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QUESTION, *Professor King*: How do you handle disagreements within the roundtable process?

ANSWER, *Mr. Buzzelli*: One of the things we've done when participating in round tables is try to move the topic away from a currently hot, emotional issue. What you have to do is address issues that have not yet been polarized. You must address issues that can do something to prevent the kind of problem you think might arise in the future. In other words, you have to take a future look, and that's how we've been able to get some closure on some of these issues.

Incidentally, you cannot always reach closure. At that point, you just have to pack up and be prepared to leave. So, it isn't a guarantee. More often than not, I find that we can set aside the things we disagree on, look for areas on which we all agree, and move forward in those areas. As you build some trust and get a few successes under your belt, you can sneak in some of the things that you first didn't agree on.

QUESTION, *Mr. Edwards*: How, in setting priorities, do you deal with jurisdictional differences, and who do you involve around your round table to ensure that a proper balance is struck between local concerns and international concerns?

ANSWER, *Mr. McLeod*: What I do in my office when a client has a problem — whether it concerns water quality, air quality or whatever — is make a checklist. I say to myself, how am I going to deal with the city, the region, the province, the federal government? Maybe I get rid of any two or more of those four, and perhaps there is a fifth, the international arena. Very quickly, I learn how to concentrate on the one that really makes the most sense at that point in time.

In answer to your question, you have to be alert to the idea that there are those four jurisdictions at least. How you solve conflicts amongst or between two or more of the four (or five) is very much a function of the personalities and the precise issues involved.

COMMENT, *Mr. Buzzelli*: Until very recently, I think a business would have told you that it was easier to operate in the United States than in Canada. In the United States, the EPA sets the over-arching policy, and then grants authority to the states to administer that policy. There are state regulations, but for the most part, the U.S. is a federal

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system. Most companies typically find it easier to operate in the United States simply because of the differences that exist in the political systems in Canada, where the federal system, with regard to the environment, really doesn't have the powers that the provincial governments do. We found it to be very different working from province to province, but that is disappearing. We now really have to work at all levels on both sides of the border.

QUESTION, *Mr. Luneberg*: What is your reaction to negotiated rule making in terms of how it's been conducted, and has Canada engaged in the same process?

ANSWER, *Mr. Buzzelli*: The U.S. does have round tables in place. Every U.S. round table has been issue-specific, like the Clean Air Act. That has been the difference between the U.S. and Canada. Canadian round tables don't sit down to discuss an issue; they sit down to discuss the issues that they want to put on the table.

It is quite different than the concept I'm talking about. I hear all kinds of criticisms on negotiated rule making, and I personally believe it's the only way to go; it's the only way to get the Agency to really open up and get the rule making done in the open — like consulting — as opposed to the traditional rule making approach, which has not been done in the open.

COMMENT, *Mr. McLeod*: Canada does have a form of rule making by negotiation in the sense that, in our country, we have a ladder of different types of government intervention into an individual's or a company's operations. The ladder starts with a statute, which is passed by the legislature. That statute is clearly not company or site specific. Next, the cabinet of the government of the day passes what's called a "regulation". At that second rung, there's a possibility that it can become company and site specific. At the third rung, you encounter control orders, certificates of approval, program approvals, etc., and that's all company and/or site specific.

With respect to negotiated rule making, we've had one example in Canada in the last few years where, at the second rung, the passing of a regulation, there was negotiation concerning Ontario's acid rain regulations. In an unusual way, the regulations relating to Inco, Algoma, Falcon Bridge and Ontario Hydro were company and site specific, and they were all negotiated. They were very detailed. From the point of view of those companies, it was a hard process, but I think it was far better for them to have gone through that negotiated rule-making process than for them to have stayed away and allowed the bureaucrats do it on their own without consulting them.

QUESTION, *Mr. Martin*: How do you reconcile the need for companies to be more open with the public and the communities with environmental audits and assessments and, in particular, the risk to officers and directors on a personal basis as a result of what comes out of those

assessments? How do you protect the employees who may be implicated by those audits?

ANSWER, *Mr. Buzzelli*: There's no question in my mind, and I think in the minds of most of the senior management of the chemical industry, that some way of third-party validation of the industry's performance must occur.

