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BRIEF TO THE HOUSE OF COMMONS STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT REGARDING THE CANADIAN COUNCIL OF MINISTERS OF THE ENVIRONMENT (CCME) ENVIRONMENTAL 'HARMONIZATION' INITIATIVE

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Brief to the House of Commons Standing Committee on Environment and Sustainable Development Regarding the Canadian Council of Ministers of the Environment (CCME) Environmental 'Harmonization' initiative.

1. INTRODUCTION

The Canadian Institute for Environmental Law and Policy (CIELAP), Canadian Environmental Law Association (CELA) and the West Coast Environmental Law Association (WCELA) welcome the opportunity to address the House of Commons Standing Committee on Environment and Sustainable Development regarding the Canadian Council of Ministers of the Environment's (CCME) environmental 'harmonization' initiative.

This brief provides a brief historical overview of the evolution of the CCME harmonization initiative. This is followed by a discussion of the rationale for the initiative, and an analysis and assessment of the contents of the proposed "Canada-Wide Accord on Environmental Harmonization" and sub-agreements on inspection, Canada-wide environmental standards, and environmental assessment.

This discussion concludes that the proposed Accord and sub-agreements would devolve responsibility of the enforcement of the bulk of federal environmental law to the provinces and territories, severely constrain the ability of the federal government to establish and maintain meaningful national environmental standards, and effectively limit the application of the Canadian Environmental Assessment Act to undertakings which take place on federal lands.

The brief continues with an examination of implications of the proposed Accord and sub-agreements, should they be adopted, for the future protection of Canada's environment. This includes an review of the existing environmental roles and responsibilities of the federal government and their impact on environmental protection in Canada, and the track record of previous efforts to devolve federal environmental responsibilities to provincial governments.

A substantial discussion of recent developments at the provincial level, particularly in terms of budgetary and staffing reductions to environmental agencies, and the weakening of environmental laws is also provided. These developments raise serious questions about both the will and capacity of provincial and territorial governments to assume the environmental protection functions which would be transferred to them from the federal government as a result of adoption of the proposed Accord and Sub-agreements.

The brief concludes with a discussion of potential alternatives to the current CCME harmonization initiative to improve the coordination and effectiveness of the efforts of the federal, provincial and territorial governments, in the protection of the health and environment of present and future generations of Canadians.

II. THE CCME HARMONIZATION INITIATIVE: A BRIEF HISTORY

The history of the CCME harmonization process begins with the creation of the Canadian Council of Ministers of the Environment (CCME) as a separate entity in 1988. Previously environment and natural resources ministers had sat on a joint council, called the Canadian Council of Resource and Environment Ministers, first established in 1962.

The CCME existed principally to provide a forum for off-the-record exchanges between provincial and federal ministers of the environment. It also provided a forum for similar contacts among federal and provincial environmental officials. The Ministers have traditionally met approximately every six months, and decision-making occurred within the Council on a consensual basis.[1]

The profile of the CCME was significantly enhanced in 1992 when the then Prime Minister, the Rt. Hon. Brian Mulroney, identified the Council as one of four key institutions in the implementation of a sustainable development agenda in Canada, in his speech to the United Nations Conference of Environment and Development.[2]

The CCME environmental 'harmonization' initiative first began to take shape during the brief government of Prime Minister Kim Campbell. During this time there were indications from the federal government of a willingness to reduce its role in environmental matters, and to enhance the role of the Council in the formulation and implementation of national environmental policies.[3]

The concept of an enhanced role for the CCME was an attractive proposition to the provinces for a number of reasons, particularly in the context of the more active environmental role that the federal government had taken on in the late 1980's and early 1990's. In particular:

> "Within the CCME the provinces...are in a relatively strong position to resist federal proposals. The Council's long-established norm of consensual decision-making also strengthens the provinces' ability to constrain federal involvement, particularly in joint initiatives. These features can help explain why revitalization of the Council was consciously pursued by some provinces as a means to establish a credible alternative to federal policy-making."[4]

Following its November 1993 meeting, the CCME announced that harmonization would be its top priority in the coming two years. A document describing the "Purpose, Objectives and Principles" of the initiative was released in June 1994.[5] The first words in the document stated that:

> "The elimination of duplication and overlap in federal/provincial/territorial regulatory matters, the harmonization of policies and programs, and the need

> to redefine working relationships between orders of government, the private sector and the public, have quickly become fundamental issues in the Canadian political context."

By late 1994, environmental organizations responding to the document had begun to express doubts that "duplication and overlap" in federal and provincial environmental programs was as pressing a problem as it was being made to be. A submission made to the House of Commons Standing Committee on Environment and Sustainable Development in September 1994 by CIELAP, as part of the Canadian Environmental Protection Act (CEPA) review process asked:

> "Given that there is very little federal law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What, exactly, is being duplicated? Where...is there overlap?"[6]

The Institute expressed other concerns in its brief as well. The harmonization project seemed to contemplate transfers of authority and responsibility between governments in a manner which was inconsistent with basic principles of the constitution. CIELAP also noted that the CCME's consensus based decision-making process was likely to result in "lowest common denominator" national environmental standards.[7]

At the fall 1994 CCME meeting the Ministers decided to release a draft Environmental Management Framework Agreement, and four 'schedules' dealing with environmental assessment, national environmental standards, environmental law enforcement, and international environmental affairs. These drafts were the subject of a multi-stakeholder consultation hosted by the CCME in February 1995. Further schedules, on a wide range of issues, where stated to be under development.

