have been too broad a range of issues to allow the process to be effective.[295] While the number of issues on the RAC table offered the potential for "bundling and trading," outside of a few instances on the *Law List* and the *CSL*, RAC participants said they saw very little of this being done.[296]

<u>B. Increasing the Likelihood of Success</u>

Commitment

RAC participants were asked to assess the level of commitment shown to the process by FEARO, federal departments, and the Conservative government. Generally, participants had favourable views of FEARO's commitment, but questioned the degree to which government departments and the Cabinet were committed. Although framed in terms of commitment, these results also provide some indication of a distrust between non-government and government groups. Continued experience with the RAC process may encourage the commitment that is

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[294]*Ibid.* at 46.
[295]See Chapter V, Part A, s. 3 above.

necessary for trust and the trust that is necessary for commitment.[297]

One FEARO participant summarized the overall federal government commitment by suggesting FEARO was committed, other departments were sceptical, and that there was only a sporadic "buy-in" at the political level.[298] One participant suggested that FEARO had little trouble with the notion of RAC because it already had a long history of formal public consultation, had written the principle of mediation into the Act, and had the right combination of personalities to carry it out.[299] With respect to federal departments, however, one FEARO participant felt that senior government officials were hesitant, cautious, and concerned about the role of RAC in the regulatory process, and suggested that this was particularly true of the central agencies.[300] Another participant felt that the other departments were uncomfortable with consultation and had declined an opportunity to participate.[301] At the political level, one participant felt that commitment was lacking because the Conservative government was uncomfortable with sharing power.[302] Another participant thought that in retrospect it was a mistake to pitch RAC as a Minister's committee because

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[296]See Chapter II, Part A, s. 5 for more discussion.
[297]See for example, Chapter IV, Part C, s 6.
[298]Pers. comm. Notes on file with the author, p. 39.
[299]*Ibid.* at 255.
[300]*Ibid.* at 32.
[301]*Ibid.* at 110.
[302]*Ibid.* at 38.

the Minister was never fully committed and because ultimately broader cabinet-wide commitment is necessary to make the process work.[303] This participant also felt it would have been useful to insist on a formal commitment from non-government participants.[304]

The views of industry participants were slightly more mixed. FEARO's commitment was described as "noticeable,"[305] but also as less forthcoming than it could have been.[306] One member thought RAC received great support from government people,[307] another member felt the attitude of some government departments was "we'll do what we want."[308] At the political level, participants had different views on whether the government was committed to the results of the process. One member felt the government showed a lot of commitment especially given the political distractions of the day which included constitutional negotiations, a leadership convention, cabinet restructuring, and a federal election.[309] Another, however, felt a "major disappointment" with the amount of political will shown towards the process, and felt "conned" as a result.[310]

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303 *Ibid.* at 110.
304 *Ibid.* at 110.
305 *Ibid.* at 168.
306 *Ibid.* at 161.
307 *Ibid.* at 134.
308 *Ibid.* at 47.
309 *Ibid.* at 168.
310 *Ibid.* at 212.

One departmental participant thought FEARO was committed but that it unsuccessfully attempted to play two often contradictory roles: defending the interests of federal departments, and the "honest broker." This participant also felt that departments had nothing to commit to, but realized the importance of the meetings and committed as much as they could.[311] Another departmental participant thought there was not enough of an attempt to get the government to buy into RAC, and felt that, after spending a lot of time on the regulations, departments were forced to stand back and watch it fall apart only to be asked to "regenerate the same wheel."[312] This participant also thought the government had agreed to an Act it could not afford, and as a result, could not decide what it wanted to do.[313] One participant felt surprised at the strength of the government commitment to RAC, and thought the federal department's toleration of RAC was "remarkably high."[314] Another participant thought that the Minister of Environment was more committed than anybody, but felt none of the departments were because they were never really involved in the process.[315]

One ENGO member described FEARO's commitment as "above and beyond the call of duty,"[316] and another felt that FEARO had taken a "ground-breaking role" to ensure ENGOs could take

[311] *Ibid.* at 83.
[312] *Ibid.* at 69.
[313] *Ibid.* at 69.
[314] *Ibid.* at 187.
[315] *Ibid.* at 195.

