Harmonization in Environmental Assessment in Canada: The Good, the Bad, and the Ugly

Arlene Kwasniak
Associate Professor
Faculty of Law
University of Calgary

Abstract:
A cornerstone of sustainable development is environmental assessment. Through environmental assessment processes regulators identify and assess the environmental, social, and economic consequences of proposed project to assist them in determining whether projects should be approved, and if so, under what conditions. Under the Canadian Constitution both the provincial or territorial and federal governments may have regulatory responsibility over projects that impact environmental, social, or economic values. In many instances processes under federal and provincial or territorial legislation will require that an environmental assessment be carried out prior to the approval stage. Where an environmental assessment is required by more than one level of government, project proponents and provinces have claimed that there is unnecessary overlap and duplication. Although jurisdictions have tried to *harmonize* environmental assessment processes to reduce or eliminate perceived overlap or duplication, provinces and proponents still seek further streamlining. This paper analyzes, from an environmentally concerned public interest perspective, when *harmonization* is appropriate and when it is not. The paper concludes that *harmonization* is good, and should be pursued, when it requires coordination, cooperation, and in some cases convergence, with respect to environmental assessment processes, but it is bad, or even ugly, when it tends to eliminate or greatly erode one level of government's constitutionally authorized interest in developments.

I
Introduction

This paper argues that, from an environmentally concerned public interest perspective, the only acceptable *harmonization* relating to federal/provincial/territorial environmental assessment, is of the coordination, cooperation, and where appropriate, convergence variety. Further, the papers argues that that from any perspective, public interest or not, any *harmonization* that involves a devolution of federal constitutional authority to provinces or territories, or involves the removal of or limitation on the national perspective, is unacceptable. The kind of *harmonization* that could involve such devolution, removal, or limitation, may be found under the guise of "equivalency" or "substitution" of provincial processes for federal ones. The paper recommends abandoning such quests for equivalency and substitution and instead, aiming for effective coordination, cooperation, and where appropriate, convergence.

In Part II the paper describes what is a public interest perspective, in contrast to an industry or governmental perspective. Part III sets out definitions for "harmonization", "uniformity", "equivalency", "substitution", "overlap", "duplication", and "cooperation,

coordination and convergence". These terms have been associated with *harmonization*. Part IV considers, from an environmentally concerned public interest perspective, what is good, what is bad and what is ugly about federal/provincial *harmonization,* actual or proposed. The paper section gives examples from Federal/Provincial bi-lateral agreements on environmental assessment harmonization. Part V describes how many criticisms, primarily from an industry perspective, alleging that *harmonization* has not succeeded and arguing that more radical streamlining is "necessary," may be, in effect, flogging the wrong horse. Part VI sets out recommendations on how *harmonization* should proceed and how it should not proceed.

II
Environmentally Concerned Public Interest Perspective to *Harmonization*

What is an "Environmentally Concerned Public Interest" Perspective?

INTRODUCTION

This paper takes a public interest perspective to harmonization, focusing on an environmentally concerned public. This perspective may be contrasted with an industry or governmental perspective. Based on cited literature and on discussions held in the Canadian Environmental Network Planning and Environmental Assessment workshop held in Ottawa on March 7, 2008, the following may be identified as indicia of the three perspectives.

INDUSTRY PERSPECTIVE

This paper limits "industry" to for-profit corporations, whose industrial activities require regulatory permitting and may require environmental assessment. Examples include, oil and gas industry, forestry industry, nuclear industry, and various mining industries. What is the likely or expected perspective of corporate industry in respect of regulation of its affairs pertaining to environmental assessment and consequent permitting? To answer this we must briefly consider the nature of the for-profit corporation and how that nature relates to having a perspective in relation to determining environmental and social impacts of its activities.

As philosopher Christopher Stone in 1975 said a corporation "is a *persona ficta,* a "legal fiction" with "no pants to kick or soul to damn"".[1] According to Stone the corporation is "overwhelmingly a profit maximizer."[2] Nevertheless, the corporate persona may, to a limited degree, stretch beyond the goal of making a profit and nothing else. Stone suggests that corporate goals are first, to survive, and assuming survival, to make a satisfactory profit. "to stave off shareholder insurrections".[3] Once these two stages are attained a corporation may seek "higher" goals such as "expansion, prestige, innovation" and an "exciting internal environment".[4] Once these are secured, the corporation may

[1] C.D. Stone, *Where the Law Ends The Social Control of Corporate Behavior,* (New York: Harper and Row: 1975) at 3. For the quoted parts Stone refers to H. L. Mencken, *A new Dictionary of Quotations on Historical Principles from Ancient and Modern Sources* (New York: Knopf, 1942) at 223.
[2] *Ibid.*, at 39.
[3] *Ibid.,* at 38.
[4] *Ibid.,* at 39.

display an increasing "social orientation"[5] such as sponsoring cultural events.[6] It would follow that for Stone, in having a perspective on environmental assessment and permitting processes, an industry would first want to ensure that the processes do not threaten its existence, satisfactory profits, and expansion etc. plans. Once these are secured the corporate entity may engage in "socially responsible" behavior and support societal values relating to environmental assessment and permitting, such as reducing environmental impacts, rehabilitating environmental damage, facilitating broad and effective public involvement, engaging the community, and so on.

More recently, in 2007, Paul Hohnen made a strong business case, in the sense of maximizing profits and minimizing risk, for corporate social responsibility. To summarize Hohnen, by incorporating social responsibility into day to day operations corporations can improve reputation management, enhance ability to recruit, develop and retain staff, improve innovation, competitiveness and market positioning, enhance operational efficiencies and cost savings, improve ability to attract and build effective and efficient supply chain relationships, enhance ability to address change, and provide a more robust "social licence" to operate in the community.[7] Applying Hohnen to an environmental assessment and permitting process, an industry perspective could include aspects of environmentally socially responsible behavior because they will ultimately enhance profits and minimize risk.

Based on such literature and on ENGO observation of industrial representatives, indicia of an industry perspective are the following:

- the *raison d'etre* is to act in the best interests of the corporation and this includes its shareholder's interests, primarily through a corporation's making a profit;
- industry often requires the use of the environment to carry out its projects, and it is generally in industries' best interests to obtain all required authorizations to use the environment as quickly and inexpensively as possible, and as quickly as possible;
- absent government, shareholder, or corporate constating document requirements to protect environment or generally to operate on a triple bottom line (economic prosperity, environmental quality and social justice), there is nothing inherent to a corporate "personality" to do so;
- industries may engage in socially responsible behavior in respect of environmental assessment and permitting processes, but such behavior is
  (a) a driver that is subsidiary to making a profit, and carrying out its survival and growth agenda;
  (b) primarily engaged where it makes good business sense to do so;
- in any event, the costs and benefits of industrial environmentally progressive socially responsible behavior must be economically recognized to support such behavior.

---

[5] *Ibid.*
[6] *Ibid.*
[7] P. Hohnen, *Corporate Social Responsibility, An Implementation Guide for Business* (Winnipeg: International Institute for Sustainable Development, 2007) at 14.

PUBLIC INTEREST PERSPECTIVE

A private or self-interested action or perspective may be characterized as being preferable to the actor from a utilitarian or egoistic perspective.[8] For example, a snowboarding enthusiast may contemplate the building of a new winter sports resort in a nearby wilderness area with enthusiasm in that it would satisfy the boarder's wants and desires for a close place to snowboard. By contrast, for the purposes of this paper, a public interest action or perspective is not one that is seated in an actor's personal wants. Rather it is seated in the actor's beliefs and values about what is best for the collective welfare of the community or society as a whole, regardless of any person's particular utilitarian wants. For example, the boarder just discussed, independent of his or her personal wants may believe that it is in the public interest that the winter sports resort not be built. He or she may believe that it is better for the community and society to preserve scarce wilderness and wildlife habitat rather than to sacrifice them to human wants and desires.[9]

A person's beliefs and values about what is in the public interest could be objectively right or wrong, and there are many undisputable cases of what is in the public interest and what is not. For example, no one would dispute that it is in the public interest that the air we breathe is relatively unpolluted and that it will not poison us with toxic chemicals. This is true, regardless of anyone or thing's desire to make a profit from building a plant that clearly will result in toxic, harmful emissions. Accordingly, the question of whether a perspective or action is in the public interest is not a question regarding whose values and beliefs are relevant, but rather whether they are correct.[10]

As there can be disagreement as to what *objectively* is in the greater public interest, since the public interest covers a span of interests from aesthetic to economic, this paper takes a narrower perspective, namely that of an environmentally concerned public interest. This public interest is typified by public concerns for lasting environmental health and quality, sustained wildlife habitat, and so on. Included in this perspective are the following:

An environmentally concerned public:

- is not limited by a goal or need to make a profit, or by a financial bottom line; and
- is not limited by legal, policy or administrative constraints, (a role of the public is to drive improved policies).

---

[8] F. E. Oppenheim, "Self-Interest and Public Interest" in 3 *Political Theory* 3 (1975) at 267.

[9] This example is drawn from an example by Mark Sagoff in *The Economy of the Earth: Philosophy, Law, and the Environment* (Cambridge: Cambridge University Press, 1988) discussed at 50-55. A case law example that reflects Sagoff type reasoning is *R v Sussex Confirming Authority, ex p Tamplin & Sons' Brewery (Brighton) Ltd,* [1937] 4 All ER 106 at 112 (United Kingdom Court) where Justice Du Parcq J. stated that "'It is fallacious to say that a condition is not in the public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the *public neither know nor care anything about it*" [emphasis added].

[10] For further discussion of the objectivity of evaluative judgments see A. Carlson "Whose Vision? Whose Meanings? Whose Values? Pluralism and Objectivity in Landscape Analysis," *Vision, Culture, and Landscape,* ed., P. Groth (Berkeley: University of California, 1990) pp. 157-168.

Public interest views relating to environment are more normative than those of government or industry; e.g. they may be based on:

- a public right for a healthy and unpolluted environment now and in the future;
- human rights in general;
- the rights of or concern for conditions and habitats of non-humans;
- the view that we do not have a right to needlessly destroy ecological integrity or environmental values;
- the precautionary principle and the polluter pays principle; and
- a public right to meaningful public consultation with respect to proposed developments or decisions that could impact the public.

Finally the environmentally concerned public is not in a hurry to see the environment polluted, wetlands drained, forests harvested, subdivisions built, natural areas mined, lakes used as tailing ponds, and so on. Where there are projects that propose such developments, the public wants to proceed cautiously and ensure that impacts to the environment and society are carefully considered, weighed, and mitigated. Where a project would result in significant impacts on environmental values, the environmentally concerned public expects government regulators to turn down project applications.

