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The Regulatory Framework for Environmental Protection

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THE ISSUE

Acting in the public interest and not for private gain, the women and men who monitor and enforce environmental legislation are truly on the front lines protecting the natural world.

Environmental concerns have received a great deal of public attention over the past three decades. But, it is important to remember that these concerns have been an important issue for working people for much longer. Workplace and community concerns about the health effects of industrial pollution have been with us since the founding of the first factories. Much of the present body of environmental legislation arose out of the struggles of unions and community groups to protect public health and to ensure the continued existence of the natural world.

The public sector has a special role to play as guardians of our environment. Acting in the public interest and not for private gain, the women and men who monitor and enforce environmental legislation are truly on the front lines protecting the natural world. The strength of these environmental regulations and the ability to effectively implement them are vital for human health and continued environmental integrity.

As with all areas of the public sector both federal and provincial governments, encouraged on by corporate lobbyists, have embarked upon a process of environmental deregulation and cutting back on the staffing.

Not surprisingly, many businesses and governments see environmental regulations as a barrier to continued profitability. As with all areas of the public sector both federal and provincial governments, encouraged on by corporate lobbyists, have embarked upon a process of environmental deregulation and cutting back on the staff.

This paper is the first in a series by the National Union exploring the attack on the regulatory framework for environmental protection. As a starting point we are going to explore the manner by which the Federal Government has implemented a strategy to:

- use global competitiveness as an excuse;
- weaken federal environmental legislation and enforcement capacity;
- devolve responsibility to the provinces; and
- appeal to corporations to self-regulate.

Future papers in the series will focus more specifically on the effects of environmental deregulation and cuts to regulatory mechanisms within the provinces, who have been unwilling to raise standards.

The Federal Government Abdicates Its Role As Watchdog

Like most areas of public policy deregulation and devolution are the centerpieces of the Chrétien Liberals' environmental agenda.

Canadians, historically at least, have come to expect their federal government to act on their behalf when it comes to environmental regulation and law enforcement. Unfortunately, the corporate push for increased globalization of our economy has seen our government progressively abandon its role as watchdog for our natural world. Like most areas of public policy deregulation and devolution are the centerpieces of the Chrétien Liberals' environmental agenda. The three primary ways in which they have enacted this agenda has been through international trade agreements, the Canadian Environmental Protection Act and the Harmonization Accord with the provinces.

<u>International Trade Agreements and the Environment</u>

Environmental regulations, pertaining to things like pesticides, food safety, bio-technology and environmental protection, are often seen as non-tariff barriers to trade and WTO negotiations have consciously moved to limit the capacity of governments to establish standards and controls in these areas.

It will come as no surprise to anyone that the North American Free Trade Agreement (NAFTA) has had an impact on Canadian environmental regulations. There is scarcely an area of public policy that has not felt the icy grip of this agreement. But only now are Canadians becoming aware of the far-reaching implications that the trade agreements being negotiated by the World Trade Organization (WTO) will have on their daily lives.

The most fundamental goal of all current international trade negotiations is to promote deregulated trade in services, goods and investments through the removal of both tariff "barriers" and non-tariff "barriers" to trade. Environmental regulations, pertaining to things like pesticides, food safety, bio-technology and environmental protection, are often seen as non-tariff barriers to trade and WTO negotiations have consciously moved to limit the capacity of governments to establish standards and controls in these areas. Standard setting under both NAFTA and at the WTO is limited by the provisions of two chapters: <u>Technical Barriers to Trade</u> (TBT) and <u>Sanitary and Phytosanitary Standards</u> (SPS).

International trade policies influence domestic policy through the imposition of trade sanctions based on decisions regarding a government's behaviour in an area of global trade. For example, the WTO decided that Canada's policy on magazine advertising violated the TBT provisions and moved to enact trade sanctions against other Canadian exports. One of the most fundamental principles adopted by the NAFTA and

WTO is that of the *Most-Favoured-Nation Treatment* (sometimes referred to as *National Treatment*). This principle requires governments to treat "like" products from member countries equally. In other words, a government cannot discriminate against foreign producers of a product either in favour of a domestic industry or regardless of the labour or environmental conditions entailed in that production. This results in a two pronged attack on environmental regulation. First it makes it impossible for the Canadian government to use trade measures as a means to exert influence on polluting or hazardous industries in other countries. On the flip side, Canadian products have to compete with foreign producers who lack environmental regulations and protections. We are caught in a dangerous race to the bottom with the world's people ultimately being the losers.

While the GATT/WTO could have, under the provisions of Article XX, acted to provide environmental protection from the very beginning, it has invariably led to the elimination of government options to regulate! There is no evidence to date to indicate that this trend will change.