part in the process.[317] One member, however, thought that FEARO was a "reluctant ruler" in many cases, and suggested that political survival at times forced them to act against the interests of the process.[318] Commitment from government departments was described as "only when it suited them,"[319] and "at times not doing their best to make it work."[320] One participant wondered if certain departments would ever be willing to give up a "strong and controlling interest in cabinet."[321] Another thought that FEARO's status as a junior department made the bigger departments reluctant to cooperate, and suggested many departments did not see much cost for not committing.[322] With respect to commitment at the political level, one ENGO member felt that the process needed more institutional commitment from the highest level.[323] Another felt that some of the changes made by government during a "second kick at it" were indefensible.[324] One member thought that Cabinet's refusal to accept some of the consensus recommendations was the "biggest thing that didn't go well," and wanted to warn the government not to use RAC as a token, because false expectations are created and then frustrated.[325] Two members, however, had slightly different views. One felt that Cabinet stood by the process because it

[316] *Ibid.* at 152.
[317] *Ibid.* at 231.
[318] *Ibid.* at 92.
[319] *Ibid.* at 92, 175.
[320] *Ibid.* at 152.
[321] *Ibid.* at 231.
[322] *Ibid.* at 240.
[323] *Ibid.* at 91.
[324] *Ibid.* at 175.

did not "pull the plug" on it, and thought that the decision not to accept certain recommendations did not necessarily undermine the process.[326] The other felt that with new legislation and a new regulatory process, some nervousness could be expected, and thought that it was not made clear at the beginning that RAC would not work without commitment.[327]

Provincial participants felt that FEARO was committed,[328] but one member thought that federal departments may not have been.[329] At the political level, one member felt the level of commitment was never clear,[330] one felt some decisions made at the end were arbitrary and unsupported,[331] and one felt that without proclamation, the process will become tainted in both a political and personal sense.[332]

Facilitator

Almost all RAC participants expressed support for the work of the facilitator. Only three participants, all from industry, had some question about the facilitator's neutrality.[333] One participant felt that in order to effectively manage the "egos" at the table, it was important for the facilitator to

[325] *Ibid.* at 229.
[326] *Ibid.* at 152.
[327] *Ibid.* at 240.
[328] *Ibid.* at 123, 145.
[329] *Ibid.* at 123.
[330] *Ibid.* at 145.
[331] *Ibid.* at 125.
[332] *Ibid.* at 198.
[333] *Ibid.* at 24, 168, 186.

know the substance of what was being debated, and that access to independent environmental law advice was helpful.[334] This participant also suggested that the bulk of the facilitator's work was done outside of meetings phoning members and encouraging between-meeting discussions.[335] Other RAC participants found the strengths of the facilitator to be her ability to be at ease with participants,[336] to build relationships,[337] to keep members on track,[338] and her ability to "weather" the process.[339]

RAC participants also thought the process could be improved if the facilitator could avoid "forcing" consensus,[340] become better versed on substantive issues,[341] do more brokering of trading,[342] set the rules earlier,[343] and be tougher on people who change their views.[344]

Many, however, found it confusing that a FEARO representative acted as chair for the RAC meetings in addition to having a facilitator. RAC participants found the chair to be unnecessary,[345] to have contributed to the overall

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[334] *Ibid.* at 261.
[335] *Ibid.* at 266.
[336] *Ibid.* at 135.
[337] *Ibid.* at 135.
[338] *Ibid.* at 158.
[339] *Ibid.* at 199.
[340] *Ibid.* at 220.
[341] *Ibid.* at 74.
[342] *Ibid.* at 176.
[343] *Ibid.* at 232.
[344] *Ibid.* at 241.
[345] *Ibid.* at 31.

confusion,[346] to have contributed to a sense of aggravation,[347] to be possibly in a conflict of interest,[348] and to be not capable of playing the role of an honest broker.[349]

Federal Participants

All RAC participants, however, felt that certain federal government departments should have been members of the RAC table from the beginning. One FEARO participant described the lack of a direct role in RAC for departments as a "big mistake."[350] Representatives from key government departments have now been added to RAC as full members.[351]

One industry member suggested that had the departments been at the table from the beginning, the process would not have "erupted" after the draft regulations were pre-published.[352] Industry participants felt that departments would have brought expertise to the table, and a familiarity with balancing issues.[353] In their absence, one member felt FEARO

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[346] *Ibid.* at 27, 31, 135, 168.
[347] *Ibid.* at 39.
[348] *Ibid.* at 74.
[349] *Ibid.* at 245.
[350] *Ibid.* at 110.
[351] See for example, Minutes of the *Canadian Environmental Assessment Act* Regulatory Advisory Committee, Meeting 10.0, January 25-26 and Minutes of the Canadian Environmental Assessment Act Regulatory Advisory Committee, Meeting 9.0, September 17, 1993. The federal departments that sent representatives were Environment Canada, Fisheries and Oceans, Industry Canada, Indian and Northern Affairs, and Natural Resources Canada.
[352] Pers. comm. Notes on file with the author, p. 43.
[353] *Ibid.* at 134, 249.

