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POTENTIAL ACCOUNTABILITY MECHANISMS UNDER MULTILATERAL AGREEMENTS IN THE AREAS OF INSPECTIONS AND STANDARDS

Prepared by:

Karen Clark, LL.B., M.A.

and

Mark S. Winfield, M.A., Ph.D.

Canadian Institute for Environmental Law and Policy
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517 College Street, Suite 400 • Toronto, Ontario • M6G 4A2 • Tel: (416) 923-3529 • Fax: (416) 923-5949
E-mail: cielap@web.apc.org • Home Page: http://www.web.apc.org/cielap

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POTENTIAL ACCOUNTABILITY MECHANISMS UNDER MULTILATERAL AGREEMENTS IN THE AREAS OF INSPECTIONS AND STANDARDS

1. INTRODUCTION

This discussion provides a review of various accountability mechanisms for consideration in the CCME harmonization project. It is necessarily limited by time and resource constraints, and by the fact that the nature of the agreements that will be entered into is still unknown.[1]

The harmonization project proposes to create a new environmental management framework for Canada, structured around an "umbrella accord" and implemented through a number of agreements -- multilateral, bilateral and regional -- guided by the principles and objectives set out in the accord. The stated purpose of the Harmonization project is to address, through a harmonized "environmental management" regime the "largely anecdotal"[2] inefficiencies, duplication, overlap and "irritants" that have developed over three decades of environmental law making within the Canadian federal state.

The term "environmental management" is a short-form rubric under which fall literally hundreds of pieces of federal and provincial legislation and thousands of pages of regulations, policies and guidelines. Harmonizing this complex regulatory regime will not be a simple process. It follows that determining which mechanisms will best serve to keep a rationalized system accountable will also be challenging. It will require careful consideration of the nature of the agreements, the function covered by the agreements and the fundamental question of to whom must the agreements, and the parties to them, be accountable.

Two of the goals of the project are to arrange for delegation of powers from one level of government to another, and to establish a decision-making and standard-setting

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[1] For the purposes of this discussion, it will be assumed that the agreements being entered into under the present form of harmonization will be in the same form as that chosen for earlier versions of harmonization: non-legally binding intergovernmental administrative agreements. It should be noted, however, that this is not the only option available. Governments may, by way of legislation and other formally binding mechanisms -- the discussion of which is far beyond the scope of this analysis -- legally bind themselves to act on the terms of the agreement. It has been the nature of the harmonization project, and a point relevant to some of the observations made in this report, that the parties have so far avoided the option of making governments legally bound to perform.

[2] Canadian Council of Ministers of the Environment, "Background on the Harmonization Initiative," IRQ: http://www.mbnet.mb.ca/ccme/background.html, at 4 of 6.

process outside of the legislatures and Parliament. Therefore, it must also be acknowledged at the outset that the proposed system will be by its nature less accountable than a system where each Minister is directly responsible for the implementation of the laws of his or her Ministry. The accountability mechanisms implemented within any of the agreements will not change this fundamental fact.

2. THE CONTEXT OF HARMONIZATION

Note must also be made of the current regulatory context in which the harmonization project is being developed. Several provinces, notably Alberta, Ontario, Quebec and Newfoundland, have decreased or are in the process of decreasing the capacity of their Ministries of the Environment to administer and enforce provincial law, and have cut back, or are in the process of cutting back their environmental protection laws.[3] The question of accountability is particularly relevant in this context, where there are real questions whether the jurisdictions to which additional duties may be delegated will have the capacity or the will to implement these responsibilities.

Also relevant to the notion of accountability is the process, entering its fourth year, by which the harmonization project is being developed. It is currently understood that the project will be implemented through a series of intergovernmental agreements (IGA's). It has been argued that IGAs have, in the past, served to blur lines of responsibility and accountability.[4]

IGAs have, since the second world war, served to facilitate joint initiatives between the federal and provincial governments such as health care, taxation and unemployment

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[3].See, for example, M.Winfield and G.Jenish, Ontario's Environment and the Common Sense Revolution: A First Year Report (Toronto: Canadian Institute for Environmental Law and Policy, June 1996).