The draft Framework Agreement and accompanying four schedules prompted expressions of serious concerns from the environmental community. The Agreement proposed the transfer of most the federal government's substantive environmental protection functions within Canada to the provinces and territories, and the transfer of responsibility for national environmental policy-making and the establishment of national environmental standards from the federal government to the CCME.

A commentary on the draft Framework Agreement developed by CIELAP and CELA described it as a "de facto" constitutional amendment, which would result in the effective repeal of most existing federal environmental laws, including CEPA, the Canadian Environmental Assessment Act, and the pollution control provisions of the Fisheries Act. CIELAP and CELA also noted that the proposed agreement would greatly expand the role of the provinces in the development of Canada's position on international environmental issues.[8] This brief is attached as Attachment number 1.

A statement, endorsed by a large number of environmental non-governmental organizations from across Canada was released in March 1995, asking the federal Minister of the Environment not to proceed with the harmonization initiative.[9]

The May 1995 CCME meeting was an important watershed in the evolution of the harmonization project. The Ministers failed to come to agreement on the future direction of the initiative. There were reported to be particular disagreements between the federal Minister of the Environment and her provincial and territorial counterparts on the issue of environmental assessment. The following month the House of Commons Standing Committee on the Environment and Sustainable Development released its report on the review of CEPA, calling for a significantly strengthened role for the federal government in the protection of Canada's environment.[10]

In addition, in response to the doubts expressed about the amount and seriousness of duplication and overlap in the environmental programs of the federal, provincial and territorial governments, the CCME commissioned a consultant's report on the topic. The resulting report, completed in August 1995, showed that there was very little actual duplication and overlap, and what there was had been effectively limited by agreements between governments.[11]

However, a demand for the revitalization of the CCME project was an important outcome of the September 1995 Premiers 'conference. As a result, the federal Minister of the Environment was asked by the Prime Minister to reach an accommodation on the initiative with her provincial counterparts, particularly in the context of the upcoming Quebec referendum.[12]

In the aftermath of the Quebec referendum, the harmonization initiative took on even greater significance. At the November 1995 CCME meeting it was agreed to release a new draft of the Framework Agreement and drafts of all of the proposed schedules, except for that dealing with environmental assessment, These dealt with such diverse topics Monitoring, Compliance and Enforcement, Policies and Legislation, Standards and Guidelines, Environmental Education, Environmental Emergencies, State of the Environment Reporting, International Affairs, and Research and Development.

In January, 1996, the CCME held a multi-stakeholder workshop in Toronto to review the draft Agreement and Schedules. The drafts where severely criticized by environmental non-governmental organizations, aboriginal organizations, and members of the academic community in attendance.

The chief problem identified with the Accord, was that it would establish the CCME as Canada's national environmental policy and decision-making body, effectively creating what was described as a 'new level of government' which would be accountable to no legislature or electorate. Furthermore, it would have bound the members of the CCME to a unanimous

consent decision-making process that would either lock the ministers in endless negotiations, or result in lowest common denominator outcomes.

In addition, the Agreement proposed to solve the alleged problem of "duplication and overlap" by delegating to the provinces the responsibility for the enforcement of federal environmental laws. In its February 1996 analysis of the proposed Framework Agreement and Schedules completed for the Harmonization Working Group of the Canadian Environmental Network (CEN), CIELAP concluded that it was "a model for dysfunctional federalism." A copy of this analysis is attached to this Brief[13] as Attachment number 2. A further analysis is outlined in Attachment number 3.

However, pressure from the provinces to proceed with the initiative continued to grow. During a post-referendum tour of the provinces by the new federal Minister of Intergovernmental Affairs, Stephan Dion, in early 1996, environmental issues, along with manpower training, where identified by the provinces as being the leading irritants in federal-provincial relations.

The federal Minister of the Environment, Mr. Marchi, found himself pressed between the environmental community and other critics of the harmonization agreement, who asked that he not proceed with the initiative, and desire of the federal government to accommodate provincial concerns and promote national unity. The government appeared to be particularly interested in the conclusion of an agreement to demonstrate its flexibility and the potential for non-constitutional approaches to the reform of the federation.[14]

In the result, at the May 1996 CCME meeting, it was agreed to drop the proposed Environmental Management Framework Agreement, and its accompanying eleven schedules. Instead, the Ministers agreed to proceed on the development of a brief "Canada Wide Accord on Environmental Harmonization," and three substantive sub-agreements, dealing with inspections for the purpose of environmental law enforcement, 'Canada-wide' environmental standards, and environmental assessment. At the First Ministers' Conference held the following month, the environment ministers were directed to "make progress" on the initiative by their November 1996 meeting.

At the November 1996 CCME meeting, the Ministers agreed "in principle" to the draft "Canada-Wide Accord on Environmental Harmonization." However, the document was neither initialled or signed by the Ministers. Furthermore, there was no agreement on the proposed sub-agreements on environmental standards, inspections, and environmental assessment. The contents of the Accord and current publicly available drafts of the sub-agreements are discussed in detail in the following section of this brief.

The Ministers were to scheduled to sign the Canada Wide Accord and the three sub-agreements at the May 1997 CCME meeting. However, this meeting was cancelled due to the June 1997 federal election. The Accord and sub-agreements are now scheduled to be signed

at a meeting of the CCME on November 3rd and 4th in St.John's Newfoundland.

