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The Draft Environmental Management Framework Agreement and Schedules: A Commentary and Analysis

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I. INTRODUCTION

The CCME Harmonization Project

The Canadian Council of Ministers of the Environment (CCME) is the major forum in Canada for discussion and joint action on environmental issues of national and international concern.¹ Since November of 1993, the CCME has focused on the harmonization of environmental management as its top priority. A Lead Representatives Committee, consisting of officials from the federal, provincial and territorial governments, released the draft Environmental Management Framework Agreement (EMFA) for public comment on December 13, 1994.

The Agreement includes an umbrella framework outlining the objectives and principles of the CCME harmonization initiative and setting out the roles and obligations of each jurisdiction. In addition to the general component of the Agreement, the environmental field is divided or categorized into eleven "functional" areas. More specific details with respect to the eleven functional areas are to be worked out under individual Schedules which will then form part of the overall Agreement. Four draft Schedules—monitoring; compliance, licensing and approvals; environmental assessment; and, international agreements—were presented for comment along with the EMFA.

Since the CCME began discussion on harmonization, the environmental community has had serious concerns about its rationale, its negotiation process, and the potential implications for the administration and implementation of environmental law and policy in Canada. Such concerns were articulated in a paper titled: "An Environmentalists' Perspective on Harmonization: A Preliminary Analysis," presented to the Ministers of the Environment at the November 1994 CCME meeting. Ten guiding principles for harmonization were outlined in the paper. They are presented in BOX 1.

The concerns expressed in the preliminary analysis paper have been raised consistently by environmental delegates to the National Advisory Group on Harmonization (NAG), a multi-stakeholder group that is intended to provide feedback to the ministers on the issue. This document re-iterates these concerns and then provides a more detailed analysis of the Environmental Management Framework Agreement and the four Schedules. While the findings and conclusions are presented at the end of this document, suffice to say at this point that the concerns raised by non-governmental representatives on the NAG have not been addressed. In fact, the Framework Agreement and its Schedules reinforce the concerns of the environmental community.

¹This definition is taken directly from the CCME brochure.

Table 1

TEN PRINCIPLES FOR ENVIRONMENTAL HARMONIZATION IN CANADA

- 1) Harmonization must not reduce government powers to ensure that environmental quality, biological diversity and ecosystem integrity are protected. It must ensure that special protection for special species and areas is provided.
- 2) Responsibility for environmental protection by all levels of government and by the individual must not be reduced.
- 3) The initiative must respect the Canadian constitutional and legal framework.
- 4) Harmonization of standards must occur in an upwards direction, not towards the lowest common denominator. It must allow governments to adopt more stringent standards than other jurisdictions when they deem it necessary to do so.
- 5) Canadian sovereignty over decision-making must be maintained.
- 6) The harmonization initiative must take into account regional disparities.
- 7) The harmonization initiative must include strong enforcement provisions, including the right of citizens to enforce agreements, regulations and legislation.
- 8) Accountability mechanisms must be established with respect to the EMFA, including annual reporting, periodic reviews, full public access to information and a public registry.
- 9) The harmonization agreement must be subject to an environmental impact assessment.
- 10) There must be full and effective public consultation before the EMFA proceeds.

From: S. Ochman, ed., An Environmentalists' Perspective on Harmonization: A Preliminary Analysis (Ottawa: Harmonization Working Group, November 1994)

The Goals of the EMFA

The pursuit of the CCME harmonization process has been justified on three main grounds: a "rationalizing" of federal-provincial programs; the creation of more "consistent" roles and more "predictable" environmental law and policy; and, the establishment of a clearer delineation of government roles and responsibilities. The first goal, rationalization, aims to eliminate duplication and overlap between federal and provincial/territorial programs. The second goal is more directly related to an actual harmonization of law and policy, based on the assumption that "consistency" and "predictability" will create a more stable regulatory environment. The third goal represents an attempt to define when a given jurisdiction will be responsible for a particular aspect of environmental management, in order to clarify what role each government should fulfil. The maintenance or enhancement of environmental protection is stated to be an *underlying* tenet of the process.

Sources of Concern

De facto Constitutional Change

The participating governments claim that the harmonization exercise is an administrative process that will eliminate overlap, create certainty, reduce government costs and create more efficiency. However the scope of the EMFA is much more dramatic. Although the CCME emphasizes that harmonization will stop short of Constitutional reform, all mechanisms up to that stage are to be considered.² It seems the outcome may have the same impact as an actual Constitutional amendment, since a major redistribution of the roles and responsibilities of the federal and provincial governments for the protection of Canadian's environment is proposed in the Draft EMFA.

Neither the participating governments nor their officials have been given a mandate to do indirectly what they acknowledge they cannot achieve directly. In recognizing that the effect of this process is akin to a Constitutional realignment of responsibilities, these power transfers should not occur without full and effective public consultation, in-depth scrutiny and a full review of alternatives. However, to date, there has been less public discussion and consultation on the harmonization initiative than any other major environmental initiative over the past decade.

²CCME. "Rationalizing the Management Regime for the Environment" 7.

The "Problem" of Duplication and Overlap

One of the fundamental concerns which has been identified regarding the harmonization initiative is the failure of the sponsoring governments to present any substantive evidence regarding the extent of the problems of duplication and overlap in their efforts to protect Canada's environment. No justification has been provided for the sweeping scope of the reallocation of roles and responsibilities which is being attempted through the harmonization exercise. While efficiency may be good for government, it is possible that the same goal is not particularly good for the environment.³

The only evidence that has been presented in support of the initiative has been anecdotal in nature. There has been no systematic study of the extent of the problem of duplication and overlap in Canadian environmental policy⁴, or to document the potential long-term environmental benefits of harmonization. Indeed, many observers have argued that the most serious problem in the protection of Canada's environment has been a lack of effective efforts on the part of the federal and provincial governments, not an excess.⁵

What empirical evidence does exist, supports this conclusion. In its 1993-94 regulatory review, for example, only five of the twenty-five CEPA regulations were identified by Environment Canada as having the potential to overlap with existing provincial requirements, and in some cases, the overlap was only partial.⁶ Enforcement responsibilities for the *Fisheries Act* have already largely been delegated to the provinces, and Environment Canada appears to have a policy of avoiding enforcement action under

³Franklin S. Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection" in Law and Process in Environmental Management, Steven A. Kennett ed., (Calgary: Canadian Institute of Resources Law, 1993) at 255.

⁴Stefan Ochman (ed.) "An Environmentalists' Perspective on Harmonization: A Preliminary Analysis" Discussion Paper of the Environmental Working Group on Harmonization of the Canadian Environmental Network (2 November 1994) 6-7; Steven Kennett, "Making Federalism Work for Sustainability: Addressing Overlap, Duplication and Conflict in Environmental Regulation" Discussion Paper for the *Projet de Societe Workshop on Environmental Jurisdiction* (22-23 October 1993 Banff, Alberta) 25.

⁵See, for example, B.Rutherford and K.Clark, "The Constitution, Harmonization, Federal Provincial Relations and CEPA," in M. Winfield, ed., Reforming CEPA: A Submission to the House of Commons Standing Committee on Environment and Sustainable Development (CIELAP Brief 94/7) (Toronto: Canadian Institute for Environmental Law and Policy, September 1994).

⁶Environment Canada, Canadian Environmental Protection Act: Report for the Period April 1993 to March 1994 (Toronto: Supply and Services Canada, 1994), p.20.

CEPA where there is potential overlap with provincial jurisdiction.⁷ Furthermore, there is no known instance in which full federal and provincial environmental assessments have proceeded in parallel on the same project.⁸

Federal Abandonment of Responsibility for Protecting Canadians' Environment

In addition to these overriding concerns regarding the scope and justification presented for the EMFA the contents of the Agreement and its accompanying Schedules, raise a number of serious questions regarding the future of environmental protection in Canada. The primary feature of the draft EMFA and Schedules is the provision of a framework for the withdrawal of the federal government from the field of environmental protection.

The federal government appears to be prepared to surrender its capacity to ensure a minimum level of environmental protection for all Canadians or provide leadership in international arenas. Responsibility for national leadership and integration is being transferred from the federal government to the CCME, a body which has no legal or constitutional status, and no effective accountability mechanisms. This is despite consistent demands by Canadians for a strong federal environmental role.⁹

Provincial Incapacity

There is an assumption underlying the EMFA that the provinces will be capable of assuming significant elements of the federal government's environmental responsibilities. However, some environmental problems, by their nature, are beyond the capacity of the provinces to address either individually or even collectively. This possibility was judicially recognized in the Supreme Court of Canada's 1988 *R. v. Crown Zellerbach Canada* decision.¹⁰

In addition to the question of the provinces' jurisdictional capacity, there is the issue of the degree to which the provinces have the technical and human resources to take on major components of the federal government's environmental functions. The draft agreement indicates that resources are to be transferred from the federal government to

⁷.K.Clark and B.Rutherford, "CEPA and Environmental Law Enforcement," in Winfield, ed., Reforming CEPA, p.6.

⁸.Personal communication, R. Northey, McCarthy Tetrault, March 6, 1995.

⁹.See, for example, Standing Committee on Environment, Environment and the Constitution (Ottawa: House of Commons, March 1992).

¹⁰.*R. v. Crown Zellerbach Canada*, (1988), 1 S.C.R. 401.

the provinces to facilitate the fulfilment of these expanded responsibilities, although no indication of the contemplated level of resource transfers has been provided.

However, given that cost cutting purpose of the initiative, at all levels, and the federal government's current fiscal situation, the transfer of adequate resources seems highly unlikely. There are no indications of how the agreement is to function if the federal government is unable to transfer the necessary resources. If there are no transfers, then the net result seems likely to be the *de facto* withdrawal of federal environmental requirements.

The agreement also fails to take into account the different existing capabilities of the provinces. It assumes that all of the provinces will be able to assume an equivalent level of responsibility for federal environmental protection functions. This "one size fits all" approach ignores the differences in size and fiscal position of the provinces. Some provinces may need the federal government to play a larger role than others to ensure that their residents receive an acceptable minimum level of environmental protection.

Constraining Policy Innovation in the Provinces

The achievement of "consistency" in environmental policy is a major goal of the harmonization initiative. However, the pursuit of this objective may significantly constrain the ability of individual provinces to set higher standards and to adopt innovative environmental programs and policies. This would undermine well-understood dynamics of policy innovation and development in federal systems of government.¹¹ There is no basis for the claims, made by proponents of harmonization, that increased consistency necessarily will lead to enhanced environmental protection. On the contrary it seems likely, at best, to reinforce the status quo. Opportunities for an upwards movement on environmental standards may be limited by the need to obtain consensus among the participating jurisdictions.

Relationship with First Nations and the lack of Public Accountability Mechanisms

The harmonization initiative suffers from a number of other major weaknesses, including any clear conception of the relationship between first nations and other governments in environmental management in Canada, and the absence of any effective monitoring and accountability mechanisms.

¹¹. See, for example, K. McRoberts, "Federal Structures and the Policy Process," in M. Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993), pp. 149-178.

Conclusions

If implemented in its present form through the draft EMFA and its accompanying schedules, the harmonization initiative will have serious negative effects on the quality of Canadians' environment. The agreement seems likely to result in a net reduction in the level of protection provided by Canadian governments.

In addition, by delegating many of the federal government's environmental responsibilities to the provinces, the harmonization exercise has the potential to decrease the level of consistency currently experienced in the development and implementation of environmental law and policy across Canada. Furthermore, by imposing constraints on the ability of provinces to introduce new and innovative environmental protection measures, the agreement will slow the forward movement of environmental policy in Canada.

Ultimately, the EMFA fails to address the real emerging problems in environmental management in Canada. The most important of these is to ensure, in a period of budgetary restraint, especially at the federal level, that the functions and services essential to the protection of Canadians' health and environment are maintained. This can only be achieved through the combined efforts of the federal and provincial governments.

It will be necessary for the federal government to play a more extensive role in some provinces than in others, both to provide assistance in areas where provincial capability is weak or does not exist, and to act in cases where provinces fail to provide critical services. The second role will be particularly important in the fields of pollution-based monitoring, environmental law enforcement, and environmental impact assessment. This implies a need for a very different approach from the "one size fits all" model articulated through the EMFA.

The following analysis examines the basis for these conclusions in detail. This analysis is framed by the belief that the overriding goal of harmonization should be the enhancement of environmental protection for the benefit of present and future generations of Canadians. The net result must guarantee all Canadians a minimum level of environmental quality, while maintaining the unqualified capacity of individual provinces to adopt higher standards for their residents if they choose to do so.

II. THE CONSTITUTIONAL, LEGAL AND POLITICAL CONTEXT OF THE HARMONIZATION PROJECT

Introduction

The implications of the EMFA and its Schedules cannot be fully understood without a discussion of the constitutional, legal and political parameters within which it has been developed. This section attempts to outline these contexts.

The Constitution and the Protection of Canada's Environment

Division of Powers

The division of powers provided in the *Constitution Act* establishes the scope of the legislative authority of the federal parliament and provincial legislatures with respect to the environment. The EMFA cannot redistribute federal and provincial environment roles and responsibilities in a manner which violates the framework provided by the constitution.

Through a combination of provisions the Constitution establishes the provincial legislatures as the primary owners of natural resources within Canada, with much of the responsibility for their protection and management.¹² However, provincial jurisdiction in this regard is not exclusive.

Several sources of federal authority over natural resources management and environmental protection can be found in the *Constitution Act* as well. Among the most important sources of federal legislative authority are parliament's power to legislate for the peace, order and good government (POGG) of Canada, and to make legislation with respect to criminal law, sea coasts and inland fisheries, navigable waterways, and trade and commerce. The federal government's extensive taxation and spending powers provide additional means for it to address environmental matters.¹³

¹²J.Swaigen and M.Winfield, "Water," in D.Estrin and J.Swaigen, ed., Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Emond-Montgomery Publishers Inc. and the Canadian Institute for Environmental Law and Policy, 1993), p. 520.

¹³.For a detailed discussion of the scope of these powers see Clark and Rutherford, "The Constitution, Federal-Provincial Relations, Harmonization and CEPA," pp.5-8. See also Swaigen, "The Framework for Protecting Ontario's Environment," in Estrin and Swaigen, , Environment on Trial.

In practice, federal-provincial relations with respect to the environment have been strongly coloured by federal reluctance to stand on its constitutional authority to protect the environment.¹⁴ This is despite the view of many scholars that the federal government has a firm constitutional basis for action in the environmental field, and that a strong federal role in environmental management is a necessity.¹⁵

This conclusion also is reflected in the results of what public consultations and discussions have occurred on this subject. These have indicated very clear public support for the retention, and even expansion of federal authority over the environment.¹⁶ Public opinion polls also suggest strong support for an environmental action at the national and international levels (see Table 2).

In this context, the implied devolution of federal responsibility for environmental protection through the EMFA raises a number of serious questions. In effect, the federal government

¹⁴.See generally, Clark and Rutherford, "The Constitution, Federal-Provincial Relations, Harmonization and CEPA."

¹⁵.See for example; D.P Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972) 10 Osgoode Hall Law Journal 647; D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54; Mains, "Some Environmental Aspects of a Canadian Constitution", (1980) 9 Alternatives 14; D. Gibson, "Environmental Protection and Enhancement under a New Canadian Constitution," in Beck and Bernier, eds., Canada and the New Constitution (Montreal: The Institute for Research on Public Policy, 1983); D. Tingley, ed., Environmental Protection and the Canadian Constitution (Edmonton: Environmental Law Centre, 1987) including A.R. Lucas, "Natural Resources and Environmental Management: A Jurisdictional Primer," p. 31; A.R. Lucas, "Case Comment on R. v. Crown Zellerbach Canada Ltd." (1989) 23 U.B.C.L.Rev. 355; Rodney Northey, "Federalism and Comprehensive Environmental reform: Seeing beyond the Murky Medium," Osgoode Hall Law Journal (1989), Vol.29, No.1, p.127; R. Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal Government," in Into the Future: Environmental Law and Policy for the 1990s (Edmonton: Environmental Law centre, 1989); P. Muldoon and B. Rutherford, Environment and the Constitution: Submission to the House of Commons Standing Committee on Environment 1991 (Toronto: The Canadian Environmental law Association, Brief No.200); and P. Muldoon and B. Rutherford, "Designing an Environmentally Responsible Constitution," 18 Alternatives No.4, May/June 1992; and B. Rutherford, "The Constitutional Division of the Environment: A Comment on the Oldman River Decision", National Journal of Constitutional Law, Vol.2, No.2, July 1992.

¹⁶.See, for example, Standing Committee on the Environment, Environment and the Constitution. See also Renewal of Canada Conferences, Compendium of Reports - Division of Powers, Halifax, Nova Scotia, January 17-19, 1992.

Table 2**FOCUS OF ENVIRONMENTAL RESOURCES**

Question: In order to make significant progress towards protecting the environment, where do you think the most attention and resources will need to be focussed? At the local, provincial or international level?

	REGIONS							URBAN CENTRES			TOTAL
	A t l a n t i c	Q u e b e c	O n t a r i o	M a n i t o b a	S a s k.	A l b e r t a	B. C.	M o n t r e a l	T o r o n t o	V a n c o u v e r	
International level	51	5 8	45	36	48	50	50	63	49	5 2	50
National level	14	1 3	25	29	24	14	12	14	31	1 2	19
Local level	26	1 8	17	14	16	22	17	17	12	1 3	18
Provincial level	3	9	6	6	8	6	12	5	4	1 4	7
All of the above	1	1	3	4	2	4	5	2	3	8	3

Source: Environics, The Environmental Monitor: 1993-4 Report, April, 1994. Page 21.

is agreeing not to exercise its constitutional capacity to establish and implement national environmental standards through federal legislation. This *de facto* abandonment of legitimate legislative authority by federal government could make a re-assertation of this authority in the future extremely difficult.

This would be partly a consequence of the federal government's loss of institutional capacity in the field due to the elimination of fiscal and human resources. In addition, once it is established by practice and convention that the federal government not exercise its legislative authority, and that the provinces fully occupy the field, an effort by the federal government to re-assert its legal authority would be likely to engender intense federal-provincial conflict.

*Overlapping Jurisdiction*¹⁷

The generality of some of the language used in the Constitution Act to describe federal and provincial powers has meant that many problems fall within both federal and provincial competence. In fact, most problems arising from twentieth century conditions are likely to involve both jurisdictions. The general rule is that where overlapping jurisdictions exist, both levels of government are free to deal with the matter. But if federal and provincial laws dealing with the same problem conflict with each other, the federal law takes priority, and the provincial law is regarded as invalid to the extent of the conflict.¹⁸

Therefore, if both levels of government have jurisdiction to deal with a problem, and the federal government does not act, the provincial government may pass a law that will be valid until the federal government passes a law that is inconsistent with it. Another aspect of overlapping jurisdictions is that there may well be overlapping - and different - sets of standards. Some judges have said that in a situation where *both* jurisdictions can make laws, provincial laws may validly require stricter standards for environmental protection than those found in the federal legislation.¹⁹

There are substantial benefits to maintaining both a provincial and a federal role in environmental protection, even if it precludes absolute clarity. A degree of overlap acts as a check on the other legislative branch. The Constitution helps avoid unilateral

¹⁷.Elements of this discussion are adapted from J.Swaigen, "The Framework for Protecting Canada's Environment," in Estrin and Swaigen, Environment on Trial, p.24.

¹⁸.*R. v. Lake Ontario Cement Ltd. et al.*, [1973] 2 or 247 (Ont. H CJ)

¹⁹.*Interprovincial Cooperatives Ltd. and Dryden Chemicals Ltd. v. The Queen*, (1975) 53 DLR (3d) 321 (SCC). This is an *obiter dictum*.

exercises of power or a single government's refusal to act.²⁰ In addition, the very fact that the federal government retains the power to regulate, even if rarely used, is a powerful mechanism to fashion appropriate provincial behaviour.²¹

Provincial control over many environmental management issues makes sense as it allows a greater degree of responsiveness to local needs. However, there is also a legitimate argument for ensuring a continued federal role in setting minimum national standards. In addition, the "provincial incapacity" doctrine elaborated on in *Crown Zellerbach*,²² recognizes that there are certain functions which demand federal leadership.

*Delegation of Power*²³

In some circumstances the federal and provincial governments may delegate their functions to each other. The courts have held that although one level of government may not make a direct, formal delegation of its powers to make laws to the Parliament or legislature of the other,²⁴ one government may confer power on the subordinate

²⁰See generally, Peter Nemetz, "The Fisheries Act and Federal-Provincial Environmental Regulation: Duplication or Complementarity," Canadian Public Administration, 29 (1986), pp. 401-424.

²¹For example, in response to the Federal *Environmental Contaminants Act*, 1975, the next year, Ontario promulgated its own regulation of hazardous waste under the *Environmental Protection Act* and Alberta passed the *Hazardous Chemicals Act*, 1978 a few years later. More recently the passage of the *Canadian Environmental Protection Act* and the *Canadian Environmental Assessment Act* have been accompanied by extensive legislative reforms in many provinces. See Winfield, "The Ultimate Horizontal Issue," pp.148-149.

²²The matter must be a discrete subject that cannot have a scale of impact irreconcilable with the Constitutional division of powers. To determine whether it is a matter that passes the "provincial inability" test, consideration must be given to what would happen if a province did not effectively deal with the intra-provincial elements of the matter. (*Zellerbach, supra*, at 431-432.)

²³For a detailed discussion of the law of delegation refer to **APPENDIX 1: The Law of Legislative and Administrative Delegation and the EMFA** of this paper.

²⁴*Attorney General of Nova Scotia v. Attorney General of Canada* (Nova Scotia Interdelegation Case), [1951] SCR 31.

agencies of the other.²⁵ The federal government cannot, for example, give a province the power to pass legislation regulating fisheries, but it can, and does, validly delegate its power to enforce the federal *Fisheries Act* to provincial Ministries of the Environment and of Natural Resources.²⁶

It is possible, however, that administrative delegation may have the same *de facto* result as legislative delegation. Even if the courts continue to distinguish legislative delegation because Parliament has maintained the authority to withdraw that delegation, as time goes on, it is less and less likely to occur. This is partly a practical result, as the federal government loses its institutional capacity to fulfil that role due to the elimination of fiscal and human resources. However, it also is a political consequence, as an effort by the federal government to re-assert its legal authority would be likely to prompt strong provincial resistance.

The Environmental Roles and Responsibilities of the Federal Government

There is a strong constitutional basis and practical rationale for the federal government playing a major role in the protection of Canada's environment. This includes activities in the following areas:

Providing Leadership on Interprovincial and International Environmental Issues

The federal government must continue to play a leadership role on environmental issues that are interprovincial or international in scope. The provinces have no jurisdictional capacity to deal with issues of this nature. This area includes questions which are global in scope, such as global warming,²⁷ ozone depletion,²⁸ and biodiversity protection,²⁹ or which are interprovincial or international in nature, such as transboundary air and water

²⁵ *Prince Edward Island Potato Marketing Board v. Willis*, (1952) 2 SCR 392.

²⁶ Swaigen, "The Framework for Protecting Ontario's Environment," p.25.

²⁷ See *Climate Change Convention*, United Nations Conference on Environment and Development, June 1992.

²⁸ See the *Montreal Protocol on Substances that Deplete the Ozone Layer*, 1987.

²⁹ *Biodiversity Convention*, United Nations Conference on Environment and Development, 1992.

pollution,³⁰ the transboundary movement of hazardous wastes,³¹ the management of transboundary movements of wildlife, such as migratory birds.³² Indeed, there are long-standing concerns within Canada regarding the capacity of provincial interests to limit Canadian commitments in the global community.³³

Environmental Management in Areas of Federal Jurisdiction

This function includes ensuring environmental protection on federal works, undertakings and lands, and in the operations and activities of federal departments, boards, agencies and Crown Corporations.³⁴ It also encompasses environmental protection in relation to enumerated federal heads of power in the *Constitution Act*, such criminal law in relation to the protection of public health, navigable waterways, and sea coasts and inland fisheries.

Environmental Management in Areas of National Concern and Provincial Incapacity

There are some environmental protection functions, which are national in scope and which the provinces acting individually, or even collectively, are not capable of fulfilling. The legitimacy of federal legislative action in such cases of national concern and "provincial incapacity," through Parliament's power to legislate for peace, order and good government was judicially recognized by the Supreme Court of Canada in its *R. v. Crown Zellerbach* decision.³⁵ Subjects which fall into this category may include the environmental and health impact assessment of substances new to Canada, and the regulation of substances found to be "toxic" for the purposes of CEPA.

³⁰See, for example, *Great Lakes Water Quality Agreement*, 1987.

³¹See *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal*, 1987.

³²See *Migratory Birds Convention Treaty*, 1916.

³³Mark Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Constitutional Order" (1991) 24:2 *Alberta Law Review* 420 at 434.

³⁴See K.Fisher, "CEPA and the Federal House in Order," in Winfield, ed., *Reforming CEPA*.

³⁵*R. v Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401 at 431-432.

