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A SHARED ENVIRONMENT: ECOLOGICAL ISSUES

*An Address to the Queen's University Canada-US Project,
School of Policy Studies Conference On
Rethinking North American Relationships*

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**Rethinking North American Relationships
A Shared Environment: Ecological Issues**

I. INTRODUCTION

The organizers of this conference have asked me to discuss the federal government's current environmental priorities, as well as to survey recent Canadian initiatives in environmental policy. I was also asked to comment on the importance of the environmental agenda to Canadian-American relations generally.

The topic of a shared environment is most appropriate in looking at Canada-U.S. relations. Pollutants do not respect political borders and across the 5000 miles of the Canada-U.S. boundary, one can find many examples of both past and present transboundary environmental issues. Such transboundary issues often dominate the Canadian environmental agenda. They include:

Acid rain. North American industries and automobiles annually discharge 50 million tonnes of acid gas emissions into the atmosphere. The damage caused to lakes, forests, buildings and health on both sides of the border has been well documented. For Canada, acid rain has been a major issue for over a decade and until very recently a major thorn in the side of Canada- U.S. relations. The Canadian government wants, ultimately, a bilateral air quality agreement with the U.S. that would deal with the transboundary flows of nitrous oxides (NO_x), volatile organic compounds (VOCs) and other air pollutants in addition to sulphur dioxide (SO₂). However, the importance of the Congressional Bills to amend the U.S. Clean Air Act has been recognized. During the week of October 23, 1989 members of the House of Commons Standing Committee on the Environment travelled to Washington to meet with members of Congress in relation to the proposed bills to amend the Clean Air Act. Their submissions have stressed the need for a cap to acid rain emissions to be built into the legislation.

Great Lakes Water Quality. The Great Lakes contain 20% of the earth's fresh water and 80% of the fresh water in North America, and are the source of drinking water for 24 million people.

One out of every 3 Canadians and 1 out of every 7 Americans lives around and depends on the Great Lakes. Yet, according to the International Joint Commission, the Great Lakes have become a toxic sink. Over 60,000 chemicals and metals are used around the Great Lakes with approximately 1000 having been detected in the lakes. The legacy of past industrial waste disposal practices is also with us. On the American side, four old chemical dumps, which include the infamous Love Canal, contain 245,000 tonnes of chemical wastes which are slowly seeping into the Niagara River which flows into Lake Ontario. The world's largest deposit of dioxin (2000 pounds) is buried at the Hyde Park landfill and continues to seep into the Niagara River. The clean up of these hazardous waste sites has been another contentious issue in U.S.-Canada relations. Canada has taken the position since the early 1980's that these sites should be excavated and the hazardous wastes either incinerated or placed in more secure landfills. The U.S. has preferred to rely on remedial works to try and slow down the rate of leakage. Unfortunately, these ticking time-bombs continue to be a major threat to Lake Ontario drinking water quality.

Other issues include the transboundary movement of hazardous waste, burial of nuclear waste, and the construction of large dam projects that have environmental impacts on both sides of the border. As well, both governments share common concerns with environmental issues arising from our industrial activities- these include control of toxic chemicals, hazardous wastes and pesticides.

There can also be no doubt that environmental concerns are rising to the top of the political agendas of both countries. This is especially the case in Canada, where environment became a major issue in recent federal, provincial and even municipal elections. Earlier this year, MacLean's magazine commissioned a poll of Canadian and American attitudes on a wide range of issues. The first question asked was "what is the most important problem facing Canada today, the one that concerns you the most?" The top six issues were noted. In Canada, the number one issue identified by 17% of those surveyed was pollution and the environment; in the United States the top issue identified was drugs/alcohol by 18% of those surveyed.

Unemployment and Free Trade were the next in line in Canada. Free trade, as could well be expected, was not on the American list and while concern with pollution/environment was identified, it was ranked in fifth place by only 5% of those surveyed.¹ Subsequent polls in Canada, have shown that environmental concerns remain on the top of the agenda.