Successive governments in Canada, both Conservative and Liberal, as well as a bevy of corporate spokespersons, have frequently attempted to alleviate citizen concerns about these trade measures through reference to Article XX of the WTO regime as it appears to provide room for governments to act in the public interest. With regards to environmental issues Article XX "permits" countries to continue or enact standards seen as necessary for the protection of "human, animal or plant life or health" and the "conservation of exhaustible resources". The same article was included in both the Canada-US Free Trade Agreement and the NAFTA and hence decisions made under any of these agreements are relevant to our discussion.

As every cook will tell you "the proof is in the pudding". In this case let's judge the politicians by what has happened, not by what they say will happen. To quote a brief prepared by the Canadian Environmental Law Association:

> *With the implementation of the expanded trade law regime following the establishment of the WTO, an increased number of trade disputes have arisen in which environmental or health standards have been an issue. In every case, the domestic standard that was at issue has been found incompatible with GATT (General Agreement on Tariffs and Trade) or the FTA leading to a requirement that it be rescinded.*

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very beginning, it has invariably led to the elimination of government options to regulate! There is no evidence to date to indicate that this trend will change.

In both of these instances the Canadian government has demonstrated a disregard for the legitimate health concerns of foreign governments.

The Canadian government has not been simply a victim of the decision of international trade bodies through all of this. To date Canada's participation in both the *Committee on Trade and the Environment* and the *Review of Technical Barriers to Trade* has been to make it more difficult for governments to set national standards. With regards to trade disputes, Canada successfully challenged Europe's standards banning hormone residues from beef (even though these standards had been enacted in response to widespread consumer demand) and is trying to force France to accept Canadian exports of asbestos, a highly toxic substance. In both of these instances the Canadian government has demonstrated a disregard for the legitimate health concerns of foreign governments.

<u>Canadian Environmental Protection Act</u>

The primary federal legislation pertaining to environmental issues is the Canadian Environmental Protection Act (CEPA). It has been undergoing a review, with the newly revised act receiving royal assent in September 1999, and proclaimed in March 2000. In its revised form it represents a considerable abdication of the federal government's traditional role as the national environmental watchdog.

There are a number of serious faults in the CEPA.

restricts federal leadership in environmental management.

- It seriously restricts the possibility of federal leadership in environmental management. In no less than 14 places the federal government is required to meet with provinces before taking action.

government unable to act unless it costs industry less to clean up the problem than to treat the people affected!

- Severe erosion of the Precautionary Principle – where there is uncertainty regarding the possibility of health or environmental harm, government should act on the side of safety – by mandating industry to take action on an issue when it is "cost-effective" to do so. Shockingly, government is unable to take action on pollution unless it can demonstrate that it costs industry less to clean up the problem than to treat the people affected!

environmental protection takes back seat to other legislation.

- The CEPA is called, in legal terms, “residual”. What that means to the rest of us is that all other legislation takes precedence over environmental protection. But should human health and environmental concerns be at the bottom of the government’s list of priorities?

able to exempt entire classes of bio-engineered from having their health or environmental impacts evaluated.

- Cabinet is now able to exempt entire classes of bio-engineered products—foods, drugs, plants, animals and fish—from having their health or environmental impacts evaluated.

But with the CEPA it is also important to look at what is missing from the legislation. Many labour and environmental organizations looked for the inclusion of so-called “Whistleblower protection.” As we have seen in both the Ministries of Health and Fisheries, scientists have been repeatedly muzzled from disclosing their concerns about possible harm to the public from an industry. Instead of taking steps to protect brave workers who step forward the government chose to keep the lid on its workers.

<u>Canada-wide Accord on Environmental Harmonization</u>

Since the early 1990s a new body, the Canadian Council of Ministers of the Environment (CCME), has established itself as the major forum for discussion and joint action on environmental issues. It is comprised of the Ministers of the Environment from each province and territory along with the federal minister. Since 1993 the primary focus of this body has been the “harmonization” of federal, provincial and territorial environmental regulations. The CCME, with the exception of Quebec, finally signed the Canada-wide Accord on Environmental Harmonization and related Sub-Agreements on Standards, Inspections and Environmental Assessment on January 29, 1998.

Harmonization has been promoted as the solution to what most analysts see as a non-existent problem – cost-cutting from duplication and overlap.

Harmonization has been promoted as the solution to what most analysts see as a non-existent problem – cost-cutting from duplication and overlap. Even a study commissioned by the CCME indicates that this is a marginal problem. Most environmentalists and workers in the field will point out that the problem has been a lack of enforcement not an excess. The drive to cut costs is rooted in a commitment to reduce the size and role of governments rather than as a response to any real problem of environmental management.

The harmonization process has really been an aspect of the continued efforts of the provincial governments to devolve power from the federal government to provinces.

The harmonization process has really been an aspect of the continued efforts of the provincial governments to devolve power from the federal government to provinces. It delegates responsibility for the enforcement of federal environmental laws to the provinces and territories, except on crown land and along international borders. Under the CEPA the federal government can still implement nationwide standards on products and substances.

