MANAGING THE ENVIRONMENTAL UNION

INTERGOVERNMENTAL RELATIONS AND ENVIRONMENTAL POLICY IN CANADA

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Introduction

CHAPTER 1

Intergovernmental Relations and Environmental Policy: Concepts and Context

Kathryn Harrison

INTRODUCTION

Canadian environmental policy is at a turning point, with the federal and provincial governments committed to leaving behind the conflicts that characterized intergovernmental relations concerning the environment in the late 1980s and early 1990s. A new Canada-Wide Accord on Environmental Harmonization, ratified in 1998 by the federal government, all provinces but Quebec, and both territories, promises to enhance environmental protection by providing ongoing mechanisms for intergovernmental coordination and by clarifying and redefining federal and provincial roles. The authors of this volume place this effort by Canadian governments to renew their relationship in the environmental policy field in a broader context by examining the broader implications for the environment of intergovernmental conflict and cooperation through historical, legal, and cross-national studies of federal-provincial relations and the environment.

Intergovernmental relations concerning the environment have undergone marked periods of both conflict and cooperation. In the last decade, tensions first emerged when provincial governments objected to the federal government's 1988 *Canadian Environmental Protection Act*, which promised to renew federal regulatory activity in a field that the federal government had for all intents and purposes long since abdicated. Relations further deteriorated when the federal government was forced by environmentalists' lawsuits to undertake a broad range of environmental impact assessments previously left to the provinces. By the early 1990s, however, a new will to cooperate became evident as federal and provincial governments

alike confronted the challenge of implementing their new environmental statutes in a climate of waning public attention to environmental issues.

Their efforts to redefine federal and provincial roles with respect to the environment were given greater urgency by broader forces for change including deficit-driven budget cuts, pressure for deregulation and to "reinvent government," and, perhaps most importantly, a desire to "renew the federation" in response to the threat of another Quebec referendum on sovereignty. The result was the Canada-Wide Accord on Environmental Harmonization, signed in January 1998, which seeks to eliminate overlap and duplication of federal and provincial activities.

In many respects, these developments in intergovernmental relations concerning the environment over the last decade echo events 20 years earlier. Much like the late 1980s, intergovernmental harmony was disrupted in the late 1960s and early 1970s when the federal government first entered the environmental field, which had previously been the almost exclusive domain of the provinces. By the mid-1970s, federal-provincial harmony was restored through a series of bilateral accords, which were in many respects the predecessors of the new Canada-Wide Accord. Thus, since the late 1960s, the pendulum has twice swung from cooperation to conflict and back.

During this period of almost three decades, the federal and provincial governments have experimented with a variety of intergovernmental relationships, from unilateralism to partnership to rationalization of federal and provincial activities. This variance in intergovernmental arrangements presents scholars with an opportunity to systematically examine the origins and consequences of intergovernmental relations in the environmental field. Moreover, the patterns with respect to intergovernmental environmental relations are also of interest in other policy fields where the activities and responsibilities of Ottawa and the provinces overlap. What we learn from the case of environmental policy may have much to say about the origins and consequences of intergovernmental arrangements in other policy fields. The authors in this volume have accepted that challenge, with those in Part One seeking to explain intergovernmental relationships and those in Part Two investigating their consequences for different aspects of environmental policy making, from environmental assessment to regulatory enforcement.

Although the federal and provincial governments have achieved consensus on a new framework for cooperation, much work remains to be done. Sub-agreements, implementation agreements, and national standards have yet to be negotiated and administered. At this critical juncture in our path, it is an appropriate time to reflect on the road that brought us here and the lessons it has to offer. The conclusions of the studies in this volume may offer practical insights to those seeking to realize the promise of the new Canada-Wide Accord and for those interested in developing similar harmonization efforts in other policy areas.

This chapter provides an historical and conceptual context for the chapters that follow. The next section offers an overview of developments in federal-provincial relations concerning the environment since the late 1960s. Thereafter, analytical concepts used by the authors are introduced, and an overview of the subsequent chapters is provided.

HISTORICAL DEVELOPMENTS IN INTER-GOVERNMENTAL RELATIONS

Prior to 1970, there was little federal-provincial interaction concerning the environment. Pollution control, as environmental policy was then characterized, was a relatively new governmental concern. Thus there simply was little governmental activity at either level to coordinate. More importantly, with the exception of fisheries, natural resources and their conservation typically were considered provincial matters by federal and provincial governments alike. What environmental policy did exist in the 1960s was almost exclusively provincial. Federal politicians resisted occasional calls to address environmental problems by arguing that resource management was a provincial matter.

When unprecedented public concern for the environment emerged in the late 1960s, however, the federal government reconsidered its jurisdiction. It asserted an independent role in the environmental field when it passed a number of new environmental statutes and created Environment Canada in the early 1970s. At the same time, provincial governments were also responding to public demand by writing legislation and creating their own Ministries of the Environment.

Various authors have characterized this period as one of unilateralism and federal-provincial conflict in the environmental field.[1] However, it is important to note that the federal government clashed only with four provinces, albeit the four most populous. Ironically, the flashpoint was the federal government's most deferential statute, the *Canada Water Act*. While Quebec and British Columbia registered objections on constitutional grounds, Alberta and Ontario instead focused their criticisms on the prospect of regionally varied standards. In contrast, the unilateral pollution control approach promised by the federal *Fisheries Act* amendments drew little opposition from any of the provinces, both because federal jurisdiction over fisheries was uncontested and because the premise of uniform discharge standards was consistent with most provinces' own approaches. This period saw independent legislative activity but minimal duplication of regulatory activity, since both orders of government were only beginning to implement their new statutes.

In contrast to tensions in the environmental field, the overall pattern of intergovernmental relations in the 1960s and early 1970s was generally quite positive.

This was the era of major new shared-costs programs and the early efforts at constitutional amendment. It was also a period of activist government. As Stimson has argued, sustained periods of economic growth tend to produce more liberal electorates, which are more supportive of government expenditure and regulatory programs.[2] Federal and provincial governments' bold proposals to undertake extensive new responsibilities in the environmental field were not exceptional during this period.

In an effort to restore intergovernmental harmony, the federal government and the provinces rejuvenated and refocused the Canadian Council of Resource Ministers, renaming it the Canadian Council of Resource and Environment Ministers (CCREM). The council was instrumental in drafting generic bilateral accords, which were signed by the federal government and seven provinces in 1975.[3] The accords established a one-window approach in which the provinces were responsible for implementing both their own and federal standards, while the federal government's role was ostensibly to develop national environmental quality and discharge standards. It agreed to refrain from directly enforcing national standards as long as the provinces were doing the job. However, although provincial enforcement was uneven at best, only rarely did the federal government intervene.[4] A similar approach was taken informally in the three provinces that did not sign formal accords: Quebec, British Columbia, and Newfoundland. In practice, the provinces once again became the lead players in the environmental field, with the federal government generally playing a supporting role of providing research and ambient monitoring.[5]

As the federal government gradually withdrew from the environmental field in the 1970s, the conflicts of the early 1970s generally faded. Tensions did briefly erupt over amendments to the *Fisheries Act* in 1977, however. Provincial objections that the amendments would extend federal involvement in environmental regulation and potentially duplicate or contradict their own activities had not been anticipated by the federal government. In response, the federal government declined to implement the contentious passages, and further withdrew from the environmental field by terminating development of new federal regulatory standards under the Act.[6]

Thus, even as federal and provincial governments sparred over energy policy and the constitution in the late 1970s and early 1980s, they managed to maintain harmony in the environmental field.[7] The contrast may not be coincidental. As the salience of the environment faded in public opinion polls, the environmental portfolio fared poorly as the federal government undertook budget cuts and a re-evaluation of its priorities in response to a weaker economy in the early 1970s.[8] The subsequent threats to national unity posed by Quebec separatism and western alienation, as well as a desire to achieve intergovernmental consensus on the

constitution, may have increased federal deference in the environmental field, with the federal government offering concessions in the low priority environmental field as a token sacrifice to the provinces.

Tensions re-emerged in the late 1980s, however, when the federal government reasserted a unilateral role in the environmental field with the passage of the *Canadian Environmental Protection Act* (CEPA). With the environment rising in public opinion polls, CEPA presented a radical departure from past federal environmental policy in promising independent federal standard setting and enforcement. As the environment minister at the time stated, "we do have authority and the federal government intends to exercise it. We do not intend to do it by committee."[9] Although the federal government responded to provincial objections by allowing federal regulations to be waived if a province established equivalent regulations of its own, it attached stringent conditions for granting equivalency in order to promote consistency with national standards.

Disagreements over CEPA paled in comparison to those that soon emerged concerning environmental assessment. In 1987, environmentalists successfully sued the federal government, forcing it to perform an environmental assessment of the Rafferty-Alameda Dam project in accordance with its own environmental assessment regulation. In the face of that decision and the subsequent Oldman Dam Court ruling, the federal government was forced to conduct assessments of dozens of projects, a responsibility it had previously deferred to the provinces. The federal-provincial conflicts that ensued were less about environmental protection than control of resources and economic development. The conflicts over environmental assessment were both more heated and more public than previous intergovernmental disagreements in the environmental field, reaching a level of rancor reminiscent of the oil and gas wars of the late 1970s. Ironically, there were relatively high levels of federal-provincial cooperation in at least some areas during that period. In March 1987, first ministers agreed to the Meech Lake Accord and there was much discussion of a new joint federal-provincial initiative on child care.

In the environmental field, this period saw independent legislative and, in some cases, enforcement activity, and raised the prospect of overlapping regulatory activity in the future. By the early 1990s, however, the federal and provincial governments, spurred by declining budgets and investors anxious about the prospect of federal-provincial duplication, inconsistency, and even competition, were seeking to repair relations. Efforts to restore harmony proceeded in two stages.[10] In the first stage, the intergovernmental council, which had atrophied since the mid-1970s, was revitalized and renamed the Canadian Council of Ministers of the Environment (CCME). The jointly-funded secretariat was relocated to Winnipeg. CCME initially sought to promote cooperative joint federal-provincial approaches as an alternative to unilateralism. In 1990, the ministers signed a

multilateral agreement to cooperate, the Statement on Interjurisdictional Cooperation, which was followed in 1991 by a statement of environmental assessment principles, intended to promote coordination and consistency of federal and provincial environmental assessment processes.[11] The council also drafted prototype administrative and equivalency agreements, which served as the basis for bilateral agreements between the federal government and several provinces. This period can be characterized as one of partnership. The assumption was that both federal and provincial governments would continue to be involved in the field, and the goal was to promote consistency and cooperation.

In the second stage, CCME increasingly emphasized rationalization. As both federal and provincial environment ministers confronted deep cuts to their budgets as well as waning public attention to the environment, CCME launched its "harmonization initiative" in 1993. The new emphasis on eliminating duplication and overlap contrasted with the implicit acceptance of overlap in the Statement on Interjurisdictional Cooperation. The initial plan was to devise nothing short of a "new environmental management regime" for Canada.

The push for a harmonization of federal and provincial roles with respect to the environment was also linked to the broader agendas of both orders of government. Greater federal-provincial cooperation would, it was hoped, lead to more efficiency and costs savings, something very important to both orders of government as the budget of Environment Ministries were cut back in response to federal and provincial government deficits. Greater cooperation would also mean a more rational and streamlined regulatory apparatus. The return to an emphasis on a single-window approach with respect to environmental regulation was consistent with the broader agenda of regulatory reform and deregulation seen as necessary to promote competitiveness in an increasingly global economy.[12] Finally, achieving harmonization of the Environment portfolio was viewed, at least by the federal government, as an opportunity to demonstrate to Quebecers that federalism can work.

In November 1995, a draft Environmental Management Framework Agreement (EMFA) and ten accompanying schedules were released for public comment.[13] (An eleventh schedule concerning environmental assessment, which had been a source of contention between the federal government and the provinces, was never released.) In many respects, the EMFA echoed the bilateral accords of the 1970s in promoting one-window delivery of environmental programs, though the various schedules extended the number of activities to be rationalized and there were more detailed reporting requirements to promote compliance than in the original accords. As in the 1970s, it was foreseen that the provinces would enforce both their own and federal standards, with the federal government only taking the lead on federal lands and in matters concerning international boundaries

and agreements. In other respects, however, the EMFA envisioned far more radical changes than the original accords. The draft agreement proposed "national" discharge standards developed by federal-provincial bodies as an alternative to "federal" standards. The federal government's role was thus redefined from primary responsibility for setting national standards to mere participation as one of 11 governments seeking consensus on "national," as opposed to "federal," standards.

From the perspective of the overall character of federal-provincial relations, the EMFA was a striking and bold document. It is not clear what motivated federal officials to agree to the distinction between national and federal standards. For some, it was a recognition of the fact that the federal government did not have sufficient resources to develop and enforce environmental standards across the country. For still others, the reference to national standards in the EMFA was a reflection of the fact that the federal government was not willing to irritate the provinces over something that was a relatively low priority.

The EMFA provided for joint federal-provincial decision making on national standards, but the document was frustratingly silent on what the decision rule would be. The ambiguous nature of the framework agreement was underlined by environmental groups, who were concerned that the EMFA would create a "third order of government" and that the implied decision rule of consensus would mean that any and all parties to the agreement would have a veto, which would likely result in incremental action at best and deadlock at worst.[14]

The EMFA and accompanying schedules were shelved after a national consultation workshop in January 1996 revealed strong and united opposition from environmentalists, who charged that the federal government was abdicating its responsibilities in the field and that, in practice, gaps in regulation were a more serious problem than duplication. Although it would have been politically difficult, particularly for the federal government, to forge ahead with the EMFA in the face of such opposition, that did not preclude trying again. When the environment continued to emerge as an irritant in discussions among first ministers, the Prime Minister's Office (PMO) directed Environment Canada to re-negotiate, and to do so quickly, with results expected by the end of the year. The need to start over was also precipitated by Quebec's return to the negotiating table, since the province had not been party to the EMFA after it withdrew from CCME discussions in protest against proclamation of the *Canadian Environmental Assessment Act*. The pressure from the PMO and from the office of the minister of intergovernmental affairs, Stéphane Dion, was not a case of pushing for a particular agreement, although Dion and his officials emphasized the need to be mindful of Quebec's concerns to secure the agreement of that province. Rather, the PMO's unity strategy required that there be some evidence that the federation works and is flexible in responding to provincial demands, especially those from Quebec. An agreement

on the harmonization of federal and provincial roles with respect to the environment was thought to be one of the more likely and promising areas for evidence of federal-provincial renewal.

The fast track approach was successful, yielding "approval in principle" of the Canada-Wide Accord by all environment ministers at their November 1996 CCME meeting. The ministers' intention was to wait to finalize the accord until the first three sub-agreements — concerning standards, compliance inspections, and environmental assessment — could be finalized as well. Environmental groups across Canada remained strongly opposed. Over 90 groups issued a joint statement urging the federal government to reject the accord, depicting it as an "abandonment of the federal role" in environmental protection that was particularly troubling in light of the deep cuts to many provinces' environment budgets.[15] In response to environmentalists' criticisms, the federal and provincial environment ministers emphasized that, rather than detracting from environmental programs, the new accord would promote the "highest" national standards.[16]

Opposition to the accord did not wane in the months to follow. Most notably, the Liberal-lead House of Commons Standing Committee on the Environment and Sustainable Development, emboldened by a Supreme Court decision upholding federal constitutional authority to set national standards for toxic substances,[17] issued a report in December 1997 calling on the federal government to delay signing the accord until consultations could be pursued with Aboriginal peoples and until further studies of the extent of gaps, overlap, and duplication could be done.[18] The committee concluded that there was inadequate evidence of duplication and overlap to justify the accord, and was also critical of the devolutionary approach implied by the accord.

Opponents of the accord found some support within the federal Cabinet. Indeed, the federal government reconsidered its support for the Canada-Wide Accord in the final days leading to the January 1998 CCME meeting, at which the accord and the first three sub-agreements were to be signed. However, despite those last minute machinations, the federal government ultimately elected to maintain its course, joining nine provinces and the two territories in signing the accord and sub-agreements at the January meeting. The Quebec government declined to sign the accord without additional reassurance of the federal government's commitment to avoid overlap via amendments to federal environmental legislation. The Council of Ministers directed their officials to begin developing national standards for six priority substances, to negotiate for four more sub-agreements,[19] and to devise annexes to the accord concerning public participation and accountability and aboriginal involvement. A public participation annex was subsequently approved by CCME in September 1998. In January 1998, the Canadian

Environmental Law Association launched a lawsuit before the federal court contesting the federal minister's legal authority to sign the accord.

The basic premise of the Canada-Wide Accord remains the same as that of the EMFA: rationalized implementation of standards based on federal-provincial consensus, though those standards are now referred to as "Canada-wide" rather than "national" in deference to the Quebec government.[20] However, there are subtle differences as well. The new accord more clearly states that environmental protection is the primary goal, with elimination of overlap and duplication offered only as a means to achieve that goal more effectively. In response to environmentalists' concerns and in recognition of the depth of budget cuts experienced by both federal and provincial environmental departments, there is also recognition of "underlap" as a potential problem to be addressed through intergovernmental cooperation. The new accord is also more explicit in stating that collective decisions will be based on consensus.

The immediate objectives of the second round are more modest, however. Certainly public consultations were less ambitious, perhaps to avoid the fate of the EMFA.[21] The content is also less ambitious with respect to timing, though not necessarily in its ultimate scope. The accord that was signed in January 1998 is quite general. Most of the details remain be worked out in sub-agreements for different governmental activities (akin to the EMFA's schedules). A third level, implementation agreements, are also anticipated to address more specific issues within the context of the sub-agreements. Rather than seeking consensus on a massive package of 11 schedules, a strategy that failed in the case of the EMFA, the ministers chose to proceed incrementally, although with a plan to reach ten agreements over a three-year period.[22]

The approach of the accord is also more flexible. In place of the EMFA's effort to redefine federal and provincial roles once and for all, with the same roles for all provinces, there is greater recognition that different approaches may be needed for different environmental problems and in different provinces, though the standards sub-agreement in particular still suggests that the provinces will normally take the lead. Perhaps the most important difference from the EMFA, however, is a subtle change in the definition of standards, which is most evident in the standards sub-agreement. The primary focus is on developing uniform Canada-wide standards for ambient environmental quality, rather than discharge or product quality standards, though the door is left open to the latter in some circumstances.[23] The distinction is not merely semantic. Consistent environmental quality standards will typically lead to inconsistent discharge standards in different regions, given different dispersion conditions and different numbers of sources. Indeed, there is no expectation that a lead government will develop enforceable discharge

standards at all, since the sub-agreement guarantees each jurisdiction complete flexibility to adopt any approach it considers most appropriate to achieve the environmental quality goal, including voluntary measures. This emphasis on uniform environmental quality standards, to the exclusion of uniform discharge standards, represents a significant and somewhat surprising departure from federal and provincial governments' historical emphasis on uniform discharge standards as a means to prevent "a race to the bottom."

ANALYTICAL CONCEPTS

The foregoing history reveals significant variation in federal-provincial relations concerning the environment in recent decades. Sometimes federal and provincial governments have fought over jurisdiction or policy content, while at other times they have achieved consensus on a surprising range of issues. They have operated unilaterally at times, worked in partnership at others, and divided tasks among themselves at still others. And, of course, the federal government has had different relationships with different provinces.

The richness of this experience forces us to move beyond the simple "conflict versus cooperation" dichotomy so often posed. The mere absence of conflict does not necessarily mean federal and provincial governments are actually working together cooperatively. Moreover, both conflict and cooperation are broad terms that can mask important distinctions within each category. For instance, governments may cooperate through joint action or by delegation — arrangements that may have very different consequences for policy content and impact. Similarly, there are important differences between governments in conflict to be "one up" on each other and governments seeking to obstruct the other's policies which they oppose.

Another reason to reject the conflict-cooperation dichotomy is the normative baggage that accompanies it. Certainly the goal of intergovernmental cooperation has intuitive appeal. Intergovernmental conflict is time-consuming and costly, has the potential to reduce the effectiveness of both governments' policies, and can spill over and wreak havoc in other policy sectors as well. The public spectacle of federal and provincial ministers quarreling via press release or subpoena merely reinforces growing public mistrust of politicians and government institutions.

However, cooperation too often has been accepted as the end in itself. At best, intergovernmental cooperation is an instrumental goal; it is desirable to the extent that it allows us to achieve our primary goals more efficiently. However, we should not lose sight of those underlying primary goals, among them protection of the environment, minimizing costs to taxpayers, minimizing costs to regulated interests

(and thus promoting competitiveness), and accountability to the electorate. This is particularly important because different kinds of cooperative arrangements may have very different implications for these goals. Moreover, the implications of conflict for those primary policy goals may not all be negative. For instance, conflict that emerges because one government is proposing stronger overlapping environmental standards than another, or because one is regulating environmentally destructive activities of the other, may better serve the goal of environmental protection than cooperation based on compromise.

In order to present a more complete model of the alternative patterns of intergovernmental relations with respect to environment policy, we offer two crucial distinctions. First, we distinguish between the "structure" of intergovernmental relations, that is the agreed-upon norms of interaction, and the actual "character" of intergovernmental relations — in effect distinguishing between the rules of the game and how the game is played in practice. Second, we suggest that there may be different patterns of intergovernmental relations within the environmental policy field, depending on whether one is looking at environmental assessment, enforcement of regulations, or implementation of international environmental agreements, to name but three examples.

Rules of Engagement

Following on the distinction offered above, the "structure" of intergovernmental relations is taken here to refer to the explicit agreement (or lack thereof) by both orders of government as to the relationship between them. In effect, informal relationships are institutionalized via more formal, mutually agreed "rules of engagement." We identify three broad categories of arrangements: unilateralism, collaboration, and rationalization or disentanglement.

Unilateralism occurs when governments act independently within their own jurisdictions, without attempting to coordinate their activities (or after failing to do so). In effect, there is no formal relationship between the two orders of government either bilaterally or multilaterally. Canadian environmental policy has witnessed brief periods of unilateralism, most obviously with respect to passage of new environmental legislation in the late 1960s and again in the late 1980s. Although the resulting federal and provincial statutes have raised the prospect of unilateral environmental assessments and regulation, in practice that has arguably seldom materialized, since efforts at collaboration and/or rationalization have followed soon on the heels of periods of unilateralism.

The other two formal structures, collaboration and rationalization, both presume some degree of intergovernmental cooperation in agreeing to intergovernmental arrangements, though we don't assume that that cooperation will necessarily

continue. Collaboration refers to formal arrangements in which federal and provincial governments agree to work together as partners, for instance by sharing information, jointly conducting environmental assessments, or jointly devising regulatory standards. Collaboration has been the norm in recent years in the environmental assessment field, and it also has long been customary in setting national environmental standards.

Disentanglement or rationalization occurs when two or more jurisdictions seek to minimize overlap and potential duplication by delineating each government's roles and responsibilities. Although in practice disentanglement may look much like unilateralism, with each government pursuing its responsibilities independently, a critical difference is that those activities are constrained by mutual agreement. There may also be duties to report to other governments on progress. Rationalization has been pursued in the environmental field via the bilateral accords of the 1970s, and more recently via bilateral administrative agreements and the new Canada-Wide Accord.

In drawing these distinctions, the authors in this volume seek to move beyond the implicit assumption that "cooperation" is desirable and "conflict" undesirable by exploring the implications of diverse intergovernmental arrangements for a range of policy goals. The history presented above suggests that the general pattern of intergovernmental relations concerning environmental policy has moved from unilateralism around 1970, to collaboration in the early 1970s, to disentanglement from the mid-1970s to mid-1980s, then again to unilateralism in the late 1980s, to collaboration in the early 1990s, and disentanglement by the mid-1990s. However, the three structural relationships can and do co-exist as federal and provincial governments adopt different arrangements for different aspects of environmental policy. Thus, collaboration has been the norm in recent years in environmental assessment, even as federal and provincial governments have pursued rationalization of enforcement via bilateral agreements.

Relationships in Practice

Notwithstanding the formal structure of the relationships between governments, the actual patterns of federal-provincial interaction can be quite different in practice. For example, Ottawa and the provinces may negotiate a formal intergovernmental agreement to collaborate (e.g., STOIC) but that need not mean that cooperation will continue to prevail. Similarly, governments may agree to rationalize their activities, but subsequently poach on the mutually agreed turf of the other level of government. As indicated above, we have identified four possibilities concerning the character of intergovernmental relations in practice: independence, conflict, competition, and collaboration. The distinction between these

categories reflects the degree to which federal and provincial governments' policy objectives are compatible, and the degree to which they take each other's policies in devising their own.