Throughout the process, environmental non-governmental organizations have expressed serious concerns regarding the content and direction of the CCME initiative. This has included the release of a series of public statements, endorsed by large numbers of environmental organizations from across Canada, articulating their concerns regarding the project, and calling upon the federal government to provide leadership on national and international environmental issues. Copies of these statements are attached to this Brief as Attachments 10, 11, 12, 13.

III. THE PROPOSED CANADA WIDE ACCORD ON ENVIRONMENTAL HARMONIZATION AND SUB-AGREEMENTS

1) Introduction

Central to the critique of the harmonization initiative presented by the ENGO community and others has been the point that it involves a significant transfer of responsibility for environmental protection from the federal government to the provinces and the CCME. This direction is evident in both the rationale for the initiative offered by its proponents, and by the contents of the proposed National Accord and Sub-Agreements.

2) The Rationale for Harmonization

The elimination of duplication and overlap in the delivery of environmental protection services by the federal, provincial and territorial governments has been presented as the primary rationale for the harmonization initiative by its proponents.

However, the project's supporters have been unable to present any persuasive evidence that duplication and overlap is a significant problem in Canadian environmental policy. Virtually no background research has been conducted to support the initiative, either to identify or substantiate the problems the project is intended to "solve," or to evaluate its likely effectiveness from either an environmental or fiscal perspective.

The one study, completed by KPMG Environmental Services, commissioned by the CCME on the issue concluded that little overlap and duplication existed, and that the savings likely to be realized through harmonization would, as a result, be extremely marginal.[15]

At the same time, the initiative appears increasingly linked to the federal government's broader agenda in the area of national unity. The harmonization initiative has become closely linked to the federal government's desire to demonstrate the flexibility of Canadian federalism, and the potential for non-constitutional approaches to the reform of the federation. This is of concern both in terms of the implication that the project is less and less driven by

environmental policy considerations, and the likely ineffectiveness of the underlying approach to national unity.

Such a strategy puts the federal government in the position of declining relevancy to the day to day lives of Canadians, as it ceases to deliver services, and to be an effective guarantor of national standards in such areas as health care, social policy, and environmental protection.

3) The Accord and Sub-Agreements

The Canada-Wide Accord

The Canada-Wide Accord sets out the goals of the harmonization initiative and includes a framework for the contents of the substantive sub-agreements. The Accord places an overwhelming emphasis on the "one-window" delivery of environmental protection services by a single order of government. This theme is mentioned no less than four times in the course of the three page Accord (Art 2, and Sub-Agreements Section Art. 2, 3, and 6). There is even an explicit bar on action ("shall not act in the role") by the level of government not charged with service delivery (Sub-Agreements Art.6). This language is repeated in all three sub-agreements.

These are extraordinary provisions for an intergovernmental agreement. The structure seems designed to block the possibility of one level government taking action in situations where the other level of government fails to do so. These provisions make it clear that the intent of the initiative is to define environmental "turf," and to bar one jurisdiction from acting in an area assigned exclusively to another. Rather than being intended to provide for cooperation and collaboration between governments, the Accord seems instead to be an agreement for governments <u>not</u> to work together.

The Accord also states that the governments "best-situated" to deliver a service are to be the one-window delivery mechanism. The criteria for the definition of the government "best situated," such as physical proximity, and ability to address client and local needs, would appear to favour the provinces in most cases (Sub-Agreements Art.3.).

Furthermore, the Accord would commit governments to seek to amend their existing legislation to bring it into conformity with the Accord (Sub-Agreements Art.9). Section 2(2)(l) of Bill C-74, the new Canadian Environmental Protection Act, appeared to be intended to implement this provision. The Accord would also commit governments to adjust existing programs and budgets to reflect the contents of the Accord (Administration Art.4).

These provisions raise serious questions about the role of the CCME as a policy and decision-making body, and the relationship of such an arrangement to the principles of

parliamentary democracy and responsible government. In effect, Parliament and Legislatures are to be asked to implement legislative and budgetary priorities established by the CCME, rather than through their own processes.

Finally, the Accord contains no formal sunset clause (Administration Art.7), and can only be amended by the unanimous consent of the parties (Administration Art. 10). This may make amending the Accord to reflect changed circumstances or altered priorities difficult, if not virtually impossible. These provisions are repeated in each of the sub-agreements.

Inspections Sub-Agreement

The proposed Inspections Sub-Agreement specifically targets for elimination situations where there is the potential for the backstopping of the efforts of one level of government by another (Section 2.3). Furthermore, under the proposed Sub-Agreement, inspection activities related to industrial and municipal facilities and discharges are to be assigned to the provinces (4.2.1). This presumably includes inspection activities related to the enforcement existing federal laws and regulations, such as those made under CEPA and the Fisheries Act which apply to such facilities.

Once this arrangement is in place, the federal government would not be permitted to conduct inspections where a province fails to do so, even in cases where there is potential for immediate harm to the environment and health. Such arrangements could lead to extremely dangerous situations. It would mean, for example, that the federal government would be unable, without extensive delays, to inspect a PCB storage site for compliance with the CEPA regulations regarding such sites, where a province has failed to do so, even if it had information that PCB's were being stored or handled improperly.

Faced with an intransigent province, it could take up to one year to get a federal inspector on to such a site. The Accord and sub-agreement require six months of consultations between the governments concerned if one government believes that another is not fulfilling its responsibilities under the Accord (Art. 5.3). If this does not produce a satisfactory result, the only way in which a federal inspector could be brought on-site would be for the federal government to withdraw from the Accord, a process which requires a further six months notice (Art.7.3). The emergency clause in the Accord (Accord, Sub-agreements Section, Art.10) would only appear to permit action once an emergency exists. It may not permit a government to act to prevent an emergency from arising.