GOVERNMENT PERSPECTIVE

Although there is ample literature – from Hobbes,[11] through to Rousseau[12] and beyond – as to why states form and their role *vis-à-vis* members of a government, there is relatively scant literature on a government's perspective on matters such as environmental assessment. One text describes the multi-faceted role that states must play when developing public policy. It states that governments have "a set of roles and institutions having peculiar drives, compulsions, and aims of their own that are separate and distinct from the interests of any particular societal group."[13] Key to governments' goals (and therefore actions and perspectives) is that their goals necessarily relate to "beliefs about how societies should be ordered."[14] Although a government must act in the public interest, we may say that government perspective and action is constrained by:

- constitutional, jurisdictional, international laws and policies;
- departmental and agency mandates;
- political and other commitments;
- administrative requirements;
- budgets and funding; and
- the need to both provide a safe and healthy environment for citizens as well as to facilitate a strong economy.

III

[11] T. Hobbes, *Leviathan* (first published in 1651) (Oxford: Oxford University Press, 2005).
[12] J. Rousseau, *The Social Contract and Discourses* (London: Everyman, 1993).
[13] S. Krasner, *Defending the National Interest* (Princeton: Princeton University Press, 1978) at 10.
[14] *Ibid.*

Lexicon: Harmonization, Uniformity, Equivalency, Substitution, Overlap, Duplication, and Cooperation, Coordination and Convergence

Introduction

The term "harmonization" is used to cover a variety of processes or states of affairs. The lack of precision with which the term is used can confuse discussions that utilize the concept. In the literature *harmonization* describes a range of situations from word for word uniformity to vague attempts to coordinate two or more processes. For clarity, this paper distinguishes among a number of concepts associated with the term "harmonization" with the objective of clarifying and simplifying the discussion.[15] In doing so, the paper strives to be as true to the classic or most accepted meaning of the terms associated with harmonization.

Harmonization

MEANING OF "HARMONIZATION"

This paper seeks to limit the use of the word 'harmonization' to its classical sense, the sense that is most at home in discussions of trade and economics. When the paper uses the word in a more generalized, non-classical sense, it puts the term in italics, i.e. *harmonization*.

Steve Charnovitz, an expert in this area, uses the word "harmonization" in its classic sense. He defines "harmonization" as a movement towards adopting or requiring equivalent standards in laws, regulations, and policies. Charnovitz defines two kinds of standards susceptible to harmonization: process standards, relating to how something is manufactured, transported, and used; and product standards, which relate to the characteristic of a good, such as its size, design or performance.[16] For example, a process standard relating to a dress might include labor condition regulations, worker safety rules, environmental conditions standards, manufacturing regulations, rules governing type of machinery used in manufacturing, and so on. By contrast, product standards might include what a size "6", "8", "10" and so on means, what expressions like "cotton-acrylic blend" mean, and various other standards and rules relating to the design and quality of the product. Harmonization of process standards involve, for example, minimum worker safety rules among trading partners. By contrast, harmonization of product standards involves, for example, standardized sizing of a product among trading partners. Charnovitz remarks that it is "dogma in trade policy circles that unilateral import standards should relate to products only – not processes."[17]

What I have dubbed the "classic" meaning of "harmonization" is no stranger in a Canadian/environmental context. For example, Francis Bedros, who won second prize in a Canadian government NAFTA @ 10 essay contest, like Charnovitz, assumes classic

---

[15] Here I follow Ludwig Wittgenstein, who is renown for his view that many verbal disputes and misunderstandings boil down to different speakers using words in different ways. If we clarify our meanings, disputes may disappear. If they do not disappear, at least the true nature of the dispute is revealed. See generally, L. Wittgenstein, *Philosophical Investigations,* (Prentice Hall, 1999).

[16] S. Charnovitz, "Environmental Harmonization and Trade Policy", ch. 20 in D. Zaelke, P. Orbuch, and R. Houseman, *Trade and the Environment, Law, Economics, and Policy* (Island Press: Washington, 1993) at 267.

[17] *Ibid.,* at 280.

meaning of "harmonization" in his essay. Bedros states, states that ""[h]armonization" refers to [the] limited situation [that is] observable when environmental standards in a particular field are virtually identical.[18]

HARMONIZATION AND ENVIRONMENTAL ASSESSMENT

Using Charnovitz' distinction between process harmonization and product harmonization, observation shows that the kind of harmonization most, if not solely, applicable to environmental assessment is process harmonization. This is because environmental assessment is comprised of processes and activities, rather than a product, such as a dress, a battery, or a camera. Along with environmental assessment expert Robert Gibson we may say that environmental assessment "is the collective term for a host of quite different activities and processes. All of them center on efforts to anticipate the environmental effects of new undertakings and make better decisions about them."[19] What environmental assessment process standards could there be? In principle, environmental assessment standards could relate to a number of environmental assessment processes, for example, best practices requirement to ensure that environmental assessment takes place in the planning stage of proposes projects, a requirement for a cumulative effects assessment, best practice standards for carrying out cumulative effects assessments, best practices for monitoring and follow-up, best practices for determining level of public participation opportunities, and best practices for carrying out public participation procedures. The International Association for Impact Assessment (IAIA) is an example of an institution that develops best practices standards for environmental assessment processes. For example, it has recommended what should be included in an environmental impact assessment and how the steps of an environmental assessment should be carried out.[20] As well, the Canadian Environmental Assessment agency has developed a number of guidelines for proponents and federal authorities that may be seen as, what the Agency regards as, best practice standards.[21] In addition, in years past, the *Regulatory Advisory Committee,* or the "RAC"[22] created under the *Canadian Environmental Assessment Act*[23] (CEAA) to advise the federal environmental Minister of matters relating to environmental assessment, was involved in the development of a Canadian Standards Association (CSA) standard for environmental assessment processes. The CSA is an organization that promotes best practices harmonization through process and product standards.[24] The RAC CSA project

---

[18] F. Bedros in "Harmonization of Environmental Standards and Convergence of Environmental Policy in Canada:" available online at << http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/bedros.aspx?lang=en>>.

[19] R. Gibson, "EA in Canada, From Wreck Cove to Voisey's Bay: the evolution of federal environmental assessment in Canada" 20 *Impact Assessment and Project Appraisal* 3 (2002) at 152.

[20] Information available online at <http://www.iaia.org/modx/>.

[21] See the Agency's website at <www.ceaa.gc.ca> link to Publications, link to Guidance Materials and Operational Policy Statements.

[22] The RAC was established by the federal government in 1991. It is a multistakeholder body with representatives from provincial governments, federal government, Aboriginal interests, industry, environmental law organizations, and environmental groups. Its original purpose was to help develop regulations under the CEAA. Over time the RAC's mandate has expanded to include assisting government in developing policies and guidelines under the CEAA and providing advice on law and policy reform.

[23] S.C. 1992, c. C-37, hereinafter "CEAA".

[24] The CSA website is <www.csa.ca>.

eventually was abandoned, but if it had succeeded, it would have set out process standards for environmental assessment. It is likely that an objective of the RAC CSA project would have been harmonization in the classic sense: that environmental assessment processes throughout Canada would incorporate the standards into domestic legislation and policies.

Uniformity

MEANING OF "UNIFORMITY"

"Uniformity" relates to efforts to make laws uniform across jurisdictions. For example, most, if not all provinces of Canada, and Canada itself, have transportation of dangerous goods legislation.[25] Uniform transportation of dangerous goods legislation makes sense. It would be inefficient, and potentially dangerous, if each jurisdiction had its own symbols for dangerous substances, and its own rules as to inspections, permits, emergency response, etc.. Uniform legislation throughout Canada in this area seeks to "minimize economic impact on industry and ensure the orderly and safe movement of dangerous goods through the transportation system". [26]

The quest for uniform (sometimes, in the non-classical sense, called "*harmonized*") legislation is not new. The oldest North American body advocating uniform laws is the National Conference of Commissioners on Uniform State Laws ("NCCUSL") established in 1892. In the last 116 years, the NCCUSL has produced 200 "model statutes". The objective of model statutes is that they be adopted by states. NCCUSL develops and promotes uniform state laws "where desirable and practicable".[27] Curiously, except for model conservation easement legislation, and the *Transboundary Pollution Reciprocal Access Act* (joint U.S./Canada), there are no NCCUSL environmental model statutes. More to the point of this paper, the NCCUSL has not developed uniform environmental assessment legislation, notwithstanding that the federal government and several U.S. states have environmental assessment legislation. Why is this?

Perhaps an answer is revealed by examining the NCCUSL's criteria for identifying appropriate candidates for model, uniform legislation.[28] The NCCUSL requires that every "Act drafted by the Conference shall conform to the following requirements:

> (i) there shall be an obvious reason for an Act on the subject such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity;

---

[25] The federal legislation is the *Transportation of Dangerous Goods Act, 1992,* S.C. 1992, c. 34.
[26] From the recitals of the Canada- *Alberta Agreement Respecting Administration of the Transportation of Dangerous Goods Act, 1997,* available online at << http://www.tc.gc.ca/tdg/clear/agreements/alberta.htm>>.
[27] See <www.nccusl.org> at << http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>>.
[28] *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Act* (January 13, 2001), online at < http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=42>>.

(ii) there must be a reasonable probability that an Act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly;

(iii) the subject of the Act shall be such that uniformity of law among States will produce significant benefits to the public through improvements in the law (for example, facilitating interstate economic, social or political relations, or responding to a need common to many States as to which uniform legislation may be more effective, more efficient, and more widely and easily understood) or will avoid significant disadvantages likely to arise from diversity of state law (for example, the tendency of diverse laws to mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the States in their activities or dealings in other States or with citizens of other States or in moving from State to State)."[29]

From the stated criteria it is apparent that the kind of law that the organization seeks to make uniform is one that primarily benefits the *public interest*. This is evident from clause (iii) which focuses on avoiding negative impacts of having diverse laws such as to "mislead, prejudice, inconvenience or otherwise adversely affect the citizens" moving from state to state. The criteria are not aimed at addressing actual or perceived economic or industrial efficiencies or interests. Although there may be aspects of environmental assessment that would support a public interest perspective for adopting uniform state environmental assessment laws,[30] to date, the public has not been driving environmental assessment *harmonization*. *Harmonization* in environmental assessment mainly is driven by industry or provincial governments. It is not driven by public interest organizations or ordinary citizens.[31]

Like the U.S., Canada has a long history relating to uniform legislation. The Uniform Law Conference of Canada was created in 1918 ("Canada Conference"). Its mandate "is to facilitate and promote the harmonization of laws throughout Canada by developing, at the request of the constituent jurisdictions, Uniform Acts, Model Acts, Statements of Legal Principles and other documents deemed appropriate to meet the demands that are presented to it by the constituent jurisdictions from time to time."[32] Also like the U.S., the Canada Conference has criteria governing decisions to develop model uniform legislation. It its words "[t]he primary object of the Conference historically, and one of

---

[29] *Ibid.*

[30] For example, uniform requirements for meaningful public participation, assessment of cumulative effects, and so on.