Both cooperation and competition presume some degree of comparability of federal and provincial policy objectives. The distinction lies in whether that comparability facilitates federal and provincial governments working together, for instance by complementing or mirroring each other's policies, or whether they engage in an effort to "one up" each other with respect to the policy process or content. Some degree of cooperation is necessary for federal and provincial governments to achieve the formal agreements discussed above. However, the very fact of such institutionalized arrangements does not guarantee that governments will continue to get along in practice. Similarly, competition can also occur notwithstanding the existence of formal intergovernmental agreements. For example, both orders of government may agree on a joint standard for a given toxic substance but a given province may impose a tighter standard within its jurisdiction.

Unlike patterns of cooperation or competition, conflict implies some degree of incompatibility between the policies of the orders of government. For example, federal and provincial regulatory approaches or procedures for environmental assessment of projects may conflict. Formal intergovernmental agreements are meant to eliminate such conflict but, of course, it will not be totally eliminated given the inability of any agreement to anticipate all possible sources of conflict. Indeed, many recent CCME agreements have been little more than "agreements to agree," deferring the hard work of achieving consensus to the future. Conflicts may also emerge in the context of agreements to promote rationalization if one order of government feels that the other is not living up to its commitments or is "poaching" on the other's turf.

Independence refers to a pattern where governments simply ignore each other, devising and implementing their policies without taking other governments' preferences or policies into account. This was the pattern up to the late 1960s when provincial governments were, for all intents and purposes, the only players in what we would now call environmental policy, but examples would be difficult to find in recent decades.

Variation Among Environmental Policy Functions

To this point we have identified a number of possible variations in the nature of federal-provincial relations with respect to environmental policy, which may prevail at different times and in different provinces. We also anticipate variation within the environmental field itself, depending on whether the focus is environmental

research, environmental assessment, the development and enforcement of standards, or the negotiation and implementation of international environmental agreements, to name but a few governing functions in the broader field of environmental policy.

RESEARCH QUESTIONS

To this point we have tried to set out a short history of the intergovernmental relations that characterize environmental policy in Canada and introduce analytical concepts that allow for a more nuanced analysis of these relations. Having identified various patterns of intergovernmental relations, the task is now to explain how and why these patterns come about and to determine what impact they have on policy outcomes. For the purposes of this volume we have restated this task in the form of two central research questions.

How can we explain the observed patterns of intergovernmental relations in Canadian environmental policy?

In Part One of the volume the central question can be stated as follows: How can we explain the variety of intergovernmental relationships that have emerged in the environmental policy field over the past 30 years? We anticipate an impact of three factors: public opinion, organized interest groups, and institutions. The first was previously examined in some depth in *Passing the Buck*, which emphasized the importance of trends in public opinion in explaining federal-provincial relations concerning the environment.[24] As the brief history presented previously in this chapter indicates, federal and provincial governments have been more inclined to act unilaterally, with an increase in both competition and conflict, during periods of heightened salience of environmental issues. Simply put, when federal and provincial governments are scrambling to respond to public demand for environmental protection, they not only try to scramble past each other but they are also more likely to step on each other's toes. However, during periods of reduced public attention to the environment, when federal and provincial governments alike have given priority to economic development over environmental protection, intergovernmental cooperation has prevailed, cemented through formal agreements promoting collaboration in some periods and rationalization in others.

With this as background, the three chapters in Part One consider the influence of the two other factors of interest: organized interests and institutions. Debora Van Nijnatten and Kathryn Harrison examine the impact of different institutions through cross-national comparisons of intergovernmental relations concerning the environment. In Chapter 2, Van Nijnatten contrasts Canada, Australia, and

Germany; while Harrison focuses on Canada and the United States in Chapter 3. In Chapter 4, Patrick Fafard examines the lobbying efforts of environmental and industry organizations seeking to influence the outcome of the recent federal-provincial harmonization exercise.

What impact do different patterns of intergovernmental relations have on policy outcomes?

In Part Two of the volume, intergovernmental relations becomes an independent variable and the focus shifts to examining the impact of different patterns of intergovernmental relations on environmental policy outcomes. The chapters examine the relationship between intergovernmental relations and policy with respect to three different environmental policy functions: environmental assessment, standard setting, and regulatory enforcement. Although these three by no means constitute an exhaustive list of environmental policy functions, a comparison between the three nonetheless provides some indication of the degree of similarity or difference that might be expected within the environmental field.

As we described earlier, in the last decade, environmental assessment has been the most contentious area of federal-provincial environmental policy relations. In Chapter 5, Steven Kennett examines past experience with federal-provincial unilateralism, collaboration, and rationalization in environmental assessment, as a basis for analyzing the prospects for the new sub-agreement on environmental assessment under the Canada-Wide Accord on Environmental Harmonization.

The setting of environmental standards and the enforcement of these same standards is the focus of the next two chapters in Part Two. In Chapter 6, Alastair Lucas and Cheryl Sharvit focus on standard setting and, in particular, the standards sub-agreement of the Canada-Wide Accord, examining the implications of collaboration in standard setting from a legal perspective. In Chapter 7, Kernaghan Webb looks at intergovernmental relationships concerning enforcement of regulations. Although generally optimistic that rationalization of federal and provincial roles via provincial enforcement of both federal and provincial regulations will promote greater consistency and more efficient use of scarce resources, Webb is nonetheless concerned that some residual federal involvement is needed to encourage and, if necessary, supplement provincial enforcement activity.

CONCLUSION

After several years of effort and intensive negotiation, the federal and provincial governments have formally ratified a new intergovernmental agreement designed to rationalize their respective roles and responsibilities in environmental policy.

This new agreement provides the backdrop to the chapters in this volume, which seek to provide a broader account of the interplay of intergovernmental relations and environmental policy in Canada. As we indicated at the outset, it is hoped that the studies in this volume will offer both historical and practical insights to those seeking to realize the promise of the new Canada-Wide Accord, as well as those seeking to harmonize and rationalize federal and provincial roles in such diverse areas as health policy and child care.

NOTES

1. Woodrow, "Federal Pollution Control," pp. 203-06; Parlour, "Politics of Water Pollution Control"; Thompson *Environmental Regulation in Canada*, p. 22; Dwivedi and Woodrow, "Environmental Policy-Making and Administration in Federal States."
2. Stimson, *Public Opinion in America*.
3. Harrison, *Passing the Buck*, p. 105.
4. Huestis, "Pilot Study Report"; Huestis, "Policing Pollution"; Estrin, "Mirror Legislation"; Harrison, *Passing the Buck*, p. 106.
5. Thompson, *Environmental Regulation in Canada*.
6. Harrison, *Passing the Buck*, pp. 93-96, 100.
7. Dwivedi and Woodrow, "Environmental Policy-Making and Administration in Federal States."
8. Harrison, *Passing the Buck*, ch. 5.
9. Canada. House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-75*, p. 14:18.
10. Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy."
11. Canadian Council of Ministers of the Environment, *Statement of Interjurisdictional Cooperation on Environmental Matters*; and *Cooperative Principles for Environmental Assessment*.
12. Mehta, *Regulatory Efficiency and the Role of Risk Assessment*.
13. The EMFA was accompanied by ten schedules concerning: education, environmental assessment, standards, legislation, policy, emergency response, research, inspection, enforcement, international negotiations, and state of environment reporting.
14. Clark and Winfield, *The Environmental Management Framework Agreement*, p. 8.
15. Mittelstaedt, "Pollution Foes Attack Federal Plan," p. A8.
16. Mittelstaedt, "Ministers Reach Pollution Accord," p. A4.
17. *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.
18. House of Commons Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection*.
19. The priority substances for national standards are mercury, particulate matter, benzene, dioxins and furans, petroleum hydrocarbons in soil, and ground-level ozone.

Sub-agreements for enforcement, research and development, emergency response, and environmental monitoring are being negotiated.

20. The accord does leave open the door for joint, rather than rationalized, environmental assessments.
21. The CCME maintained sporadic contact with its Harmonization Advisory Group of stakeholders. However, there was no repeat of the national consultation workshop that effectively killed the EMFA. While the federal government and some provinces undertook their own consultations, other provinces argued that no additional consultations were necessary.
22. In addition to the standards, inspections, and environmental assessment sub-agreements expected to be finalized in January 1998, sub-agreements are planned for enforcement, ambient monitoring, emergency response, research and development, policy and legislation, international agreements, and state of environment reporting.
23. Canadian Council of Ministers of the Environment, *Canada-Wide Environmental Standards Sub-Agreement.*
24. Harrison, *Passing the Buck.*

PART ONE

Explaining Patterns of Intergovernmental Relations

CHAPTER 2

Intergovernmental Relations and Environmental Policy Making: A Cross-National Perspective

Debora L. VanNijnatten

INTRODUCTION: CANADIAN FEDERALISM, ENVIRONMENTAL POLICY, AND THE NEED FOR COMPARISON

The Meech Lake and Charlottetown Accord debacles demonstrated the inability of Canadian political elites to achieve agreement on large-scale constitutional reform of the federation. Some would argue that such reform is now impossible, given the aggressive independence of provincial governments and the difficulties inherent in garnering the support of various publics which expect to be consulted. Perhaps not surprisingly, observers and practitioners of Canadian federalism have shown much interest in intergovernmental administrative arrangements which downplay the more "political" questions of jurisdiction and emphasize lower key, "business-like" collaboration.

One policy sphere characterized by a particularly high level of experimentation in forms of intergovernmental collaboration, in Canada and in other modern federations, is that of the environment. In no federation is a single government given jurisdiction over "the environment" and different forms of ecosystem degradation are difficult to slot into existing jurisdictional divisions. Decision-making authority for environmental matters is thus more likely to be held concurrently or shared. Given the inevitable vagueness concerning which level of government is responsible for particular environmental tasks, conflict between levels of government, competition among subnational governments, or even independent action by governments can result. Further, the potential for the development of "patchworks" of varying environmental standards across a federation, thereby creating

"pollution havens" with less stringent regulations, is high. As a consequence, governments must work together to attain uniform, stringent environmental standards across their different jurisdictions.

Although it is important to look at the Canadian experience in this area,[1] examining the institutions and procedures that underpin the conduct of intergovernmental relations in environmental decision making in other federal systems can provide a broader perspective on the range of possibilities for intergovernmental interaction. In this case, it is useful to compare the operation of intergovernmental institutions in Canada with those in the parliamentary federations of Australia and the Federal Republic of Germany. More specifically, this chapter will assess the effectiveness of their intergovernmental institutions in three areas of environmental decision making:

- policy development, the process of negotiation and the decision rules for obtaining the agreement of all members of the federation to "national standards";
- policy outputs, the result of these negotiations and the extent to which they produce uniform, stringent standards; and
- policy implementation, the process of ensuring that standards are actually implemented and administered in a consistent fashion, including monitoring and the provision of penalties for non-compliance.

This chapter finds that, in the face of similar challenges posed by environmental policy making in all three federations, Canada and Australia are moving in the direction of the German model with its more formalized institutional arrangements and focus on allocating functional responsibilities in national standard-setting and implementation. Germany's intergovernmental institutions are thus particularly appropriate foci for examining challenges faced in Canada. Australia also serves as an important focus for comparison, as it appears that this country has progressed further down the road toward institutionalized, joint policy making than Canada and has been more successful in overcoming obstacles to reform within the federation. It is argued here, however, that the barriers to change in the Canadian federation are more daunting.

The following chapter is divided into two main sections. The first provides the reader with a brief, comparative look at intergovernmental relations and institutions in the Canadian, Australian, and German federations, with particular reference to environmental policy. The second section examines the effectiveness of intergovernmental institutions in the three federations in reaching agreement on national environmental standards, ensuring that high standards result from such agreements, and implementing these standards. Germany's functional federal

system scores relatively high in all three areas. The need to obtain the agreement of a majority of Länder in the Bundesrat for federal legislation requires constructive discussions of policy priorities in intergovernmental forums. In addition, intergovernmental institutions can act to channel competition in an "environmentally friendly" manner and the implementation of outputs is highly coordinated. On the other end of the spectrum of intergovernmental effectiveness, discussions in the Canadian Council of Ministers of the Environment (CCME) have resulted in considerable interaction but disappointing policy outputs. The limited results reflect the extensive policy-making authority of the provinces vis-à-vis the federal government as well as decision-making rules requiring unanimity. Consistent with this, the implementation of CCME agreements is discretionary and variable. It is as yet unclear to what extent the Canada-Wide Accord on Environmental Harmonization will change the dynamics and products of intergovernmental collaboration in Canada, although it is unlikely to lead to radical departures from past practice. The Australian case provides more grounds for optimism. Prior to their 1992 Intergovernmental Agreement on the Environment (IGAE), intergovernmental decision making in Australia was conflictual, largely ineffectual and also non-binding. Independent action on the part of individual governments occurred frequently. The IGAE, however, has created potentially effective mechanisms for formulating as well as implementing national standards.

JURISDICTION AND INTERGOVERNMENTAL INSTITUTIONS FOR ENVIRONMENTAL DECISION MAKING: A COMPARATIVE OVERVIEW

This section provides a brief, comparative overview of jurisdiction, intergovernmental relations and collaborative institutions governing the environment in the Canadian, Australian, and German federations. As the Canadian case is given detailed attention elsewhere in this volume,[2] this section will focus on how the Australian and German cases are similar to, or different from, the Canadian case.

Jurisdiction and Intergovernmental Relations

What becomes immediately apparent when examining the three federations is that, at a most basic level, the premise underlying intergovernmental relations in Canada and Australia is quite different from that in Germany. In Canada and Australia, it is the practical requirements and complexities of environmental policy making which have necessitated cooperation among governments who otherwise expect to make and implement policy in jurisdictionally separate areas. In fact, it is the expanded activities by national governments in Canada and Australia in

areas where provincial and state governments have traditionally exercised constitutional authority — namely the management of natural resources and protection of environment — which has served to increase the need for greater cooperation. By contrast, cooperation among the national and state governments in Germany is dictated by the formal-legal requirements of its functional federal framework.

Australia's federal system is based, like Canada's, on the principle that the jurisdiction of the federal (Commonwealth) government and the six state governments is set out in the constitution. The distribution of powers in Australia is different from Canada, however, in that all federal powers are specifically enumerated and residual power resides with the states. Despite this, in terms of legislative powers, the Australian states are weaker and more fiscally dependent on the federal government than are the Canadian provinces. As a parliamentary federation like Canada, Australia also exhibits characteristics of executive federalism. Although the Australian states are represented in the Commonwealth Parliament in an elected Senate with equal representation for each state, the main forum for intergovernmental relations is a set of separate, extra-parliamentary institutions in which executives bargain.

The Australian federal government, like its North American counterpart, does not have exclusive formal powers to manage and regulate environmental matters. The states have substantial jurisdictional claims over natural resources, land-use planning, and nature conservation, while the Commonwealth has traditionally focused on providing common standards, research assistance or funds for some resource conservation activities.[3] The Commonwealth can exercise influence over the environmental policies of the states by means of certain enumerated powers and fiscal provisions which give it the ability to specify the terms and conditions of grants to the states.[4] As a result, "the practical reality in Australia is that the constitutional framework gives the states extensive jurisdictional powers over land-use management, but the Commonwealth still holds 'most of the trumps.'"[5]

The extent to which these "trumps" can be played, however, is a sensitive issue. During the early 1970s, widespread public concern about the environment, new resource development and conservation needs as well as various international obligations encouraged the Commonwealth government to intervene more directly in environmental policy. Several important statutes relating to environmental matters were enacted which established a federal presence in environmental policy.[6] At the same time, a number of major controversies erupted concerning Commonwealth involvement in state environmental and resource management issues, leading to court battles and bitter political stand-offs between the two orders of government.[7] The resulting judgements tended to support federal activism yet actually did little to clarify the overall constitutional framework for environmental policy making and management.[8]

Following a quieter period over the late 1970s and into the 1980s, relations between the two levels of government worsened again toward the end of the decade with further attempts by the Commonwealth government to assume a more active role in protecting the environment. This time, however, stalemate between the two governments led to efforts aimed at increasing intergovernmental cooperation. Although recent constitutional interpretations have expanded further the scope of Commonwealth regulation of the environment, the regional governments continue to have significant, if not always primary, decision-making powers. As in Canada, it has been acknowledged that both orders of government have a role to play in the environmental policy field. In recent years, both the Australian Commonwealth government and the Canadian federal government have preferred to address interjurisdictional environmental issues through consultation and consensus-building with subnational governments, although the Australian national government has taken a more activist role in the environmental policy sphere than has the Canadian government.[9]

Whereas the starting point for central and subnational governments in Canada and Australia is whether and how they should be engaged in common decision making and policy negotiations, governments in Germany engage in such exercises as a matter of course. In Germany, the federal (Bund) and 16 state (Land) governments must cooperate, as the state governments are responsible for implementing policy formulated at the national level. The general distribution of powers includes an exclusive federal list, a short exclusive Land list and an extensive concurrent list, with the result that the bulk of legislation in Germany actually originates at the national level. It is enacted with the participation of the states (Länder) in the Upper House, or Bundesrat, comprised of representatives of the Land governments. The implementation and administration of most federal laws, however, are the constitutional responsibility of the Länder. Thus, German federalism is characterized by a *functional division of labour* within shared policy fields, and contrasts with the *jurisdictional federalism* that prevails in Canada and Australia.

In many policy areas, the Bund has the responsibility for formulating general principles by enacting "framework legislation," after which the Land governments fill in the necessary administrative detail through subsequent enactments. In addition, unlike the Canadian or Australian constitutions, the German Basic Law contains clauses bestowing responsibility on the Bund to set "national standards," and to legislate to achieve "uniformity of living conditions beyond the territory of any one Land."[10] The Bund has certain constitutional means, then, for exercising influence over the activities of the Länder.[11] However, it should be emphasized that national policymakers must obtain the agreement of the Länder in the Bundesrat to almost all policy initiatives and must take into account their

administrative needs. In this way, the constitutional and institutional structures of the German federation necessitate continuing and close cooperation between the levels of government, to the extent that "the federal and Land governments hardly make any decisions alone anymore."[12] The two levels of government are deeply entangled in the business of policy making.

Specifically with respect to environmental matters, the federal government has the right to enact framework provisions concerning the protection of nature, and land and water utilization, while responsibility for waste management and air quality are held concurrently by the Bund and the Länder. Beginning in the early 1970s, the German federal government took the lead in environmental policy making.[13] This legislative activity on the part of the Bund became controversial during a period of economic stagnation in the mid-1970s, when environmental requirements were regarded by the Länder as restricting economic development. However, after environmental issues became the subject of intense public debate in the early 1980s and the Green Party achieved electoral success at the Land level, the Länder actually began pressing the Bund to enact more restrictive environmental regulations.[14] Thus, both levels of government are actively involved in environmental decision making as a result of both political and constitutional factors.

Intergovernmental Institutions

In keeping with the Bonn Republic's explicit requirements for cooperation among the national and Land governments, Germany's network of intergovernmental institutions is more formally constituted than that in Canada or Australia. In fact, the formal framework of governing institutions in Germany, especially the Bundesrat, acts as the nucleus around which other less formal institutions are active. In effect, the status of the Länder in national institutions provides the basis for intergovernmental discourse. This representation of subnational governments within the institutions of the central government has been described as "intrastate" federalism and can be distinguished from the "interstate" form of federalism that is dominant in other federations, notably Canada.[15] It should be noted that Australia and Canada do differ in this respect, as the Australian states have elected representation in the Upper House.

With few constitutionally independent jurisdictions in the German federation, the system requires a high degree of intergovernmental coordination and a variety of institutions to support cooperation between the Bund and Länder have been established. In fact, it has been observed that, "No other federation has as many institutions and processes for intergovernmental cooperation, consultation and consensus-building, and none involve the constituent units so integrally in federal decision-making."[16]

The keystone of the system is the Bundesrat, composed of delegates of the Länder acting on instructions from their respective governments. These delegates, in turn, bring a national perspective into the policy process within each Land. Draft policy proposals are reviewed by the relevant standing committees and their subcommittees in the Bundesrat even before they receive first reading in the elected Lower House, or Bundestag. The Bundesrat exercises a suspensive veto over federal legislation generally and an absolute veto over that federal legislation which the Länder are responsible for implementing (i.e., most of it). Supporting the Bundesrat, or the legislative process in which it is a key participant, are the "missions" of the Länder to the federation. These Länder offices in Bonn are the nucleus of working relations between the two levels.

However, the need for extensive cooperation between Bund and Länder institutions and among the Länder themselves cannot be fulfilled by the Bundesrat alone, which is a federal organ for the participation of the Länder in the national policy process and does not actually coordinate ongoing Bund-Länder and inter-Länder policy activities.[17] Institutions that support ongoing cooperation among the states are the network of 14 "conferences of equivalent ministries," each covering a broad policy area (e.g., Finance, Health, Education). As with ministerial councils in Canada, each German conference consists of ministers from relevant departments at both levels. Moreover, similar to the Canadian case, the conference is aided by senior officials from the relevant ministry, though in the more institutionalized form of a parallel "conference of administrative heads" which discusses matters of joint concern and formulates resolutions to be voted on by the ministers. The administrative heads are supported by a vast array of permanent and ad hoc committees, subcommittees and working groups, which have been collectively referred to as a "grey area" where substantive matters are addressed and, in many cases, negotiated.[18] Of particular note is that the terms of reference and operating practices of some of the conferences are set out in legislation.

More specifically for our purposes, the German Conference of Environment Ministers is one of the most formal of the ministerial conferences in terms of its operating practices. Although this conference has no statutory basis, its Standing Orders specify that it meet twice yearly for a two-day period and that supporting documentation of agenda items are provided 14 days prior to a meeting. Resolutions of the conference require unanimity, as do resolutions of almost all other conferences. In this regard, the German conferences are the same as ministerial councils in Canada, including the CCME. The Chair rotates annually among the 16 Länder and the host Land also provides a secretariat. Unlike Canada, the central government acts as an observer in the conference, rather than as an active participant.

In comparison, Canada and Australia rely more on informal or semi-formal intergovernmental arrangements than does the Federal Republic. Intergovernmental relations in Canada and Australia take place largely among executives and their officials outside the formal-legal order in institutions which are only now in the process of becoming more formalized. Thus, in these countries, Chapman's definition of intergovernmental arrangements as "moderating institutions, meaning bodies formed outside the formal framework of governing institutions" is apposite.[19]

Over the years, Australia has developed an elaborate system of federal-state "ministerial councils" for joint decision making, as in Germany and Canada.[20] The councils range in their level of activity and institutionalization and have been described as forums in which "the stuff of decisions is put forward and digested."[21] The councils do not make "executive decisions," though they may make formal recommendations to the Commonwealth and state governments. Unlike Germany, few Australian councils have a permanent secretariat and those that do exist are located at the national level, which may lend a distinctly Commonwealth flavour to their operations. However, as is the case in both Germany and Canada, Australian councils are supported by a plethora of committees and subcommittees of Commonwealth and state officials, often permanent department heads, which organize council affairs.[22]

Two ministerial councils were instituted in the 1970s to standardize practices in the environmental policy sphere and provide for the exchange of views: the Australian Environment Council and the Council of Nature Conservation Ministers. These two bodies were amalgamated in 1991 to form the Australia and New Zealand Environment and Conservation Council (ANZECC).[23] The ANZECC meets a few times a year and its decision-making procedures are based on consensus. The chair rotates annually amongst member governments, in accordance with an agreed schedule. The council has a permanent secretariat and two standing committees on Environmental Protection and on Conservation, composed of senior officials of member governments.

At a 1990-91 Special Premiers' Conference, Australian Prime Minister Hawke noted that, "the environment must increasingly become an area in which common ground and common purpose come to replace controversy and confrontation" and governments should work together for "commonly agreed environmental processes and guidelines."[24] In May 1992, Commonwealth and state officials signed an Intergovernmental Agreement on the Environment (IGAE) which: defined the roles and responsibilities of Commonwealth, state, and local governments in environmental protection; established a framework for accommodating the interests of one level of government in the execution of the responsibilities of another; and established protocols for addressing specific areas of environmental policy and

management as well as general principles to guide national environmental policy making.[25] A new intergovernmental institution, the National Environment Protection Council, would take action in areas which do not fall within discrete federal-state jurisdictional boundaries.[26] The council would consist of ministers nominated by each of the governments, with the Commonwealth minister acting as chair, and decisions would be made by a two-thirds majority of members. Moreover, the council would be aided by a Service Corporation (consisting of executive officers on secondment from member governments), a standing committee of officials and other committees formed as required. The council was actually brought into existence in 1996 through complementary Commonwealth and state/territorial legislation (although the State of Western Australia declined to participate at that time) and had its first meeting in June of that year.

As is evident from the above discussion, the different incentive structures underpinning intergovernmental relations in the three countries are played out in the construction and operation of specific intergovernmental institutions. Intergovernmental relations in Germany take place on a backdrop of formalized, functional entanglement that is not matched in the Canadian and Australian systems where the original premise was to divide decision authority according to discrete policy areas and largely avoid functional entanglement.

