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Beyond Legalism? Policy Ideas, Implementation Styles and Emulation-Based Convergence in Canadian and U.S. Environmental Policy

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ABSTRACT

Past studies of the dynamics of U.S.–Canada environmental policy and policy-making have found little evidence of 'weak' convergence in this sector; that is, of Canadian policy moving towards the U.S. model of adversarial legalism, an implementation style based upon procedural policy instruments such as action-forcing statutes, citizen suits, and judicial activism. However, recent efforts at de-regulation and the reformation of government in the U.S., and moves towards multi-stakeholder policy-making in Canada, have altered the standard against which trends towards Canadian–American convergence must be assessed. These reforms have moved the U.S. environmental regulatory system closer to that existing in Canada, in which regulations and other elements of the environmental regime are developed through negotiation rather than litigation. Since Canadian environmental implementation has also been altered over the same period, however, it is argued that a form of 'strong' convergence is emerging, in which both countries are moving not towards each other but towards a third, common, style, that associated with the development of self-regulation and voluntary initiatives under the influence of New Public Management ideas and principles.

1. *Canadian and U.S. Environmental Policy Dynamics*[1]

Comparisons of Canadian and the U.S. policy-making provide good material for the study of policy convergence, as the two countries share similar languages, closely integrated economic and socio-cultural systems, broadly similar democratic political institutions, and other forms of policy-relevant interactions such as unrestricted travel and access of each others citizens to educational, media, and other policy forums. *Prima facie*, these linkages make a strong case for the expectation that some form of convergence will be present in most policy sectors.

The environmental sector, in particular, has generated many claims

and expectations of convergent policy dynamics, based on the enormous contiguous geographical and bio-physical ecology shared by the two nations, characterized by, among other things, high north–south flows of air, water, birds, wildlife, bio-regions, and trade (Johnson and Beaulieu, 1996; Hessing and Howlett 1997; Reif, 1993). Coupled with the existence of a century-old history of formalized cross-national environmental interactions dealing with areas such as the Great Lakes and international rivers, acid rain and air pollution, and the control and management of migratory birds, this situation has led many observers to expect to find some pattern of convergence when they have examined the evolution of environmental policy-making in the two countries (Hoberg 1993; VanNijnatten 1999).

Nevertheless, when the question of U.S.–Canadian environmental policy convergence has been specifically addressed over the past decade, little empirical evidence for a systematic pattern of convergence has been found (Howlett, 1994). As shall be argued below, this is partially a correct finding, but is also partially incorrect, with a large part of the difficulty encountered in understanding the policy dynamics present in this case being due to the fact that the questions of exactly what is converging, by what processes, and why, are by no means obvious. Almost all of the studies undertaken to date, for example, have focused their analysis on the expectation that a "weak" form of convergence, in which Canada moves towards the U.S. model, would be found (Hoberg 1991 and 1997). However, when a different form of convergence is sought out, – a "strong" form in which two polities move towards a third, common, model – there appears to be more evidence that the two countries' environmental policies are indeed growing closer together (Unger and van Waarden 1995).[2] That is, there is some evidence that the U.S. is moving away from its older "legalistic" policy style and towards a new regulatory style which is similar to that towards which Canada has also been moving by opening up its older, closed system of industry-government negotiations to a wider variety of interests and stakeholders (Kagan 1991; Kagan and Axelrad 1997; McAllister and Alexander 1997; Stefanick 1998; Urquhart 1998).

As shall be argued below, the most plausible explanation for this movement rests in the intersection between both governments' desire to develop precautionary or preventative environmental policies and new ideas circulating in the international sphere about how best to design and implement such policies. That is, recent environmental policy-making in both countries has been heavily influenced by the precepts of "new public management" thinking, transmitted to both countries through trans-national elite networking in other sectors, which

has "spilled over" and manifested itself in the development of similar new implementation styles of "collaborative government" in both jurisdictions (Dolowitz and Marsh 1998; Hood 1991, 1995, 1998).

2 *The General Theory of Policy Convergence*

Any study of comparative public policy, including comparative implementation studies, most sooner or later deal with the question of convergence. That is, while the motivations for comparative studies are many and varied, at some point in attempting to develop a systematic understanding of policy development an assessment must be made of the paths or trajectories of policy-making and implementation in the countries being compared (Castles 1998; Heidenheimer et al. 1975). Are instrument choices purely idiosyncratic results of domestic political, economic, social or cultural configurations? Are different countries moving along their own paths with no relationship to each other? Are they involved in a lengthy, independent but parallel path of development? Or are they growing closer together – "converging" – or moving further apart – "diverging" (Seeliger 1996)? In this sense, "convergence" is one of, if not the, central question addressed by comparative policy studies and is of significant importance to implementation studies (Goggin 1990).

Several recent studies have laid out the general terrain upon which contemporary studies of convergence take place. As Unger and Van Waarden (1995) have noted, three key questions must be answered in analyzing convergence. These are (1) what converges; (2) how does convergence take place; and (3) why does it occur.