Furthermore, these provisions raised serious questions related to the principle of ministerial responsibility. As the Minister responsible to Parliament for the administration and enforcement of CEPA and other federal environmental laws, the Minister of the Environment must be in a position to make and implement decisions about the steps necessary, including the conduct of inspections, to enforce these laws.

Standards Sub-Agreement

The proposed sub-agreement on standards is deeply also problematic. It is difficult to see how the stated goal of achieving the highest standard of environmental protection can be reconciled with the CCME's consensus-based decision-making model. Under the proposed model, the jurisdiction favouring the weakest standard will have a veto over any proposed Canada-wide standard.

Perhaps even more seriously, it appears that the proposed Canada-wide standards will hardly be standards at all, given the degree of flexibility proposed for their implementation (Accord Article 7, and Standards Sub-Agreement Art 3.1.6, 4.2, 6.1). In addition, there are no effective mechanisms proposed to deal with situations in which a jurisdiction fails to implement an agreed standard. Indeed, other levels of government are barred from direct action in such situations (Art. 4.4 and 6.6).

The Accord states that responsibility for the implementation of standards affecting intraprovincial/territorial issues, and the industrial and municipal sectors is to be assigned to the provinces (Art. 6.9). In combination with the other proposed provisions of the sub-agreement, this would appear to eliminate the possibility of the development and implementation of federal baseline standards for the major sources of air and water pollution in Canada in the future.

These provisions are particularly alarming given that there have been informal indications that there is an intention to apply the proposed agreement retroactively to the existing federal air and water pollution control standards under CEPA and the Fisheries Act for pulp and paper mills, metal mines and smelters, and petroleum refineries and other industrial facilities. Such a step would effectively eliminate the only meaningful Canada-wide environmental standards currently in existence, and remove what few constraints exist on the moves of many provinces to lower their own environmental standards.

Environmental Assessment Sub-Agreement

The environmental assessment sub-agreement has been one of the most controversial aspects of the harmonization initiative.

The central element of the most recent draft of the proposed Environmental Assessment Sub-Agreement released to the public (April 1997) states that the jurisdiction on whose lands a proposed project is located is to be the "lead party" for the environmental assessment. The other jurisdiction whose environmental assessment process might apply to such an undertaking would rely upon the assessment process of the "lead party" to provide it with the information which it requires for its own decision-making (Sub-Agreement, Art 5.7.0.).

The result of this arrangement would be that a federal environmental assessment would only occur for undertakings on federal lands. Such a structure would be incompatible with the current requirements of the Canadian Environmental Assessment Act (CEAA) and its implementation would require major amendments weakening the federal act, which was proclaimed in force less than three years ago. The Sub-Agreement would commit the federal government to seeking such amendments (Art.5.12.0.).

A detailed commentary on the current draft of the Environmental Assessment sub-agreement, prepared for the Environmental Assessment Caucus and the Harmonization Working Group of the Canadian Environment Network is attached to this Brief as Attachment number 9. A perspective of the import of this Accord for Newfoundland and Labrador outlined in Attachment number 8.

4) Conclusions

It is increasingly clear that the harmonization initiative is being driven by non-environmental considerations. The project's proponents has been unable to articulate and substantiate the problems which the Accord and Sub-Agreements are intended to solve. A review of the contents of the draft Accord and Sub-Agreements indicates that their primary goal is the definition of the scope of the exclusive environmental jurisdiction of each level of government, and the baring the one level of government from acting within the other level's jurisdiction.

Furthermore, the overall direction of the Accord and Sub-Agreements is towards the devolution of federal environmental responsibilities to the provinces. This is particularly evident in the specific provisions of the proposed sub-agreements. These would assign responsibility for the inspections of industrial and municipal facilities to the provinces and territories, including inspections for the purpose of the enforcement of existing federal environmental protection requirements.

Similarly, responsibility for the implementation of "Canada-Wide" standards which might apply to such facilities is assigned to the provinces and territories, as is responsibility for the implementation of standards related to "intraprovincial issues." No reference is made to the use of federal legislative or regulatory authority for this purpose. The implementation of such standards is to be entirely at the discretion of the provincial and territorial governments.

Environmental assessment sub-agreement is consistent with this direction as well. Under the current draft of the sub-agreement federal environmental assessments would only take place for undertakings which occur on federal lands. The conduct of federal environmental assessments of undertakings on provincial or territorial lands, as currently occur, would cease in most cases. These arrangements would require major amendments to CEAA, substantially weakening the Act.

IV. THE CONSEQUENCES OF DEVOLUTION FOR ENVIRONMENTAL PROTECTION IN CANADA

1) Introduction

It is important to examine carefully the implications for the protection of Canada's environment of the devolution of environmental responsibilities from the federal government to the CCME and provinces and territories proposed in the draft Accord and Sub-Agreements.

The concerns regarding the consequences of devolution arise from several sources. First, historical evidence indicates that the dynamics of shared federal and provincial jurisdiction over the environment has resulted in better environmental protection in Canada than would have been the case under a framework of exclusive jurisdiction and one-window delivery, such as the proposed in the harmonization Accord.

Second, there is the question of the poor environmental results which have been achieved through previous efforts to devolve federal environmental responsibilities to the provinces.