[31] A Canadian Environmental Network Planning and Environmental Assessment Caucus citizen's briefing paper in connection with CEAA 5 year review (2003) on "Duplication and Overlap in Environmental Assessment " put it this way: "Over the last decade, there has been a steady stream of criticism from provinces, provincial Crown corporations and private sector proponents, especially in the primary resource sector. The complaint has been that federal environmental assessment overlaps with and duplicates provincial processes, resulting in confusion, project delays and unnecessary and unproductive expense and effort. Unfortunately - and despite the solid evidence and arguments countering this false notion - the Canadian Environmental Assessment Agency's 5-year review discussion paper gives considerable space to this issue". The briefing papers are available online at <<http://www.cen-rce.org/eng/caucuses/assessment/index.html#top_of_page>> link to citizens briefing kit #14..

[32] See <http://www.ulcc.ca/en/about/>.

its main objects still, is to promote uniformity of legislation throughout Canada or the provinces and territories on subjects on which uniformity may be found to be *possible and advantageous*[33] [emphasis added]. Specific criteria are:

- whether there is an obvious need for, or whether it is in the public interest to have, a uniform Act on the subject;
- whether there has been any demand from any quarter for uniformity of legislation on the subject; and
- whether there is any indication that the proposed legislation would have some likelihood of being enacted.[34]

Again similar to the U.S.'s NCCUSL, although the Canada Conference has developed numerous uniform models (currently there are over 110) environmental legislation does not feature. There is only one uniform model addressing an environmental topic and it is the *Transboundary Pollution Reciprocal Access Act* (joint U.S./Canada). Why, one may ask, has the Canada Conference not pursued environmental legislative models, in particular, a model dealing with environmental assessment? Is it because such legislation is neither *possible* nor *advantageous*? Applying the specific criteria for these terms, in other words, is there no obvious need for such a model, and is there no demand for it that is in the public interest?

UNIFORMITY AND ENVIRONMENTAL ASSESSMENT

To address the last question, no one, to my knowledge, is actively campaigning for uniform environmental assessment legislation throughout Canada. This is understandable. There are many reasons why completely uniform environmental legislation would not be appropriate throughout Canada.[35] For example, consider triggering. At the provincial level, most environmental assessments are triggered because a proponent proposes to undertake an activity that, under the province's environmental assessment legislation, either requires an environmental assessment, or that may require an assessment (it is discretionary on a statutory delegate).[36] This may be called the "List Approach" to environmental assessment. A proposed project is either on a mandatory, exempt, or discretionary environmental assessment list. Uniform environmental assessment legislation throughout provinces would require that a proposal for a specific activity would trigger or not trigger or only discretionarily trigger an environmental assessment no matter which province it was proposed in. Such incursion on provincial jurisdiction over environmental assessment is not something that would be generally celebrated. Geographical, social, cultural, environmental, and economic differences that distinguish

---

[33] *Ibid.*

[34] Criteria set out in C. Cuming, *Perspectives on the Harmonization of Law in Canada* ,(University of Toronto Press: Toronto, 1985) at 33.

[35] This is not to say that it is undesirable for *aspects* of environmental assessment to be the same throughout Canada. For example, provinces could adopt the same characterization of "environmental effect" or "cumulative effects".

[36] An exception is Saskatchewan. The *Saskatchewan Environmental Assessment Act* requires a Ministerial review including an environmental assessment of a development. The definition of "development" includes any "project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to have an affect on any unique, rare or endangered feature of the environment" See S.S. 1979-80, c. E-10.1, s. 2(d) (i).

provinces drive political decisions as to what activities should trigger an environmental assessment.

By contrast to the List Approach, federal environmental assessment under the CEAA adopts what might be called a "Category Approach". A proposal is subject to federal environmental assessment if it falls under a number of categories. There must be a "project" as defined by the CEAA,[37] there must be a federal authority involved, and there must be a trigger[38]. If a proposal fits under the categories, it must be assessed, and subject to special authority in the CEAA to require an environmental assessment in other circumstances, [39] if a proposal does not fit under the categories, it is not subject to federal environmental assessment. Although all of the provinces and territories could adopt a List Approach, it is not clear whether the federal government could adopt such an approach, without greatly diminishing its presence in environmental assessment in Canada. This is because, except for projects that take place entirely on federal lands, federal constitutional authority does not easily extend to projects *per se,* such as a paper mill, a mine, or a dam. Rather it extends to aspects of projects, such as impacts to a coastal or inland fishery, impacts to migratory birds or nests, transboundary impacts, or an interference with navigation.[40] Accordingly, even if the federal government's legislation relied on a List Approach[41] the legislation also would require a federal trigger, such as is now present in section 5 of the CEAA, or a mechanism comparable to a federal trigger. Given the difference in approaches between the federal government and

---

[37] S. 2 of the CEAA defines "project" to mean :

> (a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
> (b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b)

The *Inclusion List Regulations* (S.O.R./94-637) were promulgated under paragraph 59(b).

[38] S. 5 of the CEAA sets out the triggers, namely that a federal authority it a proponent of a project, a federal authority is a funder of the project, the federal government provides an interest in land (such as a lease) for the project), or the project requires a regulatory authority under federal legislation that is listed in the *Law List Regulations* (S.O.R./94-636).

[39] Ss. 46 and 47 of the CEAA enable the federal Minister of the Environment to require a CEAA environmental assessment of a project where there is no section 5 CEAA trigger, where a project would have transboundary or international environmental effects.

[40] Legislative authority over these impacts is found in the opening and closing clauses of s. 91, and ss. 91(2), (10),(12), and s. 132 of the *Constitution Act, 1867*, formerly *the British North America Act, 1867*, (U.K.) 30 & 31 Vict., c. 3.

[41] CEAA, in part, adopts a List Approach regarding level of assessment. The CEAA contemplates 4 potential levels of assessment: screenings, comprehensive study, panel review, and mediation. Screenings are the most basic level of assessment. The *Comprehensive Study List Regulations* (S.O.R./94-638) lists projects that will require a comprehensive study. Projects are on the Comprehensive Study Regulations since they have potential for significant adverse environmental effects or may generate significant public concerns. They typically (though not always) are larger projects. The CEAA (ss.16(2) and 21-23) require additional considerations and processes for comprehensive studies over screenings. For example, early on the comprehensive study process the Minister must determine whether the project should undergo a panel review or mediation. If the project remains a comprehensive study, there are mandatory public consultation and funding opportunity requirements, and the Minister must consider purposes of, alternatives to, the need for the project, and the project's potential impacts on natural resources in relation to their ability to meet the needs of future generations. As well the Minster must set out mitigation measures and consider a follow up program.

provinces and territories, and given the differences among provinces and territories, using either the NCCUSL criteria or the Canadian Conference criteria, there is little likelihood of completely uniform environmental assessment legislation being developed. in Canada.

Equivalency

MEANING OF "EQUIVALENCY"

Mathematically "equivalency" occurs where two mathematical expressions have equal value, equal amount, or equal measure.[42] For example, 3/6 is equivalent to ½. It follows that, except for how a quantity is expressed, if A is equivalent to B, then everything true of A is true of B.

In a legal context the term "equivalency" typically is used in the context of a determination under legislation of jurisdiction "A" that a law or process of jurisdiction "B" is equivalent to a law or process of jurisdiction "A". Hence if two regulations are determined to be equivalent, they are essentially the same and have the same effect even though they may be expressed differently.

An example of "equivalency" in the legal context may be found in the *Canadian Environmental Protection Act, 1999*[43] (CEPA). Among other things, CEPA regulates substances that are determined to be toxic under the Act. Given shared constitutional jurisdiction in this area, provinces may also regulate toxic substances.[44] Subsection 10(3) of the CEPA provides:

> 10 (3) … where the Minister and a government agree in writing that there are in force by or under the laws applicable to the jurisdiction of the government
>
> > (a) provisions that are equivalent to a regulation made under a provision referred to in subsection (1) or (2), and
> > (b) provisions that are similar to sections 17 to 20 for the investigation of alleged offences under environmental legislation of that jurisdiction,

---

[42] See, for example, <www.sosmath.com/algebra/fraction/frac2/frac2.html>.

[43] S.C. 1999, c. 33.

[44] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213. At ¶ 122, Justice LaForest for the majority stated "In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in Oldman River [*Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3] … made it clear that the environment is not, as such, a subject matter of legislation under the Constitution Act, 1867. As it was put there, "the Constitution Act, 1867 has not assigned the matter of 'environment' sui generis to either the provinces or Parliament" (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the Constitution Act, 1867 to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (ibid. at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.

> the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in an area under the jurisdiction of the government.

Pursuant to this provision the Government of Canada and the Government of Alberta have entered into an equivalency agreement regarding the regulation of certain toxic substances.[45] Under the agreement, regulatory provisions may be considered to be equivalent only where the "standards, measurement or testing methods" are the same, any statutory authorizations such as approvals, "will not contain standards, measurements and testing methods which are less stringent than the corresponding standards", citizen rights to require investigations are equivalent, and sanctions and enforcement mechanisms are equivalent.[46] Under the agreement the governments agree that Alberta's regulations under the *Environmental Protection and Enhancement Act*[47] governing a number of CEPA toxic substances are equivalent to the CEPA regulations, and hence only the Alberta regulations apply.[48] This illustrates a key point about "equivalency", namely that where two legislative provisions or processes are determined to be "equivalent", it is so that there may be a direction that only one of the provisions or processes will apply. The other is inapplicable. Later it is argued that the CEPA sense of "equivalency" does not reflect true equivalency in the mathematical sense.

