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FEDERAL, STATE AND PROVINCIAL INTERPLAY REGARDING CROSS- BORDER ENVIRONMENTAL POLLUTION

*Stewart Elgie**

Thanks very much.

The one thing Canada and the U.S. have in common is our environment. Air, water and wildlife move freely across our borders. The air pollution that drifts north through Cleveland today will drift through Ontario tomorrow. The song birds migrating through Cleveland today will make their way up to Canada for the summer before heading back south for the winter. Simply put, nature does not recognize that the King of England and the President of the U.S. painted an arbitrary stripe in the middle of the North American ecosystem years ago. These are by no means trivial problems. For example, over two thousand people will die this year in Ontario because of air pollution, according to Health Canada, and half of that pollution will come from the U.S. How our two countries deal with environmental issues has a tremendous impact on our quality of life and our health. It is a fairly tall order to try to analyze how Canada and the U.S. deal with trans-border environmental issues in twenty-five minutes. I would not pretend to do it justice in that time. I hope to touch on three things.

First, I would like to briefly compare environmental standards and performance in the two countries and show some surprising differences.

Second, I would like to discuss some of the differences in the way the two countries regulate the environment, focusing particularly on federal provincial issues and cross-border environmental problems.

Third, I would like to offer some thoughts as to why the federal government plays a different roll in Canada over the environment; what the implications are for environmental protection, and maybe do a quick case study on one issue.

Let me start with a comparison of environmental standards and performance in the two countries. When I came back to Canada from Alaska in 1989 and started teaching environmental law, I was struck by the fact that Canada's environmental standards were generally weaker than U.S. standards. There were actually many significant regulatory gaps in Canadian environmental

* Elgie bio.

law. As an academic, I set out to do a comprehensive study comparing the two standards. I found this to be difficult because Canada does not have national standards. Most of the environmental laws are provincial. The most common answer I received was: I would have to look to all of the facility-by-facility permits in each regional office if I wanted to know what the provincial pollution standards were. That was a daunting task. In any event, in the absence of a comprehensive study, all of the evidence I have seen, indicates Canada's environmental standards generally lag behind the U.S. when measured on a per Gross Domestic Product (GDP) basis or per capita. That is important to note. In other words, Canadian industries generally don't have to meet the same level of discharge or performance standards as U.S. ones. There are some exceptions.

This may seem surprising to many of you. It was to me, because Canada has a pretty strong green image. It is true, when you look at overall environment quality, Canada generally does as well as or better than the U.S.; our air is a bit cleaner, our water a bit cleaner, we have more green space. That is mainly, though, because we only have one-ninth the population and one-thirteenth of the industry occupying a landmass that is larger than the U.S. Simply put, there are a lot fewer of us to mess the environment up.

Canadian standards are generally weaker, company-by-company. There are some statistics that confirm it. Each year the North American Commission for Environmental Cooperation, the North American Free Trade Agreement (NAFTA) environmental commission, puts out a report comparing pollution emissions in Canada and U.S. Basically, it uses the two countries' domestic data, so it is pretty reliable. What it shows is that Canadian companies, per average, emit about fifty percent more air and water pollution than U.S. companies.

If you look at it on a per GDP basis, the numbers come out to about one point four times as much. These numbers are pretty reliable when you cross-tabulate. The same conclusion comes from a study done by the Organization for Economic Cooperation and Development (OECD), which look at a number of pollution measurements for various OECD countries. You see here a comparison of air pollution parameters on a per-GDP basis; showing consistently Canadian emissions per unit of GDP are higher than U.S. emissions and both are higher than OECD average emissions.

To corroborate this, I also took a look at how much industries in Canada spend on average dealing with environmental protection and pollution control. Canadian businesses spend a little bit less than half of what U.S. businesses spend on environmental protection and pollution abatement. This lined up well with a comprehensive study done, based on 1987 data, which

found the same thing: Canadian companies spending just under half of what U.S. companies spend on environmental compliance.

