

THE HARMONIZATION ACCORD: A SOLUTION IN SEARCH OF A PROBLEM

BY STEWART ELGIE

On January 1, 1990, Hydro-Quebec allegedly dumped PCBs into a tributary of the St. Lawrence River. The discharge of PCBs—a highly toxic substance—is prohibited under Quebec law, yet the Quebec government took no steps to prosecute the provincially-owned utility. Therefore, the federal government stepped in and laid charges under the *Canadian Environmental Protection Act (CEPA)*, which also prohibits the discharge of PCBs. This situation illustrates the importance of the federal government playing a strong role in environmental protection.

In a strongly worded judgement, the [Supreme Court of Canada] emphasized the importance of the federal government "exercising the leadership role expected of it by the international community" in the area of environmental protection.

However, the story does not end here. Hydro-Quebec, joined by the Quebec government, decided to challenge the constitutionality of CEPA. The case went all the way to the Supreme Court of Canada where,

on September 18, 1997, the Court upheld the CEPA, ruling that the federal government has the constitutional authority to set national standards to control toxic pollution. In a strongly worded judgement, the high court emphasized the importance of the federal government "exercising the leadership role expected of it by the international community" in the area of environmental protection.

THE ACCORD

As the ink was drying on this landmark decision, securing the federal government's authority to take a leadership role in environmental protection, Canada's federal and provincial environment ministers were preparing to sign an agreement that would do just the opposite. The Canada-Wide Accord on Environmental Harmonization is a comprehensive federal-provincial agreement designed to "rationalize" environmental management in Canada. Distilled to its essence, the Accord has two main thrusts. First and foremost, it seeks to eliminate federal-provincial overlap in the area of environmental protection. Under the Accord, the general rule would be that the federal government will regulate environmental protection on federal lands, and the provinces will regulate everywhere else (although exceptions may be made in certain circumstances). In other words, in areas of shared environmental jurisdiction, the federal government would withdraw and allow the provinces to be the

sole environmental regulator. The second main thrust of the Accord is that national environmental protection standards would be set, not by the federal government, but by all 13 provincial, territorial and federal environment ministers, on a consensus basis.

The Harmonization Accord states that its primary objective is to "enhance environmental protection". In fact, it is likely to have just the opposite effect.

DEBUNKING THE DUPLICATION MYTH

The Accord focuses almost exclusively on dividing up responsibility for environmental protection between the federal and provincial governments. It says nothing about what the governments will do to strengthen, or even maintain, existing environmental protection levels.

The greatest threat to environmental protection in Canada is not duplication—or perceived duplication—but rather dramatic cuts in government funding. In recent years, the Ontario, Alberta, Newfoundland, and Quebec governments, among others, have slashed their environment departments' budgets by 30-60 per cent, and laid off hundreds of environmental protection officers.

The basic premise of the Accord is that there is a significant amount of wasteful duplication occurring between federal and provincial environmental regulators, and that eliminating this duplication will improve environmental protection. To support this premise, the Canadian Council of Ministers of the Environment hired the consulting firm KPMG to conduct a study documenting the extent of federal-provincial environmental duplication. The problem was, the study could not find any examples of significant duplication. In areas where federal and provincial environmental authorities overlapped, KPMG concluded, administrative arrangements were already in place to ensure coordination and avoid unnecessary duplication. Thus, the basic premise of the harmonization initiative is flawed.

The greatest threat to environmental protection in Canada is not duplication—or perceived duplication—but rather dramatic cuts in government funding. In recent years, the Ontario, Alberta, Newfoundland, and Quebec governments, among others, have slashed their environment departments' budgets by 30-60 per cent, and laid off hundreds of environmental protection officers. At the same time as the provinces are dramatically reducing their environmental capacity, the Accord purports to give them far more environmental responsibility.

THE NEED FOR NATIONAL STANDARDS

Far from strengthening environmental protection in Canada, the Harmonization Accord is likely to weaken it, by weakening the role of the federal government. There is ample evidence indicating that federal leadership in setting

baseline environmental standards typically leads to stronger environmental protection levels. That is why the U.N. Commission on Environment and Development, in its widely-acclaimed *Our Common Future* report, recommends that the setting of environmental standards "should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms". This recommendation was highlighted by the Supreme Court of Canada in its recent Hydro Quebec decision.

The strong leadership role taken by the U.S. federal government may be one reason why U.S. environmental standards are generally tougher than Canadian ones. For example, a 1997 report by the North American Commission on Environmental Cooperation found that Canadian industries, on average, emit more than twice as much air and water pollution as their U.S. counterparts.

To see a working example of the benefits of federal leadership in setting environmental standards, one need only look south of the border. Prior to 1970, environmental regulation in the U.S. had been primarily the domain of the states. In the early 1970s, however, the U.S. federal government passed a series of strong statutes setting

national standards in a number of environmental areas, including air quality, water quality, endangered species protection, toxic substances control, and environmental assessment.

These new federal laws typically allowed states to set stronger, but not weaker, standards. The effect of this federal legislative initiative was to significantly raise environmental protection levels in most parts of the country (except in a few states whose existing standards already exceeded the new federal ones). One particularly interesting outcome was that these new federal laws spurred most states to pass strong new environmental laws of their own, equaling—or in some cases surpassing—the federal standards.

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The phenomenon of the federal environmental initiative spurring provincial action also can be seen in Canada, at least in those areas where the federal government has taken a leadership role. For example, in 1990, the federal government introduced comprehensive environmental assessment legislation that would apply to most major industrial projects. The provinces complained loudly about this intrusion into their jurisdiction (none more so than Alberta). However, shortly after the passage of

the federal bill, Alberta and three other provinces passed new environmental assessment legislation of their own. A similar story has unfolded in the area of endangered species protection: following the release of proposed federal legislation in 1995, four provinces introduced their own endangered species bills, and another province significantly strengthened its existing legislation.

That is not to say that provinces only take strong environmental initiatives when prodded by the federal government—far from it. However, experience shows that federal leadership in setting baseline environmental standards, especially where provinces/states are allowed to improve on those standards, generally leads to higher environmental protection levels.

There is no evidence that federal-provincial overlap in environmental regulation is a significant problem. To the contrary, there is ample evidence that national environmental standards, combined with the option of tougher provincial standards, result in stronger overall environmental protection levels.

A full explanation of why this is so goes beyond the scope of this paper. However,

one of the main reasons is that, without national environmental standards, there is a temptation for an individual province to use lower environmental standards as a way to attract, or retain, industry. This phenomenon, known as the "pollution haven" problem, was one of the primary reasons why the 1972 Parliamentary Committee on the Constitution of Canada (the "MacGuigan Committee") called for the federal government to take a leadership role in setting national environmental standards. Similarly, Parliament's Environment Committee, in its 1992 report "The Environment and the Constitution", echoed the need for strong federal leadership in setting national environmental standards.

In sum, the Harmonization Accord is a solution in search of a problem. There is no evidence that federal-provincial overlap in environmental regulation is a significant problem. To the contrary, there is ample evidence that national environmental standards, combined with the option of tougher provincial standards, result in stronger overall environmental protection levels. Simply put, there is no basis for the claim that the Harmonization Accord will enhance environmental protection in Canada. In fact, by weakening the federal government's environmental role, it is likely to have the opposite effect. 🍁

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