EQUIVALENCY AND ENVIRONMENTAL ASSESSMENT

To understand how equivalency relates to environmental assessment a distinction must be drawn between the environmental assessment process and the regulatory decision following the process. The environmental assessment process is carried out to gather information on the potential environmental, social, and economic impacts of a proposed project. The environmental assessment report (that summarizes and explains potential impacts, proposed mitigation of impacts, monitoring and reporting) is provided to the statutory delegates who regulate the project. The regulators, using the information provided in the report, decide whether they will exercize their authority under legislation to take action to enable a project to proceed, for example, by granting a regulatory approval, providing funds for the project, or granting an interest in land to enable the project to proceed, and if so, under what conditions. These decisions are the regulatory decisions. They are discrete from the environmental assessment process.

Federal regulators make regulatory decisions pursuant to federal legislation, and provincial regulators make regulatory decisions pursuant to provincial legislation. Sometimes only the federal government may legally regulate something, and sometimes only the provincial government may legally regulate something. This is because the

---

[45] *An Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta,* (1994), available online at <http://www.mb.ec.gc.ca/pollution/e00s61.en.html>.
[46] *Ibid,* s. 2.
[47] R.S.A. 2000, c. E-12.
[48] The CEPA regulations that are not applicable in Alberta under the Agreement are: *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations* SOR/92-267 (All Sections), *Pulp and Paper Mill Defoamer and Wood Chips Regulations* SOR/92-268 (ss.4(1), 6(2), 6(3) (b), 7 and 9 only), *Secondary Lead Smelter Release Regulations* SOR/91-155 (All Sections), and *Vinyl Chloride Release Regulations* SOR/92-631 (All Sections).

Canadian Constitution[49] allocates what are called "heads of legislative power" between the federal and the provincial governments. The framers of the Constitution intended the allocation to be exclusive in the sense that if the Constitution gives one level of government the right to legislate a matter, it excludes the other level from legislating that matter. If one level of government passes a statute or regulation governing a matter over which the Constitution gives the other level exclusive power to legislate, a court may strike down the law as being *ultra vires* since it is beyond authority given by the Constitution.

Where it is not clear which level of government -- federal parliament or provincial legislature -- has jurisdiction over a subject matter, a court has three alternatives. First, it could find that the matter truly falls within the power of only one of the two levels. In determining this, a court will apply interpretation rules developed over years. Generally, with these rules, a court first attempts to characterize the essence of the regulated subject matter (the *pith and substance*[50]), and then it considers whether the matter falls under provincial or federal constitutional authority. For example, the court might ask whether a provincial law prohibiting timber imports into a province really has to do with regulating provincial timber resources, (a matter within provincial authority) or whether it really has to do with trade and commerce (a matter within federal authority). If the essence of the law is the former, the court will find the provincial law to be valid, but if it is the latter, it will declare the law to be *ultra vires* the Constitution. Second, a court could find that both levels may validly legislate some aspect of the matter. An example is toxic substances, which as noted earlier, may be regulated either federally or provincially, or by both levels of government.[51] However, if provincial and federal laws directly conflict, our courts will apply the doctrine of paramountcy to confirm the operation of the federal law, and to order the provincial law to be inoperative, to the extent that it conflicts with the federal law.[52]

How may these rules be applied to the regulatory decision following an environmental assessment? Consider an example. The federal government has exclusive legislative jurisdiction over inland and coastal fisheries[53]. Some matters relevant to a fishery are in constitutional provincial jurisdiction such as the regulation of water and water quality.[54]Although a provincial government may regulate in the fields of water and water quality, it may not legally directly regulate for the protection of an inland or coastal

---

[49] *Constitution Act, supra* note 40.

[50] In determining whether a statute is intra or ultra vires the Constitution, a court will engage in a "pith and substance" analysis. The elements of a pith and substance analysis were spelled out in Ward v. Canada (Attorney General et. al.), 2002, 283 N.R 201 (SCC), in which McLachlin, C.J.C., for the Court, at paragraph 16 stated that the "… pith and substance analysis asks two questions: first, what is the essential character of the law? Second, does that character relates to an enumerated head of power granted to the legislature in question by the Constitution Act, 1867?". In answering these questions a court will examine the essential character of a law, as well as its legal and practical effects.

[51] See *supra* note 44.

[52] For a succinct summary of the constitutional rules see A. Lucas, "Natural Resources and Environmental Management: A Jurisdictional Primer", in *Environmental Protection and the Canadian Constitution*, (Edmonton: Environmental Law Centre, 1990).

[53] S. 91(12) of the *Constitution Act, supra* note 40.

[54] Ss. 92(5), (13) and (16) of the *Constitution Act, supra* note 40.

fishery. If a provincial government did this, a court could declare the purported regulation to be *ultra vires* the Constitution. Accordingly a provincial government could not make a regulatory decision that directly involves inland or coastal fisheries, or any other matter that falls within exclusive federal legislative jurisdiction. Since a province may not regulate in such area, legally there may not be federal/provincial equivalence with respect to making regulatory decisions following an environmental assessment where the matter regulated is a matter exclusively under provincial or under federal jurisdiction.

But what about the environmental assessment process itself? May there be equivalence with respect to the environmental assessment process even though there may be not be equivalence with respect to the regulatory decision? First off, note that there should be no objection to a level of government considering matters outside of that level's constitutional jurisdiction during the environmental assessment process. An environmental assessment process is, after all, as Supreme Court Justice La Forest has said, an information gathering exercize.[55] The environmental assessment process itself is not the exercizing of a regulatory decision. Nevertheless, there is strong argument that there can be no true federal/provincial equivalence in the environmental assessment process that leads to a regulatory decision where the decision is within exclusive constitutional jurisdiction. The argument is based on the fact that although the environmental assessment process and the regulatory decision, though separate, they are intimately connected. The main reason for conducting an environmental assessment process is to guide and assist the regulator in making the regulatory decision. Accordingly, which impacts are considered in an environmental assessment will directly relate to the regulatory decision. For example, consider a proposal to build a dam. Assuming the project will impact a fishery, the regulator, the Department of Fisheries and Oceans, will want to ensure that the environmental assessment covers all matters relevant to fishery impacts. The provincial government also may require information on impacts to fish habitat in the environmental assessment process, but since that level of government does not have direct regulatory authority over fish habitat, its concerns in this regard will be limited. Its concerns will focus on matters within its constitutional jurisdiction, such as water flow and water quality.

Similarly, consider mitigation. Mitigation proposals form a key component of environmental assessment. In determining whether there are significant environmental impacts the government official overseeing an environmental assessment process will consider to what degree potential impacts may be mitigated. Which mitigation measures are considered in the context of an environmental assessment depends on the power of the regulator to impose mitigation conditions in exercizing its regulatory authority.[56] And, it is only the regulator in a jurisdiction that knows precisely what kind of conditions may be imposed on a proponent, and what kind of monitoring and follow-up may be required to determine whether mitigation is successful.

---

[55] *Friends of the Oldman River Society v. Canada (Minster of Transport)* [1992] 1 S.C.R. 3 at ¶¶ 95 and 101.

[56] S. 20(1.1) of the CEAA only allows mitigation to be taken into account if the responsible authority (the federal authority who oversees the environmental assessment) can ensure that it will be implemented or is satisfied that some other person or body will implement.

But what about matters that do not fall under exclusive constitutional jurisdiction? Can there be true equivalence with respect to the environmental assessment process relating to them.? Although it is not possible to fully cover this topic in this short paper, it is submitted that even where there is shared constitutional jurisdiction federal/provincial equivalence in environmental assessment processes may not be possible. For example, the federal government and provincial governments share jurisdiction over water quality. The federal interest stems from its constitutional authority over inland and coastal fisheries, exhibited in the *Fisheries Act*[57], especially section 36, which prohibits the discharge of deleterious substances into waters frequented by fish, and its constitutional authority over criminal matters[58]as they relate to water quality and exhibited in the *Canadian Environmental Protection Act,* under which the federal government regulates discharges of toxic substances.[59] For the sake of simplicity, this paper will focus on the fisheries power. The provincial interest relates to provinces' constitutional powers over property and civil rights.[60] There are two accounts as to why true equivalence may not be possible in such a situation. One is practical and one is conceptual. Both accounts concern how reasons and motives relate to actions or courses of actions.

The practical account is best understood in the context of an example. The example concerns an action or course of action – John's cleaning his apartment -- that may be done for different reasons or motives. John's cleaning his apartment might well differ if he is cleaning in anticipation of his buddies' visit, in contrast to cleaning in anticipation of his mother's visit, or in anticipation of his new girlfriend's visit. There might be much overlap in each case (e.g. straightening up the living room, vacuuming the floors) but there will be differences in approach and concern. For example, John's kitchen is likely to end up much cleaner for his mother, than for his buddies. John may pay special interest to his bathroom for his girlfriend (lest she discover "secrets" such as John's complexion treatments) and his bedroom, in case the relationship takes a certain turn. For his mother or buddies, he might forget the bedroom altogether and simply close the door to it. So, even though it may be true that there are a set of actions that constitute John's cleaning his apartment in all three cases (for his buddies, for his mother, and for his girlfriend), there is no true equivalency in the actions. The reason for the lack of equivalency was because the actions were done for different motives or reasons.

Now apply the practical account to federal/provincial situation where each level of government regulates water quality. Assume that the federal government's regulation necessarily is grounded it is concern for fisheries and that the provincial government's regulation is grounded in its concern for environmental quality in general. The course of action that the federal government takes in regulating water quality will necessarily be related to what is needed for fish health and habitat. The provincial government's course

---

[57] R.S.C. 1985, c. F-14.
[58] S. 91(27)of the *Constitution Act, supra* note 40.
[59] See *supra* note 44 and accompanying text.
[60] S. 92(13) of the *Constitution Act (supra* note 40) assigns "Property and civil rights" exclusively to provincial legislatures. This covers all private law , including the law of property, contracts, torts and trusts, and generally government regulation affecting private relations and property.

of action will necessarily be related to what is needed for environmental water quality generally. Although there may be overlap in regulation (e.g. both levels may prohibit discharges of a given chemical over a certain quantity and concentration) each level of government will have different reasons or motives for the prohibition. Because, from a practical standpoint, the reasons or motives that one has to undertake a course of action have an effect on the nature of the course of action, regardless of the overlap. For example, if a province regulates for water quality generally it may be interested in maintaining quality through the use of chemicals such as chlorine. However the federal regulator, interested in fishery health, might not want to use such chemicals because of their impacts on the fishery. As well, given the different reasons and motivations for regulating water quality, it would be expected that the federal government would be paying more attention to certain aspects of water quality than the provincial government, and that federal monitoring and enforcement would differ from provincial because it would concern fishery health, and not water quality in general. As well, practically speaking, it would be expected that technological and scientific advances concerning fishery health *per se* would more likely lead to changes in the federal regulatory approach than lead to changes in the provincial regulatory approach. Accordingly, from a practical point of view, a claim that a provincial regulatory course of action is equivalent to a federal regulatory course of action, cannot be true, although specific regulatory actions may be identical. A declaration of equivalence in this regard invites disregard for one jurisdiction's reasons and motives to regulate and could result in, from that jurisdiction's perspective, deficient monitoring, enforcement, and innovation.