Third, there is the issue of whether, in the context of developments over the past few years, provincial governments have either the will, or the capacity, to take on additional environmental responsibilities transferred to them by the federal government.

Finally, the long term impact of the Accord and Sub-Agreements on the capacity of the federal government to deal with national and international environmental issues in the future must be considered.

2) Dynamic Federalism Versus Harmonization

Federalism and Environmental Protection

Canadian environmental law and policy has evolved over the past three decades in the context of a federal political system. The fact that there are two levels of government should not be necessarily regarded as a disadvantage, but indeed, as a positive attribute. Federalism encourages government and it provides checks, balances and "backstops" so that one government can "step in" when the other level of government fails to act.

One commentator has put the matter this way:

> "Federalism forms (of government) are to be preferred to unitary forms because the inherent competition implies the existence of alternatives. This [is called]

duplication and overlap, bu those who fault federalism for competitiveness and duplication, fault it for its main virtue.[16]

When two levels of government share responsibility over a field, such as the environment, it may be easy to identify the possible occasions of overlap and overlook the fact that the shared jurisdiction may lead to a more effective environmental protection regime. Where two levels of governments share jurisdiction both tend to want to "occupy the field." In the result, provincial governments are prompted to take action that they would not otherwise have taken but for the fact that the federal government has proposed the put environmental laws into effect at the national level.

One example relates to attempts to address toxic substances. In 1975, the federal government enacted the Environmental Contaminants Act, which dealt which gave the federal government the power to regulate the manufacturing, import and use of toxic substances. In response, Alberta passed the Alberta Hazardous Chemicals Act, Quebec amended its Environmental Quality Act and Ontario established its Hazardous Contaminants Programme.[17]

More recently, the enactment of regulations by the federal government to limit discharges of organochlorines from pulp and paper mills was an important catalyst for the adoption of similar regulations in a number of provinces. In fact, a number, including Ontario and British Columbia ultimately adopted standards which were more stringent that the federal requirements.

Federalism can work by providing the opportunity for provinces to enact laws to response to their own particular conditions and provincial goals within the context of overall national standards. Further, even where some provinces do act first, there may be need for the federal role to provide for consistent nation-wide minimum standards.

Federalism also allows either level of government to take action where one level of government is unwilling or unable to act. In Newfoundland, for example, the federal government takes responsibility for the inspection of pulp and paper mills where the province lacks the resources to do so effectively.

At times, even the possibility of the federal action can spark positive provincial response. This dynamic is widely seen, for example, as having been fundamental to the achievement of agreement between the federal government and the seven eastern provinces to take action to curb acid rain in 1984.[18]

In effect, therefore, the dynamic relationship between the federal and provincial governments within the context of environmental protection allows both levels of government play a significant role, providing a system of checks, balance and "backstops." Both levels of government have the capacity to develop laws and enforce those laws. If one level of government, for whatever reason fails to live up to its obligations, the other level of

government can develop and enforce its own laws.

The Federal Constitutional Mandate

The argument against harmonization outlined in the previous section is essentially that federalism has a number inherent advantages that may mitigate if not complete offset any corresponding detriment that might arise from overlap and duplication. There is also a related argument against harmonization, namely, that the federal government may be the only level of government that can, under the constitution address certain issues.

It should be recalled that the Supreme Court of Canada, in its recent decision The Attorney General of Canada v. Hydro Quebec, affirmed and possibly enhanced the federal constitutional mandate with respect to the environment. The case dealt with the issue of whether certain provisions the CEPA were valid federal authority. The majority felt that it did not have to decide on the basis of Parliaments authority to legislate for the Peace, Order and Good Government. Instead, the Court held that the Act was constitutional on the basis of the Parliament's criminal law power. In its decision, the Court noted that:

> "What the foregoing underlines is what I referred to at the outset, that the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels. ...The purpose of the criminal law is to underline and protect our fundamental values...
>
> ...I agree with that paper that the stewardship of the environment is a fundamental value of our society and that Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values."[19]

It is respectfully submitted that the Court is correct in characterizing the environment as a fundamental value of our society. It is further submitted that the federal government has some inherent duty to protect those values through the criminal law and other powers vested with it under the constitution.

The Environmental Harmonization Accord undercuts this constitutional role by devolving significant powers to the provinces and the CCME. While the Supreme Court gave the federal government the explicit basis to act more aggressively to protect the nation's environment, the harmonization initiative can be seen as an explicit retreat from the exercise of those very powers.

3) The Results of Previous Efforts at the Devolution of Federal Environmental

Responsibilities

Attempts to "harmonize" federal-provincial environmental laws and policies are not new. In fact, the Canadian Environmental Protection Act includes a number of mechanisms designed to ensure there is an avoidance of overlap and duplication and to solicit provincial cooperation. Two of these mechanisms include "equivalency" agreements and "administrative" agreements between the federal and provincial governments. Considerable comment has been given on these mechanisms and will not be discussed in detail here.[20]

At present, there are a number of administrative and equivalency agreements related to the Canadian Environmental Protection Act and the Fisheries Act. Over the past year, we have attempted to access reports by the provincial government that have been party to the administrative and equivalency agreements to determine the quality and extent of the work done under those agreements.

The reports received from the provinces to the federal government were deficient in a number of ways:

* the generality of the reports made it impossible to determine the true level of activity under those agreements;

* the inability to determine the level of enforcement activities and the extent to which there are opportunities for enforcement actions; and

* the poor level of public information available about the performance of the regulations.