had to explain to departments who were reluctant to listen what the process was about.[354] Two participants, however, expressed concern about keeping the size of the RAC committee to a manageable number,[355] one suggesting a system of concentric circles may be useful.[356] Another participant felt that in addition to being at the table, departmental representatives must be in a position to make decisions and to speak frankly.[357]

One departmental participant thought that because public and intergovernmental consultation was taking place on two separate tracks,[358] and because neither process was able to influence the other, "you could see the problems coming."[359] Several participants felt that FEARO was unable to speak on behalf of federal departments,[360] and one suggested it did not even try.[361]

One ENGO member felt it was difficult for FEARO to represent the interests of federal departments, especially if it intended to play the role of "honest broker."[362] Another member felt that departments were assuming they could have

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[354] *Ibid.* at 276.
[355] *Ibid.* at 169, 209.
[356] *Ibid.* at 209.
[357] *Ibid.* at 218.
[358] The RAC and the interdepartmental committee called the Senior Management Committee on Environmental Assessment. See Chapter II, Part A, s. 3 for more details.
[359] Pers. comm. Notes on file with the author, p. 55.
[360] *Ibid.* at 67, 83, 191.
[361] *Ibid.* at 67.
[362] *Ibid.* at 93.

one last kick at it, and that there was no incentive for them to test the waters to see if their positions would fly among RAC members.[363] One participant, however, wondered how easy it will be for departments to see themselves as just one interest among many, and perhaps an interest that ought to have given way.[364]

One provincial member also questioned whether the facilitator would be able to manage a table that included federal members, but felt it would be better for the process.[365] Another member thought that having departments at RAC meetings merely as observers sent the wrong message to RAC members because it gave the appearance that departments were not willing to work hard or to contribute.[366]

Selection of Representatives

Many RAC participants found the representation around the table to be acceptable,[367] although almost all had suggestions as to how it could have been improved.

FEARO participants were concerned about the lack of representation from First Nations and from the province of

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[363] *Ibid.* at 176.
[364] *Ibid.* at 226.
[365] *Ibid.* at 123.
[366] *Ibid.* at 199.
[367] *Ibid.* at 31, 62, 153, 170, 177, 221, 228, 236, 247, 262.

Quebec.[368] It was suggested, however, that native groups had reserved judgment with respect to participating,[369] and that although the "door was always open" for Quebec, more involvement was politically very difficult.[370] One participant felt the selection was heavily Calgary/resource-based, and that secondary and tertiary interests like the manufacturing industry were missing.[371] Another participant thought that public policy is to a large extent driven by personalities, and as a result, felt that representatives should have been from higher levels of management in the various organizations.[372] One participant felt that the use of alternate members was expensive but crucial because it allowed the changing of representatives with limited disruption.[373] One participant questioned the relevance of two interests represented at the RAC table, but thought the most important victory was convincing the provinces to come to the table.[374]

One industry participant felt that there was at least one industry that would have been represented better by a different organization than the one that was selected for RAC.[375] Another industry participant felt that one of the ENGO representatives was not in a position to represent the

[368] *Ibid*. at 1, 12, 31.
[369] *Ibid*. at 109.
[370] *Ibid*. at 31.
[371] *Ibid*. at 19.
[372] *Ibid*. at 109.
[373] *Ibid*. at 115.
[374] *Ibid*. at 262.

interest he claimed to represent.[376] One industry member thought that part of the problem was self-selection within organizations, and felt that the ENGOs sent too many lawyers.[377] One member felt the industry selection was far too heavily weighted on the resource side, with groups that were mostly regulated under provincial legislation.[378] Notable absences from the RAC table identified by industry participants included consulting engineers,[379] small business,[380] provincial governments,[381] agricultural industries,[382] the tourism industry,[383] exporters,[384] and the chemical industry.[385] One member, however, felt that some of the missing interests were able to get into the process through a "buddy system" that developed along the way.[386] Another member felt the selection was fair because participants were largely chosen as a result of the cross-Canada consultations which had revealed the groups with the strongest interest in *CEAA*.[387]

One departmental participant felt a better mix would have included more representatives from the native community,

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[375] *Ibid.* at 22.
[376] *Ibid.* at 100.
[377] *Ibid.* at 49.
[378] *Ibid.* at 155.
[379] *Ibid.* at 131.
[380] *Ibid.* at 131, 167, 209, 277.
[381] *Ibid.* at 207.
[382] *Ibid.* at 207.
[383] *Ibid.* at 207.
[384] *Ibid.* at 207.
[385] *Ibid.* at 277.
[386] *Ibid.* at 277.
[387] *Ibid.* at 170.