In Canada, we have seen an outpouring of "green rhetoric" at the federal level, yet there has been very little action taken. This is a change from the past, where environmental problems were denied and there was no rhetoric and no action. However, in terms of specific programs and policies to protect the environment we have seen little progress behind the veil of rhetoric. There has been more progress in some of the provinces, notably in Ontario--- but at all levels of government the rhetoric far outstrips a firm commitment to action.

What I would like to do today is focus on two major differences in the framework of the two countries in tackling environmental issues before turning to a more general survey of what the federal government is doing in the environmental field. I will conclude with a brief discussion of the environmental implications of the free trade agreement.

II. THE CONSTITUTIONAL FRAMEWORK

No discussion of the framework for Canadian environmental law or policy can be complete without a brief foray into Canadian constitutional law. The Constitution Act, 1867, which reflected the problems and concerns of 1867 when it was enacted, did not allocate legislative authority for the environment to either the federal or provincial governments. As a result, there is a large degree of overlapping jurisdiction because of the generality of the federal and provincial powers as defined in the Constitution.

The constitutional division of powers has created many problems. Deciding whether a matter of federal concern is within provincial, federal or is a matter of shared jurisdiction is often very difficult. Without clear responsibility for environmental concerns, both levels of government have engaged in a lot of "jurisdictional buckpassing."

Constitutional questions frequently arise in relation to the question of which level of government will deal with the emerging concerns of the late 20th century (eg. biotechnology or the clean up of hazardous waste sites). For many years, the idea of establishing a national superfund to clean up hazardous waste sites has been discussed at federal-provincial meetings of environment and resources ministers. Environmentalists and a number of the provinces have been advocating that a tax on the producers of toxic chemicals and waste should be the primary mechanism for financing such a fund. However, this is not to occur. On October 16, 1989, the federal Minister of Environment, Lucien Bouchard announced that his government would contribute \$100 million towards the costs of a federal-provincial program to clean up abandoned contaminated land sites. The provinces would be expected to contribute \$150 million dollars. This fund would only cover about 5% of the estimated 1000 identified contaminated sites in Canada. The other 95% of the sites would have to be addressed by the provinces, whom Mr. Bouchard said should take immediate steps to have the sites cleaned up at the expense of the responsible party. Mr. Bouchard announced to the press that this confirmation of funds "underscored the federal government's commitment to complete its current environmental programs, as outlined in the Speech from the Throne this spring."² Unfortunately, it appears more like the Minister wants to wipe his hands of any involvement in the establishment of a national superfund. This is despite the urging of provinces such as Ontario who have stated that the federal government is the only level of government that can levy a tax on the generators of waste.

Constitutional issues were also raised in the context of the recently passed federal Canadian Environmental Protection Act (CEPA).³ Under this legislation, the federal government has the power to pass regulations dealing with toxic chemicals. However, the statute requires that the provinces be consulted prior to any regulation being passed. Further, where the provinces have equivalent regulations to those being proposed by the federal government, and an agreement is reached between the two levels of government, provincial law will apply. It was the opinion of many environmental groups across the country that CEPA was a step backwards from then existing federal law, such as the Clean Air Act which gave the federal government the authority

to pass national air emission standards without consulting the provinces. Environmentalists and others have charged that the federal government has abdicated its responsibility to enact strong national standards and instead of preventing the creation of pollution havens, CEPA may actually encourage their creation. In part, this will occur because the provinces have widely divergent enforcement programs and resources to ensure that the regulations are met.

This move by the federal government to pass the buck on the regulation of existing chemicals ironically, comes after a Supreme Court of Canada decision which upheld a section of the federal Ocean Dumping Control Act as constitutional under the peace, order and good government clause.⁴ The Court held that although ocean dumping would at one time have been a local concern, marine pollution had now taken on a greater dimension. While arguably, this case could be used as further justification for a greater federal role in environmental protection, the present government does not seem to want to take up the challenge.

The American constitutional framework, on the other hand, gives their federal government a broader role in legislating for environmental protection. For example, the power to regulate trade and commerce has been much more broadly defined in the United States and is often used to justify national environmental laws; in Canada the courts have taken a very restrictive view of this power.