The accord also provides for the systematic review of federal environmental legislation looking for overlap and will likely mean repeal of federal laws seen to be “overlapping". For example, in June of 1994, the federal government exempted Alberta from four sets of CEPA regulations, claiming that they have been replaced by equivalent Alberta regulations.

When you consider that the provinces of Ontario and Alberta have already seriously gutted both their environmental regulatory framework and enforcement mechanisms we are looking at a race to the bottom instead of a raising of standards.

While this may ultimately look like a reduction in the amount of government, in reality it creates a new level of government. All decisions regarding environmental management must be made through the CCME. But the CCME lacks any mechanism for public accountability, has no public mandate and is not answerable to any electorate or legislature. Furthermore, utilizing a consensus decision-making structure really means that the government most strongly objecting to a proposed regulation or concern will hold sway. When you consider that the provinces of Ontario and Alberta have already seriously gutted both their environmental regulatory framework and enforcement mechanisms, we are looking at a race to the bottom instead of a raising of standards. Just in case there are any decisions made by the CCME unacceptable to a government, the accord stipulates that the CCME’s decisions are not binding on the provinces or territories.

All of this will severely limit the ability of the federal government to act on its own to protect the environment and to negotiate international environmental agreements. Even national environmental educational materials would require the agreement of the provinces.

For workers in the areas of environmental management this does not bode well. As environmental regulations and enforcement mechanisms are harmonized downwards, we will likely see increasing job losses.

THE PROVINCIAL ATTACK

In those cases where environmental regulations remain in effect, provinces have substantially cut the staffing levels of enforcement and monitoring agencies to the extent that legislation becomes almost pointless.

Environmental regulations in Canada are truly in a race to the bottom. Using their newly found powers to deregulate environmental protections, provincial governments have ignored public concerns in favour of corporate profit. In those cases where environmental regulations remain in effect, provinces have substantially cut the staffing levels of enforcement and monitoring agencies to the extent that legislation becomes almost pointless. Governments also attempt to ensure their workers remain silent about the environmental impacts of development through intimidation or strong-arm tactics. The following examples of government practices should help illuminate the argument.

The Mike Harris Tories in Ontario have cut and restructured the Ministry of the Environment to the point that its ability to actually protect the environment has been seriously compromised. OPSEU reports that one-third of the number of jobs in the Ministry have been eliminated, including front-line staff in spill response and toxicology and almost one half of the pesticide control field staff, effectively losing one-third of the ability to protect our environment. Most frightening is the reduced ability to prosecute polluters. Between 1985/86 and 1994, the number of prosecutions of environmental polluters, both companies and individuals, had risen from 49 to 470. Fines similarly rose from $605,668 to almost $2.5 million. Despite the strong evidence of the need for protection, the enforcement branch saw its staff cut by 10%, leaving only four full-time prosecutors.

In British Columbia, there is a fairly strong body of environmental regulation and a clear public mandate, but, as a recent BCGEU report states:

> *...these goals are not realized in field presence, budgets, staff allocations, or management concern for professional development.*

British Columbia cut its Ministry of Environment, Lands and Parks (MELP) staff by 21%. When asked about the state of environmental safeguards in the province, 88% of the remaining professionals working in the Ministry felt that they do not have the necessary support to adequately protect the environment. Perhaps even more worrisome is that 65% of the respondents to the survey felt that politics and economics

play a greater role in the setting of standards and guidelines, and the issuance of permits, than did scientific knowledge.

In Manitoba, in the late 1980s, the Manitoba government held environmental hearings prior to allowing Louisiana Pacific to build a chipboard plant in Swan River, Manitoba. A government biologist was dismissed for speaking out on the negative effects this plant would have on the local environment. Another employee was transferred to what was in essence a constructive dismissal.

It is clear that while the provinces play an important role in safeguarding the natural environment it is vital that the federal government set national standards for monitoring and enforcement.

INDUSTRY SELF-REGULATION: NOT REALLY AN OPTION

Privately, most corporations admit that strong regulation is the single best way to protect the natural world.

Despite government appeals for corporations to self-regulate, the evidence forcefully suggests that very little has changed in the manner in which businesses conduct their affairs. Privately, most corporations admit that strong regulation is the single best way to protect the natural world. In a confidential survey commissioned in 1994, of 300 corporations, municipalities and school boards (redone in 1996 on 1,000 organizations with similar results):

- **95%** said their primary reason for instituting environmental programs was to comply with government regulations;
- **66%** acted in response to the threat of "director liability" law; and
- **16%** would adopt better environmental practices if the choice were strictly voluntary.