[4] See Franklin Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection," in Steven A. Kennett ed., Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources. (Calgary: Canadian Institute of Resources Law, 1993). He notes "...while agreements may be in the interest of executive government they may be contrary to the interest of the individual citizen and may undermine such important values as accountability and responsiveness," at 262. Gertler also observes: "...the general spirit of the agreements is such that federal officials will defer to the scientific evaluations and decisions of provincial authorities. Second, while lip service is paid to ongoing federal involvement and responsibilities, the administrative agreements are regarded as precluding federal enforcement action...Finally, there are no remedy or appeal provisions in such agreements," at 274.

insurance. IGAs have been part of a process described as "federal-provincial diplomacy"[5] and part of the executive-dominated legislative process described as "executive federalism."[6] Commentators on both processes have noted that, while these have helped in their way to make the Canadian federation possible, they have also served to undermine the strength of the federation, and to undermine the concept of responsible government.[7]

The harmonization project fits within the model of both "federal-provincial diplomacy" and "executive federalism." The problems it purports to address are the kind of cross-jurisdictional issues that have given rise to these sorts of administrative solutions in the past. Provincial "irritation" with federal "interference" through legislation such as the *Fisheries Act* and the *Canadian Environmental Protection Act* (CEPA) is well-known and amply documented.[8] It has also been noted that the "duplication and overlap" targeted by harmonization is the political jargon often used for the problem of "joint federal/provincial regulatory competence" the solution to which has often been understood to be the diminishment (or elimination) of the federal role.[9]

It should be noted that these observations have been made about the harmonization agreement in the past and, although the comments have been

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[5] See Richard Simeon, Federal-Provincial Diplomacy (Toronto: University of Toronto Press, 1972).

[6] First Ministers' Conferences are the best-known "institution" within executive federalism. "One of the most striking characteristics of this phenomenon is that a wide range of public policy issues is worked out through secret negotiation and then presented to Parliament and the provincial legislatures in agreed form for ratification, so the normal legislative process of debate and open compromise is replaced by agreements which are no longer discussable or negotiable by the time they become public." J.R. Mallory, The Structure of Canadian Government (rev.ed.) (Toronto: Gage Educational Publishing Company, 1984).

[7] See note 5.

[8] Tensions between the provincial and federal governments were noted more than once in the Resource Futures International report on the five-year review of the *Canadian Environmental Protection Act,* Evaluation of the Canadian Environmental Protection Act (CEPA) Final Report (Ottawa, 1993). The CSE Group prepared a report in March 1994 for the CCME, "Harmonization and the Federal Fisheries Act," that accepted as an *a priori* assumption that federal capacity to regulate fisheries could be solved by reducing as much as possible federal activity in this sphere.

[9] Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," in Douglas Brown and Janet Hiebert, eds. Canada: The State of the Federation 1994 (Kingston: Institute of Intergovernmental Relations, 1995).

acknowledged, they have not been addressed.[10]

3. THE MEANING OF "ACCOUNTABILITY"

"Accountability" does not necessarily mean the same thing to all of the groups impacted by the harmonization project.

3A. The Parties' Perspectives

In previous discussions of harmonization, the governments who will be parties to the agreements have demonstrated a number of "accountability" concerns. The first relates to ensuring that the promises made under the agreement are kept. The idea of accountability has also reflected the concern that the agreements reached would be firm, and no other party will move unilaterally to change anything the parties have agreed to.

The latter concern can be understood as a subset of the first. Harmonization has meant, and appears still to mean, the delegation to the provinces of federal powers to implement and enforce federal environmental law. As well, harmonization still appears to mean that federal responsibility for setting national standards will be replaced by consensus-based standard-setting by all the parties. The goal appears to be to homogenize as much as harmonize, and this requires a commitment on the part of all parties to keep the regime homogenous, and to not unilaterally change local laws.

The parties' concern with this last form of unilateral action presents some problems for the accountability of the project, in that the agreements appear to fetter the capacity and discretion of governments looking to either enforce or reform their own laws. In other words, it is unlikely that the harmonization project can truly homogenize environmental management in all Canadian jurisdictions without compromising the legitimate powers of provincial legislatures and the federal Parliament. As discussed in more detail below, it is unlikely that a perfectly stable, perfectly homogenous regime will accord with the principles of responsible government.

3B. Accountability to the Legislature/Responsible Government

One of the fundamental precepts of governance under parliamentary democracy is that Ministers are responsible to either Parliament or their legislatures for the

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[10] See, "Background on the Harmonization Initiative," op cit.

administration and enforcement of the laws under their Ministry's purview.

The process of the harmonization project contemplates that Ministers of the Environment will meet and agree on an environmental management framework, the implementation of which will entail, subject to provincial capacity, the federal government delegating its responsibilities under federal environmental legislation to the provinces. Under normal circumstances, there is a clear line between the Minister and any Act which it is his or her responsibility to administer. As noted above, any delegation of those responsibilities serves to blur the line of accountability.

The harmonization project also contemplates that the CCME will be the forum for negotiation of all elements of the new environmental management framework. There are at least two accountability issues that relate to this. The first is that the CCME has no legislative status within the Canadian state -- it is not a law-making body. If it becomes a virtual law-making body by becoming the forum of negotiation of the new environmental management framework, then it cannot negotiate as it has done: behind closed doors. As discussed in greater detail below, if the CCME is to take on the quasi-legislative task of creating what will become new environmental laws, it must, as the legislatures and Parliament must, make its deliberations part of the public record.