Similarly, the numbers show that the environment is generally a little bit lower priority for Canadian governments than U.S. ones, in terms of the percentage of budget spent on the environment. The U.S. spends about fifty percent more of its budget on environmental issues than Canada does, and what is interesting, that relationship is true at both the federal level and the state/ provincial level. This trend has been consistent for the past eleven years.

What is interesting, though, is that if you look at social spending, you see exactly the opposite pattern. Canadian governments typically spend more than U.S. governments do, in terms of spending on social issues. So it is not a pattern that cuts across all regulatory issues, at least in the case of environment, particularly Canada. There has been no comprehensive, empirical study, but the available evidence strongly indicates that Canada's environmental standards and performance lag behind the U.S. on a per GDP basis.

I would not put too much stock in the numbers, they are just case-by-case indicators, but based on my experience in both countries, I can say with a good deal of confidence that the overall pattern is accurate. Again, recognizing that there are some specific exceptions.

Let me turn to the next question, which is why Canada's environmental performance lags behind the U.S. What are the differences that help to explain this?

One reason for the difference is that Canada, until recently, has not reached what you can call a perceived crisis point in terms of environmental degradation.

In the U.S., by comparison, crisis mentality did set in during the early 1970s. A country that based so much of its mentality on a wild frontier started to realize it was running out of unspoiled places. That was spurred on by incidents like the Cuyahoga River setting on fire in Cleveland, the big oil spill in Santa Barbara, Love Canal, near Buffalo. All this crisis mentality led to a strong environmental movement.

In the early 1970s in Canada we also had environmental problems, of course, and there was a rise in public concern but nowhere near as much as in the U.S. Largely that was because most Canadians, even if their own region was polluted, were able to look north at all the lakes and forest and unoccupied land and say, "We can never ruin all of that." Much the same way that the U.S. did in the early 1900s, looking west or the first settlers in the Great Lakes. It is not an uncommon pattern for countries to go through this. However, the environment had not reached the same crisis point in Canada

as it did in the U.S. in the early 1970s from a perception viewpoint, although, arguably that is changed a bit in recent years.

Recent poles consistently show that Canadians place just as high or higher priority on environmental protection than citizens of the U.S. do. This is true even when you ask people to choose between environmental protection and economic growth.

There is a survey done every year going back to 1967, asking countries' residents what is more important environment or economic growth. Canada comes out first globally. That pattern is consistent, even if you go back to 1967 and track the responses. This is not because Canadians as a whole are less concerned about the environment. The opposite may, in fact, be true. A major reason why Canada's environmental standards are weaker, I will argue, lies in the countries' different regulatory structures, particularly the weaker role played by the Canadian government.

Let me start by doing a quick tour of history. Up until 1970 the environmental regulatory systems of Canada and the U.S. looked pretty similar. You had environment being considered mainly a state or provincial issue, most regulation was at that level and the standards were quite variable, but generally pretty weak. The federal government's main role was to support and cajole and coordinate and to regulate only in its specific regulatory niches, like federal land or marine issues.

Starting on January first, 1970, public concern rose and states efforts were seen as often inadequate in the U.S. The U.S. federal government stepped in, and between 1970 and 1978, passed a slate of strong national environmental laws still unequalled in the world. The U.S. federal government set standards for air pollution, water pollution, endangered species and toxic site clean ups. The general pattern was the states could improve on these, but not make them lower. These federal standards were a floor not a ceiling. The general result was to raise the level of environmental protection in most parts of the country. With the exception of a few states like California, for example, who were probably already leaders on their own, in states like Louisiana, West Virginia, the level of environmental protection was raised significantly by the existence of new national environmental standards.