However, a certain amount of entanglement is unavoidable in federations generally, and in environmental policy making in particular, as pointed out at the beginning of this chapter. Canada and Australia have thus sought to develop institutions and procedures for dealing with this entanglement. In fact, developments in environmental policy making in both the Canadian and Australian contexts indicate a tendency away from focusing on policy *jurisdiction* and toward apportioning policy *functions* to different levels of government, such that policy goals are set jointly while implementation and enforcement take place in the constituent units. This focus on function is evident in the recent harmonization exercise of the Canadian Council of Ministers of the Environment and in Australia's IGAE. Thus, an examination of Germany's functional federal system, with its formalized intergovernmental institutions, as well as the currently developing institutionalization in Australia, can aid in understanding the challenges faced in the Canadian context.

INTERGOVERNMENTAL COOPERATION IN CANADA, AUSTRALIA AND GERMANY: SOME COMPARATIVE OBSERVATIONS

This second section examines the effectiveness, or potential effectiveness, of the intergovernmental institutions described above in the development, implementation,

and enforcement of nationally applicable, stringent standards for environmental protection in Canada, Australia, and Germany. The process of setting priorities for the country as a whole and formulating "national standards"[27] is made difficult by the challenges associated with obtaining the agreement of all members of the federation to a set of standards and at the same time ensuring that this negotiation process does not result in minimal standards. Moreover, it is necessary to ensure that these standards, once developed, are actually implemented and enforced in a consistent fashion.

The Policy Development Challenge

There are a number of key questions which may be asked concerning the process of developing national standards for environmental protection in the three federations. Do the respective processes facilitate reaching agreement or is it easy for individual governments to slow decision making or to veto decisions reached? What is the decision rule, if any? Are formal agreements actually reached or do the processes become mired in endless discussion? Finally, are conflict between various governments and independent action on the part of individual governments minimized?

Creating the conditions necessary for the establishment of national standards is, in part, a function of the nature of the process used to establish national standards, itself structured by basic features of the intergovernmental collaborative institutions in an individual federation.[28] In Germany, the need to obtain the agreement of a majority of Länder in the Bundesrat to federal legislation drives relatively constructive discussions of policy priorities in all intergovernmental forums. Emphasis is placed on eliminating Länder objections before a vote, which can lead to protracted, but often effective, negotiations. In Canada, and in Australia prior to the IGAE, the greater policy-making authority of the provinces/states and decision-making rules requiring unanimity in ministerial forums have resulted in non-binding, often ineffectual decision-making processes subject to the vagaries of domestic politics within constituent units. The decision mechanisms set out in the IGAE may increase the effectiveness of intergovernmental decision making in Australia, however.

In Germany, intergovernmental consultation occurs in numerous forums in anticipation of the Länder's formal ability to send a legislative initiative back to the federal ministry for revision or, in some cases, veto it. Especially in the face of a possible veto, it is necessary that most policy differences are worked out prior to an Upper House vote on legislation. A current policy problem might be discussed in the Conference of Environment Ministers in the early stages, whereby differences in policy stances are examined first in the Conference of Administrative

Heads and its specialized committees and then in the Conference of Ministers. Then, or perhaps simultaneously, the Länder participate in the detailed drafting of bills through interchanges between their environment ministries and the federal department drafting the legislation. These interchanges are facilitated by officials in the Länder missions in Bonn. The legislation is then submitted for formal scrutiny by the Länder in the relevant subcommittee(s) and parent committee(s) in the Bundesrat. Thus, the Bundesrat is "the visible tip of a larger iceberg of intergovernmental consultation."[29]

There are certainly obstacles to achieving a Bund-Länder consensus on environmental standards. The principle of unanimity applies to all decision making in the Conference of Environment Ministers and, as a consequence, discussions can be protracted and complex, as a result of diverging party alignments as well as diverging interests between rich and poor, and now between east and west, Länder. Yet the Conference of Environment Ministers is less active in the setting of policy goals than it is in the coordination of Länder implementation strategies. In fact, the conference terms of reference specifies that it cannot make decisions on initiatives under active consideration by the Bundesrat.[30] Indeed, it is the Bundesrat which works to develop and sustain a consensus for the achievement of national standards through its extensive committee system. Other channels of intergovernmental negotiation[31] feed into the Bundesrat system. It is certainly the case that the Bundesrat can be "the single greatest obstacle to achieving such standards,"[32] especially when, as has been the case in the recent past, it is dominated by representatives of the opposition party. It should be noted, however, that the Bundesrat finalizes decisions on the basis of majority vote, rather than unanimity, and decisions do not require the explicit support of each Land.

Unlike Germany, intergovernmental relations in Canada are dominated by interactions among federal and provincial executives outside central institutions and resemble more a meeting of government heads. The Canadian Council of Ministers of the Environment (CCME), the main intergovernmental forum in matters environmental, operates on the basis of consensus decision making and the chair rotates annually among the 11 federal and provincial ministers. The considerable strength and independence of the Canadian provinces — due to their size and number, the presence of the "Quebec factor" which has no analogue in Australia or Germany, the tradition of anti-Ottawa sentiment and province-building in Alberta and British Columbia, and provincial control over the all-important natural resource economy — is evident within the CCME. Here the provinces are placed on equal footing with the federal government and are in a relatively strong position to resist federal proposals. Perhaps not surprisingly, the federal government has frequently demonstrated a reluctance to interfere with provincial decision making affecting the environment, for fear of provoking separatist sentiment in

Quebec or clashing with provinces highly dependent on natural resource revenues.[33] It is these dynamics which underlie CCME discussions, rather than the presence of different political parties in the constituent units and at the federal level, as is the case in Germany.

Observers of intergovernmental relations in Canada have wondered if these dynamics would change with "harmonization," an initiative undertaken by the CCME "to clarify roles and responsibilities with a view to improving accountability and allowing each government to better focus its environmental activities."[34] In a departure from past practice, the 1995 Environmental Management Framework Agreement (EMFA) adopted a functional approach to the allocation of roles, focusing on who should perform tasks in areas such as compliance, environmental assessment, international agreements, monitoring and environmental education.[35] At the time, some feared that the practical effect of this allocation of responsibilities under the EMFA would be to devolve responsibility for environmental matters to the provinces and further fragment the environmental protection framework. With respect to national standards, the EMFA provided for the establishment of a National Coordinating Committee of member government representatives to oversee standard development and implementation.[36] The committee would have operated, as the CCME does, on the basis of consensus, which was also widely regarded as a barrier to effective standard-setting. Similar concerns have been expressed about the revised harmonization agreement, the Canada-Wide Accord on Environmental Harmonization,[37] which received agreement-in-principle from the 11 ministers in November 1996 and was formally approved in January of 1998. The accord's standards sub-agreement states merely that "Ministers will agree on a process for the development of standards on a case by case basis."[38] Such a process "could include a process internal to the Canadian Council of Ministers of the Environment, or could include other agreed-upon fora."[39] Decisions also would require the endorsement of all 11 governments.

As in Germany and Canada, the Australian Environment Council, the Council of Nature Conservation Ministers and, more recently, the Australian and New Zealand Environment and Conservation Council (ANZECC)[40] operated on a consensus basis, such that individual state governments or the Commonwealth could veto or even simply ignore decisions. Political/partisan considerations have traditionally played a significant part in the deliberations of the ministerial councils, thereby making discussions difficult. Walker has described the Australian Environmental Council and the Council of Nature Conservation Ministers as "largely talks-shops, easily vetoed by any state that chooses to subvert a particular cause on ideological or expedient grounds."[41] He argues that state ministers pursued pro-development policies while acting as representatives on the council. Independent action on the part of individual states has been frequent. Also, the

effectiveness of the ANZECC has been limited by its rather ambiguous role as a simultaneously regional and international forum.

The terms of reference and structural features of the new Australian National Environment Protection Council (NEPC) may help overcome intergovernmental decision-making difficulties. The council, which fills a gap not currently bridged by any other intergovernmental structure and will work cooperatively with the ANZECC, *is a statutory body* established through complementary Commonwealth and state legislation. Moreover, the council was given the power to establish National Environment Protection Measures (NEPMs) — national objectives for protecting particular aspects of the environment — *on the basis of a two-thirds majority vote.* A NEPM will automatically become law in each participating jurisdiction once it is passed by two-thirds of council members, unless it is disallowed by either House of the Commonwealth Parliament. Thus, both the council's decision rule and its statutory basis contrast markedly with the CCME's unanimity requirement and less formalized structure. The impetus for reform came from a national government that had realized it was incapable of implementing the myriad of policies relating to the environment and was ready to move beyond the intergovernmental confrontation of the 1980s.[42] In addition, a majority rather than unanimity approach to environmental policy making through the IGAE was made more palatable to the states through a decision-making "trade-off": in exchange for losing veto power in NEPC deliberations, the Commonwealth promised to consult the states before the negotiation or ratification of any new international treaty on environmental matters, something long desired by the states. Moreover, High Court decisions throughout the 1980s had strengthened the position of the Commonwealth to act in some environment-related areas and the states realized that collaboration was unavoidable.

The effectiveness of the council, that is, whether it has the potential to become more than a "talking shop," will be difficult to judge until it has been tested in real policy-making exercises. The IGAE provides a mechanism for giving "full faith and credit" to systems, practices or processes agreed upon by both the Commonwealth and state governments. The different governments accredit the other's procedure or a modified procedure as the basis on which governments will exercise decision-making powers.[43] Specific schedules set out protocols for data collection and handling, land-use decisions and approval processes, environmental impact assessment, and the formulation of environmental protection measures (e.g., climate change). Moreover, signatories to the IGAE recognize that facilitating the cooperative development of national environmental standards is a Commonwealth responsibility, while the states have an interest and responsibility to participate in such development exercises.[44] Unfortunately, the new spirit of intergovernmental cooperation embodied in the IGAE suffered a setback at the end of

1993 when the newly-elected, anti-Commonwealth government in Western Australia withdrew from the agreement. Although Western Australia now appears to be participating in the NEPC, this episode indicates that national standard-setting under the IGAE will remain to a certain extent reliant on the goodwill of and domestic politics within states.

Policy Outputs

The presence of institutions for intergovernmental decision making means little in terms of environmental stringency if this consensus-building usually results in policy outputs embodying minimal standards to meet the objections of constituent governments. What the concerned observer wants to know is whether the process of negotiation and accommodation is likely to lead to a "bidding up" of environmental standards to match those of the more ambitious constituent units, or to a reduction of standards to the "lowest common denominator." Does intergovernmental cooperation and the absence of conflict work in the direction of stringency or does it operate to encourage, even sanction, inaction? As Harrison notes in the first chapter, it cannot be assumed that cooperation among governments in a federation is always beneficial in terms of policy outputs. Indeed, it may be that cooperation masks inaction. In fact, competition in actual patterns of intergovernmental relations might be channeled in such a way that it benefits the environment, for example, one state or province might enact stringent regulations which places pressure on others to act. This is the case in Germany, where intergovernmental institutions have acted to channel competition between the Bund and Länder such that "environmentally friendly" outputs may result. On the other hand, although the CCME has succeeded in institutionalizing intergovernmental cooperation in Canada, policy outputs have been disappointing. In Australia, despite past practices and policy outputs which resembled those of the CCME, there appears considerable potential for the formulation of effective national standards through cooperative arrangements in the IGAE.

Benz argues that intergovernmental institutions in Germany have served to intensify pressure for effective environmental legislation, because Länder governments, under pressure at home to protect the environment, have formulated far-reaching proposals which they then introduced into intergovernmental processes.[45] The strength of the Green Party in a number of Länder, as well as the environmentalist inclinations of the opposition Social Democratic Party (SPD), serve to strengthen scrutiny of federal environmental bills in the SPD-dominated Bundesrat. It is often the case that Bundesrat proposals for revisions result in a strengthening of environmental provisions. For example, when the Bundesrat was considering a new federal law aimed at reducing packaging waste in the early 1990s, the states

demanded stricter measures than those proposed. Relatively few bills have actually failed because of Länder opposition in the Bundesrat, although many have been revised in light of Länder concerns. The federal government generally takes great pains to formulate bills which are acceptable to the Upper House.

If intergovernmental institutional interactions in the German Bundesrat result in legislated, often "beefed up" measures for environmental protection, by contrast, agreements emanating from the CCME have been non-statutory, broader accords setting out guidelines and providing support for cooperative action. For example, the 1990 *Statement of Interjurisdictional Cooperation on the Environment*, the 1991 *Cooperative Principles for Environmental Assessment* and the 1992 *Draft Framework for Environmental Assessment Harmonization* outline what member governments "should do" to manage the environment and, to varying extents, set out model procedures for implementation. There have been some ambitious issue-specific agreements with laudable goals, including a National Contaminated Sites Remediation Program, a National Packaging Protocol, Canadian Water Quality Guidelines, a National Action Plan to Phase out CFCs and a NOx/VOC Management Plan. Yet these agreements set out goals or statements about principles and roles, rather than uniform, binding standards. Thus, for example, drinking water in Canada continues to be regulated through national standards voluntarily implemented at the provincial level, rather than through minimum legal standards.[46] Similarly, the goals set out in the National Packaging Protocol have been disregarded by provinces choosing to regulate packaging waste in varying and often conflicting ways.[47] Moreover, CCME's Climate Change Action Plan has been cited by environmentalists as an example of "lowest common denominator" decision making.[48]

In fact, despite the huge number of bi- and multilateral federal-provincial accords which have piled up over the last two decades, the CCME has produced little in the way of meaningful "national standards." This has not escaped the notice of students of federalism in Canada. Harrison, for example, is dismissive of the role of CCME and argues that provincial support for the development of CCME standards stems largely from a desire to avoid the imposition of federal standards and to dilute federal influence by locating decision making in the 11-member CCME.[49] Elsewhere, she uses the case of pulp mill effluent regulation to show the difficulties encountered by the CCME when it actually attempts to harmonize disparate regulatory standards.[50] Holland describes intergovernmental decision making in the Canadian context as most often leading to "buck-passing, delays, inaction, rigidity, and piecemeal solutions."[51] Skogstad notes that, within the forums of executive federalism, "provinces have been able to bargain successfully for restraint of federal interference with provincial regulations."[52] Certainly, there are positive assessments of the CCME's activities.[53] Overall, however, it appears that the

CCME's activities have promoted intergovernmental cooperation in Canada, but stringent national standards have not resulted from this cooperation. Moreover, it seems unlikely that the Canada-Wide Accord will change this situation; the accord is replete with phrases such as "if a consensus is not achieved in any given area, governments are free to act with their existing authorities" and "all governments retain their legislative authorities."[54]

Neither has binding decision making been the rule in the Australian context, although this situation appears to be changing. As with the CCME, ANZECC outputs have taken the form of mainly political compacts expressing aspirations for a cooperative environmental policy-making framework. However, recent intergovernmental agreements have tended to be more detailed and more formally drafted. The IGAE, the most notable example of this trend, sets out basic principles and procedures for intergovernmental cooperation on environmental management, but is intended to be a working document for regular government decision making. The IGAE empowers the NEPC to establish and monitor the implementation of National Environment Protection Measures, which may consist of mandatory standards, goals (understood as desired outcomes), guidelines providing guidance on possible means of meeting desired outcomes (which are not mandatory), and protocols, or processes to be followed in measuring environmental characteristics to determine whether a standard or goal is being achieved.[55] Further, these measures are to incorporate the following principles for environmental management: the precautionary principle, intergenerational equity, and conservation of biological and ecological integrity.

The council had its first meeting in June of 1996, where members agreed to the development of a National Pollutant Inventory, a NEPM to ensure a consistent, national approach to setting air quality goals, national guidelines to provide a system for tracking hazardous waste across state and territorial boundaries, and national guidelines for assessing contaminated sites.[56] In February 1998, formal agreement was reached on the National Pollutant Inventory and larger Australian facilities began reporting emissions as of 1 July 1998.[57] The other NEPMs on ambient air quality, used packaging materials and assessment of contaminated sites are in varying stages of completion. Although it is much too early to make any judgements as to the efficacy of the IGAE and council, these instruments have the potential to contribute to the development of effective national standards in Australia.

Implementation

The implementation of nationally applicable standards requires the coordination of ongoing national and constituent unit policies, as well as adequate enforcement.

Once agreed to, how effective is the implementation of standards in the three federations? Are there any sanctions for non-compliance? How is implementation monitored? In Germany, the implementation of federal environmental legislation is highly coordinated through the Conference of Environment Ministers, while the implementation of ministerial agreements is discretionary and variable in Canada. In Australia, provisions in the IGAE set out a clear framework for the coordinated and uniform implementation of environmental protection measures, though some political and legal obstacles to implementation remain.

With common guiding principles to promote environmental protection set at the centre, the Länder act as "agents, through supplementary regulations, to complete and fulfil the requirements of federal laws."[58] The Länder discuss the harmonization of their implementation and administration of national requirements primarily in the Conference of Environment Ministers, which is specifically concerned with coordinating Länder administrative activities. These discussions are less controversial than those dealing with the setting of standards and the federal government usually has observer status only. Information and experiences from the departments are exchanged and directives for the implementation of federal laws are agreed upon.[59] Information exchange is formalized through the Bundesrat committee system and in the committees and working groups of the Conference of Environment Ministries. In some cases, the Bund and Länder have reached administrative agreements requiring that Conferences consult with various advisory/expert bodies, as well as among themselves. For example, the Conference of Environment Ministers invites as observers the secretary of the Bundesrat environment committee, the federal health minister and a representative of the Council of Experts on Environmental Questions. The host Land is also responsible for briefing officials from other conferences.

In many cases, model legislation is developed, which is then implemented by all Länder.[60] Laufer argues that there is such a high degree of coordination, brought about especially through the conferences, that conference activities threaten the independence of the Länder.[61] Although the administrative agreements reached by the Länder environment ministers are not legally binding, they nonetheless serve to bring about a unitarisation of those few Länder policy activities which still remain within their jurisdiction. Indeed, the compulsion for unitarisation is great; it is the responsibility of the Länder to meet federal legislative goals and to comply with the constitution's demand for "uniformity of living conditions."

In Canada and Australia, the implementation of decisions reached in ministerial councils has depended on the respective governments exercising their executive powers at home consistently with the principles adopted by the councils or expressed in the agreements.[62] The prevailing view in both countries has been that intergovernmental agreements are policy instruments not intended to have legal

effect or to be enforceable in court.[63] In Canada, the CCME cannot impose its suggestions on its members as it has no authority to implement or enforce legislation.[64] Each jurisdiction decides whether and how to adopt CCME agreements. In an early example, the 1992 *Draft Framework for Environmental Assessment Harmonization*, while outlining mechanisms for federal-provincial coordination of impact assessment procedures, nevertheless assumed that each party makes its own decision after the assessment and separately takes responsibility for monitoring compliance. Similarly, the Environmental Assessment Sub-Agreement to the Canada-Wide Accord states that, after an assessment is performed, "each Party retains the ability to make decisions respecting the proposed project and to issue or refuse permits, licenses, funding, or other authorizations with regard to a proposed project."[65] Although the CCME speaks generally of governments being "more accountable for meeting standards"[66] under the accord and notes that "each government will undertake clearly defined responsibility for environmental performance and will report publicly on its results,"[67] implementation of standards reached under the accord is not mandatory.

It should be noted that CCME agreements have become progressively more specific and quasi-contractual in form. This raises the question of whether such agreements may be granted legal enforceability in the courts in the future. In this volume, Lucas and Sharvit discuss the standards sub-agreement of the Canada-Wide Accord and conclude that it is unlikely that this agreement could be enforced either directly by governments party to the agreement or indirectly through the actions of third parties. Moreover, even if this and other agreements under harmonization were enforceable, it is doubtful whether this enforcement would be uniform or vigorous. Webb's chapter shows that current enforcement activities by provincial governments under the statutory provisions of the federal *Fisheries Act* are uneven and diverse. In addition, he finds that intergovernmental cooperative arrangements for enforcement have little visibility; some officials in his study were not even aware of the existence of such agreements. Indeed, scholars of Canadian federalism have noted that provincial sensitivities concerning federal intrusion into areas traditionally perceived as under their jurisdiction, as well as the ever-present spectre of Quebec nationalism, have encouraged the federal government to leave enforcement activities to the provinces and avoid taking the kind of effective enforcement action one might observe in the American context.[68] This has led in the past to weak and uneven patterns of enforcement.[69]

Intergovernmental administrative arrangements for environmental management in Australia have been similarly criticized. Both the Commonwealth and state governments have considerable scope to act independently of, or to unilaterally destroy, such arrangements. Kriwoken uses the example of the intergovernmental Great Barrier Reef Marine Park Authority to show that arrangements for

cooperative management can fall prey to the partisan or economic objectives of different governments and that even legislation governing these arrangements could not guarantee the compatible use of environmental resources.[70] Similarly, Davis notes that there are considerable variations in environmental management practices between the Australian states, which he attributes to the personalities of premiers and the ideology of the party in power.[71] To the extent that there has been some convergence of practice at operational levels in land-use management and nature conservation, this is often linked to professionals in the state and federal bureaucracies "who have in modest ways advanced natural resource management within the past decade."[72] Kellow argues that the Commonwealth government simply lacks the capacity to enforce its decisions.[73] He attributes the inability of the Commonwealth government to exert its control over land-based resources under the *Great Barrier Marine Act* to a dependence on state governments for information and enforcement resources.

Yet not all attempts at implementing intergovernmental agreements in Australia have been unsuccessful, as the example of the Murray-Darling Basin Commission shows.[74] In fact, the IGAE and the new council bear some resemblance to the Murray-Darling Basin Commission in structure and process.[75] The establishment of boards, commissions or agencies — tasked with carrying out agreed upon environmental goals, comprising representatives of the national and subnational units involved, and often reporting to a ministerial council — is very much in the Australian federal tradition. However, the NEPC may prove a very different creature.[76] The IGAE was officially signed by all the first ministers and has been described by one legal scholar as "pseudo-legal (one is tempted to say pseudo-constitutional)."[77] Indeed, signatories to the IGAE agreed to develop legislation establishing mechanisms for the application of agreed National Environmental Protection Measures. The legislation ensures that any measures established by the council will apply as valid law in each jurisdiction and will replace any existing measures dealing with the same matter.[78] Moreover, the IGAE states that the Commonwealth and states are responsible for attaining and maintaining agreed national standards and complying with national guidelines and that "a uniform hierarchy of offenses and related penalty structures" will be established under any agreed law.[79] Annual reports from the NEPC must be tabled in all parliaments, which may help to ensure that governments take their commitments to the NEPC seriously.

Some implementation difficulties may arise, however. It has been pointed out, for example, that there exists a lack of statutory authority for the cooperative agreements provided for in IGAE's schedule on environmental impact assessment and that state legislation contains no express provisions for entering into such arrangements. Thus, the implementation of such agreements may encounter

legal problems.[80] In addition, the implementation of agreements may be jeopardized by the assertion of states' rights by newly elected governments who were not party to the drafting of specific agreements.

INTERGOVERNMENTAL COOPERATION ABROAD AND THE CANADIAN CASE

An integrated approach to achieving environmental protection must include mechanisms for effective interjurisdictional cooperation, as the interrelatedness of environmental questions should be reflected in the institutions designed to manage them. This is especially challenging in federal states, where there is already considerable fragmentation of decision-making authority. At the same time, the federal form of government offers immense flexibility and a capacity to tolerate a variety of institutional arrangements, as is evident from the above discussion of intergovernmental institutions in Canada, Australia, and Germany.

As is always the case with cross-national comparisons, one must be cautious in drawing conclusions based on comparison of intergovernmental decision processes. Each federation operates according to quite different organizing principles and their respective structures vary markedly in certain respects. Nevertheless, because environmental policy making presents similar challenges to the German, Canadian, and Australian federations and because Canada and Australia appear to be moving in the direction of the German model with its more formalized institutional arrangements and its focus on allocating functional responsibilities in environmental protection, there is a basis for comparative reflections.

This chapter has examined the effectiveness and/or the potential of intergovernmental institutions in the three federations in three areas: reaching agreement on national standards; ensuring that high standards result from such agreements; and implementing these standards. Germany's functional federal system scores relatively high in all three areas. The need to obtain the agreement of a majority of Länder in the Bundesrat to federal legislation drives constructive discussions of policy priorities in intergovernmental forums. In addition, intergovernmental institutions have acted to channel competition in an "environmentally friendly" manner and the implementation of these outputs is highly coordinated. The Canadian case is less inspiring. CCME activities have been characterized by a considerable degree of cooperation, yet the results of these activities have been disappointing, both in term of policy outputs and their implementation. Prior to the 1992 Intergovernmental Agreement on the Environment, intergovernmental decision making in Australia was also conflictual, largely ineffectual and nonbinding. Independent action on the part of individual governments occurred frequently. Reforms set out in the IGAE, however, have the potential to increase the

effectiveness of intergovernmental decision making as well as the implementation of these decisions.