The second accountability issue is that each Minister of the Environment -- the agreements reached at the CCME notwithstanding -- is still accountable to his or her own legislature. At present, it is proposed that, once the Ministers have reached agreements regarding certain environmental management functions, the Ministers will then "ensure" that the agreements will be implemented in legislation and regulation. It is unclear how individual Ministers can *ensure* this outcome. It is not possible that a Minister of the Environment can *guarantee* that agreements will be implemented in provincial laws, a lesson taught by the fate of the Meech Lake Accord. Consent for the implementation of agreements must be obtained from the respective cabinets and the legislatures of the parties.

3C. Industry Perspectives

"Accountability" appears to mean to industry that whatever terms are agreed between the provinces and the federal government, the laws resulting from the IGA will be knowable and reasonably stable. Industry's primary concern is with being confident that it can expect to find out the full extent of its responsibilities under the law, so that it can know it is in compliance with the law, and can avoid the liability arising from non-compliance. Industry criticisms of the present environmental regime indicate that there is a degree of impatience not only with federal/provincial "duplication and overlap" but also with the multiple requirements of different ministries within one province. An "accountable" system from industry's perspective would, therefore, provide all of the information regarding compliance up front, and would contain no "surprises" from any

level of government. It may also be that, for industry, an "accountable" system would be one that would provide some recourse in the case that the certainty of the terms of the agreement between governments was undermined.

3D. Public Perspectives

The final area of accountability pertains to the fundamental concept that government is accountable to the public. Public concepts of accountability arise from the general understanding that government sets laws to control activity that has a negative impact on the environment because the environment -- air, land, water -- is a public good, and it is the role of government to protect public goods. Particularly, the public expects -- irrespective of agreements made between governments -- legislative and/or policy reform if public goods are not receiving adequate protection.

To the public, the "accountability" of environmental protection regimes means that standards achieve an acceptable level of environmental protection. In addition, an accountable regime requires that regulated enterprises comply with it, that government monitors compliance, and that government enacts sanctions in the event of noncompliance. Finally, accountability means that if either the standards are not high enough to adequately protect the environment, or if governments are not enforcing their laws, then the public shall have recourse to do something about the shortfall in environmental protection either by legal or electoral means.

As pertains to electoral means, in a parliamentary democracy, the public has to be able to attach responsibility to government for the results that government actions and decisions achieve. It is the expectation of the public that if government(s) do something that is believed not to conform to the public's needs, then the public may express its displeasure at the next election and vote the offending party out of office. This is a fundamental precept of accountability in parliamentary democracy and must be preserved.

4. ACCOUNTABILITY MECHANISMS

The different understandings of "accountability" described above -- so far as they conform to the concept of responsible government -- must be included in the umbrella accord or sub-agreements created by the harmonization project. The following discussion assumes that the interests of industry, and its understanding of accountability, can be included within the larger category of the general public. The discussion also assumes that the first priority for accountability mechanisms is to preserve, as much as possible, governmental accountability to the public and to the legislatures and Parliament. The discussion below will, therefore, assess various accountability

mechanisms in their ability to keep parties accountable to each other, to their respective legislatures, and to the public.

4A. Inspection

4A1. Introduction

Inspection can be a routine procedure, and appears to lend itself readily to the "one window of delivery" model that is central to the harmonization project. However, as the CCME states, "this area of environmental management is closely linked to compliance and enforcement."[11] Inspection is the first necessary step to take in order to ensure that an enterprise is in compliance, and to determine whether or not enforcement steps are necessary. The timeliness and thoroughness of inspections can themselves have a positive effect on industry compliance. Inspection impacts directly, therefore, on public concerns regarding the accountability of an environmental management regime.

The chief accountability issues attaching to harmonized inspection are: that the designated inspectors are sufficiently trained to inspect for compliance to federal and provincial legislation; that the information gathered is sufficient to show compliance to all relevant provincial and federal laws; and that this information is reported in a useful format to both levels of government.

4A2. Potential Accountability Mechanisms

i) Moral Suasion/Reporting Requirements

The most basic accountability mechanism among the parties to an agreement on inspection would be the moral and political obligations that ministers feel to fulfil their commitments under an agreement. Failure to fulfil such obligations would carry significant costs in terms of lost trust and good will. A fundamental requirements for the operation of this accountability mechanism is the establishment of detailed reporting requirements between the parties, particularly on the part of the party delivering the "one-window" inspection service. It must provide inspection reports to the party for whom it is conducting inspections, and on the number, time and location of inspections conducted, and the results obtained.