III. THE NATURE OF ENVIRONMENTAL LEGISLATION

Canadian environmental legislation is still largely media or product oriented. In other words, separate laws deal with air, water, land and toxic chemical pollution. As well, because of our constitutional framework, there are often many pieces of legislation at both the federal and provincial levels of government that may deal with a specific environmental issue. This single media approach is similar to that taken in the United States.

However, there is a significant difference in the way Canadians and Americans draft their environmental legislation. Canadian legislation tends to be written with broad, general

prohibitions with discretion left in the hands of the Minister or his officials administering the legislation. Most environmental legislation contains the word "may" rather than "shall," which permits government discretion, and does not impose a duty on an official to take certain steps. Usually a broad power is given to the department or ministry to take certain actions to protect the environment. In some cases, this will take the form of legally enforceable standards, as is the case with the air emission standards set under Ontario's Environmental Protection Act. However, in many cases, informal guidelines and policies are used rather than legally enforceable regulations.

For example, in the area of water quality, Canada does not have legally enforceable drinking water standards except in Quebec which has taken the lead in this area. There are only federal drinking water guidelines which are usually adopted in the provinces, again as unenforceable guidelines. Environmentalists have lobbied for the enactment of a federal Safe Drinking Water Act and similar provincial acts, but while the federal Department of Health and Welfare expressed some interest as far back as 1981, no steps have been undertaken to introduce such legislation. The United States, in contrast, has had safe drinking water legislation since 1974.

In general, the U.S. approach to environmental legislation has been to set out standards and criteria in great detail in regulations found under their laws.

IV. THE FEDERAL ENVIRONMENTAL AGENDA

A. Overview

As mentioned above, the federal government both during and subsequent to the last election engaged in a lot of environmental rhetoric. The appointment of Mr. Bouchard was initially seen as a positive move, in that Mr. Bouchard was a close friend of Brian Mulroney and might therefore have more clout in cabinet. Unfortunately, the track record in the past year has been dismal.

What we have seen is a government pursuing a host of policies and initiatives which are often

antithetical to a course of environmental protection. This is in part due to the current government's general priorities of privatization, de-regulation and free trade.

One difference between the U.S. and Canada has been the embracing by the federal and provincial governments of the Brundtland Commission report, "Our Common Future", and the principle of sustainable development.⁵ This was done in Canada through the auspices of the National Task Force on Environment and Economy and the subsequent establishment of Roundtables at the federal and provincial levels.⁶ Unfortunately, sustainable development has become the new buzzword that is in danger of becoming meaningless. During the past two years, I have heard everything from the cutting down of the old growth forest in Temagami to the pavement of agricultural land for development called sustainable development.

It is my submission that what the Brundtland Commission did exceptionally well was to set out a comprehensive and well documented account of many of the current environmental problems facing us and to tell us that action must be taken now if we are to avoid extinction. It clearly and forcefully put the case for implementing preventive and anticipatory strategies rather than what have become known as reactive and curative measures. It also stressed the importance of integrating economic and environmental decision-making. However, the concept of sustainable development has been translated by many to mean "growth"- an interpretation that may lead us to continue many of the practices which have led to our current environmental problems. While it is unclear how this concept will be made operational, it is very much part of the rhetoric of all levels of government in Canada. However, a careful look at the federal government's priorities do not lead one to very much optimism about new initiatives for improving the Canadian environment.

Mr. Bouchard has announced that Cabinet will be presenting a government-wide action plan for the implementation of sustainable development in the spring. What this plan will cover is currently unknown.

B. Global Warming

Canada has been attempting to obtain an international profile and take a leadership role in dealing with international environmental issues. Canada hosted the meetings that led to the signing of the 1987 Montreal Protocol which committed nations to reducing levels of chlorofluorocarbons which contribute both to a depletion of the ozone layer and global warming. Canada also sponsored the June 1988 International Conference on the Changing Atmosphere, attended by scientists and policy makers from over 45 countries which concluded that "the consequences of global warming could be second only to a global nuclear war".⁷ The conference statement called on nations to reduce CO₂ emissions by 20% by the year 2005 as an interim step towards a 50% reduction by 2050. Then in February 1989 a meeting of international experts took place in Ottawa where initial steps were taken towards the development of a framework convention on climate change and protocols on specific greenhouse gasses.