In general terms, tentative answers to these three questions are available in the literature. That is, as Bennett (1991)has argued, what converges can be any one or combination of policy content, policy outcomes, policy goals, or policy instruments. Although usually analyzed separately, it is also possible to group several of these characteristics of policy-making into a larger unit: *an implementation style* which combines policy goals, policy content and policy tools, and characteristic procedural policy norms into a more or less coherent whole (Knill 1998). Examining the evolution of implementation styles in particular sectors hence provides a good source of evidence on policy dynamics and a reasonable standard by which to evaluate movements towards policy convergence and divergence.

The general nature of the processes through which convergence occurs are also well known. Although the original proponents of the convergence thesis ultimately attributed the growing together of policies to the function prerequisites of modernization, or to the inevitable

consequences of technical advance (Kerr 1983; Hoberg 1986), most recent work has noted the continuous idiosyncracies existing in different countries and, within countries, in different policy sectors (Freeman 1985; Peters 1997). As a result, the teleological aspects of convergence theory have, for the most part, been expunged in favor of a more contingent theory focusing on the conjuncture of national, trans-national and international effects and actors which have led to specific instances of convergence (Rose 1991 and 1993; Wolman 1992). As Bennett noted, empirical studies have revealed that convergence can occur through a number of quite different processes, including "emulation", "harmonization", or "domination" (Bennett 1991). Domination involves one country being forced to adopt the policies of another, usually through the exercise of coercive force or through adherence to some form of treaty or similar arrangement. Harmonization involves the conscious modification of internal policies by governments committed to cross-national standards which they may have had a hand in drafting. Emulation is a more complex learning process involving the recognition of foreign exemplars and their incorporation into new or existing policies.

Less certainty exists on the third, "why" question, however, especially when examining the reasons and factors driving emulative convergence processes. Understanding the motivation for domination-based convergence processes is not problematic since this involves convergence occurring from the conscious efforts of at least one state to impose its policies on another. The causal structure of harmonization-based convergence processes is also relatively unproblematic, since it requires the existence of some standard to which various countries have agreed to move. This is usually readily apparent in the form of a treaty or convention to which different countries are more or less voluntarily subscribed. Emulation, however, is both more difficult to trace, since there, generally, is neither a record of conquest nor a formal treaty which signals the existence of a convergence process; and its origins are more difficult to understand since there is not necessarily any conscious recognition by governments or other policy actors that their actions may result in convergence. Accordingly, the factors which drive this convergence process are difficult to assess and its theorization more complicated as a result (Bennett 1997).

At present, it is often argued that, broadly speaking, emulation is a function of sectoral-level trans-national elite networking, the mechanism by which new policy ideas spread from country to country (Blyth 1997; Evans and Davies, 1999). That is, emulation arises from the fact that policy-making in all countries is formed by policy subsystems dominated by small groups of individuals bound together by their expertise and knowledge in the subject matter concerned (Howlett and

Ramesh 1995; Sabatier 1987; Haas 1992); and that members of these subsystems are engaged in a constant learning process which invariably involves drawing upon the ideas, lessons and experiences not only of their own jurisdiction, but also of those of other countries (Dolowitz and Marsh 1996; Bennett and Howlett 1992). However, exactly what kind of lessons will be drawn from this process, whether or not emulation will lead to convergence and, if so, what kind of convergence will result, are open questions. That is, as Unger and Van Waarden have suggested, at least two major types of emulation are possible, "weak" convergence processes which arise when one of two parties moves towards the other, and "strong" processes which occur when two countries move towards a third model (Unger and van Waarden 1995). Convergence processes associated with domination are always "weak", and those associated with harmonization usually "strong", but emulative processes can be of either type.

This article examines the historical evolution of environmental policy implementation styles in Canada and the U.S. in order to determine the nature of the policy dynamics found in this sector and, more specifically, the role played by new policy ideas and their emulation in policy convergence. As was set out in the introductory section above, this study of similar systems is useful for furthering the analysis of emulation-based convergence processes as it provides not only a case in which the pre-conditions required for emulation-based convergence are present, but in which the case is uncluttered by other types of convergence processes.

3. Three Regimes of Canadian and U.S. Environmental Policy

Generally speaking, environmental policy-making in both Canada and the U.S. has proceeded through three successive regimes of regulation, each with its own distinct implementation style (Eisner 1993 and 1994; Harris and Milkis 1989). Although these styles have shared some similarities, they also have exhibited distinct differences. Moreover, in terms of an analysis of convergence, it is only in the last two epochs that any possible trends in this direction can be noted.

3.1 Private Law Environmental Protection Prior to 1960

There is little doubt that until relatively recently Canada and the U.S. had very different patterns of environmental policy-making despite having somewhat similar policy instrument preferences and orientations. In the pre-regulatory era prior to 1960, when environmental con-

trol in both countries was exercized through private actions in the legal system, the two systems differed in many important respects.