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[11] CCME, "Inspections: An Overview," at IRQ: http://www.mbnet.mb.ca /ccme/ov_inspections.html, at 1 of 1.

The effectiveness of this accountability mechanism would be greatly enhanced if detailed reports on one-window inspection activities, providing information on the time, number, location and results of inspections conducted under an agreement were also made available to Parliament, the legislatures of the participating governments and the public. Parliamentary reporting requirements for activities under CEPA administrative and equivalency agreements are currently established through that Act.

However, in practice, the elements of the CEPA annual reports delivered to parliament dealing with these subjects have contained little or no useful information beyond reporting the existence of such agreements. Much more detailed reporting requirements are necessary for reports of this nature to be useful accountability mechanisms to Parliament and the public.

ii) Formal Dispute Resolution

A formal dispute resolution mechanism could conceivably function to resolve some disagreements between the parties during negotiation and some implementation stages of an inspection agreement. The most obvious form of dispute would be a complaint by one party that the other party, which has been assigned responsibility for the delivery of one-window inspection services, is failing to provide adequate inspections to support the enforcement of the first party's laws and regulations.

A formal dispute resolution mechanism would require formal procedures for the bringing of a dispute by one party against another. Following the model of many international agreements, provision would have to be made for the establishment of an independent, third party body to ensure that disputes are adjudicated fairly. Mechanisms to ensure that the results of dispute resolution processes are adopted would also be required. In order to ensure parliamentary and public accountability, the process would need to be open, and provide for full public access to information.

However, this approach suffers from a number of potentially serious shortcomings. Formal dispute resolution procedures could be expensive and time-consuming. The lack of timely resolution could be a particularly serious problem where day-to-day inspection, compliance and enforcement activities are concerned. Furthermore, the creation of a neutral third party body to adjudicate disputes could require the establishment of a new "national" institution.

There is also the pressing problem that the Minister responsible for the administration of the Act at issue will be, in effect, surrendering his or her right to enforce the law to the dispute resolution process. At the end of the process a

Minister might find him or herself in the contrary position of being held accountable by Parliament, or his or her legislature, and the public for an outcome over which she or he has had no control.

A more simple approach to the resolution of disputes in this area would be to permit the party which has delegated inspection activities to another party under an agreement to withdraw from the agreement and initiate inspection activities of its own, if it believes that the delegated party is failing to provide adequate inspection services. This approach, of course, presumes the retention of some inspection capacity by the delegating party.

iii) Citizen Complaint/Enforcement Mechanisms

Mechanisms might also be provided which permit citizens to take action where they believe that inadequate inspection and enforcement activities are being undertaken by a party. This would provide a direct accountability structure between the public and the parties to an inspection agreement. Such mechanisms could take a number of different forms including:

a) Public Complaint Procedures

A public complaint mechanism could follow the structure of the existing provisions of section 108 of CEPA and the request for investigation procedure established under the Ontario *Environmental Bill of Rights*. Such provisions would have to be incorporated into the legislation of the delegating party. Responses to investigations could be required to be provided by the delegating party. Alternatively, following the model of the North American Agreement on Environmental Cooperation, an independent third party agency could be charged with investigating and reporting on public complaints.

In the event that responses to requests for investigations are provided by the parties to an agreement, an independent third party agency would be required to oversee the adequacy of their responses. This would follow the model of the Environmental Commissioner's Office, established under the Ontario *Environmental Bill of Rights*. However, it would also involve the creation of a new "national" intergovernmental institution.

b) Citizen Suits

Members of the public might also be provided with the means of seeking direct remedy for failures of governments to undertake adequate investigation and

enforcement activities. A citizen suit provision, for example, would permit citizens to seek civil remedies in cases of actual or imminent violations of environmental law. Such provisions could be based in either the delegating or delegated jurisdiction's legislation.[12]

Citizen suit provisions are well established in U.S. federal environmental law, where they have been an important tool in ensuring adequate state enforcement efforts in relation to federal statutes.[13] They have also been provided for in environmental legislation in Ontario, Quebec, Yukon and Northwest Territories.[14] In addition, a citizen suit provision was proposed by the federal government in its December 1995 response to the June 1995 report of the House of Commons Standing Committee on the Environment's report on CEPA.[15]

c) *Private Prosecutions*

A further potential mechanism to ensure the enforcement of legislation for which inspection activities have been delegated to another party is to strengthen the right of members of the public to pursue private prosecutions under the delegated legislation. In particular, statutory limits would be required on the ability of Attorneys-General to stay private prosecutions within their jurisdiction. Provisions of this nature would have to be provided in the legislation of the delegating jurisdiction.[16]

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[12].The Ontario EBR, for example, permits citizen suits in relation to the federal *Fisheries Act*.