One question that arises from the above discussion is why Canada appears not to have progressed as far down the road as Australia toward rationalized, joint policy making. It is interesting to note that during the process of drafting the initial harmonization document, the EMFA, Canadian officials studied the IGAE as a model for structuring intergovernmental environmental cooperation in Canada.[81] In fact, the EMFA did bear some similarity to the earlier Australian document, but key features of the IGAE did not appear in the EMFA or its successor accord. Most importantly, the Australians managed to equip their new National Environment Protection Council with a statutory basis and a majority decision rule, despite a context of considerable intergovernmental tension and frequent unilateral action by individual governments.

One might argue that there are particular obstacles to reform in Canada which are not present or are less significant in other federations. Holland, in comparing environmental policy-making experiences in Canada, Australia, and the United States, has observed that,

> If any of the three federations were to remake its constitution it is likely, with the possible exception of Canada due to the influence of the provinces, that the constitutive assembly would assign explicit regulatory authority over air, water, land, and natural resources to the central authority.[82]

The Canadian provinces are more powerful and independent than either the German or Australian states. Certainly the presence of the "Quebec question," as well as aggressive province-building tactics in Alberta and British Columbia, help to explain the strength of the constituent units within the Canadian federation.[83] In addition, the complex agenda of constitutional reform in Canada means that jurisdiction over the environment is not a priority item, assuming a constitutional amendment was even possible. Thus, there are political and constitutional obstacles to the establishment of a comprehensive and effective intergovernmental decision-making regime in the environmental policy area which do not exist in Germany and which are weaker or non-existent in Australia.

Moreover, it is important not to overlook factors in the Australian and especially the German case which may auger well for productive intergovernmental relations. For example, both Germany and Australia have a functioning Upper House which integrates subnational concerns into national level deliberations. In the German case, the Bundesrat is an integral part of decision making and the majority decision-making rule in the Bundesrat would seem to have a significant impact on the operations of intergovernmental machinery. Furthermore, the nature and structure of the German economy, rooted as it is in the manufacturing, technology, and service sectors, produces somewhat less regionally divisive dynamics

than the resource-based economies of Australia and Canada. In addition, in a country which is quite small relative to Canada and Australia but has a relatively large population and economy, the type of pollution problems which arise in the German case also require different, perhaps more immediate, government action. And finally, the German Green Party and environmentally sympathetic SPD play an important role in ensuring that environmental concerns appear on the political agenda and are acted upon. Australia and Canada have no such politically salient force for the environment.

It is as yet unclear to what extent the recently signed Canada-Wide Accord on Environmental Harmonization may change the dynamics and products of intergovernmental collaboration on environmental matters in Canada. A cursory assessment of its decision features does not reveal any striking departures from past practice and, indeed, one might conclude from the accord's emphasis on consensus and "flexibility" that we may see "more of the same" in future intergovernmental relations concerning the environment. In fact, some observers fear that the accord will result in further devolution of environmental protection responsibilities from the federal to provincial governments which are unwilling and unable to carry out these responsibilities. In this case, increased fragmentation of the environmental protection framework in Canada may result. On the other hand, it may be that federal and provincial governments in Canada can employ the lessons drawn from their own experience as well as the experiences of federations such as Australia and Germany — which face very similar challenges and which have developed workable institutional solutions — to forge a path to effective environmental governance.

NOTES

1. In terms of refining forms of intergovernmental cooperation in Canada, it is, of course, necessary to review recent experiments in Canada itself, as these are becoming ever more numerous. Indeed, one analysis of federal-provincial policy making assessed 16 case studies of cooperation in a variety of policy areas involving various types of policy activity and called for further research into this "new federal-provincial context." Sutherland and Knubley, *Case Studies in Federal-Provincial Analysis and Policy-Making*, p. 2.
2. See especially the introductory chapter by Harrison.
3. Davis, "Federalism and Environmental Politics," p. 2.
4. These Commonwealth powers include: the trade and commerce power (under which it can prohibit the import and export of natural resources); the corporations power (which allows it to control, having regard to environmental considerations, manufacturing, production or extractive processes); jurisdiction over federal lands and parks;

the power to make laws with respect to Aboriginal peoples; and the external affairs power (under which it has greater freedom than the Canadian federal government to negotiate and enter into agreements affecting the environment). Galligan and Lynch, "Federalism and the Environment," p. 154.

5. Ibid., p. 155.
6. Boer and Craig, "Federalism and Environmental Law in Australia and Canada," p. 303. Statutes dealing with environmental impact assessment, national heritage, the Great Barrier Reef, national parks and wildlife and Aboriginal land rights were enacted under the Whitlam government of 1972.
7. These issues concerned, for example, the protection of the Great Barrier Reef, hydro-electric development in Tasmania and uranium mining in the Northern Territory.
8. Galligan and Lynch, "Federalism and the Environment," p. 155.
9. Barrie, *Environmental Protection in Federal States*, p. 13.
10. *Grundgesetz.* Artikel 72(2).3.
11. Klatt, "Forty Years of German Federalism," p. 186.
12. Ibid., p. 189.
13. Benz, "Intergovernmental Relations in the 1980s," p. 214.
14. Ibid., p. 215.
15. Smiley and Watts, *Intrastate Federalism in Canada.*
16. Institute of Intergovernmental Relations, *Approaches to National Standards in Federal Systems,* p. 13.
17. Laufer, *Das föderative System der Bundesrepublik Deutschland*, p. 158.
18. Marheineke, "Federal Arrangements in Germany," p. 25.
19. Chapman, "Inter-Governmental Forums and the Policy Process," p. 103.
20. As of May 1994, there were 24 such councils (reduced from 45 in 1992), as well as seven specialized ministerial forums (e.g., The Great Barrier Reef Ministerial Council).
21. Chapman, "Inter-Governmental Forums and the Policy Process," p. 106.
22. At the apex of the system of ministerial councils is the recently created "Council of Australian Governments" which comprises the heads of the Commonwealth, state, territorial and local governments.
23. Commonwealth-State Relations Secretariat, Department of the Prime Minister and Cabinet, *Commonwealth-State Ministerial Councils: A Compendium.* May 1994. The new ANZECC was both a regional and international intergovernmental forum, which served to institutionalize earlier, more informal New Zealand-Australia cooperative relations on environmental matters. It should also be noted that other ministerial councils have responsibilities related to environmental management and interact with ANZECC, including the Australian Forestry Council, the Australian Soil Conservation Council, the Australian Water Resources Council and the more specialized forums of the Great Barrier Reef and Murray-Darling Basin Ministerial Councils. The latter two councils function in respect of particular resource regions crossing jurisdictional boundaries.

24. Galligan and Lynch, "Federalism and the Environment," p. 158.
25. Intergovernmental Agreement on the Environment, http://www.erin.gov.au/human_env/env_leg/igae.html, 12/10/96; Gardner, "Australian Developments in Intergovernmental Co-operation in Environmental Impact Assessment," p. 2.
26. These areas include: ambient air quality, water quality, general guidelines for the assessment of site contamination, environmental impacts associated with hazardous wastes, motor vehicle emissions, and the reuse and recycling of used materials. Galligan and Lynch, "Federalism and the Environment," p. 159.
27. National standards have been defined as "ways by which standards, norms, objectives and similar expressions of policy harmonization can be achieved on a federation-wide basis," in Institute of Intergovernmental Relations, *Approaches to National Standards in Federal Systems*, p. 2.
28. Ibid., p. 27.
29. Ibid., p. 49.
30. Geschäftsordnung der Umweltministerkonferenz vom 18./19. April 1991, geändert am 05./.06 Mai 1993, Auf. 6.3.
31. Institute for Intergovernmental Relations, *Approaches to National Standards in Federal Systems*, p. 22.
32. Ibid., p. 37.
33. Holland, "Introduction," p. 8.
34. Kennett, "The Environmental Management Framework Agreement," p. 1.
35. Ibid., p. 2.
36. *Environmental Management Framework Agreement,* Discussion Draft, October 1995, Schedule V, Article 6.2.
37. Mittelstaedt, "Pollution Foes Attack Federal Plan," p. A10.
38. *Canada-Wide Accord on Environmental Harmonization*, Canada-Wide Environmental Standards Sub-Agreement 5.2.1.
39. Standards Sub-Agreement 5.2.2.
40. It has been noted that, because New Zealand is a member of the ANZECC, it has had "an ambiguous role as a regional intergovernmental forum at both the subnational and international levels simultaneously, and this constitutes a potential problem for its effectiveness." Kellow, "Thinking Globally and Acting Federally," p. 151. ANZECC is not the only joint Australia-New Zealand councils; there are a number of such bodies.
41. Walker, *Australian Environmental Policy*, p. 230.
42. Kellow, "Thinking Globally and Acting Federally," pp. 148-49.
43. Gardner, "Australian Developments in Intergovernmental Co-operation," p. 2.
44. Intergovernmental Agreement on the Environment, Section 2.2.1. and 2.3.4. http://www.erin.gov.au/human_env/env_leg/igae.html, 12/10/96.
45. Benz, "Intergovernmental Relations in the 1980s," p. 215.
46. Tingley, "Conflict and Cooperation on the Environment," pp. 138-39.

47. VanNijnatten, "Institutions, Participation and the Nature of Public Policy."
48. Fitzsimmons, Director, Special Projects, CCME Secretariat, "Harmonization Initiative of the Canadian Council of Ministers of the Environment," p. B2. What is being referred to here is the perceived tendency of consensus decision making to lead to standards that are reflective of the most recalcitrant constituent units.
49. Harrison, *Passing the Buck*, pp. 143-44.
50. Harrison, "The Regulator's Dilemma," pp. 469-96.
51. Holland, "Introduction," p. 8.
52. Skogstad, "Intergovernmental Relations and the Politics of Environmental Protection in Canada," p. 115.
53. For example, Dwivedi and Woodrow, "Environmental Policy-Making and Administration in Federal States," pp. 282-83, argued that "despite the widespread perception of duplication and ineffectiveness, our review of the impact of overlapping jurisdiction in the environmental field has generally been positive." Others have pointed to the role of the Council in generally contributing to intergovernmental cooperation prior to the late 1980s and more specifically to the Council as instrumental in building trust among member governments (see, for example, Dupré 1985).
54. CCME Harmonization Initiative, Guide to the Canada-Wide Accord on Environmental Harmonization, http://www.ccme.ca/ccme/harmonization/plain.html, 04/24/98.
55. Commonwealth-State Relations Secretariat, The Department of the Prime Minister and Cabinet, *Commonwealth-State Ministerial Councils*.
56. Senator Robert Hill, Leader of the Government in the Senate, Minister for the Environment, "Developing National Environmental Standards," Media Release, 22 June 1996. http://www.erin.gov.au/portfolio/library/minister_env/mr22jun.html.
57. Information on all NEPMs currently in the formulation stage can be found at http://www.nepc.gov.au/geninfo.html.
58. Chandler and Zöllner, "Introduction," p. xiv.
59. Laufer, *Das föderative System der Bundesrepublik Deutschland*, p. 160.
60. Marheineke, "Federal Arrangements in Germany," p. 25.
61. Laufer, *Das föderative System der Bundesrepublik Deutschland*, p. 160.
62. Gardner, "Federal Intergovernmental Cooperation on Environmental Management," p. 7.
63. Ibid., p. 18.
64. About CCME Web page: http://www.ccme.ca/ccme/about.html. 12/10/96
65. Sub-Agreement on Environmental Assessment 5.10.0, http://www.ccme.ca/ccme/harmonization/ea.html.
66. CCME Harmonization Initiative, Guide to the Canada-Wide Accord on Environmental Harmonization, http://www.ccme.ca/ccme/harmonization/plain/html, 04/24/98.
67. Ibid.
68. Holland, "Introduction," p. 10; Tingley, "Conflict and Cooperation on the Environment," p. 140.

69. See, for example, Lundqvist, "Do Political Structures Matter in Environmental Politics?"; Giroux, "A Statement by the Canadian Environment Advisory Council on Enforcement Practices in Canada"; Skogstad and Kopas, "Environmental Policy in a Federal System"; and Skogstad, "Intergovernmental Relations and the Politics of Environmental Protection in Canada."
70. Kriwoken, "Great Barrier Reef Marine Park," p. 360.
71. Davis, "Environmental Management," p. 150.
72. Walker, *Australian Environmental Policy*, p. 231.
73. Kellow, "Thinking Globally and Acting Federally," p. 142.
74. The commission was established some time ago through complementary legislation of the Commonwealth and three state governments to address problems encountered by common users of the River Murray. The commission, composed of two commissioners from each government, reports to the Ministerial Council of Murray-Darling Basin Commission, itself composed of three ministers from each participating government holding portfolios for land, water, and the environment. A Secretariat, with a staff of 34, serves the council and the commissioners, drawing on the expertise of member governments in addition to using independent consultants. The ongoing activities of these structures are governed by an agreement signed by the participating governments. There is no formal surrender of decision-making authority to the commission, as minister and commissioners must receive approval from their governments before action is taken. However, its ongoing activities are concerned with managing natural resources for the entire catchment area. The Commonwealth plays a relatively limited role in this body, facilitating discourse, research, and organizational reform with little direction intervention.
75. Kellow, "Thinking Globally and Acting Federally," p. 150.
76. Chapman, "Inter-Governmental Forums and the Policy Process," p. 109.
77. Gardner, "Federal Intergovernmental Cooperation on Environmental Management," pp. 9, 22.
78. Schedule 4: 16(a)(b).
79. Schedule 4: 17, 18.
80. Gardner, "Australian Developments," p. 4.
81. Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," pp. 187-88. In an early CCME document entitled "Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles," (4) it was noted that "Ultimately the Framework could be embodied in an intergovernmental agreement similar in scope to an agreement signed by Australia's governments in 1992."
82. Holland, "Introduction," p. 2.
83. Ibid., p. 5.

CHAPTER 3

The Origins of National Standards: Comparing Federal Government Involvement in Environmental Policy in Canada and the United States

Kathryn Harrison

INTRODUCTION

A recurrent theme in the literature on social policy in federal states is that of the "race to the bottom" among subnational governments. From Oates' seminal work on fiscal federalism to Peterson and Rom's study of US state welfare programs, students of federalism have emphasized the need for national government involvement to prevent a race to the bottom among subnational governments.[1] Similar concerns emerge with respect to environmental policy. Replacing the fear that states will compete to lower benefits lest they become "welfare magnets" is the concern that states will compete to lower environmental standards, thus creating "pollution havens."[2]

While there has been considerable discussion of the perils of subnational policy making in these fields, there has been less attention to the empirical question of when federal governments actually get involved in setting national standards. Under what conditions do federal governments intervene to establish national standards, and when are they content to leave policy making to their subnational partners? This chapter addresses these questions by comparing the federal government role in establishing and implementing national environmental standards in two countries: Canada and the United States.

Since the early 1970s, the US federal government has been active in setting national standards for environmental quality and pollutant discharges. In so doing, the federal government has assumed a dominant role relative to the states,

directly regulating their own activities and coercing their participation in administration of federal environmental programs through a combination of inducements and threats. In contrast, the Canadian federal government has played a largely supporting role in the environmental field, conducting research and facilitating development of consensus-based national guidelines, but leaving the front-line task of regulating most sources to the provinces' discretion.

The chapter seeks to explain differences in the scope, form, and persistence of US and Canadian federal government involvement by examining the influence of public opinion, interest group pressures, government institutions, and the history of federal involvement in related policy fields in the two countries. The conclusion places greater emphasis on institutional differences than previous studies of comparative environmental policy, arguing that societal pressures are mediated by institutions that shape governments' responses.

THE CASE OF THE UNITED STATES

The 1970s: Federal Domination

As Vogel has observed, prior to the 1970s, "the American tradition of States' rights effectively precluded an expanded federal role in either pollution control or land use planning."[3] The federal government did begin to play a more direct role in regulating emissions from automobiles in the 1960s, largely at the urging of the industry, which feared the emergence of inconsistent state standards.[4] However, the federal government was more cautious with respect to stationary sources of pollution. Congress gently encouraged the states to take greater responsibility for the environment, typically via grants-in-aid and research in support of state programs, but did not test the limits of its own jurisdiction.[5]

This pattern of federal behaviour changed dramatically in the 1970s, when the US federal government moved aggressively into the environmental field. The shift in the relationship between the federal government and the states began with the *Clean Air Act* of 1970, which was closely followed by the *Clean Water Act* of 1972, the *Safe Drinking Water Act* of 1974, the *Resource Conservation and Recovery Act* of 1976, the *Toxic Substances Control Act* of 1976, and the *Clean Air Act Amendments* of 1977.

The *Clean Air Act* has been described as the "great watershed" in federal-state relations in the environmental field.[6] Since the Act served as a template for subsequent US federal environmental statutes, its characteristics warrant greater attention. First, the Act placed great emphasis on uniform national standards, including ambient air quality standards, and discharge standards for new stationary

sources, sources of hazardous air pollutants, and automobiles. Members of Congress justified national standards as necessary to preclude the emergence of "pollution havens," rather than on the relatively easier premise of mobility of pollutants across state boundaries.[7] The implication of this distinction was that federal involvement was thus called for even to address localized air quality problems.

A second innovative feature of the *Clean Air Act* that was emulated in later statutes was its degree of specificity. Rather than adhering to the historical practice of granting considerable discretion to the executive branch, Congress itself assumed the role of regulator, specifying procedures, deadlines, and even numerical standards for some sources.[8] The national ambient air quality standards established by the Act thus were more than lofty goals. The Environmental Protection Agency (EPA) was directed to ensure that healthful air quality was attained by 1975, and that deadline was backed by the threat of a "hammer provision" banning construction of all new sources in areas that failed to attain air quality standards after that date.

A third innovation of the *Clean Air Act* was its provision for so-called citizen suits. The Act authorized individuals or groups to sue EPA or individual polluters for failure to comply with any of the requirements and deadlines of the statute. This provision, and similar ones in all subsequent federal environmental statutes, reinforced Congress' detailed statutory directives for the executive branch.

Finally, although Congress retained the rhetoric of respect for state jurisdiction — asserting in the Act itself that "air pollution control at its sources is the primary responsibility of States and local governments"[9] — this statement "masked a dramatic shift in the allocation of power between states and the federal government."[10] Beginning with the *Clean Air Act*, the federal government assumed a hierarchical role relative to the states in the environmental field. "Congress sought both to enlist the states' assistance and to bend them to the federal will."[11]

The states were encouraged to assume substantial responsibility for implementation of the Act. They were given the option of enforcing federal regulations for new and hazardous sources, and of developing State Implementation Plans (SIPs) to achieve air quality goals by the deadlines specified in the Act. However, given the specificity of the statute, as Dwyer has noted, "much of what is left to the states is filling in the details."[12] If a state declined to participate, EPA was directed to develop and implement a federal plan for that state.

The threat of federal preemption thus provided an important inducement for state participation. Although what remained for the states may have been "details," those details had tremendous implications for economic development within the state, and most states preferred to make such critical decisions on their own. A further inducement was an offer of grants-in-aid for state air pollution control programs. However, perhaps more influential than these carrots were the sticks

included in the Act. States that failed to achieve air quality goals were threatened with discontinuation of federal grants for highway construction. In making this threat, Congress demonstrated willingness to link environmental objectives to a popular and large grant program in another policy area. Finally, hammer provisions such as the threatened construction ban would take effect whether it was EPA or the state that failed to achieve air quality goals.

This pattern of federal dominance of state environmental programs was maintained in other federal environmental statutes of the 1970s and 1980s, although there was some variation across statutes in the degree of flexibility granted to the states.[13] A critical distinction can be drawn between two facets of the federal-state relationship. First, federal environmental statutes typically induce state participation in implementation of federal programs and enforcement of federal regulations through conditional grants. Faced with conditions attached not only to new grants for program administration, but to long-standing capital grants such as those for highway construction and sewage treatment facilities, most states took advantage of opportunities to assume "primacy" in implementation of federal environmental laws.[14]

The second facet of the federal-state relationship is the direct federal regulation of the states themselves. National standards have been extended to activities traditionally falling to state and local governments, such as solid waste disposal, sewage treatment, and drinking water treatment. Although participation in administration of federal programs can be costly and time-consuming, it is adherence with this second type of mandate that generates the greatest costs for state and local governments, and accordingly elicits the most vociferous objections.

Federal domination of the states has not been as complete as it might seem. Lacking the resources to do the job itself, EPA has often been reluctant to reject state plans and enforcement programs or to impose penalties for even blatant violations of statutory requirements.[15] The states in turn sense EPA's vulnerability and "game" their plans and reports to EPA.[16] Citizen suits to challenge EPA and state delinquency are not always forthcoming, since environmental groups also lack resources to pursue every violation of the Act. Indeed, Congress itself has shown reluctance to impose its own blunt penalties, and has instead periodically extended deadlines. However, despite this room for manoeuvre, the basic framework remains one of federal domination of state programs.

The 1980s: The Reagan Assault

Although this framework has remained unchanged since the 1970s, there have been shifts over time in the extent of federal dominance of the states. Certainly the biggest story in the 1980s was the efforts by the Reagan administration to

pursue deregulation and decentralization of federal environmental programs. However, Congress successfully resisted the administration's proposals for legislative reform, and instead spent the late 1970s and early 1980s fine-tuning and in some cases strengthening the legislative framework established in the early 1970s. Although Congress tended to retreat from its original deadlines, it did not abandon its basic approach.[17] Indeed, as the quid pro quo for extended deadlines, Congress often added new and more detailed requirements for EPA, states, and individual polluters. Legislative activity continued unabated, occasionally over the president's veto, yielding Superfund (1980), the *Emergency Planning and Community Right to Know Act* (1986), and significant amendments to the *Resource Conservation and Recovery Act* (1986), the *Safe Drinking Water Act* (1986), and the *Clean Water Act* (1987).

When Congress rebuffed its proposals to reform environmental legislation, the Reagan administration instead pursued an administrative strategy to attain its goals. The administration appointed sympathetic individuals to key positions in the EPA. Reagan's first appointee as EPA administrator, Anne Gorsuch-Burford, "believed strongly that nearly all responsibility for environmental regulation should be devolved to the states, and she acted to put those beliefs into practice."[18] The administration thus pressed for greater delegation of environmental programs to the states, greater state discretion in administering federal programs, and reduced federal oversight of state activities.[19] Although EPA previously had often been reluctant to grant primacy to the states, during the Reagan administration delegation of programs doubled from 1981 to 1984.[20] Crotty has concluded that the states that most actively sought delegation included not only those most aggressive in pollution control, but also those least aggressive, the latter viewing primacy with relaxed federal oversight as an opportunity to sidestep federal requirements.[21]

The administration also pursued its goals through budget cuts. Between 1979 and 1983, federal government spending on pollution control and compliance fell by 60 percent. These cuts to EPA's budget provided additional incentives to devolve federal programs to the states. Federal grants to the states for air and water pollution control also fell, by 54 percent and 68 percent respectively between 1979 and 1988.[22] Thus, the renewed respect for state autonomy was accompanied by reduced financial support for state programs. The reaction from the states was mixed, but most did not fully replace the lost federal revenues from their own coffers.[23]

The Reagan administration certainly did not achieve the wholesale decentralization of environmental programs that it sought. Faced with a Congress unsympathetic to its proposed legislative reforms, the executive could only accomplish so much within the constraints of statutes that established clear mandates for both the executive and state governments. However, the administration's discretion did allow a partial shift of responsibility back to the states.

Although President Bush shared much of his predecessor's antipathy to regulation, he was more sympathetic to Congress' environmental goals. The Democratic-controlled Congress' inclination to create new environmental mandates for EPA and the states thus met with less resistance from the White House. Indeed, President Bush worked closely with congressional leaders to develop the massive *Clean Air Act* Amendments of 1990, legislation that further turned the screws on state governments by eliminating EPA's discretion to impose certain sanctions.[24] Ironically, in the end, more new intergovernmental mandates were signed in the 1980s, by Republican presidents committed to a "new federalism," than in the 1970s.[25]

The 1990s: Backlash Against Federal Mandates

The effort to shift responsibility for environmental protection back to states, which had been largely unsuccessful in the 1980s, gained greater momentum in the early 1990s with the support of both the executive and Congress. A grassroots rebellion against "unfunded federal mandates" emerged during the early 1990s, culminating in participation by over 1,000 state and local officials in National Unfunded Mandates Day in October 1993. Kincaid attributes this uprising to several factors. Federal aid to state and local governments was declining, while at the same time state and local governments faced increasing costs of compliance with federal mandates, particularly in the environmental field. The National Governors Association estimated that by the year 2000, state and local governments would be required to devote over 30 percent of their budgets to environmental activities.[26] (It is noteworthy, however, that while environmental costs borne by state governments had increased, the states' share of national pollution control spending had actually declined in real dollars from 1973 to 1990.)[27] These developments occurred at a time of greater attention to government deficits and voter resistance to tax increases.