The conceptual account relies on a large body of philosophical literature concerning the relationship between reasons, motives, and actions.[61] Reasons and motives rationalize actions in the sense that they justify or explain why they were done. John turned left at the stop sign because he wanted to go to the Safeway. John's wanting to go to the Safeway, justifies or explains the action of turning left. Some philosophers would go so far as to say that some reasons are the causes of actions.[62] But whether or not reasons are causes, it is undeniable that there is a conceptual connection between reasons and motives and actions. Without identifying reasons or motives, events involving humans would be unintelligible. It would be impossible to ascertain whether Mary's action of fatally stabbing George with a kitchen knife was self-defense, murder, or an accident. If Mary's reasons or motives for stabbing George were solely because he had a gun pointed at her and he was ready to shoot, the stabbing was self-defense; if Mary's reasons or motives were to kill the dirty son-of-a-gun for doing her wrong, the stabbing was murder; if Mary's reasons or motives were to puncture a lamb roast on the cutting board and George slipped and fell into the knife over the cutting board just as the knife was irretrievably descending, the stabbing was an accident. Indeed some human events can only be explained by reference to a given motive or intention. For example, the act of murder

[61] E.g., John Austin, "A Plea for Excuses" Published in *Proceedings of the Aristotelian Society*, 1956-7. Transcribed into hypertext by Andrew Chrucky, August 23, 2004. available online at <http://www.ditext.com/austin/plea.html>; Donald Davidson, "Actions, Reasons, and Causes", (1963) LX:23 The Journal of Philosophy 685; and Anthony Kenny, *The Metaphysics of Mind* (Oxford University Press, 1992),

[62] E.g. Donald Davidsion, *ibid*.

may only be done intentionally or with reckless disregard. This is because 'murder' by definition requires *mens rea* or at least the mental attitude of reckless disregard.

Another way of putting the point relies on the distinction between *de dicto* and *de re* as these terms may apply to events in the world. Philosophers have explained these terms in various ways[63] but this paper relies on the simple, classic, direct translation that "*de dicto*" means of the word, whereas "*de re*" means of the thing. Thus an intentional description of an action is *de dicto* but the action/event in the world, irrespective of a description, is *de re*. Using the Mary/George scenario, the act of stabbing is *de re,* but describing the event as a murder , self-defense, or an accident, is *de dicto*.

How may the conceptual account be applied to actions or courses of actions taken by provinces or the federal government in carrying out constitutional authority where each level of government could perform the same regulatory act? An example would be where both the federal government and provinces prohibit the discharge of a chemical into watercourses over a certain amount and concentration. Call this "Prohibition A". The federal government could legislate Prohibition A to protect the fishery, whereas a provincial government could legislate Prohibition A to protect water quality in general. However, Prohibition A, when carried out by a province, could not be validly described, in the *de dicto* sense, from a constitutional point of view, as a province's protection of the fishery. Indeed if the *pith and substance* of the provincial legislation incorporating Prohibition A was to protect the fishery, a court could declare the legislation to be *ultra vires* the constitution.[64] Likewise, Prohibition A, when carried out by the federal government, could not be validly described, in the *de dicto* sense, from a constitutional point of view, as the federal government's regulation of water quality in general, as this area of legislation constitutionally falls to provinces under the provincial right to control property and civil rights. Accordingly, from a conceptual point of view there cannot be true equivalence between federal legislation to protect the fishery and provincial legislation to protect water quality generally, even where both level of governments, in the *de re* sense take the same regulatory action in the exercize of shared constitutional jurisdiction.

If there can be no true equivalence with respect to a federal/provincial regulatory actions on both the practical and conceptual approach, even when the actions are the same in the *de re* sense, can environmental assessments carried out prior to regulatory actions be truly equivalent? For the reasons set out in the discussion above concerning equivalency and exclusive legislative jurisdiction it is submitted there can be no true federal/provincial equivalency with respect to the environmental assessment process where the project falls under shared constitutional jurisdiction, such as water quality.

Substitution

[63] See, for example, Alvin Plantinga, The Nature of Necessity (Clarendon, 1989) and Saul A. Kripke, Naming and Necessity (Harvard, 1980).
[64] *See* note 50 for an explanation of "pith and substance".

MEANING OF "SUBSTITUTION"

"Substitution" occurs where a law or process of one jurisdiction or agency "A" is substituted for a law or process of jurisdiction or agency "B" such that the application of A's law or process is deemed to be an application of B's law or process. Substitution differs from "equivalency" as that term has been used (e.g. in the CEPA context) since with substitution there is a deeming that the application of one law or process is the application of another law or process whereas with equivalency, there need be no such deeming. With equivalency only one law or process applies. As illustrated below, another key difference is that with substitution, at least as that term is used in the CEAA, is that there does not need to be equivalence between the processes or laws substituted one for the other.

Subsection 43(1) of the CEAA provides:

> Where the referral of a project to a review panel is required or permitted by this Act and the Minister is of the opinion that a process for assessing the environmental effects of projects that is followed by a federal authority under an Act of Parliament other than this Act or by a body referred to in paragraph 40(1)(d) would be an appropriate substitute, the Minister may approve the substitution of that process for an environmental assessment by a review panel under this Act.

Note that all that is required of the Minister in exercizing his or her discretion under this provision is that the Minister be of the opinion that the substituted process is an "appropriate substitute". There is no requirement that the processes be identical or equivalent.[65]

SUBSTITUTION AND ENVIRONMENTAL ASSESSMENT

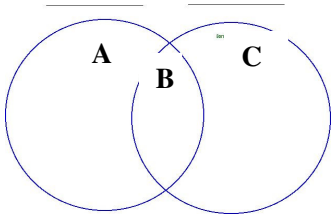
For the same reasons set out under "Equivalency and Environmental Assessment" substitution of a provincial environmental assessment for a federal environmental assessment (or *vice-versa*) is not legally possible where the project requires regulatory authority that falls under a head of exclusive constitutional authority. Also, for the same reasons set out in that section, the substitution of a provincial assessment for a federal environmental assessment (or *vice-versa*) is not appropriate where the project requires regulatory authority that falls under shared constitutional authority. Hence, if substitution is to have a role in the environmental assessment process, it must be within one jurisdiction's family, such as is permitted under paragraph 43(1) of the CEAA set out above.

Overlap

[65] To date there has been only one substitution under the CEAA was the 2006 Emera Brunswick Pipeline panel review. In this review, the National Energy Board's assessment process under the *National Energy Board Act* (R.S.C. 1985, c. N-7). For a critique of the substitution see G. Schneider, J. Sinclair and L. Mitchell. *Environmental Assessment Process Substitution: A Participant's View,* available online at << http://www.cen-rce.org/eng/caucuses/assessment/docs/Final%20Substitution%20Paper%20March29.pdf>>.

MEANING OF "OVERLAP"

The Canadian Oxford Dictionary (2000) defines "overlap" as "**1**.lay over. **2.** … cover and extend beyond. **3.** … partly coincide, extend beyond". Hence in the Ven diagram below area B may be said to overlap areas A and C.



:

Overlap in and of itself is neither bad nor good. If a mother has 5 children the time that the children's appetites are active may overlap on a daily basis. This is not a good thing, or a bad thing; it is just the way things are in the world. Regulatory requirements of two jurisdictions may overlap as well. For example, suppose a company wishes to discharge deleterious substances into a fish bearing river in Nova Scotia. The Department of Fisheries and Oceans in carrying out its mandate under the *Fisheries Act* may need information on impacts on water quality impacts on in order to ascertain whether the project would have a negative impact on the fishery, a matter within federal authority. The Nova Scotia Department of Environment and Labor also may need information on water quality impacts to ascertain whether the project would cause water pollution, a matter within provincial authority.[66] In other words their information requirements overlap, although their constitutional mandates extend beyond the overlap. The overlap is not good or bad, it is just what would be expected in a federation such as Canada.

OVERLAP AND ENVIRONMENTAL ASSESSMENT

A Canada Google search of "overlap & environmental assessment" reveals numerous pages of claims and concerns that there is unnecessary overlap between federal and provincial requirements and that such overlap should be minimized or eliminated. The web pages typically are those of a level of government, industry, or business or their representatives. Although not every link was followed, a cursory review revealed no links where a member of the public was complaining about overlap in environmental assessment. Rather the review revealed claims or concerns by self-interested private or governmental entities that overlap somehow lead to or resulted in inefficiencies, wasting time and so on.

It is submitted that these claims are ill founded.[67] Overlap *per se* is not bad or inefficient. Just as a mother's 5 children's appetites overlapping is not bad nor inefficient, different levels of government's overlapping requirements for environmental assessment

[66] Nova Scotia generally regulates pollutant discharges under the *Environment Act,* S.N.S. 1994-5, c. 1. S. 68 of the Act prohibits discharges of substances into the environment "in an amount, concentration or level or at a rate of release that is in excess of that expressly authorized by an approval or the regulations".
[67] For an environmentally concerned public interest perspective on overlap, *see* "Duplication and Overlap" in the Planning and Environmental Assessment Caucus' *Citizen's Briefing Kit* (#14) *supra* note 14.

information in order to carry out regulatory responsibilities is neither bad nor inefficient. It is only the duplication that may result from overlap that may raise questions of inefficiency, wasting time, etc. Which takes us to the next heading.

Duplication

MEANING OF "DUPLICATION"

"Duplicate" means "copied or exactly like something already existing.[68] "Duplication" thus means the result of doing the same thing more than once. We are all asked to duplicate the providing of information or doing things from time to time and, with the aid of electronic copies and photocopiers, the task may not be onerous. However the task could be more time consuming if certain inefficiencies are introduced. Taking the example of the mother with 5 children, it should not be overly onerous for the mother to make a large quantity of food and serve 5 identical meals to satisfy the children's overlapping appetites. However if the children eat at different times, the job gets harder. The challenge for the mother, as with all inefficient duplication, is attempting to arrange affairs to minimize the inefficiencies when having to do the same thing more than once.