[13].On citizen suits in the United States see G.Block, "Public Participation in Environmental Enforcement," First North American Conference on Environmental Law Phase II: Procedings (Wasington, Mexico City and Toronto: Environmental Law Institute, Fundacion Mexicana para la Educacion Ambiental, and Canadian Institute for Environmental Law and Policy, 1994).

[14].On Citizen suit provisions in Canada see M.Winfield, G.Crann, and G.Ford, Achieving the Holy Grail? A Legal and Political Analysis of Ontario's Environmental Bill of Rights (Toronto: Canadian Institute for Environmental Law and Policy, 1995), pp. 44-45.

[15].CEPA Review: The Government Response/Environmental Protection Legislation Designed for the Future - Renewed CEPA/A Proposal (Ottawa: Government of Canada, December 1995), pg. 26.

[16].A strengthening of the right of members of the public to pursue private prosecutions was proposed by the House of Commons Standing Committee on the Environment and Sustainable Development in its June 1995 report It's About Our Health! (Recommendation

iv) Conditional Grants

Conditional grants would make transfers of resources to support one-window inspection services from the delegating government contingent on adherence to the terms of an inspection agreement by the delegated government. Such an approach would follow the practices of the United States Environmental Protection Agency's in its grants to state agencies.

This mechanism relies on the availability of funding for resource transfers at the outset. This may or may not be a realistic expectation under current federal and provincial budget policies.

v) Civil Action Between the Parties

Under some circumstances, it may be possible for a party or parties to an agreement to initiate a civil action against another party for its failure to fulfil its obligations under an inspection agreement. The availability of such mechanisms would be dependent on the wording of any agreement. In addition, the law related to the enforceability of commitments made under intergovernmental agreements is uncertain and further detailed legal research is required to provide a clear resolution of this issue.

vi) National Compliance Committee

A "national compliance committee" would be a body whose purpose would be to review the parties' performance in complying with the terms of the agreement and conforming to the purposes of the legislation subject to the agreement.

Seeking to preserve accountability through a "national compliance committee" is problematic in that it takes the power of review, and, potentially, enforcement away from the Ministers and places it in the hands of a non-legislative, non-accountable institution. A committee of this nature was considered at earlier stages of the harmonization project. However, As a purely internal process, the Compliance Committee would not meet the accountability concerns of the public or the necessity of accountability to the legislatures and Parliament.

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vii) Terms of Approval, Expiry, Review and Renewal

The final accountability mechanism to be considered for agreements dealing with inspection functions (and, indeed, any function) are terms of approval, expiry, review and renewal. The approval process should include provisions for public, parliamentary and legislative review and comment on proposed agreements. Proposals for approval procedures of this nature for intergovernmental agreements were made by the federal government in its December 1995 response to the June 1995 report of the House of Commons Standing Committee on the Environment and Sustainable Development on CEPA.[17]

The application of a "negative resolution procedure"[18] might also be contemplated in the approval process for proposed inspection agreements. Such a process would permit, at least at the federal level, an opportunity for Parliament to reject agreements proposed by the Minister. This would preserve a key element of accountability, namely Parliament's capacity to have the final say regarding who is responsible for the enforcement of its laws. Provisions for a negative resolution procedure would have to be incorporated into the delegating party's enabling legislation for one-window inspection arrangements.

Agreements made under the harmonization project should only apply for a finite period of time.[19] In addition, provisions should be made for the independent review of activities undertaken under an agreement prior to its renewal. This would be an essential element of accountability to Parliament, the legislatures and the public. It is also a fundamental to accountability that governments be required to make an explicit decision to renew agreements.

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[17].Environmental Protection Legislation Designed for the Future, pp.17-19.

[18].The process is initiated by the Standing Joint Committee of the House of Commons and Senate for the Scrutiny of Regulations. Where the Committee considers that a regulation should be annulled, it can make a report to the House containing a resolution to the effect that the particular regulation be revoked. See *House of Commons, Standing Orders 123-128*. None of the provincial legislatures have established equivalent procedures in relation to the enactment, amendment or repeal of regulations.

[19].A five year expiry provision was proposed by the federal government for CEPA equivalency and administrative agreements and "general agreements on environmental management," in December 1995. See Environmental Protection Legislation Designed for the Future, pg.18.

4A3. Conclusions

"Inspection," on an initial assessment, may lend itself well to a "one-window" delivery mechanism. However, it is intimately connected to investigation and enforcement issues. Any transfer of responsibilities between governments in this area will inevitably involve a blurring of the lines of accountability for the administration and enforcement of legislation between governments, their legislatures, and the public. The mechanisms outlined above may compensate, to a limited degree, for this loss of clarity. However, in the end, Ministers must retain the right and the capacity to undertake inspection and enforcement actions under legislation which Parliament or their legislatures have given them the responsibility of administering.

