Sustainable Governance in the Twenty-First Century: Moving beyond Instrument Choice

by

KERNAGHAN WEBB

in

Designing Government

From Instruments to Governance

Edited by

PEARL ELIADIS

MARGARET M. HILL,

AND MICHAEL HOWLETT

Reprint of Chapter 10, pp. 242 - 280 (and endnotes, pp. 411- 421)

MCGILL-QUEEN'S UNIVERSITY PRESS
MONTREAL & KINGSTON • LONDON • ITHACA

TABLE OF CONTENTS

SUSTAINABLE GOVERNANCE IN THE TWENTY-FIRST CENTURY: MOVING BEYOND INSTRUMENT CHOICE[1]

KERNAGHAN WEBB

INTRODUCTION

The position taken in this chapter is that there is considerable value in moving beyond narrow investigations of which policy instrument governments should use to more broad and nuanced inquiries into how a range of societal actors can organize themselves to address problems of mutual concern. By changing the focus of inquiry in this manner, it is possible to more directly address some of the new realities of governing in the twenty-first century. These "new realities," which will be more fully explored in the body of the chapter, include:

- Factors that highlight some of the limits of the state, such as the increasing significance of international influences beyond the control of national and subnational governments, the continuous calls on government for "no new taxes," industry pressure to minimize regulatory burden and thereby enhance capacity to compete, and the rise in importance of technological issues
- Recognition that actors other than the state have both an interest in and a capacity to carry out governing functions, be they industry associations, nongovernmental organizations (NGOs), communities, or individual citizens.

To recognize some of the limits of the state and the importance of nonstate actors is not to suggest that state institutions will not remain the central actor in public policy or that conventional instruments of

governing will not remain of central importance. But it is to suggest that governments can and should work more systematically with others to develop and implement sustainable approaches to governing— that is, governance approaches that, because they integrally involve other actors, have the potential to be more robust, responsive, efficient, effective and flexible than conventional, state-imposed regulatory approaches. In the use of a diverse, multivariable approach to governing, the failure of any one approach does not necessarily mean an overall implementation failure but rather that another actor, instrument, institution, or process is in a position to "pick up the slack" or otherwise act as a check and balance concerning a particular behaviour. Illustrations of how this approach works in practice are provided later in the chapter, using the consumer-and environmental-protection contexts as examples.

In the sense that sustainable governance involves a combination of governmental and nongovernmental institutions, processes, instruments, and actors, it entails much more than simply a question of instrument choice. It also entails much more than a question of intelligent use of command-and-control regulations and financial-incentive instruments (although, clearly, intelligent use of such conventional approaches must remain an important preoccupation for governments).

Sustainable governance is a concept that attempts to recognize and draw on the largely untapped potential of the private sector, the third (voluntary) sector, and individual citizens to assist in governing in the public interest. It is a more collaborative and systematic approach to governing that focuses on developing— and putting in place the conditions for the development of— innovative institutions, instruments, and processes for use, by a range of actors, often working in partnership with each other.

Although collaboration is a common feature of sustainable governance, so too is a certain amount of "creative tension," such as where one institution is established to act as a watchdog over the actions of others, or where industry and nongovernmental-association certification programs openly compete in the marketplace for public approval and customer buy-in, or where processes are created that facilitate the ability of citizens to challenge the actions of others. Thus sustainable governance recognizes and attempts to harness the value of both collaboration as well as rivalrous check-and-balance initiatives. As the examples of innovative approaches provided in the body of the chapter suggest, it would appear that many jurisdictions are "groping" their way toward more sustainable governance approaches but are not doing so consciously or systematically, with the result that the thinking and practice of policy implementation are not as advanced as they could be.

The objective of this chapter is to sketch out in a preliminary manner some key aspects of the sustainable-governance landscape. First, a brief description of some of the realities of governing in the twenty-first century is provided. Then an exploration of the concept of sustainable governance is undertaken. Following this, an examination of some of the key building blocks of sustainable governance is provided. Examples of government, private-sector, and third-sector institutional, rule-instrument, and process innovations are set out. Next, two Canadian policy contexts (consumer and environmental protection) in which a nascent sustainable-governance approach may be at play are described. The value of systematic as opposed to spontaneous approaches to governance innovation is explored. The corporate social responsibility phenomenon, and its relation to sustainable governance, is examined. The role of civil society in sustainable governance is discussed. Some caveats concerning the sustainable-governance concept are set out. Then conclusions are provided.

Learning from our Mistakes: The Realities of Governing in the Twenty-First Century

There will always be breakdowns in public-policy implementation that can be characterized as the result of instrument-choice or public-policy "failures." It is difficult to extract a common theme or explanation underlying such varied public-policy breakdowns as the tragedies of the Walkerton water contamination and Westray mine collapse, the depletion of the East Coast cod-fishery stocks, the blood-contamination disasters in several jurisdictions, the outbreak of mad cow disease in the United Kingdom and Canada, or the Enron/WorldCom meltdown. The explanations are as diverse as the policy contexts within which such tragedies occur.

Typically, bodies that undertake inquiries into why these failures have occurred conclude by calling for more funding, more staff, more training, more inspections, more enforcement actions, higher standards, new laws, and more education and awareness. The sad fact is that there will rarely if ever be enough financial resources or inspectors available, enforcement actions undertaken, or sufficiently high standards in place to fully and properly address a given public-policy problem. Governments can't have an inspector on every street corner and in every establishment and operation. Enforcement agencies can't take every transgression to court. Governments will rarely have enough resources to do anything more than maintain minimally acceptable levels of implementation and enforcement. At the same time as the public wants rigorous and efficient administration and enforcement, they also

want their taxes reduced. Moreover, they want a growing economy, which entails creating an environment that is attractive to businesses and business investment. Businesses want streamlined regulations that are not burdensome and that will give them a competitive advantage over, or a level playing field compared with, those operating in other jurisdictions. Political willpower for particular programs will vary from government to government and minister to minister; public interest in issues will wax and wane; and budgets and staff will increase and be cut back.[2]

As if these "realities of governing" in the twenty-first century weren't enough, they are joined by a host of other difficult challenges:

- Roller-coaster economies; the only thing of apparent certainty is that economies will rise and fall in ways that are not expected
- A growing but unpredictable influence of international factors (e.g., wars, terrorism, environmental problems, viruses, stock-market booms and crashes) on domestic affairs
- Strong economic interdependence, facilitated by trade agreements; which, in addition to increasing the influence of trade-partner economic deve1opments on home jurisdictions, puts pressure on trade partners participating in the agreements to develop compatible regulatory approaches
- Alarmingly low levels of public trust in democratic institutions (matched by very low trust levels in corporations, particularly multinational corporations)[3]
- The introduction of new technologies at a rapid pace, with difficult-to-predict effects (e.g., reproductive technologies, genetically modified organisms, advances in telecommunications and computers); governments are struggling to maintain the knowledge/expertise base needed to keep abreast of technological developments that, on the one hand, offer the prospect of new opportunities and benefits for society and business while, on the other, possessing the potential to create significant problems
- A considerably more devolved, decentralized, and fragmented federal-provincial-municipal governing context than was in operation prior to the 1990s.

In short, the task of developing and implementing effective public policy responses has become exceedingly challenging in the twenty-first century. We need to acknowledge the topsy-turvy, less-than-perfect wor1d in which public policy takes place and devise approaches that operate effectively in these suboptimal conditions. In important ways, conventional command-and-control regulatory approaches are not well

suited to operate in conditions of wildly fluctuating budgets and priorities, and they are hard to adjust in midstream in order to address new challenges. To put it another way, the "first-generation," resource-intensive, top-down, state-centred approaches to regulation that were largely put in place from the 1960s through the 1990s are particularly vulnerable to failure in the conditions described above.[4]

The position taken here is that attention needs to be focused on devising public-policy approaches that are capable of effective operation in the imperfect, difficult, and challenging circumstances we now face. The suggestion being made is that multivariate, multiparty governance approaches have a better likelihood of success in such choppy waters because they harness the energies and experience of multiple parties and perspectives and are therefore likely to be more robust, flexible, responsive, efficient, and effective. In a word, they are more likely be sustainable in today's operating environment.

Sustainable Governance: An Approach to Governing for the Twenty-First Century

The starting point for understanding how to respond to the realities of governing in the twenty-first century is acknowledging that, while the state has certain significant advantages in terms of governing when compared with nonstate actors[5], it doesn't have a monopoly on effective, efficient, and responsive governance approaches[6] --whether they entail institutions, instruments, or processes[7]. Sustainable governance recognizes and draws on the largely untapped potential of the private sector, the third (voluntary) sector and individual citizens to assist in governing. As the examples discussed later in the chapter suggest, typically these nonstate actors are not eager to participate in governing out of the goodness of their hearts. In the case of the private sector, their motivations often revolve around maintaining or enhancing market share. They are discovering that it can make good business sense to appropriately and expeditiously anticipate and address consumer, worker, environmental, and community concerns through a variety of different institutional, rule-instrument, and process innovations. In the case of nongovernmental organizations, their interest in assuming governing functions through certification programs, ombuds-schemes, and monitoring programs seems to stem from a lack of faith in government's ability to perform these functions properly. In the case of individual citizens or consumers, their motivations for challenging government and private sector actions or for boycotting certain companies may also be largely ones of self-interest. Nevertheless, this motley array of self-interested[8] nonstate actors can bring energies, perspectives, and

resources to the governance table that the state alone cannot bring to bear. In this sense, even if their motivations for addressing particular issues may differ, the private sector, NGOs, citizens, and consumers have in certain cases demonstrated a willingness to devise or support solutions in areas of mutual concern – solutions that have broad, public benefits. As noted above, sustainable governance puts emphasis on increased collaboration among actors[9] but also values a certain amount of creative tension among actors through the creation and support of rivalrous check -and-balance[10] techniques.[11]

Governance is a concept that, while not new, has recently gained prominence.[12] It represents a different and potentially promising way of looking at how we order ourselves. Governance has been defined as "the sum of the many ways individuals and institutions, public and private, manage their common affairs."[13] By involving the full range of public-sector, private, and civil-society organizations as well as citizens in public-interest governing,[14] the responsibilities, costs, and learning can be shared, and the ability to respond to new challenges or changing circumstances can be enhanced. Moreover, because these approaches characteristically involve more than one actor and often all three (government, industry, and civil society), they are likely to be more robust from the viewpoint of withstanding economic and fiscal downturns and shifting priorities.[15] It is for this reason that the governance strategy described here earns the name *sustainable* governance.

In the sense that sustainable governance is premised on the understanding that others than simply the state are capable of and willing to take on governing responsibilities, the concept of sustainable governance resonates in important respects, at the level of theory, with some of the work of Michel Foucault (in particularly his broad conception of government and governmentality) and Jürgen Habermas (in particular his notion of "juridification").[16] For Foucault and those who have elaborated on his ideas, the concepts of government and governmentality are not limited to activities of the State and instead refer more generally to how entities (individuals and others) place themselves under the management, guidance, or control of others or seek to place others under their own sway. Looked at in this way, law is simply one of many forms of governance, and nonstate bodies—including the individual, and entities between the individual and the state, such as the family, the community, industry associations, and NGOs— are all capable of creating or being subject to nonstate governance techniques. According to some writers who have explored Foucault's ideas, the notion of governmentality, when considered in light of modern liberal fixations with the proper limits of the state, generates an inclination to locate responsibility in actors other than

the state. This phenomenon— referred to as "responsibilization"— takes place when actors accept and internalize an obligation.

The writings of Habermas are centrally concerned with the tendencies of law to engage in processes of "colonization of the life-wor1d" (what he calls "juridification"), whereby informal means of structuring relations and activity are increasingly replaced by more formal, law-like approaches. While juridification can be positive, such as when notions of justice are imported into the resolution of disputes, it can also lead to increased bureaucratization and complexity, by which the individual is ultimately rendered less capable of protecting his or her own interests.