In both countries a variety of common law actions were available to private individuals to deal with purely private concerns, many of which can have an environmental impact. These included actions to correct a number of misdoings or torts respecting private property rights, such as nuisance, trespass, riparian rights or negligence (Jeffreys 1984; Elder 1973). In both countries, the courts historically reserved the right to initiate litigation ("standing") in such matters solely to the individual(s) aggrieved by one or more of these activities.

Despite their longevity, in neither country was this type of action an adequate tool for dealing with the expansion of environmental issues which occurred as pressures on the environment grew during the last half of the 20th century. In Canada this was because "modern" environmental grievances tended to affect more than one individual and courts were very reticent to recognize a private individual's right to press public or common actions (McLaren 1972; Elder 1975). In the U.S., courts did recognize private individuals' rights to express public views, but common law torts such as nuisance were stripped of their deterrent ability by a spate of pro-development decisions handed down in the 19th century which limited damages received by plaintiffs in these actions (Horwitz 1977; Hurst 1956; Brenner 1974; Nedelsky 1981). Hence, although for different reasons, private nuisance actions were not significant deterrents of substantial environmental damage in either country. In the U.S. plaintiffs had greater access to such actions, but the remedies they received from the courts, should they be successful, were limited. In Canada, the opposite condition prevailed with reasonable remedies but restricted standing prevented most cases from even entering the court system.

Not all legal avenues were purely private during this era, of course. Towards the end of the period in the U.S. the courts allowed notions of a "public trust", that is, of common resources such as air or the seashore controlled by neither public nor private authorities, which citizens may protect through recourse to the courts (Sax 1969–1970 and 1971). Although such resources, of course, existed in Canada, Canadian courts refused to accord them special status, insisting that rights to their use existed in the common law and could either be replaced by statute or litigated according to traditional common law private actions (Hunt 1981). With respect to "class action" suits, there were also, and continue to be, significant differences between the two countries. Under English common law, class actions were simply multiple private actions, for example, involving nuisance or trespass alleged by multiple property holders along a railway line, which could be heard more efficiently all

at once. Thus for a class action to proceed, there had to be a readily identifiable class of individuals with virtually identical grievances; those concerns had to meet the standards of private tort actions; and class actions could not substitute for public actions, which, once again, courts generally ruled could only be pressed by public authorities. Canada retained virtually all of the elements of this English system (Chester 1981). In the U.S., however, the differences between the English and American legal systems in terms of standing in private actions spilled over into class actions, which, as a result approached the status of public actions. These tendencies were formalized in court decisions in the 1930's which ruled that individual grievances had only to be broadly similar, rather than virtually identical if a class action was to proceed (Miller 1978). Once again, however, despite liberalized standing in such matters, the restricted notion of damages found in U.S. private actions restricted their use in environmental matters.

Thus there were significant differences in the implementation styles found in both countries in this first era of environmental regulation.[3] Hence, in this earliest environmental regulatory regime, there is no evidence of convergence in any of Bennett's five areas. That is, policy goals and instruments were similar – to correct *ex post* environmental damage and prevent its re-occurrence through legal means – while policy content, and style were quite different; due to significant differences in the underlying institutions, structures and judicial practices of each country. If any convergence was occurring, it was only with respect to policy outcomes, as this first regime failed in both countries to provide adequate relief to correct growing public environmental damages.

3.2 Public Law Regulatory Regimes 1960–1990

The legal and market failures associated with the earliest U.S. and Canadian regimes of environmental regulation became more and more apparent as industrialization proceeded apace in both countries in the post Second World War era. As occurred in many other areas of social and economic life, this resulted in the supplementation of legal devices by public regulatory regimes for environmental protection (Amenta and Skocpol 1989; Eisner 1994; Orren and Skowronek 1998–1999; Hodgetts 1973).

Although the environment was a late subject of regulation in both countries, by the end of the 1960s both the U.S. and Canada had some form of statutory provision in place which provided the framework for a new regulatory regime. In the U.S. the National Environmental Policy Act (NEPA) and other relevant environmental regulation such as the Clean Air Act, all featured "action-forcing" language in which adminis-

trative standards were set out and administrators compelled to act to implement the law. Following the U.S. tradition of citizen-activism in the courts, the acts also provided for "private attorney generals" whereby individual citizens were empowered to go to the courts to enforce actions should administrators prove recalcitrant (Melnick 1983; Vogel 1986; White 1976; Jaffe 1968).

This legalistic style of environmental protection was quite different from the Canadian style which had evolved over the same period in the form of voluntary Environmental Assessment Review Process (EARP) "guidelines", administrative standards subject to negotiation of compliance agreements with polluters coupled with a general lack of citizen recourse to overturn administrative decisions (Estrin 1975; Swaigen 1980; Emond 1985; Schrecker 1984; Thompson 1980). Both countries continued to have similar policy goals, contents, and outcomes – to eliminate life-threatening environmental hazards, manage resources for long-term economic sustainability, and mitigate environmental damage from industrial and other activities – and utilized similar policy instruments, primarily regulatory in nature, to do so. However, their overall implementation styles were quite different. In the U.S., adversarial legalism was in full bloom during this period. However, in Canada, legal remedies were eschewed and regulation instead relied upon the negotiation of bilateral government-industry accords and agreements.