4B. Standard Setting

4B1. Introduction

The processes of standard-setting are very different from inspection. It follows that there would be different concerns and different mechanisms for ensuring the accountability of the standard-setting function. Standard-setting is apparently contemplated in the harmonization project as a two-stage process. Standards will be established by the parties negotiating under the auspices of the CCME, and then implemented through legislation and regulations.

There are at least three areas where accountability mechanisms will be required. The first is at the stage of standards negotiation. The second is at the stage of implementation into legislation and/or regulation. The third would apply once the standards have been enacted in legislation, and would entail a mechanism by which it is made clear to the parties, industry and the public that the standards were being monitored and enforced. The third accountability issue has been at least partially covered in the proceding section on inspection. The rest of this section will deal with the first two.

The proposed approach to the establishment of national environmental standards raises a number of extremely serious issues related to accountability. In effect, the CCME would become a national environmental standard setting body, whose decisions would be adopted by each party to the agreement. However, the CCME as it currently exists, operates within a legal and constitutional vacuum, where no legislative or electoral accountability structures exist.

In other words, there currently exist no mechanisms to hold the CCME collectively accountable for the quality and adequacy of the national standards which might emerge from its processes. There is no "national" legislature to which the members of the

Council must collectively answer, and no "national" electorate which can vote the Council out of office if it regards the Council's decisions as inadequate.[20]

At best, the legislatures, parliament and members of the public might question their individual ministers regarding their roles in CCME decisions. However, the content of such intergovernmental discussions have traditionally been treated as confidential and ministers have refused to provide details of their deliberations. There is consequently no means by which ministers can be held to account for their individual actions within the CCME process.[21]

Furthermore, as it appears to be intended that the standards collectively developed by the CCME would subsequently be adopted by all participating jurisdictions, Ministers would no longer be directly responsible for the content of the standards implemented within their individual jurisdictions. The standards adopted in each jurisdiction would be the product of the deliberations of the CCME, rather than those of consultations and cabinet discussions within the individual jurisdictions. This would result in the significant blurring of ministers' and governments' direct accountability to their respective legislatures and electorates for the level of environmental protection which they provide within their jurisdictions

4B2. Standard Setting Within the CCME Structure

Any discussion of accountability structures under a multilateral standard setting process must take into account the character of the CCME's current decision-making structure and the types of decisions which it is likely to produce. In their May 1996 communique, the Minister's indicated that their commitment to harmonization to the "highest" environmental standards. However, it is difficult to envision how such an outcome can be achieved within the existing CCME framework.

The existing consensus-based decision-making structure has the effect of granting each member of the council a veto over decisions. As with all consensus based decision-making structures this is likely to result in deadlock, or lowest common denominator

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[20] The best example of such structures to parallel multilateral decision-making process would be the relationship between the European Parliament and the European Commission. See P. Leslie, The European Community: A Political Model for Canada? (Ottawa: Minister of Supply and Services, 1991).

[21] This is a long-standing criticism of the practice of "Executive Federalism" in Canada. See, for example, D.Smiley, The Federal Condition in Canada (Toronto: McGraw-Hill Ryerson, 1987), Chapter IV.

outcomes.[22] The only way in which such outcomes might be avoided would be for the CCME to abandon its current, unanimity decision rule, and for dissenting jurisdictions to be bound by majority decisions of the Council.[23]

However, agreement on such an approach is highly unlikely, as it would mean that some provinces could potentially find themselves in the position of being compelled to adopt standards which they have rejected. Even within Canada's existing general constitutional amending formula, there are provisions for dissenting provinces to "opting-out" of constitutional amendments. Within this context, the best a CCME-type approach to national standard setting may be able to achieve is to place some limits on the capacity of jurisdictions with the lowest standards from lowering their standards further.

Proposed accountability mechanisms in this area must also consider the limits on the capacity of ministers to guarantee the adoption of standards developed by the CCME by their individual jurisdictions. Proposed standards may have to be accepted by the cabinets of individual jurisdictions before they can be incorporated into regulations. If a standard is to be incorporated into law, the provincial legislatures and federal parliament must accept the proposed changes as well as the provincial and federal cabinets.[24]

4B3. Potential Accountability Mechanisms

i) Moral Suasion/Reporting Requirements

As is the case with inspections, the most basic accountability mechanism among the parties is the obligation that ministers owe one another to take the agreements reached at the CCME back to their governments, legislatures and Parliament and make a "best effort" to have them implemented in legislation and regulation. This is essentially the existing accountability structure within the CCME; during earlier discussions of harmonization, the emphasis was on consensus and cooperation, with only very rudimentary dispute resolution procedures in place.