There appears to be implicit recognition in these interpretations of Foucault and Habermas that there are limits to the capability of the state and of the law and that, in view of these limits, there is a space for coexisting and sometimes competing forms of governance, including alternatives to law (this coexistence or competition has been referred to as "legal pluralism"). In light of these potential limitations, there also appears to be some acknowledgement that restraint in the use of law may be useful in some circumstances, as would be the development of legal approaches that increase the self-regulatory capacity of nonstate actors (this has been referred to as "reflexive law"). Building on the work of Habermas, Gunther Teubner describes the emerging strategy as follows: "The task of the law then is still to control power abuses, but the central problem becomes rather to design institutional mechanisms that mutually increase the power of members and leadership in private institutions."[17]

It is perhaps self-evident that there are potential dangers associated with devising systems and approaches that acknowledge or encourage nonstate actors to take on governance responsibilities and to internalize public-interest-oriented obligations. For example, there is the potential for the state to abdicate its legitimate responsibilities in favour of private bodies that are less accountable, transparent, and democratic. However, as discussed below, the notion of sustainable governance should in no way be understood as a call for or support of the idea of the state withdrawing from its legitimate governing responsibilities or as support for development of subpar governance approaches by nonstate parties. Rather, sustainable governance is based on recognition that bodies other than the state can take on certain governance responsibilities in a coordinated, accountable way that supplements the governance activities of the state. It is also based on recognition of the limitations of the state's conventional governance mechanisms. Sustainable governance is a structured and systematic approach to state and

nonstate governing activities working in tandem, in the public interest, and in an accountable, transparent manner.

As noted above, an enhanced role for nonstate actors and approaches in no way takes away from the fact that, in most circumstances, conventional public-sector institutions, rule instruments, and processes of governing—approaches involving democratically elected legislative bodies, the courts, administrative tribunals, and government departments and agencies devoted to the administration of the justice system and to the implementation of regulatory regimes and other programs— will and should remain the central and most powerful components of governance in the public interest. Indeed, they are the formative foundation of such governance.[18]

However, an enhanced role for nonstate actors and approaches does suggest that conventional public-sector approaches, like all approaches, do have their share of weaknesses. Thus, for example, the processes of law development and administration and of court adjudication are slow, expensive, and formal and therefore difficult to adjust to changing circumstances.[19] Moreover, bureaucratic, centralized, "top-down" approaches to governing do not necessarily capture the full range of energies and actors that are available and could be harnessed in support of public-interest objectives. For these reasons, overreliance on conventional command-and-control regulations enforced by government departments and agencies can be problematic, leaving society vulnerable and not as effectively governed as it could otherwise be.

In light of these limitations, there is a space created for other institutions, rule instruments, and processes that can to some extent counter some of the weaknesses of the conventional approaches.[20] This is not to maintain that these nonstate approaches are without limitations. For example, industry and NGO-led approaches often experience difficulties addressing free riders (i.e., those who choose not to participate in a program) and have lower visibility and often lower credibility than public-sector approaches. There is also the possibility of less rigorous standards being developed and applied than those that would emerge from a conventional regulation-development process; there is often variable public accountability; and there is the potential for conflicts with regulatory approaches.[21] Some of these limitations of industry and NGO-led approaches may be rectified or minimized through innovations introduced by the state.[22] In recognition of this sort of experience, it is maintained that the best approach to governing in the twenty-first century is a combination of conventional and innovative institutions, rule instruments, and processes that plays to the strengths of each while attempting to minimize and counter their weaknesses.

THE BUILDING BLOCKS OF SUSTAINABLE GOVERNANCE

Institutional, rule-instrument, and process innovations are the three key building blocks of sustainable governance. Each of these is briefly described below, and examples are provided.

SUSTAINABLE GOVERNANCE: INSTITUTIONAL INNOVATIONS

Institutions Defined

For the purposes of this chapter, institutions are organizational structures of government, industry, and nongovernmental organizations that carry out particular governance functions having an observable public-interest dimension. Innovative institutions take on such forms as public sector, industry, or NGO ombudsmen, councils, associations, commissions, or commissioners. These institutions perform such functions as monitoring and reporting on the implementation of rule regimes, investigating and reporting on possible enforcement problems, and dispute resolution. They rely on drivers such as citizen-triggered petitioning powers, consumer complaints, peer pressure, and public opprobrium, and they typically operate against a backdrop of conventional state-based institutions, rule instruments, and processes.

Innovative Government Institutions

Examples of innovative government institutions include the Ontario Commissioner for the Environment; the Commission for Environmental Cooperation (CEC), established as part of the North American Free Trade Agreement (NAFTA); and the federal Commissioner of the Environment and Sustainable Development established as an offshoot of The Auditor General of Canada.[23] In the early 1990s, in apparent recognition of the need for some form of check and balance on its line ministries responsible for environmental protection (most notably, the Ministry of Environment and the Ministry of Natural Resources), the Government of Ontario established the Ontario Commissioner for the Environment. Among other things, the Commissioner oversees the administration of an online registry concerning environmental decisions and draft decisions of Ontario-government offices, which is accessible to all members of the public. In addition, citizens of Ontario are given the power to request an investigation or response concerning any potentially problematic environmental behaviour, and the Commissioner oversees and publishes the responses of the responsible ministries. The request for investigation and response provision has been used extensively by Ontario citizens and has led to enforcement actions being under-

taken by government ministries. The Commissioner annually tables a published report (including the petitions and responses) in the Legislative Assembly. Arguably, the existence of such a check-and-balance institution, and the associated processes for citizen petitions, can act as a form of "distant ear1y warning" device that may decrease the likelihood of environmental disasters such as that of Walkerton happening in the future. Under NAFTA a similar petitioning process is available for Canadian, American, and Mexican citizens concerned with possible instances of inadequate federal enforcement in any of the three jurisdictions (through the NAFTA CEC). More recently, the federal Commissioner of the Environment and Sustainable Development has also established a similar citizen-petitioning process. In the final analysis, these "watchdog" institutions have the power only to publicize and potentially shame parties into action; nevertheless, the information revealed through their activities can alert parties to problems and lead to regime improvements. It is noteworthy that citizen use of these institutions has been modest and responsible.

Another example of a government-led institutional innovation is the Ontario regulated-industry self-management model.[24] In the case of motor-vehicle sales, funeral sales, travel agents, and the safety of elevators, amusement devices, and pressure boilers, the Ontario Ministry of Consumer and Business Services has authorized through statutes and regulations the development of industry self-management councils, which are responsible for inspection and enforcement of rules pertaining to the industry sectors. Funding for the industry self-management is provided through fees from industry. The self-management councils include government and consumer/public-interest representatives. The councils are each accountable to the Ministry of Consumer and Business Services. Simi1ar self-management approaches have been put in place in Alberta. Available evidence suggests that compliance rates have improved since the self-management councils were put in place, although there is potential for accountability and control problems now that considerable power and expertise have been "downloaded" to nonstate councils.

Industry Institutional Innovations

An example of a private-sector institutional innovation is the Canadian Banking Ombudsman[25] and its new partner organization, the Financial Services Ombudsnetwork. An elaborate banking-ombudsman system operates in Canada to resolve small-business and consumer complaints. It is entirely funded by industry, and it operates without any legislative basis. Consumer representatives sit on its board. Recently, it has evolved into a broader Financial Services Ombudsnetwork involving other financial

institutions. It, too, is entirely funded by industry. Because it is voluntary and nongovernmental, the ombudsnetwork can operate in a seamless way and cannot be tripped up by federal-provincial regulatory and jurisdictional issues. Although lacking a legislative foundation, the banking ombudsman was developed "in the shadow of the law" in the sense that the financial industry recognized that if they did not act, government would impose a regime upon them. Government retains the authority to put in place a regulatory response and will likely exercise this authority if and when it concludes that the industry approach is not working. The same can be said about the ombudsnetwork: It operate as a voluntary network unless and until there is a reason for a regulatory response. That the financial-services industry has chosen to "step up to the plate" and provide a nonregulatory response and that federal and provincial governments have essentially allowed the financial sector to demonstrate its capability to take on these functions instead of immediately developing a conventional, government-funded and government-implemented regulatory response is evidence on both sides of sustainable-governance thinking.

NGO Institutional Innovations

An example of an NGO institutional innovation is Oxfam Australia's Mining Ombudsman.[26] In the I990s the Australian Mining Council (the Australian mining-industry association) developed a voluntary code concerning environmental-management practices for its members, to be applied to mining operations both in Australia and abroad. Community Aid Abroad (CAA), the Australian branch of Oxfam, a nongovernmental human-rights organization, had been critical of the code from its introduction on a number of grounds, including its failure to address possible human-rights aspects of Australian mining companies operating in developing countries and its failure to put in place a dispute- resolution process open to communities that have concerns with respect to the operation of mines. CAA decided to create the Mining Ombudsman, which individuals and communities can turn to when they have complaints regarding Australian mines. The Ombudsman conducts fact-finding missions concerning complaints and then takes well-founded complaints to the mining operators. Several mine companies have responded favourably to the actions of the Ombudsman, leading to structured dialogues with affected communities and rectification of certain issues.

An example of a community-based NGO institutional innovation is the Riverkeepers organization.[27] Both Canadian and American communities have created Riverkeepers organizations, with the objective of monitoring the quality of rivers in their respective areas and promoting

good practices. As community-based organizations, these entities work with the multiple governmental authorities and jurisdictions that are frequently involved in water quality (and the Riverkeepers are not impeded by the jurisdictional problems that may hamper governmental activity). Riverkeepers also work with local industries and individuals to develop best practices and to remove administrative impediments.

SUSTAINABLE GOVERNANCE: RULE-INSTRUMENT INNOVATIONS

Rule instruments are stipulations of objective criteria that are designed to influence or control behaviour and that allow for evaluation of whether an entity or an activity is or is not in compliance with the criteria. Innovative rule instruments include such techniques as performance- or results-based regulations, financial incentives based on performance to agreed-upon standards, procurement contracts premised on compliance with stipulated public-interest criteria, voluntary codes, good-neighbour agreements, accords, memoranda of understanding, and standards developed through the formal-standards system. Typically, these rule instruments harness community, market, NGO, and peer pressure to a much greater extent than do conventional rule instruments, although they also draw on conventional legal instruments, institutions, processes, and pressures.

Government Rule-Instrument Innovations

One example of an innovative government rule instrument is the new federal law to protect personal information.[28] In the early 1990s, as budgets and staff within government departments were being systematically cut back, there was little appetite for new consumer legislation of any kind in Canada. In recognition of this public mood, as well as of industry resistance to a new law, the federal Department of Industry (Industry Canada) spearheaded efforts to develop a market-driven voluntary code, not a law, pertaining to personal information protection, involving other government departments and agencies from both the federal and provincial level, industry, and consumer organizations, and using the services of the Canadian Standards Association (CSA). Although the original intention was to use this code on a voluntary basis, upon its completion, a key industry player that had participated in its development requested that it become the basis for federal and provincial laws. A federal law has now been passed, the Personal Information Protection and Electronic Documents Act (PIPEDA), which draws expressly on the CSA code. PIPEDA has a distinctively "light" implementation approach. The rules are intended to be flexible and to allow organizations to adapt them to their own circumstances and to the

level of sensitivity of the personal information involved. It balances an individual's right to the privacy of personal information with the need of organizations to collect, use, or disclose personal information for legitimate business purposes. The Act designates the Privacy Commissioner of Canada as the ombudsman for complaints under the new law. The Commissioner seeks whenever possible to solve problems through voluntary compliance rather than heavy-handed enforcement. The Commissioner investigates complaints, conducts audits, and promotes awareness of and undertakes research about privacy matters. Rather than involving inspectors, as in conventional regulatory approaches, PIPEDA establishes a complaints-based system. Where the Privacy Commissioner has reasonable grounds to believe that an organization is contravening a provision of the Act, the Commissioner can audit the organization, individuals can make complaints to the federal Privacy Commissioner, who has the power to investigate, report on, and publicize infractions. The Annual Report is a key information dissemination instrument for the Privacy Commissioner, wherein he or she can describe problems that the Commissioner has encountered and make suggestions for how firms can stay in compliance. Under certain specified conditions, unresolved complaints can be taken to the Federal Court, which can order offending organizations to correct practices, publish notices of rectifications, and pay damages.