The reasons for these differences lay in the structure and operation of macro-political institutions in the two countries. One significant area of difference again related to the legal doctrine of "standing". The U.S. private attorney-general doctrine provided citizens with the ability to pursue actions in the public good if so authorized by Congressional statute (Jaffe 1968; Albert 1974) and this practice lay at the heart of the NEPA (Anderson, 1973). This was never the case in Canada. In civil cases involving public interests, until quite recently, the general rule established over 75 years ago by the Supreme Court of Canada in *Smith v. Attorney General of Ontario*[4] was that only the public attorney general could pursue cases pertaining to public grievances unless the individual "was exceptionally prejudiced by the wrongful act". Thus, for the most part, public actions remained the monopoly of the provincial or federal attorney-generals who could undertake an action personally, or through the appointment of a private "relator" (Estey 1972; Roman 1981). Most environmental regulation falls into the category of non criminal public actions related to statutory regulations and their violation and thus had to be supported by elected public officials if prosecutions were to occur.

In a series of cases decided in the 1970s and 1980s the Supreme

Court of Canada did move to allow individual citizens greater access to the courts, but only in very specific types of public actions. This affected environmental matters but by no means opened the floodgates to citizens suits as did the passage of the NEPA in the U.S. In 1974 in *Thorson vs. A.G. Canada*[5] the court liberalized standing in constitutional cases, a ruling which presaged the constitutionally entrenched right to litigate under the terms of the 1982 Canadian Charter of Rights and Freedoms. Sections 24(1) and 52(1) of the Charter allow citizens access to the courts to deal with infringements of their constitutionally-protected rights. The impact on environmental litigation of these changes in rules of standing governing constitutional cases, however, was negligible because there is no direct link between the Charter and environmental litigation. Although one Charter right (Section 7) could be broadly interpreted as a right to a clean environment, it has not been so construed by the courts which have restricted its application to questions of the due process of law (Gertler et al., 1990). More generally, Canadian courts ruled that the Charter applies only to relations between citizens and governments; thereby excluding matters dealing, for example, with relations between employees and employers or between citizens and polluting companies.

While the constitutional aspects of *Thorson* had little impact on environmental litigation, the case was also used by the Supreme Court to provide greater judicial discretion in the definition of exceptional personal agreement set out in *Smith*. In 1986 in *Finlay v. Minister of Finance of Canada*, the court clarified its groundrules for such private litigation in the public interest.[6] It argued that in exceptional circumstances, standing would be granted to private individuals to press public cases if: (1) the issue was "justiciable", that is, could at least in theory be decided by a court; (2) the issue at the heart of the dispute was serious and not trivial or speculative; (3) that individual had a genuine interest in the issue based on personal interest or a strong interest based on involvement in a public policy process; and (4) there was no other reasonable means by which the action could be brought before the courts (Bogart 1988). Environmental cases were among those which received the benefit of subsequent judicial discretion in the area of standing. Cases such as *Canadian Widlife Federation Inc. vs. Canada (Minister of the Environment)*[7] and *Friends of the Oldman River Society vs. Canada (Minister of Transport)*[8] broke new ground in Canadian environmental law and did so on the basis of cases brought before the courts under post-*Finlay* rules of standing. However, despite the significance of these cases the fact is that standing in Canada has changed very little in most areas of law and in the area of public law remains subject to a very circumscribed judicial discretion.

This is due in no small part to the very different configuration of governments institutions found in the two countries (Weaver and Rockman 1993a and 1993b). In the U.S., Congress cannot guarantee that a member of the political executive such as the attorney-general will actually carry out its will. Not trusting the executive, Congress has liberalized rules of standing, allowing for "private attorney-generals" to press public actions. In Canada with the fusion of legislative and executive authority found in British Parliamentary institutions, there is little reason for governments to object to the privileged position of the Attorney-General.

A second important difference between the two countries' public law regimes was related to judicial activism. In the U.S., the judiciary played a very strong role in limiting or restricting the scope of administrative discretion in the interpretation of statutory obligations. Although the exercise of judicial power to check the exercise of administrative discretion varied with successive rounds of judicial appointments,[9] it was a consistent element of the U.S. public law environmental regulatory regime. This is quite different from the situation in Canada, where the judiciary plays a much smaller role in the regulatory, or policy implementation, process.

Both countries share a common judicial heritage and the powers exercised by U.S. courts in the policy-making process are largely those which they inherited from earlier pre-revolutionary British practices. As a result of this common heritage, both U.S. and Canadian courts have roughly the same set of judicial remedies at their disposal (Kernaghan 1985; Davis 1969).[10] However, the two countries differ substantially in the grounds upon which their courts determine whether or not to overturn an administrative decision, greatly affecting the role played by the courts in environmental policy implementation.