Ensuring a Minimum Level of Environmental Protection for all Canadians

The fourth essential environmental role of the federal government is to ensure a minimum level of environmental protection to all Canadians. This function has two dimensions. The first is to provide assistance to those provincial governments which lack the resources to ensure a minimum level of protection of their residents' environment. Secondly, the existence and active enforcement of federal environmental standards are critical to ensuring that "pollution havens" do not develop among the provinces.³⁶

"Pollution havens," which are intended to attract investment, can prompt a "race to the bottom," among competing jurisdictions. Federal standards ensure that there is a floor below which no jurisdiction is permitted to sink. In fact, it has been observed that in the past, provinces with strong environmental standards have welcomed federal activism, as it may compel provinces with weaker environmental requirements to raise their standards. This would limit the leading provinces' vulnerability to competition from "pollution havens."³⁷

The Role of the Canadian Council of Ministers of the Environment (CCME)

Until it adopted its new form in 1989, the CCME was an obscure, relatively uninfluential, and purely political body that allowed off-the-record interaction between Canadian Ministers of the Environment. The Council has a permanent Secretariat office in Winnipeg. It is two-thirds funded by the provinces and territories, on the basis of population. The federal government provides the remaining third.

The Council operates on the basis of a long-established norm of consensual decision-making. Within this structure the federal government is reduced to the status of one voice among thirteen governments, rather than being the lead "national" government. This structure greatly strengthens the provinces' ability to constrain federal involvement,

³⁶Kernaghan Webb, Pollution control in Canada: the regulatory approach in the 1980s (Ottawa: Law Reform Commission, 1988) 61.

³⁷Mark Winfield, "The Ultimate Horizontal Issue: The Environmental Policy Experiences of Alberta and Ontario" (1994) 27:1 Canadian Journal of Political Science 130 at 149. An analogous situation has been noted with respect to the behaviour of Germany in the context of the European Community's Community Environmental Policy. See R.H. Williams, "The Environmental Impact Assessment in the European Communities," The Role of Environmental Impact Assessment in the Planning Process (New York: Mansell Publishing, 1988).

particularly in joint ventures.³⁸ Indeed, the revitalization of the Council appears to have been consciously pursued by some provinces as a means to establish a credible alternative to federal policy-making for this reason.³⁹

In the result, much of the federal government's responsibilities for providing national leadership and integration functions in environmental policy-making, appear to be increasingly surrendered to the CCME. This is particularly evident in the failure of the EMFA to indicate which government is to be responsible for what it defines as "national," as opposed to "federal" environmental issues.⁴⁰

This is a serious concern for a number of reasons. In effect, the Council, which has no legal or constitutional status, and for which there exists no effective public accountability mechanisms, is emerging as a new "national" order of government within Canada. This restructuring is occurring in the context of very limited public consultation, and certainly no evidence of public consensus that such a transfer of responsibility should occur.

In more practical terms, the achievement of environmental sustainability in Canada will require an environmentally active federal government. However, the placement of "national" environmental policy-making within the consensus-based decision-making structure of the CCME, means that "national" environmental policies will inevitably reflect the lowest common denominator position among the provinces.

This outcome recently has been powerfully demonstrated in the inability of the federal and provincial energy and environment ministers to develop an action plan to meet Canada's international commitments regarding the stabilization and reduction of Canada's carbon dioxide emissions. This failure appears to have been the result of the objections of a single province, Alberta.⁴¹

In effect, the federal government is indicating through the EMFA, and its surrender of responsibility for "national" environmental policy to the CCME that it is prepared to accept whatever environmental role the provinces agree is appropriate for it. This approach seems unlikely to result in adequate responses to the increasingly globalized nature of environmental issues.

³⁸.K.Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," D.Browne, J.Hiebert, eds., Canada: The State of the Federation, 1994 (Kingston: Institute of Intergovernmental Relations, 1994), p.28.

³⁹.Ibid.

⁴⁰.Draft Environmental Management Framework Agreement, s.5.5.

⁴¹.M.Nichols, "The 'greenhouse gap,'" MacLeans, February 27, 1995.

Conclusions

There is a strong constitutional basis and practical rationale for a major federal role in the protection of Canadians' environment. The constitution presents no direct barriers to the delegation of the administration of federal environmental law to the provinces, or the surrender of the federal government's national leadership and integration functions to the CCME. However, there is a significant risk to the federal government that administrative delegation and a failure to exercise legitimate legislative capacity will permanently weaken the federal capacity to act in the environmental field. This will be a result of a combination of the loss of institutional capacity, and the likely emergence of strong constitutional conventions against federal activity in the area. This would have serious implications for Canada's ability to act on the world stage on environmental issues, and for the federal government's capacity to guarantee all Canadians a minimum level of environmental quality.

III. ENVIRONMENTAL MANAGEMENT FRAMEWORK AGREEMENT

The EMFA is an umbrella agreement that outlines the objectives and principles of the harmonization initiative. It includes a general statement about the roles and obligations of jurisdictions and processes for dispute resolution. Details with respect to roles and obligations are to be worked out under Schedules pertaining to eleven functional areas.

Summary

The EMFA is composed of nine sections and a preamble. The preamble essentially supports the idea of securing a high level of environmental protection in Canada, while attempting to address the complexity of environmental issues and the reality of shared jurisdictional responsibility. The Parties believe that clarification of roles and responsibilities will create a more efficient and effective environmental management regime.

The definitions, set out in Section 1, describe the meaning of terms to be used throughout the EMFA and its accompanying Schedules. What this section says is important as harmonization means different things to different people.⁴² In addition, an important distinction is made between "federal," which means the sole or predominant role of the federal government, and "national" which reflects a common interest among governments and the need for shared decision-making. For example, national standards would be set by all the jurisdictions through a consensus process, where as federal standards would be set by Parliament only.

The Objectives and the Principles sections reflect the CCME document entitled "Rationalizing the Management Regime for the Environment". The objectives describe what harmonizing environmental protection is supposed to achieve, for example, improved environmental protection, a clarification of roles and a minimizing of overlap and duplication between the Parties. The principles define considerations to be taken into account during development and implementation of the EMFA. This section incorporates important concepts, including sustainable development, the precautionary principle and the significance of openness, transparency and accountability. The potential inclusion of the principles of intergenerational equity, conservation of biological diversity and ecological integrity and the polluter pays idea have been proposed as well.

Section 4 asserts that the Parties to the EMFA are the signatories.

⁴²Although the term harmonization is, itself, never defined in the Agreement.

The initial classification of roles, obligations and [responsibilities]⁴³ is found in Section 5. The importance of Section 5.1, which outlines the scope of each government's interests in environmental management, is emphasized in the Agreement. In outlining the interests of the respective governments, words such as managing, developing and implementing define primary responsibilities, while words such as providing, working with or contributing to delineate a secondary or shared role. Section 5.3 adds to the statement of interests found in Section 5.1, by establishing what else should be taken into account when determining roles and obligations. These provisions reflect the EMFA objectives and some of the principles. The final one, (k), acknowledges the relevance of fiscal, constitutional and legislative requirements.

The current list of Schedules is found in Section 6, which also creates the opportunity to propose new schedules and sub-agreements. As it stands now, there is a commitment to establish Schedules for eleven functions: monitoring; environmental assessment; compliance, licensing and approvals; international agreements; standards and guidelines development; legislation/regulations/policy; communications/education; pollution prevention; research and development; State of the Environment reporting; and, emergency response. It has not been determined whether the EMFA will take precedence over the Schedules and Sub-Agreements, or even whether the Schedules will be required to conform with the EMFA or merely reflect its terms and intent.

Dispute Resolution, found in Section 7, creates a process for resolution of disputes if a Party fails to comply with the EMFA. Currently, this section is only complete to the extent that the Parties resolve to try and avoid disputes and commit to resolve any disputes in a conciliatory and cooperative manner. Important issues on the agenda for dispute resolution include the roles of third Parties and who those Parties may be, openness of the process and enforcement of the outcome.

Section 8 addresses fiscal and resource matters, recognizing that resource arrangements will have to be made where there has been a transfer of a function. There is a provision in this section which makes this requirement subject to appropriation of the necessary funds by the relevant Legislature or from Parliament.

At the end of the Agreement, there is a General Provisions Section. Section 9.1 reaffirms that the EMFA does not affect the Constitutional rights and responsibilities of the Parties and Section 9.2 affirms the EMFA does not affect existing aboriginal or treaty rights. There is a conditional guarantee that the Agreement will not impede a Party from adopting more stringent standards, if notice is given to the other Parties. The following section is meant to ensure that environmental protection levels are high and that the

⁴³The term "responsibilities" is currently in brackets in the draft because there is a concern that it is not always clear whether the word refers to constitutional responsibilities or those arising from obligations under the Agreement.

Parties strive to improve those levels. There is also a commitment, under Section 9.5, to review existing intergovernmental agreements to ensure consistency with the EMFA. How many governments must sign the Agreement before it comes into force or whether a government may sign without accepting all of the Schedules are issues which have not yet been decided.

Commentary

As an inter-governmental agreement, there are no legal obligations created by the EMFA. The only accountability mechanisms are political. However the relevance of the EMFA cannot be understated. There is a political convention in the country that such accords be treated with political respect.⁴⁴ As noted earlier, once a distribution of roles and responsibilities is agreed to, reversing the structure will be difficult for both practical and political reasons.

1. Definitions

In the EMFA, there are a number of definitions, several of which are of interest. The definition of "consistent" and "environment" become important with respect to their potential implications. In addition, the distinction between "federal" and "national" are a cause for concern. Finally, although this is a "harmonization" initiative, no definition can be found here, or anywhere else in the EMFA.

Within the definitions section, "consistent" is defined to be similar and compatible for processes and producing equal effect for standards. This definition reflects the view that the term is not meant to imply "uniform" standards. Of course, the actual difference between "consistent" and "uniform" standards remains unclear. The governments imply that "uniform" standards would lead to a reduction of standards across Canada to the lowest common denominator. It would seem that their understanding of "consistent" standards is not the lowest common denominator, but some mid-range common denominator. The problem is that "consistent" standards still could be the lowest standards. Moreover, both consistent and uniform definitely work away from a race to more stringent standards. In fact, their very goal is to discourage provinces and the federal government from undertaking more aggressive or innovative actions since they would then either work against the concept of uniformity or lead to "inconsistent" standards. Further, some industry representatives are very clear in their desire to ensure

⁴⁴John D. Whyte, "Issues in Canadian Federal-Provincial Cooperation" in Managing Resources in a Federal State, J. Owen Saunders (ed) (Calgary: Carswell, 1986) 322-336 at 324.

that the implication of "consistent" standards moves closer to the uniform interpretation.⁴⁵ In the end, both terms are problematic.

A second concern within this section arises from the definition of "the environment", as it only encompasses the natural components of the environment. The Ontario *Environmental Assessment Act* (EAA) defines the environment to include social, economic and cultural conditions. If the EMFA is used as the guide for harmonization of processes, the former definition might be used to facilitate the achievement of one process environmental assessment (EA). The definition of the environment in the EMFA must represent the most expansive one found in environmental legislation, so it is not used as a mechanism to lower environmental protection standards.

Finally, while "federal" is defined to mean the sole or prevalent role of the federal government, "national" is defined as a shared common interest demanding a cooperative approach. The pervasiveness of the term "national" in the draft suggests a significantly reduced federal role. National standards under this definition mean the provinces, through a cooperative effort, become responsible for the national environmental policy. While provincial governments are elected to protect local interests, in Canada, it is the federal government that is supposed to protect the national interest. This distinction serves to eliminate the federal role as the guarantor of a minimal acceptable level of national environmental quality.

2. Objectives

It is not clear how the Schedules and implementation of the Agreement will attempt to incorporate all the goals and objectives stated in the EMFA. The opening paragraph of the CCME document, "Rationalizing the Management Regime for the Environment," suggests that the impetus for the exercise is from competitive concerns of industry, a desire to reduce government expenditures, and a desire to increase government efficiency. The initiative appears to focus more on eliminating overlap and duplication than ensuring the enhancement of environmental protection. Consequently, if better environmental protection and the promotion of sustainable development are achieved, it will only be as a fortunate by-product of the exercise. In any harmonization process, the overriding goal must be enhanced environmental protection.⁴⁶

⁴⁵CCPA, "Comments by the Canadian Chemical Producer's Association on the CCME Harmonization Initiative and the Discussion Draft 'Environmental Management Framework Agreement.'" (February 1995) 2-3.

⁴⁶Ochman An Environmentalists' Perspective on Harmonization: A Preliminary Analysis.

3. *Principles: priorities, public rights and harmonization*

It has already been noted that many of the principles in the EMFA are quite progressive. However, it is not clear what these commitments will have achieved if the Agreement is not enforceable by the public or, if the efficiency objectives supersede the environmental principles. No public accountability structures are articulated to ensure that the participating governments fulfil their obligations under the agreement.

It has been asserted that the traditional processes of creating intergovernmental arrangements in Canada have not been compatible with environmental protection or democratic process values.⁴⁷ The Agreement states the principles of openness, transparency and public participation are to apply to the development and maintenance of an effective environmental management regime. However the process by which the agreement has been developed to date has not reflected these principles. There has been little opportunity for actual participation at the appropriate times.

Pursuing the harmonization of environmental standards across the provinces, territories and regions of Canada is a principle guiding the initiative. However, this goal may lead to downward pressures on standards as national standards must be achieved by consensus. It has been argued that the creation of a federal baseline standard should ensure the minimum requirements acceptable for all Canadians. The advantage to this approach is that individual provincial approval is unnecessary and independent enforcement is possible.⁴⁸ This can then be augmented by a provincial right to go beyond the federal standard if a province chooses to do so. The net result is that the federal standards ensure a minimum level of environmental protection for all Canadians, while the provinces are given the freedom to move environmental standards forward if they choose to do so.⁴⁹

Section 9.3 purports to maintain the right of a government to set stricter standards. The importance of unconditionally maintaining this particular right cannot be understated as certain jurisdictions have more substantial environmental problems in particular areas and the citizens of some provinces may have higher expectations with respect to

⁴⁷Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection," 276.

⁴⁸Kathryn Harrison, "The Regulator's Dilemma: Regulation of Pulp Mill Effluents in a Federal State" (Department of Political Science, UBC June 1993) 12.

⁴⁹B. Rutherford and P. Muldoon, "Designing an Environmentally Responsible Constitution" (1992), vol. 18, no. 4, Alternatives 26.

environmental protection.⁵⁰ At first glance, the requirement to give notice to other parties may not appear to be very onerous. However, the draft wording has the potential to limit this right by tying the creation of higher standards to measures which, "reflect specific circumstances or to protect environments or environmental values located within a jurisdiction." Consequently, another jurisdiction has the opportunity to complain that the circumstances are not specific or the affected area goes beyond that jurisdiction.⁵¹ An often stated advantage of federal systems is that provinces can be used as laboratories to test new policies. Often, successful innovations are then adopted by other jurisdictions.⁵² If this right is qualified, it affects this unique process.

4. Parties

A number of major issues in this area have yet to be resolved. The EMFA says the Parties to the Agreement are the signatories. It is not clear how many parties must sign the Agreement for it to come into force. Is the Agreement binding on non-signing parties? In addition, the ability to sign the Agreement without accepting all of the Schedules is being contemplated. This would have major implications for the negotiating positions of the participating governments, and it is surprising that the Agreement has proceeded to its present state without this issue being resolved.

In addition, no procedure for the withdrawal of a party from the Agreement is presented, and there are no termination procedures for the Agreement, and as there is no time frame set for the Agreement, it is apparently intended to remain in force in perpetuity. Section 9.8 of the Agreement permits the parties to amend the EMFA, but no amending process is articulated.

Furthermore, although several of the schedules make references to First Nations, there is no indication of how First Nations are to be included in the Agreement. It should be noted that some provinces, including Ontario,⁵³ have made commitments that all relations with First Nations are to be conducted on a government to government basis. Consequently, they would have to become parties to the EMFA if it affects their rights or

⁵⁰Kathryn Harrison, "The Regulator's Dilemma: Regulation of Pulp Mill Effluents in a Federal State" (Department of Political Science, UBC June 1993) 15-17.

⁵¹The CCPA is concerned that the Agreement does not create a strong enough qualification on the right to set higher standards.

⁵²Richard Simeon, "Criteria for Choice in a Federal System" (1982-83) 8 Queen's Law Journal 131 at 147.

⁵³Government of Ontario *Statement of Political Relationship with First Nations* (March 1991).

responsibilities in any way.

5 *Roles, [Responsibilities] and Obligations*

This section is the most important element of the EMFA. The CCME asserts that no changes in constitutional responsibility are implied. However, this part of the EMFA would significantly reduce the environmental roles and responsibilities of the federal government. The federal government's direct role in environmental management is restricted to four functions: the management of "trans-national" environmental issues (5.1(b)(ii)); environmental management on federal lands (5.1(b)(vii)); the protection of "nationally significant ecosystems" (5.1(b)(viii)); and the conduct of international relations (5.1(b)(x)).

Surprisingly, neither "trans-national" environmental issues, or "nationally significant ecosystems" are defined in the Agreement. Furthermore, federal activities in each of these areas is to be conducted in "co-operation with" the provinces and territories and pending devolution of authority over federal lands to the territories (5.1.(b)(xi)). Federal management of international issues is tied to the contents of the International Affairs Schedule of the Agreement. The federal government is to be reduced from the status of national government to one of thirteen jurisdictional units, responsible for matters exclusively within the "federal" sphere.

Even more importantly, no government or body is assigned responsibility for the management of "national" environmental issues (5.5). One would expect that this would be considered a responsibility of the federal government, or that the federal government would be assigned a lead role in national environmental issues. This provision makes it unmistakably clear that what is intended through the Agreement is a devolution of federal authority and a surrender of federal leadership on environmental matters in Canada.

Finally, section 5.3 lists additional considerations to be made in the Assignment of Roles and Obligations. It is stated that the determination of roles will be based on existing capacities.⁵⁴ However, this has nothing to do with responsibilities. A constitutionally defined role cannot be transferred due to inadequate capacity.

6. *Schedules and Sub-Agreements*

It is through the Schedules that the implementation of the EMFA will be articulated. If there is no provision which ensures that the Schedules and Sub-Agreements conform with the EMFA, there will be no recourse if the Schedules do not fulfil the EMFA's objectives and principles. This would undermine the purpose of having a framework

⁵⁴EMFA, section 5.3(c).

agreement as opposed to a series of functional area agreements. Without such a provision, critical principles which are articulated in the EMFA, such as the primacy of protecting ecosystem health (3.1(a)) openness, transparency and public participation (3.1(c)), and the protection of the right of provinces to raise standards independently, (9.3), will be meaningless.

7. *Dispute Resolution*

It is not clear what will constitute a dispute under the Agreement, how the dispute resolution process will be triggered, or who will be involved. This section could have some potential value for the enhancement of environmental protection if members of the public could complain that a particular Party is not fulfilling the responsibilities it has agreed to under the EMFA. However, if there is no onus in the Agreement to enhance environmental protection in the country, there is nothing to stop that Party from asserting that they are unable to achieve that goal. Any dispute resolution process should be open to the public and the inclusion of third parties should be allowed to trigger a dispute. The rationalization of the environmental management regime must result in accountability to the electorate, not just to other governments.⁵⁵

8. *Fiscal Resources*

All governments are restricted in what they are capable of doing by limited resources. However, this section underlines the pre-existing limits to the creation of a more effective environmental management regime by emphasizing that all arrangements under the Agreement are contingent on appropriation of the necessary funds. Streamlining is more likely to result in reduced resource commitment than enhanced environmental protection. As the current federal fiscal situation is clearly an impetus for this initiative, it is unlikely that the federal government will be able to make significant fiscal transfers to the provinces to assume their new responsibilities. In addition, if federal funds are to be provided, resource transfers under the Agreement must be conditional on their use for the intended environmental purpose if they are to support former federal environmental functions.

The importance of resource issues cannot be understated. There are provinces that are

⁵⁵Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," forthcoming in Canada--The State of the Federation 1994 Douglas Brown, Janet Hiebert, eds. (Kingston: Institute of Intergovernmental Relations, 1995).

currently struggling to enforce their own environmental protection regimes.⁵⁶ If there are no concomitant resource transfers, the result is likely to be the *de facto* elimination of the existing federal requirements as there will be no provincial capacity for their implementation or enforcement. It is not clear how the provinces could formulate their position on the EMFA without firm commitments from the federal government on the issue of resource transfers.

9. General Provisions

There are many instances where the EMFA has the potential to actually reduce environmental protection in Canada, beyond the concern that a lack of resources will lead to a provincial incapacity to fulfil new roles. Section 9.5 anticipates a review of existing intergovernmental agreements to determine which should be maintained, amended or abolished. The goal is to ensure consistency with this Agreement, the result, however, may lead to a reduction in the existing environmental protection regime.

Conclusions

A number of major elements of the EMFA have yet to be completed. This includes issues related to the nature of the parties' participation, the relationship between the EMFA and its Schedules, the duration of the Agreement, amending procedures, dispute resolution, and withdrawal and termination procedures. The critical questions of resource transfers, and the relationship to First Nations also remain unresolved, and no public monitoring, accountability or review processes have been articulated.

Furthermore, even as drafted, the EMFA contains a significant redistribution of roles and responsibilities in the management of Canada's environment from the federal government to the provinces. This is especially evident in section 5 of the Agreement. The federal government is to be limited to dealing with environmental management on federal lands, and in the undefined fields of "trans-national" issues and "nationally significant ecosystems." Even more significantly, no government or body is assigned responsibility for the management of "national" environmental issues. This constitutes a surrender of federal responsibility to provide leadership on national environmental questions, and creates an enormous gap in the environmental management system which the EMFA purports to create.

⁵⁶Environmental Coalition of PEI, "Comments on CCME Environmental Management Framework Agreement: Discussion Draft December 1994" (February 1995) 3.

IV. SCHEDULES

Schedules are to be established under the EMFA to define detailed roles and obligations in eleven functional areas. The Schedules will be considered part of the Agreement. The following analysis addresses the four Schedules which were presented in conjunction with the draft EMFA. While only four draft Schedules have been created, the other seven are likely to raise critical legal, constitutional and functional questions.

The Schedule on Standards and Guideline Development, for example, would seem likely to have a substantial potential to limit provincial autonomy. Arguments raised with respect to the effective abrogation of federal responsibility for the environment may also be further affected by the Legislation/Regulation and Policy Schedule. In the draft Compliance, License & Approvals Schedule, only the Compliance section has been addressed. The issue of improper delegation seems likely to arise under the remaining part of this Schedule. Within these limits we present the following comments.

MONITORING⁵⁷

"In the one area where the federal government has already delegated monitoring and enforcement authority to the provinces, there has been a serious deterioration in compliance. A review of the metal mining liquid effluent regulations issued under the *Fisheries Act*, indicates that compliance fell from 85 percent in 1982 to 48 percent in 1988,"

*Kenneth M. Dye
Auditor General of Canada
1990 Report*

Goals

This function covers the responsibilities of data gathering, designing and operating an environmental database, accessing the database and interpreting data for environmental management. The Monitoring Schedule aims to eliminate the inconsistent monitoring efforts between jurisdictions which lead to inefficiencies, uncertainty and duplication.

Summary

The scope and application of this Schedule covers all activities the Parties undertake to measure and assess environmental conditions, ecosystem components and processes, and emissions of pollutants. It is noted that while monitoring provides the essential data needed for environmental management, the final establishment of roles will be determined by the ensuing environmental management functions.

In this Schedule, the definitions section divides monitoring activities into Pollution-based Monitoring of effluents, emissions and deposits of substances, and Ambient Environmental Monitoring which assesses general environmental conditions by measuring trends and changes in air, water, land and biota. The components of environmental monitoring include: planning and coordination; methods and procedures development; sample collection; analysis/measurement and data verification; database management; and, data interpretation, information and dissemination.

In Section 3, the Parties have established lead roles for each component, listed under a

⁵⁷.Note that in its Program Review announcement on February 27, 1995, Environment Canada indicated that federal environmental law enforcement capacity will be retained. The implications of this for monitoring activities has yet to be fully articulated. It clearly has major implications for the contents of this Schedule.

Table in the Schedule. The Provinces are to be responsible for planning, coordinating and delivering the programs in conjunction with their regulatory, compliance and resource management responsibilities. This will include pollution emission monitoring in relation to federal environmental legislation and the dissemination of this information. The federal government is to be responsible for scientific and technical leadership, as well as for the design, development and operation of database systems to support programs of national interest. In addition, federal roles with respect to monitoring on federal lands and to carry out international obligations are to be maintained.

Implementation is to be based on national mechanisms to ensure the coordination of monitoring networks and national consistency in methods and procedures. This is the foundation of the idea behind this Schedule, as the goal is to create consistency of monitoring between jurisdictions through the development of a comprehensive national approach to monitoring. The hope is that a national approach will not only improve overall efficiency, but also help to eliminate inconsistent data interpretation.

A resources section is included to highlight the need to ensure that the responsible parties have the resources to carry out the obligations.

Commentary

Scope

No indication is provided, of which federal statutes are to be included in the provincial pollution-based monitoring mandate.

Rationale

No evidence has been presented to illustrate that there is problem with the current arrangements in this area. No specific instances of duplication and overlap have been identified by the CCME, and no effort has been made to indicate what might be systemic problems, as opposed to one-off events. Similarly, no effort has been made to identify what gaps might exist in the area of environmental monitoring in Canada.

