Among the few deliverables outlined in the final communiqué of the August Montebello Summit on the Security and Prosperity Partnership (SPP) was the little noticed Regulatory Cooperation Framework Agreement. It is a slim four-page document—hard to believe that this was the full result of two years of negotiation—that will serve as a template for the many sectoral regulatory harmonization initiatives already under way.

This agreement seems innocuous enough—certainly not something to arouse the passions around the loss of Canadian sovereignty. Disparaging the critics’ opposition to regulatory harmonization, Harper quipped: “Is the sovereignty of Canada going to fall apart if we standardize the jellybean. I don’t think so.”

It was a standard PR ploy designed to trivialize and divert attention from what lies beneath. There is definitely more than meets the eye here.

The significance of the agreement comes into greater focus when viewed as part of a broad deregulation/harmonization initiative—driven by business and supported by governments—the long-term goal of which is to create a single unified business-friendly regulatory regime for North America, though not along the European model of supranational regulatory bodies to protect the public.

It is a small step—one of many. It represents a consensus around key business-friendly principles that will shape the course of regulatory harmonization throughout the continent. Although progress has been slow, it represents significant movement toward the long-term goal.
We’ve seen this movie before—the one in which working groups consisting of bureaucrats and industry representatives meet behind closed doors, cooking up various ways to “maximize” trade in goods and services. In this version, the SPP business council (it’s called the North American Competitiveness Council, or NACC) gives big business a hand on the steering wheel driving this initiative. Regulatory harmonization—let’s not be lulled by soft terms like “cooperation” and “compatibility”—was one of three sets of priorities identified by the NACC in its February 2007 report to the nine SPP ministers.\(^2\)

A central NACC demand for immediate action was the conclusion of a regulatory agreement that would ensure that “new regulations in all three countries are as compatible as possible and reduce the number of unnecessary differences between existing standards and rules. Wherever possible, regulators should make every effort to reflect prevailing North American or international standards...including private sector standards.”

Voilà: the Regulatory Cooperation Framework Agreement. Like Mary Poppins’ carpet-bag, it holds all kinds of tools and instruments. The deeper you dig, the more unusual the find. Thanks to Prime Minister Harper, we can call it a jellybean jar. Thanks to the NACC report, we know we can look in this jar for deregulation initiatives in the areas of food and agriculture, financial services, transportation, intellectual property, and energy. But don’t stop there. Anything not specifically excluded can be deemed to be inherently included.

**Telecom Policy on the International Stage**

Only Canada, at the moment, has appointed a representative of a major telco to the NACC: Michael Sabia, at the time CEO of Bell Canada Enterprises. Sometimes governments claim that appointees to such councils are only acting as experts rather than direct representatives of their industries. But the list of U.S. representatives makes no pretense. It lists only corporations, not individuals. An appointee from BCE shows that the Canadian government sees an important telecom connection in this agenda.

Helpfully moving the agenda forward, one of the recommendations of the recent Telecommunications Policy Review Panel (TPRP) *Final Report*\(^3\) downgrades the national importance of telecommunications by recommending that *The Telecommunica-
tions Act be stripped of the recognition “that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty.” The Panel felt that this kind of wording was outdated. That’s convenient. Having a statement like that in the Act could certainly get in the way of regulatory harmonization.

The NACC urged regulators in the three countries to take into consideration the trade effect of regulations that differ from the North American standard. Experience from previous agreements tells us that the biggest trader wins. Sinclair and Traynor point out how powerful countries can use obscure treaty rules to force developing country governments to deregulate, enriching foreign corporations at the expense of local citizens:

In mid-2004, a WTO panel issued its decision on a challenge brought by the U.S. against Mexico’s telecommunications regulations. The panel ruled that Mexico was violating its GATS commitments by not providing “cost-oriented and reasonable rates, terms and conditions” to U.S. telecom companies for connecting their long-distance calls to Mexico. The panel also ruled that, contrary to GATS rules, Mexico was not taking appropriate measures to prevent “anti-competitive practices” by Telmex, Mexico’s privatized national telephone company.