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[22] On these general features of consensus-based decision-making processes see, for example, M. Howlett, "The Round Table Experience: Representation and Legitimacy in Canadian Environmental Policy Making," Queen's Quarterly 97 (1990), pp. 580-601.

[23] On proposals of this nature see D.M. Brown P.C. Farfard, "Asymmetry and Transparency: Some Thoughts on the Changing Federal Role in Environmental Management," (Kingston: Queen's University, January 1996).

[24] As noted earlier, at federal level a negative resolution procedure under the Standing Orders of the House of Commons also permits the House of Commons to disallow proposed federal regulatory standards.

A natural adjunct to the obligations arising from agreements on standards would be formal requirements that each jurisdiction report to the other parties on the "ratification" by their government, parliament and the legislatures of the terms of the agreement. Another important accountability mechanism would be the provision of reports on the implementation of agreed standards to the legislatures, Parliament and the public.

However, moral suasion -- even backed up with reporting requirements -- suffers from a number of limitations. Among other things, the fluid nature of the membership of the CCME, due to the results of elections and cabinet shuffles,[25] weakens the opportunity for the development of "trust ties" and feelings of obligation among Council members. Indeed, it is unusual for the same group of ministers to participate in two successive CCME meetings. Furthermore, there is, ultimately, no specific penalty, beyond political costs, attached to the failure to adopt any terms of an agreement.

ii) Formal Dispute Resolution Mechanisms

A bilateral or multilateral agreement on environmental standards might also incorporate a more formal dispute resolution mechanism to deal with situations in which a party fails to adopt an agreed standard. As noted above for inspections, such a mechanism would require formal procedures for the bringing of a dispute and provide for full parliamentary and public disclosure of related information.

However, even with such structures, the establishment of formal dispute resolution procedures in this area would present a number of serious problems. A formal dispute resolution process would likely be expensive and time-consuming. Furthermore, the establishment of an independent, third party dispute resolution body, could potentially involve the creation of a new "national" intergovernmental institution.

In addition, it is difficult to envision how such a mechanism would be able to enforce its decisions, beyond the political costs associated with ignoring the findings of a dispute resolution procedure. The dispute resolution body itself, having no constitutional basis, could not impose standards or apply fiscal penalties against a party. Indeed, the only body with the legal capacity to implement such penalties is likely to be the federal government.

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[25] Given 13 governments on a four-year electoral cycle and assuming a two-year cabinet cycle, there will be an average of three elections and six cabinet shuffles in any given year.

iii) Public Complaint Procedure

Consideration might also be given to the establishment of a process which permits members of the public to bring complaints against governments for their failure to adopt agreed standards. This could be similar to the public complaint structures related to environmental law enforcement which have been established under the North American Agreement on Environmental Cooperation.

In a manner similar to the proposed procedure for resolving disputes between parties, a public complaint process would require a procedure for bringing complaints. It would also have to provide for the establishment of an independent third party body to investigate and report on the validity of such complaints and recommend steps towards their resolution. This may again involve the creation of creation of a new "national" intergovernmental institution.

As with the dispute resolution process between parties, the political costs associated an unfavourable finding resulting from a public complaint would be the primary enforcement mechanism for such a procedure.

iv) Civil Action Between the Parties

As with the case of inspections, under some circumstances, it may be possible for a party or parties to an agreement on standards to initiate a civil action against another party for its failure to fulfil its obligations under an agreement on standards. The availability of such mechanisms would be dependent on the wording of any agreement. In addition, the law related to the enforceability of commitments made under intergovernmental agreements is uncertain and further detailed legal research is required to provide a clear resolution of this issue.

v) Financial Incentives/Penalties

A mechanism which might be employed to encourage parties to adopt agreed to standards would be to provide financial incentives for the adoption of standards, or to attach financial penalties for the failure to do so. As it is unlikely that the CCME or any other "national" institution would have the financial resources to provide such incentives or penalties, mechanisms of this nature would have to be provided by the federal government.

However, the ability of the federal government to provide positive incentives for the adoption of standards in, for example, the form of financial assistance for

their implementation, would be a function of the availability of the necessary federal resources. The application of financial penalties would, similarly, presume the existence of federal resource transfers at the time of the adoption of a given standard which could be withdrawn in a case of non-implementation.

vi) Incorporation of Agreed Standards into Federal Legislation/Regulations

A further mechanism which might be employed to ensure the adoption of standards agreed to through multilateral or bilateral processes, would be the implementation of such standards through federal legislation and regulations. Such an approach offers a number of significant advantages. The application of a given standard in all Canadian jurisdictions would be guaranteed, and clear lines of accountability for the implementation and enforcement of standards would be provided to parliament and to the public. Furthermore, if well-designed, the adoption of federal standards would permit jurisdictions to adopt higher standards if they wish to do so.