In the U.S. case, judicial review encompasses review on both points of law and points of fact. This is due to the willingness of U.S. courts to set aside administrative decisions not only on questions of jurisdiction and natural justice, but also if a decision is found to lack "substantial evidence" in its support (Jaffe 1965 and 1969; White 1976; Dickinson 1927). In Canada, the courts follow British practice in that the central question to be decided in administrative law cases is whether or not an inferior court, tribunal, or agency has acted within its powers or jurisdiction. If it has, and if it has also abided with key principles of natural justice and has not acted in a capricious or arbitrary fashion, then its decision will stand subject to any existing statutory appeal provisions. In other words, in Canada judicial review focuses primarily on issues or errors in law (Wade 1966).

Although changes at the federal and provincial levels in Canada in

the late 1960's and 1970's appeared to presage a greater scope for judicial review, the courts themselves proved very reticent to alter their behavior (Abel 1962; Lawford 1962; Angus 1974). In the environmental area, a patchy, *ad hoc*, approach to administrative law and judicial review has been manifest (Hogg, 1973). In the course of deciding the *Canadian Wildlife Federation Inc.* case concerning the Rafferty-Alameda dam, for example, the Federal Court held that voluntary federal environmental assessment guidelines passed by Order-in-Council in 1974 were in effect statutes and hence were legally binding on government departments. In subsequent cases Canadian courts reviewed administrative and ministerial conduct in light of the now mandatory environmental assessment process. However, while enthusiasts argued this amounted to a revolution in judicial conduct, a careful analysis of the subsequent decisions reveals that only traditional criteria of judicial review were exercised. In fact the courts continued to consistently defer to legislators in matters related to the environment (Lucas 1993; de Pencier 1992).

Hence in the era of public law regulation, the two systems developed in the U.S. and Canada to deal with the expansion of environmental concerns in the post-war period were broadly similar but differed in many important respects, especially procedural ones pertaining to the ambit of the law, standing and judicial review. These differences had their origins in sets of legal and judicial norms and principles established in much earlier eras which were institutionalised in the fundamental political structures established in each country. The implementation style which developed in each country in the environmental sphere in this period was, as a result, quite different and little evidence of convergence exists over this time period outside of the general movement to expand the scope of environmental regulation and to utilize public regulatory means to do so.

3.3 New Collaborative Partnership Regimes Post-1990

As Hawkins has suggested, in the public law period Canada developed all the elements of a "compliance" system of environmental implementation in which recourse to penalties and coercion existed only as a very infrequently used last resort of administrators. On the other hand, the adversarial legalism practiced under the U.S. system more closely resembled a "penal" system in which coercion existed as the preferred tool of enforcement (Hawkins 1984; Hawkins and Thomas 1989).

In the most recent period, these established implementation styles have begun to change in both the U.S. and Canada and there is now

some evidence that the environmental policies and practices of each country are in fact growing more similar. That is, that for the first time convergence may be occurring in U.S. and Canadian environmental implementation styles.

Just as the scale of environmental problems outgrew the potential for private remedies in the transition to public law regimes in the 1950s and 1960s, by the mid-1980s the scope of these policies outgrew the abilities of existing public law regimes in both countries to curb environmental damages. Be they compliance or enforcement based, the public law regimes in both countries were, like the earlier private law regimes, primarily *ex-poste* systems of regulations. That is, public law regimes required the existence of an established problem, such as a new mining project in an environmentally sensitive area or the discovery of a toxic substance in a food source, in order to be effective. By the mid-1980s, however, the notion of preventing environmental problems at source, through the very design of technology for industrial processes, and the idea of planning for long-term sustainability over a larger scale than previously considered, required the creation of new *ex-ante* regulatory arrangements (Dente 1995; Haeuber 1996; Janicke and Jorgens 1997; Janicke and Weidner 1997).

The elements of the new regime first emerged in the practices of many countries which created forms of long-term environmental plans and environmental "treaties" settling jurisdictional problems encountered between governments and levels of governments. Soon afterwards many countries began to encourage "voluntary" initiatives by industry and industrial associations to incorporate "green" technologies directly into product and production process design. At the same time many governments began to adopt arrangements opening up environmental policy processes to the larger public through various forms of consultation as a means of monitoring and legitimizing precautionary planning (Glasbergen 1998; Knoepfel 1995).

These initiatives are important to an understanding of the dynamics of emulation-based convergence in this sector since they represent the intersection of general "new public management" thinking about public administration practices with specific initiatives launched in the environmental sector. That is, they represent the application to the environmental policy sector of a general new public management emphasis on the design of institutions to promote "collaborative governance" arrangements between regulator and regulatee (Aucoin 1995; Freeman 1997).