To support its conventional command-and-control regulatory provisions in the Canadian Environmental Protection Act 1999 (CEPA 1999), Environment Canada now makes use of a number of innovative rule instruments that essentially facilitate the ability of Environment Canada to act in an expeditious manner in advance of formal regulatory instruments, usually with the cooperation of private-sector participants. Three such instruments are described here:

1. Environmental-performance agreements (EPAS).[29] Depending on the circumstances, Environment Canada can use environmental performance agreements as a compliment, a precursor, or an alternative to regulations in order to address toxic substances of concern. EPAs can be used for the reduction of pollution emissions, broad-based pollution-prevention planning, extended producer responsibility, and hazardous-waste management. A number of criteria concerning the capacity of participants and appropriateness are used before EPAS are developed. One agreement (referred to as a memorandum of understanding) has been developed between the minister of environment, the minister of industry, and the Automotive Parts Manufacturers' Association to seek voluntary, verifiable

reduction and/or elimination of the use, generation, or release of specified priority toxic substances.[30] The agreement does not and is not intended to establish legally binding obligations among the parties.

2. Environmental-protection alternative measures (EPAMs).[31] An EPAM is a negotiated agreement to return an alleged violator to compliance. Its purpose is to restore to compliance a person who has been charged and who is willing to take steps to return to compliance without undergoing a trial. The alleged offender must accept responsibility for the action that forms the basis of the offence. EPAMs can contain initiatives such as the development of effective pollution-prevention measures to reduce releases of toxic substances to regulated limits, the installation of better pollution-control technology, changes to production processes in order to ensure compliance with regulatory requirements, and clean-up of environmental damage. The EPAM must be completed within 180 days. If the EPAM discussions do not lead to a negotiated EPAM, the Attorney General has the right to proceed with the prosecution. The EPAM is registered with the court as a public document. In one case,[32] an EPAM required an offender to develop and implement a standard operation procedure and policy for the export and import of substances regulated under CEPA 1999; to develop a training program for this activity; to submit for publication an article or paid advertisement describing the facts of the case, issues relating to the environmental problem concerned, and the essential terms of the EPAM; and to make a payment of $30,000, in trust, to the Environmental Damages Fund for the storage and disposal of toxic substances in the possession of Environment Canada or for other work that would benefit the environment.

3. Pollution-prevention (P2) plans.[33] P2 plans can be required in respect of a substance specified on the List of Toxic Substances or through other provisions in CEPA 1999. Pollution prevention has been defined in CEPA 1999 as "the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health." Typically, P2 plans include a statement from the CEO, the corporate or facility environmental policy, principles and commitments, the scope and objectives of the P2 plan, a baseline review, identification and evaluation of P2 options, an implementation plan, monitoring and reporting, and review and evaluation. Noncompliance with any of the requirements for pollution prevention stipulated under Section 56 of CEPA 1999 is an offence punishable by fines of up to $1 million or by imprisonment for up to three years.

Another example of a rule innovation is the Canada-Wide Standards (CWS) agreements developed by the Canadian Council of Ministers of the Environment.[34] The CWS agreements provide a national framework to address key issues in environmental protection and health-risk reduction that require common environmental standards across the country. Although the CWS agreements do not change the jurisdiction of governments or delegate authority, a key guiding principle is to avoid overlap and duplication of implementation activities. Each government has the flexibility to act in response to unique circumstances within its respective jurisdiction, yet each can work toward a common goal and timetable as well as provide public reporting on progress. In implementing CWS agreements, governments may take measures such as pollution-prevention planning, voluntary programs, codes of practice, guidelines, economic instruments, and regulations.

Industry Rule-Instrument Innovations

One example of an industry-led rule innovation is the Responsible Care Program of the Canadian Chemical Producers' Association (CCPA).[35] In the early 1980s, the CCPA, fearing a repeat of the Bhopal chemical-plant explosion on Canadian soil (and the negative repercussions of such a disaster for their sector) and wishing to forestall what they perceived as a possibly burdensome new Canadian Environmental Protection Act, developed the Responsible Care Program. Originally a simple set of principles, it has evolved to include a detailed 152-point code of behaviour; an advisory group including academics, environmental organizations, and community representatives; the monitoring of facilities by a combination of competitors, NGOs, and community representatives; and public reporting of results. Adherence to the Responsible Care Program has become a condition of membership in the CCPA. Both the federal government and the Ontario government have since entered into memoranda of understanding with the CCPA concerning its Responsible Care Program, and versions of Responsible Care now operate in over forty-five countries around the wor1d. In a sense, an association of Canadian "branch- plant" chemical producers has influenced and altered the behaviour of the American and foreign chemical industry around the world. At a more subtle level, the Responsible Care Program marks the evolution of an industry association from a lobbying organization into a rule-making and self-policing body concerned with the behaviour of its members (which, at the same time, has also made it a more effective lobbying organization). Some critics have suggested that such programs are being used to impede the progress of new regulatory initiatives.

Another example of an industry rule-instrument innovation is the environmental-management systems (EMS) standards developed through

the International Standards Organization (ISO), a nongovernmental organization with a private-sector focus. These EMS standards, called ISO 14001 standards, establish a structured approach to assessing an organization's environmental impacts; then, following a plan-do-check-act model, they describe a process for addressing and managing these impacts. Many firms pay to be "registered" for ISO 14001 assessments. In doing so, they are essential1y undergoing private inspections at their own expense. The ISO 14001 standards not only assist firms in putting in place programs to meet regulated requirements and voluntary-code commitments, but also help firms to identify production improvements and energy-efficiency improvements within their operations. Achieving ISO standards also gives firms visibility for their environmental performance. Government-determined performance standards and regulations are foundation documents used in the implementation of environmental management systems. ISO 14001 management-systems standards have been used by governments to address different forms of private-sector behaviour. It is perhaps self-evident that not all regulated actors are the same. Some are more than willing to exceed legal requirements. Some wil1 meet legal requirements if pushed. Others will do everything possible to avoid compliance. In some jurisdictions,[36] governments have offered firms the possibility of expedited permit processes if they voluntarily choose to put in place an environmental management system in compliance with ISO 14001 standards. Here, voluntary ISO 14001 standards are being employed by government as a reward or inducement in a manner that may be particularly attractive to "overachieving" firms that are willing to exceed regulatory requirements. In other cases, legislation provides that courts may take into account use of EMS systems in determining liability. Here, EMS systems seem to be employed by governments to address those firms that are generally law-abiding and simply need a nudge, or "another good reason" to reinforce their law-abiding behaviour. And final1y, as part of sentencing, Courts have imposed ISO 14001 registration on firms found not to be in compliance with the law. Here, ISO 14001 is being used to address laggards, and although the ISO 14001 standards were designed by nonstate actors for voluntary compliance, they have become decidedly nonvoluntary in these instances. These three examples show how a private, voluntary standard, as a supplement to a command-and-control regulatory scheme, can be used by governments and courts in different ways to address three types of regulated actor.

An example of an industry rule-instrument innovation that was developed with significant government involvement is the Canadian Scanner Price Accuracy Code.[37] The code addresses the issue of accuracy of supermarket bar-code scanners. An essential part of the

program is the requirement that, if a consumer finds a discrepancy between the price at the cash register and that on the product, he or she gets the product for free (if it is priced at $10 or under; if it is more than $10, the consumer gets $10 off the price of the product). The Canadian code was patterned on a similar code developed by the Australian supermarket-industry association. The Canadian code is operated by the Canadian Association of Chain Drug Stores, the Canadian Council of Grocery Distributors, the Canadian Federation of 1ndependent Grocers, and the Retail Council of Canada. The Canadian Competition Bureau has endorsed the Code. Compliance rates have been high, and complaints to government regulators are low in part because the program creates incentives for both consumers and supermarkets to be vigilant. The program supports regulatory provisions under the Competition Act that prohibit misleading or deceptive marketing practices but does so through nonregulatory, market mechanisms. The program simultaneously harnesses consumers' self-interest in getting products for free by being vigilant in checking their receipts[38] as well as merchants' self-interest in not making any errors and thereby not having to give away products for free.

NGO Rule-Instrument Innovations

An example of an innovative NGO-led rule instrument is the Forest Stewardship Council's program for sustainable-forestry certification and labelling.[39] As efforts to negotiate a global forest-protection convention sputtered in the early 1990s, several major international environmental organizations (most notably, the Worldwide Fund for Nature, working with retailers and others, spearheaded the development of the Forest Stewardship Council (FSC) and its certification and labelling program for products from sustainably harvested and managed forests. While initially facing much resistance from the forest-extraction industry, despite experiencing numerous start-up administrative difficulties, there are now more than 24 million hectares of FSC-certified forests worldwide. In response to the FSC, forest producers have taken leadership roles in developing their own competing programs for voluntary sustainable forestry, in some cases using the services of standards-development organizations, such as the Canadian Standards Association. In addition to private-sector use of the programs, governments in Canada and the United States have begun efforts to have their regulatory forest-management regimes certified as being in compliance with the FSC and with other forest-certification programs. A separate spin-off Marine Stewardship Council has been established for certified sustainable-fishery harvesting practices, and

now the WWF is considering developing a sustainable-mining stewardship council and certification program.

Another example of an innovative NGO-led rule instrument is the good-neighbour agreement.[40] A good-neighbour agreement is a form of flexible accord between local communities or NGOs and businesses whose underlying philosophy is the mutual acknowledgment by a business and an independent community, organization of the need to build a relationship responsive to the needs of each. Agreements are formally negotiated, although some remain voluntary and without legally binding language, while others are incorporated as a condition of formal permitting processes and can be legally enforced. Although developed against a backdrop of legal instruments, these agreements typically do not involve government as a formal party, yet they work to further public-interest goals. At this point, good-neighbour agreements are largely an American phenomenon, although certain agreements on Canadian aboriginals' community-resource extraction resemble the model of the good-neighbour agreement.

SUSTAINABLE GOVERNANCE: PROCESS INNOVATIONS

Processes are techniques that facilitate the ability of parties to participate in a meaningful and informed way in decision making that affects their interests. For the purposes of this chapter, those processes that have a public-interest dimension are of central importance. Process innovations can take the form of (1) information-access programs that allow parties to better protect themselves and (2) approaches that facilitate the ability of parties to access decision making on issues of concern to them, such as citizen-triggered investigation provisions concerning enforcement, private prosecutions, modernized class-action and contingency fees, and alternative dispute-resolution processes.

It is apparent that the process innovations discussed here operate under the tacit assumption that individuals and groups have both the desire and the capacity to engage in government and private-sector decision-making processes of concern to them. This assumption seems to be borne out in practice.

Government Process Innovations

An example of an innovative government process (information-access) program is the National Pollutants Release Inventory (NPRI).[41] Following a similar model in place in the United States and drawing on the initiative of the Canadian Chemical Producers' Association to ensure reporting on national emissions reduction, Environment Canada has

developed a publicly accessible inventory of pollutants in use in Canada, pursuant to the Canadian Environmental Protection Act 1999. Firms are required to provide Environment Canada with a description of pollutants used in their operations and with the quantity of each. The NPRI allows individual citizens to determine which pollutants are used in their communities, in what quantities, and by whom. The NPRI may be of particular use in conjunction with programs such as Accelerated Reduction/Elimination of Toxics (ARET), a voluntary toxics-reduction initiative, since the NPRI ensures that information on the use of industry toxics is publicly available, thereby assisting communities and individuals in verifying whether progress is really being made in reducing toxics.[42]

Another example of a government process (information-access) innovation is the Consumer Gateway.[43] In the late 1990s, the Canadian Office of Consumer Affairs spearheaded the development of the Consumer Gateway as a single, central gateway to the information and services offered by Canada's governments, industry associations, and NGOs. Through a strategic partnership between more than 400 federal departments and agencies, provincial and territorial ministries, industry associations, and NGO partners, the Gateway allows Canadians to search for consumer information and services on the Internet, thus enabling them to better protect themselves. The Gateway has proven to be a particularly popular website destination for Canadians, attracting thousands of "hits" each month.

Government Process Innovations for Enhanced Citizen Access

The citizen-petitioning processes associated with the NAFTA CEC, the federal Commissioner of the Environment and Sustainable Development, and the Ontario Commissioner for the Environment were described above. While rightly framed as institutional innovations in the sense that new watchdog institutions have been created, they can also be characterized as good examples of administrative process innovations that enhance the ability of citizens to check up on and question government administrators.