Canada's pattern was different. Environment concern arose in the 1970s, we did not respond with strong national laws. We mainly used federal guidelines or policies, non-binding instruments. It was mainly left to provinces to pass environmental laws and standards. Canada had a bit of a flurry of new federal and provincial environmental laws between 1987 and 1992 we had a bit of a mini green wave of our own, driven by public concern. The end result is still most environmental regulation in Canada is provincial and most

of those standards are generally weaker than U.S. ones, again, with those notable exceptions. I can give you lot of examples where this is the case; air standards, forest management standards. There are also some huge gaps in Canada laws. We have no legislation or funds for clean up of toxic sites equivalent to Super Fund. There are no laws to protect wetland or endangered species in many of Canada's provinces. There are a few, but most provinces do not have these laws. I certainly do not claim that all of this is due to the lack of strong federal leadership. Clearly it is not but it is certainly an important factor.

Let me turn now as to why national standards usually result in a high level of environmental protection. I am going to offer three reasons that I think generally explain it, and the first two are political reasons, and the third one comes from economic theory

The first is simple bargaining dynamics. If a company wants to set up in the U.S., it knows it must meet the same minimal environmental standards anywhere in the country. In Canada that company can bargain with each province to try to obtain the best deal. Not just in environment, but one of the bargaining chips is an environmental standard. A company can play one province against another. Some know this as the race to the bottom and there is debate as to the extent that is happening. The parallel effect is called regulatory chill, and that certainly is a phenomenon, and I have witnessed it myself, in regulatory negotiations with provincial and federal governments. As long as the environment can be used as bargaining chip between different provinces, I will predict we'll continue to have weaker environmental laws in Canada.

The second reason why federal standards are generally more effective is purely political; it is that provincial governments are usually more easily influenced by major industry than federal governments are. In Canadian terms, British Columbia's timber industry has more influence in Victoria than in Ottawa; Alberta's oil industry has more influence in Edmonton than it does in Ottawa, and it is lobbying for these major industries that generally play a large role in softening up environmental laws, and that law being simply far more effective with the provincial government than with the federal government.

To collaborate this, there is an interesting story from a fellow named Mr. Arnold. He is the head of something that is called the Center for the Defense of Free Enterprise, which is a prominent, right-wing group based in Seattle, that argues vocally against environmental regulations. When Mr. Arnold speaks to a group, one of the main points he makes is, that if you want to avoid strong environmental controls, then try to get regulatory control away

from the federal government; the state government is better; local government is best. He has figured out the same thing I am telling you.

The final reason comes from the world of economics, and not being an economist, of necessity I will keep this simple, but economists tend to view the world from a cost-benefit perspective. Translating that into politics, the government will set policy in a way that will maximize benefits in its jurisdiction and minimize costs in that area. It will seek to maximize utility. Economists would call this an accounting stance. For the provincial government, its accounting stance is the boundaries of its province. For the federal government, the accounting stance is all of Canada. In Canada, where most environmental authority rests with the provinces, the accounting stance they take in setting environmental policy is a provincial one. Costs and benefits are measured within a provincial box. What are the implications of a provincial accounting stance for the environment? For a development project, a province is usually able to capture most of the economic benefits of a project. They capture all of the primary benefits like taxes and royalties and a high percentage of the secondary benefits such as jobs, local spending, et cetera. However, many of the environmental costs of that development can be passed on to other provinces or other countries. These costs could include trans-boundary water or air pollution, emissions that contribute to global warming or ozone depletion, et cetera. I am not saying a province does not absorb any environmental cost, clearly it does. What I am saying is a significant percentage of the environmental costs are externalized, and when a province can capture most of the economic benefits of a project. Now, sometimes it is harder to see this when you look at your own country because the lens we look at it through blinds us.

Think of Brazil for example. The rain forests of Brazil hold almost half of the world species. They are incredibly important sink against global warming. They modify the earth's atmosphere and give us our oxygen. If it were up to us the forests of Brazil would not be cut because of their tremendous ecologic value. It is not up to us. From Brazil's accounting stance, it makes sense to cut the forest down in large areas because that maximizes utility within their accounting stance.

The same thing is true in Canada and the U.S. When environmental costs are measured at a local level they tend to be skewed somewhat in favor of economic development. When they are measured on a national level, you tend to have a more balanced assessment of environmental costs and benefits. That is a general trend.