Although the critics of unfunded mandates tend to lump together all federal mandates, what drew the strongest opposition were the costs of complying with federal regulation of state and local governments' own activities, rather than the costs of implementing federal regulations governing the private sector. In objecting to requirements for testing and treatment of drinking water, disposal of solid and hazardous waste, and sewage treatment, state and local governments were behaving much like private interests that resist the costs of compliance with national environmental standards. Although state environmental program administrators over time have been relatively supportive of federal programs — viewing EPA as a convenient "gorilla in the closet" with which to threaten both polluters and state legislatures[28] — state politicians have been considerably less sympathetic, since they are the ones taxpayers hold accountable.[29]

Resistance to unfunded mandates was bolstered by the improved reputation of state governments in the 1990s. When the federal government moved into the environmental field in the early 1970s, it could make a credible argument that the states simply were not doing the job. However, state environmental programs had gained renewed respect by the 1990s. As more federal programs were delegated to the states in the 1980s, it was the states — or rather, some states — that became the source of the most important innovations in the environmental policy field.[30] In some cases, state governments got together to establish regional requirements stricter than the federal requirements. However, at the same time, other states legally prohibited their environmental agencies from going beyond federal standards.[31]

Various authors have argued that this innovation at the state level ironically was made possible by the centralized nature of US environmental policy. According to Dwyer, "Centralization paradoxically gives states greater opportunity and incentives to undertake policy experimentation."[32] Innovation emerged only after states were forced by the federal government to develop their administrative capacities in the environmental field and to develop policies in response to federal mandates. Moreover, states may have been more willing to innovate with the reassurance that other states were being forced by the federal government to take comparable action.[33]

Although the crusade against unfunded mandates received some support from Democrats and Republicans alike after the 1992 election, the issue was given an important boost with the election of Republican majorities in both the House and Senate in 1994. Criticism of unfunded federal mandates had been a prominent feature of the Republicans' "Contract With America" election platform, and thus became a top legislative priority of the 104th Congress. The result was the passage of the *Unfunded Mandate Reform Act* in March 1995. Although the Republican majority rebuffed amendments to exempt environmental mandates, the final bill nonetheless received broad bipartisan support.[34]

The statute does not ban new unfunded mandates, but simply raises obstacles to their creation by forcing both Congress and the executive to think harder before establishing new mandates.[35] Moreover, it does not repeal any existing mandates. The immediate impact of the *Unfunded Mandates Act* is thus limited, given the many environmental mandates already on the books. In any case, Republicans and Democrats alike seem inclined to ignore their self-imposed ban on unfunded mandates when it is politically and ideologically convenient.[36]

In the aftermath of the Reagan administration in the 1980s and the unfunded mandates debates of the early 1990s, the tendency is for the federal government to consult more widely with and grant greater discretion to state governments. For instance, the EPA and the states, represented by the Environmental Council

of the States, launched a major initiative in the National Environmental Performance Partnership Program in 1995. The trend toward decentralization undoubtedly will be reinforced by further reductions in federal agency budgets and federal transfers to the states.[37] However, at the core, the basic federal-state relationship established by the environmental statutes of the 1970s remains intact. The federal government establishes national standards in many areas of environmental policy, which the states implement subject to considerable arm-twisting and ongoing federal oversight.

THE CANADIAN CASE

The Early 1970s: Tentative Federal Assertions

As in the United States, Canadian environmental policy was transformed in the early 1970s, as both the federal and provincial governments became more active in the field. As noted in Chapter 1, prior to that time environmental protection was almost exclusively a provincial matter. Federal government spokespersons resisted occasional calls for a more active role in environmental protection, arguing time and again that "pollution control and abatement is primarily a provincial responsibility."[38] In contrast to the US national government, the Canadian federal government did not attempt to encourage provincial efforts through grants-in-aid.

However, the federal government underwent a change of heart with regard to its environmental jurisdiction in the early 1970s under sustained pressure from the parliamentary opposition and an increasingly concerned public. In response, Parliament passed five major pollution control statutes — the *Canada Water Act*, the *Amendments to the Fisheries Act*, the *Clean Air Act*, the *Northern Inland Waters Act*, and the *Arctic Waters Pollution Prevention Act* — in addition to creating Environment Canada. However, those statutes revealed federal ambivalence toward national standards and an inconsistent approach to federal-provincial relations in the environmental field.

The two central statutes in this package, the *Canada Water Act* and the *Fisheries Act Amendments*, simultaneously proclaimed in 1970, offered contradictory approaches to the problem of water pollution. Like the US *Clean Water Act*, the *Fisheries Act Amendments* called for development of uniform, technology-based national discharge standards for different categories of industry. The minister of fisheries argued that national discharge standards were needed to prevent the emergence of provincial "pollution havens." Unlike the US permitting program, however, these standards were only to be issued in the form of enforceable regulations for new sources; existing sources would be subject to more flexible national

"guidelines." Despite the potential for federal unilateralism, the *Fisheries Act Amendments* met little opposition from the provinces, which at the time were uneasy about regulating unilaterally lest their standards be undercut by other jurisdictions.[39]

The *Canada Water Act* was predicated on a very different vision of resource management and intergovernmental relations. It authorized joint federal-provincial bodies to set water quality standards on a basin-specific, rather than national, basis. The implication was that any future discharge standards or fees would also vary by water basin. Although predicated on a more cooperative model of federalism, the *Canada Water Act* drew opposition from the four most populous provinces, which objected strongly on constitutional grounds to the Act's provision for federal unilateralism should provincial participation not be forthcoming. However, their objections also lay with the basic approach of the Act, which was inconsistent with their support for uniform province-wide and even national discharge standards.[40]

The *Canadian Clean Air Act* of 1971 can be viewed as a hollow shell of the US *Clean Air Act*. Like the US statute, the Canadian Act authorized the federal government to establish "National Ambient Air Quality Objectives" and to regulate particularly hazardous categories of sources. However, unlike the US statute, no planning and regulatory process was established to ensure that those air quality goals would actually be met, and there were no deadlines for attainment. The Act envisioned a federal role that supplemented rather than supplanted or directed provincial efforts. The minister was authorized to issue emission standards in a given province only if the provincial government invited federal involvement by formally adopting the federal air quality objectives. The minister himself stressed that unilateral federal involvement in air pollution control was not foreseen.[41]

Two other environmental statutes were passed in the mid-1970s: the *Ocean Dumping Control Act* and the *Environmental Contaminants Act*. The former fulfilled Canada's international obligations under the London Convention on ocean dumping. The *Environmental Contaminants Act*, like the *Clean Air Act*, envisioned a strictly supplementary role for the federal government. Federal regulations were authorized only if the federal Environment and health ministers were satisfied, after mandatory consultation with the provinces and other federal departments, that provincial or other federal laws would not adequately address the hazards posed by a particular substance.

Significant differences in the role of the Canadian and US federal governments and relations between national and subnational governments are thus apparent in the legislative frameworks for pollution control established in the early 1970s. While the US federal government initiated national standards for air pollution, water pollution, hazardous waste management, and drinking water, the Canadian

federal government exhibited considerable ambivalence toward national standards. Although the *Fisheries Act Amendments* promised national discharge standards, at least for new sources, the *Canada Water Act* rejected the notion of national standards altogether. Moreover, the ambient standards of the *Clean Air Act* were largely symbolic, and no federal involvement was proposed to address problems associated with hazardous wastes.

In contrast to the domineering attitude of the US Congress toward the states, in deference to provincial initiatives the Canadian federal government often declined to act, and when it did propose federal involvement, it promised to work cooperatively with the provinces. Indeed, most Canada environmental statutes make consultation with the provinces *mandatory*, while only *authorizing* discretionary actions by the executive to protect the environment. No effort was made to co-opt the provinces through either inducements or threats. The federal government did not provide administrative grants to the provinces for environmental protection activities, nor did it take the US Congress' more radical step of threatening to withhold transfer payments in other policy areas in order to co-opt participation. Moreover, in contrast to the US government, the Canadian Parliament showed little inclination to regulate the provinces' own activities. The Canadian federal government thus offered to play a role that supported provincial efforts, rather than seizing control of the field and seeking to bend the provinces to its will.

1975-1985: Federal Retreat

The contrast between these two national cases became even more pronounced throughout the 1970s and early 1980s, as the Canadian federal government failed to fully implement its already hesitant new role. The controversial water quality provisions of the *Canada Water Act* simply were never implemented. Only four regulations were ever issued for sources of hazardous air pollutants under the *Clean Air Act*. Only six regulations were issued for industrial sources of water pollution under the *Fisheries Act,* although 20 such regulations had been planned by 1977.[42] In comparison, over 50 broad industrial categories were regulated during this same period under the US *Clean Water Act*. Development of federal environmental regulations ground to a halt altogether in 1979, and no new or amended regulations were issued thereafter until 1992. It is noteworthy that all federal regulations were developed in close consultation with both the provinces and the affected industry.

Nor was the federal government active in enforcing the few national regulations that did exist. As discussed in Chapter 1, it instead pursued a cooperative strategy of relying on provincial governments to enforce both their own and federal standards. In theory, this enforcement arrangement was very similar to the

US concept of primacy, with subnational governments implementing national standards developed by the federal government. However, in contrast to EPA's restrictive conditions for approval of primacy and ongoing oversight of state programs, the Canadian delegation of enforcement to the provinces came with few, if any, strings attached. And, when the provinces failed to live up to their commitment to adopt and enforce national standards, the federal government did not intervene.[43]

Another contrast is that the Canadian arrangement emerged without inducements or threats to prod provincial participation. The provinces voluntarily assumed responsibility, apparently both to defend their jurisdiction over natural resources and to defend local industries from the potential for aggressive federal enforcement,[44] a step undoubtedly made easier for the provinces by the absence of federal oversight and penalties.

While the US Congress solidified its dominant position in the environmental field, adding new statutes and strengthening others even in the face of President Reagan's opposition, the Canadian federal government role weakened throughout the 1970s and early 1980s. What legislative activity was undertaken either involved relaxing existing laws, or adopting discretionary measures that were never implemented.[45]

1985-1995: Renewed Federal Activism

The late 1980s offered, in many respects, a replay of the late 1960s, as the federal government reasserted its role in environmental policy and its commitment to national standards in response to a surge in public concern for the environment. In 1988, the federal environment minister, Tom McMillan, rejected the supplementary federal role of the past, arguing, "In the final analysis, the federal government has to act. Even though it may be an area of overlapping jurisdiction in some instances, we do have authority and the federal government intends to exercise it. We do not intend to do it by committee."[46] McMillan's successor, Lucien Bouchard, also emphasized the need for a strong federal role to establish national standards.[47]

Federal legislative activity resumed with the passage of the *Canadian Environmental Protection Act* (CEPA) in 1988. The Act took a cradle-to-grave approach to toxic substance control, thus potentially extending federal involvement to hazardous waste management, a matter previously left to the provinces. In keeping with McMillan's words, the new statute began with a presumption of federal action and, for the first time, demonstrated federal willingness to exert leverage over the provinces to promote conformance with national objectives. Although consultation with the provinces continued to be mandatory, the provinces were no

longer given an effective veto over federal action, as they had been in the predecessor *Environmental Contaminants Act*. And although a controversial "equivalency" provision allowed federal regulations to be revoked if the federal government and any provincial government agreed that the province's own regulations were equivalent to federal standards, the Act incorporated relatively strict conditions for equivalency with the clear intent of promoting consistent standards across Canada.

The next major federal initiative during this period was the Green Plan, a $3 billion five-year spending program announced in December 1990. The plan contained relatively little in the way of regulatory initiatives and avoided confrontation with the provinces by promising federal-provincial "partnerships" sweetened by the promise of new federal funds.[48]

A second major piece of legislation, the *Canadian Environmental Assessment Act* (CEAA), was introduced in 1990, passed in 1992, and finally proclaimed in 1995. The federal government nominally had been involved in environmental impact assessment since the mid-1970s, and had codified its approach in seemingly strong federal regulations in 1984. However, the regulations had always been considered discretionary and were never followed to the letter of the law. As in other aspects of environmental policy, the federal government had worked with the provinces, declining involvement in environmental assessment if a province indicated its desire to take the lead.

That cooperative arrangement was disrupted in 1987, when environmental groups took the federal government to court for failure to adhere to its own regulation. The environmentalists won, forcing the federal government to conduct an environmental assessment of the Saskatchewan government's Rafferty-Alameda dam project.[49] In the face of unprecedented public concern for the environment in the late 1980s, the federal government could not retreat from its aggressive and popular new role in environmental protection. In many respects the new *Canadian Environmental Assessment Act* maintained and even extended the ambitious terms of the original regulation.[50]

The provinces were vehemently and unanimously opposed to the Act. Federal-provincial conflict had emerged in the aftermath of the Rafferty-Alameda court decision, which forced the federal government to undertake often belated reviews of many of the provinces' own projects as well as private projects they had already approved. A clear conflict emerged between the federal role in environmental protection and the provinces' role in directing economic development of resources. Although the new legislation advocated cooperative joint assessments whenever feasible, the federal government did not accede to the provinces' request for an equivalency provision that would limit federal involvement.

The early 1990s promised a new era in Canadian environmental policy, with a more active and less deferential federal presence. However, as federal and provincial governments faced the challenge of implementing their ambitious new environmental mandates, they simultaneously had to confront both declining public attention to the environment and severe budgetary restraint in response to soaring deficits. By the mid-1990s, it seems unlikely that the assertive and unilateral federal role envisioned by CEPA, CEAA, and the Green Plan will materialize. With respect to CEPA, by 1997 the federal government had regulated only five of the 25 substances it had formally listed as "toxic" under CEPA, and had retreated from its Green Plan promise to regulate all such substances.[51] Equivalency has not had the intended effect of harmonizing federal and provincial standards since only one equivalency agreement has been signed. The potential for Green Plan funds to provide federal leverage over provincial programs has not materialized, since the spending pattern of Green Plan funds — with heavy emphasis on research and education, and minimal attention to regulation — merely re-established the federal government in its traditional support role in the environmental field.[52] In any case, the Plan was quietly terminated in early 1995, with less than 30 percent of the original $3 billion commitment spent.[53]

As public attention to environmental issues subsided in the early 1990s, federal and provincial governments sought to restore intergovernmental harmony and administrative order in light of their new environmental mandates. Both orders of government were uneasy with the potential for overlap created by the new federal role, particularly in light of deep cuts to environmental budgets. As a first step, several bilateral agreements were negotiated, which, like the accords of the 1970s, had the effect of delegating enforcement of national standards to the provinces. And although there are more reporting requirements than in the earlier accords, the conditions established by the new agreements are a far cry from the extensive restrictions imposed by the US federal government on state environmental programs.

As a second step, in November 1993, the federal and provincial environment ministers announced that "harmonization" would be their top priority, promising particular attention to eliminating overlap and duplication. The fate of this initiative is reviewed in some detail in Chapter 1. However, for the purposes of this chapter, it bears emphasis that reduction of the federal involvement appears to be an inevitable outcome.

EXPLAINING DIVERGENCE

The foregoing case studies exhibit critical differences with respect to the scope, persistence, and form of federal involvement in the two countries. First, with respect

to scope, since 1970, the US federal government has played a much more active role in environmental policy than has the Canadian federal government. National standards have been set in the United States for a greater number of source categories and a greater range of environmental problems (e.g., air, water, wetlands, hazardous waste).

Second, with respect to persistence the US federal government continued in its activism throughout the period of interest while the Canadian federal government's already weaker commitment waned from the mid-1970s to late 1980s. The US Congress sustained legislative activity throughout the 1970s and 1980s, even in the face of concerted attacks on the existing environmental policy regime by the Reagan administration. In contrast, Parliament lost interest in environmental legislation for a period of more than a decade.

Finally, with respect to form, the two federal governments have clearly adopted very different postures relative to subnational governments. The US environmental policy regime can be described as one of functional federalism, with the federal government setting national standards and the state governments implementing them, often with limited discretion. In contrast, the Canadian regime is one of jurisdictional federalism, with both orders of government acting independently on their own powers. This third difference does not follow automatically from the preceding two observations, since the greater US federal government activism could have taken various forms. Thus, it remains to be explained why, after 1970, the US federal government commandeered state governments using a combination of threats and inducements, while the Canadian federal government worked cooperatively with the provinces in setting standards and deferred to the provinces with respect to implementation.

Four potential explanations exist for these three differences. First, can the greater US federal activism be explained by divergent societal perceptions of the severity of environmental problems? Second, rather than mass opinion, can differences in interest group objectives, strength, or access account for the observed differences in policy? Third, might these differences be better explained by the broader historical and policy context in the two countries, rather than developments in the environmental policy arena? And finally, how have the two countries' very different political institutions — constitutions, federal systems, and legislative institutions — influenced the outcome?

Public Pressure

The first hypothesis is that the more aggressive and sustained intervention by the US federal government was simply a response to environmental problems that were more severe than in Canada. The impact of any differences in environmental

quality is necessarily mediated through the public's and politicians' perceptions of environmental problems. In the absence of independent measures of politicians' perceptions of the severity of environmental problems, this section examines public attitudes toward the environment in the two countries.

Very similar patterns of public pressure have been evident in recent decades in Canada and the US, with two short-lived waves of public concern for the environment peaking in the late 1960s and the late 1980s. If anything, levels of concern at the crests of these two waves have been slightly higher in Canada.[54] At the peak of the first green wave in 1970, the proportions of US survey respondents who perceived air and water pollution to be very serious were 35 percent and 38 percent respectively.[55] In contrast, 63 percent of Canadians surveyed in the same year indicated that the problem of pollution was very serious.[56] Also in 1970, Gallup asked respondents in both countries to identify their three top national priorities from a list of issues. Pollution was the second most frequently selected item in the US, identified by 54 percent of respondents, but the top item in Canada, chosen by 65 percent of respondents.[57] These limited data do not support the hypothesis that a public perception of more severe environmental problems prompted the greater activism of the US Congress in the early 1970s.

The public's attention to the environment waned in the early 1970s in both countries. The percent of respondents identifying the environment as the single most important problem facing the United States declined from 17 percent in 1970 to the point that it was no longer reported after 1974. Although Gallup Canada did not ask the most important problem question during 1969 and 1970, it did document a similar decline from 1972 onward, no longer reporting environment-related responses after 1976.[58]

Some divergence between the cases was evident in the early 1980s, however. In the US, public attention began to return to the environment in the early 1980s, apparently in response to the Reagan administration's deregulatory initiatives in the environmental policy arena.[59] In Canada, the resurgence of environmental concern seems to have begun a few years later, in the mid-1980s.[60] However, the environment enjoyed an equally dramatic resurgence in the late 1980s in both countries. The percentage of Americans identifying the environment as the most important problem facing their country increased dramatically after 1986, peaking in 1990 at 21 percent and declining thereafter. In Canada, the salience of environmental issues peaked in 1989 at between 16 percent and 21 percent (depending on the polling firm), before declining sharply in the early 1990s.[61]

Trends in public opinion account for the simultaneous emergence of federal government intervention in the environmental field in the early 1970s in both countries, as well as renewed federal attention in the late 1980s. However, given the similar patterns in public attention and concern in the early 1970s, popular

opinion cannot account for the more assertive role initially assumed by the US federal government. The somewhat earlier resurgence of public concern in the US in the early 1980s is consistent with continued congressional assertiveness at a time of parliamentary inaction. However, this divergence in public opinion polls cannot explain why Congress had been just as assertive in the late 1970s. It seems less likely that public pressures prompted US federal action in the early 1980s than that conflict between the executive and Congress triggered renewed public attention to the environment.

Interest Group Influence

Can the stronger initial intervention and greater persistence of the US federal government be explained by divergent positions or different strengths of industry or environmental lobbies in the two countries?

Environmental groups in both countries have historically supported a strong federal government role, with particular emphasis on the need for national standards. The question then is whether environmental groups in the US have exercised greater influence than in Canada. The formation of most environmental groups in Canada and the US tended to coincide with, rather than precede, the early statutes of the 1970s.[62] In fact, Elliott *et al.* have argued that the early US federal statutes gave birth to influential national environmental groups rather than vice versa.[63] However, there are some indications that US environmental groups were better organized and participated more actively in the legislative process that yielded the statutes of the early 1970s.[64]

In the late 1960s, conservation groups like the Sierra Club and Audubon Society doubled in membership and turned their attention increasingly to environmental protection.[65] They were joined by new, more political groups like the Environmental Defense Fund (1967), Friends of the Earth (1969), and the Natural Resources Defense Council, which emerged a few years before the leading Canadian groups. A Nader-affiliated group influenced development of the *Clean Air Act* when it released a report critical of Senate committee chair Edmund Muskie's environmental leadership at a critical point in the legislative process. And, a coalition of environmental groups closely monitored development of the Act in 1970.[66] In contrast, there appears to have been virtually no involvement of environmental groups with the early Canadian statutes. This stronger organization and involvement by US environmentalists in the early 1970s is consistent with the more assertive federal role that emerged in the US. However, in light of the conclusion drawn by most students of the early statutes that environmental groups were marginal participants in the legislative process, this provides a supporting explanation at best.[67]

An alternative interest group related explanation is that the business community may have taken different positions concerning federal involvement in the two countries. Regulated firms face mixed incentives in a federal system. They may prefer that responsibility for the environment fall to subnational jurisdictions where they can exercise greater influence, particularly via threats of mobility to other jurisdictions. However, firms located in the "greenest" provinces or states, or those who sell regulated products in several jurisdictions, may instead favour national regulations to "level the playing field." The question that follows is whether the US federal government assumed a strong role in response to demands from the business community, while the Canadian federal government deferred to the provinces in response to industry resistance.

Lobbying by US industries did prompt extensions of the federal government role in environmental protection in the mid-1960s.[68] Faced with a threat of inconsistent or even competitive state tailpipe emission standards, the US automobile industry reversed its earlier opposition to federal regulation of tailpipe emissions with the passage of the *Motor Vehicle Pollution Control Act* of 1965. However, federal government involvement in setting tailpipe emission standards is one area where both federal governments have assumed an equally preemptive role.

Similarly, critical to the passage of the *Air Quality Act* of 1967 was acquiescence of the mid-western coal industry, which faced increasingly stringent state and local air quality limits that threatened to restrict coal use.[69] However, although the coal industry's crucial support was gained through addition of sympathetic amendments to the bill, it was not the driving force behind it. Indeed, the industry continued to oppose national emission standards in 1967.[70] In the end, efforts by these two industries to preempt uncoordinated state actions explain only modest incremental extensions of the US federal role that occurred in the 1960s. The statutes of the early 1970s far exceeded any demands by industry both in terms of the extent of federal involvement and the stringency of national standards. The explanation for why US legislators got so carried away in the 1970s thus lies not in interest group pressures, but the combination of public opinion and institutional forces, as discussed below.

Although differences in interest group politics do not offer a compelling explanation for the emergence of the stronger US federal government role, the role of US environmentalists since the early 1970s does help to explain the US federal government's greater persistence in the environmental field.[71] The early US statutes like the *Clean Air* and *Clean Water Acts* gave environmental groups considerable institutional resources to hold the federal government's feet to the fire. In contrast to the Canadian approach of closed industry-government negotiation of standards during the 1970s and early 1980s, the new US environmental statutes all required notice and comment rulemaking, which provides all interests, rather

than just the regulated industry, with an opportunity for input, and requires that EPA respond to their comments in making its final decision. More importantly, the combination of the courts' liberalized interpretation of standing, detailed statutory mandates, and the new citizen suit provisions gave environmental groups powerful leverage over EPA. Since the 1970s, environmental groups have taken advantage of citizen suits to force EPA not only to fulfill its own regulatory responsibilities, but also to force an often-reluctant EPA to strong-arm the states.[72]

In contrast, in Canada, environmentalists were effectively excluded from environmental policy making until the mid-1980s. Although they are now routinely included in "multi-stakeholder consultations," there have no legal guarantees of access comparable to those in the US. And the discretionary statutes passed by a parliamentary government seldom offer a basis for litigation.[73] Indeed, the impact of the singular opportunity for litigation provided by the 1984 federal environmental assessment regulation underscores just how significant more widespread opportunities for citizen suits might have been in preventing the Canadian federal government's retreat in the 1970s and early 1980s.

Although the greater influence of US environmental groups does help to explain the greater persistence of the US federal government, it bears emphasis that these national differences in interest groups' influence were the result of institutional factors, particularly legislative guarantees of legal leverage, rather than differences in societal support.

The Broader Context

One hazard of studies focused on a single policy area is the risk of overlooking explanations that lie outside that area. Concurrent developments in other policy areas and the broader context of federal-provincial relations thus may offer important insights to developments in the environmental arena.