Without such information, a proposal for a realignment of roles and responsibilities, as sweeping as that contained in the Schedule, cannot be justified. With no clear understanding of the nature of the problem (if any) at hand, it is impossible to support the conclusion that the assignment of all pollution-based monitoring activities to one level of government is a rational response. How will the proposed shifts in responsibility result in better protection of the environment, enhance the capacity of a jurisdiction to fulfil this role or lead to a more consistent approach to monitoring and inspection nationally?

Furthermore, the elimination of one level of government from pollution based monitoring will remove an important check on the other in terms of the quality of its monitoring efforts. In addition, by removing the one source of national consistency in monitoring requirements, the federal presence, the proposal seems likely to increase, rather than decrease, the diversity of requirements and approaches employed in Canada.

There are also situations, in addition to those related to activities on federal lands and in relation to international agreements in which it makes no sense for the provinces to take on the monitoring role. The purpose of the new substances notification regulations made under CEPA, for example, could be undermined if key information gathering activities related to their enforcement are transferred to the provinces. If one province failed to carry out its monitoring mandate, the purpose of the CEPA provisions to ensure the assessment of substances new to Canada prior to their use or release into the Canadian environment could be defeated. The Supreme Court of Canada contemplated situations of this nature when it introduced the concept of "provincial incapacity" in its *R. v. Crown Zellerbach* decision.⁵⁸

Resource Requirements

There appears to be an assumption that transfers of resources from the federal to provincial governments will be made to enable the provinces to fulfil their new obligations under this Schedule. However, many of the provinces appear to have difficulty providing adequate monitoring in relation to their own legislation and are facing budgetary constraints of their own. They have no obvious capacity to take on federal monitoring responsibilities in addition to their own.

In addition, the approach proposed in the Schedule fails to reflect the different existing capacities of the provinces in this area. It assumes that all provinces will be able to accept the same level of responsibility for monitoring in relation to federal legislation. This ignores the range of different economic circumstances in which individual provinces find themselves. Even in Ontario, which has a relatively well-developed environmental law enforcement capacity, provincial officials have privately stated that they have no capacity to assume responsibility for monitoring and enforcement in relation to federal environmental law in addition to their existing mandate.⁵⁹

The effectiveness of this Schedule would be dependant on the adequacy of federal

⁵⁸For a detailed discussion of new substances and provincial incapacity, see also M.Winfield and B.Mausberg, "CEPA, Chemical New Substances and Biotechnology," in Winfield, ed., Reforming CEPA, pp.21-22.

⁵⁹.Confidential pers. comm. to CIELAP staff.

resource transfers, as well as the ability of the federal government to ensure that transferred resources are used for monitoring in relation to federal environmental legislation. If this does not occur and the federal government still reduces its role as suggested in the Schedule, the outcome will be an overall reduction in monitoring. In terms of ambient environmental monitoring, less information regarding general trends in environmental conditions, may lead to a reduced capacity to understand changing environmental protection needs in the country. The situation is even more serious with respect to pollution-based monitoring, which is essential to environmental law enforcement.

Even with resource transfers, the provinces are likely to gather data to enforce their own legislation first as, if they prosecute they will want to do it under their own legislation to avoid reinforcing federal jurisdictional claims. Enforcement of federal legislation will only come after that primary enforcement, if the requisite capacity exists. If the provinces fail to provide monitoring data, then there will be no means for the federal government to obtain the data necessary to enforce its own legislation. This is a result of the underlying implication of the Schedule that federal inspection and monitoring capacity will be eliminated, except with respect to federal lands and international agreements.

Questions also exist regarding the quality of monitoring data which the provinces would be able to provide to support prosecution under federal law. In the case of Alberta, for example, data generated through a provincially established industry self-monitoring program recently was deemed inadequate to provide the basis of a conviction under the federal *Fisheries Act*.⁶⁰ It is not clear how the federal government would ensure the quality of provincial monitoring programs, and what remedy would be available if it felt these efforts were inadequate.

Dissemination of Information

The schedule proposes that the dissemination of pollution monitoring information in relation to federal environmental law be made a provincial responsibility. This raises a number of serious questions regarding public access to this information. It is not clear how the federal government will ensure that this information is disseminated in a complete and timely fashion. This concern is particularly acute in Alberta, where there is no provincial freedom of information legislation. There is also strong evidence that Canadians regard the federal government as a more reliable source of environmental information than their provincial governments (see Table 3).

⁶⁰*R. v. Proctor and Gamble Inc.* Provincial Court of Alberta 1994 (Docket no. 21662804P). See also B.Laghi, "Company hit with record pollution fine," Edmonton Journal, March 2, 1994; D.Thomas, "Whistle-blower," Edmonton Journal, March 26, 1994; and Environmental Law Centre News Brief, vol.9., no 2, 1994.

Table 3

INFORMATION SOURCES

Question: How much confidence do you have in the information about environmental issues coming from each of the following? Would you say that you have a great deal, some, or very little confidence in environmental information provided by...

	REGIONS						URBAN CENTRES				TOTAL
	A t l a n t i c	Q u e b e c	O n t a r i o	M a n i t o b a	S a s k.	A l b e r t a	B. C.	M o n t r e a l	T o r o n t o	V a n c o u v e r	
ENVIRONMENT CANADA	30	28	27	26	32	33	29	28	26	25	28
PROVINCIAL ENVIRONMENT MINISTRY	9	7	10	11	11	17	13	8	5	8	10

Source: Environics, The Environmental Monitor 1993-4 Report, April, 1994. Page 49.

Conclusions

The net result of the Schedule will be to leave the federal government entirely dependant on the provinces for monitoring data related to the enforcement of its legislation, except with respect to federal lands and international agreements. The monitoring and enforcement of federal legislation will be a function of the provinces' capacity and will to fulfil this expanded mandate. Given the unlikelihood of federal resource transfers, and the track record of some provinces in the area, the net result seems likely to be the *de facto* repeal of the federal pollution control requirements as there will be no reliable data to support their enforcement.

COMPLIANCE, LICENSING AND APPROVALS⁶¹

Goals

This function deals with the tools used to encourage enforcement and compliance with environmental legislation, for example, by voluntary means, environmental audits, inspections and prosecutions, and the exercise of legislative, regulatory and administrative obligations. (At this time, only the Compliance component has been addressed in the Schedule.) The purpose of this Schedule is to outline the roles with respect to compliance as there is a belief, among industry and business, that this is where overlap and duplication are particularly evident. Consequently, the goal is to create a nationally-consistent, single window approach, with the provinces/territories taking on the primary role.

Summary

Compliance refers, in the Schedule, to all measures adopted or maintained by any government such as planning and coordination, policies and procedures, training, inspections and compliance monitoring, and enforcement measures. The Schedule is meant to address compliance promotion, verification and enforcement of all provincial environmental protection legislation, as well as two federal statutes, the *CEPA* and the *Fisheries Act*.

In the definitions section, compliance is broken up into three activities: promotion; verification; and compelling compliance. The standards definition includes guidelines and protocols. Most of the other terms are yet to be defined.

Under the Schedule, the federal government is to ensure compliance with federal environmental legislation relating to international borders, federal lands and international agreements. The provincial governments are then expected to ensure compliance for federal and provincial/territorial environmental legislation pertaining to--although not limited to--municipal activities, the industrial sector, individuals and provincial/commissioners' lands. The Schedule includes a Chart with a list of selected compliance functions, although it is neither comprehensive nor exhaustive.

In addressing basic rights and obligations, it is recognized that each government is

⁶¹.It should be noted that in its February 27, 1995 program review statement Environment Canada stated that it intended to retain its full environmental law enforcement capacity. This obviously will require reconsideration of the contents of the Compliance Schedule of the EMFA.

ultimately responsible for the enforcement of its own legislation. Even when a government agrees to ensure compliance on behalf of another government, the responsible government is still to have a role in standard setting, training, planning and coordination, information sharing, evaluations and audits. In addition, national standards are to be created in areas of shared responsibility.

The Implementation options are tentative at this point. A list is provided with the following ideas: adoption of federal or provincial/territorial legislation by provincial/territorial or federal regulators; rescinding all or parts of the legislation of a jurisdiction; creating compatibility agreements; creating national equivalency standards and guidelines; and, cross appointing federal/provincial/territorial environment officers.

Other implementation options with respect to auditing and accountability are listed. These activities are expected to create common policies to guide compliance and to ensure the development of national standards for data management, reporting, auditing, inspection and compliance reporting, as well as national criteria for quality assurance and quality control and national acceptance of international standards in compliance.

The section on resources, the actual steps to be taken and timetables are yet to be developed. The need to create national agreements on functions, activities and divisions of roles, as well as transfer of resources is recognized. It has been agreed that there will be a compulsory review every 5 years, by an independent body, possibly the CCME.

Commentary

Scope

The Schedule makes reference to two specific federal statutes, CEPA and the *Fisheries Act*. However, it is not made clear if the Schedule is intended to apply to other federal environmental statutes administered by Environment Canada as well ("internal" legislation). In addition, in some provinces, elements of the *Fisheries Act* are currently enforced by agencies other than the provincial ministry or department of the environment. How will this Schedule affect these arrangements?

Rationale

As noted earlier, there has been no evidence presented to support the contention that duplication and overlap in environmental law enforcement in Canada is a serious problem. Given the level of effort put into enforcement activities by the federal government, with less than 60 prosecutions under CEPA in the past 5 years and active enforcement of only

3 of 24 CEPA regulations,⁶² coupled with the track record of some provinces, it is difficult to take concerns of excessive and duplicative enforcement seriously. Indeed, it has been found that the federal government is unlikely to enforce compliance under CEPA where there is overlap with provincial jurisdiction.⁶³ Even when the potential for overlap exists in legislation, there is no resulting overlap in prosecutions.

Furthermore, if the federal government allows the provinces to take on its enforcement role in areas where, although federal involvement can be constitutionally supported, it is not mandatory, the result is a *de facto* devolution of powers to the provinces. The result will be a patchwork of provincial requirements rather than a consistent national structure. This is the opposite of what harmonization is supposed to achieve. Serious concern already has been expressed regarding the effectiveness of provincial enforcement of federal environmental law, by the Auditor-General of Canada on a number of occasions.⁶⁴

This concern is particularly acute with respect to the proposed repeal or sunset of federal legislation where it overlaps with provincial requirements. Particular attention is given to CEPA and the *Fisheries Act* in this context. Such an approach, in addition to being of dubious constitutionality particularly with respect to the *Fisheries Act*,⁶⁵ would completely eliminate the possibility of federal interventions to ensure that minimum national standards are maintained in jurisdictions where federal legislative requirements are said to be "repealed." This would render any statements about ultimate federal responsibility for the enforcement of federal law meaningless.

As with the Monitoring Schedule, the Compliance Schedule seems likely to result in a less consistent system across the country as each province becomes an independent actor for the purposes of enforcement, with no federal presence to ensure a basic enforcement effort, at least with respect to federal law. The concentration of all enforcement functions in one level of government removes important checks and balances from Canada's environmental management framework. The federal government will be unable to act as a guarantor of a minimum level of environmental quality for all Canadians, or to prevent the emergence of "pollution havens" among the provinces.

⁶²Karen Clark and Barbara Rutherford, "CEPA and Environmental Law Enforcement," in Winfield, ed., Reforming CEPA, p.6.

⁶³Ibid.

⁶⁴See, for example, Kenneth M.Dye, Report of the Auditor General of Canada to the House of Commons (Ottawa: Supply and Services, 1990), at 18.7.

⁶⁵There is an implication of legislative delegation, which the courts have ruled an invalid practice. See **APPENDIX 1**.

In addition, as has been pointed out with respect to the Monitoring Schedule, the purpose of some key federal environmental requirements, such as the CEPA new substances provisions, would be undermined through the devolution of their enforcement to the provinces. If one province fails to enforce these regulations then the goals of the CEPA scheme will be defeated.

Resource Requirements

As with monitoring, the capacity of the provinces to take on the enforcement of federal environmental law is dependent on availability of the necessary resources and will. However, as many provinces appear to lack the capability to enforce their own legislation adequately and are facing cutbacks, they have no obvious capacity to take on federal responsibilities as well. In order to fulfil this role, the provinces would require significant resource transfers from the federal government.

Given that a major impetus for the creation of the EMFA was the need for serious reductions in government expenditure, especially at the federal level, it is not clear how the federal government intends to finance expanded provincial environmental mandates. In addition, as the provinces are likely to use whatever resources are available for the enforcement of their own legislation before federal law, there also would have to be mechanisms to ensure that the transferred resources were used for enforcement of federal environmental law. Without such conditional transfers, the net result likely would be the *de facto* repeal of the federal legislation in question.

Furthermore, as with the Monitoring Schedule, the approach proposed in the Compliance Schedule fails to reflect the different existing capacities of the provinces. It again assumes that all provinces will be able to accept the same level of responsibility for monitoring in relation to federal legislation. This ignores the range of different economic circumstances in which individual provinces find themselves.

Accountability Structures

No process is contemplated to deal with a situation in which someone believes that a province is failing to carry out its federal law enforcement mandate. The Schedule also fails to address how this would relate to the request for investigation provisions of CEPA.⁶⁶ Nor does it help to establish who is liable for damages arising from failure to enforce federal law. In the end, the result will actually be a blurring, rather than a clarification, of responsibility for the enforcement of federal environmental law.

⁶⁶.Canadian Environmental Protection Act, s.108.

The Auditor-General of Canada has already expressed serious concern regarding the impact on political accountability structures of the existing delegations of enforcement of federal environmental law to the provinces.⁶⁷ Similar concerns regarding the effects of the practice of administrative delegation on the principle of ministerial responsibility recently have been articulated by Counsel to the Secretariat of the Standing Joint Committee of the House of Commons and Senate for the Scrutiny of Regulations.⁶⁸

It is suggested in the Schedule that it [the Schedule] be regularly reviewed by an independent body and it is suggested that this body be the CCME. The organization responsible for the creation of the Schedule, and made up of the governments responsible for its implementation, cannot be considered "independent" for the purposes of the review of its effectiveness. A separate oversight structure, perhaps involving members of parliamentary and legislative standing committees on the environment would have to be considered.

Conclusions

This Schedule delegates responsibility for enforcement of federal environmental legislation to the provinces. However, the provinces lack the resources, and in some cases the will, to take on this responsibility. The capacity of the federal government to provide the necessary conditional resource transfers to the provinces is open to serious question. Furthermore, where delegation has occurred, the results have been judged unsatisfactory by parliamentary authorities.

The likely result of the scheme proposed in this schedule, with or without federal resource transfers, appears to be a *de facto* repeal of affected federal environmental law. Indeed, *de jure* withdrawal is under consideration in certain circumstances. Furthermore, the purpose of certain key elements of federal environmental law, particularly the new substances notification process under CEPA, would be undermined by devolution of enforcement responsibility to the provinces.

⁶⁷.Dye, Report of the Auditor-General (1990).

⁶⁸.Committee Secretariat, Report of Bill C-62 (Ottawa: Standing Joint Committee for the Scrutiny of Regulations, February 1995).

ENVIRONMENTAL ASSESSMENT

Goals

This Schedule addresses the process of identifying and evaluating the environmental effects of projects and activities, including the aspect of public participation. The goal of this function is to eliminate uncertainty, duplication and confusion which has resulted from the independent development of environmental assessment (EA) regimes across the country.

Summary

A nationally consistent approach to environmental assessment in Canada is to be established through common elements and components. The preamble to this Schedule recognizes the existing efforts that have already been made towards addressing these issues, and that these efforts are to be supported until a truly harmonized approach is implemented.

A proposed division of roles has been set out based on the concept of having every project or activity assessed by the jurisdiction, with the designated lead role.

The expected implementation mechanisms are still very sketchy. The main goal is to create a nationally consistent approach through common components and decision points. In addition, the principle of one project/one assessment will be fundamental to the approach. The process will be based on basic assessment elements such as public notice and participation, screening, scope, review, hearings and reporting. Cooperative mechanisms are also expected to be created to solicit information from relevant federal and provincial agencies.

The accountability section suggests the process must ultimately be legislated. This section also addresses the need to find a way to effectively delegate responsibilities within another's normal jurisdiction. The chance for interested jurisdictions to offer input is also recognized.

The resources part of the implementation section has not been resolved, and neither have most of the steps in the process. The current Schedule merely lists the elements recognized as important to EA. Agreement to review the process after two years of implementation has been determined. There is a substantial list of other issues which have yet to be resolved, including: relationship of EA to overall decision-making process; application to private and public sector projects; consistent definition of environment; timeliness for decisions; criteria to determine need for independent public review; how to evaluate the need for alternatives; participant assistance; cumulative impacts; and class

assessments.

Commentary⁶⁹

Rationale

Although this schedule is currently in draft form, it is clear that it suffers from a number of very serious problems. Remarkably, no mention is made of the recently enacted *Canadian Environmental Protection Act*, which makes explicit provisions for dealing with situations in which federal and provincial environmental assessments are triggered with respect to the same project. Furthermore, as noted earlier, there is no known case where full federal and provincial environmental assessments have proceeded in parallel regarding the same project. This raises serious questions regarding the rationale for the schedule.

Federal Abandonment of Environmental Assessment Responsibilities

The schedule provides for the withdrawal of federal participation in a wide range of situations in which federal environmental assessments currently take place. In most situations where there presently would be joint federal-provincial processes, responsibility is to be made exclusively provincial, and where responsibility is currently exclusively federal, it is now to be shared with the provinces (Division of Roles).

These proposals represent a significant abandonment of federal responsibility for the conduct of environmental assessments regarding activities involving federal activities, federal lands, federal funding and federal decision-making responsibilities. The degree to which the federal government can escape these responsibilities without extensive changes to CEAA regulations and other federal legislation is unclear.⁷⁰

The most striking aspect of the proposed division of roles is the absence of any regard for the division of powers in the Canadian Constitution. Although the Supreme Court of Canada in the case of *Friends of the Oldman River Society v. Canada (Minister of Transport)* held that it was "unhelpful" to characterize a project as "provincial," that characterization is the basis of the proposed guideline. What does it mean, for example, to describe a project as a "provincial project on federal land?"

⁶⁹.The authors wish to thank the Canadian Environmental Defense Fund for its assistance in the development of this analysis.

⁷⁰.For a detailed discussion of this issue see **Appendix 1**.

The second striking aspect of the Division of Roles Table is its inconsistency with the overall objective of harmonization. If the objective of harmonization is the elimination of duplication and overlap, how can it make sense to move from exclusive federal administration to federal-provincial administration? This is proposed for two of the activities described, namely, "provincial project on federal land" and "international impacts."

Feasibility

In addition, serious questions exist regarding the feasibility of harmonization in the field of environmental assessment without major legislative change at the federal level and in every province. Such change seems highly unlikely given the effort which the federal government and many provinces have recently put into the development of new environmental assessment legislation over the past five years.

The extent of the problems inherent in achieving the harmonization of environmental assessment processes within Canada can be demonstrated through a close examination of two of the most developed Canadian EA regimes, the federal CEAA regime and the Ontario regime under the Ontario *Environmental Assessment Act* (OEAA), there are a number of differences of approach that could not be harmonized without significant legislative amendments and changes in policy.

Differences of approach between the federal and Ontario regimes include the circumstances that trigger environmental assessment, the components of the EA process, and the substantive matters to be addressed in an EA. Each of these matters is discussed below.

What is Environmental Assessment?

The present draft schedule defines EA as "a comprehensive and systematic process". On the basis of this description, it is unclear whether EA requires consideration of alternatives. If it does, then the screening process under the CEAA is not an EA process. On the other hand, if EA does not require consideration of alternatives, what distinguishes EA from other environmental approvals such as Ontario's waste disposal approvals under the EPA, development approvals under the *Planning Act*? Is EA harmonization intended to cover these regulatory regimes? Similarly, on the federal side, provision is made for special processes for Crown corporations and harbour commissions. Are these processes subject to EA harmonization? Absent clarification on this point, it is uncertain what is being harmonized.

What Triggers Environmental Assessment?

The draft schedule suggests that EA is applicable to "projects and activities". This

language does not indicate whether EA is restricted to physical projects and activities or whether it may include planning projects and activities. Currently, EA regimes in Quebec and Ontario apply more broadly than simply to physical projects and activities.

A second issue is whether EA applies equally to the public and private sector. Ontario, for example, does not apply EA to the private sector except through specific designating regulations. The CEAA, on the other hand, does not apply to Crown corporations: an alternative process is proposed to be implemented through regulations.

A third issue is the means for triggering EA. In Ontario, the trigger is simply the act of carrying out an undertaking and government actions which involve granting money or approving undertakings by other persons are exempt from EA. By contrast, the CEAA applies only if there is a project that involves a federal authority as proponent, providing money, granting an interest in land, or issuing a designated approval.

All these issues involve differences of legislation and policy. Nowhere does the present draft schedule indicate how these differences are expected to be resolved.

The Relationship of EA to Other Approvals

The Draft schedule identifies a policy of "one project, one assessment". This policy does not appear to be easily implemented. First, there are fundamental differences in the legal status of environmental assessment under different EA regimes. In Ontario, environmental assessment is a separate approval which, where applicable to an undertaking, provides the foundation for all approvals and decisions respecting the undertaking. Thus, where EA applies, Ontario can ensure "one project, one assessment". On the other hand, where the EAA does not apply, Ontario has numerous environmental approvals that require study. All that Ontario ensures for these approvals is "one project, one hearing" - through the *Consolidated Hearings Act*. Federally, under the CEAA, there is no EA approval. Rather, the words of the courts, federal EA is "superadded" to other approval processes. It is therefore unclear how a federal EA may provide the foundation for all federal approvals.

A second difficulty is the timing of assessment. The present draft schedule provides no discussion of this issue. Where the OEAA applies, no Ontario approval may be issued or money granted until the EA is approved. This is a further means by which Ontario ensures "one project, one assessment". (However, if EA loosely defined, so that it may encompass other Ontario approvals, there is no similar guarantee). The CEAA applies "as early as practicable" on a decision-by-decision basis. Courts have granted federal decision-makers all kinds of leeway in the timing of EA - even to the extent of authorizing the issuance of federal approval without an EA - so long as EA was done prior to

construction. These differences of approach require resolution if harmonization is to be achieved.

Phases of the EA Process

All environmental assessment regimes establish a process for planning the undertaking, reviewing the resulting EA, and making a decision on the acceptability of the EA and the undertaking. Ontario now uses several types of EA process, depending on whether the undertaking is subject to individual EA or an approved Class EA process. For an individual EA, Ontario provides for a planning phase, a review phase, an adjudication phase (if necessary), and a decision-making phase. However, for class EA processes, Ontario EA may have two distinct components: a screening component and an environmental study report component, each of which may have phases. Yet the class EA makes no provision for a hearing phase. The federal EA process under the CEEA combines elements of both parts of both Ontario models. On the one hand, it has two phases: a screening phase and a public review phase; on the other hand, the public review phase can involve an adjudication or a mediation.

It is not easy to see how either of the Ontario processes may be reconciled with the federal EA process. If an undertaking is subject to individual EA in Ontario, there is no equivalent to the federal screening process. On the other hand, if the undertaking is subject to an Ontario Class EA process, there are many planning similarities with the federal process, but no provision for a public review, as there is under the federal process.

The decision making phase is also quite different for each of the EA processes. Under individual EA in Ontario, the Minister of Environment and Energy can make a decision, but only if he or she decides not to send the matter to a hearing. If the matter goes to a hearing, then the Board makes the decision. For the Class EAs, there is no ministerial or board decision making: all decisions are made by the proponent. Federally, all decisions are made by the Minister or cabinet. If the Minister decides that a public hearing is necessary, the hearing panel makes no decision: it provides recommendations to the Minister and cabinet.

Where required, EA hearings differ significantly between the Ontario and federal models. The Ontario model is a quasi-judicial hearing, with intervenor funding for experts and legal counsel. The federal model emphasizes informality and lack of legal representation. Although some recent joint federal-provincial EA hearings or agreements suggest that the federal model may permit adoption of a more formal approach, many provinces do not seem supportive of the Ontario approach and would prefer a more informal approach. There would appear to be political and legal difficulties with Ontario agreeing to a less formal hearings approach.

Contents of an EA

The contents of an EA differ significantly between the CEAA and OEAA regimes. Above, the issue of alternatives was raised because Ontario requires examination of alternatives in individual and Class EAs whereas the CEAA requires an examination of alternatives in special circumstances only.

Other important differences exist in the scope of assessment. Ontario defines the environment comprehensively to include not just the natural environment but also the social, economic and cultural environment. This definition means that all relevant factors to making a decision are included in the environmental assessment. The CEAA does not follow this approach: it uses an approach which examines all matters related to and resulting from impacts upon the natural environment, but it does not include examination of the social or economic effects of the project itself. Thus, federal EA does not integrate environment and economy and society. It examines only part of this interaction. These differences between the Ontario and federal regimes on the definition of the environment suggest underlying differences of opinion on the role of EA. On the other hand, the CEAA requires consideration of the cumulative effects of a project in relation to other projects while the Ontario EAA approach to cumulative effects is not clearly articulated.