Lest I be accused of being anti-provincial, let me also say provinces often do very good things in the environment, often we have federal governments who do not see environment as a high priority. The best solution for the en-

vironment is to have both levels of government trying to put in place effective controls.

Let me move on to the next question I think, which is begged by this analysis that is why Canada's federal government has chosen to play a limited role in environmental protection. Obviously, it is not because they do not care about environmental problems. Usually one hears it is due to constitutional limitations. In fact, that is a bit of a red herring. In reality is it usually political factors.

Let me tell you a brief story to illustrate the way constitutional and political factors affect federal environmental law making in Canada. It has to do with endangered species. Canada has no federal law protecting endangered species. We do have two hundred species listed as endangered, but they get no legal protection, at least in most parts of Canada. Ironically, Canada was the first western nation to sign the Biological Diversity Convention at the Real Earth Summit in 1992 and received international praise for doing that. I should add that specifically requires each country to pass legislation protecting threatened species. Canada's Federal Environment Minister came back, in his official statement on the issue, said that to comply with the convention, there was no need for us to pass an endangered species law, that was actually a provincial issue. When you read the words of the convention closely, they should be read as non-binding. Fortunately, Canada's Parliamentary Environment Committee did not agree with the Environment Minister and in 1993 they passed a unanimous, all-party, report saying Canada should immediately pass endangered-species legislation to comply with the requirements of this convention. In 1995 the Environment Minister indicated Canada would pass federal endangered-species legislation. I should note at the time only four of Canada's twelve provinces and territories had their own endangered-species legislation. I should also note that over seventy percent of Canada's endangered species are trans-boundary, they migrate or range into the U.S.

From the U.S. perspective, which has had a strong endangered-species law since 1973, their government is spending a lot of money trying to recover cross-border species like the grizzly bear or woodland caribou, and they were understandably concerned that when those species roamed into Canada, they got no legal protection, and in the case of the grizzly bear, it was actually legally hunted in some provinces, although it was on the species at risk. This is a prototypical cross-border environmental issue. Once the federal government announced its intention to pass a law, several provinces made it known that they did not support the federal law applying outside federal lands in Canada. That did not leave much, since only four percent of Canada is federal lands, excluding their arctic territories, and those are mainly parks. Nonetheless that was the provinces' view.

On the other side the U.S. government wanted strong protection for cross-border species. Canada did not have this protection. Initially, the Canadian federal government gave its usual response. It said, "Sorry, we do not have the constitutional authority to protect trans-boundary, endangered species." The Canadian Bar Association refuted this claim. The federal government then revised its opinion and said, "We actually do have the power to protect trans-boundary, endangered species" and a draft bill was amended to put in such protection. However, in a classic Canadian compromise, the protection was extended only against killing cross-border endangered species. It was okay to destroy the habitat areas where they live, even though that is ninety percent of the problem. Even this moderate change sparked provincial wrath. All twelve Provincial Environment Ministers wrote a joint letter to the Environment Minister saying things like this would disrupt the balance of power in Canada; it will completely undermine provincial wildlife programs and other things. Ironically, I should add, the provinces signing that letter did not actually offer to address the problem themselves, by passing their own legislation, they just said the federal government should not do it. As it turned out, though, this federal bill died in 1997. A new bill was introduced in January of 2001, almost nine years after Canada signed the Biodiversity Convention. This bill includes no protection for cross-border species; it was taken out and now is treated as a provincial responsibility. What is in the bill, though, is a weak clause, giving the federal government the residual power to step in and pass legislations if it determines that a province's laws do not effectively protect endangered species. This is a really common Canada response to cross-border environmental problems and the competing pressures.

The federal government includes a weak residual clause, giving it power to act when the provinces are not doing a good job. The problem is that those powers are never used. They have a similar power in the Environmental Assessment Act, in the Canada Water Act, what used to be called the Clean Air Act and even in the old Canada Wildlife Act. This is a good example how federal politics plays out over environmental issues, particularly ones with a cross-border dimension.