Quebec, and from municipal governments.[388] Another participant felt that none of the RAC members were able to effectively represent the concerns of people living in Canada's north.[389] One participant felt that a better mix of interests may have prevented the *CSL* crisis from happening.[390] Another participant thought that a general call for participants was not sufficient, and felt it was FEARO's responsibility to take a proactive role in balancing the group. This participant also felt that if there was no obvious group to represent a certain interest, special care should be taken to consider those interests during discussions.[391] Other notable absences identified by the departmental participants included the manufacturing industry,[392] small business,[393] pipeline companies,[394] and direct foreign investment.[395]

ENGO participants generally found the selection to be acceptable, but one member thought a role for the international development community would have been helpful, and regretfully reported that labour organizations had declined.[396] One member suggested that on-line access to documents could potentially bridge the gap between RAC

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[388] *Ibid.* at 62.
[389] *Ibid.* at 69, 71.
[390] *Ibid.* at 78. See Chapter II, Part A, section 4 for a discussion of the "*CSL* crisis."
[391] *Ibid.* at 183.
[392] *Ibid.* at 78, 183.
[393] *Ibid.* at 183.
[394] *Ibid.* at 78.
[395] *Ibid.* at 183.

members and those groups not represented.[397] Another participant felt that industry groups who were not represented had successfully found a way to get their concerns to the table.[398] One member found that the ENGO members had some problems linking with their constituents, and suggested these problems eventually lead to the perception among some in the environmental community that a certain member was acting without first seeking instructions.[399]

One provincial member said that a lot of ground work was necessary to bring the views of provincial governments to the table, and attributed the reluctance of some provinces to the failure to get key concessions relating to equivalency of process at the Committee stage.[400] Another member thought that the provincial representatives that were at the table were the ones who were most interested in the process.[401] One member felt that observer status for the provinces was a waste of resources and "bad manners," and suggested that as the process evolved, provinces who wanted a direct pipeline through the CCME started to take a greater interest in RAC.[402] One member felt that a subcommittee was needed to address issues peculiar to northern Canada, and thought that it was

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[396] *Ibid.* at 237.
[397] *Ibid.* at 154.
[398] *Ibid.* at 228.
[399] *Ibid.* at 177.
[400] *Ibid.* at 123-124.
[401] *Ibid.* at 145.
[402] *Ibid.* at 197.

important to dovetail the RAC process with some of the comprehensive claim negotiations that were underway.[403]

Number of Negotiators

Of the seven RAC participants who had views on this subject, all had concerns about the size of RAC.[404] Some participants encouraged the use of more subcommittees to address this concern.[405]

Training

Several RAC participants felt some pre-RAC training would have been helpful. Suggested topics included negotiating skills,[406] getting constituent views to the table;[407] and alternate dispute resolution techniques.[408]

Resource Pool

RAC imposed an extraordinary responsibility and workload on its participants. Most participants felt "stretched" by the work and time demands of the process.[409] One industry member felt the provision of a secretariat may have been helpful,

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[403] *Ibid*. at 141.
[404] *Ibid*. at 14, 40, 49, 75, 221, 230, 261.
[405] *Ibid*. at 40, 230.
[406] *Ibid*. at 71, 259.
[407] *Ibid*. at 71.
[408] *Ibid*. at 124.

but was concerned that *per diem* funding would create "professional advisors" who in their self interest would perpetuate the process.[410] One industry member estimated that RAC accounted for fifty per cent of his time over two years; another participant thought RAC consumed twenty-five per cent of his salary, travel and consultation budgets.[411] One member felt that despite the resource implications, the time spent was valuable for his company, and suggested it requires a certain amount of time to be able to take a responsible position.[412]

One ENGO member felt time and money constraints left members dependent on FEARO, and stopped short of allowing them to do a good job.[413] Another ENGO member, however, felt that the funding provided by FEARO was a key to the process, and thought the ENGOs could not have participated as fully without it.[414] One ENGO member felt that RAC was a huge drain on resources, and resulted in little "bang for the buck," but thought that with such a large investment in the process, it was difficult to pull out.[415] Another ENGO member suggested a resource pool for technical issues was needed, and felt that

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[409] *Ibid.* at 89, 104-105, 126, 137, 160, 177, 227, 242, 280-281.
[410] *Ibid.* at 49.
[411] *Ibid.* at 211.
[412] *Ibid.* at 280-181.
[413] *Ibid.* at 89.
[414] *Ibid.* at 154.
[415] *Ibid.* at 177.