Modernized class actions are another significant process innovation that enhances the ability of citizens to challenge those who negatively affect their interests. In recent years, both the federal and provincial governments have put in place new or revised provisions that facilitate the ability of citizens to file private-law representative (or class) actions to protect their interests through the courts. Six provincial jurisdictions have now put in place modernized class-action legislation. Without such legislation, there is frequently little motivation for individual citizens

to go to courts to address problems affecting them, particularly where these problems are relatively small in cost or impact (e.g., individual consumers each possessing a defective household product or individual members of communities each inconvenienced by noise or odour caused by industrial activity). With class actions, these comparatively small problems can be aggregated and dealt with efficiently as a group of similarly affected individuals. Thus class actions enhance and expand the opportunity for citizens to protect their own rights instead of simply depending on government to act on their behalf. From an industry perspective, the possibility of class actions creates a stimulus for industry to proactively solve problems before they escalate to legal action and, thereby, to remain competitive with other jurisdictions, such as the United States, where industry is also open to class actions.

Another process innovation that has enhanced the ability of citizens to protect their interests is the creation of new private-law rights of action in both the consumer and environmental areas in stipulated incidents of illegal behaviour (e.g., Canadian Environmental Protection Act 1999, Ontario Environmental Bill of Rights Act, and the "civil damages" provision of the Competition Act).

Citizens can also file private prosecutions under the Fisheries Act and the Migratory Birds Convention Act, and if successful, they are entitled to one-half of the proceeds resulting from such actions.[44] As with modernized class-action legislation, these provisions enhance and expand the opportunity for individuals to protect their own rights without being dependent on governments to do so.

Industry Process Innovations for Enhanced Citizen Access

An example of an industry process innovation is the Canadian Automobile Motor Vehicle Arbitration Program (CAMVAP).[45] CAMVAP is a non-profit corporation with a board of directors that includes representatives of provincial and territorial governments, consumer organizations, and the automobile industry. CAMVAP is funded by automobile manufacturers, with fees based on market share and past CAMVAP case performance. CAMVAP arbitrates disputes that consumers have been unable to resolve directly with dealers. A consumer completes a CAMVAP claim form, and the manufacturer must reply within ten days. The consumer is then given a choice of three arbitrators who come from a variety of backgrounds but are not automobile experts. The consumer and dealer must agree to accept the decision of the arbitrator. More than 60 per cent of the arbitrators' rulings to date have been in the consumer's favour.

The Canadian Banking Ombudsman and the Financial Services Ombudsnetwork, described earlier, can also be characterized as institutional

innovations with significant process aspects designed to enhance the ability of consumers to protect their interests without relying on government agencies to do so.

NGO Process Innovations

The Mining Ombudsman, Riverkeepers, and good-neighbour agreements described earlier as institutional innovations all have significant components of citizen access-process innovation, permitting citizens to "converse" directly with firms and governments on issues of concern to them.

Distinguishing Characteristics of Sustainable Governance Innovations

The question might legitimately be asked as to how we can distinguish institutional, rule-instrument, and process innovations compatible with a sustainable-governance paradigm from any old run-of-the-mill institution, rule instrument, and process? Innovations that "fit" the sustainable-governance paradigm tend to:

- Work particularly well against a backdrop of conventional governance institutions, rule instruments, and processes[46]
- Recognize the value of multiple centres of authority and responsibility all targeted at the same policy context
- Frequently include elements of both policy development and policy implementation
- Often harness (or attempt to harness) citizen, NGO, and industry energies (not just fear of government-imposed legal liability) in order to address a particular policy problem
- Explicitly acknowledge the value of multiactor collaborations, particularly those that cross the public-, private-, and third-sector boundaries[47]
- Work under the assumption that a certain amount of rivalrous institutional, and process friction is valuable as a check- and-balance mechanism and as a means to stimulate creative tension among initiatives and actors.

It should be pointed out that there is frequently overlap among institutional, rule-instrument, and process innovations. For example, the Responsible Care Program of the Canadian Chemical Producers' Association is on one level a rule-instrument innovation, but accompanying it is an institutional innovation as the Canadian Chemical Producers' Association moves from being a pure lobbying body to being an industry

body with some degree of self-regulatory function. It also has process-innovation aspects given the involvement of communities, NGOs, and academics as part of an advisory panel; the use of community and NGO representatives and competitors in conformity verification reviews; and the public-reporting the program. Similarly, environmental commissions or commissioners at the federal, provincial, and NAFTA levels can be considered both institutional and process innovations.

It should also be pointed out that sustainable governance recognizes and acknowledges that evolution and change are part of the process of governance.[48] Thus, for voluntary CSA standard pertaining to protection of personal information has evolved and become the basis for federal legislation. Similarly, voluntary systems standards for sustainable-forestry management developed outside of government have been subsequently implemented and applied by governments to Crown land as part of regulatory regimes (as has recently happened in New Brunswick). The Canadian Banking Ombudsman has evolved to become part of a larger Financial Services Ombudsnetwork. These sorts of examples demonstrate the considerable potential for evolution in the sustainable-governance model.

Models of Proto-Sustainable Governance: The Consumer- and Environmental- Protection Contexts

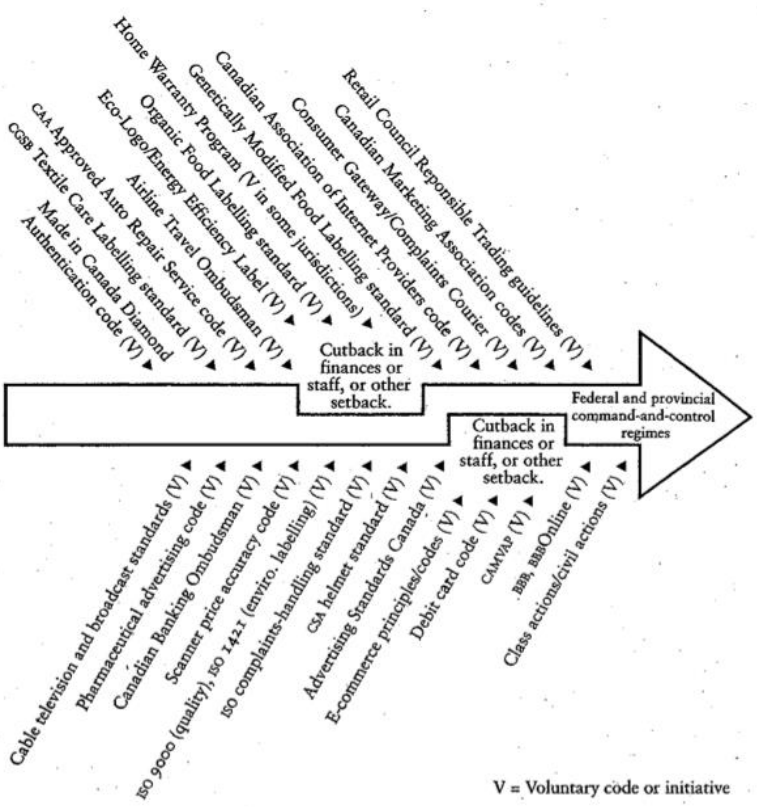
Using the consumer- and environmental-protection contexts as examples, the two figures that follow are an attempt to illustrate that many individual innovations, when taken together, constitute models of proto-sustainable governance— so called because, while they display some of the characteristics of a mature sustainable-governance approach, such as a diversity of approaches and actors all directed at the same activity, they were not developed in a systematic and coordinated way and hence lack the sort of coherency and comprehensiveness that a mature sustainable-governance model would ideally exhibit.

The Consumer- Protection Model Of Proto-Sustainable Governance

There are a host of federal, provincial, and municipal command-and-control regulatory instruments that form the foundation for consumer-protection efforts in Canada.

Included here are federal laws, such as the Competition Act, the Consumer Packaging and Labelling Act, the Hazardous Products Act, the Food and Drugs Act, and the Personal Information Protection and Electronic

FIGURE 10.1. Sustainable Governance: Consumer Protection in Canada



Documents Act, as well as provincial laws, such as the Ontario Consumer Protection Act and the Alberta Fair Trading Act 1998. In recognition of their pivotal role, these legal instruments represent the main arrow in the centre of Figure 10.1.[49]

On both sides of the main arrow are a range of support institutions, rule instruments, and processes, represented by smaller arrows.[50] Some are initiatives where government plays a significant or lead role. For example, the Air Travel Complaints Commissioner is a new institution created by the federal government; the Environmental Choice Eco-Logo product-labelling program is a rule-instrument innovation that was initiated by the federal government; and modern class-action legislation, a process innovation, has been put in place by six of the ten provinces.

In other cases, it is industry that has assumed the leadership role. For example, the Canadian Banking Ombudsman is an institutional innovation of the Canadian banking industry; the Code of Good Practice created by the Canadian Association of Internet is a rule-instrument innovation for the internet industry; and the Canadian Automobile Motor Vehicle Arbitration Program (CAMVAP) is a process innovation funded and operated by the automobile industry (provincial-government and consumer-organization representatives sit on its board). In other cases, consumer organizations have played lead roles, such as the operation by the Quebec consumer organization SAC-Shawinigan of a merchant-certification program to ensure e-commerce consumer protection.

In many cases, government, industry, and consumer organizations are integrally involved. For example, the Canadian Code of Practice for Consumer Protection in E-Commerce is an innovative voluntary-code rule instrument involving federal, provincial, industry, and consumer organizations (brokered by Industry Canada's Office of Consumer Affairs), and the Consumer Gateway is a single window internet portal for trustworthy consumer information from territorial governments as well as from consumer organizations and industry associations (developed and coordinated by Industry Canada's Office of Consumer Affairs). It is possible for small, nonlegislative "side arrow" initiatives to evolve into "main arrow" regulatory programs. For example, the voluntary CSA privacy code has become the basis for the federal Personal Information Protection and Electronic Documents Act and is also being used as the foundation for parallel provincial legislation (which is still in development at the time of writing).[51]

There is also potential for "small arrow" single-industry initiatives to evolve into bigger, multisector initiatives. For example, the Canadian Banking Ombudsman, an institution voluntarily created and funded by the Canadian Bankers Association in 1996-97, became a component of a broader Financial Services Ombudsnetwork in 2002, which provides single-window access to independent complaint-resolution services in the industries of banking, life and health insurance, general insurance, and securities and mutual funds. The Ombudsnetwork is voluntarily sustained and funded by the financial sectors involved.

Nonregulatory institutional, rule-instrument, and process innovations can potentially avoid some of the constitutional wrangling associated with conventional legislative instruments. For example, because the Financial Services Ombudsnetwork is a voluntary, industry-led institutional innovation it has neatly avoided some of the thorny constitutional division-of-powers issues that would have bedevilled a

federal-provincial legislated approach even though it involves both federally and provincially regulated industries. Similarly, the CSA privacy code was a voluntary rule-instrument innovation developed outside the normal federal and provincial legislative arenas, with both federal and provincial input (as well as with the input of business and consumer organizations), and was intended to act as a national code to be used anywhere in Canada by any industry or government. As noted above, it has since become the basis for a federal law and is now being used as the basis for provincial laws. A joint federal-provincial initiative to introduce coordinated federal and legislated privacy laws would likely have bogged down in federal-provincial squabbling, as has happened with deliberations about whether to establish a national securities regulator.[52] The Canadian Automobile Motor Vehicle Arbitration Program (CAMVAP) is a process innovation funded and operated by the automobile industry that now operates across Canada, with Quebec finally joining the fold in 2002. A pan-Canadian legislated initiative to accomplish the same objective would face many obstacles that this voluntary initiative has avoided.