As a result, U.S.-based long-distance firms can no longer be required to contribute to the development of Mexico’s telecommunications infrastructure as a condition for gaining access to the Mexican market. The ruling denies Mexico an important source of revenue that should be used to expand basic telephone service to poor customers and into rural areas, many of which do not have any access to phone services.

All governments that have made or will make GATS Telecommunications Reference Paper commitments are thus forbidden to include the costs of expanding telecommunications infrastructure or improving universal access when setting rates for interconnection. This prohibition—which will hit developing countries the hardest—deprives governments of a proven regulatory method and source of revenues for improving their citizens’ access to basic telecommunications services.

The Regulatory Cooperation Framework Agreement accepts the business demand that governments promote the adoption of “relevant international standards as well as domestic voluntary con-
sensus standards” and work toward a single voice for their representatives in international standards setting bodies. Given North American power realities, this means an American voice. It also means the erosion of an independent Canadian position in these forums and, by extension, the erosion of an independent Canadian regulatory capacity.

International standards in telecom are set by the International Telecommunication Union (ITU). It is not a union, but a specialized UN agency established in 1865. It consists of 189 member countries. Its functions include allocating radio frequency spectrum and satellite slots, developing standards for communication equipment and services, facilitating agreements on tariff sharing between international telecommunications operators, and providing research and strategic advice to developing countries on telecommunications projects. The ITU also represents 650 private sector groups—a who’s-who list of telecom giants around the world. Civil society and other public interest groups are nowhere to be found, either on the members’ or associate members’ list.

ITU meetings in the past have been used as high-profile opportunities to lobby for strategic changes to world telecommunications. In 1994, then-U.S. Vice-President Al Gore urged the ITU Development Conference in Buenos Aires to include his dream of a “global information infrastructure (GII)” in the Buenos Aires Declaration being prepared by the assembly. The GII was to follow the U.S. model of the “National Information Infrastructure” which was already being built and maintained by the private sector.

His appeal did not fall on deaf ears. The Buenos Aires Declaration endorsed the development of telecommunications “fostered by liberalization, private investment and competition in appropriate circumstances.” Many observers saw the Buenos Aires meeting as a major step on the road to telecommunications deregulation at all levels – a move that has led, in the interim, to massive media and telecommunications corporation mergers (rather than more competition) and equally massive media and telecommunications corporations’ financial disasters.

If implemented, this new SPP agreement will give big business even more opportunity to push for downward harmonization at the national, continental, and international levels, and to frustrate domestic implementation of regulations they oppose.

The SPP Regulatory Cooperation Agreement and Recent Deregulation Initiatives

Business representatives on both sides of the border have long
TAKING THE TOP OFF THE JELLYBEAN JAR

pushed for deregulation—though it is usually framed as “streamlined regulation” or “efficient regulation,” or “cutting red tape”—and governments have responded sympathetically.

In Canada, the deregulation drive was re-packaged as “smart regulation” under the Chrétien government, and gained momentum under the Martin and Harper governments. The Conservatives are, if anything, more ideologically committed to deregulation than previous governments.

A central part of the “smart regulation” agenda is to shift the basic regulatory philosophy from a precautionary principle to a risk management approach. The former approach says, “err on the side of caution” and “protection has primacy over other considerations.” The latter approach elevates consideration of business costs and competitiveness to the same level as protection. It mandates various competitiveness and trade impact assessments of new and existing regulations. The precautionary approach places the burden of proof for a product’s impact on the company, whereas the risk management approach puts the burden of proof on the regulator to show that the impact is undesirable, and favours voluntary compliance and so-called self-regulation options.

“Smart regulation” has made major headway in Canada. And, by allying with the Bush administration, which is dominated by fervent deregulation hawks, the Harper government is reinforcing deregulation here at home by the back door of continental regulatory harmonization. The Harper government advanced the “smart regulation” agenda with the introduction on April 1, 2007 of its new regulatory policy, which sets the ground rules that will apply to all agencies. The Cabinet Directive on Streamlining Regulation (CDSR) pays lip service to the precautionary principle, but in fact weakens it in a number of ways. It implements tests for new regulation that put the burden of proof on the regulators. It expands the number of barriers that must be overcome for a department to pass a new regulation, and subjects existing regulations to review and sunset clauses. It directs that regulations impose the least possible cost on business and not be more trade restrictive than necessary.