Public consultation is another area of difference. Ontario individual and Class EAs require extensive public notice and opportunities for involvement during the planning of the undertaking and throughout the review and approval phases. On the other hand, the CEAA is unclear about the role of the public in screenings and explicitly requires public involvement in exceptional circumstances only. Which approach will be used?

Further differences exist in the standard for approval. The Ontario process focuses on identifying the "preferred alternative". To identify the preferred alternative, it requires a planning process that is rational and traceable. By contrast, the CEAA requires examination of alternatives in special cases only. The key to federal approval is the absence of significant adverse environmental effects. The planning process for reaching this conclusion is not explicitly required to be traceable and can often be "ad hoc". As an Ontario EA may never consider the concept of significance and the federal process may never consider alternatives, it is not clear what a harmonized EA would contain.

Conclusions

No evidence of problems with respect to federal and provincial duplication and overlap in the field of environmental assessment has been presented in support of this schedule. Its implementation would require that the work of the federal and many provincial governments on new environmental assessment legislation be set aside, and that new legislation be developed. This seems an unlikely outcome.

In addition, the schedule provides a framework for the abandonment of federal participation in environmental assessments in a wide range of situations in which it currently would be required. This raises a serious questions regarding the future role of the federal government in ensuring a that adequate environmental assessments are conducted where federal lands, agencies, or decision-making authority it affected.

Furthermore, an examination of the significant differences between the federal and Ontario regimes, suggests that harmonization of EA across Canada is far from simple or straightforward. EA harmonization would not appear achievable without extensive legislative and policy changes at both levels. These differences should also highlight how far the current draft Schedule is from providing a practical model of EA harmonization.

A further conclusion which may be drawn is that the current regimes should not be characterized as providing overlap and duplication; rather, the federal and Ontario EA regimes appear to be seeking different objectives. Each reveals inadequacies with the other. From this perspective, this Commentary suggests that the draft schedule characterization of EA as "comprehensive and systematic" is misleading unless one is prepared to say that neither the OEAA or CEAA regimes meet this standard.

INTERNATIONAL AGREEMENTS

Goals

The function area called "international agreement" includes all aspects of the preparation, negotiation and potential amendment of international agreements. It is intended to ensure cooperation between governments with respect to the establishment of the Canadian position on international environmental agreements.

Summary

The principles enunciated in this Schedule reflect those outlined in the CCME's "Statement of Interjurisdictional Cooperation on Environmental Matters", which commits the governments to consult and cooperate in developing and implementing international environmental agreements. The purpose of this Schedule is to enhance cooperation and create mechanisms to ensure that a national position is reflected internationally. At the same time, there is an affirmation of the federal responsibility to negotiate and conclude international agreements, as well as of the federal government's accountability in the international environmental arena.

In outlining the division of roles, the relevant factors are determined to be the subject matter, the nature of the potential obligation and the actions, required for implementation. Guidelines are set-out for dialogue on issues of international environmental importance as well as on requirements to give notice as issues arise. The onus is on the federal government to notify the provinces and territories before any formal decision is taken on the nature of Canada's participation with respect to the development of a new international agreement.

The section on negotiation addresses domestic consultation, position development, intergovernmental discussion, international negotiations, clarification of obligations and signature/non-signature. There seems to be consensus on the need to make individual assessments with respect to the level of interest, on a case-by-case basis to identify the potential obligations of a Party. However, there is no agreement on the regularity of discussions, or to what extent the federal government will take the views of the provinces into consideration during preparation and negotiation. There is a provision for placing a provincial representative on the Canadian delegation for negotiating sessions. All members, however, are to be committed to the official Canadian position.

In terms of implementation, after the signing of an international environmental agreement, there will be a review to confirm the final impact. Designated issue-specific mechanisms will be used to discuss the implications of Canada becoming a Party and ratifying an international environmental agreement. In terms of monitoring and reporting, the

provinces commit to helping the federal government fulfil its international obligations by providing information.

Mechanisms to determine the nature and extent of participation by the provinces and territories are to be established on a case-by-case basis. This is because the nature of involvement will depend on the individual assessment which determines interests. Involvement may range from information sharing to consensus seeking on the Canadian position. Suggested mechanisms range from informal and ad hoc discussion to formal advisory bodies. There is also, under Section 4.1.4, support for the idea that these mechanisms be structured to expand to other stakeholders and major groups.

There are many issues still left to be resolved in this Schedule. A key one is the actual nature of the role provincial/territorial governments will have in the development of Canadian positions and participation in dispute resolution procedures under the agreements. It is also recognized that the Schedule may have little impact in terms of influencing the actual composition of Canadian delegates. Consideration still needs to be given to the addition of provisions for implementing and managing international environmental agreements, identifying specific mechanisms, and discussing other international agreements that may affect matters within the mandate of the Parties, but are not covered under the Schedule.

Commentary

While there is no objection to the federal government consulting with the provinces in the development of Canada's international positions, especially where provincial jurisdiction may be affected,⁷¹ the federal government needs to maintain a leadership role. In agreeing to negotiate with the provinces, (s.3.2.2.1.) an undesirable outcome could be that the Canadian position will reflect a lowest common denominator position among all the provinces. The fact that the EMFA tends to expand provincial power with respect to environmental protection in general, exacerbates this concern.

When the Environment Ministers met in February of 1995 to agree on a national standard for climate change, the front page *Globe and Mail* headlines were "BC, Alberta differ on

⁷¹.For detailed discussion of federal capacity to implement international environmental commitments see D.Vanderzwaag, and L. Duncan, "Canada and Environmental Protection: Confident Political Faces, Uncertain Legal Hands," in R. Boardman, ed., Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1992), pp.5-6.

emission policy," followed the next day by, "Climate Strategy Falls Short."⁷² The response by Environment Minister Sheila Copps was that the Ministers reached a "difficult consensus". The result is that Canada will fail to meet its international commitments. The "difficult consensus" which comes out of pursuing a "national" route is the very basis of this concern. A commitment to agree to a common standard set by all the provinces will inevitably demand a response that lowers the final standard. The outcome prevents the federal government from fulfilling a national commitment to the international community.

On the whole, the Schedule will tend to reinforce provincial capacity to stall or frustrate the realization of federally negotiated international commitments. Consequently, the definition of the federal-provincial relationship in this Schedule has the potential to weaken the push for interpretation of a stronger federal leadership role to enhance its capacity to implement international commitments.

Furthermore, the role of other federal Departments in the development of Canada's international positions should be considered. Even if all the Environment Ministers sign the EMFA, this may mean nothing vis-a-vis the Department of External Affairs and International Trade. Although the Federal Department of the Environment may wish to cooperate with the provinces on international environmental agreements, there are other players which may complicate the process.

Conclusions

This Schedule does little to enhance the federal government's ability to fulfil its role in the international arena. Indeed, it may result in Canadian positions in international negotiations which reflect a lower common denominator position among the provinces. This problem has recently been demonstrated in Canada's efforts to meet its commitments under the United Nations *Climate Change Convention*. This would seriously weaken Canada's ability to act as a leader on international environmental issues.

⁷²Dan Westell, Globe and Mail (20 February 1995) A1; Dan Westell, Globe and Mail (21 February 1995) A1.

V. CONCLUSIONS

The preceding analysis points to the fact that the draft EMFA proposed by the CCME will have significant implications for the development, administration, implementation and enforcement of environmental laws and policies in Canada. At this stage, it is impossible to determine every consequence of the agreement. However, the following general findings can be presented:

Conclusions

1) The Agreement is a *De facto* Constitutional Amendment

The scope of the EMFA and its accompanying schedules goes far beyond the stated goal of eliminating administration duplication and overlap. The agreement provides the framework for a major redistribution of the roles and responsibilities of the federal and provincial governments in the protection of Canadians' environment. The outcome may have the same impact as an actual constitutional amendment.

2) The process to date has been inadequate given the scope of the Agreement

The quasi-constitutional character of the EMFA has not been reflected in the public consultations and discussions facilitated by the CCME to date. There has been less public discussion and consultation on the harmonization initiative than on any other major environmental initiative over the past decade. Indeed, the consultation process has been less than that normally provided, for minor environmental legislation. In recognizing that the effect of this process is akin to a constitutional realignment of responsibilities, these power transfers cannot occur without full and effective public consultation, in-depth scrutiny and a full review of alternatives.

3) No analysis of the problems which the agreement is intended to address has been developed

The sponsoring governments have failed to present any substantive evidence regarding the extent of the problems of duplication and overlap in their efforts to protect Canada's environment. No justification has been provided for the sweeping scope of the reallocation of roles and responsibilities which is being attempted through the harmonization exercise. The only evidence presented in support of the initiative has been anecdotal in nature, suggesting that the problems of duplication and overlap are of a minor and administrative nature.

Substantive evidence exists, particularly in the areas of environmental law enforcement and environmental assessment, that duplication and overlap are not major environmental or administrative problems. Indeed, a lack of effective efforts on the part of Canadian governments to protect the environment seems a much more serious question. In the absence of any substantive analysis, it is difficult to conceive of how the drafters of the EMFA and its schedules can have any confidence that their efforts will address the most significant problems at hand.⁷³

4) The EMFA fails to address the real emerging problems in environmental protection in Canada

As a result of the lack of any clear underlying understanding of the issues which it claims to address, the EMFA fails to deal with the real emerging problems in environmental management in Canada. The most important of these is to ensure, in a period of budgetary restraint, especially at the federal level, that the functions and services essential to the protection of Canadians' health and environment are maintained. This can only be achieved through the combined efforts of the federal and provincial governments.

It will be necessary for the federal government to play a more extensive role in some provinces than in others, both to provide assistance in areas where provincial capability is weak or does not exist, and to act in cases where provinces fail to provide critical services. The second role will be particularly important in the fields of pollution-based monitoring, environmental law enforcement, and environmental impact assessment. This implies a need for an approach very different from the "one size fits all" model articulated through the EMFA.

5) The Agreement is a framework for Federal abandonment of the environmental field

One of the most obvious consequences of the CCME harmonization process is that the federal government will have a diminished role in the protection of the environment. It is of little consequence that the "devolving" or "opting out" of the federal role is *de facto* as opposed to *de jure* (that is, opting out in fact, even without formal or constitutional amendment) since over time, the loss of capacity

⁷³On the organizational costs of an exercise of this nature see generally, Anthony Scott, "Piecemeal Decentralization: The Environment" in R.W. Boadway, T.J. Couchemne and D.D. Purvis, Economic Dimensions of Constitutional Change, Volume 1 (John Deutsch Institute for the Study of Economic Policy: Queen's University, 1991).

and will to exercise the traditional federal role may lead to the same result.

This devolution is being undertaken without a close examination of the capacity and willingness of the provinces to "pick-up" the roles and responsibilities traditionally in the domain of the federal government. Even with appropriate resource transfers, individual provincial action cannot replace strong federal leadership. The very fact that the federal government retains the power to regulate, even if rarely used, is a powerful mechanism to fashion appropriate provincial behaviour. Federal devolution also flies in the face of the increasingly interwoven and globalized nature of environmental problems.

The federal government appears to be prepared to surrender its capacity to guarantee a minimum level of environmental protection for all Canadians, to ensure that "pollution havens" do not emerge in Canada, and to provide leadership in international arenas. This is despite consistent demands by Canadians for a strong federal environmental role.

6) Responsibility for national environmental leadership and integration is being transferred from the Federal government to the CCME

Much of the federal government's responsibilities for providing national leadership and integration functions in environmental policy-making, appear to be being surrendered to the CCME. This is particularly evident in the failure of the EMFA to indicate which government is to be responsible for what it defines as "national," as opposed to "federal" environmental issues.

This is a serious concern for a number of reasons. In effect, the Council, which has no legal or constitutional status, and for which there exist no effective public accountability mechanisms, is emerging as a new "national" order of government within Canada. This restructuring is occurring in the context of very limited public consultation, and certainly no evidence of public consensus that such a transfer of responsibility should occur.

In more practical terms, the achievement of environmental sustainability in Canada will require an environmentally active federal government. However, the placement of "national" environmental policy-making within the consensus-based decision-making structure of the CCME, means that "national" environmental policies will inevitably reflect the lowest common denominator position among the provinces.

7) The Agreement provides for the down-loading of Federal environmental responsibilities onto the provinces

The Agreement provides for the transfer of significant federal environmental responsibilities to the provinces, particularly in the areas of monitoring, environmental law enforcement, and environmental assessment. There is an underlying assumption that the provinces will be capable of assuming significant elements of the federal government's environmental responsibilities. However, some environmental problems, by their nature, are beyond the capacity of the provinces to address, either individually or even collectively.

This possibility was judicially recognized in the Supreme Court of Canada's 1988 *R. v. Crown Zellerbach Canada* decision. The assessment of substances new to Canada under CEPA is an obvious example of such a function. If one province fails to carry out its monitoring and enforcement mandate in relation to CEPA, the purpose of the CEPA provisions, of ensuring the assessment of substances new to Canada, prior to their use or release into the Canadian environment, will be defeated.

In addition to the question of the provinces' jurisdictional capacity, there is the issue of the degree to which the provinces have the technical and human resources to take on major components of the federal government's environmental functions. The draft agreement indicates that resources are to be transferred from the federal government to the provinces to facilitate the fulfilment of these expanded responsibilities, although no indication of the contemplated level of resource transfers has been provided.

However, given that the principle purpose of the initiative is to cut costs at all levels, and address the federal government's fiscal situation, the transfer of adequate resources seems highly unlikely. The net result of the EMFA appears likely to be the *de facto* repeal of the federal environmental laws in question.

The agreement also fails to take into account the different existing capabilities of the provinces. It assumes that all of the provinces will be able to assume an equivalent level of responsibility for federal environmental protection functions. This "one size fits all" approach ignores the differences in size and fiscal position of the provinces. Some provinces may need the federal government to play a larger role to ensure that their residents receive an acceptable minimum level of environmental protection.

8) The Agreement places constraints on the ability of provinces to adopt progressive environmental standards

The achievement of "consistency" in environmental policy is a major goal of the harmonization initiative. However, the pursuit of this objective may significantly constrain the ability of individual provinces to set higher standards and to adopt innovative environmental programs and policies. This would undermine well-understood dynamics of policy innovation and development in federal systems of government.

There is no basis for the claims, made by proponents of harmonization, that increased consistency necessarily will lead to enhanced environmental protection. On the contrary it seems likely, at best, to reinforce the status quo. Opportunities for upwards movement on environmental standards may be limited by the need to obtain consensus among the participating jurisdictions.

In some cases, the requirements of the EMFA and its Schedules would require a weakening of existing provincial environmental law. Bringing the Ontario *Environmental Assessment Act* and *Intervenor Funding Project Act* into compliance with Environmental Assessment Schedule, for example, would require major legislative changes. These would significantly diminish the scope of environmental assessments in the province, and opportunities for public participation in them.

9) The EMFA will lead to more, not less uncertainty and inconsistency in the protection of Canada's environment

Through the delegation of many of the federal government's environmental responsibilities to the provinces, the harmonization exercise has the potential to decrease the level of consistency currently experienced in the development and implementation of environmental law and policy across Canada. Each province will become an independent actor for the purposes of monitoring, enforcement, and environmental assessment, with no federal presence to ensure basic efforts in these fields, at least with respect to federal law. The concentration of functions in one level of government removes important checks and balances from Canada's environmental management framework.

10) There is no articulation of how the EMFA is to relate to First Nations

Some aspects of the EMFA and its Schedules will affect First Nations. This is especially true with respect to the Environmental Assessment Schedule. However, First Nations representatives have not been included in the EMFA discussions, and

the CCME appears to have no vision of how the EMFA will relate to First Nations. It also should be noted that some provinces have signed agreements with their First Nations that state that all relations will be conducted on a government to government basis.⁷⁴ This commitment must be fulfilled in the development and implementation of the EMFA.

11) No monitoring or public accountability mechanisms have been presented in the EMFA

No structures or processes have been identified to review the impact and effectiveness of the EMFA. No structures or processes have been articulated to address situations in which a province or the federal government fails to carry out its responsibilities under the Agreement. Concerns regarding the impact on accountability of the delegation of administrative responsibility for federal environmental legislation, have been expressed already on a number of occasions by the federal Auditor-General.

12) The proposed framework will lead to diminished environmental protection in Canada

The EMFA will weaken the federal government's capacity to provide leadership on national and international environmental issues, and to ensure a minimum level of environmental quality for all Canadians, and to prevent the emergence of "pollution havens" which may precipitate a "race to the bottom" among the provinces in order to attract investment. Furthermore, the delegation arrangements contained in the monitoring, compliance and environmental assessment schedules seem likely to result in the *de facto* repeal of the affected federal environmental legislation.

Furthermore, the development and implementation of stringent national environmental standards will be diminished, if not completely pre-empted. Instead, the best that can be achieved is a set of standards that all provinces could agree upon at the time. Even if they are not "lowest" common denominator, they are a "lower" denominator. Moreover, despite the ostensible safeguards that allow provinces to independently raise standards, a better view is that the EMFA will cast a "regulatory chill" such that provinces will be hesitant to break rank with other provinces.

In a paper written for the CCME on the harmonization initiative, Donna Tingley warned that: "The achievement of long term support will require a demonstrable link between

⁷⁴. See Ontario, Statement of Political Relationship to First Nations.

harmonization efforts and the agreed upon objective of more efficient environmental protection."⁷⁵ This link has not been effectively demonstrated in relation to the EMFA. Indeed, the net result of the agreement, if implemented seems likely to be a reduction in the level of environmental protection currently provided to Canadians by their governments, at the expense of present and future generations of Canadians.

Federal, Provincial, Territorial and First Nations Roles In the Protection of Canada's Environment

In light of these fundamental flaws in the draft EMFA, the question of the appropriate roles of the federal, provincial, territorial and First Nations governments in the protection of Canadians' environment must be addressed. This discussion must be formulated in the context of the following principles.

1) The harmonization initiative must respect the Canadian Constitution.

Any discussion of federal, provincial/territorial and First Nations roles in the protection of Canada's environment must be based on an understanding of Canada's constitutional framework, the historical roles of the various levels of governments, and the rationale for those roles. As noted throughout this paper, the harmonization initiative as presently conceived is a *de facto* constitutional amendment.

These constitutional implications should inform decision-makers as regarding the development of the Agreement. Most obviously, First Nations have been not directly involved in the harmonization initiative to date. This omission must be addressed. In addition, extensive background documentation, and thorough public discussion and consultation, are required before the EMFA proceeds.

2) The Federal and Provincial Governments must continue to share responsibility for the protection of Canadians' environment.

Concurrent federal and provincial environmental protection responsibilities provide significant benefits to Canadians. The dynamics of federalism provide for enhanced environmental protection. The presence of both levels of government provides for important checks and balances in the field.

⁷⁵Donna Tingley, "Models and Instruments for Harmonization" Document prepared for the CCME. (25 February 1994) 4.

In the context of shrinking fiscal resources at the federal and provincial levels, the federal and provincial governments must ensure that, through their combined efforts in each province, the functions and services essential to the protection of the environment are provided. Given the different level of existing capability and resources among the provinces, the specific roles and responsibilities of the federal government in achieving this outcome will vary from province to province. This implies that the "one size fits all" federal role envisioned in the draft EMFA is fundamentally flawed.

3) The Federal government must retain responsibility for environmental leadership at the national and international levels.

The federal government must continue to exercise those duties and responsibilities that are specifically assigned to it under the Constitution, such as environmental protection in relation to federal lands and activities, and the protection of seacoasts and inland fisheries. In addition, it must take a leadership role on transboundary issues, questions of national concern and in situations where the provinces, acting individually, or even collectively, cannot provide effective protection. It is only rational, for example, that the federal government undertake a regulatory program for the assessment of new chemicals. Without federal involvement, producers and users of these chemicals would have to go through the same process thirteen times.

The federal government also must provide leadership in the protection of the global environment. It must provide a bridge between the local, regional and international dimensions of environmental issues.

4) The Federal government must ensure that all Canadians have an acceptable minimum level of environmental quality.

Canadians are entitled to a minimum level of environmental quality regardless of where they live in Canada. The federal government can fulfil this commitment in two ways. First, it must assist those provinces that lack the capacity to develop and enforce their own standards. Secondly, through the existence and active enforcement of federal environmental standards it must ensure that "pollution havens" do not develop among the provinces.

Federal standards ensure that there is a floor below which no jurisdiction is permitted to sink. This implies that the federal government must retain the responsibility and capacity to enforce federal environmental requirements and to play the lead role in environmental assessments involving federal lands, activities, funding or decision-making authority.

5) The Provinces must retain an unconditional right to raise environmental standards.

This would provide the opportunity for provinces to be innovative and respect local conditions. The ability of individual provinces to set higher standards and to adopt new environmental programs and policies has long been recognized as a critical source of policy innovation and development in federal systems of government.

6) There must be no down-loading of Federal environmental responsibilities to the Provinces.

Many provinces are facing difficult fiscal situations of their own. They have no residual capacity to take on federal environmental mandates. Under these circumstances, the net result of transfers of responsibilities would be the *de facto* withdrawal of the federal services and requirements in question.

7) Discussions regarding the role of First Nations in the protection of Canada's environment must occur on a government to government basis.

Several provinces, including Ontario, have committed themselves to dealing with First Nations on a Government to Government basis. These commitments must be upheld in the development of any framework agreement.

8) Effective public accountability mechanisms must be established for the protection of Canada's environment.

Any intergovernmental agreements related to environmental protection must include sunset clauses and provide for public reviews of their effectiveness prior to re-authorization.⁷⁶ In addition, direct citizen enforcement mechanisms should be provided in federal environmental laws. These provisions should not be affected by intergovernmental agreements.⁷⁷

⁷⁶. The Canadian Environmental Protection Act: An Agenda for Reform (Ottawa: Toxics Caucus, Canadian Environment Network, 1994), Recommendation 1.5.

⁷⁷. Ibid., Recommendation 2.4.

The Next Steps

It is clear that in the context of the federal government's February 1995 budget and the Environment Canada Program Review, fundamental revisions to the harmonization project are required. The participating governments must begin by developing a clear articulation of the functions and services necessary to ensure an acceptable minimum level of environmental protection for all Canadians. They must then establish a framework which provides for these functions and services in each Province, Territory and First Nation. The role which the federal government is likely to play in each jurisdiction will vary significantly as a function of capacity and will. The result necessarily will be very different from that proposed in the EMFA.

In the event that an overall framework agreement is reached, public hearings on the agreement should be held by the House of Commons Standing Committee on the Environment and Sustainable Development prior to its ratification by the federal government.⁷⁸ Public hearings by appropriate committees of the provincial and territorial legislatures also would be an important step in ensuring that the agreement meets the needs and aspirations of Canadians.

The protection of the environment, like the protection of health and safety, is a core public good which must be provided for by Canadian governments. The federal government has a fundamental role in guaranteeing a minimum level of environmental quality to all Canadians. This responsibility is essential to guaranteeing environmental sustainability for present and future generations of Canadians.

⁷⁸. This step was requested of Prime Minister Chretien in an open letter submitted on February 17, 1995. More than 70 national and regional environmental, labour, conservation and public health organizations are signatories to the letter. The letter is attached in **Appendix 4**.

APPENDIX 1

THE LAW OF LEGISLATIVE AND ADMINISTRATIVE DELEGATION AND THE EMFA

THE LAW OF LEGISLATIVE AND ADMINISTRATIVE DELEGATION AND THE EMFA

**Prepared by Shelly Kaufman, B.A.
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March 1995

A jurisdiction's ability to legislate with respect to an environmental concern must be linked to the existing division of powers in the Canadian Constitution. Some of the heads of power are directly related to an aspect of environmental management, but others are incidental and related to the general authority created by that particular head. Examples of areas that can be seen to establish federal authority to regulate environmental matters include: the Peace, Order and Good Government power, Trade and Commerce, Navigation and Shipping, Seacoast and Inland Fisheries, Taxation, Criminal Law, and Federal Works and Undertakings. Examples of provincial heads include: Property and Civil Rights, Municipal Institutions, Natural Resources, Management and Sale of Public Lands, and Matters of a Local or Private Nature. Agriculture is an example of a power that is explicitly concurrent.¹ The result is that environmental management in Canada is shared.

The preamble to the EMFA recognizes the constitutional reality of shared jurisdiction, but also articulates the belief that a more understandable environmental management regime is needed. Clarification of environmental protection roles through the EMFA is seen as the mechanism for producing a more effective environmental management regime in the country. It is clear that the CCME believes a fundamentally altered management regime is attainable without a Constitutional amendment.² However, affirmation of existing constitutional responsibilities as stated in the EMFA under Section 9.1, does not guarantee existing jurisdictional roles will not be affected by this process. Recently, the courts have affirmed the expansive authority of the federal government to regulate environmental matters.³ The EMFA attempts to transfer some of these responsibilities to the provinces and consequently, the overriding constitutional concern is the impact the Agreement will have on the federal role in environmental protection.

¹Constitution Act, 1867, ss. 91, 92, 92A & 95.

²CCME. "Rationalizing the Management Regime for the Environment."