Nevertheless, with respect to all of these initiatives, the federal and provincial governments retain the right to impose a legislated regime if and when they choose. In this sense, these voluntary initiatives can be said to operate "in the shadow of the law"; indeed, the threat of government putting in place a law to accomplish the same objective is often a strong stimulus for industry action and helps to sustain continued diligence in the operation of these initiatives.[53]

To reduce the likelihood of insurance companies having to pay out compensation to their customers, the industry has put in place many process-oriented initiatives intended to stimulate more risk-prudent behaviour among their customers. Individual consumers know that their premiums will be reduced if they take driver-education programs; if they do not get into car accidents; if they adopt a healthy, smoke-free lifestyle; and if they install house alarms that meet insurance-company specifications. Insurance companies have also banded together to create the Insurance Institute for Highway Safety (IIHS), which in conjunction with an affiliated institute tests the safety of cars and publishes the results for use by consumers and insurers. The intended effect of this initiative is simultaneously to stimulate automobile manufacturers to make safer cars and to encourage consumers to purchase safer cars. The IIHS also regularly tables interventions before legislators in support of government initiatives that reduce the likelihood of accidents. By means of both insurance initiatives and consumer-information programs such as the Consumer Information Gateway, citizens are

being encouraged to take on more risk-management responsibility for protecting their own interests, a phenomenon referred to in the literature as "prudentialism".[54]

Taken together, Figure 10.1 depicts what appears to be a thriving ecosystem of institutional, rule-instrument, and process innovations, an ecosystem where the failure of or problems with any one initiative does not necessarily lead to an overall diminution of consumer protection because, to some extent, the existence of one of the other innovations can potentially counter a particular initiative's problems or failure. Thus, for example, consumers having problems with automobiles that rust out prematurely have not one but several options from which to choose: They can turn to CAMVAP, complain to industry self-management bodies (such as the Ontario Motor Vehicle Industry Council) and to conventional government consumer agencies, or file legal actions using modernized class-action processes. The opportunities for effective consumer/ citizen resolution of any particular problem are enhanced through a multipronged sustainable-governance approach, and the consumer/citizen is potentially less vulnerable to reductions in budgets when there are options available other than simply going to an already burdened government consumer-protection agency. This having been said, it is clear that a fully and rigorously enforced regulatory regime is the optimal basis for sustainable-governance activities.

As is hopefully apparent, Figure 10.1 cannot fully and accurately depict the depth and diversity of interaction among actors, institutions, rule instruments, and processes that does take place. For example, it does not portray the dynamic relationship between, on the one hand, the Better Business Bureau (BBB) as a "frontline" business-led mechanism for addressing consumer complaints and, on the other, government regulators, who frequently share information and work out coordinated responses with the BBB in order to address emerging problems. Nor does it portray nuances and problems associated with each of the initiatives.

Unanswered questions about the Canadian consumer-protection model of sustainable governance include whether:

- The range of initiatives are as effective as they could be
- There are mechanisms for "quality control" of industry- and NGO-led initiatives
- There is adequate coordination among initiatives
- There is adequate transparency and accountability associated with each of the initiatives
- Consumers are confused by or unsatisfied with the range of initiatives

- Government, business, and NGOS could be doing more and, if so, how and what
- There are gaps that need to be addressed.

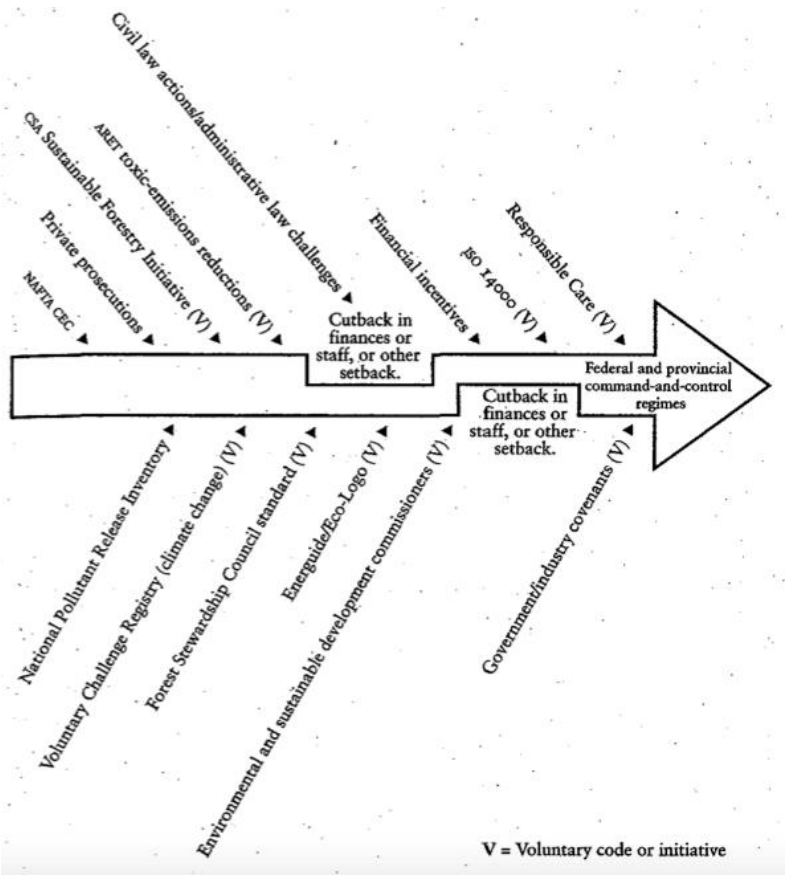
Clearly, this is just a preliminary list of questions.

THE ENVIRONMENTAL PROTECTION MODEL OF PROTO-SUSTAINABLE GOVERNANCE

As with the consumer-protection model, federal, provincial, and municipal laws are again the dominant policy instrument used to protect the Canadian environment, and hence this approach is indicated by the "main arrow" in the centre of Figure 10.2 below.[55] Included here are such federal statutes as the Canadian Environmental Protection Act 1999 and the pollution-control provisions of the Fisheries Act as well as provincial legislation, such as the Ontario Environmental Protection Act and the British Columbia Waste Management Act. Supporting these command-and-control measures are intergovernmental (e.g., the NAFTA CEC), federal (e.g., the Commissioner of the Environment and Sustainable Development), and provincial (e.g., the Ontario Commissioner for the Environment) institutions and processes discussed above that facilitate citizen engagement concerning instances of alleged problematic enforcement as well as private prosecutions and private-law actions (including class actions). There are also a range of information- disclosure initiatives (e.g., the NPRI, discussed above), financial incentives (e.g., tax incentives), and voluntary codes and agreements pertaining to environmental and energy characteristics of products, reduction of toxic substances, reduction of harmful climate-change activity, environmental management initiatives, and generic initiatives in environmental-management systems.

There are a wide number of ways that industry- or NGO-led initiatives can interact with and supplement regulatory command-and-control approaches (see, for example, earlier discussion of the interaction between, on the one hand, the industry-driven ISO 14001 standards for environmental-management systems and, on the other, judicial, legislative, and governmental activity supporting use of environmental-management systems as a complementary method of achieving regulatory objectives). It is also possible for there to be useful interaction among other initiatives. For example, use of the National Pollutants Release Inventory, an information-process innovation of the federal government in which businesses are required to disclose what chemicals they use and in what quantities, can assist in the progress or failure of voluntary toxic-reduction programs.[56]

FIGURE 10.2. Sustainable Governance: Environmental Protection in Canada



As with the questions articulated above in the consumer- protection context concerning coordination and quality control of institutions, instruments, and processes, similar questions can be posed concerning the range of approaches and actors involved in the Canadian environmental-protection sustainable-governance model.

SPONTANEOUS VS SYSTEMATIC: DOES ANYTHING MORE NEED TO BE DONE?

In view of the existence of the examples of governing innovations provided above, an argument can be made that the best approach to encouraging sustainable governance is a hands off, "let all flowers

bloom" approach. After all, so the argument would go, if this approach has led to these innovations, what more needs to be done? If it ain't broke, don't fix it.

However, while these examples show impressive incidents of individual government, private-sector, and NGO leadership and imagination and demonstrate the potential and inclination for sustainable governance, they are random and isolated acts, not a planned approach designed to cultivate and encourage widespread, sustained innovation that maximizes the potential for all parties to contribute to governing in the public interest. Can more be done? Should more be done?

A parallel can be drawn to the identification and training of Olympic athletes. There can be little doubt that talented and successful athletes can emerge without the benefit of any sort of systematic governmental assistance by virtue of their raw talent and determination alone, perhaps supported by individual benefactors in particular communities. So one possible approach to developing an Olympic-athlete program is a laissez faire approach, allowing such talented and determined athletes to fight their way from obscurity to the top on their own. But some countries have set out to identify potential Olympic athletes from an early age, to nurture and train them, and to provide them with an appropriate competitive environment so that they may flourish. Comparatively small nations (such as Australia) that have developed effective, systematic Olympic-athlete programs of this nature have been disproportionately successful in obtaining medals. Similar to effective programs in support of Olympic athletes, a mature and fully formed sustainable-governance approach starts from the premise that systematic rather than random efforts are more likely to lead consistently to positive results and should lead to transferable knowledge that can be successfully applied to new and different circumstances.

Perhaps the most advanced thinking and activity on more systematic approaches to governing comes from the European Union (EU). Among other things, a recent white paper on governance calls for opening up the processes of government, for establishing partnership arrangements that go beyond minimum standards, and for greater use of co-regulatory instruments.[57] The European Union has also developed a legal framework for a voluntary environmental-management auditing program[58] and a network of national bodies to assist consumers in finding extrajudicial solutions to cross-border consumer disputes.[59]

Another innovative governance approach in place in the European Union is known as the "New Approach".[60] The New Approach is a legal technique that consists of defining mandatory essential product requirements through EU directives to ensure a high level of public protection

while leaving the choice of technical solution up to interested parties (users, manufacturers, etc.), which must adhere to standards developed through recognized European-standards bodies. Because of its flexibility, the New Approach has proven to be a highly efficient technique for promoting industrial competitiveness, product innovation, and the free movement of goods across the EU. In the United Kingdom, the Office of Fair Trading has developed a new regime for review and approval of voluntary codes of practice pertaining to consumer matters.[61] The suggestion is not being made here that Canada, or indeed any other country, should adopt any of these European approaches. Each of these innovations is a product of the distinctive legal, political, social, and cultural environment in which it was originally conceived and developed. However, they do seem to demonstrate a more advanced systematic approach to governance than is currently being used in Canada. It is worth emphasizing that sustainable governance will and should "play out" differently in different jurisdictions in keeping with the unique characteristics of each jurisdiction.

AN ENHANCED ROLE FOR CANADIAN CIVIL SOCIETY

If the concept of sustainable governance is to succeed in Canada, civil society will need to play a key role in its success. As Susan Phillips has noted,

> [b]y necessity, the process of governance is much more embedded in civil society institutions than was traditional government. Effective governance requires both a strong private and strong voluntary sector [that] ... includes not only those organizations providing direct services, but intermediary umbrella groups and those, either as independent interest groups or as part of social movements, that are dedicated primarily to advocacy activity ...In governance, the [voluntary] sector is necessary not only to deliver programmes that the state wishes to contract out or vacate, but to provide input into policy-making processes and to promote strong communities capable of helping themselves. Active citizenship, in which citizens engage in civic life through voluntary associations, supports governance by providing better input and monitoring of policy and, as a by-product of participation, by producing greater trust in other citizens and in government.[62]

In the fall of 2002, the Canadian Policy Research Network and its partner, Viewpoint Learning, invited a representative sample of Canadians to participate in one of ten day-long dialogue sessions on Canada's future and, looking ten years ahead, to create their own vision for “The

Kind of Canada We Want."[63] They were also asked to reflect on how this vision could be achieved and to indicate who should be responsible for making it happen. The resulting report suggested that Canadians are ready to revise the roles and responsibilities of governments, business, communities, and citizens themselves to suit the circumstances of the twenty-first century. According to the report, these updated roles and responsibilities "form a new unwritten social contract to shape Canada's future" (iv). Based directly on the executive summary of the report, three key points emerge:

1. Markets are no longer seen as separate from and even opposed to civil society. Instead, markets are now seen as an integral part of a working society, a part that serves public as well as private interests, with market values being integrated into Canadians' notions of civil society and social equity in a unique and compelling way. At the same time, citizens are pragmatic about the limitations of both markets and governments.
2. Citizens see themselves as more active participants in governance. Having moved toward greater self-reliance and beyond deference, they now demand a voice. Hidden beneath a thin crust of cynicism lies a keen desire for more active citizen involvement in public affairs. Citizens insist on greater accountability on the part of governments, business, and other institutions and are willing to assume greater responsibility and accountability themselves. They want to see more responsive governments that foster ongoing dialogue with and between citizens.
3. Canadians share a remarkably consistent set of values from coast to coast. This distinctive values base provides an essential foundation on which Canadians and their governments can build a different community north of the forty-ninth parallel, notwithstanding the growing economic integration of North America.

This report provides considerable support for the proposition that Canadian citizens have both an appetite for and a capacity to make significant contributions to government and private-sector decision making that affects their interests. In many ways, the dialogue sessions align with the various examples of citizen and NGO involvement in governance innovations discussed earlier in this chapter.