ENVIRONMENTAL ASSESSMENT AND DUPLICATION

First it is important to distinguish between what truly is duplication where a project undergoes multi-jurisdictional environmental assessment, and what is not. Again, duplication relates to doing the *same* thing more than once. So, for example, having to obtain a federal authorization and a provincial authorization to carry out a project, is not duplication. The authorizations relate to different constitutional heads of power, and distinct mandates and interests. It is part and parcel of the fabric of Canada, as a federal republic, that the federal government regulate some matters and provincial governments regulate other matters. This paper assumes that industries' and provinces' complaints about duplication are not, in the usual case, complaints about federalism. If provinces' and industries' complaints about duplication were about federalism, then asking governments to address duplication would be asking, in effect, for constitutional amendments to alter the current division of powers with the result that industries need only deal with the requirements of one level of government. On the contrary, this paper assumes that, at least in the usual case, industries' and provinces' complaints about duplication involve the claim that proponents are asked to provide the same information to federal and provincial regulators or assessors, where there are inefficiencies. For example, industry may be asked to provided the same information to different levels of government, or different agencies within a level of government, but in different formats, or at different times, or more than once.

Sometimes such duplication is not very onerous, and involves only, say, sending out photocopies or electronic copies to more than one regulator or assessor. However it has been claimed that sometimes it can be quite onerous. Industry's allegation is that such duplication could result in project delays, additional expenses, losses of opportunities, etc. For example, Jacques Whitford, an industry consultant, in its paper "Environmental

[68] The Canadian Oxford Paperback Dictionary (2000).

Assessment Crisis in Canada: Reputation versus Reality?" [69] lists perceived duplication. One is the Department of Fisheries and Oceans' ("DFO's") requiring a detailed review and providing of information by the proponent to determine whether a project will result in a harmful alteration, disturbance or destruction of fish habitat and therefore require a r subsection 35(2) *Fisheries Act* authorization. Then, after determining that an authorization is required, since subsection 35(2) triggers a CEAA assessment, asking for the same information again in connection with the environmental assessment.

To respond to Jacques Whitford, first note that this example has nothing to do with *harmonization.* The example concerns only what happens within the federal family and does not involve a province. Second, this kind of "duplication" could be avoided if the DFO simply would trigger an environmental assessment earlier. The author has argued elsewhere that under a correct interpretation of the relationship between the CEAA and the *Fisheries Act* subsection 35(2) triggers a CEAA environmental assessment at the planning stage of a project and accordingly a proponent should only be required to provide information in respect of the environmental assessment and the regulatory decision should be made on the basis of that information[70]

Another example of alleged duplication of Jacques Whitford concerns where in a joint federal/provincial assessment each jurisdiction scopes a project differently. The consultants claim that where the federal responsible authority scopes narrowly and the provincial authority scopes more broadly there is less duplication than where both the federal responsible authority and the provincial authority scope broadly.[71]

To respond to Jacques Whitford, the consultants' logic breaks down. It would seem that if both jurisdictions scoped the same (broadly) for the most part they would require the same information. The proponent could then simply provide the same information to each of them. However if one scopes narrow and one scopes broad then the proponent would likely have to send different information to each authority. It appears that rather than duplication being the problem here, it is rather uncertainty and discretion regarding scoping decisions, at least federally, and this could be dealt with by clearer policy directives or legislation.

In summary, it is not the fact of federalism that is the problem of inefficient duplication. Nor is it the fact that provincial interests and mandates differ from federal mandates and interests. It is the fact that either a single jurisdiction with more than one agency involved in an environmental assessment, or multiple jurisdictions involved in an

---

[69] J. Barnes, C. Leeder, and R. Frederico, **"**Environmental Assessment Crisis in Canada: Reputation versus Reality? (June 2, 2005) available online at <<http://www.jacqueswhitford.com/site-jw/media/JacquesWhitford/eacrisis.pdf>.

[70] See "Slow on the Trigger: The Department of Fisheries and Ocean, the Fisheries Act and the Canadian Environmental Assessment Act," Dalhousie Law Journal, Vol. 27, No. 2 (2004) 349. The paper criticizes the DFO's practice of attempting to avoid a harmful alteration, disturbance or destruction of fisheries habitat by project redesign or relocation, outside of the federal environmental assessment process, and giving the proponent a "Letter of Advice" instead of triggering the CEAA and going through the subsection 35(2) authorization process.

[71] *Supra* note 69 at 8.

environmental assessment, require the same or similar information of industry and industry finds this to result in inefficient duplication. Tackling this problem takes us to the final terms in this Lexicon, "cooperation, coordination, and convergence".

Cooperation, coordination, and convergence

MEANING OF "COOPERATION, COORDINATION, AND CONVERGENCE"

According to the Canadian Oxford English Dictionary, "co-operation" means "working together to the same end", "coordination" means "the harmonious or effective working together of different parts", and "converge" means come together from several diverse points toward a common point". "Convergence" means "the action, fact, or property of converging". Steve Charnovitz, characterizes "convergence" as a "lessening of a gap, not uniformity."[72] In the context of environmental standards, convergence would not require identical standards, but could involve lessening differences among distinct standards to increase commonality. For example, it could involve using terms in the same way,[73] using the same units of measurement, etc.

ENVIRONMENTAL ASSESSMENT AND COOPERATION, COORDINATION, AND CONVERGENCE

Cooperation, coordination, and convergence, without doubt are key elements of a successful federal/provincial or federal/territorial joint assessment. They also are key to a successful federal assessment where more than one federal authority is involved. There is much indicia that the federal family has been striving to cooperate, coordinate, and to a degree, converge with respect to environmental assessment. Indicia include the increased role that the Canadian Environmental Assessment Agency plays in joint federal/provincial/territorial environmental assessment or when a project is listed on the *Comprehensive Study List* regulation.[74] As well, the Agency recently has issued a report on Quality Assurance which concerns many matters relevant to cooperation and coordination in respect of federal screening level environmental assessments.[75] Also, the federal government has a regulation to coordinate federal authorities in the environmental assessment process and is in the process of amending and updating this regulation.[76]In addition, the fact that there are 7 Canada/Provincial environmental assessment cooperation agreements indicates the desire to cooperate, coordinate, and to a degree

---

[72] S. Charnovitz, *supra* note 16 at 272.

[73] P. Fitzpatrick and J. Sinclair, in their "Multi-jurisdictional Environmental Assessment"(in *Environmental Impact Assessment Process and Practices in Canada*, K.S. Hanna (ed.). Oxford University Press, Don Mills, pp. 160-184) at 177-178 set out how different environmental assessment legislation defines terms differently, such as "environmental effect". With some jurisdictions more or less is included. If the differences among the definitions could be minimized, without the loss of autonomy or jurisdiction, it would help all parties involved in a joint assessment to understand and respond to requirements**.** This would be convergence.

[74] CEAA s. 12.1-12.5 and *Comprehensive Study List Regulations, supra* note 41. Through CEAA amendments in 2003 the Agency introduced the role of federal environmental assessment coordinator for joint panel reviews and for joint comprehensive studies.

[75] The report is available online at << http://www.ceaa-acee.gc.ca/017/reports_e.htm>> link to Federal Screenings: An Analysis based on Information from the Canadian Environmental Assessment Registry Internet Site.

[76] *Regulations Respecting the Coordination of by Federal Authorities of Environmental Assessment Procedures and Requirements,* S.O.R./97-181.

converge.[77] Nevertheless, at least some interests do not find these efforts to be sufficient to meet their needs. Industry representatives, provinces, and the Canadian Council of Ministers of the Environment (CCME) alike have called for further streamlining and harmonization.

The CCME is a particularly strong voice in the field of *harmonization*. The CCME developed the Canada-wide Accord on Environmental Harmonization, under which the federal/provincial environmental assessment agreements are entered. A new and ongoing CCME initiative seeks to further streamline environmental assessment processes on the basis that past attempts to *harmonize,* including under federal/provincial agreements, has not worked.[78] In the next section of this paper, "The Good, the Bad, and the Ugly" the author, in consultation with the environmental assessment public interest community, has identified limitations on what is acceptable in any future streamlining initiative.

IV
Environmental Assessment *Harmonization*: The Good, The Bad, and The Ugly

Introduction

This section considers from an environmentally concerned public interest point of view what is good, what is bad, and what is ugly about actual and prospective *harmonization* in general, and in particular, in respect of environmental assessment. The section builds on distinctions made in Lexicon in Part III.

Again when the word "*harmonization*" is in italics, as set out in Part III of this paper, it is used in its generalized sense that may include other concepts such as equivalency, substitution, and so on. Use of the word "harmonization" without italics means harmonization in its classic sense, as set out in the Lexicon in Part III.

The Good

IN GENERAL

Harmonization in some cases is a good thing. Theoretically, harmonization may move standards etc. up or down. From a public interest perspective upward harmonization that better protects environment, public safety, ecosystems, etc. is good and should be pursued. As well, harmonization can be useful in setting standards such as the size of computer discs, credit cards, or batteries.[79] This type of harmonization (which also may qualify as convergence) facilitates use by and convenience for the public and contributes

---

[77] The agreements are available online on the Agency's website at at <http://www.ceaa.gc.ca/013/agreements_e.htm#1>. The current agreements are Canada and Alberta, British Columbia, Manitoba, Ontario, Quebec, Saskatchewan, and Yukon.

[78] The CCME has formed 4 sub-committees to examine perceived issues concerning environmental assessment. These are: short term streamlining actions that can be implemented within existing legislative frameworks and bi-lateral agreements, options to streamline consistent with a one project one assessment approach, exploring regional strategic environmental assessment to streamline environmental assessment processes, and coordinating Aboriginal consultation in joint assessments.

[79] This point is made in Public Citizen's, *A Public Citizen Backgrounder Public Citizen's Global Trade Watch Harmonization Project* (June 2000) at 15, available online at <http://www.citizen.org/documents/BCKGRNDforpdf.PDF>>

to the utility of these items. As well, such harmonization saves the public money since citizens do not need to have a variety of kinds of each of these items to serve different uses.

IN RESPECT OF ENVIRONMENTAL ASSESSMENT

Upward harmonization of environmental assessment standards, where it does not interfere with constitutional jurisdiction or unduly affect autonomy, can be good. For example, if all jurisdictions in Canada had the same standard for measuring cumulative effects, and it was a high and defensible one that would serve public interests, it would discourage jurisdiction shopping and "death by a thousand cuts" throughout Canada, and would encourage environmental protection.