The primary limitations of such an approach are the jurisdictional constraints on federal constitutional authority to set standards of this nature. This is generally limited to substances deleterious to fish, and activities which may harm fish habitat under the *Fisheries Act*, fuels and vehicle emissions, products hazardous to human health, substances declared "toxic" for the purposes of the *Canadian Environmental Protection Act* (CEPA), and substances addressed by international agreements to which Canada is a party.

There may also be some potential for administrative duplication in provinces which may have already adopted an equivalent or higher standard within their legislation. However, such situations can be addressed on a case-by-case basis through CEPA administrative agreements and similar mechanisms.

Finally, this approach might be interpreted as limiting the federal government to using its legislative and regulatory authority to establish "national" standards where these standards have been agreed to through multilateral processes. This would place significant constraints on the ability of the federal government to take independent action in the area of environmental standard setting.

It is important to note that this approach is the only one identified in this review with a proven track record of success. This has been demonstrated most recently through the impact of the pulp and paper effluent regulations adopted in 1993 under CEPA and the *Fisheries Act*. The establishment of new federal standards in this area created an effective minimum standard for pulp mill effluent across Canada, and prompted a number of provinces to adopt higher standards

of their own.[26]

vii) Public Record of Proceedings and Decisions of Multilateral Standard Setting Bodies

In the event that a multilateral decision-making process is adopted for the creation of "national" environmental standards, the establishment of formal records of the proceedings of any such process should be considered. Such records would be essential to ensuring the accountability of the parties for their actions to their respective legislatures, Parliament, and their electorates.

The lack of such records has been a long-standing criticism of the processes and procedures of executive federalism within Canada.[27] In the absence of such documentation, there is no means by which individual ministers can be held to account for their role in the decisions which emerge from the multilateral process. All documents developed by parties in support of multilateral standard setting exercises should also become part of the public record.

viii) Approval, Sunset, Review and Renewal Processes

Finally, as discussed in relation to inspection agreements, any multilateral standard setting process should include provisions for the approval, sunsetting, review and renewal of the process itself. The approval procedure should include processes for public, legislative and parliamentary review of proposed agreements before their adoption. Such procedures were proposed by the federal government in its December 1995 response to the June 1995 report of the House of Commons Standing Committee on Environment and Sustainable Development on the review of CEPA.[28]

As with multilateral or bilateral agreements established in the area of inspections, agreements in the area of standard setting should only apply for a limited period of time, perhaps of not more than five years, and should be subject to an independent review process prior to renewal. This might involve a committee of members of the legislatures of the parties and of parliament.

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[26] See Kathryn Harrison, "The Regulator's Dilemma: Regulation of Pulp Mill Effluent in a Federal State," (Vancouver: Department of Political Science, University of British Columbia, 1993).

[27] Smiley, The Federal Condition in Canada, Chapter IV.

[28] Environmental Protection Legislation Designed for the Future, Chapter 2.

Renewal should occur as an explicit step by the parties.

Structures of this nature are necessary to ensure that the participation of a jurisdiction in a multilateral standard setting agreement is not placed beyond the reach of subsequent governments, Parliament, the legislatures, and the electorate. It would also provide for consideration of whether the agreement is meeting needs of jurisdiction in question, and require an explicit decision by its government to continue to participate in the process.

4B4. Conclusions

The multilateral approach to environmental standard setting currently under consideration within the CCME harmonization process presents a number of serious challenges to existing parliamentary and electoral accountability structures within the Canadian system of government. The proposed sharing and redistribution of responsibilities seems to lead inevitably to a blurring of the formal lines of accountability within the current constitutional, legal and political framework. This problem is further exacerbated by the tendency of multilateral processes to produce lowest common denominator outcomes.

The accountability mechanisms which have been identified in this review may, to some degree, compensate for this weakening of formal accountability structures. However, a number of these mechanisms, such as the establishment of formal dispute resolution procedures, raise significant constitutional and legal issues of their own, and may require the establishment of new intergovernmental institutions. Indeed, the only mechanism in this area with a clearly established record of effectiveness is the use of federal legislative authority to establish environmental standards of national application.

5. CONCLUSIONS

The above discussion has sketched a number of possible mechanisms that could be enacted in either the umbrella accord or the several agreements arising from the harmonization project. However, as has also been noted, the processes and purposes of the project themselves have the potential to lead to an environmental management regime that is less accountable to Parliament, the legislatures and the public than is currently the case.

This fundamental aspect of the harmonization project will diminish, but not disappear, if the accountability mechanisms discussed are applied. A further conclusion must be drawn that if the mechanisms reviewed above are not made part of the project, harmonization will unquestionably serve to make governments less accountable, less responsible, and the project will put the environment at greater risk of not being adequately protected.