THE BENEFITS OF HARMONIZING OUR ENVIRONMENTAL REGULATORY SYSTEM

BY MICHAEL CLOGHESY

Unfortunately, the *Constitution Act* of 1867 does not make any reference to the environment when it deals with the distribution of legislative powers between federal and provincial governments. Thus, both levels of government have the ability of intervening in any and all areas relating to environment regardless of whether there is overlap and duplication. In fact, a recent Supreme Court decision has confirmed this status.

Over the past few years, the Canadian Council of Ministers of the Environment (CCME) has been attempting to streamline the Canadian environmental regulatory system by more clearly articulating the roles and responsibilities of respective governments. The aim is clearly to develop a more efficient and effective regulatory regime in Canada by eliminating unnecessary duplication and areas of inconsistency.

The current system penalizes the private sector by imposing various unnecessary costs, such as:

* Information costs, arising from the need to discover the regulations, procedures and authorities for approvals.
* Uncertainty costs, arising from not knowing if or when approval will be granted or under what conditions.
* Compliance costs, arising from the need to comply with more than one set of regulations or standards required by more than one agency or jurisdiction.
* Delay costs, arising from the increased time required from application to approval due to multiple assessment or compliance procedures.
* Double jeopardy costs, arising from regulation in one jurisdiction prohibiting actions required in another jurisdiction.

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A particularly blatant example of overlap occurs in the area of environmental assessment where both the federal and provincial governments have legislation and regulation that apply to many, if not most, of Canada's major industrial projects. The uncertainty and high costs related to these processes continues to discourage investment in Canada's natural resources sector, where the inconsistent application of environmental assessments has become an obstacle to competitiveness for the forestry, mining, and oil and gas industries. Governments and society in general can also benefit from a streamlined environmental regulatory system as they will be in a position to utilize their scarce resources in a more effective and efficient manner.

In order to address this issue and as a means of formalizing their intent to work in partnership to achieve the highest level of environmental quality for all Canadians, CCME member governments have developed the " Canada-Wide Accord on Environmental Harmonization", which is intended to be signed at an upcoming meeting of Ministers of the Environment. The objectives of harmonization which are stated in the Accord are to

* enhance environmental protection
* promote sustainable development, and
* achieve greater effectiveness, efficiency, accountability, predictability and clarity of environmental management.

Also clearly stated in the Accord is the following : "Nothing in the Accord alters the legislative or other authority of the governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada".

In addition, the Accord mentions that it will be consensus-based and driven by the commitment to achieve the highest level of environmental quality. Furthermore, the agreement will not prevent a government from introducing more stringent environmental measures to reflect specific circumstances.

To implement the commitment set out in this Accord, the governments will enter into multilateral sub-agreements on various aspects, including Inspections, Standards, Environmental Assessment, Monitoring, and Enforcement. These sub-agreements will delineate specific roles and responsibilities to provide a one-window approach to the implementation of environmental measures. Roles and responsibilities will be undertaken by the level of government best situated to effectively discharge them. In assessing which level of government is best situated to assume responsibility, consideration will be given to applicable criteria such as:

* scientific and technical expertise
* equipment and infrastructure to support obligation
* physical proximity
* efficiency and effectiveness
* human and financial resources to deliver obligations
* scale, scape and nature of environmental issue
* ability to address client or local needs
* inter-provincial/inter-territorial/international considerations.

Clearly, not all provinces are in a position to assume additional responsibilities in this area nor are all of them interested in so doing. Priority setting and budgetary constraints will play a leading role in determining whether a government decides to seek responsibility in one or several areas of environmental management as defined by the various sub-agreements.

When a government has accepted obligations and is discharging a role, the other order of government will not act in that role for the period of time determined by the relevant implementation agreement. In the event a government is unable to fulfill its obligations under a sub-agreement, the concerned governments shall develop an alternative plan to ensure that there are no gaps created within the environmental management regime.

To ensure that objectives of this Accord are being met, Ministers, through the CCME, will review progress, address issues, and administer the requirements of the various sub-agreements on a regular basis. To ensure transparency, progress reports will be shared between and among governments and will be made available to the public.

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Regardless of the various measures included in the Accord and its sub-agreements to ensure an effective, efficient means in attaining the highest level of environmental quality within the context of sustainable development, there remains considerable opposition to the concept of a harmonization agreement on the part of environmental groups. The main concern relates to the possible devolution of federal powers to the provinces. There is much scepticism about the ability of the provinces to assume responsibility for environmental matters. In addition, there is concern that this Accord might lead environmental quality being set to the lowest common denominator.

With respect to the first point regarding the federal government giving up some of its power, there has been no indication to this effect. Quite to the contrary, in fact, the federal government, buoyed by the recent Supreme Court decision in its favour, intends to extend its reach into additional areas currently covered by provincial juridiction. This trend is evident in the proposed new draft legislation on environmental protection.

With respect to provincial governments not assuming their responsibilities, the Accord and its sub-agreements deal specifically with this instance and mechanisms will be put in place to regularly review progress and deal with problems.

Finally, it is difficult to understand the concern the environmental groups have with respect to a lowering of environmental quality as a consequence of harmonization. First and foremost, the citizens of Canada have clearly stated in recent polls that they do not want any decrease in environmental quality. In fact, they want to see the quality of the environment improved but in a way that will not affect their jobs or the economy. Politicians would be foolish to misread this message delivered by the population in general. The Accord clearly states that its objective is to enhance environmental protection; thus, it would be difficult to imagine the contrary.

In conclusion, the Harmonization Accord should be viewed in a positive and constructive sense, where various levels of government are working together to develop a better system to manage the environment. The Accord will provide Canada with an opportunity of meeting its key objectives of seeking a better environment and stimulating the economy by providing investors with a streamlined environmental regulatory regime, which will reduce costs, delays and, most importantly, uncertainty.

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THE CANADA-WIDE ACCORD: A THREAT TO NATIONAL STANDARDS

BY KATHRYN HARRISON

In November of 1996, the federal, provincial, and territorial governments unanimously agreed in principle to a Canada-Wide Accord on Environmental Harmonization. Indications are that this Accord and the first three sub-agreements (concerning standard setting, compliance monitoring, and environmental assessment) will be signed at the next meeting of the Canadian Council of Ministers of the Environment this January.

The Canada-Wide Accord warrants scrutiny both for its implications for environmental protection in Canada and the precedents it could set for other policy fields. The environmental Accord is one of few concrete products of recent efforts to "renew the federation". Indeed, the degree of intergovernmental harmony achieved is quite remarkable in what only a few years ago was a hotly contested area of jurisdiction. However, intergovernmental harmony has come at a high price. It is worth noting at the outset that we have seen much of this before. In the mid-1970s, the federal government signed bilateral harmonization agreements with seven provinces (all but Quebec, Newfoundland, and British Columbia). Not coincidentally, the first generation of Accords emerged under circumstances very similar to those of today, with environment departments facing the challenge of implementing new legislation in the face of waning public attention to the environment, threats to national unity, and declining budgets. The federal government then (as now) had few incentives to challenge provincial resource jurisdiction in the name of the environment, and provincial governments were happy to resume the lead.

Th[e] disappointing experience with the first generation of Accords is troubling as we embark on a second-generation Accord, which renews efforts to rationalize federal and provincial roles.

Like the new Canada-Wide Accord, the bilateral Accords of the mid-1970s sought to clarify federal and provincial roles in order to reduce over-

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