Deleted: , and

As well, cooperation and coordination also serve the public interest. This is true both in respect of the government family involved in a one jurisdiction/multi-agency environmental assessment or in respect of a joint federal/provincial/ or territorial assessment. For example, with a CEAA environmental assessment that involves more than one federal authority, it serves the public interest for all federal authorities to communicate to ensure that all federal interests are taken into account in the assessment. As well it serves the public interest for all federal authorities to cooperate to ensure that, for example:

- a lead responsible authority is determined in a timely fashion, so that the public knows who to contact and consult with,
- postings to the public registry are made in a timely manner and in a consistent fashion,
- triggering occurs early while the project is still in the planning stage, and
- scoping decisions are made in a timely manner and with public involvement such that all federal authorities concerns are incorporated.

Convergence also may serve the public interest, where it does not interfere with constitutional jurisdiction or unduly affect autonomy. As noted earlier in the Lexicon in Part III, convergence in environmental assessment could be useful in joint federal/provincial/or territorial environmental assessment if terms are defined in the same way, such as "environmental effect" and if the same standards of measurement of effects and impacts are used, even if each jurisdiction is interested in different effects and impacts.

The Bad

IN GENERAL

There are many aspects of harmonization in the classical sense that warrant criticism from an environmentally concerned public. There is no doubt that agreements such as the 1993 North American Free Trade Agreement[80] (NAFTA) and the 1994 General Agreement on Tariffs and Trade[81] (GATT) (which established the World Trade Organization (WTO) have significantly driven harmonization. However there is

[80] The NAFTA text may be found at 32 I.L.M. 289 (1993) and 32 I.L.M. 605 (1993). NAFTA side agreements may be found at 32 I.L.M. 1480 (1993), 32 I.L.M. 1502 (1993), and 32 I.L.M. 1520 (1993).
[81] 33 I.L.M. 9 (1994).

disagreement on whether these agreements have lead to downward harmonization or upward harmonization.[82] Nevertheless, there have been NAFTA trade challenges to environmental standards that cannot be ignored that have lead to a government's compromising its standards.[83] From an environmentally concerned public interest perspective, any downward harmonization of environmental, health, labor, or related standards, resulting from trade agreements is bad.

Deleted: concerned public

Deleted: Bad

Another general problem identified with harmonization is that it erodes jurisdictional autonomy. It necessarily involves constraint on each jurisdiction that submits to harmonization.[84] As well, harmonization does not account for cultural and other differences from jurisdiction to jurisdiction. An example from the literature is that a standard regarding use of pesticides to produce a product may not take into account how much of the product is consumed from culture to culture. For example a lower standard regarding pesticide use in growing rice may be fine for western jurisdictions that do not consume great quantities but could be harmful for Asian or Latin countries where substantial quantities are consumed.[85]

---

[82] For example, the Public Citizen publication, *A Public Citizen Backgrounder Public Citizen's Global Trade Watch Harmonization Project, supra* note 79 at 6 states that " Unfortunately, the actual provisions in NAFTA and the WTO requiring harmonization or providing incentives for harmonization could result in the lowering of the best existing domestic public health, social, economic justice, natural resource conservation and environmental standards around the world. For instance, under NAFTA and the WTO, international standards serve as a ceiling which countries cannot exceed rather than as a floor that all countries must meet. The agreements provide for the challenge of any domestic standards that go beyond international standards in providing greater citizen safeguards, but contain no provisions for challenging standards that fall below the named international standard. Thus, the provisions in NAFTA and the WTO promoting harmonization are likely to serve only as a one-way downward ratchet on domestic standards. Challenges of domestic standards that exceed international standards will be resolved in the binding dispute resolution system built into these agreements." By contrast F. Bedros in "Harmonization of Environmental Standards and Convergence of Environmental Policy in Canada:" available online at << http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/bedros.aspx?lang=en>> *supra* note 18 concludes that "… when there is harmonization of environmental standards, it is generally one-way, i.e. from a powerful state to a less powerful state – in our example, from the United States to Canada. But this influence had begun before NAFTA, and even the FTA, came into force. Next, the harmonization that has been observed has been upward, toward the top; so we seem to have avoided the argues that the NAFTA Context."

[83] For example, in 1996, because of serious concerns over human health, the federal government banned the importation and interprovincial trade of a manganese-based fuel additive called MMT. In 1998, the Ethyl Corporation, a US-based manufacturer of MMT sued the Canadian government for about $350 million under NAFTA's chapter 11 investor-state suit provisions. On July 20, 1998, the Globe and Mail reported on its front page that "Threat of NAFTA Case Kills Canada's MMT Ban". Canada rescinded its MMT ban and agreed to pay the Ethyl Corporation more than $19 million dollars. This was, in effect, a lowering of a Canadian environmental standard. See News from the West Coast Environmental Law, Vol. 22:02, 9-28-1998, pp. 1-2. Another example concerns the WTO which states "Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements" (Art. XXIV-12 in Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, GAATT Doc. MTN/F (Dc. 15, 1993), ## I.L.M.9 (1994) Pursuant to this provision in 1996 the U.S. successfully challenged the European Union ban on domestic or foreign sales of beef from hormone-treated cattle. See Public Citizen *supra* note 79 at 11.

[84] This point was made by M. Boodman, "The Myth of Harmonization of Laws" (1991) 39 Am. J. Comp. L. 699.

[85] Public Citizen, *supra* note 79 at 15.

Harmonization of environmental assessment processes are bad whenever a jurisdiction lowers its standards or approaches in order to participate in the *harmonization*. Fitzpatrick and Sinclair give a number of examples in their paper "Multi-jurisdictional Environmental Assessment."[86] One example considers the fact that a CEAA hearing process provides informal opportunities for the public to "present information about a project to an 'unbiased' selection of experts appointed by the Minister."[87] Section 34 of the CEAA requires a panel to make information available to the public and to give the public an opportunity to participate in hearings. However, where the hearing process of a party to a *harmonization* is other than the federal government, the informal nature of the hearing and meaningful opportunities to participate may be compromised. For example, where the National Energy Board's hearing processes prevail, hearings are more formal than CEAA hearings, including requirements for affidavits, and formal cross-examination.[88]

As well, *harmonization* processes are bad where one level of government characteristically is in the inferior role in an environmental assessment process. This often is the case with joint hearings pursuant to federal/provincial/or territorial environmental assessment cooperation and coordination agreements.[89] Most agreements provide a process for designating a "Lead Party" and designating the 'Other Party". Applying the formulae to determine the Lead Party, the province or territory typically assumes that role.[90] The Lead Party is very important in that the Lead Party administers

---

[86] *Supra* note 73.
[87] *Ibid.,* at 171.
[88] *Ibid,* at 172.
[89] See *supra* note 77 and associated text.
[90] This is because the Lead Party is determined in all agreements (except the Quebec agreement that does not contain the words "Lead Party") according to similar criteria. Applying the criteria normally results with the federal government being the Other Party. For example the Federal/Manitoba agreement (see *supra* note 77) provides: "32. For the purposes of the cooperative environmental assessment, the Lead Party will generally be determined as follows:
a. Canada will be the Lead Party for project proposals on federal lands where federal approvals apply;
b. Manitoba will be the Lead Party for project proposals on lands within its provincial boundary, not covered under clause 32(a) of this Agreement where provincial approvals apply; and
c. if a project proposal will be located on lands under federal and provincial jurisdiction, the Lead Party will be determined by mutual agreement of the Parties taking into account the criteria in clause 34 of this Agreement.
Clause 34 provides: "In the notice referred to in clause 33 of this Agreement, the Party will provide its rationale for suggesting a variance based on an evaluation of any of the following criteria:
a. scale, scope, and nature of the environmental assessment;
b. capacity to administer the assessment including available resources;
c. physical proximity of the government's infrastructure;
d. effectiveness and efficiency;
e. access to scientific and technical expertise;
f. ability to address client or local needs;
g. interprovincial, inter-territorial, or international considerations; or
h. existing regulatory regime, including the legal requirements of quasi judicial tribunals.

the environmental assessment process, subject to the agreement. The Other Party often is reduced to a consultative role under an agreement. For example, in the Federal/Alberta agreement the Lead Party will determine the terms of reference for an environmental assessment after consultation with the Other Party, though the Lead Party is meant to ensure that the Other Party's requirements are met.[91]

Another example of where *harmonization* is bad is when it results in one or either party not complying with a provision of their statutory authority in order to *harmonize.* This could be either bad or ugly. It is bad when statutory directives are compromised, it is ugly when a party, in carrying out a *harmonization* fails to exercize authority in an area of constitutional jurisdiction. An example would be if an environmental assessment process, in following the Lead Party's process, fails to provide the public with the extent and quality of participation opportunities that would have been available if the process were only under the CEAA.[92]

Note: Some agreements provides that where the equivalent of 32(c) is the case the parties will mutually agree on the Lead Party.

The writer asked the members of the Environmental Caucus whether they could recall any joint assessments where the federal government clearly was the Lead Party and of the responses there was only a few cases where an agency or ministry of the federal government took the lead. In the vast majority of cases, a province lead the assessment process.

[91] For example, para. 6.1.2 of the 2005 Federal/Alberta agreement; see *supra* note 77.

[92] For example the 2005 bilateral Alberta/Canada agreement (*supra* note 77) contains the following provision: "6.2 The Lead Party will administer its process used for the cooperative environmental assessment to enable both Parties to meet their legal environmental assessment requirements. *The Other Party will adapt its procedures and practices, to the extent its legal requirements allow, to follow the process of the Lead Party.* " [Emphasis added]. And later "10.0 PUBLIC INVOLVEMENT
10.1 The Parties involved in a cooperative environmental assessment will facilitate public participation, *where consistent with their policies and legislation*, which may include providing access to information, technical expertise, and participation at public meetings." [Emphasis added]. Under s. 44(6) of the Alberta *Environmental Protection and Enhancement Act* (R.S.A. 2000, c. E-12), (EPEA), only those who are "directly affected" by a proposed project may file a statement of concern regarding it and regarding the need for an environmental assessment. Where government determines that an environmental assessment is required, under s.. 3(1)(iii)(b)of the *Environmental Assessment Regulation* (Alta. Reg. 112/1993) only those who are directly affected by a proposed project may file a statement of concern and participate in the assessment process. Alberta court and tribunal decisions have determined that the class of "directly affected" persons is fairly narrow. For example, in the oft referred to *Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17 C. E. L. R. (NS) 246 at p.257.) the Court stated: "[T]he possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. "Directly" means the person claiming to be "affected" must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other." Alberta's narrow participation window may be contrasted with Canada's wide-open one. The CEAA (para. 3of the purposes, s. 4(1)(d), and ss.18(3), s. 21.2, 22, and 34) by contrast to Alberta's EPEA in numerous places requires opportunities for public review and participation, where "public" means anyone, and not just those who are directly affected. Given the differences in legal thresholds for participation in an environmental assessment process it is difficult to see

The Ugly

IN GENERAL AND IN RESPECT OF ENVIRONMENTAL ASSESSMENT

Harmonization can be ugly if it leads to one level of government of government failing to exercize an area of exclusive constitutional jurisdiction. This would occur where *equivalency* or substitution were to apply to enable a province to carry out environmental assessment processes on behalf of the federal government in an area where the federal government has exclusive legislation jurisdiction. A less ugly, but ugly nonetheless, version would occur where there is shared constitutional jurisdiction in an area, and through the application of *equivalence* or substitution in environmental assessment processes the national interest drops out or is compromised.