The 1960s and early 1970s were periods of policy centralization in both countries. However, at the end of the 1960s, the federal government probably had greater momentum in the United States. State governments were widely depicted as weak and incompetent as the federal government moved forcefully into new areas, including voting rights, welfare programs, and civil rights.[74] Although a similar trend was evident in Canada with increased federal involvement in health care and language policy, it was less pronounced. Certainly, there was no history of the federal government sending in troops to override a provincial government, as occurred when the US National Guard faced down the governor of Alabama over school integration.

This context helps to explain the more assertive posture of the US federal government in the early 1970s. Moreover, since the US federal government had already

entered the field tentatively via grants-in-aid in the 1960s, it was a less radical step to extend those grants and attach conditions to them in the 1970s. However, it is noteworthy that while President Johnson's centralist "great society" agenda forged ahead in the 1960s in many other policy areas, its environmental components were singularly unsuccessful.[75] This suggests that the US federal government's assertiveness in the environmental arena in the early 1970s was more than just a continuation of the federal juggernaut.

The greater hesitance of the Canadian federal government in the late 1970s and early 1980s is also consistent with the prominence of constitutional negotiations during this period. Since the environment was not a prominent issue on the political or constitutional agenda, there was no reason for the federal government to risk its objective of patriation of the constitution by provoking the provinces with aggressive actions in the environmental arena. However, the influence of the constitutional agenda provides a supporting explanation at best, since the federal government had largely retreated in the environmental field before the re-emergence of constitutional negotiations.

Institutional Influences

This section considers three institutional differences between the two countries: differences in federal constitutional authority, differences in federal systems, and differences in legislative institutions.

Constitutional Authority. It was undoubtedly easier for the US federal government to assert a stronger role in the environmental field, and even to bully state governments, because it was in a stronger constitutional position than its Canadian counterpart.[76] This finding is ironic in a policy field not mentioned in either constitution, since the Canadian constitution leaves all residual powers to the federal government, while the US Constitution leaves them to states. However, it is widely acknowledged that judicial interpretation has fundamentally reshaped the formal division of powers in both countries.

The two most important sources of environmental jurisdiction for the US federal government are public lands and the interstate commerce clause.[77] The US federal government has extensive proprietary authority as owner of two-thirds of the lands west of the Mississippi River. In Canada, with the exception of offshore resources and the northern territories, public lands are owned by the provinces, thereby strengthening the presumption that protection of natural resources is a provincial matter.

A more significant source of US federal authority, however, is the interstate commerce clause. Since 1937, US Supreme Court decisions concerning the

commerce clause have signaled "a nearly unconditional abdication of the courts' potential role of promoting federalism by protecting the states from an intrusive Congress."[78] Between 1937 and 1976 every constitutional challenge of federal authority under the commerce clause failed.[79] As a result, the US Congress has been able to confidently enter virtually any policy sphere, including environmental regulation, under the guise of interstate commerce.

Although there was little doubt concerning federal authority over environmental protection, the Supreme Court's 1981 decision in *Hodel v. Virginia Surface Mining and Reclamation Association* clarified that the commerce clause does provide Congress with broad authority to enact environmental legislation.[80] More recently, the court's 1995 decision in *US v. Lopez* to overturn a federal law prohibiting possession of firearms near schools indicates that the current court will be more watchful than its predecessors. However, Percival concludes that the decision will not present grave difficulties for Congress in the environmental arena where a plausible connection to commerce can usually be made.[81]

The Canadian Supreme Court historically has adopted a restrictive reading of the trade and commerce power compared with the generous reading of the commerce clause south of the border. However, there are indications in recent years that that restraint is loosening. In particular, in the 1994 Grand Council of Crees case, the Supreme Court condoned federal reliance on the trade and commerce power to pursue environmental objectives.[82]

Other heads of power that have the potential to offer the Canadian federal government far-reaching environmental jurisdiction are the criminal law power, and "Peace, Order, and Good government."[83] However, in each case, the extent of environmental authority is highly uncertain. With respect to "peace, order, and good government," the federal government received positive signals from the Supreme Court in the 1975 Interprovincial Cooperatives case, and from the Court of Appeal in the Canada Metal case in 1983; however, neither of these cases provided a direct or definitive interpretation. More recently, the Supreme Court offered a generous reading of federal environmental authority under "peace, order, and good government" in its 1988 Crown Zellerbach decision, which upheld a federal statute regulating ocean dumping.[84] The court reinforced federal environmental authority in the 1992 Oldman River Dam decision, relying both on "peace, order and good government" and more specific heads of power, such as fisheries and navigation.[85] Most recently, the Supreme Court ruling in 1998 in the Hydro-Québec case upheld federal regulation of toxic substances under CEPA as a legitimate exercise of the criminal law power.[86]

Although the Canadian federal government's constitutional position has been buttressed by several recent Supreme Court decisions, the fact that its jurisdiction

was traditionally less certain than that of its US counterpart helps to explain the Canadian government's greater reticence in the environmental field. However, the fact that the Canadian government adopted a more jurisdictionally assertive posture in the late 1980s with CEPA *before* those Supreme Court decisions, and that it has returned to a more cooperative stance *despite* its stronger constitutional position in the wake of those decisions, indicates that constitutional uncertainty has not been the primary factor deterring the federal government from pursuing a more active role in the environmental field.

Moreover, differences in constitutional authority cannot explain the very different forms of federal intervention taken in the two countries. Neither federal government can directly command subnational governments. Rather, they co-opt their partners primarily through financial inducements and threats — a spending tool equally available and widely used in other policy areas in both countries, yet used much more aggressively by the US federal government in the environmental field.

Federal Systems. Although Canada and the United States are both federal countries, there are significant differences between their federal institutions that help to account for differences in national environmental policy. First, the larger number of US states than Canadian provinces makes it more difficult for the states to present coherent opposition to federal government "intrusion" in their sphere. Moreover, the US population is more evenly distributed among the states. Ontario alone is home to 37 percent of the national population, and Quebec and Ontario combined comprise 62 percent of Canadians. As a result, the views of individual provincial governments carry greater weight than those of even the largest state governments.[87]

The unique francophone character of the province of Quebec also helps to explain the Canadian federal government's greater reticence.[88] The federal government's deference to the provinces in the late 1970s and early 1990s coincided with periods of separatist government in Quebec. Moreover, the current effort to rationalize environmental policy has been fueled at least in part by the federal government's desire to demonstrate its commitment to renewed federalism to Quebecers. However, one should not overstate Quebec's influence. The federal government had already largely withdrawn from the environmental field in the early 1970s, well before the Parti Québécois' election in 1976.

Another important difference in federal institutions is the significance of intrastate federalism in the United States. The weakness of party discipline in the US legislative system, resulting from the absence of a confidence requirement, facilitates expression of regional interests by federal politicians in both houses. In particular, the presence of senators as powerful representatives of state interests within

the US federal government tends to undercut the role of state governors as spokespersons for those same interests.[89] Avenues for accommodation of state interests within the federal government may also help to account for the US Supreme Court's willingness to virtually abdicate its role as an arbiter of federalism in directing states to rely on political, rather than judicial, processes to defend their interests.[90]

Legislative Institutions. Important differences between Canadian parliamentary government and the US system of separation of powers also can explain why the US federal government assumed a stronger role in the environmental field. The combination of exceptional public pressure and US legislative institutions resulted in an unusual and much analyzed case of policy escalation in the case of the 1970 US *Clean Air Act,* which then established the baseline for federal involvement in subsequent environmental statutes.[91]

The three central players in the *Clean Air Act* drama were President Richard Nixon, the chair of the relevant Senate committee, Edmund Muskie, and the chair of the relevant House committee, William Rogers. Muskie made the first move, introducing a set of relatively cautious amendments to the 1967 *Clean Air Act.*[92] Thereafter, Rogers one-upped his Senate counterpart by introducing a stronger bill. There was speculation that he was motivated by a desire for a higher public profile in anticipation of a possible Senate bid. The administration further upped the ante by proposing both national ambient air quality standards and national discharge standards, which Senator Muskie had previously opposed. Muskie, considered the leading contender for the Democratic presidential nomination in 1972, responded with a second Senate bill that adopted the administration's proposals but tightened national standards and deadlines and introduced a citizen suit provision. In a period of unprecedented public concern for the environment, the strongest bill on the table, the Senate version, became the basis for the conference committee report and the final 1970 *Clean Air Act.*

Two features of the US legislative system were relevant in this case. First, the division of powers yielded competition between the House and Senate and, more importantly, between the executive and Congress as politicians sought to respond to voters' newfound environmentalism. Policy escalation was also supported by the US separation of powers in the sense that since Congress writes but does not implement legislation, it is more inclined to adopt unrealistic deadlines and demands on both EPA and the states.[93] Second, the absence of a confidence requirement in the US system with its scheduled elections weakens party discipline and facilitates policy entrepreneurship by individual legislators seeking to make a name for themselves. The bidding war between individual presidential candidates produced a statute that not only established a strong federal government role in the creation of national standards, but also greater federal leverage over the states in implementing them.

There was no counterpart to this bidding war when the first Canadian environmental statutes were written. In the parliamentary system, party discipline precludes similar entrepreneurship by individual Members of Parliament, and the weaker, unelected Senate does not normally compete with the House in policy formulation. Moreover, since the governing party implements as well as writes legislation, it tends to adopt more realistic and discretionary statutes.

These institutional differences also help to explain why the US federal government did not retreat to the same extent when public attention to environmental issues waned during the 1970s. Ironically, the US federal persistence can be explained because the separation of powers had the opposite effect than it did in 1970. The type of policy escalation that produced the 1970 *Clean Air Act* is considered exceptional; more commonly, the multiple veto points presented by the separation of powers system tends to deter policy change. It should be noted that this obstructive nature of the US legislative system does not always result in stronger environmental protection. For instance, in the 1960s, Congress blocked the Johnson administration's proposals for national environmental standards.[94] However, after the environmental legislative frenzy of the early 1970s, obstruction of significant amendments was tantamount to preserving strong environmental measures. Thus, the separation of powers allowed Congress to block the Reagan administration's proposals to relax environmental laws in the early 1980s.[95]

The separation of powers also indirectly made it more difficult for the US federal government to retreat from its ambitious environmental programs. Distrusting the executive branch, Congress wrote very specific statutes in the early 1970s, which were not amenable to quiet retreat. Given clear deadlines and authority for citizen suits, simply declining to implement federal statutes was not an option; formal amendment was required. Although the public was not paying as much attention to environmental issues in the late 1970s, there was still a strong reservoir of public support for a clean environment preventing legislators from publicly recanting on their very explicit promises.

In contrast, it was much easier to retreat from the kind of discretionary statutes adopted by the Canadian parliamentary government. The government could simply decline to exercise its discretionary authority at the implementation stage, which generates much less attention than formally amending a statute. The degree of discretion afforded the executive, combined with the extent of agenda and information control exercised by a majority party in the legislature, thus can allow parliamentary governments to renege on earlier commitments without provoking an outcry from the public or even the parliamentary opposition. This observation has been confirmed by Vogel, who found that "The American commitment to strong environmental regulation proved more durable and consistent" than that of parliamentary governments in both the UK and Japan.[96] Similarly,

Hoberg has concluded that "Canadian institutions are less effective than American ones in thwarting policy reversals."[97]

CONCLUSION

The preceding discussion seeks to explain three observed differences in the role of the Canadian and US federal governments with respect to national standards: the greater initial activism of the US government in setting national standards, its greater assertiveness relative to subnational governments, and its greater persistence in the face of waning public attention to environmental issues. As is typically the case with binational case studies, one cannot point to a single determining factor. However, it is possible to state which factors are consistent with the observed pattern of differences and which are not (see Table 1).

Neither the US federal government's greater involvement in setting national standards nor its greater domination of state governments can be explained by societal factors alone. Mass public opinion followed similar trends in both countries and thus cannot explain the observed differences. In any case, while the publics in both countries may have demanded national standards, there is no evidence that they had preferences regarding the particular form of the federal government relationship with subnational governments. Nor can the findings be explained by focusing on attentive publics. Although environmental groups likely were somewhat stronger in the early 1970s in the United States, they do not appear to have been a critical influence on legislation in either country. Similarly, although pressure for national standards by some industries can account for incremental extensions of US federal government involvement in the 1960s, they cannot explain the dramatic expansion of the federal role that occurred in the 1970s.

In contrast, institutional differences can explain the divergent federal government responses in the face of similar public demands. It was easier for the US federal government to assume a strong role in setting national standards because it was in a clearer constitutional position, although that cannot explain its greater coercion of the states since both federal governments have equal access to the instrument of conditional grants. The US states are less able to resist both federal involvement and federal domination of their own programs since they are individually less influential and their voices are undercut by intrastate avenues for expression of regional interests. And finally, the US system of separation of powers prompted an unusual case of policy escalation in 1970 that led to a strong and domineering federal government role in response to the first wave of public concern, while the Canadian parliamentary system enabled a more symbolic and cooperative response.

TABLE 1: Explaining Intergovernmental Arrangements

	Federal Leadership with respect to National Standards	*Federal Domination of States*	*Persistence of Federal Involvement*
Public Opinion	cannot explain differences because similar trends in both countries	cannot explain differences because similar trends in both countries	cannot explain differences because similar trends in both countries
Interest Group Pressures	cannot explain differences because little impact on original statutes	cannot explain differences because little impact on original statutes	helpful in combination with institutional factors (e.g., statutory specificity, access to courts)
Spillovers from Other Policy Fields	helpful — US federal government ascendant in the late 1960s	helpful — US federal government ascendant in the late 1960s	cannot explain: US federal government persisted even as states' reputation improved; Canadian government withdrew before constitutional negotiations
Constitutional Authority	helpful — US federal jurisdiction stronger and more certain	cannot explain because spending power available in both countries	cannot explain because Canadian government retreated in 1990s even as Supreme Court decisions strengthened jurisdictional position
Federal Systems	helpful — weaker individual states and stronger intrastate institutions in US undercut state resistance	helpful — weaker individual states and stronger intrastate institutions in US undercut state resistance	cannot explain temporal trends because there were no changes in federal institutions
Legislative Institutions	helpful — separation of powers led to policy escalation	helpful — separation of powers led to policy escalation	helpful — retreat easier for parliamentary government

The greater persistence of the US federal government is again explained by institutional factors. However, the only relevant institution in this case appears to be the legislature. While multiple veto points in the US separation of powers system of government blocked policy change in the 1970s and 1980s, the parliamentary system made it easier for the Canadian federal government to quietly retreat from its previous commitments. Although differences in the strength of interest groups do not account for the original assertiveness of the US federal government, the activities of US environmental groups, armed with powerful institutional resources in the form of detailed statutes and access to the courts, can help to account for the greater US persistence.

With respect to the debate between neo-institutionalists and those who emphasize societal forces,[98] the foregoing account, which stresses the influence of institutional factors, contrasts both with Vogel's conclusion that "the content and intensity of public opinion have been more important than the structure of political institutions in determining cross-national and intertemporal differences in environmental policy," and with Hoberg's conclusion that "profound institutional differences between Canadian and US environmental policymaking" have surprisingly little impact on policy content.[99] While trends in public attention to the environment do explain temporal differences in both countries, with both the Canadian and US governments devoting greater attention to the environment around 1970 and 1990, public opinion alone cannot account for cross-national differences in the scope, nature, or persistence of federal government response.

Indeed, faced with this two-case comparison, it would be very difficult to focus on factors other than institutional differences in accounting for different outcomes. Public opinion and interest group influence have been relatively similar in the two countries and thus cannot account for observed differences. To overstate the case somewhat, history has provided something akin to a controlled experiment designed to test the influence of different governing institutions. Thus, when one observes divergent outcomes, institutions offer the strongest explanatory force. However, when one observes general similarities, as Hoberg did in comparing the stringency of Canadian and US environmental regulations, one tends to downplay the influence of institutions.[100]

To complicate matters, however, it is a combination of societal and institutional factors that account for the observed differences. This reinforces a growing body of analysis suggesting that societal and institutional factors matter jointly, with institutional influences contingent upon social context.[101] Public pressures were funneled through different political institutions, which directed each country to a different path. Thus, in the US case, the separation of powers produced policy escalation during the initial period of public attention to the environment, and obstruction of reforms, thus solidifying environmental gains, during the

troughs. In contrast, the Canadian parliamentary system facilitated bold promises during the peaks and backsliding in the troughs.

Although both countries are experiencing a general trend toward devolution at present, decentralization is likely to have a lesser impact in the environmental field in the US for the same reasons that the US federal government persisted in the 1970s and early 1980s. The aspirational US environmental statutes, premised on equality and public health, are still popular with the public at large and thus difficult for even a Republican Congress to radically transform. And even if it did, it is likely that the president would veto a fundamental weakening of the federal government's role. In contrast, in Canada the situation is similar to that in the mid-1970s, and is likely to yield a similar federal withdrawal.

Returning to the conceptual distinctions introduced in Chapter 1, the prevailing model in both countries has been disentanglement, or rationalization — with the federal government assuming responsibility for setting national standards and subnational governments taking the lead in implementation. However, as this chapter demonstrates, this common label masks important differences in the policy regimes and intergovernmental relationships. Although there has nominally been a similar division of labour in both countries, in practice the US federal government has played a much larger role in setting national standards. In the United States, rationalization was achieved in a top-down manner, with the states' new role being imposed upon them, often against their will. In contrast, the Canadian model of rationalization was achieved through mutual agreement by the federal government and the provinces. The US approach has been fraught with intergovernmental conflict, while the Canadian model was born of and has generally sustained intergovernmental cooperation. Clearly, all approaches to disentanglement are not alike.

This chapter has not rigourously compared the stringency of national standards nor their enforcement, and the author thus is not in a position to draw firm conclusions about the efficacy of either model. However, initial indications suggest that both federal and state governments in the US have been more inclined to fulfill their responsibilities within their top-down rationalized arrangement. Historically, despite agreement on a division of roles, the Canadian federal government has set few national standards and the provinces have implemented them weakly at best. This implies that intergovernmental conflict may not always be problematic, at least with respect to the goal of achieving national standards. While Canadian intergovernmental accords have certainly promoted cooperation, that may reflect the fact that avoiding federal-provincial irritants was a more central objective to their drafters than ensuring a strong and consistent regulatory regime.

The central question raised by this chapter is under what conditions federal governments establish national standards. The differences between the Canadian

and US cases confirm that national standards do not emerge automatically. Federal governments are not benevolent despots, as has often been assumed.[102] Rather, federal politicians respond to evolving public pressures within an institutional environment that shapes their responses. Given the centrality of political institutions in explaining the differences between the Canadian and US cases, and the unlikelihood of significant institutional change, a stronger role for the Canadian federal government akin to that of its US counterpart is not on the horizon.

NOTES

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1. Oates, *Fiscal Federalism*; Peterson and Rom, *Welfare Magnets*.
2. See Harrison, "The Regulator's Dilemma."
3. Vogel, "Representing Diffuse Interests," p. 249.
4. See Jones, *Clean Air,* p. 68; Elliott *et al.*, "Toward a Theory of Statutory Evolution."
5. Percival, "Environmental Federalism"; Jones, *Clean Air.*
6. Dwyer, "The Practice of Federalism," p. 1190.
7. Ibid., p. 1220.
8. Hoberg, *Pluralism by Design,* pp. 45-47.
9. *Clean Air Act,* Section 101(a)(3)
10. Hoberg, *Pluralism by Design,* p. 75.
11. Dwyer, "The Practice of Federalism," p. 1193.
12. Ibid., p. 1198.
13. The *Clean Air Act* and *Clean Water Act* are, in a sense, mirror images. The *Clean Air Act* sets environmental quality objectives and directs the states to devise plans to meet them. In contrast, the *Clean Water Act* grants states some discretion in setting water quality goals but buttresses implementation with an ambitious national permit program for individual sources.
14. Ringquist, *Environmental Protection at the State Level,* p. 70.
15. Dwyer, "The Practice of Federalism," p. 1216; Welborn, "Conjoint Federalism."
16. Crotty, "The New Federalism Game"; US Congress. Office of Technology Assessment, *Catching Our Breath.*
17. Hoberg, *Pluralism by Design,* p. 97.
18. Ringquist, *Environmental Protection at the State Level,* p. 45.
19. Welborn, "Conjoint Federalism."
20. Ringquist, *Environmental Protection at the State Level,* p. 61.
21. Crotty, "The New Federalism Game," p. 67.

22. Ringquist, *Environmental Protection at the State Level,* pp. 19, 62.
23. Lester, "A New Federalism?"
24. For instance, EPA must disapprove a State Implementation Plan under certain conditions, and once it does so, sanctions automatically kick in in 18 months, and increase in stringency over time.
25. Conlan *et al.*, "Deregulating Federalism?" p. 25.
26. Kincaid, "Intergovernmental Costs." Costs were self-reported by individual jurisdictions.
27. Ringquist, *Environmental Protection at the State Level,* p. 22.
28. Stanfield, "Ruckleshaus Casts EPA."
29. Kincaid, "Intergovernmental Costs."
30. Lester, "A New Federalism?"; Lowry, *The Dimensions of Federalism*; Rabe, "Power to the States."
31. Ringquist, *Environmental Protection at the State Level*, p. 69, offers examples of both.
32. Dwyer, "The Practice of Federalism," p. 1224; see also Rabe, "Power to the States," p. 42.
33. Lowry, *The Dimensions of Federalism.*
34. Conlan *et al.*, "Deregulating Federalism?"
35. The statute requires that the Congressional Budget office estimate the costs of any new federal legislative mandates for state and local governments greater than $50 million annually, allows any member of Congress to raise a point of order barring consideration of an unfunded mandate unless that specific provision of the bill receives approval by a majority vote, and requires that executive agencies estimate the costs of any regulatory mandates in excess of $100 million per year.
36. Percival, "Environmental Federalism," p. 1180.
37. Rabe, "Power to the States," p. 47.
38. Canada. House of Commons, *Debates*, p. 7458.
39. Harrison, *Passing the Buck*, p. 76.
40. Ibid., pp. 74-76.
41. Canada. House of Commons Committee on Fisheries and Forestry, *Minutes of Proceedings and Evidence*, p. 1:13.
42. Edgeworth, "Canada's Approach," p. 5.
43. Not only did the provinces fail to enforce their own permits (see Harrison, "Is Cooperation the Answer?"), but those permits often did not satisfy federal requirements. A comparison of provincial pulp mill permits with federal standards revealed that most provincial permits did not match federal standards. (See Harrison, "Passing the Buck," pp. 376-81.)
44. Harrison, *Passing the Buck*, ch. 5.
45. Ibid., pp. 91-98.

46. Canada. House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-75*, p. 14:18.
47. Bouchard, "Notes for an Address at the Symposium 'Le Saint-Laurent, un fleuve a reconquerir.'"
48. Hoberg and Harrison, "It's Not Easy Being Green."
49. *Canadian Wildlife Federation Inc. v. Canada,* (1990) 4 C.E.L.R. 201.
50. The federal government did regain some control of its agenda from environmental groups and the courts by authorizing regulations to clarify which projects or decisions require assessments and which are exempted. However, the Act went beyond the original regulation by prohibiting federal departments or agencies from proceeding with projects or regulatory decisions where, after implementation of mitigation measures "that the responsible authority considers appropriate," "the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances."
51. See Leiss, "Governance and the Environment," pp. 131-35, on the limited impact of CEPA.
52. Hoberg and Harrison, "It's Not Easy Being Green."
53. "Canada's Green Plan Strikes Out," p. A4; Harrison and Hoberg, "In Defense of Regulation."
54. A more detailed comparison of survey data, yielding similar conclusions, is provided by Hoberg in "Governing the Environment," pp. 343-46.
55. Hoberg, *Pluralism by Design*, p. 42.
56. Responses to this question over the years were summarized in *The Gallup Report*, 28 May 1990, p. 2.
57. Dunlap, "Trends in Public Opinion," p. 92; *The Gallup Report*, 2 December 1970.
58. In April 1972, pollution was the fourth most frequently identified as Canada's "most important problem," cited by 5 percent of respondents (*The Gallup Report*, "Concern with Pollution Drops Among Canadians," 26 February 1975). That figure fell to 0.6 percent by April 1976.
59. Dunlap, "Trends in Public Opinion," p. 103; Dunlap, "Public Opinion and Environmental Policy," p. 131.
60. Brown, "Organizational Design as Policy Instrument," p. 31, reports that Environment Canada's polls revealed an important shift in Canadians' attitudes concerning the environment in 1984. Similarly, Doern and Conway, *The Greening of Canada*, p. 64, report that the Prime Minister's Office was conscious of the rising prominence of the environment in 1985.
61. Peaks of 16.5 percent, 16 percent, and 21 percent were reported respectively by Gallup Canada (Gallup Canada poll 907-1), Decima (Doern and Conway, *The Greening of Canada*, p. 118), and Environics (Doug Miller, in Canada. House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on the Environment*, p. 18).
62. Woodrow, "The Development and Implementation of Federal Pollution Control Policy Programs"; Hoberg, *Pluralism by Design*, p. 93.