³*R v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401; *Friends of Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3.

The principle of legislative inter-delegation, emphasizes that the powers as divided under the Constitution cannot be arbitrarily changed. The *Nova Scotia Inter-delegation Case* established that such a scheme cannot be legitimate because it amounts to an effective redistribution of Constitutional powers.⁴ Rand J. expressed concern about the practical consequences of allowing legislative delegation, as the continued exercise of a delegated power may eventually lead to a "prescriptive claim" possibly precluding the courts from viewing revocation of that power as feasible.⁵ Although the *Nova Scotia Inter-delegation Case* still stands as valid law in Canada, subsequent cases have allowed legislative bodies to achieve similar goals indirectly. The tools which have been accepted by the courts include administrative inter-delegation, referential legislation and conditional legislation.⁶ Professor Peter Hogg asserts that these cases have created enough alternatives to legislative delegation to preclude the necessity of challenging the remaining principle in the *Nova Scotia Interdelegation case*.⁷

The relevance of the state of law, with respect to the EMFA, is two-fold. The first is to ensure the Agreement does not create unauthorized delegation. Any delegation to another primary law-making body, be it a legislative or administrative role, is prohibited.⁸ In determining whether this might be an issue, Hogg suggests that the most effective question to ask is whether "the scheme of inter-delegation purports to enlarge the powers of one of the primary legislative bodies."⁹ An example of how delegation frames the limits of this initiative can be found in environmental assessment. The determination of when a federal assessment may be necessary in a provincial process, as determined in *Oldman*, relates to when there is a federal affirmative regulatory duty.¹⁰ The *Canadian Environmental Assessment Act (CEEA)* establishes that a federal assessment will be triggered if that government is required to issue a permit or license, grant an approval or

⁴*Attorney General of Nova Scotia v Attorney General of Canada (Nova Scotia Inter-delegation Case)*, [1951] SCR 31 at 48.

⁵*Ibid.*, at 50.

⁶*P.E.I. Potato Marketing Board v Willis* [1952] 2 S.C.R. 392; *AG Ontario v Scott* [1956] S.C.R. 137; *Lord's Day Alliance v AG British Columbia* [1959] S.C.R. 497; *Coughlin v Ontario Highway Transport Board* [1968] S.C.R. 569.

⁷Peter Hogg, *Constitutional Law of Canada* (3rd) (Toronto: Carswell, 1992) 367.

⁸*R v Furtney* [1991] 3 S.C.R. 89, 104.

⁹Hogg, 362.

¹⁰*Oldman River*, *supra*, at 46.

take some other action for the purpose of enabling the project to be carried through.¹¹ Making the province the lead jurisdiction and acknowledging the need for formal delegation will not alleviate the decision-making responsibility of the federal body in accordance with CEEA. This action can only be legitimated if the authority to fulfil that trigger responsibility has been transferred through the relevant legislation; it cannot merely be delegated through the EMFA, unless the original legislation authorizes this delegation. If the approval authorization has been properly delegated, the result potentially removes the application of the CEAA, despite the Law List trigger.

The second issue relates to the eventual consequences of legitimate delegation. Recounting Rand J's concern with respect to "prescriptive claims", it is possible that legislative delegation may result in a similar outcome. Even if the courts continue to distinguish legislative delegation because Parliament has maintained the authority to withdraw that delegation, as time goes on, it is less and less likely to occur. This is partly a practical result because the jurisdiction loses its institutional capacity to fulfil that role due to the elimination of fiscal and human resources. This is also a political consequence, as provincial adoption will effectively prevent re-assertion of a legitimate federal role for fear of stirring unwanted federal-provincial controversies. There are many instances in the EMFA where there is an expected devolution of responsibilities to the provinces. By agreeing, through legislative arrangement, not to create federal environmental standards, Parliament is effectively removing itself from a role it may legitimately hold through a federal head such as POGG. The federal government must maintain the will and ability to override provincial actions if those actions are not adequate with respect to effective environmental protection. The *de facto* effect of the federal government agreeing to allow the provinces to administer particular legislation, may have the result of an abdication of responsibilities.

There are substantial benefits to maintaining both a provincial and a federal role in environmental protection, even if it precludes absolute clarity. A degree of overlap acts as a check on the other legislative branch. The Constitution helps avoid unilateral exercises of power or a single government's refusal to act. Provincial control over many environmental management issues makes sense as it allows a greater degree of responsiveness to local needs. However, there is also a legitimate argument to ensure there is a federal role co-existing with the provincial role, setting minimum national standards. The provincial inability test elaborated on in *Crown Zellerbach*,¹² recognizes

¹¹CEAA, s.5(1)(d)

¹²The matter must be a discrete subject that cannot have a scale of impact irreconcilable with the Constitutional division of powers. To determine whether it is a matter that passes the "provincial inability" test, consideration must be given to what would happen if a province did not effectively deal with the intra-provincial elements of the matter. (*Zellerbach, supra*, at 431-432.)

there are certain functions, such as matters of national concern which may demand federal leadership. There are many examples of the relevance of the federal role. For instance, the national assessment regime for new chemicals under the Canadian Environmental Protection Act (CEPA) is one such example.

If the federal government lacks the political will to take a lead role in environmental protection, choosing not to use the powers it has to protect the environment, the existence or non-existence of the EMFA may not matter. It has been asserted that the federal government has already undermined its perceived ability to occupy the fields of environmental regulation and enforcement by refusing to exert its legitimate responsibilities under CEPA regulations.¹³ However, the EMFA makes it easier for the federal government to step out of its leadership role in a more permanent fashion, by "rationalizing" that the provinces will take over, by asserting that environmental protection will consequently be maintained. In other words, the EMFA acts as a political cover for the federal abandonment of its Constitutional responsibilities with respect to the environment.

Conclusions

The main concern, therefore, is that the effect of the Agreement may actually change the Constitutional divisions which exist, essentially minimizing, if not eliminating, the important federal roles in environmental protection. Even if this does not occur by judicial acceptance, the political implication of re-entering an effectively abandoned field will eventually produce a similar outcome.

¹³Clark and Rutherford, "CEPA and Environmental Law Enforcement," p.7.

APPENDIX 2

ENVIRONMENTALISTS'S PERSPECTIVE ON HARMONIZATION: A PRELIMINARY ANALYSIS

**AN ENVIRONMENTALISTS' PERSPECTIVE
ON HARMONIZATION:
A PRELIMINARY ANALYSIS**

**Discussion Paper of the
Environmental Working Group on Harmonization
of the Canadian Environmental Network**

Edited by Stefan Ochman

November 2, 1994

☛ Goal

The overriding goal of harmonization should be to preserve and enhance the integrity of the environment.

☛ Principles

The EMF must also be in accordance with the following 10 principles:

- (1) Any harmonization initiative must not reduce government powers to ensure that environmental quality, biological diversity and ecosystem integrity are protected. It must also ensure that special protection for special species and areas is provided.
- (2) Responsibility for environmental protection by all levels of government and by the individual must not be reduced.
- (3) Any initiative must respect the Canadian constitutional and legal framework.
- (4) Any harmonization initiative must be done to the highest level standard, not the lowest common denominator. It must allow a government to adopt more stringent environmental protection measures than other jurisdictions, where it deems necessary.
- (5) Canadian sovereignty over decision-making must be maintained.
- (6) Any harmonization initiative must take into account regional disparities.
- (7) Strong enforcement provisions must be present, including the right of the public to enforce any agreement, legislation or regulation.
- (8) Mechanisms to ensure accountability with respect to the EMF must be put into place, including annual reporting, periodic reviews, full public access to information and a public registry.
- (9) Any harmonization initiative should be subject to environmental impact assessment.
- (10) There must be full and effective public consultation.

BENEFITS AND PITFALLS OF HARMONIZATION

The concept of harmonization leads to some controversy and debate when discussed in the context of environmental law and policy. What fuels this debate is the different motivations to proceed with harmonization. The need to do a better job of protecting the environment is not, as it should be, the driving factor behind harmonization. One real and un-acknowledged motivation behind harmonization is business pressure for de-regulation, as codified in the free trade agreements. However, our view is that avoiding trade disputes should not be one of the main purposes for harmonization. The motivation for provinces may be that they often feel compelled to accommodate industrial interests. In addition, provinces themselves are often proponents of major projects. In such cases, provinces are all too often prepared to sacrifice environmental protection for economic development. Regardless of the motivation behind harmonization efforts, we are concerned that the Environment Management Framework (EMF) may put the evolution of a strong and effective environmental protection regime in Canada at risk.

Harmonization efforts have been justified on a number of grounds. Three of the most common are 1) "rationalization" of federal-provincial programs, 2) better "consistency" and "predictability" of environmental law and policy, and 3) more effective separation of roles and responsibilities of various levels of government. For each of these reasons, benefits and pitfalls are explored. Our main concerns and some recommendations are also outlined.

Harmonization as a "Rationalization" of Federal-Provincial Programs

☛ What is it supposed to achieve?

The most widely discussed benefit of harmonization is that it will assist in avoiding duplication of efforts between the federal and provincial governments. It will also assist in eliminating inefficiencies within the regulatory and policy system in Canada. Certainly it is difficult to argue against getting rid of duplication and inefficiencies within a regulatory framework. However, the drive to eliminate duplication and inefficiencies is a goal that must be examined more closely.

☛ Why are we concerned?

The question that must be asked first is simply: Is there duplication and inefficiency within existing federal-provincial law and policy, and does this justify an overhaul of the whole system? Clark and Rutherford in their submission to the Standing Committee

on Environment and Sustainable Development entitled "The Constitution, Federal-Provincial Relations, Harmonization and CEPA" summarize our concerns (p.19) :
"...the failure of the legal regime to achieve much in the realm of environmental protection has more to do with lack of political will -- as evidenced by an underfunded, inadequately trained and imprecisely mandated Department of the Environment -- than any inherent flaw in the legislation. Given that there is very little federal environmental law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What exactly is duplicated? Where, in a regulatory environment where the federal government acts on only three (of twenty) regulations, is there overlap?"

Another concern is related to the fact that the development of the harmonization initiative is proceeding based on the two following undocumented assumptions:

- Over-regulation in environmental matters, in the form of conflicting, duplicating and overlapping federal and provincial legislation and enforcement exists and constitutes a negative rather than a positive phenomenon in terms of environmental protection.
- As a matter of law and policy, the problem of over-regulation can be appropriately solved to the benefit of the environment by way of intergovernmental agreements, primarily characterized by federal withdrawal and recognition of provincial primacy in matters of the environment.

The experience of environmentalists suggests that contrary to these assumptions, Canada suffers from underdeveloped environmental regulation and inadequate enforcement.

■ What might happen?

The innovative and dynamic pressures arising from the existence of both federal and provincial jurisdictions have important benefits for the protection of the environment. The most recent example of this phenomenon has been the positive effect of the announced coming into force of the Canadian Environmental Assessment Act on the scope of provincial environmental assessment regimes. The federal process will often be triggered for private sector projects. While condemning the federal legislation, the Quebec Minister of Environment and Wildlife nonetheless announced that after a delay of fourteen years, the provisions of the Quebec regime providing for the assessment of major private sector projects such as aluminium smelters and pulp and paper mills will finally be brought into force. Other provinces may follow suit.

It is not constitutionally appropriate or useful to proceed on the basis of exclusivity. In the document entitled "Harmonization and the Federal Fisheries Act" prepared by the

CSE Group, it is argued that the federal fisheries power has been at the centre of a great deal of jurisdictional controversy and uncertainty. If this is true for a federal power which is as explicit, focused and closely related to matters of environmental protection as the fisheries power, then surely the attempt to define such general provincial powers as "property and civil rights" and "management and sale of public lands" as embodying exclusive environmental powers which leave no room for federal action can only succeed by way of abdication of federal responsibilities.

Although the application of the Fisheries Act has been inadequate, it remains nonetheless the most powerful and effective of federal statutes for environmental protection and pollution control. Therefore it is worrisome that the deleterious substances and habitat protection provisions of the Fisheries Act have been chosen for priority treatment in the harmonization initiative by way of the repeal of regulations, the addition and use of "equivalency" provisions and efforts to minimize their use as effective triggers for federal environmental assessment.

Finally, when rationalization is used as a reason for harmonization, it sometimes implies that environmental protection as a public policy issue is declining and that fewer and fewer resources will be devoted to it now and into the foreseeable future. Certainly governments are attempting to downsize many of their activities. However, the downsizing of environmental programs, personnel and resources without a comprehensive understanding of the present needs and future demands of environment priorities has to be rejected and loudly criticized.

☛ Recommendations

- 1) A study outlining clearly where duplication and inefficiencies occur and highlighting existing detrimental effects of duplication on industry, the public and the environment should be provided to all stakeholders before the EMF is developed any further.
- 2) A study examining the present needs and future demands of environmental priorities should also be carried out.

Harmonization as a Means to Further "Consistency" and "Predictability" of Environmental Law and Policy

☛ What is it supposed to achieve?

Even if there is little obvious duplication of effort as pointed out in the previous section, harmonization efforts are often justified on the grounds that "consistent" and

"predictable" environmental laws and policies are better. This, it is argued, will lead to a more stable regulatory environment that reduces "regulatory competitiveness". It is not clear whether "regulatory competitiveness" refers to upward competition or downward competition.

☛ Why are we concerned?

Here the question is: Is it necessary to undertake a harmonization effort to achieve an administrative goal rather than an environmental protection goal? The primary problem with the motivation to have "consistency" and "predictability" is that a "consistent" or "predictable" standard may not necessarily be the best for the environment. The ultimate criteria should be whether existing laws and policies are sufficient to protect the environment.

☛ What might happen?

To the extent that "regulatory competitiveness" means upward competition, the quest to have consistency and predictability may lead to the following:

- This quest may limit the ability of jurisdictions to be innovative in developing environmental laws and policies. "Consistency" and "uniformity" reinforces the status quo, making more stringent standards by any one jurisdiction more difficult. In effect, a jurisdiction may be unable to "leap frog" ahead, even if local conditions warrant such action. In the future, when a jurisdiction will want to enact a more stringent law, it will have to deal not only with stakeholders within its jurisdiction, but it will have to get the consent from all other jurisdictions in Canada that such action is warranted. We feel that upward competition between jurisdictions in regulation-setting is an inevitable consequence of a federal system. It is a consequence, indeed, that is best suited to respond to local concerns and environmental needs.
- Harmonization suggests that not only should there be uniform goals and standards, but also uniform means of achieving them in all jurisdictions. The establishment of such consistent means implies fundamental changes in the functioning of governments.
- Even if the stated goal is to harmonize "upward," this still suggests that the most progressive jurisdictions will have to amend their laws and policies to the harmonized level.

☛ Recommendations

- 1) The Federal government must assert the authority it has to ensure that environmental standards are not eroded. Competitiveness between jurisdictions within our federal system should be encouraged, to the extent necessary to protect the environment. It allows for local improvements over federal baseline standards and is the best system for responding to varying local concerns and environmental needs.
- 2) The ultimate criteria when examining laws and policies should be their ability to protect the environment.
- 3) "Consistency" and "predictability" can be achieved by maintaining and even increasing federal standards and improving enforcement across the country. This could be achieved by enhancing federal-provincial cooperation and dialogue and developing more effective institutions.

Harmonization as a Reshuffling of Duties and Responsibilities of Various Levels of Government

☛ What is it supposed to achieve?

The third motivation behind harmonization is to reshuffle duties and responsibilities of various level of government.

☛ Why are we concerned?

Here the question is: If a jurisdiction is responsible for an area of environmental protection, why should it be allowed to devolve that area without a full and frank discussion of those affected, that is, the Canadian public? The question concerning the realignment of duties and responsibilities ultimately leads to a question of accountability.

☛ What might happen?

We are alarmed when we read in the "Purpose" section of the CCME document "Rationalizing the Management Regime for the Environment" (p.4) that: *"Whatever implementing mechanism is chosen it will be based upon a revised definition of the roles and responsibilities of both orders of government. This concept of re-defining roles and responsibilities is fundamental"*. This will modify the effective division of powers in environmental matters. Any significant realignment of these powers, even if only

administrative in nature, must be examined in light of the requirements of constitutional law. All other considerations such as effective use of labour, resources, expertise and capacity may be valid, but must be secondary.

The Constitution belongs to the people and not to governments or bureaucrats. The division of powers affords the environment and Canadians a considerable measure of protection from the unilateral exercise of power by a single level of government and from the refusal of a single level of government to exercise its powers and to carry out its responsibilities.

In the end, the gist of the matter is the real motivation behind harmonization efforts and whether they are appropriate.

Recommendation

- 1) There needs to be a full public discussion of the benefits and pitfalls of harmonization.

GENERAL AGREEMENT AND FUNCTIONAL AREAS

The following comments are based on the presentation given by the LRC to the NAG on October 19. These comments can only be preliminary and incomplete since very few details were given.

General Agreement

The lack of detail provided prevents much comment except regarding matters which should be addressed. The prime example is the need for a public registry to store and provide access to the multiplicity of current and future intergovernmental agreements in the environmental management area. The registry should also include related documents such as memoranda of understanding, letters of intent, and accountability reports. It would also be a place where proposed agreements (or other instruments) would be posted for public notice and comment. This public registry should include, but not be restricted to, an electronic component fully accessible on the Internet.

Monitoring

Pollution based monitoring is proposed to go to the provinces, including both discharge and ambient monitoring. Shifting pollution based monitoring to provinces may

eliminate some duplication. However, it is not clear exactly how much duplication is actually occurring in this area since there has been considerable coordination of efforts already.

Apparently, the "resources" topic has not been addressed. This, however, is the big underlying issue here. It seems likely that the federal government anticipates having insufficient resources to continue to carry out monitoring it is currently doing. It is clear that the poorer provinces want the federal government to provide funding along with new monitoring responsibilities. This raises the question of how the federal government will be able to pay for provinces to do monitoring which it cannot afford to pay itself.

"Stronger federal lead in methods and procedures and database management" and *"Elimination of duplication in methods development"* are two proposals which sound great. However, the establishment of methods is not a purely technical area as it may seem. In fact, the environmental parameters chosen to develop methods of measuring are related to regulatory priorities. For example, if it is decided to regulate all organochlorines, rather than dioxins alone, a method to measure all organochlorines has to be developed, rather than a method to measure dioxins alone.

"Increasing emphasis on planning and coordination" sounds reasonable. However, this includes re-evaluating what is currently being monitored and why. People should be aware that it is under this rubric that some painful decisions will be made regarding eliminating environmental parameters that are currently monitored.

"Coordinated database linkages" are clearly essential. It would be desirable to make data, which meets quality and access criteria, publicly accessible via the Internet.

Environmental Impact Assessment (EIA)

This area illustrates the dilemma that underlies the EMF. How is it possible to have both a "nationally consistent EIA approach" and "mostly provincial lead"? Whereas having a single assessment process per project is desirable, the choice of a lead agency for environmental assessment must be determined according to the Constitutional division of responsibilities. Areas of federal jurisdiction must be dealt with by a federal process. In our experience, the possibility of interference by powerful corporations with the EIA process is much greater at the provincial level. It would therefore be dangerous to allow the EIA process to evolve into a process dominated by provincial bodies.

The Federal Government must assess the environmental impacts of projects which affect areas of federal jurisdiction and must not delegate this responsibility to the provinces.

For most part, provinces view harmonization as a matter of having the federal government change its approach to match that of a particular province. National consistency would require all the provinces to change their own approaches to one degree or another. So far, there is little indication that the provinces are inclined to move in this direction. Perhaps the long-awaited text of the draft agreements will reveal new movement in this direction.

Compliance

Again, here is the underlying dilemma: How is it possible to have a "*nationally consistent approach to compliance*" and provide that "*provinces will have primary compliance roles and ensure compliance in industries*"? The slide entitled "Compliance Implications" states "*May involve repeal/sunset of overlapping provisions of CEPA and Fisheries Act*". This refers to overlap between CEPA and the Fisheries Act on the one hand and provincial requirements on the other hand. Since CEPA and the Fisheries Act do already provide the few existing examples of national consistency, it is hard to imagine how achieving a "*nationally consistent approach*" could lead to a need to repeal sections of CEPA or the Fisheries Act. This is a matter of great concern, because it appears to reveal just what environmentalists have feared most from "harmonization" namely, that it is a code word for substituting lower provincial environmental standards for higher federal ones. The Federal Government must not abrogate its responsibility to legislate in areas of federal responsibility. Indeed, federal legislation provides a consistent national approach.

International Agreements

It is very difficult to tell whether this involves anything new, although the LRC assured the NAG that it does. The focus, however, appears to be exclusively on the negotiation and adoption of international instruments, as opposed to ensuring Canadian compliance with international instruments. This is a major gap. The harmonization initiative should be tested against global environmental problems (climate change and loss of biodiversity) as a yardstick to measure whether it will allow Canada to deal more effectively with environmental problems.

CONCLUSIONS

The harmonization initiative certainly includes a number of elements which are desirable in principle. Nonetheless, we must express in the strongest terms our concern that, as it is being carried out, the current push for harmonization and rationalization will not result in a healthier environment for Canadians and does not respect the Constitution, the fundamental principles of justice, or the right of the public to participate in decision making which affects the environment.

All Canadians and all governments share responsibility for protecting the environment. Protecting the environment must be the first priority of the CCME. The EMF should be not be developed based on industry competitiveness but rather in accordance with the ten principles of environmental protection outlined in this paper.

The Federal government must assert the authority it has to ensure that environmental standards are maintained. Competitiveness between jurisdictions within our federal system should be encouraged, to the extent necessary to protect the environment.

"Consistency" and "predictability" of environmental laws and policies can be achieved by maintaining and even increasing federal standards and improving enforcement across the country. This can be achieved by enhancing federal-provincial cooperation and dialogue and developing more effective institutions.

ENGOs do not believe that the need for the harmonization initiative has been adequately demonstrated, nor do we believe that the environment will be better protected. Therefore, we recommend that no further negotiations of the harmonization initiative occur until the following has been performed, and publicly discussed:

- ☆ a study assessing the long term environmental benefits and pitfalls of harmonization;
- ☆ a study outlining where duplication and inefficiencies occur; and,
- ☆ a study examining the present needs and future demands of environmental priorities.

So far there has been no meaningful stakeholder or public input in the harmonization initiative. The deadlines established by the CCME for developing the EMF and the sub-agreements are unrealistic. This must change.

APPENDIX 1

CONSULTATIONS AND PARTNERSHIPS

We are vitally concerned that to date the CCME initiative on harmonization has failed to live up to minimum requirements of openness and public participation and accountability. Public opinion appears to be regarded as something to be managed once decisions are taken. From our perspective, the harmonization initiative is being developed behind closed doors and the National Advisory Group is a largely ineffective way of providing input into the process. Also, the CCME has failed to implement its own guidelines for Consultations and Partnerships (apart from Principle 6 regarding participant funding, see below) in the Harmonization Initiative. Following are some recommendations and proposals to help make further development of the harmonization initiative more open and accountable.

Multistakeholder Committee (MC)

First of all, the Lead Representative Committee should be replaced by a Multistakeholder Committee. By not directly involving stakeholders in the discussions of the LRC, the CCME is not following Principle 3 of the CCME Guidelines for Consultations and Partnerships which states that *"People who are affected should be given the opportunity to influence and participate in the process"*. Meetings with the NAG or the promise of broad consultations after agreement on the EMF and on some functional areas has been reached are not effective ways to influence or even participate in the process. A partnership approach such as a Multistakeholder Committee would allow open and transparent discussions among all stakeholders and permit for direct input from all into the process. Such a Multistakeholder Committee was proposed by the interim environmental representatives on the NAG at their meeting with the LRC on October 19. The assumption that the EMF and related schedules are essentially inter-governmental agreements does not imply automatically that their negotiation has to occur behind closed doors. It is important to underline that Governments are only one of the stakeholders when it comes to managing the environment. Involving stakeholders directly in the negotiation process of the EMF and sub-agreements does not imply that governments are willing to share their authority in negotiating, but rather that governments respect the concerns and expertise that members of the public bring to these negotiations. Ultimately, by involving stakeholders directly, governments would be sending the right signal to stakeholders that they are ready to make partnerships work.

Environmental Working Group on Harmonization (EWGH)

About 50 representatives from Environmental Non Government Organizations (ENGO) from across the country have joined the EWGH of the Canadian Environmental Network (CEN). These ENGOs have considerable hands-on expertise in environmental issues and policy development, but adequate information, context and analysis are needed for them to be able to respond to complex proposals, such as the EMF and its sub-agreements. This is true of all stakeholders, not just ENGOs. Coordination and communication among ENGOs with regard to the harmonization initiative only started in September 1994, and it must continue so that informed consultations can take place. It is desirable for ENGOs to continue to work collectively through the EWGH in upcoming consultations on the harmonization initiative. The question remains how best to achieve that effectively, efficiently and credibly.

Lead Environmentalists Committee (LEC)

One way for information to start flowing between the Lead Representative Committee and the environmental community is to set up a Lead Environmentalists Committee (LEC). One environmentalist per jurisdiction would be identified from the EWGH to be part of the LEC. Each Lead Representative would communicate directly with the Lead Environmentalist from his/her jurisdiction to keep each other abreast of current information and to brief him/her about current decisions. The possibility for Lead Environmentalists to give direct feedback to Lead Representatives on an ongoing basis would open the doors slightly and lead to more effective ENGO involvement in the development of the EMF.