In Canada the transition from "old" public management to "new" has been quite pronounced and innovations have resulted in many sectors, including the environment (Armstrong and Lenihan 1999; Leni-

han and Alcock 2000; Kernaghan 1993). During the public law era, environmental policy had typically been made through closed bargaining between government and business interests over the enactment of environmental standards, their implementation, and the level of compliance expected of corporate actors (Schrecker 1984/85, 1985, 1984; Webb 1990a; Rankin and Finkle 1983). Under the public law regime the preferred instruments for environmental policy implementation were bureaucratic rather than voluntary or market-based. But by the mid-1980s the context, style and substance of the marketplace had begun to infiltrate much of the Canadian environmental regulatory process. Compliance, for example, began to be approached in terms of market-based factors: profit margins and the economic viability of industry, employment patterns, and international competitiveness becoming critical concerns affecting decisions such as the setting of annual allowable cut rates in the forest sector. Government subsidies to business also began to often underwrite compliance efforts, such as subsidies for technological improvements which enabled the pulp and paper and smelting industries to meet regulatory standards (Doern and Conway 1994; Harrison 1996 and 1995). For government, an enhanced role for industry in the regulatory process was seen as cost-effective, in that governments were not required to supply separate, and potentially redundant information for activities such as environmental assessments or pesticide registration. Industry, in the course of pursuing its own productive interests, began to supply much of the base-line data, up-to-date technical information concerning abatement technology, and cost-benefit analyses concerning production, pollution, and abatement costs, from which regulatory standards were developed and applied.

In the 1990s there was a major surge in interest in extending collaborative government-industry relationships. Discussion first centred on the potential use of market-based instruments, such as the issuing of pollution credits, although only a very restricted scheme associated with the Kyoto protocol on greenhouse gases was ever actually put into place (Doern 1990a and 1990b). Rather, the emphasis soon shifted towards a variety of procedural reforms aimed at the elimination of jurisdictional conflicts and an increased emphasis on "partnerships" and industry self-regulation or "voluntary initiatives". This was apparent in the decentralization to the provinces of many elements of environmental assessments and pollution control in the 1989 and 1992 Canadian Environmental Assessment Act (CEAA) and Canadian Environmental Protection Act (CEPA) and especially in the negotiation of the Canada-Wide Accord on Environmental Harmonization in 1997–98 (Schrecker 1991; Lucas 1990; Kennett 1995). "Voluntary" initiatives included the

Canadian Industry Packaging Stewardship Initiative (CIPSI) and the Voluntary Challenge and Registry Programme (VCR), also created as part of Canada's response to the Kyoto Climate Change Convention (Gibson 1999; Harrison 1999).

Another key move in the evolution of a new Canadian environmental implementation style was towards multi-stakeholder participation in formerly closed regulatory processes. This occurred in a number of areas, ranging from provincial planning for sustainable development through such bodies as Round Tables on Environment and Economy, or the British Columbia Commission on Resources and the Environment (CORE); to broadly consultative sectoral and national environmental planning processes such as the Accelerated Reduction/Elimination of Toxics (ARET) process and the federal Green Plan; to increased participation in local decisions affecting such areas as waste siting and disposal (Howlett 1990; VanNijnatten 1999; Hoberg and Harrison 1994; Baetz and Tanguay 1998).

Very similar sets of post-1990 initiatives can be seen in the U.S. In recent years, as in Canada, environmental regulation in the U.S. has also been de-centralized, voluntarized, and to a lesser extent, marketized (Andrews 1998; Vogel 1996). Although the U.S. remains an anomaly among developed nations in its failure to develop a dedicated national environmental strategy, it has adopted most of the elements of such strategies, albeit in piecemeal fashion (Janicke and Weidner 1997). Like Canada, since 1990 the U.S. has also experimented with market-based economic incentives, such as the 1990 Clean Air Act provisions for marketable permits in sulfur dioxide emissions (Landy and Cass 1997). However the majority of such programs concern items such as bottle, tire, and waste recycling carried out at the state and local level. California also has the most experience with emissions trading through its Regional Clean Air Incentives Market (RECLAIM) program (Rabe 1997). Also like Canada, the U.S. has begun to develop a significant number of "voluntary" initiatives in which standards and various certification processes are developed and implemented by industry associations. These have included programs like the Environmental Technology Initiatives (ETI), the Design for Environment Initiatives, the EPA'S 33/50 programs and general moves towards certification for adoption of various international standards developed by industrial associations under the ISO rubric (Press and Mazmanian 1997).

These initiatives all occurred as the nature of the previous litigious U.S. enforcement regime created under the NPA came under attack throughout the 1980s, culminating in the passage of the Negotiated Rulemaking Act of 1990 in which Congress moved to promote enhanced agency-regulatee interaction as an alternative to litigation

(Williams 2000; Coglianese 1997; McMahon 1985; Harter 1982; Nakamura et al. 1991; Langbein and Kerwin 2000). Although in the first term of President Clinton litigation stemming from executive and court decisions under the Reagan and Bush presidencies led to a record high 2,110 EPA enforcement actions, after the mid-term 1994 congressional elections reduced Democratic control in Congress, the Reagan-Bush emphasis on negotiation and bargaining re-emerged in U.S. environmental policy (Mintz 1995; Rosenbaum 1997; McSpadden 1997; Kraft and Vig 1997; Wenner 1982).