it was important that this information does not come from FEARO.[416]

One provincial member felt funding for a provincial secretariat may have been helpful, and suggested such a secretariat has been useful in the past.[417] Another member thought that the provinces incurred reasonable expenses, and did not suffer an excessive burden.[418]

Clear Deadline

The deadline for RAC, indeed the deadline for proclamation of *CEAA*, continued to move for the entire period of time under study. Many deadlines were set and then abandoned. One industry participant described the moving deadline as a source of ongoing disappointment.[419] Another industry participant felt, however, that despite the moving target, FEARO was capable on engendering a constant state of crisis which kept everybody working hard.[420] One FEARO participant felt the result was unlimited opportunity for detractors of the process to pressure FEARO.[421] One departmental participant thought that RAC deadlines were not as severe as the ones departments were asked to meet through the SMCEA.[422]

[416] *Ibid.* at 245.
[417] *Ibid.* at 126.
[418] *Ibid.* at 147.
[419] *Ibid.* at 212.
[420] *Ibid.* at 168.
[421] *Ibid.* at 21.
[422] *Ibid.* at 84.

To address the problem, one industry member suggested the implementation of an "off-line" process of communication between members so that the first day of face-to-face meetings is not spent "getting acclimatized."[423]

Clear Rules

Several RAC participants felt that the process would have been more successful if certain issues had been clarified right at the beginning. Several thought more of a discussion on the meaning of "consensus" would have been helpful, or on whether issues could be revisited.[424] Some participants felt more discussion was needed on the role of RAC in the regulatory process[425] and on what to expect during the transition from RAC to government.[426] Two participants thought the government could have mentioned the potential for a balance problem if one side decides to send all lawyers to the process.[427] Three participants would have liked to have seen more discussion on the time and work that expected.[428] One participant thought the discussion of goals could have been done earlier;[429] and two participants felt discussions between meetings could have been encouraged.[430]

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[423] *Ibid.* at 280.
[424] *Ibid.* at 28, 36, 55, 101, 126, 132, 246.
[425] *Ibid.* at 167, 210.
[426] *Ibid.* at 257.
[427] *Ibid.* at 132, 166.
[428] *Ibid.* at 104-105, 137, 167.
[429] *Ibid.* at 228.
[430] *Ibid.* at 232, 278.

Appendix B:

Summary of EPA Regneg Study
and Interview Guide

1. Regulatory negotiation (or "regneg") is a process which involves the use of negotiation at the formulation stage in the development of a regulation. Regneg brings to a negotiating table all parties who will be affected by a regulation and allows those parties, to the extent possible, to negotiate the substance and text of that proposed regulation.

2. The goal of "negotiation" used in this context is for all negotiators to reach a "consensus" agreement on the proposed substance and text of a regulation. "Consensus" in this sense does not usually mean that every party agrees to every provision in the regulation, but simply that each party concurs in the overall result, and by implication, agrees not to challenge the regulation if it is consistent with the agreement reached.

3. Regneg was used on an experimental basis during the 1980s by a few U.S. federal agencies for a handful of regulations.

4. The first american agency to attempt it was the Federal Aviation Administration who in 1983 assembled a committee to negotiate a revision of flight and rest time requirements for domestic airline pilots.

5. Since then, the Environmental Protection Agency (the "EPA"), the Nuclear Regulatory Commission, the Federal Trade Commission, and the Departments of Transportation, Labor, Interior, Agriculture, and Education have experimented with regneg. The EPA conducted seven experimental regnegs during the 1980s.

6. Supporters of the process say it has the capacity to reduce the likelihood of litigation, produce faster and less costly rulemaking, and create objectively better rules.

7. Critics argue regneg is more capable of producing a regulation that is unauthorized by statute, and has the tendency to obscure the public interest to the benefit of private interests.

8. Based on the regneg experiences of the EPA and on a survey of the literature written on the subject, the following is a summary of "preconditions" to a successful regneg, and criteria for evaluating whether a regneg is a success or not:

Interview Guide for the RAC Process

I EPA Preconditions for Success

Rule Selection:

The EPA experience suggests that not all proposed regulations will be suitable candidates for regneg, and that the selection of an appropriate rule will play an important part in the negotiation's success.

1. Existence of Countervailing Power: A regneg is more likely to be successful when no single party can dictate the results without incurring an unacceptable sanction from the other parties.

- -How would you assess the relative power around the RAC table?
  - -Is this the same traditionally?
- -How would you describe an unacceptable sanction from another party?

2. Alternatives Must Look Worse: A party to a negotiation will not seriously negotiate unless the alternative looks worse.