Plans to institute Standard Approval Schemes (SARs) have appeared in most provinces. The goal is to replace tough impartial state-funded environmental monitoring regimes with industry self-monitoring. But all the evidence indicates that industry will not take environmental considerations seriously without the presence of environmental regulations and enforcement.

Also where is public accountability? While governments and industry argue that the "court of public opinion" will force

Corporations are under no obligation to listen to anyone but their shareholders when setting their environmental standards. It is unlikely that most industries will open their doors to critical voices from unions, environmenta-lists, health and safety activists, or even concerned citizens.

industries to change, this is completely unrealistic. Without impartial and independent information, the public will not have access to the kinds of information it needs to make informed decisions. Furthermore, it is unlikely that the highly technical nature of the material will be easily accessible to most people. And just how will the public participate in the process of self-regulation? Our democratic system is built on public consultation, granted one that needs improvement, and citizen input. Corporations are under no obligation to listen to anyone but their shareholders when setting their environmental standards. It is unlikely that most industries will open their doors to critical voices from unions, environmentalists, health and safety activists, or even concerned citizens.

Clearly a tough body of environmental regulations and well-funded and staffed monitoring and enforcement agencies are essential when it comes to protecting public health and our legacy of natural spaces.

RECOMMENDATIONS

Ultimately, it will take a complete overhaul of the way Canadians work, play and are governed to realize an environmentally sustainable society. But, as they say, Rome was not built in a day. The National Union identifies the following first steps towards realizing a true “Green Revolution” in Canada.

Governments must move to:

- <u>set global environmental protection as a priority;</u>

- <u>enact whistle-blower legislation</u>;
  - Concerned citizens must be guaranteed protection for bringing their concerns forward. It is unacceptable that people are forced to choose between keeping their jobs and raising public health concerns.

- <u>strengthen the CEPA;</u>
  - The primary piece of federal legislation dealing with the environment must not be taken as a “it would be nice if...” clause to trade agreements. It must go back to Parliament and come back with some teeth!

- <u>increase Federal/Provincial funding for environmental protection;</u>
  - Provinces need the resources to protect their natural environments. For the federal government to play a greater role it must help fund these efforts.

- <u>establish a National Just Transition Fund;</u>
  - We know that in the transition period some industries will experience job loss while other, environmentally progressive industries, will expand. The federal government must take steps to insure that this does not take place at the expense of regular working people. A national fund to assist workers and employers in the transition is only fair. Currently a number of European countries are following this model and seeing actual job growth as a consequence. We think Canada should follow suit.

- <u>invest in environmentally progressive research and measures.</u>

IN CONCLUSION

Pessimism and resignation are only natural reactions to reading material like this. But the very stakes in the struggle mean that we cannot succumb to the temptation to throw up our hands and concede defeat. With our health, livelihoods and the beauty of the world around us at risk we must commit ourselves to fight to regain the ground that has been lost.

We know that poll after poll has shown that the public agrees with us on the importance of environmental issues. Being worried and concerned makes you part of the majority of Canadians. It is the minority who seeks to further reduce environmental regulation and protection. We must use the strength of numbers to make our employers, businesses and all levels of government take action!

The labour movement, the National Union in particular, is especially well situated to bring the fight for a clean and healthy environment to the government and into the workplace and citizens' homes.

FOR MORE INFORMATION

Check out these websites

Canadian Environment Network	www.web.net/cen
Canadian Environmental Law Association	www.web.net/cela
Canadian Institute for Environmental Law and Policy	www.web.net/~cielap

APPENDIX ONE

Public Opinion on Environmental Issues

Percentage of Canadians who believe that their children will experience greater health difficulties because of a worsening environment.
(POLLARA Inc., November, 1997) **78**

Percentage of Canadians who say they are just as concerned about the global impact of pollution as they are about its effects on their neighbourhood; and on global warming, 61% want governments to act now to reduce human impact on the world's climate.
(Environics International, April, 1997).....**80**
↳ **61 want government action on climate change**

Percentage of Canadians who feel that their health has been affected by environmental problems.
(Environics and Synergistics Consulting, March, 1997) **59**

Percentage of Canadians who want tougher legal measures to protect endangered species in Canada including extending protection to the habitats of species at risk.
(Canadian Endangered Species Coalition, November 1996) **75**

Percentage of Canadians who are troubled about the state of the environment, with most expressing serious concerns about the potential damage wrought by global warming; equally high levels of concern expressed about Canada not meeting international commitments to reduce greenhouse gas emissions.
(Insight Canada Research, November 1996) **90**

Percentage of Canadians who feel that environmental laws should be made stricter, despite government cutbacks and debts.
(Environics, July 1996) **82**

Percentage of Canadians that said environmental regulations should be strictly enforced even in times of recession.
(Environics & Synergistics April 94, December 92) **78**

Percentage of Canadians that said we need to protect the environment even if it costs money/jobs.
(Angus Reid Group, September and October 1996) **74**

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