4. Beyond Legalism? Patterns of Convergence and Divergence in U.S.–Canadian Policy

As this brief comparative survey has shown, the record of U.S.–Canada environmental policy dynamics has revealed a mixed record of interactions and results. In the earliest, private law, period prior to 1960 the policies adopted in the two countries were similar, but different. While policy goals and instruments were similar – to correct both *ex post* and *ex ante* environmental damage through legal means – policy content, and style were quite different. Due to significant differences in the underlying institutions, structures and judicial practices of each country, in Canada legal remedies for damages to private property were substantial but their application very narrow, while in the U.S. the opposite situation prevailed – with actions possible over a much broader range of issues but with only minor remedies available.

By 1960, however, the growing scale of environmental problems and their ability to transcend private law boundaries led both countries to develop public law regulatory regimes. However, once again, a superficial similarity in legal substance masked substantial differences in implementation processes and style. In this era both countries moved to create new laws and agencies charged with environmental planning and enforcement. In both countries, however, ultimate responsibility for enforcement was left to the courts. Again, due to significant differences in their underlying institutional structures, the ability to obtain a hearing, the grounds upon which judgements would be determined, and the likely remedy emerging from a hearing were very different. This meant that the public law regimes in the two countries remained only broadly similar but with very distinct differences, and no discernible pattern of either overall convergence or divergence.

Only beginning in the 1980s, and especially in the 1990s, are any movements towards convergence visible. This occurred as environmental problems in both countries continued to expand in scale and scope and both countries began to move away from traditional *ex-post*

command-and-control environmental instruments based on legal systems, practices and remedies, and towards a new implementation style characterized by the use of *ex-ante* voluntary and collaborative instruments. Moves towards the addition of multi-stakeholder processes brought the Canadian system closer to the level of public involvement found in the U.S. system, while moves towards regulatory negotiation found in the U.S. system moved that system away from pure adversarial legalism and closer to the traditional bargaining posture found in the Canadian system.

The general pattern of policy dynamics in this sector is set out in Figure 1 below.

When the question of possible convergence in Canadian and U.S. environmental policy was first seriously addressed, it was examined within the context of the second public law regime as a weak emulation-based convergence process, with the assumption that increased interaction between U.S. and Canadian regulators, NGOs, industries and other players was pushing Canadian policy in the direction of the litigious U.S. model. The suggestion was that the closed, negotiative Canadian style developed after 1960 showed signs of being replaced by a more legalistic system in which citizens and environmentalists gained strength through their ability to challenge government administrators and regulated groups through recourse to the courts.

Figure 1 *Evolution of U.S. and Canadian Environmental Policy Styles*

Period	Country	Substantive Instruments	Procedural Instruments	Implementation Style	Overall Pattern
Pre 1960	U.S.	Common and Criminal Law	Private litigation Class Actions	Private law regime	Similar
	Canada	Common and Criminal Law	Private Litigation	Private Law regime	
1960–1990	U.S.	Public Law Regulation	Citizen Suits Judicial Activism Action-Forcing statutes	Adversarial legalism	Different
	Canada	Public Law Regulation	Regulatory negotiation with industry on standards and enforcement	Bilateral negotiation	
Post 1990	U.S.	Market-Based and voluntary initiatives	Multi-stakeholder consultations Environmental Treaties	Multilateral negotiation	Convergent
	Canada	Market-Based and voluntary initiatives	Multi-stakeholder consultations Environmental treaties	Multilateral negotiation	

The main thrust of this argument was that Canadian and American environmental policies were converging as Canadian policymakers drew lessons from, or emulated, U.S. experiences (Hoberg 1991). This analysis was premised upon the observation that not only did Canada and the U.S. share similar socio-economic systems, but that Canadian and American interest groups, trade associations and regulators had developed closer and closer ties with each other across the U.S.–Canada border and that Canadian groups had begun to emulate U.S. practice in pursuing their interests through the courts. As Hoberg put it:

> One of the most powerful forces promoting convergence is Canadian emulation of US environmental policies. Whether US policy innovations act as models for policy elites or as public relations devices for environmental groups, they have a powerful influence on Canadian policymaking. The integration of North American economies, policy communities and media culture provides a profound stimulus for convergence (Hoberg 1992).

However, while several high profile court cases in Canada appeared to provide some indications of weak convergence in this direction, the evidence cited in support of the legalization thesis was largely anecdotal. More systematic evaluations of pressure group activities and judicial precedents revealed little movement towards the U.S. model over this period in these critical areas (Howlett 1994; Elgie 1993; Roman and Pikkov 1990). The policies were simply different at this time as the U.S. system of adversarial legalism differed in many important regards from the bilateral negotiative compliance system found in Canada.

That the two systems have only begun to converge in the most recent era is revealing in terms of the understanding of the cross-national policy dynamics and especially of the nature and origins of emulation-based convergence processes. While there is little evidence that interactions between U.S. and Canadian environmental policy elites have had a significant impact on developments in this sector, the emergence of new initiatives towards the marketization, voluntarization and decentralization of environmental policy in both countries suggests that general sets of policy ideas circulating in the international sphere had profound sectoral effects in both countries and spurred strong convergence processes.