- -What were your alternatives to the RAC process?
  - direct lobby?; litigation?; media?
- -How would you describe the chances of success for these alternative methods relative to the RAC?
- -How would you describe the typical consultation processes?
  - At Environment Canada?

3. Issue Must Be Ripe: An issue is not "ripe" enough for a successful regneg if there is little or no controversy, or if parties are still "jockeying for position" by filing lawsuits, threatening lawsuits, building media campaigns, or lining up political support.

- -Were the issues RAC dealt with "ripe" for negotiation?

4. Issue Cannot Be Purely Objective: If parties to a dispute think that science can provide the appropriate answer, the regneg has little chance of succeeding. The regneg must involve some element of competing values for which there is no right or wrong.

- -Could any of the RAC issues have been solved through science?
- -If yes, did this make them inappropriate for RAC?

5. No Fundamental Values: A rule that involves a dispute over fundamental values is unlikely to be negotiable.

-Did any of the RAC issues involve a fundemental value?
-If yes, did this make the issue inappropriate for RAC?

6. Need for Multiple Issues: A rule must involve more than just a single issue so that parties can "bundle" and trade issues in order to maximize their overall interests. Too many issues on the table, however, can lead to a break down of negotiations.

-Were you able to bundle and trade issues in order to maximize your overall interests?

Process Issues:

Once an appropriate rule is chosen, the EPA experience suggests the agency can still take steps to enhance the chances for a negotiated resolution.

1. Government Commitment: Negotiations will not produce results if the negotiators do not believe the agency will use the negotiated agreement.

-How would you describe the federal government's commitment to the RAC? FEARO's commitment?

2. Careful Selection of Facilitator: Selection of a qualified and neutral facilitator or convenor is crucial to the success of the negotiation.

-How would you describe the selection of the RAC facilitator? The importance of a facilitator? The ideal facilitator?

3. Sufficient Government Representation at Negotiating Table: Strong government presence is necessary to keep the discussion from wandering outside what is permissible by statute, and parties must know where the government stands on disputed matters.

-How would you describe the government representation at the RAC?

4. Careful Selection of Participants: Selection procedures must be able to select sufficient and credible representation. Negotiators must be able to speak on behalf of their constituency and must be authorized to accept an agreement on behalf of that constituency in the event that consensus is reached.

-How would you describe the selection of RAC participants?

5. Limited Number of Participants: The number of negotiators should not exceed 25.

-Was the RAC an effective size?

6. Training of Participants: Orientation and training of participants at the pre-negotiation stage has made a significant difference in the operation and success of regnegs.

-Would an orientation and training session have assisted you in your preparation for RAC?

7. Resource Pool: Establishment of a resource pool for scientific and technical information, to be managed by the participants, can contribute to a successful regneg. Significant cost burden to participants could threaten the effectiveness of the process in future.

-Would a common resource pool for scientific and technical information have assisted RAC discussions?
-How would you describe your cost burden for RAC?

8. Clear Deadline: The most favourable climate for negotiation occurs when all parties believe there is an urgency for reaching a decision.

-Did deadlines contribute to the reaching of agreements?

II EPA Criteria for Evaluation

1. Objectively Better Regulation: One important measure of a regulation's success is the assessment of those who are affected by it. Can the regulation be described as fairer and wiser than one which would have been produced through a more traditional process? Does it take into account the best information available? Can it be said that no joint gains have gone unrealized?

1.1 Fairer and Wiser?: A regneg regulation would be better than a conventionally developed regulation if it can be shown to be fairer and wiser than it would have been otherwise.

-Are the *CEAA* regulations fairer and wiser than what would have resulted without the RAC process?
-How would you describe the "more traditional process" of regulation making? Are consultation practices adequate?
-Does the regulation do a better job of accomplishing

its statutory objective?

1.2 Takes Into Account Best Information Available?: A better regulation would be one which is informed by a better quality of information. One weakness of traditional rulemaking is that the government is frequently the only party generating solutions to regulatory problems.

-Do the *CEAA* regs benefit from better information?
-How would you describe the quality of information that informs traditionally-produced regulations?
-Did the RAC produce any innovative solutions?

1.3 No Joint Gains Unrealized: If the interests of the parties are well reconciled, no possible joint gains should be left unrealized. Further study would not produce any ideas that would help one party but not at the expense of any other party.

-Did the RAC help to idenify joint gains?
-How does this compare to traditional processes?

2. Better Serves the Interests of Participants: If regneg is better able to serve the interests of participants to the process, that should be measurable in fewer lawsuits, shorter development time, reduced overall costs, and sustained interest in the process by all participants involved including government.