This is also a typical Canadian pattern in terms of environmental leadership. Put it this way: in this case four provinces have passed endangered species laws before the federal government did anything. Once the federal government made it clear that it was prepared to act on its own, in 1996, four more provinces passed their own endangered-species laws, largely in an attempt to occupy the field and preempt federal action. The other five are still waiting to see what the federal government is going to do and two of them have said they do not intend to pass endangered-species laws no matter what.

So, a fairly typical Canadian pattern and illustrates the benefits of environmental leadership at the federal level. I should add that we saw exactly the same pattern with the Canadian Environmental Assessment Act almost a decade ago, in terms of federal/ provincial dynamics. This story is a good illustration of the relative roles that the constitution and politics play in federal environmental initiatives in Canada.

As I said, the constitution is usually blamed as the main culprit for the federal government's inability to deal with environmental problems. In fact, I will boldly protect here today, that at least three times in this coming year Canada's Environment Minister will say, "I cannot deal with that problem because of the Canadian Constitution," because they do that pretty much every year.

I would predict at that time at least two of those three times Canada's Environment Minister will be wrong in saying that, as he was in saying they had no power to protect cross-border species, no power to protect drinking water, no power to deal with export of water in the past year. The truth of it is: Canada's Federal Government has ample constitutional power to address most significant environmental problems in Canada, particularly cross-border ones.

There are two powers of real significance for the purpose of this talk and to the federal side: One is the power to deal with international, inter-provincial environmental problems. The other is called the criminal law power. There have been two big cases decided by Canada's Supreme Court that elaborates on these.

The first case was *Crown Zellerbach*. This case established the fact that the federal government has the power to legislate over cross-border environmental issues, as long as it defines them in a specific way and does not use them as a constitutional Trojan horse.¹

The second big case was called *Hydro Quebec*.² The issue was the constitutionality of the federal statute regulating toxic substances like polychlorinated biphenyls (PCBs) and dichloro- diphenyl- trichloro- ethane (DDT). The court said that was within federal constitutional powers. Although I should confess, at the end of the argument, I wasn't sure they were going to go that way, but at the end of the day the majority did. The court held for the first time the federal power includes the power to address significant environmental problems.

We know that significant environmental problems include toxic substances, but it probably also include endangered species, ozone depleting

¹ *R.V. Crown Zellerbach Canada Ltd.* 25 B.C.L.R. (2d) 145 (1988).

² *Canada (Procureure Generale) v. Hydro- Quebec* 118 C.C.C. (3d) 97 (1997).

substances, climate-change emissions and things like that. There are some interesting political backdrops.

I will give you one example quickly. At the time this case was being decided, the federal government was in the process of negotiating an agreement that devolve years of his ever its environmental responsibility to the provinces. They actually believed they would lose this case, because it would support the argument for this devolution agreement. I happened to be in the room, with the Deputy Minister of Environment when the decision came down on this case and his face turned white as a ghost when he got the result. They actually prepared a press release in anticipation of losing, saying how this case illustrates the importance of working cooperatively with provinces and not going it alone as a federal government on national standards. Well, they put out the same press release after they won; again, saying this is the importance of working cooperatively. It is a crazy country.

Virtually every major federal environmental statute in Canada has been constitutionally challenged and every single one was upheld by the Supreme Court, with one exception, that is an obscure section in the Fisheries Act that the court ruled, about twenty years ago, needed to be tightened up to make it clear was federal jurisdiction.

My point is: The constitution is usually blamed for the federal government's limited environmental role. In fact, it gives the federal government much broader power than they have chosen to use, power almost as broad as in the U.S.

The reason why Canada's federal government has chosen not to take a strong role in the field of environmental protection is politics, particularly federal/ provincial politics.

Let me briefly throw out an idea I think may be worth thinking about. I do not think it is inevitable that the federal government would have had to choose to play a limited role in the environmental field in Canada. There are many areas where our government has stepped in and taken a strong national role that would have otherwise been provincial. Healthcare, for example, and social programs, our federal government has taken a stronger role than the U.S. federal government has. Other areas like broadcasting, food and drugs, we have also take a strong national role. It is not entirely clear to me why they did not do the same for the environment. It is an issue that does cry out for national standards. Probably the answer has a lot to do with Quebec and the separatist pressures in Quebec, and with timing.