Role of the National Advisory Group

The National Advisory Group (NAG) must start playing a meaningful role in the design of the consultation plan. It must be involved in:

- defining the terms of reference of the consultation;
- delineating the decision-making process;
- setting the consultation timetable;
- estimating the budget required to support the process;
- choosing an independent facilitator for consultations; and,
- defining the process and responsibilities for implementing recommendations.

Terms of Reference

The NAG should be involved in designing the consultation plan on the general agreement and on all sub-agreements. The merits of proceeding or not proceeding with the harmonization initiative in certain areas will have to be discussed during consultations. We disagree with the proposal that for consultations each jurisdiction will act as a window for their respective constituencies. This brings up two questions. How can this result in a consistent approach across the country? Who will consult with individuals and groups with a national interest? If, however, this approach is used, goals, objectives and process should be defined at a national level by the NAG. The following questions will have to be addressed: Who will be consulted? To whom will information be distributed? Who will receive the input and how will it be used? How will feedback be provided to those who have input?

Access to Information

The draft EMF and 4 functional areas must be released immediately following the November 7-8 Ministers meeting. They should have been released already. More than just basic information should be made available for public input on an ongoing basis. The actual draft documents should be made available. This is essential.

Timing

Even though it is understood that the main agreement and schedules for at least 4 functional areas are going to be finalized and approved by the CCME in May 1995, this deadline is unrealistic and unacceptable, since it does not allow sufficient time for meaningful stakeholder input. Organization of regional and national workshops takes time and a decision to hold those workshops must be made now, not after a full harmonization package has been drafted. The EWGH of the CEN should be given at least 6 weeks notice prior to the convening of any consultation. The CCME should ensure that all representatives receive materials and information at least two weeks ahead of scheduled meetings.

Funding

Members of the EWGH will participate in a consultation only if sufficient funding is available. Funding should be provided not only for travel, accommodation and meals of participants as stipulated in Principle 6 of the CCME guidelines for Consultations and Partnerships, but also for coordination and communication of the EWGH and possibly a meeting of the EWGH. Most ENGOs are unable or unwilling to participate in consultations without doing so in communication and co-operation with other ENGOs. This assists in putting together expertise from different issue areas and having access to "peer reviewers" to critique one's own analysis of complex issues. If ENGOs do not have resources to network and to coordinate their efforts, the situation is often one of severe power imbalance in which healthy consultation is not possible. For these reasons, Principle 6 should be modified to include costs related to communication and coordination of ENGOs through the CEN.

Coordination

Consultations should not be co-ordinated by the CCME Secretariat. There is a conflict of interest in the CCME coordinating or facilitating the consultations. ENGOs will be driven away from such an arrangement because they will have doubts whether they can truly voice their concerns without having to "go through" the staff of the CCME. A body conducting a consultation should not be directly administering the activities of the stakeholders providing input into the consultation.

By following our recommendations for input into the harmonization initiative, the CCME will show that it believes in meaningful participation of the public in its decision making process. We believe that public participation in decision making is not only a democratic value to be nurtured, but also the greatest assurance of environmentally sound decisions and the only approach which ensures widespread public support for the decisions taken.

APPENDIX 3

THE CONSTITUTION, FEDERAL PROVINCIAL RELATIONS, HARMONIZATION AND CEPA (Appendix 1 to CIELAP Brief 94/7: Reforming CEPA)

**THE CONSTITUTION, FEDERAL-PROVINCIAL RELATIONS, HARMONIZATION
AND CEPA**

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THE CONSTITUTION, FEDERAL-PROVINCIAL RELATIONS, HARMONIZATION AND CEPA

I. INTRODUCTION

In its document providing an overview of the issues for CEPA review,¹ Environment Canada identifies sustainable development and the coordination and harmonization of federal and provincial legislative and regulatory initiatives as two key issues. This paper explores the issues of constitutional basis of the federal role in environmental management, intergovernmental relations and the "harmonization" exercise currently being conducted under the auspices of the Canadian Council of Ministers of the Environment (CCME) in the context of sustainable development.

A brief overview of how governmental responsibility for environmental protection is allocated under the Canadian Constitution is provided. This is followed by a review of the past and current state of federal-provincial relations with respect to the environment. This review concludes that cooperation has been the exception rather than the rule in the environmental field.

Intergovernmental agreements are identified as an important exception to the general history of federal/provincial non-cooperation. Unfortunately, where the federal and provincial government have come to agreements to share responsibility for environmental protection, the results have been disappointing. These agreements present Canadian citizens with a number of challenges, as being administrative in nature, they require neither public comment nor review, and there are no mechanisms within them by which citizens can compel enforcement of the legislation to which the agreements apply.

Although not currently addressed within CEPA, the "harmonization" exercise presently being pursued through the CCME will have major implications for the future role of the federal government in environmental management in Canada. The harmonization initiative proposes to do something that has never been accomplished before: it attempts to establish clear, consistent, national environmental protection standards for Canada. However, given the poor past record of federal/provincial cooperation, and federal government's weak approach to its national role, the harmonization project has the potential to result in a "race for the bottom." The national standards achieved under harmonization may be whatever the lowest provincial standards are now.

Throughout the discussion, it is apparent Federal/provincial relations have been strongly coloured by federal reluctance to stand on its constitutional authority to protect the environment. Yet the achievement of environmentally sustainable development in Canada will require a strong federal role. The federal government must exercise its authority to set minimum national environmental protection standards for all Canadians.

II. FEDERAL JURISDICTION AND CEPA

The extent to which the Constitution of Canada affects the regulatory powers of the federal and provincial governments used to be an esoteric subject matter – the province of constitutional scholars in their ivory towers. No longer can this be said to be true, as the average Canadian, including the average bureaucrat and politician, has been subjected to more constitutional debate during the past few years than they would likely have ever desired. That being said, it is necessary here to reiterate a summary of the division of powers as it relates to the federal government's management of the environment.

Constitutional law, even with its recent infamy, still remains one of the most complex areas of jurisprudence. Thus while we attempt to present a synopsis of the relevant constitutional issues pertaining to the CEPA review, this discussion should in no way be considered to be a comprehensive legal opinion.² Discussion of constitutional law is worse than useless in a vacuum; therefore our primary recommendation at the outset is that the Standing Committee refer specific questions of constitutional law to a panel of well-known and respected constitutional and environmental experts, including lawyers from outside the federal and provincial governments. Moreover, we heartily recommend that this advisory panel be struck with the mandate to recommend how CEPA reform can be accomplished under the constraints of the constitution; rather than encouraging yet another negative pronouncement on why the federal government cannot do what it must do to protect the health and environment of all Canadians. Our constitution is a "living tree" with flexibility to serve many generations of Canadians. What we have been lacking is the vision and innovation to use our constitution in this way. Instead, we allow our politicians and bureaucrats to pass the "jurisdictional buck" back and forth, most often behind closed doors without the public's input.

As should be well-known by all Canadians at this point, the Constitution of Canada has two distinct parts; the *Constitution Act, 1867* contains the division of powers between the federal and the provincial governments and the *Constitution Act, 1982*, contains the Canadian Charter of Rights and Freedoms. Both parts affect the manner in which environmental regulation can be implemented. The division of powers provides the blueprint for which level of government is entitled to regulate in any specific subject matter, while the Charter constrains the manner in which each government can apply their laws to individuals.

The division of powers presents the largest obstacle to a comprehensive federal environmental regulatory framework, although many hold the opinion that this obstacle is more perceived than real.³ A growing body of scholarly papers have addressed the constitutional division of powers over the environment, indicating at the very least the

profound concern that the constitution should not limit the ability of Canadian governments to adequately regulate environmental matters.⁴ Furthermore, the balance of these writers affirm the necessity for a strong federal role in environmental management.

That the enactment of CEPA was intended to provide this strong federal role in relation to the regulation of toxics is not disputed.⁵ Similarly, it is not disputed, at least by the environmental community and some constitutional scholars, that CEPA has not lived up to its potential in terms of the ecological necessity to provide comprehensive management of toxics in the Canadian environment.⁶ Finally, it is clear that the constitutional mandate of CEPA should be reviewed in light of the imperative of a pollution prevention approach.⁷

What follows is a brief discussion of general constitutional law principles as well as a brief overview of the most important federal powers over the environment. The general principles provide the basis rules for constitutional interpretation and are provided here to demonstrate that such interpretation is not a simple question of deciding whether an impugned provision or regulation is local or national in scope.⁸

1) General Principles of Constitutional Law

I) The Nature of the Division of Powers

Theoretically, most of the division of powers pursuant to sections 91 and 92 of the Constitution Act, 1867 are supposed to "exhaustive" and "exclusive"; meaning that in respect of the powers enumerated therein, each government is supreme within its own sphere. As a practical matter generally, and particularly with respect to environmental matters, there is considerable overlapping jurisdiction, or "concurrency". The doctrine of concurrency allows the legislative competence of both levels of government to coexist as long as there is no direct conflict⁹, and belies the notion of exclusivity.

II) Pith and Substance

When courts are faced with the question of jurisdictional competence, the first threshold to cross is to determine the "pith and substance" of the impugned law. This inquiry leads to the determination of the most important feature of the law for the purposes of classification according to the division of powers¹⁰; taking into consideration both the purpose and effect of the law.

The application of the pith and substance doctrine allows one level of government to enact laws that impact substantially on matters outside its jurisdiction.¹¹ In such

situations, the court finds that the impact on the other government's jurisdiction is permissible as it is merely "incidental" to the constitutionally valid purpose and effect of the law.

A law which contains both federal and provincial powers can in some cases be treated as competent to both the federal and the provincial legislatures.¹² Where concurrent jurisdiction is identified, there exists the possibility for conflict between a valid federal law and a valid provincial law. Federal laws are usually paramount in the case of conflict. The question of how far one government can go in impacting another government's jurisdiction has been the subject of much judicial discussion as the lines of the division of powers can easily become imprecise, upsetting the delicate balance of power between the two levels of government.

III) Ancillary Power

Whereas the constitutions of the United States and Australia include an "ancillary" power in the enumerated federal powers, there is no such power in the Canadian constitution; nevertheless, several courts have implied such a power.¹³ Other courts have developed different tests to set limits to the encroachment by one level of government on areas of jurisdiction of the other.¹⁴ To make this area of constitutional law more oblique, there is *obiter dicta*¹⁵ from the Supreme Court in 1978 that supports the existence of the "ancillary" power but only with respect to the Parliament of Canada.¹⁶ It is not clear why the articulation of such a doctrine is needed given the "pith and substance" doctrine.¹⁷ In any event, as a general conclusion it can be said that some encroachment is allowable sometimes under some circumstances.

When a law is validly enacted, there may arise the question of whether the law validly applies to the other level of government. Such questions of interjurisdictional immunity are beyond the scope of this discussion.

IV) Paramountcy

The doctrine of paramountcy applies when there are inconsistent, or conflicting, federal and provincial laws. In such a situation, the federal law prevails, rendering the provincial law *ultra vires* to the extent that it is inconsistent or in conflict with the federal law. It must be stressed that the question of paramountcy only arises once it is determined that there are conflicting validly enacted federal and provincial laws. Otherwise, the problem of conflict is resolved without recourse to the doctrine of paramountcy. A validly enacted provincial law would have to expressly contradict a federal law for it to be defeated; that is, where "compliance with one law involves a breach of the other".¹⁸

2) Specific Federal Areas of Jurisdiction Pertaining to CEPA

1) Peace, Order and Good Government ("POGG")

Since the Supreme Court of Canada's decision in 1988 concerning the federal government's regulations under the *Ocean Dumping Control Act*¹⁹, there has been renewed interest in the federal government's peace, order and good government ("POGG") clause²⁰. The majority of the court held that marine pollution could be regulated by the federal government under the "national concern" branch of POGG. The majority held that marine pollution fit the national concern test of being a matter that had a "singleness," "distinctiveness," and "indivisibility" such that the provinces, even if they act in unison would be unable to effectively legislate in the area. Le Dain J., for the majority stated: "For a matter to qualify as a matter of national concern... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."²¹

This decision has been touted as powerful support for a federal environmental protection power; however, the court has since clarified that the environment is too diffuse a topic to be assigned to one level of government.²² Thus, it is necessary to look at discrete areas of environmental regulation such as control over toxic substances.

The inability of the federal government to secure adequate provincial cooperation on toxics regulation to date presents strong evidence, in the context of any constitutional challenge to current and future CEPA provisions and regulations, that the provincial inability to regulate toxics requires unilateral federal action.²³ This evidence of unsuccessful efforts to cooperate on these matters of national and international importance would likely help support the federal government's assertion that federal legislation is justified under the "national concern" test.²⁴ Hogg goes so far to state that: "It seems, therefore, that the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces."²⁵

Moreover, the development of international law on toxics and biodiversity support that these issues have recently been recognized as matters of international importance and as such require federal regulation.²⁶

The residual federal power, or POGG, has been used to fill the "gaps" in the powers divided between the federal government and the provinces,²⁷ as well as pertain to matters which are of "national concern".²⁸ The definition of matters of national concern was confirmed in the *Canada Temperance* case as follows:

"In their Lordships' opinion, the true test must be found in the real subject

matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the dominion Parliament as a matter affecting the peace, order, and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.²⁹

The national concern branch of POGG was relied solely upon by the S.C.C. in three cases concerning; aeronautics³⁰, the national capital region³¹, and marine pollution.³²

ii) Criminal Law Power in Relation to Public Health

The constitutional validity of several important federal public welfare statutes has been upheld on the basis that the legislation was valid criminal law enacted for the protection of the health and safety of Canadians. The importance of the criminal law power in respect of the constitutionality of CEPA should not be understated. It is crucial that criminal penalties remain a part of CEPA's enforcement regime from a constitutional perspective.

The Hazardous Products Act

The Manitoba Court of Appeal upheld the constitutionality of certain provisions of the Hazardous Products Act which prohibit the selling of particular infant cribs on the ground that they were dangerous.³³

The Food & Drug Act

The S.C.C. upheld certain provisions of the Food and Drug Act which prohibited the sale of contaminated or adulterate drugs and prohibited the sale of drugs in a false or misleading manner on the basis that the main purposes of the act were characterized as the protection of the public from adulteration and the suppression of fraud.³⁴

***The Clean Air Act*³⁵**

The Manitoba Court of Appeal upheld the constitutional validity of the Clean Air Act, which prohibited the emission of air contaminants in quantities which would constitute a significant danger to the health of persons. Simonsen J. found that "the dimensions of the health risk arising from air pollution is not proscribed by provincial boundaries. The harmful ingredients in air pose a national health risk."³⁶

The main issue in ensuring that the federal government has not used its criminal power to unlawfully usurp provincial power is the extent of the regulation and whether the legislative scheme contains prohibitions and/or the power to prohibit³⁷ in pursuit of some legitimate public purpose such as "public peace, order, security, health, morality..."³⁸

The emerging body of scientific documentation of the adverse, irrevocable and persistent effects of toxics in the environment³⁹, as well as the evidence of cross-media contamination from toxics in our land, air and water, would support the submission of a very different brief by the government of Canada in 1994 to justify both prohibition of toxics and cradle-to-grave regulation of toxics⁴⁰, then would have been possible at the time of CEPA's enactment. Thus the analysis of CEPA's constitutional underpinnings must evolve in light of this new scientific reality. There can be no doubt today that inadequate regulation of toxics in Canada presents dangers to the health of all Canadians and Canadian ecosystems, as well as to other communities and ecosystems in the world.

III) Trade and Commerce

The federal government has jurisdiction to enact laws in relation to "trade and commerce".⁴¹ In order to limit this potentially pervasive federal power in a way consistent with the division of powers, the courts have determined that there are two prongs; "... (1) political arrangements in regard to trade requiring the sanction of parliament, (2) regulation of trade in matters of interprovincial concern."⁴² It may also be that the power would include the general of regulation trade affecting the whole dominion.⁴³

IV) Fisheries Power

The federal government also has power over "sea coast and inland fisheries"⁴⁴ This power allows the federal government to regulate over environmental matters that adversely affect fish. The courts have found that this power does not permit the federal government to prohibit or regulate water pollution, without there being a direct connection to the health of fish.⁴⁵ The regulation of toxics is clearly connected to the health of fish, whether the fish habitat is affected by water pollution or air deposition.

v) Taxation and Spending Powers

The federal government has the power to raise revenue through direct and indirect taxation. This taxation power potentially has many uses for environmental protection. However, the federal government's taxing power cannot be used to indirectly usurp provincial powers. Thus any use of a federal environmental "toxics" tax should be clearly associated with the federal government's toxics management program.

The federal "spending power" is not specifically enumerated in the constitution. However, the federal government can use this power to influence areas of provincial jurisdiction by subsidizing certain provincial activities and by allocating conditional grants to provinces where they follow federal rules. In the absence of a clear concurrent power over environmental protection, the use of such persuasion could be a valuable tool for environmental regulation, especially with respect to national standard setting.

3) The Canadian Charter of Rights & Freedoms

The Charter provides for fundamental rules governing relations between individuals and the government. Again, any discussion of potential Charter infringements must be dealt with in the context of specific CEPA provisions or amendments. The most likely context in which such challenges could arise is in the enforcement provisions. The Charter protects individuals' procedural rights, including the right to silence.⁴⁶ Where an accused faces loss of liberty, life or security of the person, they cannot be compelled to provide self-incriminating information.⁴⁷ This limitation on the use of self-reporting data indicates the need for administrative penalties for some violations of CEPA.

4) Conclusions

The Canadian constitution presents a challenge in the reform of CEPA. The Act must be amended in a manner which ensures adequate protection of the environment and the health of Canadians from toxic contamination, and other environmental and health matters of national and international concern, while not being potentially subject to years of constitutional litigation. The political sensitivities regarding provincial autonomy⁴⁸ must not stand in the way of needed reform. Under several heads of power, the federal government has clear jurisdiction to regulate certain environmental matters, including the matter of the establishment of national standards for the control of toxic substances in Canada.

III. FEDERAL/PROVINCIAL RELATIONS AND CEPA

As argued above, there are clear constitutional grounds for federal jurisdiction over national environmental regulation. It is also clearly the case that, under the Constitution, responsibility for environmental regulation is most properly shared between the federal and provincial governments. This section of the discussion will review first the importance of cooperative federalism. Second, the discussion will review current federal/provincial relations as acted upon, and as provided for, under CEPA. A comparison of the former with the latter discussion will show that, so far as cooperation and coordination of effort are concerned, there is a marked shortfall in what could be accomplished. This shortfall will be relevant in our discussion in the section on harmonization.

1) Cooperative Federalism

Since the early 1980s, public and political attention has focused on the question of strong national standards in Canada. These concerns arose from a variety of factors: changes in the economy including the transition from a resource-based to a post-industrial, information-based economy, increasing awareness of the disparate impacts of these economic changes on the provinces, and an inclination on the part of the federal government to decentralize power.⁴⁹ Originally these concerns had to do with the national social support infrastructure (health care, unemployment insurance, pensions), but they also extend to other national concerns such as regulation of transportation and the environment. At approximately the same time that these concerns entered discussions of law and policy, came the Brundtland Report regarding sustainable development. Our Common Future strongly advocates nationally standardized environmental regulation, understanding that uniform standards protect against the creation of "pollution havens," as well as conferring other benefits.⁵⁰

The basic idea of cooperative federalism is that the federal government will work with the governments of the constituent units of the federation to establish uniform and equitable regulatory standards and programmes that will be applied and administered jointly by the governments of the constituent units and the federal government. Cooperative federalism may also require the transfer of resources from the central government to the constituent governments, and the transfer of resources from richer to poorer constituencies. This transfer of resources is necessary because uniform standards require uniform capacity to meet and enforce those standards. In theory, cooperative federalism allows for uniform, consistent and equal provision of services, and application of regulations, in each unit of the federation. The benefits of centralized standards and cooperative federalism are clear: equitable distribution of resources ensure a better standard of living for the nation's citizens; a consistent and consistently applied regulatory regime is more efficient and predictable and therefore, more amenable to the interests of industry and economic activity generally.⁵¹

In practice, Canadian federalism provides for some elements of the model, such as the national health care system and transfer payments between the federal

government and the provinces. As discussed in the second section of this paper, Canadian constitutional law establishes a legal framework within which mechanisms of cooperative federalism function.

In Canada this has meant achieving national standards without infringing unacceptably upon provincial jurisdiction. It can also mean, in its broader sense, how one can achieve the benefits of national citizenship or policy harmonization without losing the benefits of more effective and efficient program delivery by the provincial or local levels of government.⁵² The question of "infringing unacceptably upon provincial jurisdiction" has coloured much of the debate around cooperative federalism in the realm of environmental protection.

2) Uncooperative Federalism and Environmental Protection

There is a disconcerting consensus in discussions of the matter that the provinces resent federal intrusion in the realm of environmental regulation because the provinces were "there first." The consensus is disconcerting because, as "murky" a medium as Canadian constitutional law is, there is nothing in it to support the assertion that jurisdiction over a particular matter belongs to whoever gets "there first." Still, the claims are made:

"In the short term, the expansion of environmental activities by both levels of government in the late 1980s has led to overlap and increased tension. CEPA was a major contributor to this tension, since it proclaimed a more interventionist federal presence in what had traditionally been largely a provincial domain of activity."⁵³

And again:

"The overall result [of CEPA] is a federal move into environmental protection territory that was previously regarded as largely, if not exclusively, provincial."⁵⁴

The matter of jurisdiction has already been discussed in this paper, and the issue of the putative problem of duplication will be discussed below in the section dealing with harmonization. The rest of this part of the discussion will review the mechanisms under (and in the general vicinity of) CEPA that have attempted to deal with the aversion of the provinces toward the federal government stepping into their regulatory back yard.

i) Equivalency Agreements under CEPA

The equivalency agreements provided for under s. 34 of CEPA were enacted in

response to provincial objections to federal intrusion on an area they already regulated.

"Flexibility was introduced. [Under equivalency agreements] CEPA regulations, but not the entire Act, would draw back and not apply in provinces where it is agreed in writing between the federal minister and the provincial government that provincial laws are equivalent."⁵⁵

Responses outside of governments to these provisions has been mixed. Some argue that equivalency agreements serve as a "roadblock" to effective, national regulation of toxics and will result in a patchwork of provisions across the country.⁵⁶ Others are more optimistic and see the potential in the equivalency agreement provisions for true harmonization of national toxics regulation.

But for the recent publication of the Alberta Equivalency Order, these discussions would be rendered moot by the fact that no province has, until now, entered into an equivalency agreement with the federal government.⁵⁷ RFI indicates that negotiations for other agreements have been ongoing for some time, however.⁵⁸ Equivalency has been a tough regulatory nut to crack for a number of reasons, only one of which is provincial disinclination to cooperate. RFI cites several problems that have been encountered on the way to equivalency: provincial incapacity to meet the equivalency criteria of sections 108 and 109 of the Act concerning citizen's requests for investigations; the fact that the federal government took more time than expected to put toxics regulations in place; the cost of formulating and implementing equivalency agreements; and the difficulty of determining what, exactly, "equivalent" means.⁵⁹

Although equivalency agreements were to have been a concession to the provinces, RFI notes that "[t]he CEPA provision for equivalency agreements is clearly an irritant in federal-provincial relations."⁶⁰ The comments collected by RFI from provincial officials regarding equivalency reflect this:

"Several provinces expressed their reluctance to change their laws, their priorities or the way they did business "just because the federal government wants to do things differently." They chafe at having to develop equivalent procedures and argue that greater emphasis should be placed on achieving equivalent results instead....They complain about being forced to undertake activities they would have chosen not to carry out....At least four provinces state that they do not intend to negotiate equivalency agreements...[which] reflects more an unwillingness to change their regulatory approach and a skepticism about the federal government's ability to go it alone than an implicit acceptance of the federal role. One provincial official sums up the attitude of several of his colleagues this way: 'Let's stand back and watch them try to enforce all these regulations.'"⁶¹

The federal government has apparently softened its stance on equivalency, and appears to be bending more toward "equivalency of effect" provisions as opposed to identical provisions in provincial regulations, which may serve to deal with some of the complaints.

However, the other complaints expressed – the aversion to doing things differently, being forced to undertake tasks not currently undertaken, and the aversion to "all these regulations" – suggest a completely different kind of problem than federal "arrogance" or strict insistence on the requirement of equivalence.⁶² These complaints indicate that the requirements of CEPA are more than some provinces are willing to implement and enforce. At a time when cooperation seems more important than ever, the stance of these provinces is problematic. The impact that this demonstrated provincial reluctance will have on national standards under the harmonization initiative will be discussed below.