In light of these deficiencies, it is virtually impossible to determine how effectively the provincial governments are carrying out their delegated responsibilities.

However, another Access to Information request related to the training materials for provincial personnel that are to assume the duties of federal officials. The result of this request was astounding. While the request asked for information related to all federal training material for provincial personnel.

Material was only provided regarding training in one province, Saskatchewan. This implies that while federal officials have been withdrawn from their activities related to the enforcement of CEPA and the Fisheries Act in other provinces, no one at the provincial level has been trained to carry out these responsibilities.

The evidence of weak provincial performance under these agreements is consistent with the findings of the Auditor General of Canada in his 1990 report, regarding the delegation of the enforcement of the pollution control provisions of the Fisheries Act to the provinces in

the 1980's. The Auditor-General noted a dramatic decline in industry compliance with the regulations following delegation.[21]

Clearly, if the experience with these existing agreements is any indication, further delegation of federal responsibilities through the harmonization process would place the effective enforcement of federal environmental protection requirements in even greater doubt.

4) The Loss of Capacity at the Provincial/Territorial Level

The Loss of Provincial Capacity to Deliver Environmental Protection Services

The effective consequence of the harmonization accord is the devolution of traditional federal environmental roles and responsibilities to the provinces. However, a major question arises at this point. Is the federal government about to "hand-off" its traditional environmental roles and responsibilities to provinces that may not either have the capacity and resources or the will to undertake comprehensive environmental management?

Over the past few years, environmental agencies at the provincial level have dramatically downsized. Table 1 represents just a sample of the dramatic and consistent downsizing of provincial environment ministries. The Table does not reflect the downsizing of the other ministries that have environmental responsibilities, such as the Ontario Ministry of Natural Resources (MNR), where more than 2400 positions (more than 40% of 1994-95 staff levels) have been eliminated since 1995. The MNR has traditionally played a major role in the enforcement of the habitat protection provisions of the Fisheries Act in the province.

There have been severe cuts to some specific components of the environmental Agencies. New Brunswick's annual spending on environmental planning, operations and enforcement, for example has declined from $16.8 million to $12 million since 1991-2.[22] In Ontario, the cuts to the budget of the Ministry of Environment and Energy have directly affected full-time enforcement staff, standards development, spills reporting and response, pesticides regulation, waste management regulation, groundwater protection, laboratory testing and water sampling and testing.

TABLE 1
Provincial Downsizing
of Environmental Ministries[23]

Province	Reduction in Ministry Budget (%)	Resource Reduction $(millions)	Staff Reduction	Government Annual Spending (%)
Ontario	43 (since 1995)	$290 to $165	2,430 to 1,550	0.17
Alberta	31 (since 1993)	$405 to $317	1,550 to be cut between 1993-2000	n/a
Newfoundland	60 (since 1995)	$10.6 to $3.6	n/a	n/a

n/a: not available

In many provinces, these reductions in budgetary and personnel resources have been accompanied by dramatic changes to environmental laws and regulations. In virtually all cases, these have weakened or eliminated environmental protection requirements, removed opportunities for public participation in decision-making, and constrained mechanisms for public accountability for the consequences of environmental decisions.[24]

Reports providing detailed reviews of the changes to the budgets of environmental and natural resources agencies, and environmental laws and regulations which have occurred in Ontario, Alberta, and Newfoundland over the past three years are attached to this Brief[25] in Attachments 5, 6 and 7.

It must be recalled that the Accord proposes to transfer significant obligations federal environmental legislation to the provinces without a corresponding transfer of funds to enable provinces to fulfil their new roles. How will the provinces be able to update these responsibilities?

Furthermore, some provinces, perhaps inadvertently, have recognized the limits of devolution. In September of 1997, for example, the Ontario Minister of Natural Resources, Chris Hodgson, announced that his Ministry would no longer enforce the habitat protection provisions of the Fisheries Act. The grounds cited include the fact that there was no formal resource transfer agreement and that, without such an agreement, the province was no longer in position to undertake the responsibility for the enforcement of the federal statute. A copy of this announcement is attached to this submission as Attachment 14.

5) The Loss of Federal Environmental Capacity As a Result of Harmonization

The erosion of capacity at the provincial level as the provinces are willing to increase additional responsibilities is not the only concern with respect to capacity. It should be recalled that the accord ensure that the level of government that is not dealing with a particular matter "cannot" act during that time. It has been argued that, in light of the definition of "best situated," it will be the provinces that will gain more responsibilities than the federal government.

The issue then becomes one of federal capacity. Is it possible that the federal government will retain its existing capacity in terms of regulators, enforcement and policy development personnel if those staff are not used on a continual basis. However, it is respectfully submitted that, over time, the fiscal justification for that staff will be lost. In the result, the federal government will be unable, even if there were the necessary political will at some point in the future, to regain its traditional role, as it would no longer have the technical capacity or the expertise to carry out these functions.

Over the next few years, it may well be that the pressure to reduce staff in light of harmonization will not be as acute in years to come. However, sooner or later, it is submitted that it will be inevitable that federal capacity will be directly affected under the principle of "use it or lose it." The assurances that have been provided that the federal government can "assume" its traditional role when the provinces fail to abide by its commitments may, in practice, ring very hollow.