In the writer's experience, both representatives of provinces and industry representatives have pushed for ugly *harmonization,* though these views certainly have been among the minority in these sectors.[93] Complaints about having more than one environmental assessment process to deal with, as noted above under the discussion on duplication, typically are not indirect attacks on federalism *per se*, but rather are attacks on how federalism is implemented in joint environmental assessment processes. Nevertheless, attempts to invoke ugly *harmonization* are made and, from an environmentally concerned public interest, and Canadian perspective, for that matter, should be recognized for what they are.

Environmental public interest advocates have consistently argued against both the ugly and bad versions of this kind of *harmonization.* For example, in the 1999 action *Canadian Environmental Law Association (CELA) v. Environment Minister*, the CELA took the federal government to court arguing that the federal Minister exceeded jurisdiction in signing the Harmonization Accord. CELA argued that the Harmonization Accord in effect devolves constitutional federal responsibility to the provinces without the required constitutional amendment.[94] The Court's decision and reasoning for it are telling.

After examining the Harmonization Accord the Court concluded that the agreement merely was an "effort to cooperate and coordinate." This implies that an agreement to cooperate and coordinate processes between jurisdictions is fine. However the Court acknowledged that there could be specific fact situations that would amount to an unauthorized devolution.[95] Although the Court was not specific, the Court opened the door to challenges of unconstitutional devolution pursuant to harmonization agreements. It is submitted that where a fact situation involves *harmonization* of the ugly sort, as described here, there could well be such a challengeable unconstitutional devolution.

---

how the Alberta/Canada bi-lateral agreement could be complied with in a manner that favors the federal process.

[93] This experience is from the writer's nearly 11 years as counsel with the Edmonton based Environmental Law Centre, nearly 10 years as a member of the Canadian Environmental Network Planning and Environmental Assessment Caucus, and nearly 6 years as a member or alternate on the Regulatory Advisory Committee.

[94] *Canadian Environmental Law Assn. v. Canada (Minister of the Environment*) [1999] 3 F.C. 564.

[95] *Ibid.,* para. 45.

V
Flogging the Wrong Horse

Introduction

As noted in the last part, the CCME has claimed that despite attempts to *harmonize* environmental assessment processes, undesirable states of affairs yet exist. In a recent CCME report "CCMR Action on Environmental Assessment" the CCME has claimed that despite bilateral agreements that call for a cooperative approach to EA there are still challenges to be met to integrate two processes. And, as a result there is "duplication of work, inconsistencies and delays for proponents". Because of these perceived problems the CCME has undertaken an initiative to further streamline environmental assessment where there is more than one jurisdiction involved.

This Part argues that *harmonization* agreements that are limited to cooperation, coordination, and convergence (where appropriate) may not be to blame for proponents concerns about "duplication of work, inconsistencies and delays." It points out that there are numerous factors, independent of *harmonization* that can account for these. It stresses that some duplication and so-called "inconsistencies" are necessary in a federation such as Canada and they cannot be compromised away through *harmonization.*

Other horses

WEAK ROLE OF THE FEDERAL COORDINATOR UNDER THE *CEAA* AND ADHERENCE TO SELF ASSESSMENT

The environmental community and others interested in federal environmental assessment have long argued that the Canadian Environmental Assessment Agency or some other entity should have greater control over the federal assessment process.[96] It has been argued that the principle of self assessment accounted for many of the perceived problems with federal environmental assessment. For example, late triggering has been identified by both the environmental community and industry as lending uncertainty and delays in environmental assessment. The environmental community was and still is particularly concerned because late triggering often results in a project being planned and mitigation considered prior to a determination that an environmental assessment is required under the CEAA.[97] If an independent agency ran the environmental assessment process more consistency, certainty, and timeliness likely would result.

LACK OF A REVISED FEDERAL COORDINATION REGULATION

In 1997 *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* came into effect[98] ("federal coordination regulation"). The regulations set timelines for federal authorities to determine whether they likely will require an environmental assessment, and timelines for matters related to an assessment such as notifying the proponent that more information is required, making a determination as to whether an assessment will be

[96] See for example, A. Nikiforuk, "The Nasty Game: Environmental Assessment in Canada" available online at << http://www.gordonfn.ca/resfiles/Nasty_Game.pdf>>.
[97] See *supra* note 70 and accompanying text.
[98] SOR 97/181.

required after obtaining information, and reporting on the determination.[99] Unfortunately the regulation contained no enforcement provisions or consequences for federal authorities who failed to comply with its provisions.

Following CEAA amendments in 2003 the federal government began developing a new federal coordination regulation to accommodate changes in the CEAA and to impose stricter timelines on members of the federal family in order to effect greater certainty and timeliness to the environmental assessment process. Although 5 years have passed, the new federal coordination regulation has not yet seen the light of day.

The lack of a revised, stricter federal coordination regulation with consequences for non-compliance is in part responsible for delays and uncertainties originating within the federal family. These delays and uncertainties could be better dealt with through a federal coordination regulation with teeth. Consequences must result for federal authorities who do not comply with regulatory provisions, such as an independent agency coming in and taking over processes.

FAILURE TO WAIT FOR THE FEDERAL QUALITY ASSURANCE PROGRAM

It would be precipitous, to say the least, to leap into further streamlining activities without a clear idea of what is the problem. As mentioned earlier, the Agency is carrying out a Quality Assurance Program that is designed to acquire actual data on federal environmental assessment, to pinpoint where there is a lack of quality, and to address how better quality may be assured.[100] The first Report contains much valuable information about quality assurance and federal screenings and offers ways to address quality assurance issues.[101] Although it has taken a long time to compile, without the information that the Program provides it would be wrong to assume that further streamlining is the answer to perceived problems. For example paragraph 6.3 of the Report states "Although there has been considerable anecdotal commentary about screenings that have taken an unacceptably long time to complete, the Internet site data does not necessarily reinforce that impression. In some cases the data might even give the opposite impression." Given this data, it would be irresponsible, for example, to pursue a general program designed to shorten timelines in federal screenings. As the Agency continues to produce Quality Assurance reports, all stakeholders will have the opportunity to test their views as against actual data.

INDUSTRY ITSELF TO BLAME

Proponents themselves are sometimes the cause of delays in the environmental assessment process. For example, proponents could insist that the DFO require an environmental assessment up front rather than participating in attempts to mitigate projects down to below the harmful alteration, disturbance or destruction of fishery habitat threshold and then provide a so-called "Letter of Advice."[102] In addition to

---

[99] *Ibid.,* ss. 5 and 6.
[100] *Supra* note 75 and accompanying text.
[101] *Ibid.* It is not possible to analyze or take a position on aspects of the report in this paper. The report is raised to demonstrate that the Agency is taking steps to gather the kind of information that is necessary to rationally debate whether further streamlining is necessary.
[102] See note 70 and accompanying text.

avoiding delays, such early triggering would be in compliance with the CEAA which requires that environmental assessment be conducted in the planning stages of a project[103] and not after a project has been planned. It also would show good faith and a willingness to provide an opportunity to involve the public in planning and mitigation measures as required by the CEAA for screenings, as appropriate, and for all other levels of assessment, rather than conduct planning and mitigation behind closed doors.

Instances of proponents causing delay also may be found in the context of the environmental assessment Process. For example, on March 3, 2008, the Joint Panel reviewing the proposed EnCana Shallow Gas Infill Development project[104] for three well licenses in the Suffield National Wildlife Area in Alberta, announced that it would postpone the hearing, originally scheduled for March 2008, until October 2008. It did this as a response to a request by EnCana in order to respond to intervener requests. Another example concerns the Whites Point Quarry (Digby) Nova Scotia. The proponent delayed the process by not filing the environmental assessment and requested amendments in a timely fashion. The panel finally called a hearing, but in a number of places in its Report noted that the Proponent's processes or information were lacking. Because of such deficiencies the environmental assessment process took longer than it would have without them.[105]

ONUS TO SUBSTANTIATE THE ISSUE HAS NOT BEEN FULFILLED

Finally, the onus to substantiate and quantify alleged delays, uncertainties, overlap, duplication, and so on is on the entity claiming that the same exist. It is unfair to expect government and the citizens of Canada to respond to address complaints unless they are substantiated. This is particularly so when the response involves *harmonization* that may not be in public interest. Although the Agency, as noted above, is gathering information in the context of its Quality Assurance Program, the onus is still on the complainant to document and establish problems. If the complainant argues that further *harmonization* is required to address issues, then the complainant must establish how it is that the lack of *harmonization* is to blame and not some other cause.

Part VI

Recommendations

On the basis of the forgoing, from a public interest environmental concern prospective it is submitted and recommended that:

- The only appropriate *harmonization* is of the cooperation, coordination, and convergence (as appropriate) kind;
- Existing environmental assessment bi-lateral agreements be examined and be amended insofar as their terms do not fall under cooperation, coordination, and convergence (as appropriate);

[103] CEAA recitals, and s. 5(1)(b)(i).
[104] EUB Application No. 1435831.
[105] Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, Joint Panel Review Report, October 2007, pp. 6, 7, 11 and 12.

- The federal government, provinces continue to establish appropriate *harmonization* agreements but that further attempts to harmonize be limited to pursuing better cooperation, coordination, and convergence (as appropriate)
- Attempts to pursue federal/provincial equivalency or substitution in environmental assessment that would involve devolution of federal constitutional authority to provinces, or involve the removal of or limitation on the national perspective, be recognized for what they are and not be pursued.