II) Administrative Agreements under CEPA

RFI reviews the main elements of administrative agreements under CEPA:

"Section 98 of CEPA provides for bilateral federal-provincial agreements with respect to the administration of the Act. Administrative agreements represent "work-sharing" partnerships for the cooperative and reciprocal management of toxic substances under the authority of both federal and provincial legislation. The agreements aim to eliminate overlap and duplication and to provide a "one-window" approach to industry. In order to maintain ministerial accountability under CEPA, administrative agreements will provide information-sharing and other mechanisms to allow the federal government to verify industry compliance with federal regulations. The federal government reserves the right to intervene directly if federal requirements are not being met."⁶³

RFI also notes that "administrative agreements do not have to meet the tough tests that equivalency agreements do."⁶⁴ While no administrative agreements have been signed to date, four are, apparently, "ready for signing."⁶⁵ Administrative agreements do not appear to irritate the provinces as much as equivalency agreements, but RFI notes some provincial officials' suspicion that "the federal government wants the provinces to do things 'the federal way.'"⁶⁶

III) Intergovernmental Agreements

While there are no administrative agreements, and only one equivalency agreement currently in force in Canada, Franklin Gertler notes that:

"Environment Canada is party to several hundred intergovernmental agreements...To these agreements must be added certain orders in council that purport to delegate administrative and law enforcement authority."⁶⁷

The fundamental problem posed by some of these agreements to the principle of the rule of law and meaningful accountability to the public for their contents is that:

"Law and policy for environmental protection in Canada are being articulated and implemented in some considerable measure through an obscure intergovernmental process that is inaccessible to the public and almost unknowable...This process often culminates in intergovernmental agreements and largely escapes both legislative control and judicial review."⁶⁸

On the one hand, as reviewed above, there are many benefits to be gained nationally from co-operative federalism, but it can also have seriously detrimental effects:

"...while agreements may be in the interest of executive government they may be contrary to the interest of the individual citizen and may undermine such important values as accountability and responsiveness."⁶⁹

Gertler offers as an example of the problems of "bureaucratic administrative federalism" the 1987 "Canada-Alberta Fisheries Agreement", that played an important role in the Oldman River Dam controversy:

"When [citizens] wrote to the Minister of Fisheries and Oceans demanding the application of the [*Environmental Assessment and Review Process Guidelines Order*] on the grounds that effects on fish habitat and fisheries were federal matters and the responsibility of the department, the Minister refused, in large part on the basis of "long-standing administrative agreements."...The correspondence in the Oldman litigation demonstrates several dangers associated with intergovernmental agreements delegating the administration and enforcement of federal environmental law. First, the general spirit of the agreements is such that federal officials will defer to the scientific evaluations and decisions of provincial authorities. Second, while lip service is paid to ongoing federal involvement and responsibilities, the administrative arrangements are regarded as precluding federal enforcement action...Finally, there are no remedy or appeal provisions in such agreements."⁷⁰

Intergovernmental agreements provide the opportunity for the provinces and the federal government to forget their differences and come to agreement. However, when the two levels of government have in the past managed to agree on environmental protection in this fashion, the agreements have all the appearance of agreeing to do little.

In delegating its authority under these agreements, the federal government appears to actually abandon its responsibilities, leaving the province more-or-less free to do as much, or as little, as it wishes with its delegated authority. The ramifications of this behaviour will be discussed below in more detail in the context of "harmonization."

iv) Reforming the Use of Intergovernmental Agreements Through CEPA

Gertler argues that a separate act dealing with intergovernmental agreements should be made into law. However, specific provisions dealing with intergovernmental agreements could also be made part of CEPA. These new sections might provide that:

- * the intention to negotiate an intergovernmental agreement is made public, through pre-publication, public consultation, and the publication of draft agreements in Part I of the *Canada Gazette* with an appropriate comment periods;
- * once agreements have been concluded, they be published in the *Canada Gazette* part II and indexed;
- * all agreements require *detailed* annual reporting to Parliament on the administration and enforcement of federal laws or equivalent provincial laws; and
- * all agreements have sunset clauses requiring periodic review.

In addition, the federal government should always retain its right to prosecute under federal statutes when entering into such agreements. Mechanism permitting citizens who believe that enforcement by provincial officials is inadequate to petition for federal enforcement or to undertake private prosecutions, should also be included in agreements.⁷¹

3) Federal/Provincial Advisory Committee

Section 6 of CEPA provides for the creation of a Federal/ Provincial Advisory Committee

"...for the purpose of establishing a national framework for national action and taking cooperative action in matters affecting the environment and for the purpose of avoiding conflict between, and duplication in, federal and provincial regulatory activity..."

According to the CEPA Annual Report 1992-1993:

"Representatives from Environment Canada, Health Canada and each of the

provinces and territories compose the Federal-provincial Advisory Committee (FPAC). This group ensures that the federal and provincial governments consult with each other and take action together to protect the environment from the effects of toxic substances. FPAC also aims to achieve nationally consistent environment standards."⁷²

The Annual Report notes that the action undertaken by FPAC so far has been the creation of several FPAC working groups (Ozone-Depleting Substances, Air Quality Guidelines, and CEPA Partnerships). Whether these working groups "ensure" federal-provincial consultation and action to protect the environment from the effects of toxic substances is not clear.

What is clear in the brief RFI review of FPAC is that the Committee does provide the provinces with something else to complain about:

"Interviews with FPAC members and a review of the minutes of FPAC meetings indicate a general satisfaction with the Committee's operations. It is important, however, not to confuse this satisfaction with provincial acquiescence with the status quo. At least two provinces question whether FPAC should continue to exist; their scenario for CEPA reform, which includes a more modest role for the federal government, has the Environmental Protection Committee of CCME playing the necessary federal-provincial coordinating role."⁷³

As will be discussed in detail below, the Canadian Council of Ministers of the Environment (CCME) may already be playing the "necessary federal-provincial coordinating role." Whatever role FPAC plays, it appears to be diminishing in importance to the provinces and territories, as suggested by the fact that the committee has never achieved its original plan to meet four times a year.⁷⁴ The Committee now meets twice a year, but, at the spring, 1993 meeting, only seven of twelve provincial and territorial representatives attended.⁷⁵ The reason offered for the reduced number of meetings, and the reduced number of attendees at the meetings is the expense.⁷⁶ A better explanation might be that the work statutorily created for FPAC is understood by the provinces and the territories as being done by another body, the CCME.

4) Canadian Council of Ministers of the Environment (CCME)

In current discussions of interjurisdictional cooperation and harmonization of federal/provincial environmental regulation, FPAC is never mentioned; the CCME, however, is. The Council, comprised of the federal, provincial and territorial Ministers of the Environment, has existed in one form or another since the early 60's. Its current form came into being in 1989. As for the Council's activities, this is what its brochure says:

"The Canadian Council for the Ministers of the Environment (CCME) is the major inter-governmental forum in Canada for discussion and joint action on environmental issues of national and international concern. The Council is made up of environment ministers from the federal, provincial and territorial governments. These 13 ministers normally meet twice a year to discuss national environmental priorities and determine work projects to be carried out under the auspices of CCME."[emphasis added]

The CCME, so far identical to FPAC in every way, save that it includes the federal Minister of the Environment, differs from FPAC in that it has a wider mandate (FPAC is bound to matters dealing with toxics under CEPA, while CCME has no statutory bounds to the environmental matters it may apply itself to) and it has a permanent Secretariat office in Winnipeg (funds for the office are supplied jointly by the provinces and territories, based on population; the federal government provides one third of the funding). Quite unlike FPAC, which forces the provinces to acknowledge a subordinate status to the federal government, the unique nature of the CCME puts the provinces "in a stronger position to resist federal proposals."⁷⁷

The CCME appears to be one of the best hopes in Canada for achieving cooperative federalism in environmental regulation. The question that must be asked, however, is whether the CCME represents the beginning of a new cooperative federalism in Canadian environmental regulation based soundly on principles of constitutional law, or represents another version of the "bureaucratic administrative federalism" described by Gertler.

IV. HARMONIZATION

1. Introduction

Until it adopted its new form in 1989, the CCME was an obscure, relatively uninfluential, purely political body that allowed off-the-record interaction between Canadian Ministers of the Environment. However, "the Council's long-established norm of consensual decision-making" has evidently strengthened "the provinces' ability to constrain federal involvement, particularly in joint ventures."⁷⁸ This is why "revitalization of the Council was consciously pursued by some provinces as a means to establish a credible alternative to federal policy-making."⁷⁹ This may also be why the provinces and the federal government have chosen the CCME as the forum within which to work toward harmonization.

Harmonization is not an initiative under CEPA. However, as harmonization will have a tremendous impact on all environmental regulation in Canada, it is important that it be discussed in the context of CEPA review.

The equivalency agreements under CEPA were intended to achieve harmonization – that is, they were supposed to eliminate duplication and overlap of laws emanating from different levels of government. They were also, in theory, to establish consistent, minimum standards for environmental protection nation-wide. The imperative of reducing overlap and duplication remains at the heart of the new harmonization imperative, although now there is more at stake than simple efficiency:

"Protection of the environment, while remaining vitally important to Canadians, must now be seen in a broader context. A context that includes maintenance of jobs and social programs, expenditure control, greater public participation in decision making and the globalization of economic and environmental considerations....

...Canada's Ministers of the Environment have recognized these changing trends and have concluded that the way in which we manage our environmental responsibilities has to change. They believe that a window of opportunity exists to undertake a fundamental review of Canada's environmental management regime and to establish a new regime based on cooperation, and a more effective definition of roles, responsibilities and capacity to act. They believe that our environmental protection objectives can be best met through a new management regime."⁸⁰

Toward creating that new management regime, the Ministers established a Task Group to define the scope of and develop a process leading to a Management Framework for Canada's Environment.⁸¹ The Task Group proposes that the purpose of the harmonization initiative should be:

"to develop a new Management Framework for Canada's Environment, based upon cooperation and an effective and efficient definition of roles and responsibilities, that will lead to and enhance the maintenance of a consistent and high level of protection of Canada's environment."⁸²

The Task Force also proposes a number of objectives and principles that should guide the development and implementation of the Framework. Attention should be drawn to the fact that the proposal scrupulously avoids mention of the words "law", "regulation", "statute" or anything that might suggest legislative or parliamentary involvement, or attract the requirements of public notice and publication in the Gazettes. The whole plan is proposed as a "management framework", and will result in an intergovernmental agreement the form of which has yet to be determined, although it may be roughly similar to one recently signed in Australia.⁸³

2) Questions and Concerns Regarding the "Harmonization" Exercise

If the resulting intergovernmental agreement is to be similar to the ones discussed above, then the proposal must raise serious concerns. Harrison notes that the provinces have worked to revitalize the CCME because it has strengthened their ability to "constrain federal involvement", and provides an "alternative to federal policy making." Will the harmonization agreement – as did the Canada/Alberta Fisheries Act agreement – also result in an "alternative" to federal enforcement of federal laws? In the absence of federal enforcement under the harmonization agreement, will the provinces be free – as Alberta was – not to follow federal legislation?

These questions, and other concerns, arise from four aspects of the plan in particular:

- i) the focus on the issues of "efficiency" and "duplication and overlap," as opposed to environmental protection;
- ii) the proposals that "roles and responsibilities" be determined on the basis of "effective use" of labour and capacity and not, apparently, on the basis of legally defined responsibilities under the Canadian constitution;
- iii) the potential for the intergovernmental dynamics of the harmonization exercise, particularly in the context of a weak federal role, to generate a "race to the bottom" in terms of environmental standards; and
- iv) the emphasis on "partnerships" with regulated sectors in the implementation of a "harmonization" agreement.

In sum, the harmonization initiative's objectives of clear, effective national standards for environmental protection and of interjurisdictional cooperation are worthy of support. However, there is a concern that, in an effort to achieve harmony, efficiency and standardization, the initiative might lose sight of the requirements of the Constitution and the rule of law. It may also lose sight of the goal of effective environmental protection.

i) "Duplication and Overlap" and the Goal of "Efficiency"

The ineffective implementation and enforcement of federal environmental laws have been reviewed elsewhere in this submission. Our conclusion in that section was that the failure of the legal regime to achieve much in the realm of environmental protection had more to do with lack of political will – as evidenced by an under-funded, inadequately trained and imprecisely mandated Department of the Environment – than any inherent flaw in the legislation. Given that there is very little federal environmental law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What, exactly, is being duplicated? Where, in a regulatory environment where the federal government acts on only three (of twenty) regulations, is there overlap?

Clear evidence of the existence and the detrimental effects of "duplication and overlap" on industry, the public and the environment should be provided, as there is a serious concern that the ultimate effects of the harmonization exercise, as presently conceived, may be lower environmental standards, less regulation and less effective enforcement. This concern is reinforced by the description of the second objective of the exercise, which is to "lead to greater clarity, predictability and certainty in government decision making processes." This objective is more fully explained:

"The public and the business sector will be assured of more predictable and consistent environmental decision making. This will facilitate decision making by companies that operate in more than one jurisdiction and will help ensure that the public will not have to deal with duplicative processes. Both the public and the private sector will face reduced costs and will bear a lighter regulatory burden."⁸⁴

It is not clear how "the public" has to deal with "duplicative processes." Indeed, members of "the public" currently deal with a dearth of processes that allow them to work to protect the environment. Complaints about "duplicative processes" and the current "regulatory burden" are chiefly made by business interests. The concerns of industry are valid and important. However, as presently conceived, harmonization appears to privilege these interests over others, which casts some doubt on how much the initiative can or will serve the interests of the Canadian public and the environment.

II) The Division of Roles and Responsibilities

While there is not a lot of law in Canada regarding the delegation of powers, what little there is is clear: constitutionally identified legislative powers may not be delegated.⁸⁵ As argued elsewhere in this paper, the division of powers provides significant protection for the environment and for the rights of Canadians. But, were one to deviate from the recognized, legal, mechanisms in the name of efficiency and harmonization, one would "[blur] the effective division of powers and [render] ineffective existing mechanisms for legal control over government."⁸⁶ The harmonization initiative must, therefore, not lose sight of the requirements of Canadian constitutional law.

Unfortunately, there are indications within the objectives and principles of harmonization that "lose sight" is just what the Task Force has done. It is difficult to disagree with the Task Force's conclusion that "efforts to address environmental issues through changes to the Constitution are not...an effective method for cooperation at this time."⁸⁷ Indeed, it is far from clear that changes to the Constitution are even necessary to provide for effective environmental management in Canada. However, the criteria proposed by the Task Force for the division of roles and attribution of responsibilities appear to take no notice at all of what the Canadian constitution requires.

The first of a number of these troubling principles states:

"The Framework will establish clear definition of responsibility, in particular those areas of exclusive responsibility.

Elimination of duplication, overlap and jurisdictional disputes will begin with reaching consensus on areas where exclusive responsibility can be assigned."⁸⁸

However, much of this work has already been done for the Task Force -- in 1867, when the *British North America Act* became law, and set out in sections 91 and 92 what were the areas of exclusive responsibility of the federal and provincial governments. The Task Force appears to be suggesting that the Ministers achieve by "reaching consensus" something other than what is already written in the Constitution. This principle, therefore, seems to propose either constitutional reform, or illegal delegation. As the Task Force clearly states that constitutional reform is not an option, there must be a concern whether the results "reached by consensus" will conform to the existing constitutional division of powers legal.

The list of principles goes on:

"Areas of shared responsibility will be identified and minimized while recognizing regional variation and the need for flexibility and capacity building...The division of roles and responsibilities will be based upon the most effective use of labour, resources, expertise and capacity."

Again, the point that the consideration of where roles and responsibilities lie must be based on a close reading of the Constitution must be emphasized. All of the other considerations -- as valid, and as sensible as they appear to be -- must be secondary. Otherwise the Framework will have no foundation in law and cannot stand.

III) National Standards and the Dynamics of Harmonization

Harmonization includes the stated principle that "Consistent national standards will be developed and maintained."⁸⁹ The creation, implementation and enforcement of strong national standards for environmental protection is an important principle. Standardization may result in the efficiencies of fewer, clearer, regulatory requirements and potentially the efficiency of a "single window" of monitoring and enforcement activities. It is not clear, however, how such standards will be achieved under the harmonization exercise.

First, let us examine the foundation the harmonization initiative has to build on. The evidence presented by RFI in its report, and, generally the history of federal/provincial

relations in matters of environmental regulation, indicate a lack of consensus that has to date rendered the achievement of consistent national standards all but impossible. The Task Force acknowledges that implementing harmonization requires "a commitment to cooperation that has not been evident to date."⁹⁰

Harrison describes the dynamic of disagreement between the provinces and the federal government as the "regulator's dilemma".⁹¹ This discussion has touched on some of the elements of the dynamic: the federal reluctance to regulate or impose itself on the provinces in spite of its clear authority to do so; the provincial resentment of any federal intrusion on environmental regulation (or, more accurately, as Harrison notes, federal intrusion on provincial resource management). Add to these elements the facts that some provinces, Ontario, Alberta and British Columbia primarily, and Quebec to a lesser extent, have over the past decade actually competed with one another in the establishment of tough regulatory programmes and well-organized, well-funded enforcement branches in their Ministries of the Environment. Other provinces have not been able to participate in these competitions because of lack of resources.

The provinces with their own strong laws and strong enforcement practices are more inclined to support national standards: if every province upholds strong standards, there will be less likelihood of capital flight to provinces where regulations are not as strict. The weaker provinces oppose strong national standards because they are disinclined to commit the resources to enforce higher standards.

Harrison studies an actual incident where this dynamic had an opportunity to play itself out in full: the formulation of the federal pulp mill dioxin and furan emissions regulations. At a time of high public concern about the presence of dioxins in pulp mill effluent, the federal government undertook to set new regulations under CEPA. Harrison's comments describing the "end game" before the regulations were finally set are illustrative of our concerns, and bear quoting at length:

"Since the dioxin issue coincided with the ... wave of environmental concern, provincial governments were eager to prove that they were not only doing a good job, but a better job than their neighbours. The resulting competition between Ontario, Quebec, Alberta and British Columbia to claim the most stringent standards probably resulted in tighter regulations for the pulp and paper industry, at least in the larger provinces....[But] when it came time to follow through on promises, provinces that had been eager to distance themselves from their neighbours in voters' eyes became quite eager to harmonize federal and provincial standards from the perspective of the regulated industry...Perhaps the most striking conclusion...is the weak role of the federal government...In addition to industry resistance, the federal government also faces resistance from provinces defending their own mills and their jurisdiction. It is striking that on occasions where some provinces were pressing for more stringent federal standards, it was the

defensive provinces to which the federal government deferred. Thus, in many respects, the new federal regulations reflect the lowest common denominator among the provinces, rather than reinforcing the position of more stringent provinces.⁹²

The first important pattern of governmental behaviour to note is that governments generally attend to environmental issues only in the context of high public concern about the environment. In times of low public interest, government activity correspondingly declines.⁹³ The second important pattern -- competition between jurisdictions in regulation-setting -- is attached to the first pattern: politicians take strong stances on environmental protection when there is political capital to be gained from doing so. The third important pattern to note is that, once the opportunity for political gain has passed, so too does the governmental resolve to regulate. Insecurity about the effects of strict regulation on industry sets in, and the provinces with strong regulations start to talk about "harmonization." The fourth, and final, pattern is unique to the federal government. While Harrison finds it "striking" that the federal government capitulated to the lowest common denominator, this seems entirely consistent with the general pattern of federal regulatory activity, or, more accurately, lack thereof in the environmental field.

There are parallels between these patterns of behaviour and the harmonization initiative, as well as some inconsistencies. One glaring inconsistency is that, although virtually all environmental regulation has arisen in whole or part as a response to citizen concerns about the environment, the harmonization initiative has arisen without the help of marked public concern. Rather, it is generally accepted that the recession of the early 90s has focused public attention on other matters.⁹⁴ Recall that the Task Force mentions in the Principles and Objectives paper that the Ministers of the Environment believe that a window of opportunity exists to undertake a fundamental review of Canada's environmental management regime and to establish a new regime based on cooperation, and a more effective definition of roles, responsibilities and capacity to act.⁹⁵

Is this "window of opportunity" the current public inattention to the environment? If so, and if the patterns described above work in reverse, then one should be concerned that, in the absence of strong public interest in the environment, governments may take the "opportunity" to downgrade environmental protection laws.

Public preoccupation with other concerns links harmonization with the second pattern of governmental behaviour. In a time where there is little political capital to be gained from taking a strong stance regarding environmental protection, it follows that there is little to be lost if environmental laws are eroded. This is particularly true if other concerns provide alternative sources for gaining political capital. These concerns are outlined by the Task Force: "fiscal constraints, [and] demands for deregulation"⁹⁶...concerns over the competitiveness of Canadian industry, serious reductions in government expenditures at all levels and increased public concern about

the public debt issue and government inefficiency.⁹⁷ One could reasonably surmise that the political gains to be made by meeting these concerns will more than compensate for whatever, limited, losses may arise from whittling away at environmental standards.

However, it should be noted that while the environmental concerns of the Canadian public are not necessarily top of mind, they have neither disappeared completely. Harrison notes that the environment has become a "core issue" for Canadians, and is something they are always generally concerned about, even if other issues take occasional priority.⁹⁸ A general awareness of this fact on the part of Canada's Ministers of the Environment may account for the comparatively low profile of the harmonization initiative.

The harmonization initiative exactly parallels the third behaviour pattern described above. As already noted, harmonization is primarily concerned with the interests of industry, and the interests of government in keeping industry in Canada, which is analogous to the concern the "competing" provinces had once the competition over pulp mill regulations had settled down. Their worry then was the regulatory disadvantage they had created for themselves. The analogous concern for harmonization is the "competitiveness of Canadian industry." The harmonization initiative expressly targets "competitive standard setting" as something it will work to avoid. It will avoid competition by setting national standards at a level reached by consensus.

The stated goals of setting standards by consensus and avoiding competitive standard setting are completely at odds with well understood dynamics of policy innovation in federal systems. In federal systems, new policies are usually first developed and adopted at the state or provincial level, and then implemented nationally. The "anti-competition" element of the CCME proposal has the potential to significantly constrain the capacity of individual provinces to raise standards and experiment with innovative policy approaches in the absence of the consent of their partner governments in the federation.⁹⁹

The fourth pattern indicates what will be the likely result of consensus-based standard-setting. The patterns that played themselves out over the pulp mill regulations will repeat themselves. The larger, richer provinces with high standards will push for standards like their's across the country. The provinces with lower standards, and fewer resources to enforce them, will have no interest in raising standards. The federal government, for all that it plays a lesser role in the forum of the CCME, will have to have the final say. And that say will be to set the standards in line with the poorer provinces. The national standards achieved by harmonization will be whatever the lowest standards are now. This result is inevitable so long as the federal government is unwilling to press the provinces to do anything more than what the least active province is prepared to do.

A "race for the bottom" does not have to be the inevitable result of harmonization. The fourth pattern of behaviour can and should be modified. The federal government can

assert the authority it has to ensure environmental standards are not eroded.

iv) "Partnerships" and the Uncertain Role of the Public

One of the stated principles of the initiative is that "the development of the Framework will include an effective stakeholder involvement and consultation process." The annotation elaborates:

"While the Framework is essentially a government to government initiative, public and stakeholder support will be essential to its success. Partnerships between governments and stakeholders will be developed."¹⁰⁰

This raises at least two questions. First, what happens after the Framework has been developed? Second, which stakeholders have the resources and are therefore the most likely to develop partnerships with the governments, and what will the effect of those partnerships be on regulation and enforcement?

Regarding the first question, recall Franklin Gertler's arguments reviewed above. Remember, in the Oldman River Dam controversy, that after Alberta and the federal government came to their agreement about administration of the Fisheries Act, the public found virtually no toe hold to force either government to comply with the law. Public review, opportunity to comment and opportunity to compel enforcement of the provisions of the agreement, as provided for in Gertler's recommendations below, are necessary in order to prevent this circumstance from arising again.

Regarding the second question, the strengthening of "partnerships" between the government and stakeholders raises serious problems. As already discussed, harmonization currently privileges the interests of industry; "partnerships" between industry stakeholders and the government will further exacerbate this imbalance. Furthermore, the role of government is to regulate and enforce; "partnerships" will confuse and distort this role, and, as experience as shown, will make enforcement more difficult, if not impossible.¹⁰¹

3) Conclusions

In light of the seriousness of the four concerns reviewed above, it is difficult, if not impossible, to endorse the CCME harmonization exercise as presently conceived. The justification presented in support of the effort (duplication and overlap) has yet to be fully demonstrated as a serious problem. In addition, the constitutional propriety of some of what is proposed as part of the exercise is open to serious question. Furthermore, the dynamics of the harmonization process among the provinces may lead to a "race for the

bottom" and the adoption of "lowest common denominator" standards.

The likelihood of such an outcome is reinforced by the emphasis placed in the process on the concerns of business interests, and the weakness of the federal government's role as promoter of strong national environmental standards. The capacity of the process to result in constraints on the ability of provinces to raise standards independently and to adopt innovative policy approaches is also a serious matter. Finally, the process as presently conceived insufficiently provides for meaningful public participation before and after the "management framework" is agreed upon and made.

V. CONCLUSIONS AND RECOMMENDATIONS

1) Constitutional Jurisdiction and The Federal Role In Environmental Management

The federal government's jurisdiction over toxics is well-supported under several federal heads of power, some of which can provide needed constitutional support to others. The federal government's power to enact criminal law in respect of health, the peace, order and good government clause, the fisheries power, the spending power¹⁰², the trade and commerce power, and the taxation power, separately and combined, provide the federal government with ample jurisdiction to enact minimum national environmental standards.