The U.S. does not have the province that routinely elects separatist governments and has referendum whether to leave the country that has a real affect on federal provincial regulations.

From a timing perspective, the first real separatist crises in Quebec occurred in 1970s, or at least in recent memory, in 1976 a separatist government was elected, and that is the same period where the first big green environmental wave was occurring in the U.S. and all the big national standards were being passed in that same period. The next major Quebec crisis came between 1987 and 1992, when, after Quebec refused to sign the new constitution in 1982, there was an effort to renegotiate it to bring Quebec back on board.

That same period, from 1987 to 1992, when there were two failed attempts to renegotiate the constitution, was the same period of the next wave in public concern for the environment in Canada and the federal government was reluctant to step in at that time and rock the boat.

What is interesting, though, is this federal devolution agenda, or the weak federal rule is not driven by public concern. Canadians overwhelmingly believe the federal government should be primarily responsible for protecting the environment.

Returning to the question of why Canada's federal government not chosen to play a role in the environment. To some extent it is a question of timing. It also reflects probably the fact that Canada has not had a prime minister who chose to make the environment a high priority. In an executive-driven style of government, that is a very important factor. I do not think that it is inevitable that will always be the case. It could change the way it did in the U.S. in the 1970s.

Let me just sum up here. Nature does not recognize the artificial political border between our two countries.

Our environmental interconnection is impressive. Fifty percent of Ontario's air pollution comes from the U.S., about eighty percent of the pollution of the Great Lakes comes from the U.S., and over seventy percent of our endangered species are trans-bounded. As I have said, there is a compelling argument that a stronger federal rule in setting national standards would improve environmental standards as it did in the U.S.

In the case of cross-border environmental issues, there are three main factors at work determining the federal government's role: the first is the political pressure from the provinces for a weaker federal rule. The second is the basic ecological reality that air, water and wildlife don't stop at the border. These cry out for national and bi-national solutions. The third is the political pressure from the U.S. and other countries, which usually tends to favor a stronger federal rule in addressing international problems. I should add, it works the other way, too; Canada is pushing the U.S. to take a stronger role and we have to get our own house in order, as in the case of acid rain.

The end result of these three competing pressures is these discretionary clauses in legislation, giving the federal government residual power to act, and these powers have almost never been used, which suggests, out of the three competing pressures, provincial pressure for a weaker federal rule tends to win out, which is not surprising in a democracy because foreigners do not vote, and I would add that wildlife does not vote either. These discretionary residual federal powers do provide some negotiating leverage for the federal government to press for tougher provincial standards. This pressure only works in times when we have an activist Federal Environmental Minister who is willing to threaten to go it alone if the provinces do not act. We are seeing that on trans-boundary smog issues. The Federal Minister is leveraging Ontario to go further than it wants to in dealing with trans-boundary smog emissions.

As a final thought, let me come down to what is probably the end of this analysis, which begs this question: Is the federal government's limited roll a good thing? Putting aside my own biases, which I suspect are fairly evident, I would say it depends on your lens, whether your lens is an ecological one or a political one.

From the perspective of a Provincial Premiere, it is a good thing. It may even be a good thing from the perspective of Canada's national democratic stability. Although, I could make a strong argument that in the long run, it is actually a bad thing for stability, but I will not get into that issue here since it is not for me to question the judgment of our political leaders. Let us assume the premieres are right on that perspective.

From the perspective of the environment, it is a bad thing. From the perspective of an asthmatic child who cannot go outside many summer days because the smog level is so high, or an endangered animal that migrates back and forth between the two countries, there is a very strong argument for a stronger federal rule in setting national standards, and I would add for stronger bi-national environmental standards which reflect ecological reality. It depends on what lens through which you are looking.
Thank you.