63. Elliott *et al.*, "Toward a Theory of Statutory Evolution."
64. Hoberg, "Governing the Environment."
65. Vogel, "Representing Diffuse Interests in Environmental Policymaking," p. 255; Hoberg, "Governing the Environment."
66. Jones, *Clean Air*, pp. 191, 198.
67. Indeed, Elliott *et al.*, "Toward a Theory of Statutory Evolution," p. 338, argue that the *absence*, rather than strength, of environmental groups was a contributing factor in the strength of the original legislation. In the face of mass public pressures, but with no well-recognized environmental leaders with whom to bargain, the Senate leadership "had no way of knowing how much would be enough."
68. Ibid., p. 326.
69. Ibid., pp. 332-33.
70. Vietor, *Environmental Politics and the Coal Coalition*, pp. 140-50.
71. Hoberg, "Governing the Environment," p. 377.
72. For instance, the Natural Resources Defense Council used a citizen suit to force the EPA to make the states adopt highly unpopular transportation control measures in the 1970s. See Dwyer, "The Practice of Federalism," p. 1202.
73. Harrison and Hoberg, *Risk, Science, and Politics*, ch. 9.
74. Rabe, "Power to the States."
75. Vogel, "Representing Diffuse Interests in Environmental Policymaking."
76. Holland, "Introduction."
77. A more thorough review of US environmental jurisdiction is presented in Fitzgerald, "The Constitutional Division of Powers."
78. Dwyer, "The Practice of Federalism," p. 1189.
79. Fitzgerald, "The Constitutional Division of Powers."
80. The case is summarized in Fitzgerald, "The Constitutional Division of Powers."
81. Percival, "Environmental Federalism," pp. 1169-71.
82. *The Grand Council of the Crees (of Quebec) and the Cree Regional Authority, appellants, v. The Attorney General of Canada, the Attorney General of Quebec, Hydro-Québec and the National Energy Board, respondents*, 24 February 1994.
83. A more detailed summary of Canadian environmental jurisdiction is presented in Harrison, *Passing the Buck*, ch. 3.
84. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 84 N.R. 1.
85. *Re: Friends of the Oldman River Society and The Queen in Right of Alberta et al.*, (1992) 88 D.L.R. 1. An incisive analysis of the case is provided in Kennett, "Federal Environmental Jurisdiction After Oldman."
86. *R. v. Hydro-Québec*, [1997] S.C.R. 213, February 1997.
87. Gibbins, *Regionalism*, pp. 99-100.
88. Holland, "Introduction"; Rabe, "Cross-Media Environmental Regulatory Integration," p. 262.

89. Gibbins, *Regionalism;* Holland, "Introduction," p. 8.
90. The 1985 National League of Cities decision, in which the Court explicitly gave such direction to the states, is reviewed in Fitzgerald, "The Constitutional Division of Powers."
91. Jones, *Clean Air*; Hoberg, *Pluralism by Design*; Elliott *et al.*, "Toward a Theory of Statutory Evolution."
92. The following account is based on Jones, *Clean Air.*
93. Lundqvist, *The Tortoise and the Hare*, p. 117.
94. Vogel, "Representing Diffuse Interests in Environmental Policymaking," p. 250.
95. Hoberg, "Governing the Environment," p. 379.
96. Vogel, "Representing Diffuse Interests in Environmental Policymaking," p. 260.
97. Hoberg, "Governing the Environment," p. 385.
98. Evans, Rueschemeyer and Skocpol, *Bringing the State Back In*; Almond, "The Return to the State."
99. Vogel, "Representing Diffuse Interests in Environmental Policymaking," p. 265; Hoberg, "Governing the Environment," p. 376.
100. However, in addition to direct public and interest group pressures, Hoberg also emphasized the influence of Canadian emulation of US policy initiatives. Vogel examined a larger number of countries over a longer time horizon, with greater variance in public opinion and interest group pressures, and thus was in a better position to observe distinct influences of both societal and institutional factors.
101. Simeon, Hoberg and Banting, "Globalization, Fragmentation, and the Social Contract;" Weaver and Rockman, "Assessing the Effects of Institutions."
102. Bélanger, "The Division of Powers in a Federal System."

CHAPTER 4

Groups, Governments and the Environment: Some Evidence from the Harmonization Initiative

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INTRODUCTION

This chapter deals with the interactions between groups and governments. In particular, it considers the preferences of powerful interest groups with respect to how governments interact when seeking to make and implement environmental policy in Canada. The pattern of intergovernmental relations that predominates in the field of environmental policy will be the product of many factors, including the preferences of powerful organized interests that are so important to the formulation and implementation of environmental policy. In contrast to other policy fields, the making of environmental policy in Canada is characterized by extensive, routine and formalized consultation with "stakeholders." These stakeholders include those actors whose behaviour is often regulated in the name of environmental protection (e.g., manufacturing, resource development) and environmental non-governmental organizations (ENGOs). This chapter is concerned with the kinds of intergovernmental interactions that are preferred by the different stakeholders, especially the associations representing industrial and business concerns and by ENGOs.

The chapter is organized into four sections dealing in turn with the patterns suggested by the existing literature on intergovernmental relations, the very different patterns that have prevailed in the ongoing harmonization exercise, possible explanations for the discrepancy between the expected and the observed, and a concluding section which suggests amendments to the existing generalizations about groups and intergovernmental relations and areas for future research and theory building.

INTEREST GROUPS AND PATTERNS OF INTERGOVERNMENTAL RELATIONS

As indicated in the introductory chapters to this volume, we can simplify the myriad of intergovernmental interactions by invoking the following categories. With respect to the more formal structure of intergovernmental relations, the relationship can be dominated by collaboration, disentanglement, and unilateralism. As for the less formal character of intergovernmental relations, that is the actual patterns of interaction, the relationship can be one of independence, conflict, competition, and collaboration or by some combination of all four.

The question that this chapter seeks to address is: Which of these patterns are preferred by associations representing industrial and business concerns and by ENGOs? To begin to answer this question it is helpful (but as I will demonstrate, insufficient) to begin with what some of the existing Canadian research suggests might be the preferences of organized interests with respect to the pattern of intergovernmental relations.[1]

Unfortunately, much of the existing literature on federalism and intergovernmental relations is silent as to the behaviour of non-governmental actors as they interact with the institutional arrangements of federalism. Moreover, this literature has even less to say about the preferences of interest organizations with respect to the patterns of intergovernmental relations. Scholars who write on federalism in Canada and elsewhere often have a blind spot for other determinants of policy, including organized interests. In other words, students of Canadian federalism (a government-to-government dynamic) suffer from "the curse of expertise in independent variables" and do not pay much attention to the government-to-group dynamic.[2]

To the extent that the relationship between the two dynamics has been analyzed, the usual starting point is to contrast a "multiple-crack" hypothesis where interest organizations enjoy multiple access points to policy making in a federal system with a "frozen-out" hypothesis where interest organizations are unable to penetrate the dense web of intergovernmental relations.[3] These two metaphors capture much of the available research on how organized interests behave in federal systems.[4] However, these two metaphors are meant to describe the ways in which interest organizations behave in a federal system. They say little about the preferences of groups with respect to the nature of intergovernmental relations. With one exception, we have to infer these preferences.

Hypothesis One: Interest organizations prefer intergovernmental cooperation

Richard Simeon's early account of federal-provincial relations emphasizes cooperation and collaboration.[5] His model of "federal-provincial diplomacy" suggests

a fair degree of formal collaboration (but not necessarily rationalization) and less formally, considerable cooperation with occasional, and probably inevitable, periods of conflict. However, Simeon also emphasizes the extent to which governments act independently of the preferences of non-governmental actors. Groups are "frozen out" of the policy-making process when issues become subject to intergovernmental negotiations. Thus, whatever the preferences of groups might be, they are largely irrelevant since the whole point of intergovernmental relations is to strive toward cooperation and collaboration. Lack of cooperation is a failure to the extent that it leads to suboptimal policy outcomes.

There is one systematic, albeit incomplete, study of the views of interest organizations with respect to the character of intergovernmental relations. An analysis of more than one thousand submissions to the Macdonald Royal Commission suggests that, although not a major concern, private interests most often called for improved federal-provincial coordination, a reduction in overlap and duplication, and for reduced federal-provincial conflict.[6] These results need to be interpreted with caution. First, the submissions received from organizations representing business and industry were not necessarily representative — large multinational firms, for example, were not well represented. Second, the submissions arguably reflect the tenor of the times. There was, for example, strong support for a strong federal government and very few groups addressed themselves to the need for decentralization of power from Ottawa to the provinces (those that did favoured decentralization over the status quo). Nevertheless, what is striking is the fact that the concern about overlap and duplication has been carried forward to the present day. As outlined later in this chapter, reducing perceived overlap and duplication is a high priority from at least some business and industry groups who participated in the harmonization exercise.

Hypothesis Two: Interest organizations prefer intergovernmental competition

A quite different picture of groups and intergovernmental relations is suggested by the work of Albert Breton who has advanced the proposition that intergovernmental competition is desirable because it means that governments will compete to be as responsive as possible to societal demands.[7] The implication is that, to the extent that societal demands are advanced by organized interests, these organizations will prefer independent action by both orders of government using a logic that might be summarized as: "if you cannot get it from one government, try another." Of course, different groups will have different objectives, the "it" that groups want from governments will vary. In the case of environmental policy, ENGOs look for the highest possible levels of environmental protection whereas some firms look for regulatory stability while others look for deregulation or self-

regulation. To return to the model outlined in the first chapter, Breton's analysis would suggest that interest organizations would prefer a fair degree of formal unilateralism and considerable informal competition. Such formal and informal patterns of intergovernmental relations are more likely to result in groups being able to achieve their desired objectives.

In the case of the analysis offered by Simeon and Breton, one has to infer the preference of interest organizations since they do not figure prominently in the analysis. These authors are, not surprisingly, primarily interested in the behaviour of governments. Such is not the case in the work of those who begin, not with governments, but with social classes.[8] In this account of intergovernmental relations, the policy options preferred by the federal and provincial governments reflect the preferences of the dominant fraction which exercises the dominant influence. Thus, for example, the clash between the Government of Alberta and the federal government over natural resources or, more recently, environmental assessment of resource development projects, is really a clash between social classes, a regional new *petit bourgeoisie* whose preferences are advanced by Alberta versus an established capitalist class whose preferences are advanced by Ottawa. The implication of this line of analysis is that these different class fractions will promote a considerable degree of formal unilateralism and informal conflict. If we strip away the class analysis, the argument can be restated as follows: economic interests in a given province exercise predominant influence on "their" provincial government and, to the extent that their preferences conflict with the interests of other economic interests who may be predominant in Ottawa or in other provinces, this will lead to intergovernmental conflict. Extended to the realm of environmental policy, the argument can be restated yet again to suggest that dominant economic actors in a given province will enjoy good relations with the provincial government and encourage that provincial government to develop an environmental regulatory regime that is favourable to them. For example, the oil and gas industry in Alberta will work closely with the Government of Alberta to develop an environmental policy regime which takes into account the concerns and the particular needs of the industry. In contrast, the federal government may have quite a different set of environmental priorities reflecting a much broader range of influences. The result may well be a clash between the environmental policy regime favoured by Alberta and that favoured by Ottawa.

Hypothesis Three: Governments and interest organizations are mutual allies who then advocate particular positions, some of which may be unrelated to patterns of intergovernmental relations.

In the scholarly literature surveyed so far, the assumption has been that governments and groups are analytically separate. There is considerable disagreement

on the autonomy of governments from group pressure, but the two are kept analytically distinct. There is, however, another approach which emphasizes not the separateness of groups and governments but the extent to which they are joined together. There are a number of variations of this argument. To take one example, Alan Cairns has argued that state and society are inextricably interconnected. The state is embedded in society, "linked in thousands of ways to interests in society that no longer can meaningfully be described as private."[9] This has significant implications in a federation such as Canada because, as the scope and reach of government action has increased, Canadian society and the Canadian economy have become fragmented and the result is "politicized and overlapping national and provincial societies and economies."[10]

Although Cairns does not address himself to the question of the preferences of societal actors with respect to the character of intergovernmental relations, the implications of his analysis are clear. First, if the state is embedded in civil society, and policy is developed out of a set of overlapping provincial societies and economies, then not only will organized interests exert influence on governments, the reverse will also be true: governments, both federal and provincial, will exert influence over the interest organizations with which they have built strong and ongoing relationships.

Second, and this follows from the first point, the policy preferences of interest organizations will be, to a certain extent, the result of their relationships with state actors. We know, of course, that some groups have a more intense working relationship with the federal government, others with one or more provincial governments. However, and this is the implication of the notion of the embedded state, the relationships between an interest organization and a government can become so intense that the positions advanced by an interest organization may begin to reflect the preferences of the governments. The preferences of the national ENGOs, for example, for a continued strong role for the federal government with respect to environment policy is arguably the result of the fact that these organizations enjoy well-established working relationships with the federal government. However, at some point, it is likely that these groups would in effect, become allies of the federal government in protecting if not enhancing the federal role in environmental policy. Conversely, those firms and industries which have deep and complex relationships with one or more provincial governments, will prefer to limit the role of the federal government. But once again, at some point governments and groups become allies in protecting, if not expanding, the role of the provinces with respect to environmental standard-setting and enforcement. In other words, both the federal and provincial governments become linked to various interest organizations in policy communities, policy networks, and advocacy coalitions such that the relationship between governments and groups is by no means clear and influence runs in both directions.[11]

According to this hypothesis, therefore, we cannot easily predict the preferences of organized interests with respect to the character of intergovernmental relations. For any given interest organization, much will depend on the preferences of its government allies, and the preferences of the other members of the advocacy coalition or policy community. However, we can expect that, in certain circumstances, the pattern of intergovernmental relations that is preferred is unrelated to issues of jurisdiction per se. Rather a preference is expressed as a means of pursuing other objectives unrelated to intergovernmental relations. For example, ENGOs may express a strong preference for independent action by the federal government or, to a lesser extent, intergovernmental competition by governments leading to a degree of regulatory overlap and, hopefully, higher levels of environmental protection. Similarly, a given industrial sector can express a preference for intergovernmental cooperation because they hope this will lead to reduced overlap and duplication and thus, reduced costs of regulatory compliance. In neither case is the preference fundamental. Patterns of intergovernmental relations become a means to an end, not an end in themselves.

The three hypotheses developed above are summarized below. They are not consistent with one another, indeed they are directly contradictory. Each hypothesis suggests a quite different pattern of group-government relations.

One: Interest organizations prefer intergovernmental cooperation.

Two: Interest organizations prefer intergovernmental competition.

Three: Governments and interest organizations are mutual allies who then advocate particular positions, some of which may be unrelated to patterns of intergovernmental relations.

The task is now to see what evidence, if any, can be found for these hypotheses in the interventions of interest organizations during the course of negotiations between Ottawa and the provinces with respect to a environmental policy harmonization agreement.

WHAT PATTERNS OF INTERGOVERNMENTAL RELATIONS DO INTEREST ORGANIZATIONS PREFER?

In order to test each of these hypotheses, I reviewed a number of submissions to the CCME Secretariat as part of the development of the harmonization agreement.[12] Various interest organizations, academics, government departments and others made submissions to the CCME at various times over the period 1993-96. Some were submitted before the drafting of the Environmental Management Framework Agreement (EMFA), others submitted as commentaries on the EMFA,

or on the Canada-Wide Accord on Environmental Harmonization (the "accord"). I also reviewed the testimony of various witnesses before the House of Commons Standing Committee on Environment and Sustainable Development. The committee held hearings on the CCME harmonization initiative in December 1997.[13] A list of the submissions analyzed for this chapter can be found in the Appendix.

Before moving onto an analysis of the submissions themselves and the committee testimony, it is important to make some general observations about the CCME consultation process and the pattern of interest organizations that did and did not participate.[14] First, the very fact that the CCME Secretariat engaged in an extensive consultation process is significant because it challenges the generalization that the conduct of intergovernmental relations inevitably means that groups are frozen out of the policy-making process. The extensive consultations are the result of the general pattern of stakeholder consultation in the development of environmental policy, a pattern replicated when the policy-making process involved intergovernmental discussions. Moreover, the consultations of the CCME were supplemented by a similar pattern for individual governments. For example, in Alberta the provincial government organized a meeting with stakeholders to discuss the EMFA. In Quebec, in cooperation with the CCME, the provincial government released a detailed commentary on the harmonization process, made the commentary available via the Internet, and invited feedback by electronic mail as well as by more conventional means. For its part, the Government of Canada engaged in its own, often more private consultations.[15]

While extensive and in some ways innovative, the consultations initiated by the CCME are not unique. Since at least the late 1980s there has been a growing pattern of consultation across government, including situations where more than one order of government is involved. For example, the federal and provincial governments consulted widely in anticipation of making changes to the Canada and Quebec Pension Plans. However, not all consultative processes are equivalent. The development of environmental policy, at least by the federal government, often involves extensive consultations well before final decisions are made. Occasionally, participating groups actually have a hand in the drafting of policy. In other cases, consultation is less extensive. At its worst, "consultation" becomes a *pro forma* exercise and is divorced from the actual policy-making process. Generally speaking, in their dealings with the federal government, ENGOs have come to expect something akin to the first pattern of consultation. In contrast, the consultations leading to the EMFA, while extensive by intergovernmental standards,[16] did not go so far as actual drafting. Moreover, the consultations in anticipation of the Canada-Wide Accord were even less extensive. Indeed, one member of the National Advisory Group (NAG) made up of ENGO, academic, and industry representatives was highly critical of the consultations. Martha Kostuch, vice-

president of the Friends of the Oldman River, observed that, while the NAG was a good idea, in practice "we were ignored totally."[17]

Second, the participation by interest organizations in the harmonization consultations was very uneven. It would appear that the CCME sought to consult with as wide a range of stakeholders as possible. However, the response to the invitation was mixed. ENGOs participated actively in the consultation process. Several submissions were filed on behalf of the Canadian Environmental Network and/or by individual ENGOs, notably the Canadian Institute for Environmental Law and Policy (CIELAP) and the West Coast Environmental Law Association. These submissions were often very detailed and included a clause-by-clause analysis of the various iterations of the harmonization agreement. In marked contrast, interest organizations representing business and industry were much less likely to submit briefs to the CCME as the harmonization process developed. With some notable exceptions, those submissions were often much shorter and restricted to commenting on some general principles. As I argue below, the differences in the level and intensity of participation as between ENGOs and industry may be the result of the fact that the harmonization exercise was perceived differently by both groups.

Environmental Non-Governmental Organizations (ENGOs)

Throughout the harmonization process, ENGOs repeatedly argued that the federal government must retain a strong role in the development and implementation of environmental policy in Canada. This is consistent with the position taken by environmentalists in Canada since the early 1970s. The views of ENGOs can be summarized, with only a small degree of exaggeration, as "federal government good, provincial governments bad."[18] In fact, some environmental activists have gone so far as to label provincial governments "the environmental ogres of our time."[19]

ENGOs and others often echo the proposition advanced earlier in this chapter that provincial governments cannot be trusted to ensure adequate environmental protection because of close ties to resource industries. More recently, provincial governments are said to be unable to take responsibility for environmental protection because of massive cuts to the budgets of provincial environment departments. As a result, ENGOs argue that the federal government should remain active with respect to environmental policy if not expand its role and make use of its apparent constitutional authority with respect to environmental protection.[20] Evidence for both propositions can be found in the existing literature on Canadian environmental policy and Canadian federalism and in the submissions of ENGOs to the harmonization process.

For example, Susan Holtz has argued that provincial environmental policy is heavily influenced by the fact that such governments are closer to "resource-based economic interests and the jobs and revenue they represent" and that provincial environmental policy is thus coloured by other considerations if not an outright conflict of interest.[21] In contrast, the federal government is thought to be "more removed" from the concerns of resource-based industries.[22] For his part, Alastair Lucas argues that "provinces are more directly involved than the government of Canada in promotion of natural resources and manufacturing developments."[23] He extends the argument by also suggesting that provinces will often oppose federal action on the environment because they are under "pressure from local industrial interests that have adjusted to provincial environmental regulation and fear additional burdens, or at least the initial uncertainties, of federal regulations."[24] In their commentary on the original EMFA, CIELAP argued that "the primary force driving harmonization forward is the strong desire of some provinces to regain exclusive control of resource management within provincial boundaries."[25] In their submission, the authors of the CIELAP brief go on to raise concerns about poor track records of provincial governments with respect to the enforcement of the pollution prevention and habitat protection requirements of the *Fisheries Act*.[26] Later in the harmonization process, as the emphasis shifted from the EMFA to the Canada-Wide Accord, ENGO representatives emphasized the cuts to provincial environment budgets. As the harmonization process evolved, the budget of Environment Canada and provincial Environment ministries were cut back, in some cases quite significantly. According to Gary Gallon of the Canadian Institute for Business and the Environment, the budget of the Ontario Ministry of the Environment was cut by 43 percent from $290 million to $165 million. Similarly, the Alberta government cut the budget of its environment department from $405 million to $296 million.[27] ENGOs complained that the CCME harmonization process would increase the responsibility of provincial governments for environmental protection at precisely the moment that their budgets were being cut back. They also raised concerns that the enforcement capability of Environment Canada was being cut back making it impossible for the federal government to backstop the provinces.

As a result of this concern about the very ability of provincial governments to articulate and enforce a coherent set of environmental policies, many of the ENGOs who made submissions to the harmonization exercise were very critical of an agreement which they thought would unduly weaken the ability of the federal government to develop and implement environmental policy. For example, William J. Andrews, executive director of the WCELA, argued that "the federal government has now, and should continue to have, the primary responsibility to establish Canada-wide environmental priorities."[28] Similarly, in their submission CIELAP

argued that, "the federal government must also retain responsibility and capacity for providing leadership and action on international and national environmental issues. These responsibilities should not be transferred to the CCME."[29]

Not only were ENGOs concerned that the harmonization agreement would unduly weaken the federal government's role in environmental protection, they also argued that the initial draft of the EMFA was unduly preoccupied with perceived overlap and duplication between Ottawa and the provinces. The submissions by CIELAP, either on its own behalf or on behalf of the Harmonization Working Group of the Canadian Environmental Network (CEN), repeatedly argued that there is insufficient evidence of extensive overlap and duplication. In making this argument, CIELAP repeatedly cites a study commissioned by the CCME Secretariat which showed that there is little actual duplication and overlap.[30] Thus, CIELAP continues, the efforts at concluding a harmonization agreement are designed to solve a problem that may not exist.[31] Moreover, for environmentalists, to the extent that overlap and duplication do exist, this may be a benefit. For example, in their commentary on the overall harmonization project initiated by the CCME, CIELAP argued that, "dynamic federalism creates the potential for more all-inclusive environmental protection regimes.... the involvement of both levels of government means fewer cracks for things to fall through. It also provides for more consistent coverage for environmental protection nation-wide."[32]

ENGOs also argued that the harmonization exercise would transform the CCME into a decision-making body. This was seen to be a problem for two reasons. First, ENGOs feared that the council would be unable to reach decisions. Because the CCME operates by consensus, decision making by the council pursuant to a harmonization agreement would be inefficient and subject to veto by any single jurisdiction. For example, in his commentary on the accord, William Andrew argued that the draft standards sub-agreement introduces a concept of "Canada-wide environmental priorities" which would be set by the CCME. He argues that the result would be an unfortunate situation where any single provincial (and perhaps territorial) government could exercise a veto and "frustrate an initiative to declare a particular environmental problem to be a 'Canada-wide environmental priority.' This goes too far in strengthening the provincial role in environmental decision-making."[33]

However, ENGOs were also concerned that the harmonization process, by turning the CCME into a decision-making forum, would put environmental policy making, "out of the reach and oversight of the Legislatures, Parliament and the electorate."[34] By creating a new level or order of government in Canada, the harmonization process would lead to a situation where it would be harder to make the federal and provincial governments and, in particular, ministers of the environment, accountable for the decisions they make about environmental protection.[35]

The overriding goal of ENGOs with respect to the harmonization process was one of ensuring that the highest levels of environmental protection be maintained and that any existing gaps in federal and provincial activities with respect to the environment would be filled. In order to achieve these objectives, ENGOs argued the case for a strong role for the Government of Canada. They were concerned, therefore, less with harmonization per se and more with how best to maintain and retain high levels of environmental protection.

This concern led the ENGOs to express support for a considerable degree of independent action on the part of the governments, particularly the federal government. Independent action by Ottawa is deemed to be desirable on the assumption that the federal government is more likely than provincial governments to strive to ensure high levels of environmental protection. Moreover, ENGOs were also willing to accept overlap and duplication in federal and provincial environmental policy. Such overlap would allow for a degree of intergovernmental competition to fill gaps in existing environmental policy or strengthen the regulatory regime as governments engage, as they did to some extent in the late 1980s, in a "race to the top."