RECOMMENDATION

In order to ensure that nothing in CEPA prevents a broad reading of the federal government's environmental jurisdiction, in particular its capacity to set minimum national standards, the Preamble of CEPA be amended to explicitly state that:

"...Whereas the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines, codes of practice and standards..."

2) Intergovernmental Agreements

Intergovernmental agreements are a potentially useful mechanism for facilitating federal-provincial cooperation in environmental management. However, concerns exist regarding the extremely weak accountability mechanisms associated with the use of these agreements.

RECOMMENDATION

CEPA should be amended to provide that:

- * the federal government's intention to negotiate an intergovernmental agreement is made public, through pre-publication, public consultation, and the publication of draft agreements in Part I of the Canada Gazette with appropriate comment periods;**
- * once agreements have been concluded, they be published in the Canada Gazette part II and indexed;**
- * all agreements require detailed annual reporting to Parliament on the administration and enforcement of federal laws or equivalent provincial laws;**
- * all agreements have sunset clauses requiring periodic review; and**
- * all agreements should permit the federal government to retain its right to prosecute under federal statutes when entering into such agreements. Mechanism permitting citizens who believe that enforcement by provincial officials is inadequate to petition for federal enforcement or to undertake private prosecutions, should also be included in agreements.**

3) Harmonization

The "harmonization" process currently underway under the auspices of the CCME raises a number of serious concerns, and cannot be endorsed in its present form. The justification presented in support of the effort (duplication and overlap) has yet to be fully demonstrated as a significant problem. In addition, the constitutional propriety of some of what is proposed as part of the exercise is open challenge. Furthermore, the dynamics of the harmonization process among the provinces may lead to a "race for the bottom" and the adoption of "lowest common denominator" standards.

The likelihood of such an outcome is reinforced by the emphasis placed in the process on the concerns of business interests. The capacity of the process to result in constraints on the ability of provinces to raise standards independently and to adopt innovative policy approaches is also a major concern.

However, perhaps the most serious flaw in the harmonization project is the underlying potential for the federal government to abdicate any meaningful role in environmental management in Canada. The federal government appears willing to limit itself to whatever role the provinces regard as being appropriate for it. Furthermore, the

federal government appears to be distinctly unwilling to press the provinces to adopt standards or requirements beyond which they would be prepared to act upon on their own initiative. This raises questions regarding the federal government's future role in domestic environmental policy.

The federal government must affirm the fact that it is interested in what happens to Canada's environment and will intervene to the full extent of its jurisdictional capacity when it feels it is necessary to do so. The establishment of minimum standards for environmental protection within Canada is clearly provided for by CEPA and other federal statutes. It is now up to the federal government to demonstrate the political will necessary to effectively fulfill these responsibilities.

ENDNOTES

1. Environment Canada. Reviewing CEPA: An Overview of the Issues (Ottawa: Environment Canada, 1994)
2. The general principles we elaborate herein are meant to provide a road map for constitutional interpretation in the context of specific issues, should any arise during the review of CEPA.
3. See for example, T. Vigod and R. Lindgren, Overview of Federal Law, Regulation and Policy (Toronto: The Canadian Environmental Law Association)
4. See for example; Rodney Northey, "Federalism and Comprehensive Environmental reform: Seeing beyond the Murky Medium," Osgoode Hall Law Journal (1989), Vol.29, No.1, p.127; D.P Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972) 10 Osgoode Hall Law Journal 647; D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54; D. Tingley, ed., Environmental Protection and the Canadian Constitution (Edmonton: Environmental Law Centre, 1987) including A.R. Lucas, "Natural Resources and Environmental Management: A Jurisdictional Primer," p. 31; A.R. Lucas, "Case Comment on R. v. Crown Zellerbach Canada Ltd." (1989) 23 U.B.C.L.Rev. 355; D. Gibson, "Environmental Protection and Enhancement under a New Canadian Constitution," in Beck and Bernier, eds., Canada and the New Constitution (Montreal: The Institute for Research on Public Policy, 1983); Mains, "Some Environmental Aspects of a Canadian Constitution", (1980) 9 Alternatives 14; R. Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal Government," in Into the Future: Environmental Law and Policy for the 1990s (Edmonton: Environmental Law centre, 1989); P. Muldoon and B. Rutherford, Environment and the Constitution: Submission to the House of Commons Standing Committee on Environment 1991 (Toronto: The Canadian Environmental law Association, Brief No.200); and P. Muldoon and B. Rutherford, "Designing an Environmentally Responsible Constitution," 18 Alternatives No.4, May/June 1992; and B. Rutherford, "The Constitutional Division of the Environment: A Comment on the Oldman River Decision", National Journal of Constitutional Law, Vol.2, No.2, July 1992.
5. CEPA's preamble is evidence of this, declaring among other important environmental facts of life that "...the presence of toxic substances in the environment is a matter of national concern;" that "...toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;" and that "...the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice."
6. CELA, Overview of Federal law, Regulation and Policy. See also R. Northey, "Federalism and Comprehensive Environmental reform," p.129; wherein it is stated that "The government retreated from regulating all toxic chemicals from cradle-to-grave..."

7. Mandating the reduction of the use, and the zero discharge, of toxic chemicals is consistent with the pollution prevention approach. Accordingly, regulation of the use of toxics in commerce must be part of CEPA's mandate.

8. The veiled reference here is to the 1992 decision of the Quebec Superior Court: *The Attorney General of Canada v. Hydro-Quebec and The Attorney General of Quebec* (File No. 410-36-000024-914; August 6, 1992; Andre Trotier, J.S.C.)

9. Where there is conflict, the doctrine of paramountcy is invoked. federal laws are always paramount to, that is take precedence over, provincial laws.

10. Peter Hogg, Constitutional Law of Canada, (Toronto: Carswell Company of Canada, 2nd. ed., 1985), p.314.

11. Ibid.

12. This is known as the "double aspect" doctrine; but the courts have not made it clear when it is necessary to choose between the federal and provincial features of a challenged law. Hogg, ibid., at p.317 adopts Lederman's explanation:

...the double aspect doctrine is applicable when "the contrast between the relative importance of the two features is not so sharp." In other words, the double aspect doctrine is the course of judicial restraint.

When the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or a Legislature.

13. Hogg, The Constitutional Law of Canada, p.334.

14. This branch of constitutional law has developed into a truly confusing and conflicted doctrine. The S.C.C., in the span of three weeks, decided two cases which are in direct conflict. In *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161, the court upheld a federal law that impacted on provincial jurisdiction because the impact had a "rational, functional connection" with the federal law. In contrast, in *Regional Municipality of Peel v. MacKenzie* [1982] 2 S.C.R. 9, the court would not uphold an extension of the federal criminal law where it could not be shown that such an extension was "essential" to the legislative scheme. The former test is less strict and preferred by Hogg. (See Hogg, pp.334-337).

15. "Obiter dicta" are words of an opinion entirely unnecessary for the decision of the case. Such words are not binding as precedent. Black's Law Dictionary, Abridged 5th Edition, 1983.

16. In Laskin C.J.'s dissent in *A.-G. Que. v. Kellogg's of Canada* [1978] 2 S.C.R., in which the majority upheld a provincial law regulating advertising on television (television being

within federal jurisdiction) directed at children, he states that: "...in so far as the British North America Act may be said to recognize an ancillary power or a power to pass legislation necessarily incidental to enumerated powers, such a power resides only in the Parliament of Canada." (p.216)

17. As stated above, according to the pith and substance doctrine, a valid law can encroach upon areas outside the enacting legislature's jurisdiction. See *Bank of Toronto v. Lambe* (1987) 12 App. Cas. 575, and Hogg, Constitutional Law of Canada p.314.

18. *Smith v. The Queen* [1960] S.C.R. 776, p.800.

19. (S.C. 1974-75-76, c.55). The case is called *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

20. The opening words of s.91 of the *Constitution Act, 1867* confer on the federal Parliament the power:

to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by

this Act assigned exclusively to the Legislatures of the provinces...

21. *Crown Zellerbach* [1988] 1 S.C.R. 401, 438. Interestingly, Hogg finds the S.C.C.'s substitution in 1979 (*The Queen v. Hauser*, [1979] 1 S.C.R. 984) of the criterion of "newness" for "distinctness" (from the *Anti-Inflation Reference* and later to be referred to in *Crown Zellerbach*.) to specious. He concludes that "newness" is irrelevant and unhelpful... See also Lysk on this point, (1979) 57 Can. Bar Rev. 531, 571-572 and *Crown Zellerbach*, 432, per LeDain J. for the majority. Hogg cautions about the reference to 'newness' by LaForest J. dissenting at p.458.

22. *Friends of Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, at pp.63-64.

23. The opportunity for establishing equivalency agreements under CEPA also works in the favour of justifying federal jurisdiction.

24. See Hogg Constitutional Law of Canada. In the second S.C.C. case on "national concern," *Munro v. National Capital Commission* [1966] S.C.R. 663, Cartwright J. writing for a unanimous court referred to the unsuccessful efforts to zone the national capital region through the cooperative action of the two provinces of Ontario and Quebec.

25. See Hogg, Constitutional Law of Canada 3rd. ed., s.17.3(c). The provincial inability test was referred to in *Crown Zellerbach*, *Labatt Breweries v. A.-G. Can.* [1980] 1 S.C.R. 914, 945; *Schneider v. The Queen* [1982] 2 S.C.R. 112, 131; *The Queen v. Wetmore* [1983] 2 S.C.R. 284, 296.

26. The United Nations Conference on the Law Of the Sea was referred to in *Crown Zellerbach*. Although the *Labour Conventions* case seemed to rule out a separate international treaty power, Hogg suggests that the earlier Radio Reference case (*Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304) holding that the federal power to perform treaties came within POGG may be finding renewed judicial favour. See Hogg, s.17.2.

27. Hogg, Constitutional Law of Canada 3rd. ed., s.17.3(a); for example, treaties, official languages and offshore resources.

28. *Canada Temperance Federation; Russell v. The Queen* (1882); *A.-G. Ont. v. A.-G. Can* (Local Prohibition)[1896] A.C. 348: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada." (p.361).

29. *Canada Temperance*, pp.205-206.

30. *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292.

31. *Munro v. National Capital Commission* [1966] S.C.R.663.

32. *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401.

33. *R. v. Cosman's Furniture* (1972) Ltd. et al. (1976), 32 C.C.C. (2d) 345 (Man. C.A.).

34. *R. v. Wetmore et al.* (1983), 2 D.L.R. (4th) 577 (S.C.C.).

35. This act was repealed by s.145 of *CEPA*. Part IV of *CEPA* allows the federal government to regulate air pollution from federally controlled works, undertakings and activities such as nuclear power plants, railways and airlines. The regulation of fuels and fuel additives under the former *Clean Air Act* is now contained in ss.46-48 of *CEPA*. Part V of *CEPA* (sections 61-65) pertains to domestic sources of air pollution that have international effects. Section 61(2) codifies the "provincial inability" test and s.63(3) allows for equivalency agreements regarding federal regulations attempting to curb air pollution with international dimensions (either causing international air pollution or causing (or likely to cause) a "violation of an international agreement entered into by the Government of Canada in relation to the control or abatement of pollution." Note that the reference is to any international agreement regarding pollution, not just air pollution.

36. *Re Canada Metal Co. Ltd. and The Queen* (1982) 44 D.L.R. (3d) 124 (Man.Q.B.), pp.130-131.

37. Mere regulation of an activity is not criminal law. See *Re Information Retailers Association of Metropolitan Toronto Inc.* (1985), 22 D.L.R. (4th) 161 (O.C.A.), *City of Montreal v. Arcade Amusements Inc. et al.* (1985) 18 D.L.R. (4th), 161 (S.C.C.) and *Labatts*.

38. These decisions all applied the test in the seminal case regarding the true nature of criminal law: see *Reference re Validity of s.5(a) of Dairy Industry Act* (The Margarine Reference) [1949] 1 D.L.R. 433 at pp. 472-3. Some legitimate public purpose must underlie the prohibition:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? *Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law...*"(emphasis added).

39. Dr. Theo Colburn's work for World Wildlife Fund US, recent reports of the International Joint Commission, Toxic Trade Update 6.4 (Greenpeace) citing Environmental Research Foundation, *Rachel's Hazardous Waste News*, #343, June 24, 1993.

40. This is probably true of biotechnology given the signing of the Biodiversity Convention, the rapid loss of biodiversity and the patenting of life-forms around the globe. In addition, the discovery and use of indigenous plant species for medicinal purposes is also

41. S.91(2).

42. *Citizens' Ins. Co. v. Parsons* (1881), 7 App. Cas. 96

43. *Ibid.*

44. *Constitution Act, 1867*, s.91(12).

45. See *R.v. Fowler*, [1980] 2 S.C.R. 213, 113 D.L.R. (3d) 513 and compare *Northwest Falling Contractors Ltd. v. The Queen*, (1980), 113 D.L.R. (3d) 1 (S.C.R.)).

46. The right to silence is considered to be a component of the procedural rights contained in s.7, and is also protected by s.11(c), 11(d), and s.13.

47. For example, see *R. v. Weill's Food Processing Ltd.* (1991), 6 C.E.L.R. (N.S.) 248 (Ont. Ct. J.), wherein the Ontario Court of Justice held that using mandatory spill reports as evidence would be contrary to an accused's right to silence.

48. Such sensitivities are reinforced by court decisions such as the *Hydro Quebec* case wherein a Que. Supreme Court struck down a PCB regulation under CEPA as being unconstitutional ("ultra vires"). Until, this vaguely-reasoned decision has been taken to the S.C.C., it cannot be considered to be a definitive statement on the constitutionality of the regulation. Moreover, should it be found to be unconstitutional by the S.C.C., it is likely possible to sever this regulation from the remainder of CEPA, leaving the balance of the Act and its regulations intact. In such a scenario, the appropriate response, we submit, is to identify possible inadequacies of the evidence put forward by the federal government to support its constitutional mandate and/or determine how better to define the scope of regulations under CEPA to avoid overstepping provincial jurisdiction.

49. Institute of Intergovernmental Relations. Approaches to National Standards in Federal Systems. (Kingston: Queen's University Press, September, 1991) at 1.

50. World Commission of Environment and Development. Our Common Future. (New York: Oxford University Press, 1987) at 314 ff.

51. The analysis in this paragraph is discussed generally in, Institute of Intergovernmental Relations, Approaches to National Standards, *ibid.*

52. Institute of Intergovernmental Relations, *ibid.* at 3.

53. Resource Futures International. Evaluation of the Canadian Environmental Protection Act: Final Report. (Ottawa: Ministry of Supply and Services, 1993) at 99.

54. Alastair R. Lucas, "Jurisdictional Disputes: Is 'Equivalency' a Workable Solution?" in Donna Tingley, Ed. Into the Future: Environmental Law and Policy for the 1990's. (Edmonton: Environmental Law Centre, 1990) at 25.

55. Lucas, *ibid.* at 25-26.

56. See Toby Vigod and Rick Lindgren "Overview of Federal Law, Regulation and Policy: A paper presented to the Canadian Institute two day course on Environmental Law and Regulation in Ontario", (Toronto: Canadian Environmental Law Association, 1994) at 25-26.

57. See Canada Gazette, Part I (July 23, 1994), at p. 3459.

58. Resource Futures International, Evaluation of CEPA, at 104.

59. *ibid.*, pp.102-103.

60. *ibid.* at 103.

61. *ibid.*

62. Ibid., at 103.

63. Ibid., at 104.

64. Ibid.

65. Ibid., at 105. One of these agreements, the Quebec/Canada agreement on pulp and paper effluent, is, according to Stephania Trombetti at Environment Canada, waiting only on the signature of the Premier of Quebec, which, at the time of writing, August 1994, may wait until the elections in Quebec are over. An Access to Information request has been entered by the author for this agreement.

66. Ibid., at 105.

67. Franklin Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection", in Steven A. Kennett ed., Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources. (Calgary: Canadian Institute of Resources Law, 1993) at 261-262.

68. Ibid., at 260.

69. N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements in Canada and Australia" (1991) 29 Alta. L. Rev. 792 at 797.

70. Gertler, "Lost in Intergovernmental Space," at 274.

71. Ibid., at 281-282.

72. Environment Canada. Canadian Environmental Protection Act: Report for the period April 1992 to March 1993. (Ottawa: Minister of Supply and Services, 1993) at 3-4.

73. Resource Futures International, Evaluation of CEPA, at 100.

74. Ibid.

75. Ibid.

76. Ibid.

77. Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," forthcoming in Douglas Brown, Janet Hiebert, eds., Canada – The State of the Federation 1994 (Kingston: Institute of Intergovernmental Relations, 1994) at 27.

78. Ibid., at 28.

79. Ibid.

80. Canadian Council of Ministers of the Environment. "Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles," undated, at 2-3.

81. The Harmonization Task Group members are: Dr. David Besner, Director, Policy and Intergovernmental Affairs, Department of the Environment, Fredericton, NB; Mr. Andre Harvey, Assistant Deputy Minister, Sustainable Development and Conservation, Department of Environment and Wildlife, Sainte-Foy, Quebec; Ms. Janet Bax, Director, Federal Provincial Relations Branch, Policy and Communications Directorate, Environment Canada, Hull, Quebec; Ms. Jisele Jacob, Acting Director General, Program Integration Directorate, Environment Canada-EPS, Hull, Quebec; Mr. Ken Richards, Coordinator, Intergovernmental Relations Office, Ministry of the Environment and Energy, Toronto, Ontario; Mr. Dick Stephens, Director, Legislation and Intergovernmental Affairs, Department of Environment, Winnipeg, Manitoba; Mr. Bob Ruggles, Director, Water Quality Branch, Environment and Resource Management, Regina, Saskatchewan; Mr. Ron Hicks, Assistant Deputy Minister, Research and Strategic Services, Alberta Environment Protection, Edmonton, Alberta; Mr. Jamie Alley, Director, Corporate Policy, Planning and Legislation, Ministry of Environment, Land and Parks, Victoria, British Columbia.

82. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," at 4.

83. The Australian "Intergovernmental Agreement on the Environment, May, 1992" was the original model for the Canadian intergovernmental agreement on Harmonization. However, according to Barbara Czech, Director of Communications, CCME, the final Canadian agreement may take a form completely unlike the Australian agreement.

84. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," at 5.

85. *A.G. Nova Scotia v. A.G. Canada* (Interdelegation Reference), [1951] S.C.R. 31.

86. Gertler, "Lost in (Intergovernmental) Space," at 255.

87. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," p.7.

88. *Ibid.*

89. *Ibid.*, at 8.

90. *Ibid.*, p.9.

91. Kathryn Harrison, "The Regulator's Dilemma: Regulation of Pulp Mill Effluent in a Federal State," presented at the Annual Meeting of the Canadian Political Science Association, Ottawa, June 1993.

92. Ibid., at 31-33.

93. Many writers beside Harrison have noted this tendency. See, among others, Toby Vigod and Richard D. Lindgren, "Overview of Federal Law, Regulation and Policy" (Toronto: Canadian Environmental Law Association, 1994); George Hoberg, "Environmental Policy: Alternative Styles", in Michael M. Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993); Tom Conway, "Taking Stock of the Traditional Regulatory Approach" in G. Bruce Doern, ed., Getting It Green: Case Studies in Canadian Environmental Regulation (Toronto: C.D. Howe Institute, 1990); Ted Schrecker, "Of Invisible Beasts and the Public Interest: Environmental Cases and the Judicial System" in Robert Boardman, ed., Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1993).

94. See George Hoberg, "Environmental Policy: Alternative Styles" in Michael M. Atkinson (ed.) Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993) 307.

95. Canadian Council of Ministers of the Environment. "Rationalizing the Management Regime," p.3.

96. Ibid., p.9.

97. Ibid., p.1.

98. Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," p.23.

99. For a discussion of the dynamics of policy innovations in federal systems see, for example, K. McRoberts, "Federal Structures and the Policy Process," in M. Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993), pp.159-160.

100. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," p.8.

101. George Hoberg, "Environmental Policy: Alternative Styles," at 315.

102. Northey suggests that "... the federal government could use its spending power to provide uniform administration and enforcement of comprehensive environmental regulation across Canada. Equally, it could use this power to link regional economic development to environmental performance. Secondly, the federal government could use its declaratory power to create a national scheme of toxic waste disposal sites, thus removing a major regulatory burden facing the provinces. Federal responsibility for this area could encourage provinces to assist the federal government in thoroughly controlling the remaining aspects of a comprehensive cradle-to-grave scheme." (p.180)

APPENDIX 4

An Open Letter to Prime Minister Chretien Regarding the Protection of Canadians' Environment and Health

February 17, 1995

February 17, 1995

The Rt. Hon. J. Chretien
Prime Minister
House of Commons
Ottawa, Ontario
K1A 0A6

An Open Letter Regarding the Protection of Canadians' Health and Environment

Dear Mr. Chretien,

We are writing to you to express our deep concern regarding a number of initiatives recently undertaken by your government. Taken together, these measures raise serious questions about the future role of the federal government in the protection of the health and environment of present and future generations of Canadians. We are especially alarmed by the following developments:

- * the Environmental Harmonization Initiative of the Canadian Council of Ministers of the Environment (CCME). Through this initiative, the federal government appears to be prepared to abandon many of its essential responsibilities for the protection of Canada's environment to the provinces. The provinces have neither the constitutional authority, the human and technical resources, nor in some cases, the will, to take on this mandate;
- * the introduction of Bill C-62, *The Regulatory Efficiency Act*. This Bill would allow businesses to be exempted from federal regulations by negotiating private "agreements" with Ministers. The Bill could apply to all federal legislation and regulations. Regulations in areas essential to the protection of Canadians' health and environment such as food, drugs and medical products, biotechnology, mining, forestry, aquaculture and automobiles have been targeted for early action; and
- * the Environment Canada and Department of Fisheries and Oceans program reviews. Major reductions in the mandates and capacity of these agencies to provide for the protection of Canadians' environment, health and natural resources are under consideration.

In the Liberal Party's 'Red Book' you promised to strengthen the role of the federal government in the protection of Canadians' health and environment. We ask you to fulfil

this commitment by:

- * withholding the federal government's ratification of the CCME harmonization agreement until the completion of public hearings on the environmental responsibilities of the federal government by the House of Commons Standing Committee on Environment and Sustainable Development;
- * withdrawing Bill C-62, the *Regulatory Efficiency Act*; and
- * ensuring that Environment Canada and the Department of Fisheries and Oceans retain their mandates and core capacity to protect Canadians' environment, health and natural resources, including marine and inland fisheries.

Your government was elected on an expectation of positive change, not a dismantling of the federal government's essential functions. It is fundamental to the security of present and future generations of Canadians that the federal government continue to play the leading role in the protection of their health and environment.

We look forward to your reply.

Yours Sincerely,

Signatories as attached.

Signatories

**Canadian Institute for Environmental Law and Policy
Canadian Environmental Law Association
Canadian Environmental Defense Fund
Canadian Labour Congress
CAW Canada
Communications, Energy and Paperworkers Union of Canada
Friends of the Earth Canada
Greenpeace Canada
Ocean Voice International
Pollution Probe
Sierra Club of Canada
United Steelworkers of America - National Office (Canada)
Action: Environment
Conservation Council of New Brunswick
East Coast Environmental Law Association
Environmental Coalition of Prince Edward Island
Newfoundland and Labrador Environmental Association
Citizens' Environmental Alliance of Southwestern Ontario
Clean North
Conservation Council of Ontario
The Environmental Forum
Great Lakes United
Northwatch
Toronto Environmental Alliance
Windsor and District Labour Council - Environment Committee
Friends of the Oldman River Society
Pembina Institute for Appropriate Development
Rivers Defense Coalition
Sierra Club of British Columbia
Sierra Legal Defense Fund
West Coast Environmental Law Association
Yukon Conservation Society**

Organizations adding signatures after February 17, 1995

**BC Wild
Biomedical Incineration/Ban Incineration
Bruce Peninsula Environment Group
Centre for International Studies
Citizens Against Pollution
Citizens For a Quiet Beach
Dummer Environment Watch
The Earth Awareness Society of Edmonton
Ecology North
Edmonton Friends of the North Environmental Society
Environmental Hazards Team for the Great Lakes Sink
Environmental Health Effects
Envirowatch
Furiously Opposed To All Dumping
Grassroots Woodstock
Guideposts for a Sustainable Future
Halton Environmental Land Protectors
Incineration Counteracts the Environment
Kingston Environmental Action Project
Lawns for Kids
Mothers United to Stop Trash
Pesticide Action Group -- Guelph
Preservation of Agricultural Lands
Shore Watch
The Nova Scotia Environment and Development Coalition
Nova Scotia Organic Growers Association
Pippy Park Conservation Society
Save the Rouge Valley System
Saskatchewan Environmental Society
Save Georgia Strait Alliance
Sierra Club of British Columbia
Stop Incineration United In Yards Anywhere
Trout Unlimited Canada
The Valhalla Society
Voice of the Earth Society
Washademoak Environmentalists
Waste Not
Wastewise**