That is, in past epochs government responses to increasing environmental problems had been constrained by macro-level institutional arrangements which ensured that policy-making in both countries followed distinct national trajectories. In the most recent period, however, re-thinking of sectoral environmental issues emphasizing ex

ante precautionary or preventative measures has dove-tailed with a re-thinking of general macro-political arrangements focussing on the promotion of collaborative government arrangements. The new implementation style of multi-lateral negotiation which has emerged in the environmental sector in both the U.S. and Canada is very much in keeping with the general thrust of the governments in North America and Europe to resort to a new set of policy instruments for societal steering in order to retain their ability to influence policy outcomes in the face of increasingly complex internal and external policy environments (Kickert et al 1997; Rhodes 1997; Milward et al 1993). Governments in many countries have turned away from implementation styles based on a relatively limited number of traditional, more or less command and control oriented, "substantive" policy tools – such as public enterprises, regulatory agencies, subsidies and exhortation – to embrace an entirely different set of "procedural" instruments such as government-NGO partnerships, public advisory commissions, interest group funding and information dissemination, which act in a less direct fashion to guide or steer social actors in the direction government wishes (Peters 1996; de Briujn and ten Heuvelhof 1995).

These ideas have been spread by international elite networking at a general, rather than sectoral level but, as this study has shown, have spilled over and affected sectoral policy-making and policy dynamics. While it is beyond the scope of this article to evaluate the actual sources and routes through which these processes have occurred in the case of U.S. and Canadian environmental policy, empirical studies of other cases have suggested that general ideas originating in the international sphere can be spread independently through media and educational institutions as well as international organizations devoted to their dissemination, indirectly affecting sectoral policy-making efforts in seemingly unrelated policy areas (Hall 1989 and 1992; Goldstein and Keohane 1993; Radice 2000).

In the environmental sector as in many others, the processes of globalization and internationalization which have been associated with the spread of new public management ideas have had an important independent influence on the creation of contemporary policy regimes in the U.S. and Canada (Kahler 1989 and 1995; Keohane and Milner 1996; Keck and Sikkink 1998; Risse-Kappen 1995). The effect of new general sets of ideas originating in the international sphere and undermining established national policy trajectories is an important aspect of the working and causes of strong emulation-based convergence processes.

NOTES

1. This paper has benefitted from the comments made by the anonymous reviewers for this Journal; from discussions with several individuals including Colin Bennett, Debora Van Nijnatten, George Hoberg, and Kathy Harrison as well as from participation in the Western Economics Association special session on U.S.–Canada environmental policy instruments held in San Diego in July 1999. Comments received at the time from Ken Richards, Mark Sproule-Jones, Carolyn Johns, Thomas McGarity, and Sidney Shapiro were especially helpful.
2. Although U.S. movement towards a Canadian model is also a conceptually distinct possibility, this possibility has not been seriously mooted. Despite the fact that Canadian policies in areas such as health care and gun control have been prominently and publicly examined in U.S. federal institutions in recent years, and that the same environmental communities and actors previously suggested as being responsible for Canadian emulation could, in theory, provide the vehicle for American learning, no author has seriously evaluated this possibility.
3. This is also true of the situation surrounding the use of criminal laws. In both countries standing was not an issue in criminal cases since both counties have always allowed individuals to lay criminal charges. The problem in both countries with regard to utilizing criminal actions in environmental matters was (and still is) the burden of proof required for successful prosecution; especially the necessity to establish beyond a reasonable doubt that a guilty party possessed a guilty mind or *mens rea* at the time of a crime. Thus in both countries citizens could press charges in environmental cases but rarely did so (Webb 1990b).
4. S.C.R. (1924) 331.
5. 1 S.C.R. 1975, 138. In 1976 the Supreme Court ruled in *McNeil vs Nova Scotia Board of Censors* (2 S.C.R. 1976, 265) that a part of its earlier ruling in *Thorson* distinguishing between regulatory and legislative pronouncements in granting increased standing was unworkable. In 1981 it ruled in *Borowski vs. Minister of Justice of Canada* (2 S.C.R. 1981, 575) that constitutionality extended to violations of the (then) non-constitutionally entrenched Canadian Bill of Rights (Ontario Law Reform Commission 1989; and Cromwell 1986).
6. 2 S.C.R. 1986, 607.
7. 3 C.E.L.R. (ns) 1989, 287.
8. 7 C.E.L.R. (ns) 1992.
9. Goldsmith and Banks, for example, have argued that the U.S. Supreme Court had by 1979 gutted the liberal interpretations of the NEPA provided by earlier decisions in the lower Courts (Goldsmith and Banks 1983; Kovacic 1991 and Mintz 1995).
10. The standard set of judicial remedies being *Habeus corpus, certiorari, mandamus, prohibition, injunction* and *declaration* (Henderson 1963; de Smith 1973; Wade 1966).

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