2.1 Less Litigation. EPA has concluded that regneg has significantly reduced their litigation activities. Lack of judicial challenge is a strong endorsement of the process that produced the regulation. Those who would most likely bring suits would be participants in the process; "consensus" implies that parties will not challenge the agreed-upon rule.

-Do you expect the RAC regulations to be contested as often as they would have if RAC not been involved?
-How would you describe the prevalence of litigation in this area generally?

2.2 Less Time: EPA reports that regneg has shortened their total process time for each regulation; A longer "up front" time investment can reduce overall time spent on litigation and "administrative wrangling".

-Do you expect the time invested in the RAC process will shorten the overall process time for these regulations?
-Would you factor in time for litigation and administrative wrangling?

2.3 Less Expensive: EPA regneg participants predict that taking into account the costs of the process, the likelihood of litigation, and costs associated with compliance and enforcement, the cost of rules produced through regneg is likely to be less than the cost of rules produced through traditional processes.

-Do you expect that the cost of implementing *CEAA* will be less because of RAC than it would have without RAC?

2.4 Support of Participants to the Process: EPA regneg participants interviewed had all become advocates for further regnegs. One participant is quoted as saying, "there is no magic in the process, but it is better than going through the traditional battle".

-Would you be interested in future RAC-type processes?

2.5 Support of Government: Regneg has apparently attracted the full support of the EPA who have now institutionalized the process. The EPA now have full-time staff to manage regnegs and to evaluate new candidates, and they are considering expanding into the areas of policy development and enforcement.

3. Better Serves the Interests of Non-Participants: A better regulation-making process would better serve the interests of all citizens, and not just the ones who are chosen represent particular interests at the negotiating table. The danger is that a dispute over what is in the public interest may become a dispute between various private interests.

-Do you think the public interest was well served by the RAC?

4. Better Compliance: A better regulation could be measured in terms of how well affected parties comply with it. The EPA believes compliance is "very high" with their regneg regulations because there was a feeling of "ownership" of the regulation by the participants, and because the regulated community better understood what was meant by the regulation, and what was expected of them.

-Do you expect compliance with the *CEAA* regs will be higher than it would have been without RAC?

5. Improved Relationships: A better rule making process should improve the relationships between traditionally adversarial parties. Some EPA regneg relationships continued beyond the regneg and helped foster agreements in other settings. Improved relationships often increased the opportunities for dialogue. Participants benefitted from better relationships and access to government officials. Regnegs that didn't succeed were still able to increase understanding of the issues and of various parties' perspectives.

-Have you found that the RAC process has improved communications with other RAC members?
Representing different interests?
With government representatives?

Appendix C:

Litigation under EARP
(As of April, 1994)

British Columbia Wildlife Federation and others v. Her Majesty the Queen and others (1991), 44 F.T.R. 273, 6 C.E.L.R. (N.S.) 265; Application for leave to appeal dismissed February 4, 1993 (S.C.C.) 149 N.R. 239m and 150 N.R. 80n.

Canadian Parks and Wilderness Society v. Superintendent of Banff National Park, Director of the Western Region of Parks Canada, Dr. Bruce Leeson, Jean Charest (in his former capacity as Minister of Environment), Monique Landry (Secretary of State Canada) and the Attorney General of Canada, F.C.T.D. Nos. T-2505-93 and T-137-94.

Lifeforce Foundation v. The Queen (Beluga Whales), Unreported judgment of Collier, J. dated August 10, 1990, F.C.T.D. Nos. T-2201-90 and T-2181-90.

Western Canada Wilderness Committee v. Minister of the Environment, Unreported "interim" decision of Collier, J. dated December 21, 1990, final Order and Reasons, February 28, 1993, F.C.T.D. No. T-2913-90, F.C.A. Nos. A-605-91 and A-237-93.

The Edmonton Friends of the North Environmental Society and others v. Minister of Western Diversification, Minister of Transport, Minister of Fisheries and Oceans and Minister of the Environment (Daishowa), Unreported Order and reasons of Jerome, F.C.J., dated December 11, 1992, F.C.T.D. Nos. T-441-90 and T-440-90, F.C.A. No. A-1675-92.

Friends of the Island Inc. v. Minister of Public Works, Minister of Transport, Minister of the Environment (No. 1)(Fixed Link), [1993] 2 F.C. 229 (T.D.); (1993), 102 D.L.R. (4th) 696 (F.C.T.D.).

Friends of the Island Inc. v. Minister of Public Works, Minister of Transport, Minister of the Environment (No. 2)(Fixed Link) (1993), 65 F.T.R. 180.