In September of this year, the federal government may have given a hint as to what is to come in this regard. A memo was distributed to Environment Canada staff outlining staff cuts of some 200 personnel. Ironically, the justification used related to the harmonization efforts. Moreover, the cuts related to jobs in some of the major polluting sectors in Canada, including mining and petro-chemicals. This memo is attached to this submission as Attachment 15.

The Implications for the Future of Federal Environmental Law

The thrust of the devolution argument is that the harmonization accord will constrain the ability of the federal government to provide a minimum level of environmental protection for all Canadians. It should be made clear that the harmonization accord will not only affect federal capacity to protection the environment as mentioned above, but its legislative capability to take strong federal action as well.

The ability of the federal government to enact new laws and regulations will be circumscribed to the extent that such activities are inconsistent with the harmonization

initiative. Indeed, the establishment of such a brake on the federal government is widely believed to be one of the primary reasons why many provinces are so anxious to complete the initiative.

The reforms of the Canadian Environmental Protection Act will, for example, be compromised to the extent that they are subject to the harmonization process. The most obvious evidence of this is found in section 2(1)(l) of Bill C-74, the proposed new Act, which died on the order paper with the call of the last election. This section reads that the federal government shall:

> "(l) act in a manner that is consistent with the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest standards of environmental quality throughout Canada."

The effect of this clause would be to incorporate, by reference the harmonization Accord and Sub-Agreements into CEPA.

Furthermore, it is apparent that the design of the harmonization accord, together with the Toxic Substances Policy recently released for public review by the CCME in June 1997 that CEPA would be relegated to providing for the assessment of toxic chemicals. Any action to regulate or control toxic substances would proceed through the harmonized CCME. Our comments on this latter policy are provided in Attachment 4.

The potential impact of the harmonization Accord on the future shape of federal environmental legislation is made clear in the minutes of an Environment Canada Executive Management Board meeting held in April of 1997 obtained through the federal Access to Information Act. One of the line items in the minutes reads as follows:

> "Harmonization, CEPA and CESPA (the proposed Canada Endangered Species Act) are interrelated files and need to be addressed in one strategy so that we can position the new Minister on his/her arrival. The strategy should factor in PCO's views."[26]

In sum, harmonization will have a dramatic impact on federal law and policy, that will not be easily reversed over time.

6) Conclusions

The historical record indicates that the dynamics of shared jurisdiction over the environment between the federal and provincial governments has resulted in a better environmental protection framework than might have otherwise have been the case. However, it is precisely these dynamics of backstopping, and upwards movement of

standards, which harmonization Accord and Sub-Agreements appear to be designed to shut down.

Furthermore, past experience with limited devolution by the federal government to the provinces, particularly in relation to the conduct of inspections and environmental law enforcement activities, has not been positive. This is evident in audits of such arrangements undertaken by the Auditor-General of Canada, and in other reports and materials which are available.

In addition, serious questions must be raised about the will and capacity of provincial governments to take on new environmental responsibilities from the federal government. This is especially true in light of dramatic downsizing of provincial environmental agencies, and weakening of environmental laws and regulations which has taken place over the past few years.

Finally, the adoption and implementation of the Accord and Sub-Agreements would severely weaken the capacity and authority of federal government to deal with new national or international environmental challenges in the future. There is substantial evidence that the initiative has already had a significant impact on the direction new federal environmental legislation.

V. CONCLUSIONS

1) Conclusions

Over the past two years it has become is increasingly clear that the CCME environmental harmonization initiative is being driven by non-environmental considerations. The project's proponents has been unable to articulate and substantiate the problems which the Accord and Sub-Agreements are alleged to be intended to solve.

A review of the contents of the draft Accord and Sub-Agreements indicates that their primary goal is the definition of the scope of the exclusive environmental jurisdiction of each level of government, and the baring the one level of government from acting within the other level's jurisdiction.

Furthermore, the overall direction of the Accord and Sub-Agreements is towards the devolution of federal environmental responsibilities to the provinces. This is particularly evident in the specific provisions of the proposed sub-agreements. These would assign responsibility for the inspections of industrial and municipal facilities to the provinces and territories, apparently including inspections for the purpose of the enforcement of existing federal environmental protection requirements.

Similarly, responsibility for the implementation of "Canada-Wide" standards which might apply to such facilities is to be assigned to the provinces and territories, as is responsibility for the implementation of standards related to "intraprovincial issues." No reference is made to the use of federal legislative or regulatory authority for this purpose. The implementation of such standards is to be entirely at the discretion of the provincial and territorial governments.

Environmental assessment sub-agreement is consistent with this direction as well. Under the current draft of the sub-agreement federal environmental assessments would only take place for undertakings which occur on federal lands. The conduct of federal environmental assessments of undertakings on provincial or territorial lands, as currently occur, would cease in most cases. These arrangements would require major amendments to CEAA, substantially weakening the Act.

The historical record indicates that the dynamics of shared jurisdiction over the environment between the federal and provincial governments has resulted in a better environmental protection framework than might have otherwise have been the case. However, it is precisely these dynamics of backstopping, and upwards movement of standards, which harmonization Accord and Sub-Agreements appear to be designed to shut down.

Past experience with limited devolution by the federal government to the provinces, particularly in relation to the conduct of inspections and environmental law enforcement activities, has not been positive. This is evident in audits of such arrangements undertaken by the Auditor-General, and in other reports and materials which are available.