COMMENT, *Mr. McLeod*: From the Canadian perspective, the conventional wisdom is that you would have a lawyer quarterback your environmental audit. The audit is then physically placed in the lawyer's office and is subject to solicitor/client privilege. Therefore, the EPA — in the States — can't come in and take it. Whether that's right or wrong, nobody knows for sure at the moment. What we know is that the U.S. EPA and the Federal Department of the Environment and the Internal Ministry of the Environment in Canada have all issued public statements saying that environmental auditing is a super thing to do. So, why don't we all do it?

COMMENT, *Mr. Buzzelli*: Any business that is not doing internal environmental audits because of fear of seizure is on the path of destruction. That is clear.

COMMENT, *Mr. McLeod*: I go in with you on that. That is very important, because no matter what happens, if there is a charge against anybody, be it the company or an individual, if I were the individual that was charged or if I were the lawyer acting for that individual or company, I would not want to have the prosecutor suggest that I had failed to audit. You're just dead in the water if you don't do some kind of auditing. There are legal issues with respect to exactly how it should be done, but, substantively, it's very important that you do some kind of auditing.

COMMENT, *Mr. Jeffery*: With regard to the question of whether or not the audit is privileged, and many of us have a lot of doubt, I think that if it were ever challenged in court, and it was not based on advice provided by counsel in contemplation of litigation, it may well not stand up to a court challenge.

With respect to companies not doing the audits, this opens up a host of problems, one being that you will not likely be able to make out a due diligence defense. So, you are obliged, in order to protect yourself down the line, to find out what is wrong and then take steps to rectify it.

I think a lot of us forget, even if the audit is privileged or is beyond the reach of the investigators because the lawyer has hung on to it and is willing to undertake a challenge in producing it, when you know of certain noncompliance issues that have arisen, under most of the regulatory legislation, there are mandatory duties to report. If you don't report, you have, in that sense, committed another offense. It's really sort of an interwoven problem in the audit, and how you handle the audit report is

just one little aspect of what you have to worry about, whether or not it gets into the hands of the investigators.

COMMENT, *Mr. McLeod*: The point is extremely well taken. The purpose of the audit is to find out what's wrong and then fix it. If the report is sitting in the lawyer's office, and the manager of Department X is not entitled to see it, how can he be expected to fix it?

My own view, and what I advise my clients, is that it's probably, on balance, worth a try to get the privilege, but only if you're satisfied that the full intended purpose of the audit can be accomplished. Therefore, I tend to err on the side of going ahead with the audit and letting the people who need to see it see it. On balance, I say report. Tell the regulator as much as you can. I know that's a gross overgeneralization, but at least in Canada, there is a new argument that your report can't be used against you in a prosecution of any offense, because you are, in effect, incriminating yourself when you make that report.

COMMENT, *Mr. Buzzelli*: From a company standpoint, one of the things we learn is to make sure that the audit reports stick to the facts, and not to opinions. Basically, where hundreds of companies have been burned in the past is where some overzealous employee cites his opinion — "I think" kind of thing — in the audit report. We spend a lot of time making sure our audit reports — and we do about 400 a year now — stick to facts, not to opinions, feelings or general directions; are we in compliance, or are we out of compliance?

QUESTION, *Mr. Kadens*: Who are the "facilitators" in the round table process? How are they selected, and what is their role? Is this the same as mediation?

ANSWER, *Mr. Buzzelli*: No, in fact, it's not mediation at all. When Dow put our first community advisory panel together, it was done in Canada, and we hired a Toronto firm to help us. All of our community advisory panels now have a facilitator who chairs and runs the panel.

The company is not officially a voting member of the community advisory panel. Think about that. We're at every meeting, we're the subject of the panel, we're the resource for the panel, but we've chosen to have the panel learn how to operate itself. So, the "facilitator" is a true facilitator. He or she runs the meetings and works with the panel to set the agenda. We talk at the meetings, obviously, but we have found that in order to keep the balance of power, we cannot chair these panels. The minute we tried, we found ourselves in the position of taking an opinion and influencing the panel, and then we ended up having to defend our own opinion. That wasn't what we wanted. What we wanted was input.

These facilitators, incidentally, come from all backgrounds. Quite frequently, we find that local colleges or universities will have professors on their staffs who are trained in the area of facilitation and also seem to have a reputation in the community as being a disinterested third party

who can provide that kind of service. It's not exclusive that we use university and college people, but quite a few of our panels are facilitated in that manner.