Cree Nation and other v. The Queen and others (N.B.R./James Bay), F.C.T.D. No. T-1913-90.

Mathew Coon Come and others v. Hydro Quebec, A.G. Quebec (Great Whale/James Bay II), Quebec S.C. Nos. 500-09-001076-900, 500-05-004330-906.

Mathew Coon Come and others v. The Queen, Pierre Cadieux, Lucien Bouchard and Thomas Siddon (Great Whale/James Bay II), F.C.T.D. No. T-962-89.

Hydro Quebec v. National Energy Board (Great Whale/James Bay II), [1991] 3 F.C. 443 (C.A.); (1991), 132 N.R. 214, rev'd unreported decision of the S.C.C. dated February 24, 1994.

Cree Regional Authority and Namagoose v. Robinson (Great Whale/James Bay II) on the preliminary question of jurisdiction: [1991] 2 F.C. 422 (T.D.), affirmed, [1991] 3 F.C. 533; leave to appeal denied, July 4, 1991 (S.C.C.); on the merits: [1992] 1 F.C. 440 (T.D.), (1992) 84 D.L.R. (4th) 51 (F.C.T.D.).

The Eastmain Band and others v. Raymond Robinson and others (Eastmain/James Bay), [1992] 1 C.N.L.R. 90 (F.C.T.D.); rev'd [1993] 1 F.C. 501 (C.A.); leave to appeal denied with costs, October 14, 1993 (S.C.C. No. 23382).

Cree Nation of Chisasibi and others v. Minister of the Environment, Indian Affairs, Transport and Fisheries, Hydro-Quebec and others (Laforge 1 and 2/James Bay), F.C.T.D. No. T-1638-92; Quebec S.C. No. 500-05-011892-922.

Naskapi Montagnais Innu Association v. Minister of National Defence (Innu/Low Level Flying) (1990), 35 F.T.R. 161, [1990] 3 F.C. 381 (T.D.); (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

Vancouver Island Peace Society v. The Queen and others (1993), 11 C.E.L.R. (N.S.) 1 (F.C.T.D.), 53 F.T.R. 300.

Friends of the Oldman River Society v. Minister of Transport and Minister of Fisheries and Oceans (Oldman No. 1) (1990), 30 F.T.R. 108; [1990] 2 W.W.R. 140 (F.C.T.D.); affirmed, [1992] 1 S.C.R. 3; (1992), 132 N.R. 321.

Friends of the Oldman River Society Inc. v. Minister of the Environment, Minister of Transport, Minister of Fisheries and Oceans, Minister of Indian and Northern Affairs, Her Majesty the Queen in right of Alberta (Oldman No. 2) (1993), 105 D.L.R. (5th) 444 (F.C.T.D.); noted [1993] C.C.L. 9905.

Friends of the Oldman River Society v. Minister of Environment, F.C.T.D. No. T-2840-90.

Friends of the Oldman River Society v. Regina, Minister of Environment and others, Alberta Q.B. Nos. 9001-04254 and 9001-04256.

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Friends of the Oak Hammock Marsh Inc. v. Minister of Western Diversification, Minister of the Environment and Ducks Unlimited (Canada), F.B.T.D. No. T-612-93, F.C.A. Nos. A-379-93 and A-393-93.

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Canadian Wildlife Federation and others v. Minister of the Environment and Saskatchewan Water Corporation (No. 2)(Rafferty No. 2), [1990] 1 F.C. 595 (T.d.; (1990), 31 F.T.R. 1; affirmed [1991] 1 F.C. 641 (C.A.), (1991) 121 N.R. 385.

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Tetzlaff Brothers v. Minister of the Environment and Saskatchewan Water Corporation (Rafferty No. 4), [1991] 1 F.C. 261 (T.D.); rev'd [1992] 2 F.C. 215 (C.A.); (1992) 134 N.R. 57.

Tetzlaff v. Minister of the Environment, Saskatchewan Water Corporation, John Archer, William J. Stole and Roderick R. Rieve (Rafferty No. 5), F.C.T.D. No. T-499-92.

Saskatchewan and others v. Minister of Environment (Rafferty), Sask. Q.B. No. 4258 of 1990.

Sasketchewan Power Corporation v. The Queen and the Minister of Environment (Rafferty), F.C.T.D. No. T-2698-90.

A.G. Canada v. Saskatchewan Water Corporation and Souris Basin Development Authority (Rafferty), [1991] 1 W.W.R. 426 (Sask. Q.B.); reversed, [1992] 4 W.W.R. 712 (Sask. C.A.), with additional reasons issued June 22, 1993; [1993] 7 W.W.R. 1 (C.A.).

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