However, what has been happening on the domestic front? In terms of CFC's, we have made some progress. Regulations were passed in July, 1989 requiring the virtual phase out of CFC's by 1999.

However, in respect to CO₂ a very different picture emerges. First, as Friends of the Earth revealed last November, spending on energy conservation and renewable energy programmes fell 95% from \$405 million in 1984 to \$76 million in 1988. Cabinet approved cuts in August 1988 would further cut back spending to \$39.5 million by 1993. At the same time, the federal government was making election promises committing over \$5000 million dollars for a number of mega-projects including Hibernia, the Husky Heavy Oil Upgrader, the Vancouver Island Natural Gas Pipeline and the OSLO Oil Sands Project in Alberta. These mega-projects will produce millions of tonnes of carbon dioxide over their lifetimes. When burned, the oil from the Hibernia project alone will put 220 megatonnes of carbon into the atmosphere, almost twice the value for all Canadian energy use in 1985.⁸ Mr. Bouchard has subsequently stated that the decisions to proceed with these mega-projects have been made and are irreversible.

More recently a consultant's report done for the Federal-Provincial Task Force on Energy and Environment concluded that not only was a 20% reduction achievable, but that the economic benefits from the most cost effective combination of energy saving measures far outweighs the costs of implementation and would yield an estimated net saving of \$108 billion by 2005.⁹ However, the Task Force and the energy ministers refused to adopt the 20% target and instead relied on the old refrain that "further study" is needed on the social and economic impacts of reducing emissions before target models can be set.¹⁰

Mr. Bouchard, while acknowledging that climate change is a crucial environmental issue, has made some recent pronouncements about nuclear power being a possible solution.¹¹ What is frightening is the fact that Mr. Bouchard seems to have accepted hook, line and sinker the position taken by the Canadian Nuclear Association that nuclear energy is the answer to global warming and that it represents a "clean" source of electricity. This is despite the fact that studies have shown that for nuclear power to reduce global fossil fuel use by half during the period 1995-2020, the world would need an impossible 16 new nuclear plants per week (this assumes current levels of economic growth and energy efficiency).

In addition, a study done by the Rocky Mountain Institute has noted that efficiency enhancements are seven times more cost-effective than nuclear power for abating carbon emissions. Thus investment in nuclear power actually exacerbates the greenhouse problem by diverting funds away from the most promising approaches. The report notes that "for every \$100 invested in new nuclear power, one additional tonne of carbon is released into the atmosphere that could have been avoided had the money been invested in improved efficiency."¹² Other commentators have noted that even under the best of circumstances, a dollar spent on nuclear power might displace about six pounds of coal used at another electric plant. But the same dollar spent on energy efficiency programs saves more than 40 pounds of coal.

C. Environmental Assessment

In Canada, at the federal level environmental assessment has always been haphazard. The Environmental Assessment Review Process (EARP) was first established by a Cabinet directive in 1973. It was refined and placed in a regulation in 1984 known as the EARP "Guidelines Order".¹³ Self-assessment has been the underlying concept and the Minister of the initiating department makes the decision of what proposals go to public review and whether panel recommendations will be accepted. The process has been roundly criticized over the years. There is no comprehensive definition of the environment, no requirements that alternatives be examined and no requirement for public hearings. However, last spring the process had some life breathed into it when the Federal Court of Canada quashed a licence issued by the Minister of Environment for the construction of the Rafferty/Alameda dams in the Souris River Basin in Saskatchewan. The Court held that the Minister had not complied with the EARP Guidelines Order which required an assessment be done on any project with an environmental impact on an area of federal responsibility.¹⁴ Unfortunately, the Minister then had an environmental assessment done and issued a new licence without a public hearing taking place. The Canadian Wildlife Federation is now back in court challenging the Minister's decision not to hold a hearing.