In addition, serious questions must be raised about the will and capacity of provincial governments to take on new environmental responsibilities from the federal government. This is especially true in light of dramatic downsizing of provincial environmental agencies, and weakening of environmental laws and regulations which has taken place over the past few years

Finally, the adoption and implementation of the Accord and Sub-Agreements would severely weaken capacity of federal government to deal with new national or international environmental challenges in the future. There is strong evidence that the proposed Accord is having a significant impact on the direction of proposed federal environmental legislation.

2) A Different Path Forward

The past four months marked by a striking series of failures and disasters in the protection of Canada's environment. These have included:

* the Prime Minister's admission before the United Nations in June of Canada's failure to meet the commitments it made at the Earth Summit five years ago, particularly on the issue of controlling greenhouse gas emissions. Figures released on October 15, 1997 indicate that Canada's emissions are likely to have grown by approximately 13% measured against the 1990 base year, by the year 2000. Canada was to have stabilized its emissions by that date;[27]

* the Pacific salmon crisis;[28]

* the fire at the Plastimet Ltd. PVC recycling plant in Hamilton, Ontario, resulting the release of significant amounts of dioxins and other hazardous pollutants;[29]

* an explosion at the Swan Hills hazardous waste management facility in Alberta, and subsequent reports of significant contamination of the surrounding environment with toxic substances;[30]

* the release of a report from the North American Commission for Environmental Cooperation which placed Ontario 3rd, Quebec 12th, and Alberta 17th among the leading sources of pollution in Canada and the U.S;[31]

* the announcement of Ontario Hydro's intention to shut down seven nuclear reactors due to safety concerns. This was accompanied by an announcement of the utility's intention to bring a number of fossil fuel power plants back into service to replace the lost power generation. The recommissioning of these facilities will result in large increases in emissions of carbon dioxide, sulphur dioxide, nitrous oxides, heavy metals, and other toxic contaminants;[32]

* a large hydrochloric acid leak at a fertilizer plant in Red Deer, Alberta;[33]

* the discovery of a 32 kilometre long "blob" of unidentified material in the North Saskatchewan River flowing through Edmonton;[34]

* the release of a report by the National Air Issues Coordinating Committee indicated that a further 75% reduction in acid rain causing emissions is required halt the damage to Canadian lakes and rivers. The report also made an explicit linkage between sulphur dioxide emissions and human health issues related to fine particles of pollutants. The report contained no plan of action to meet this need. This was reportedly due to the objections of a number of provinces, including Ontario; and[35]

* the release of a report by the Auditor-General of Canada concluding that due to "significant gaps" in the areas of prevention, detection, and enforcement, Canada is not in a position to know the extent to which it is living up to its international obligations with regard to the prevention of illegal traffic in hazardous wastes.[36]

These events indicate that the current approaches being taken to the protection of Canadians' health, safety and environment are inadequate, and that the situation is being compounded by the impact of the dramatic reductions in capacity of environmental agencies across Canada over the past few years.

This emerging situation demands federal environmental leadership to ensure the protection of the environmental well-being of present and future generations of Canadians. The legitimacy and necessity of a strong federal role in the protection of the environment was affirmed last month by the Supreme Court of Canada's in its ruling regarding Hydro Quebec and CEPA.[37]

The Court's decision was particularly important in terms of the strength with which the majority affirmed the federal government's authority in this area. The Court held that the protection of the environment was a legitimate exercise of Parliament's power to legislate on matters relating to criminal law. Indeed, the majority stated that it did not even need to refer to Parliament's more general power to legislate for the Peace Order and Good Government of Canada, to uphold the authority of federal legislators to deal with environmental issues.

The events of the past few months, and the Supreme Courts decision indicate that a different approach from that proposed through the harmonization agreement needs to be taken by Canada's federal and provincial governments. The contents of the proposed Accord and Sub-Agreements indicate that they are principally about defining, in rigid terms, the roles of the federal and provincial governments in environmental protection. There is a particular focus on limiting the substantive functions and autonomy of the federal government beyond federal lands. The agreement would also significantly constrain innovation in environmental policy development at the provincial level.

There must be instead a clear focus on the real, and in many cases, expanding environmental challenges which Canada faces. The consequences of the dramatic dismantling of environmental institutions and laws across Canada which has taken place over the past three years must also be dealt with. This has resulted in the emergence of significant, and growing, gaps in Canada's environmental protection system.

Addressing this situation in an effective way will require genuine collaboration and cooperation between the federal and provincial and territorial governments. Efforts must be made to ensure that all of the functions essential to the protection of the well-being of present and future generations of Canadians are carried out. Such an outcome is likely to be best achieved on bi-lateral, rather than the multilateral basis proposed through the harmonization Accord. The federal government, in particular, may be called upon to fulfil different roles in individual provinces and territories, as a function of both capacity and will within those jurisdictions.

At the same time, a strong federal presence to is needed to backstop and support provincial and territorial efforts. It is also required to provide for meaningful national environmental standards which limit the potential for downwards competition among jurisdictions seeking investment from industries with high environmental impacts, such as mining. In addition, the federal government has both a legal and moral obligation to ensure the fulfilment of Canada's international environmental obligations.

These outcomes cannot be achieved within framework of the harmonization Accord which is scheduled to be adopted in early November. A fundamentally different approach, which addresses the real environmental challenges facing Canadians as they enter the next century is required.

ENDNOTES

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20. For example, see: Franklin Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection" in Kennett, Canadian Interjurisdiction Processes, pp. 254-283.

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22. Paul McKay, "Environment Canada Told to Cut Staff, Spending: Impact Compounded by Provincial Cuts" - Ottawa Citizen, October 4, 1997.

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