But at the same time, it is clear that much more needs to be done to create "the space" in which citizens can meaningfully play this greater governance role. Surveys show that fewer and fewer volunteers are doing more and more.[64] Surveys also show that Canadians are having difficulty coping with the complex choices made available to them. Incen-

tives need to be put in place (and disincentives removed) so that Canadians can meaningfully understand the changes taking place around them and can have real opportunities to become more involved in decisions that affect them. At the end of the day, a new, more systematic participatory model for governance is possible, where governments, businesses, communities, and individuals all have important roles and responsibilities. This could be the basis for a uniquely Canadian approach to societal organization with competitive and social benefits for all concerned.

Approaches to enhancing citizen involvement in government and private-sector decision making that could be adopted include:

1. Government and private sector recognition and encouragement of employees participating in volunteering activity. Several firms already systematically provide employees with a certain number of paid days per month for employees to engage in voluntary activity.[65]
2. More systematic and concerted efforts by governments and the private sector to provide "a seat at the table" for representatives of community or nongovernmental organizations in the operation of initiatives that affect the community. The inclusion of community and NGO representatives on the boards of (or on advisory committees to) logo/certification and code programs, ombudsprograms, and self- management initiatives are examples of how civil society could be more involved in governance institutions. By including citizen representatives in the formal decision-making processes of governance institutions, the level of public trust is likely to increase, and the quality of decision making might improve, while the representatives involved gain insights into the challenges and intricacies of governing in the twenty-first century.
3. More effort by governments and the private sector to systematically provide citizen voicing and action processes concerning policy development and implementation, building on the somewhat haphazard citizen petitioning, investigation, prosecution, and class-action initiatives already in place, which were discussed earlier in this chapter.
4. Reform of the regulatory regime applying to public interest organizations to ensure that these organizations can and effectively and appropriately participate in public-policy decision making on a more-or-less even footing with other societal actors.[66] ln important ways, enhancing the role for citizen participation in governing may be the key to rebuilding citizen trust in government and private-sector institutions.
5. As citizen groups take on greater public-interest responsibilities, they too will need to adopt more transparent, accountable, and accessible modes of governing, along with the government and private sectors.

CORPORATE SOCIAL RESPONSIBILITY: THE PRIVATE SECTOR CONTRIBUTION TO SUSTAINABLE GOVERNANCE?[67]

Corporate social responsibility (CSR)[68] is an evolving term that does not have a standard definition or a recognized set of specific criteria.[69] With the acknowledgment that businesses play a pivotal role in job and wealth creation in society, CSR is generally understood to be the way a company achieves a balance or integration of economic, environmental, and social objectives while at the same time addressing stakeholder expectations and sustaining or enhancing shareholder value. Insofar as sustainable development has been defined as *development that meets the needs of the present without compromising the ability of future generations to meet their own needs* and is generally understood as focusing on how to achieve the integration of economic, environmental, and social imperatives, CSR is frequently seen as the business contribution to sustainable development.

CSR applies to firms wherever they operate in the global economy. CSR commitments and activities typically address aspects of a firm's behaviour (including its policies and practices) with respect to such key elements as health and safety, environmental protection, human rights, labour relations, practices in human-resource management, corporate governance, community development (e.g., the broader social fabric within which firms operate), and others (e.g., reporting, supplier relations, consumer protection, competition, and bribery). These elements of CSR are frequently interconnected and interdependent.

The way businesses involve shareholders, employees, customers, suppliers, governments, nongovernmental organizations, international organizations, and other stakeholders is usually a key feature of the concept. While business compliance with laws and regulations on social, environmental, and economic imperatives set the minimum level of CSR performance, CSR is frequently understood as involving private-sector commitments and activities that extend beyond this foundation of compliance with laws (particularly where the legal frameworks are weak or not enforced). In this sense, CSR can be seen as a form of proactive political, economic, social, and environmental risk management, an effort to build a "social" licence to accompany the legal licence to operate that firms possess.

To date, private sector CSR initiatives have taken many forms, including individual company codes and commitments, sectorwide programs, self-assessment tools, and voluntary reporting initiatives. In many ways, some of the programs and initiatives that have been described above (e.g., the Financial Services Ombudsnetwork, sustainable-forestry certification

programs, ISO 14001 environmental management program, and the Responsible Care Program of the Canadian Chemical Producers' Association) can be seen as examples of CSR. Insofar as these initiatives acknowledge and to breathe life into the notion that corporations need to recognize and balance social and environmental objectives with economic objectives, it should be apparent that CSR is a concept that resonates with sustainable governance. While the private sector quite rightly has the lead on many CSR initiatives, there is much that governments and NGOs can do to facilitate and encourage its development in a rigorous and effective manner.[70]

Some Caveats About the Sustainable Governance Concept

As stated above, a key theme and understanding underlying the concept of sustainable governance is the value of harnessing the energies, expertise, and advantages of multiple actors, instruments, institutions, and processes. Diversity, and even some degree of conflict, rivalry, and overlap among actors, institutions, instruments, and the like, creates a thriving (if somewhat chaotic and confusing), multivariate "ecosystem" of approaches addressing a particular policy issue or problem, with the effect that the failure of any one approach does not necessarily mean an overall implementation failure but rather that another actor, instrument, institution, or process is or could be in a position to "pick up the slack" or otherwise act as a check-and-balance concerning a particular behaviour.[71]

A dynamic of "mutually assured implementation" can occur when multiple actors, instruments, institutions, and processes are all brought to bear on the same activity. To put it another way, it takes a society to run a society.[72]

It is time to move to a fully mature view of governing that recognizes and embraces the wide variety of interactions taking place and the complexity of the interrelations. It is also time to shed the mechanical, and frankly adolescent view that government has control over all the buttons and moves all the levers and therefore can structure society on its own. Sustainable governance should not be looked upon as a zero-sum game, in which the energy and resources spent on developing and implementing one initiative necessarily take away from the attention devoted to another initiative. A key value of sustainable governance is its ability to harness energies and expertise that are currently under-utilized, thereby increasing the total attention spent on addressing a particular problem while at the same time spreading costs. Use of the sustainable governance approach is intended to assist policy makers in determining whether any particular policy context is as "robust" and responsive as it could be: That is, is the full range of

actors, institutions, rule instruments, and processes in use? If not, why not? Where can adjustments and additions be made? What sort of interactions between actors, institutions, rule instruments, and processes are taking place? Could the system be better coordinated or more accountable and transparent? Where are the gaps? Is the operating environment as optimally conducive to governmental, private-sector, third-sector, and citizen action and innovation as possible? By mapping the range of instruments and actors employed in several particular contexts using the sustainable governance model, it may be possible to identify under-utilized or over-utilized approaches or actors as well as opportunities for better coordination.

The concept of sustainable governance should in no way be considered a call for the abandonment or even necessarily for a reduction in the use of conventional public-sector governing approaches. Rather, to practise sustainable governance is to acknowledge the limitations of such approaches and the need to draw on other approaches that are not as limited (although they have distinctive limitations of their own). Regardless of which innovation is used, all need to be assessed in terms of values such as accountability, transparency, credibility and legitimacy, cost effectiveness and efficiency, and fairness.

While it was probably the intention of the proponents of many of the innovative approaches to governing discussed in this chapter to devise more cost-effective approaches to governing, the result may not, in fact, necessarily be less costly, but it should be more sustainable. In this sense, any costs should be viewed as longer-term investments in better governing. To the extent that sustainable governance decreases the likelihood of another Walkerton-type environmental tragedy, the immediate investment may be well worth it. Likewise, to the extent that Canadian firms gain a competitive advantage through use of collaborative approaches (while other jurisdictions fight out issues in courts and through formal regulations), the investment may again be well worth it.

There may also be situations where particular sustainable-governance contexts turn out to be difficult to manage and even inflexible. Thus, for example, once in place, it may be difficult for government to change an industry-ombudsmen or scheme despite observable new trends in the marketplace that would seem to call for changed approaches.[73] This reflects the reality that sustainable governance is to some extent a less centralized approach to governing, where more than one "player" has governance responsibilities and powers.[74] Indeed, this very weakness is in other regards a strength. Because sustainable governance involves multiple responsibility centres and a sharing of power, it is difficult to control, but it is also less vulnerable to downturns.[75] In addition, it can be more responsive. For example, industry and NGOs may be able to respond more quickly and appropriately to certain technological

advances (e.g., electronic commerce) than would conventional state-based approaches. Eventually, these "first-generation" instruments may come to be viewed as stop-gap measures to be superceded by regulatory approaches (this, arguably, was the trajectory of the Canadian privacy code, which has become the basis for a federal law). There is nothing wrong with this, nor is a move from voluntary private-sector or community-based approaches, to governmental approaches a necessary or preferred path of evolution.

The challenge here is to devise framework approaches that empower a range of actors to assume governance responsibilities while at the same time creating and maintaining the overall framework within which this activity takes place, thereby maintaining quality control and the ability to intervene or to alter directions when necessary. In the more decentralized governance context that characterizes sustainable governance, law will continue to play a central role no matter which institution, instrument, or process is involved. Thus, for example, law can be used to maintain accountability over self-management regimes that are industry-run but government-structured, to stimulate firms to put in place management systems in order to meet due-diligence defences and thus avoid liability for strict-liability offences, to control anticompetitive behaviour, and to address misrepresentations concerning rule instruments.[76]

If the challenges of decentralized governing involving multiple centres of responsibility are acknowledged from the outset, there is a likelihood that appropriate responses can be "designed in" to the frameworks. For example, rivalrous check-and-balance initiatives and regular third-party reviews of programs and institutions offer opportunities for *in situ* and in progress alterations to particular initiatives as necessary.

One of the greatest challenges associated with implementing the sustainable-governance concept may be attitudinal: accepting less-than-perfect operating conditions as a given; accepting the need for a sharing of power with diverse, less-than-perfect governance partners; and accepting that governance in the public interest is more like managing a complex, multivariate ecosystem full of unknowns and surprises than it is like operating a mechanical device with clear inputs and outputs.

CONCLUSIONS

In conclusion, several points emerge concerning sustainable governance as a new approach to governing in the twenty-first century.

1. In view of the "suboptimal" realities of governing in the twenty-first century, governments need to do a better job of drawing on the full

range of state and nonstate institutions, rule instruments, processes, and actors that are available in support of the development and implementation of public policy. Governments need to recognize that they can play a greater role in encouraging nonstate actors to protect the environment, consumers, workers, communities, and the like and that, in fact, government sometimes creates disincentives and obstacles to performance through conventional regulatory approaches.

2. ln adopting this new approach to governing, we move from single provider (and hence vulnerable) regulatory approaches to multi- variate, collaborative governance approaches and from fluctuating capabilities susceptible to a variety of "winds of change" to more sustainable, robust, effective, efficient, competitive, and innovative approaches to public-policy development and implementation. ln the sense that sustainable governance involves a combination of governmental and nongovernmental institutions, processes, instruments, and actors, it entails much more than simply a question of instrument choice. It also entails much more than a question of the intelligent use of command-and-control regulations (although, clearly, intelligent use of regulations remains an important preoccupation for governments). While collaboration is a frequent hallmark of sustainable governance, so too is use of rivalrous initiatives, where one institution, rule instrument, or process is specifically designed as a check and balance on another. Sustainable governance will "play out" differently in different jurisdictions, reflecting the unique social, cultural, political, legal, and historical characteristics of each jurisdiction. ln developing jurisdictions, where the legal and regulatory systems may be particularly weak, nonstate institutions and initiatives may need to play a particularly important role until the state's capacities can be brought up to speed.
3. While the Canadian context has been the focus of discussion here, it should be clear that the sustainable-governance concept should be equally relevant in other jurisdictions, although the specific manifestation of the concept will differ depending upon the circumstances.
4. There are many examples of innovative, collaborative approaches to governing that are used at the federal-government level, at the provincial level, and elsewhere. For a variety of cultural and historical reasons, Canada seems to possess a particularly receptive and positive environment for the development of innovative and collaborative approaches to governing. Innovations that “fit” the sustainable governance paradigm tend to:

    - Work particularly well against a backdrop of conventional governance institutions, rule instruments, and processes

- Recognize the value of multiple centres of authority and responsibility all targeted at the same policy context
- Frequently include elements of both policy development and policy implementation
- Often harness (or attempt to harness) citizen, consumer, community, NGO, and industry energies (not just fear of government-imposed legal liability) in order to address a particular policy problem
- Explicitly acknowledge the value of multiactor collaborations, particularly those that cross the public-, private-, and third-sector boundaries
- Work under the assumption that a certain amount of rivalrous institutional, rule-instrument, and process friction is valuable as a mechanism and as a means to stimulate creative tension among initiatives and actors.