Mr. Bouchard has promised that environmental assessment legislation will be introduced this fall. Whether it will finally ensure that projects are adequately assessed early on in the planning process is another question mark. As noted above, the mega-projects will not be subject to this new legislation.

D. Free Trade

The Canada-U.S. Free Trade agreement is going to have significant and on-going implications on Canadian environmental policies. During the last federal election, over 90 environmental groups from across the country assailed the deal for its profound and adverse implications for the Canadian environment.¹⁵ One of our major concerns was that Canada's ability to manage resources in a sustainable manner would be constrained by guaranteed U.S. access to a

proportionate share of Canadian resources, even in times of shortage. We further noted that Canadian subsidies and financial incentives designed to encourage environmental and resource management objectives would be vulnerable to attack as non-tariff barriers to trade; only oil and gas exploration subsidies have been specifically preserved under the deal.

Unfortunately, our worst fears are coming true. Our energy resources are being exploited for the American market and in the future Canadians may have to develop more resources in environmentally sensitive locations while our cheaper, more accessible supplies of, for example, natural gas are tied up in contracts with the U.S. The recent decision of the National Energy Board is disturbing. On October 19, 1989, the NEB granted licences to Esso Resources Canada Ltd., Gulf Canada Resources Ltd., and Shell Canada Ltd. to export 9.2 trillion cubic feet of natural gas to the United States over a 20 year period beginning in 1996.¹⁶ This involves virtually all of the three companies' natural gas reserves in the Mackenzie River delta. No discussion of the environmental impact of these licences was undertaken by the Board and Energy Minister Jake Epp has taken the position that this would be done at the time of hearings for the construction of the pipeline. However, it is disturbing that while the Board did consider the costs of transporting the gas based on estimates for the construction of a hypothetical pipeline down the MacKenzie Valley in reaching its decision, it did not include the environmental costs in this equation. It also did not take into account the fact that in tackling global warming, we might want to substitute natural gas for other fuels that emit more carbon dioxide when burned.

At the same time, negotiations proceed in regard to GATT. These negotiations aimed at reducing tariffs will have a significant impact on environmental protection laws. A recent decision of the Court of Justice of the European Communities illustrates one type of contradiction that can arise between the objective of liberalized trade on the one hand and environmental protection on the other. The court held that a Danish environmental law requiring all beer and soft drinks to be sold in returnable containers was a non-tariff barrier. This was so even though the regulation was non-discriminatory and "highly effective."¹⁷ This

case sets a dangerous precedent and shows the need to amend the GATT rules to allow nations to take measures to protect the environment.

V. CONCLUSIONS

Due to the fact that Canada and the United States share a common boundary and a common industrial base, it is inevitable that the two countries will share common environmental problems. Public opinion polls have raised the environment to the top of the political agenda and governments are scrambling to respond. Unfortunately, to date, we have seen more "green rhetoric" than action in tackling the host of environmental issues Canada faces. One exception, on the Canadian side, has been the acid rain issue where a programme has been put in place to reduce acid rain emissions significantly by 1994.

What I have tried to do today is outline two of the major differences between the Canadian and American approach to developing environmental laws and policies- one is the real or perceived constitutional constraints and the other is our approach to legislation where we tend to leave a lot of discretion to our ministers and rely more heavily on guidelines rather than enforceable regulations. Another area where we differ appears to be Canada's adoption of sustainable development as a guiding concept in the development of its environmental programmes. The rest of my paper has dealt with Canada's recent initiatives in dealing with some key environmental issues. Unfortunately, what we see is a patchwork and often contradictory approach taken. One example is the commitment by this government to a series of energy mega-projects that will add significantly to the loadings of carbon dioxide to our environment. The contradiction between the recognition of the seriousness of global warming and the adoption of the principles of sustainable development on the one hand and the promotion and funding of these mega-projects is staggering. Finally, the environmental implications of the free trade agreement and international trade negotiations are widespread and will continue to impact on the development of Canadian environmental policy and law.

It is inevitable that environmental issues will continue to be on the Canada-U.S. agenda and influence relations between the two countries.

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