Telecom policy is falling in line with very little recognition of the ways in which these various deregulatory agendas interact. The TPRP Final Report specifically indicates its intention to comply
with the principles of the “smart regulation” strategy. In June 2006, Conservative Industry Minister at the time, Maxime Bernier, tabled a policy directive to the CRTC to take a “hands-off” approach to regulating the telephone industry, a directive which came into force in January 2007. “Tabling this document signals the government’s intention to direct the CRTC to rely on market forces to the maximum extent feasible under the Telecommunications Act and regulate—where there is still a need to do so—in a manner that interferes with market forces to the minimum extent necessary,” said Bernier. This agenda was accelerated in April 2007 when the Minister, ignoring opposition from the Standing Committee on Science, Industry and Technology, and changing a previous CRTC decision, tabled an order-in-council deregulating local telephone service.

The speed of all this even took the industry by surprise. “Bell and Telus must be thrilled,” said a spokesperson for Rogers Communications. “With this order we’re embarking on a policy adventure in a way that no other country has done. We’re deregulating whether there is competition or not...”

Like a jigsaw puzzle, pieces are being aligned bit by bit. Stephen Clarkson and Maria Banda, in “Community of Law: Proposals for a Strategic Deal with the United States,” suggest what the final picture might look like:

Harmonization in transportation, telecommunications, financial services, oil, gas, and electricity sectors would mean constructing a one-way street completely to align the Canadian transportation grid with that of the United States.

It’s Not Just About Jellybeans

Much of what will occur in the coming years under the SPP falls under the category of regulatory harmonization. Regulation is a contested policy arena in Canada—one of action and reaction, ebb and flow. Under the normal democratic process, we can expect current deregulation initiatives to generate strong resistance and potentially result in the emergence of new political alliances—less sympathetic to the business-friendly regulatory model—that would reverse this deregulation experiment.
It is easy to see beyond the assurances in the SPP Agreement that regulatory cooperation in no way diminishes the sovereignty of each partner. With this and other measures, the SPP, like NAFTA, seeks to constrain democratic processes. It consciously tilts the balance in favour of the deregulation model—by locking in hundreds of continental regulatory agreements and protocols, which then are much harder to reverse. SPP regulatory harmonization is a policy straightjacket that tightens with each new agreement, narrowing Canadian regulatory policy flexibility as it conforms to the dominant U.S. regime.

The United States—the bigger partner—is not bound by this straightjacket and can simply ignore or unilaterally change the rules (which by and large it set), with little consequence if important national interests are deemed to be at stake. The smaller partners do not have the same leeway to disregard the rules because the consequences of doing so are much greater. Regulatory integration seriously compromises their national sovereignty and democracy. It represents a de facto form of political integration in North America, but—unlike the European Union—without supra-national institutions and political representation.

Don’t expect the regulatory harmonization process to be dramatic. It is taking place stealthily in the sub-basement of bilateral relations: small technical steps—some inconsequential, others significant—largely invisible to the public. The cumulative effect, however, is hugely significant as we move closer to the end-point: a single continental regulatory regime whose shape is determined effectively by the largest partner.

Perhaps at some future point, in the wake of a major crisis, people will ask, why did our government fail to protect us? And maybe some politician will point to an obscure SPP deal and say, “Our hands were tied. We were compelled to harmonize our regulations in an integrated North American market to secure our prosperity and ensure North American competitiveness with China.”

This is not an inevitable future, but preserving essential policy flexibility to act in accordance with national priorities requires constant vigilance from an engaged citizenry. We need to tell our Prime Minister that we have taken a look inside the jellybean jar and what we see there will bring on more than a national toothache.

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5 Canadian entries on the members list include: Alcatel Canada, Allstream, Bell Canada, Cap Gemini Ernst & Young, Catena Networks, Mitel Networks Corporation, Nortel Networks (Canada), Rogers Wireless, SR Telecom, Telecommunications Executive Management Institute of Canada (TEMIC), Teleglobe Canada, and Telesat Canada.