5. While there are many examples of institutional, rule-instrument, and process innovations in Canada, these tend to be random and ad hoc rather than drawn together and used in a coordinated, coherent way, policy context by policy context. Sustainable governance is all about systematic, concerted efforts to draw on the full range of options available. Although far from perfect, and not necessarily appropriate for Canada, the various examples of sectorwide governance initiatives from the European Union discussed above provide useful illustrations of how sustainable governance could be undertaken.
6. Although sustainable governance may hold considerable promise as a more effective means of governing, this is not to downplay the significant challenges associated with its implementation. Systematically such a concept in place will involve a considerable investment of time and resources, will require acceptance of a greater degree of complexity associated with the use of multiple centres of authority, and will necessitate considerable efforts from governments, the private sector, and civil society to ensure maintenance of appropriate levels of accountability, transparency, fairness, and coordination.
7. Among other things, a strategy for implementation of the sustainable-governance model might include:

    - Articulation of model sustainable-governance approaches
    - Review of existing policy contexts at a macro level to determine what elements of sustainable governance are missing from current regimes and why
    - Development and support of policy environments that stimulate sustainable governance

- Systematic support for an enhanced role for civil society
- Publication of case studies providing examples of nascent and promising sustainable governance (e.g., why have particular policy contexts proven to be more receptive to sustainable type innovations?)
- Creation of multistakeholder learning and sharing forums on sustainable governance.

[1] I would like to express my appreciation to a number of people who me with their thoughts on the sustainable-governance concept: David J. Bell, of the York Centre for Sustainability; Kathy.Brock, of the School of Public Policy, Queen's University; Jolm Chlbuk, of Strategic Policy, Industry Canada; Cary Coglianese, of the John F. Kennedy School of Government, Harvard University; Bruce Doern, Les Pal, and Susan Phillips, of the School of Public Policy and Administration, Carleton University; David Hecnar, of Alcan Incorporated; Derek Ireland, of Chreod Associates; Michael Jenkin, of the Office of Consumer Affairs, Industry Canada; Michael Kane, of the United States Environmental Protection Agency; Gernot Kofler, of the Competition Bureau, Industry Canada; Richard Paton and Brian Wastle, of the Canadian Chemical Producers' Association; Paul Pross, Professor Emeritus of the School of Public Administration, Dalhousie University; Tom Rotherham, of the International Institute for Sustainable Development; Bella Wilson, of the United Kingdom's Department for International Development; and Stepan Wood, of Osgoode Hall Law School, York University. The opinions expressed are those of the author and not those of any institution with which he has an affiliation. The original articulation of the sustainable-governance concept is contained in Kernaghan Webb, "Sustainable Governance: A Pub1ic Policy Perspective on Corporate Social Responsibility and the Marketplace," paper presented at the *Canada@theworld.ca* Research Initiative Conference, November 2000, Ottawa. More recent and developed discussions are included in Kernaghan Webb, *Sustainable Governance: Developing an Approach for Canada* (forthcoming); and Kernaghan Webb, ed., *Voluntary. Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and the Environment, 2004).

[2] For example, see the chart tracking fluctuating federal-government budgets and Environment Canada's budget in particular, prepared by the Commissioner of the Environment and Sustainable Development, as presented at page 3 of the Commissioner's 2002 report, "The Commissioner's Perspective, 2002: The Decade after Rio," www.oag-bvg.gc.caJdomin0/oag-bvg.nsf/html/environment.html. Similar charts could be prepared for consumer protection, worker health and safety, and other policy contexts at both the federal and provincial levels.

[3] A global public-opinion survey released in November 2002, based on polling data of 36,000 citizens in countries (including Canada) gathered between July and September 2002, indicates that, around the world, the principal institution in each country (e.g., Parliament, Congress, etc.) is the least trusted of the seventeen institutions tested, including global companies. For more information, see www.environicsinternational.com/default.asp?sp-girn.asp?article= Trust_Survey.pdf.

[4] In a similar vein, the then-OECD head of the Program on Regulatory Reform, Scott Jacobs, has stated that the effectiveness of traditional national institutions and policy tools has diminished and that "second generation" regulatory reforms are needed through better institutions and policy tools, market incentives, and cooperation with civil society. Scott Jacobs, "The Second Generation of Regulatory Reforms," paper prepared for delivery at the International Monetary Fund Conference on Second Generation Reforms, 8-9 November 1999.

[5] For example, only the state has the legitimate authority to deprive someone of his or her physical liberty in support of public policy aims.

[6] A similar point is made by Bryne Purchase in "The Political Economy of Voluntary Codes," in *Voluntary Codes, 77-96.*

[7] These terms are defined in the next section.

[8] This is not to suggest that nonself-interested behaviour (e.g., based on notions of ethics and civic duty) cannot also play important roles in driving such initiatives but rather to signal that even base-self-interested motivations can be harnessed for the purposes of public-interest governance.

[9] While collaborations and partnerships are common features of sustainable governance, it is wrong to assume that government is always a direct partner in these collaborations. For example, industry associations have developed environmental, social, or consumer programs, working with civil society organizations, without having government representatives at the table (see examples below). Similarly, NGOs have developed voluntary initiatives, such as ombudsman programs, certification programs, and good neighbour agreements without any government participation (see examples below). While there may be the looming threat of law or an indirect legal dimension to some of this activity, sustainable governance does not assume that government is a necessary partner for direct collaboration. But government can put in place conditions that increase the likelihood of collaborative industry-NGO governance innovations being developed.

[10] In his discussion of "destabilization rights," Roberto Unger seems to be referring to a similar concept to the notion of "built-in" institutional, instrumental, and process checks and balances referred to here. According to Unger, the introduction of "destabilization rights" is intended to empower the disadvantaged, to undermine the status quo, and to advance processes of social change. Roberto Unger, "The Critical Studies Movement," *Harvard Law Review* 96 (1982): *561-675.*

[11] In acknowledging the importance of creative tension and rivalrous initiatives as part of a system-wide approach to governing involving multiple government, industry, NGO, and citizen actors, sustainable governance differs from the "horizontal governance" concept, which seems premised exclusively on the notion of collaboration across organizational boundaries. See, for example,

the Canadian Centre for Management Development's discussion of horizontal management at www.ccmd-ccg.gc.ca.

[12] Recently, American scholars such as Lester Salamon have articulated the concept of "the new governance", which in many ways is similar to what is described here. See, for example, Lester Salamon, "The New Governance and the Tools of Public Action: An Introduction," *Fordham Urban Law Journal* 28, no.5 (June 2001): 1611-74. Where "the new governance" would appear to differ from sustainable governance is in its failure to separate institutions from rule-instruments and processes (Salamon collapses these into a single concept: "tools"), its lack of recognition of the fact that sustainable governance in the public interest can take place by private actors with no direct government involvement (he speaks of "public" or "public-private" but not purely "private" approaches), and in its apparent failure to recognize the value of rivalrous initiatives. Canadian work on governance also appears to concentrate more on collaborative horizontal approaches; see, for example, Gilles Paquet, "Tectonic Changes in Canadian Governance," in Leslie A. Pal, ed., *How Ottawa Spends, 1999 – 2000: Shape Shifting: Canadian Governance Toward the 21st Century* (Toronto: Oxford University Press, 1999), 75-111.

[13] Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press, 1995), 2. It perhaps goes without saying that the governance of central interest in this chapter is governance that has public interest dimensions. This means that a wide range of private-sector and civil-society governance activity is of no direct relevance to this chapter. It is possible for miniature-train aficionados to band together and create a club with a governance structure and, potentially, rule-instruments and processes designed to support the aims of the miniature-train enthusiasts, but this sort of governance has little relevance to the discussion here. Similarly, there are institutions for the development of technical standards designed to enhance private-sector commercial activity (e.g., standards concerning screws and fasteners used in machinery) that, while highly useful to the private sector, usually have little or no public interest dimension. Hence, while important, these sorts of institutions, rule instruments and processes with no over public interest aspects are not the subject of discussion here.

[14] Public-interest governing takes place whenever any entity purports to put in place approaches that have or could have a significant public-interest component. Thus industry initiatives such as Responsible Care or the Canadian Banking Ombudsman and NGO initiatives such as the Forest Stewardship Council's certification programs, Oxfam Australia's Mining Ombudsman, or community-group-led Riverkeeper or good-neighbour agreements (al1 discussed below) are examples of public-interest governing even though they were not initiated, developed, or implemented by the public sector.

[15] While collaborative approaches with multiple actors can be more robust, flexible, and cost-effective, it is also possible for them to be difficult to manage, quite rigid, and expensive. This is discussed in greater detail later in the chapter.

[16] The following description of the relevant thinking of Foucault and Habermas draws substantially on A. Hunt, "Legal Governance and Social Relations: Empowering Agents and the Limits of the Law," in M. MacNeill, N. Sargent, and P. Swan, eds., *Law, Regulation, and Governance* (Don Mills, ON: Oxford University Press, 2002), 54-77. See also Stepan Wood, *Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada* (Ottawa: Law Commission of Canada, 2002).

[17] G. Teubner, "Legal Instrumentalism? Strategic Models of Post- Regulatory Law," *International Journal of the Sociology of Law* 12 (1984): 375-400, at 394.

[18] One need only look at jurisdictions where one or more of these aspects are deficient to see how easily governance in the public interest can falter. Thus, for example, in developing countries where public-sector institutions are weak and/or corrupt, it is difficult for individuals and organizations to feel secure about and to plan for the future and difficult for societies to thrive and improve their quality of life. A culture of trust and integrity concerning public institutions may be missing (this culture of trust and integrity is often taken for granted in Canada). Nevertheless, even in developing countries where public institutions are weak and/or corrupt, private-sector, NGO, and citizen-based institutions, rule instruments, and processes can play integral roles in capacity building, which can help to stimulate the development of effective public-sector institutions, instruments, and processes. Sustainable governance is an approach to governing that is equally relevant to developed and developing countries, although the precise combination of institutions, rule instruments, processes, and actors may vary considerably from one jurisdiction to another.

[19] See, for example, itemizations of limitations in Kernaghan Webb, "Understanding the Voluntary Codes Phenomenon," in Webb, ed., *Voluntary Codes*, 3-32. A Canadian example of cost and time issues associated with regulations is the process of amending the Metal Mining Effluent Regulation that began in 1990 and only reached fruition in late 2002, that involved dozens of studies and consultations with hundreds of stakeholders, that cost in excess of $1 million to develop, is estimated to necessitate an expenditure of $2 million annually to enforce. See the *Canada Gazette* for the "Regulatory Impact Assessment Statement" associated with the regulations: www.ec.gc.caJnopp/docs/regs/mmer/mmer.pdf.

[20] Thus, for example, industry-funded consumer ombudsmen; councils, and programs can act as frontline resolvers of consumer disputes, with govern-

ments and the courts acting as last-resort mechanisms. Similarly, the implementation of environmental-management systems within firms, subject to audits, can usefully supplement government's inspection capacity.

[21] For a comparison of the strengths and weaknesses of voluntary approaches and conventional regulatory approaches, see Kernaghan Webb and Andrew Morrison, "Voluntary Approaches, the Environment and the Law: A Canadian Perspective," in C. Carraro and F. Leveque, eds, *Voluntary Approaches in Environmental Policy* (London: Kluwer Academic, 1999), 229 – 59.

[22] For example, voluntary toxics-reduction programs may be made more effective through the creation of government-mandated toxic release disclosure programs (as discussed in greater detail below); legal actions for misrepresentations can help to ensure that firms keep their voluntary code commitments; and regulatory prosecutions or tort actions can lead to judicial recognition of voluntary codes as evidence of industry-wide standards for reasonable care. For discussion of these latter two points, see Kernaghan Webb and Andrew Morrison, "Voluntary Codes and the Law: Untangling the 'Tangled Web,' " in Webb, ed., *Voluntary Codes,* 97-174.

[23] For information regarding the Ontario Environmental Commissioner and its investigation process, see www.eco.on.ca. For information regarding the citizen-petitioning process of the federal Commissioner of the Environment and Sustainable Development, see www.oag-bvg.gc.ca/domino/oag-bvg.nsf/html/environment.html. For information regarding the citizen-petitioning process of the NAFT A Commission for Environmental Cooperation, see www.cec.org.

[24] See, for example, discussion of the Ontario self-management model in M. Winfield, "Public Safety in Private Hands: A Study of Ontario's Technical Standards and Safety Authority," *Journal of Canadian Public Administration* 45, no. 1 (Spring 2002): 24-51.

[25] For more detailed discussion of the Canadian Banking Ombudsman, see David Clarke and Kernaghan Webb, *Market-driven Consumer Redress Case Studies and Legal Issues* (Office of Consumer Affairs, Industry Canada, 2002), http://strategis.ic.gc.ca/pics/ca/redress_case_studies_eng.pdf.

[26] For more detailed discussion of this initiative, see Kernaghan Webb, "Voluntary Codes and the Mining Industry: Digging out the Legal Implications," in E. Basteda, ed., *Mining and the Law* (University of Dundee, forthcoming).

[27] For more information on Canadian Riverkeepers, see www.ottawariverkeeper.ca and www.elements.nb.ca/theme/rivers/michel/michel.htm.

[28] For more detailed discussion of the Canadian privacy code and the Personal Information Protection and Electronic Documents Act, see Colin Bennett, "Privacy Self-Regulation in a Global Economy: A Race to the Top, the Bottom or Somewhere Else?" in Webb, ed., *Voluntary Codes,* 227-48.

[29] The fol1owing discussion is derived from Environment Canada, *Environmental Agreements*, www.ec.gc.ca/epa-epe/pol/en/framewk7.cfm.

[30] This agreement is available at http://strategis.ic.gc.ca/epic/interne/inauto-auto.nsf/vwGeneratedInterE/amoI504e.html.

[31] Information derived from Environment Canada, *The New CEPA and Environmental Protection Alternative Measures (EPAMs)*, www.ec.gc.ca/CEPARegistry/gene-info/fs_12_e.pdf.

[32] See the case concerning Sherritt International Corporation at www.ec.gc.ca/CEPARegistry/enforcement/sherrit_agree.cfm.

[33] Information derived from Environment Canada, *Pollution Prevention Handbook*, www.ec.gc.ca/NOPP/DOCS/P2P/hbook/En/index.cfm.

[34] Information derived from the website of the Canadian Council of Ministers of the Environment: www.ccme.ca.

[35] For more detailed discussion of the Responsible Care Program, see John Moffet, François Bregha, and Mary Jane Middelkoop, "Responsible Care: A Case Study of a Voluntary Environmental Initiative", in Webb, ed., *Voluntary Codes*, 177-208.

[36] The discussion here is derived from Webb and Morrison, "Voluntary Codes and the Law."

[37] For discussion of the Australian see N. Gunningham, "Codes of Practice: The Australian Experience," in Webb, ed., 317-34. For a copy of the Canadian Scanner Price Accuracy Code, go to http://strategis.ic.gc.ca/SSG/cto2379e.html.

[38] Although many consumers may be "too busy" to check their receipts, the author can point to seniors such as his father who have both the time and the inclination to carefully scrutinize such receipts. The comparatively small number of vigilant consumers act as unpaid inspectors whose activities, although motivated only by concern for their own welfare, can nevertheless benefit a wide number of nonvigilant consumers (and reduce the need for government-agency intervention at the same time).

[39] For more detailed discussion of this program, see Gregory Rhone, David Clarke, and Kernaghan Webb, "Two Voluntary Approaches to Sustainable Forestry Practices," in Webb, ed., *Voluntary Codes, 249-72*.

[40] See the discussion at www.rccproject.org/clw2001_pane1.pdf.

[41] For more information, see www.ec.gc.ca/pdb/npri.

[42] This point was made by Werner Antweiller and Kathryn Harrison, "Toxic Release Inventories and Green Consumerism: Empirical Evidence from Canada," *Canadian Journal of Economics* 36, no. 2, (May 2003): 495-520 at 495.

[43] To visit the Consumer Gateway, go to http://consumerinformation.ca/cgibin-main.cgi?Language=E.

[44] For more discussion concerning use of this provision, see Kernaghan Webb, "Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement," *McGill Law Journal36* (1991): the abstract is available at http://jounal.law.mcgill.ca/abs/363webb.htm.

[45] For more detailed of this initiative, see Clarke and Webb, *Market-driven Consumer Redress*.

[46] Thus, for example, the environmental commissions or commissioners that have been established to assume the existence of a command-and-control environmental-protection infrastructure. By the same token, however, the sustainable-governance model also works in jurisdictions where the existing institutional, rule-instrument, and process infrastructure is minimal (e.g., in developing countries), although it works differently.

[47] However, collaborations or partnerships are not a necessary condition of sustainable-governance innovations, and where such collaborations do occur, they may not involve government as a direct party.

[48] Indeed, the very notion of sustainability is based on the need to recognize that there is a time element in governance, that conditions change, and that those governance systems that have a capacity to respond to change will likely be the most robust and effective.

[49] The indentations on either side of the large arrow are intended to represent the occasional budget setbacks or other setbacks that occur with regulatory programs. The indentations do not relate to any particular cutback or setback; in other words, the specific location of each indentation on its side of the main arrow is not significant. The abbreviation CGSB refers to the Canadian General Standards Board, and BBB refers to the Better Business Bureau.

[50] The small arrows are not placed in any particular order on either side of the main arrow. In other words, no attempt should be made to interpret the placement of any of the small arrows as particularly significant in relation to the main arrow or to the small arrows. Simply put, they represent supplementary or secondary institutions, rule instruments, and processes. There are many more secondary institutions, rule instruments, and processes that could be included; the initiatives that have been identified should be considered a more-or-less representative sampling of what is currently in operation. An attempt has been made to characterize each of the small arrows as institutions, rule instruments, or processes and to note which actors played particularly significant roles in their development or implementation. But both the resulting characterizations and the role ascriptions are somewhat arbitrary.

[51] For example, see draft Ontario privacy legislation, as discussed at www.cbs.gov.on.caJmcbs/english/57PUWP.htm.

[52] Nevertheless, this has not stopped some provinces from threatening to challenge the constitutionality of the federal privacy legislation based on the CSA

privacy code. However, these possible challenges relate not so much to the substantive obligations contained in the code as to the scope of coverage of the federal law.

[53] For discussion of the "shadow of the law" phenomenon in the context of environmental protection, see Kernaghan Webb, "Voluntary Environmental Initiatives and the Law: Exploring the Potential for a Constructive Partnership," in R. Gibson, ed., *Voluntary Initiatives: the New Politics of Corporate Greening* (Peterborough: Broadview Press, 1999), 32-50.

[54] See P. O'Malley, "Risk, Power and Crime Preventions," *Economy and Society* 21 (1992): 252-75.

[55] As was noted with respect to the consumer-protection initiatives included in Figure 10.1 above, the indentations on the side of the main arrow are not intended to relate to any particular cutback or setback, and the small arrows are not placed in any particular order. There are many more institutions, rule instruments, and processes that could be included; thus Figure 10.2 is an attempt to portray only a representative sampling of what is currently in operation. As noted with respect to the consumer-protection context, the characterization of initiatives as institutions, rule instruments, or processes is somewhat arbitrary, as is the ascription of who among government, industry, or NGOs played lead roles.

[56] This point is discussed in Antweiller and Harrison, "Toxic Release Inventories."

[57] Commission of the European Communities, *European Governance: A White Paper* (Brussels: 2001).

[58] More information concerning the Eco-Management and Audit Scheme can be found at http://europa.eu.int/comm/environment/emas/index_en.htm

[59] More information concerning this network, referred to as EEJ-net, can be found at www.eejnet.org.

[60] More information concerning the New Approach can be found at www.newapproach.org.

[61] More information concerning the UK Office of Fair Trading's regime for Consumer Codes of Practice can be found at www.oft.gov.uk/Business/Codes/default.htm.

[62] Susan Phillips, "More than Stakeholders: Reforming State-Voluntary Relations," *Journal of Canadian Studies* 35 (2000 -2001): 182-201, at 184-4.

[63] The following is taken directly from M. MacKinnon, J. Maxwell, S. Rosell, and N. Saxena, *Citizens' Dialogue on Canada's Future: A 2Ist Century Social Contract* (Ottawa: Canadian Policy Research Networks and Viewpoint Leaning, 2003).

[64] See surveys prepared for the Voluntary Sector Initiative involving the Canadian Centre for Philanthropy at www.vsi-isbc.ca.

[65] See, for example, discussion of Suncor's approach to encouraging volunteering by its employees, described in a case study at www.volunteering-calgary.ab.ca/CWVC/case_studies/suncor.html.

[66] See, for example, the discussion in A. Paul Pross and Kernaghan Webb, "Embedded Regulation: Advocacy and the Federal Regulation of Public Interest Groups," in K. Brock, ed., *Delicate Dances: Partnerships between the Nonprofit, Public, and Private Sector* (Montreal and Kingston: McGill-Queen's University Press, 2003), 63-122.

[67] For more information, see the ISO Consumer Policy Committee's report, *The Desirability and Feasibility of ISO CSR Standards*, http://europa.eu.int/comm/employment_social/soc-dial/csr/isoreport.pdf.

[68] Corporate social responsibility is also known as corporate sustainability, corporate responsibility, corporate accountability, corporate citizenship, corporate sustainable development, and so on. At this point, corporate social responsibility, corporate responsibility, and corporate sustainability appear to be the most prevalent terms used to describe the concept.

[69] The following definition draws on work prepared by a federal interdepartmental committee tasked with exploring how CSR relates to a federal activities. It reflects a synthesis of other definitions from institutions such as the Organization for Economic Cooperation and Development (OECD), World Business Council for Sustainable Development, Business for Social Responsibility, European Union, Conference Board of Canada, and Canadian Business for Social Responsibility. The definition should be taken as an evolving concept that will change in the future as the concept is examined and developed in different domestic and international contexts.

[70] For example, government could require firms to report on their CSR activities (and thereby the ability consumers, communities, investors, lenders, governments, and others to make informed decisions concerning a firm) or put in place financial incentives to encourage CSR activities. NGOs can play significant roles in development, implementation, and monitoring of CSR initiatives.

[71] Some might argue that it is inefficient to target more than one institution, rule instrument, or process at the same activity and to thereby potentially create unconstructive interinitiative rivalries. While there is this potential, there is also the likelihood of creative tension, which is the hallmark of innovation. Elsewhere, the author has argued that, while harmonization and coordination of federal-provincial activity on environmental enforcement (which sees the federal government cede lead authority to the provinces in some circumstances) is laudable, the federal government nevertheless should not relinquish its capacity to engage in enforcement actions whenever it feels necessary. See Kerna-

ghan Webb, "Gorillas in the Closet? The Impact of Intergovernmental Relations on the Enforcement of Environmental Standards, Using the *Fisheries Act* as a Case Study," in P. Fafard and K. Harrison, eds, *Managing the Environmental Union: Intergovernmental Relations and Environment Policy* (Montreal and Kingston: McGill-Queen's University Press and Queens University Institute of Intergovernmental Relations, 2000), 163-206.

[72] Yes, this is a variation on the aphorism that "it takes a village to raise a child." My apologies to all concerned.

[73] However, see the examples given above of the voluntary privacy code evolving into a law and of the Canadian Banking Ombudsman evolving to become part of the Financial Ombudsnetwork, both over very short periods. Moreover, it is difficult to imagine that it would be easier to adjust such initiatives if they were laws.

[74] Commentators refer to the increased likelihood of the "principal-agent" problems when functions are delegated from one body to another. See, for example, Salamon, "The New Governance."

[75] In this regard, sustainable governance is not unlike the claims made about the Internet— i.e., that it is uncentralized and hence less vulnerable to full-system shutdown.

[76] As discussed in Kernaghan Webb, "Government, Private Regulation and the Role of the Market," in MacNeill, Sargent, and Swan, eds, *Law Regulation, and Governance*, 240-63.