In other words, the positions taken by ENGOs do not conform to the first hypothesis suggesting support for intergovernmental cooperation. On the contrary, the submissions by ENGOs with respect to harmonization suggest a considerable degree of support for independent action by the federal government and/or intergovernmental competition by both orders of government including, if need be, a degree of overlap and duplication. ENGOs are very wary of intergovernmental cooperation with respect to environmental policy in Canada. Admittedly, they are not opposed to cooperation in principle. Indeed, CIELAP identified what it saw as a "good" example of intergovernmental cooperation: the *Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem* (COA).[36] However, at least with respect to the EMFA, the Canadian environmental movement was opposed to intergovernmental cooperation fearing that the net result would be a weaker federal role in environmental protection and a weakening of environmental regulation.

Business and Industry

Generally speaking, the briefs submitted by organizations representing business and industry suggested quite strong support for the overall objective of harmonization. For example, Leonard Surgess, an executive with Noranda Mining and Exploration, argued that, "overlap and duplication do exist and rarely, if ever, produce significant benefits. The current system diffuses accountability and responsibility, and slows decision-making, imposing significant uncertainty, delay

and costs to Canadian industry, governments, and taxpayers alike."[37] Similarly, in a detailed submission to the CCME, the Insurance Bureau of Canada argued that, in general, harmonization "will improve the competitive position of Canadian industry by increasing efficiency though the elimination of duplication, the simplification of operations, ... the reduction of compliance costs, and the provision of greater certainty."[38]

Generally, most of the submissions by industry equated harmonization with a considerable degree of federal-provincial cooperation. In only one case did a business group strongly advocate disentanglement. In a letter sent to the Saskatchewan minister of environment and resource management, the Saskatchewan Chamber of Commerce argued that both the federal and Saskatchewan governments should withdraw completely from the jurisdiction of the other order of government. The Chamber argued that both Ottawa and the provinces should refrain from legislating and regulating in environmental areas which are the constitutional responsibility of the other order of government. Of course, this requires that government be able to delineate clearly their areas of constitutional responsibility with respect to the environment, something that most observers see as being very difficult if not impossible.[39]

At the same time business and industry associations also voiced support for a reasonably strong federal role. Given the extensive relationships that they have developed with federal officials, elected and not, the private sector lobby was clear in its support for a continued role for the federal government. For example, the Canadian Chemical Producers Association (CCPA) recommended amending the EMFA to provide for a general leadership and coordination role for the federal government both in general terms and with respect to the development of national policies.[40]

Interestingly enough, even some Quebec-based firms and associations voiced support for a continuing federal role or at least a degree of harmonization between Ottawa and the provinces. For example, in a submission to the CCME, the Quebec Mining Association said that, "cette approche d'harmonisation est tout à fait essentielle pour favoriser la protection de l'environement et susciter la collaboration des divers intervenants."[41] Similarly, in his testimony to the House Standing Committee on the Environment and Sustainable Development, Michael Cloghesy, president of the Centre patronal de l'environement du Québec argued that, rather than have two systems, one provincial and one federal, a single system would be preferable, one "that ensures that the investor will clearly know what the rules of the game are."[42]

However, considered overall, the submissions by firms and organizations representing business were not concerned, in the first instance, with federal and provincial roles. Rather, the message that repeatedly comes through is the need to

simplify regulation, in some cases, deregulate, and allow for voluntary regulation and compliance. For example, in its initial reaction to the EMFA, while the CCPA was generally supportive, its first recommendation was that the agreement recognize the role of voluntary agreements rather than be restricted to traditional command and control instruments.[43] Similar comments can be found in a somewhat remarkable joint submission to the CCME by George Miller the president of the Mining Association of Canada, on behalf of the CCPA, the Canadian Electricity Association, the Canadian Pulp and Paper Association, and le Centre patronale de l'environement du Québec. In a memorandum dated 6 November 1996, Miller raised several concerns with the draft of the accord. Among other things, he argued that, "voluntary initiatives need to be specifically recognized in the accord and sub-agreements so that they will become an instrument to promote and support further use of such instruments where appropriate."[44] In this vein, the overriding concern of business and industry groups was with overlap and duplication — real or perceived.

With one important exception that is discussed below, the briefs submitted by business and industry to the harmonization exercise were, therefore, not all that concerned about the pattern of intergovernmental relations as such. Thus, there is little direct evidence to support the hypothesis that interest organizations representing business supported either intergovernmental cooperation or intergovernmental competition. Apart from some very general statements that intergovernmental cooperation is desirable, business and industry submissions did not bluntly advocate either cooperation, competition, or independent action. Rather, the submissions made the case for a certain pattern of relations as a means to an end, the end being a more flexible regulatory environment. There are, for example, repeated statements that the harmonization agreement should not make reference to the highest levels of environmental protection but, less stringently, to a high level of protection. This was the case in the joint submission drafted by the Mining Association cited earlier which argues that, "the vision [statement] in the Accord should not be stated in terms of achieving the highest level of environmental quality for all Canadians. Instead the term 'high' or some similar term should be used."[45]

The exception to this general pattern occurs when groups representing resource industries turned their attention to the inspections and enforcement sub-agreements and the sub-agreement on environmental assessment. Here, the vast majority of submissions called for a predominant provincial role. For example, the mining industry has argued for some time that any general regulations and standards set by Ottawa or the provinces should be supplemented with site-specific requirements that would govern the discharge of effluent into local aquatic ecosystems. Not surprisingly, the industry also argues that these site-specific requirements should be developed and implemented by provincial governments. For example, in his

submission to the CCME on 26 July 1996, Leonard Surgess of Noranda Mining approvingly cited the example of the Assessment of Aquatic Effects of Mining in Canada (AQUAMIN). This process led to a series of recommendations which outlined a cooperative national environmental protection framework, but one where provincial, territorial, and aboriginal governments would be responsible for setting and enforcing site-specific requirements. Moreover, these requirements would be "established with regard to social, economic and environmental factors, as well as available control technologies."[46]

INTEREST ORGANIZATIONS AND GOVERNMENTS AS ALLIES

The close working relationship between resource industries and at least some provincial governments lends credence to the third hypothesis outlined earlier which suggests that governments or parts thereof become allied with particular interest organizations and vice versa. These alliances then articulate particular positions that are only indirectly connected to the patterns of intergovernmental relations.

For example, in an effort to diversify the provincial economy, the Government of Alberta has, over the past 15 years, sought to significantly expand the forestry industry.[47] As a means to that end the Government of Alberta also tried to streamline the regulatory process within Alberta and made a number of attempts to harmonize the provincial and federal procedures for environmental impact assessments.[48]

However, it is misleading to assume that the provinces are invariably and at all times allied with resource industries in stark contrast with the federal government. In more conceptual terms, both the provincial and federal governments enjoy varying degrees of autonomy from the resource sector. For example, in a large province like Ontario, the provincial government resembles the federal government insofar as it cannot afford to become too closely allied with one sector of the economy over an extended period of time. Thus, beginning in the mid-1980s as the most recent "green wave" gathered momentum, successive Liberal and New Democratic Party (NDP) governments in Ontario led by David Peterson and Bob Rae became increasingly critical of environmental degradation caused by resource industries.

This being said, the strategic alliances between some ENGOs and the Peterson and Rae governments did not lead to a single pattern of environmental intergovernmental relations. On acid rain, for example, Ottawa and Queen's Park were largely allies, particularly after resolving what to do about the acid gas emissions of Inco and Ontario Hydro. In the case of the regulation of toxic substances, by

way of contrast, the two orders of government were, rhetorically (most of the time) and *de facto* (some of the time) competitors. In a sort of "race to the top" the two governments sought to be aggressive in reducing pollution.

Similarly it is misleading to assume that, by some magical process, the Government of Canada will invariably be more progressive on environmental policy matters. While many Canadian ENGOs may still subscribe to the proposition "Ottawa good, provinces bad" these same organizations were often critical of both orders of government for having initiated the harmonization process.[49] Moreover, different parts of the federal government may favour different allies. This should not be at all surprising. One should expect Natural Resources Canada to articulate the interests and concerns of the mining sector within the policy-making process in Ottawa. More to the point perhaps, one expects Environment Canada to occasionally reflect the concerns of at least some ENGOs. How and to what extent the final decisions of the Government of Canada reflect the views of any particular group is, of course, quite another matter.

How is it that the federal government came to be such a strong supporter of the harmonization initiative despite the objections of ENGOs? First, it is important to observe that environmental organizations did enjoy some success in lobbying the federal government with respect to the harmonization initiative. At various times Environment Canada wavered in its enthusiasm for environmental policy harmonization. For example, in the latter part of 1995 the lobbying efforts of ENGOs paid off, at least in part. They managed to secure limited access to the then minister of the environment, Sheila Copps. The result was a decision by the minister to block the release of the EMFA sub-agreement on environmental assessment. More surprisingly perhaps, in late 1996 Environment Canada asked a small number of academics and other interested observers to take a clean slate and outline a new model for federal-provincial roles and responsibilities for the development and enforcement of environmental policy. However, this wavering on the part of Environment Canada was not sustained. Under pressure from provincial governments and the Privy Council Office, Environment Canada once again found its enthusiasm for harmonization and pushed forward to the signing of the Canada-Wide Accord in early 1998.

Thus, the harmonization exercise provides evidence to support the hypothesis that powerful interest organizations and individual federal and provincial governments are strategic allies. The relationships are complex, influence runs in both directions. Moreover, the relationships change over time. As a result, if and when a powerful organized interest expresses a preference for a particular pattern of environmental intergovernmental relations, this preference is by no means absolute. It is a strategic means to a larger end. Furthermore, the willingness and ability of a given federal or provincial environment minister to act on these stated preferences

is also variable. Of course, the final result is clear. Ottawa and the provinces did proceed with a harmonization of their roles and responsibilities with respect to the environment and, by and large, the result is more in keeping with the preferences of powerful organizations representing business and industry than it is in keeping with the preferences of ENGOs.

CONCLUSIONS

This paper presents a preliminary answer to the question: What patterns of intergovernmental relations do different interest organizations seek to encourage with respect to environmental policy making in Canada? Analysis of the submissions of key interest organizations with respect to the CCME harmonization initiative suggests that ENGOs support a considerable degree of federal unilateralism and are wary of extensive intergovernmental cooperation. Organizations representing business and resource industries, on the other hand, while supportive of intergovernmental cooperation are even more supportive of allocating to provincial governments responsibility for inspections and environmental assessment.

However, this paper also suggests that interest organizations representing both the environmental movement and business and industry are not interested in patterns of intergovernmental relations as such. Rather, these patterns are a means to an end. In the case of ENGOs the goal is higher levels of environmental protection. In the case of resource industries, the goal is a move to voluntary and self-regulation, negotiated compliance, if not outright deregulation.

The patterns identified in this paper also have implications for the generalizations in the literature regarding the interplay of intergovernmental relations and government-group relations. First, the competing metaphors of "multiple-crack" and "frozen out" will no longer serve as guides as to how organized interests respond to intergovernmental relations. In environmental policy there is little evidence to suggest that groups are truly frozen out of the policy-making process. The consultations initiated by the CCME and by individual governments with respect to the harmonization process suggest that groups can and do often exercise considerable influence on intergovernmental negotiations. Similarly, while some interest organizations or sectors did lobby both orders of government, the pattern in the case of the harmonization initiative was less a case of groups taking advantage of "multiple cracks" in the state and much more a case of the state initiating and inviting interventions in an organized and routinized fashion via the CCME Secretariat.

Second, the reason that these two metaphors and the hypotheses they represent, are no longer adequate is that they assumed a rather traditional and conventional definition of interest organizations. In the case of environmental policy, at

least, governments must contend with both conventional groups representing business and industry as well as with ENGOs. The latter may adopt the strategies and tactics of conventional groups but are just as likely to "go public," seek to mobilize public opinion, and in some cases, ultimately reject the rules of the game as set out by governments. In other words, in order to capture the range of possible linkages between interest organizations and federalism, we need to come to grips with the fact that new social movements, in this case ENGOs, do not always play the game by the conventional rules.[50]

Third, it is clear that the relationship between organized interests and federalism is different depending on the policy instruments being used by governments. Environmental policy is largely, but not exclusively, about regulation. The strategies and actions of ENGOs and industry associations may well be different in the case of regulatory politics as compared to policy fields where spending is the policy instrument of choice.

Finally, and perhaps most importantly, the analysis in this paper is very preliminary given the complexity of the relationships that exist between different interest organizations and different orders of government. The analysis presented here, for example, tends to assume that the federal and provincial governments are unitary actors and act coherently and consistently. In fact, in the case of environmental policy we know that while Ministries of the Environment are central players, other ministries, notably those responsible for natural resource policy, are also important. In the particular case of harmonization we also know that the negotiations were of great concern to the Prime Minister's Office and to some of the intergovernmental relations specialists in the Privy Council Office. Environmental policy, it is hoped, will be another area where governments can demonstrate that the federation works. In the case of interest organizations, I have tended to focus on industry associations and have said little about the negotiations within these associations and the activities of individual companies who may or may not always agree with the position or the lobbying strategy of the association of which they are a member. In effect, we need a more sophisticated model to capture the complex web of relationships that exist when we seek to link the group-government dynamic with the government-government dynamic.[51]

However, in anticipation of such a detailed analysis, some tentative conclusions are still possible. As I have sought to argue in this paper, the patterns of group-government relations that we find in the case of the harmonization initiative of the CCME suggest that interest organizations are often not concerned with intergovernmental relations per se. Rather, intergovernmental cooperation, competition, or independent action are simply a means to an end. In the case of ENGOs, strong and perhaps unilateral action by the federal government is seen as the only way of ensuring continuing high levels of environmental protection. In the case

of organizations representing business and industry, intergovernmental cooperation is seen to be desirable. However, in the key areas of inspections, enforcement and environmental assessment, provincial paramountcy is key. As it turns out, the sub-agreements under the Canada-Wide Accord on Environmental Harmonization endorsed in principle by the CCME in November 1996, do give provincial governments a larger role with respect to inspections and enforcement.

The interactions between groups and governments are complex and multifaceted. However, the case of the harmonization initiative undertaken by the CCME would seem to suggest that organized interests can and do have an impact on the patterns of intergovernmental relations that predominate with respect to environmental policy in Canada. Even though ENGOs and industry associations may not be primarily concerned with intergovernmental relations, they do lobby for particular patterns or relations between Ottawa and the provinces, patterns which they hope will enhance their preferences with respect to environmental regulation in Canada.

NOTES

The author would like to thank Kathryn Harrison, Réjean Landry and Katherine Sharf-Fafard for comments on earlier drafts of this chapter.

1. It is important to recognize that the implicit or explicit goal of much of the literature is to explain the move from what was assumed to be a golden era of "cooperative federalism" in the 1960s to the more conflictual pattern of intergovernmental relations that characterized the 1970s and 1980s. Hence, it is perhaps not surprising to see the lack of focus on cooperation.
2. I have developed this argument at much greater length as a preliminary step to articulating my concept of the intergovernmental state. See Fafard, "The Intergovernmental State."
3. These two contrasting hypotheses are summarized by Thorburn, *Interest Groups in the Canadian Federal System.*
4. As outlined below, this generalization holds even when the analysis is cast in terms of class terms rather than a more pluralist account of government-to-group relations.
5. Simeon, *Federal-Provincial Diplomacy.*
6. See Thorburn, *Interest Groups in the Canadian Federal System*, pp. 83-114.
7. See Breton, "The Theory of Competitive Federalism," pp. 457-502.
8. See for example, Stevenson, "Federalism and the Political Economy of the Canadian State," pp. 71-100. See also Pratt and Richards, *Prairie Capitalism.*
9. Cairns, "The Embedded State," p. 57.
10. Ibid., p. 39.

11. Unfortunately, much of the existing literature on policy communities and advocacy coalitions does not directly take into account the implications of federalism and intergovernmental relations. On policy networks, see Atkinson and Coleman, "Policy Networks, Policy Communities, and the Problems of Governance," pp. 193-218.
12. A summary of the negotiations on environmental policy harmonization can be found in Chapter 1 of this volume.
13. See Canada. House of Commons Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection.*
14. On the changing nature of public participation in intergovernmental negotiations, see Fafard, "Green Harmonization," pp. 203-27.
15. The private consultations included a somewhat extraordinary request in late 1995 sent to a limited group of academics and interest organizations. Environment Canada asked for short commentaries on what should be the relationship between Ottawa and the provinces with respect to environmental policy notwithstanding the existence of the EMFA.
16. On the nature of public consultations when policy is being made intergovernmentally, see Fafard, "Of Chess and Heart Attacks," pp. 3-20.
17. Canada. House of Commons Standing Committee on Environment and Sustainable Development, *Hearings*, 23 October 1997, p. 33.
18. This pattern is long-standing. For a review of how ENGOs in Canada view the federal and provincial governments with respect to environmental policy, see Fafard, "Federalism, Intergovernmental Relations, and the Environment in Canada."
19. Buttle, "Cutback in Environmental Role Feared," p. B4.
20. This argument is developed in greater detail in Fafard, "Federalism, Intergovernmental Relations, and the Environment in Canada."
21. Holtz, "The Public Interest Perspective," p. 111.
22. Ibid.
23. Lucas, "The New Environmental Law," p.184.
24. Ibid., p. 182.
25. Clark and Winfield, "The Environmental Management Framework Agreement," p. 8.
26. Ibid., p. 12. Although in his analysis of the intergovernmental relations of the enforcement of the *Fisheries Act*, Kernaghan Webb is less critical and suggests that, despite some problems, the joint enforcement of the regulations under the Act works reasonably well. See Kernaghan Webb's chapter in this volume.
27. Canada. House of Commons Standing Committee on the Environment and Sustainable Development, *Evidence*, 21 October 1997, p. 21.
28. Andrews, "The Federal Government and Canada-Wide Environmental Priorities."
29. Clark and Winfield, "The Environmental Management Framework Agreement," p. 12.
30. KPMG Management Consulting, "Project Report: Resource Impacts Assessment Study, Environmental Management Framework Agreement Study Report."
31. Clark and Winfield, "The Environmental Management Framework Agreement," p. v.

32. Clark and Winfield, "Harmonizing to Protect the Environment?" p. 3.
33. Andrews, "The Federal Government and Canada-Wide Environmental Priorities."
34. Clark and Winfield, "Harmonizing to Protect the Environment?" p. 11.
35. Ibid.
36. Ibid., p. 10.
37. Noranda Mining and Exploration, "Preliminary Comments on Draft Accord."
38. Insurance Bureau of Canada, "Harmonization of Environmental Standards in Canada," p. 2.
39. Lucas, "National Resource and Environmental Management," pp. 31-43.
40. Letter from Jean M. Bélanger, president, Canadian Chemical Producers' Association to the Honourable Sheila Copps, deputy prime minister and minister of the environment, 23 January 1996.
41. "This approach to harmonization is absolutely essential in order to protect the environment while at the same time securing the cooperation of all parties concerned" [translation by the author]. Correspondence with the author from Jean Roberge, directeur, Environement et affaires juridiques, l'Association Minière du Québec, February 1996.
42. House of Commons Standing Committee on the Environment and Sustainable Development, *Evidence*, 21 October 1997, p. 4.
43. Canadian Chemical Producers Association, "Comments on the CCME Harmonization Initiative, p. 2.
44. Memorandum from George Miller, president, Mining Association of Canada, to ministers of the environment, 6 November 1996.
45. Ibid.
46. Noranda Mining and Exploration, "Preliminary Comments on Draft Accord."
47. See Pratt and Urquhart, *The Last Great Forest.*
48. See the chapter by Steven Kennett in this volume for more information on the harmonization of environmental assessment in Alberta.
49. See, for example, the testimony of Mark Winfield from the Canadian Institute for Environmental Law and Policy before the House Committee. House of Commons Standing Committee on the Environment and Sustainable Development, *Evidence*, 21 October 1997, pp. 2-4.
50. For an exploration of the tension between ENGOs and federalism see Gibbins, "The Challenge of New Politics and New Social Movement to the Future of Federalism," pp. 17-41.
51. I have tried to develop such a model elsewhere. See Fafard, "Capacity and Autonomy of the Intergovernmental State."

APPENDIX
Submissions to the CCME with Respect to Harmonization Reviewed for this Analysis

A. To the Canadian Council of Ministers of the Environment

- Institute of Forestry – Rocky Mountain Section
- Mining Association of Canada
- l'Association minière du Québec
- Noranda Mining and Exploration
- Placer Dome Ltd.
- Canadian Chemical Producers Association
- Alberta Power Limited
- Saskatchewan Chamber of Commerce
- Insurance Bureau of Canada
- TransAlta Corporation
- Manitoba Hydro
- West Coast Environmental Law Association
- Newfoundland Public Health Association
- Canadian Labour Congress
- Nova Scotia Environmental Assessment Board
- Canadian Institute for Environmental Policy and Law

B. To the House of Commons Standing Committee on Environment and Sustainable Development

- Canadian Institute for Environmental Law and Policy
- Canadian Environmental Law Association
- Centre québécois de droit de l'environnement
- West Coast Environmental Law Association
- Mining Association of Canada
- Noranda Mining and Exploration
- Centre patronal de l'Environnement du Québec
- Canadian Institute for Business and the Environment
- Environment Canada
- Canadian Environmental Assessment Agency
- Packaging Association of Canada
- Conservation Council of New Brunswick
- Canadian Environmental Defence Fund
- Friends of the Oldman River
- Canadian Labour Congress
- Assembly of First Nations
- Grand Council of the Crees of Quebec
- Kathryn Harrison, University of British Columbia
- Canadian Council of Ministers of the Environment
- Ronald Northey

PART TWO

The Consequences of Different Patterns of Intergovernmental Relations

CHAPTER 5

Meeting the Intergovernmental Challenge of Environmental Assessment

Steven A. Kennett

INTRODUCTION

Intergovernmental issues relating to environmental assessment (EA) have had a high profile over the past decade. EA has been the subject of constitutional litigation, intergovernmental conflict, multilateral harmonization initiatives and bilateral federal-provincial agreements. Overlap between federal and provincial EA processes has been among the principal industry complaints with environmental regulation in Canada and environmental groups have been active in litigation on jurisdictional issues and in opposing initiatives that might reduce the federal role in EA.

EA also proved to be the undoing of the most ambitious attempt to date at intergovernmental harmonization, the *Environmental Management Framework Agreement* (EMFA).[1] Although it is debatable whether EA was the Achilles' heel of an otherwise viable initiative or merely the straw that broke the camel's back, there is little doubt that the federal government's refusal to accede to provincial demands in this area contributed directly to the demise of the EMFA. Undeterred by this experience, governments gave EA a prominent place in the subsequent multilateral harmonization initiative. That they returned to this issue so quickly underlines the centrality of EA to the intergovernmental environmental agenda in Canada.

This chapter examines the policy consequences for EA of various patterns of intergovernmental relations. The analysis of these consequences, it is argued, has important practical implications for the ongoing debate over harmonization as a means of meeting the intergovernmental challenge of EA. To begin, the next section

briefly describes the normative perspective adopted for evaluating EA policy outcomes. The discussion then turns to an overview of two broad categories of intergovernmental relations: unilateralism and cooperation. In the two following sections, specific patterns of interaction are identified within each of these broad categories and their implications for EA are examined. The discussion of unilateralism focuses on intergovernmental conflict and competition. Thereafter, two models for intergovernmental cooperation are explored. These models are intergovernmental collaboration through bilateral process coordination and the rationalization of government involvement in EA by means of process substitution. When analyzed in terms of the chapter's normative framework for evaluating policy outcomes, process coordination emerges as the preferable approach to EA harmonization. Brief concluding comments are presented in the final section.

NORMATIVE PERSPECTIVE

EA is a process designed to inform decision making rather than a set of standards for environmental quality or principles for resource management. Direct connections between EA regimes and environmental outcomes are therefore difficult to establish.[2] The impact of EA on environmental protection is always filtered through decision-making and regulatory processes, themselves subject to a host of other influences. Perhaps the most that can be said with certainty is that while good EA processes do not guarantee good environmental outcomes, the absence of EA may significantly increase the risk that decisions will be taken without sufficient regard to their environmental effects.

Given this limitation, the normative standard adopted here foregoes direct reference to environmental outcomes and focuses instead on the elements of "good" EA process. The purpose of EA is to improve decision making by evaluating potential environmental impacts and possible mitigation measures *before* activities that may have significant negative environmental effects are undertaken. EA applies the "look before you leap" principle to project planning and regulation. More specifically, it is designed to identify information (including values) relating to the potential environmental effects of activities, evaluate or test that information to ascertain its reliability and comprehensiveness, and disseminate the information and conclusions to regulatory authorities, project proponents, and the public at large.

The core process values of EA thus relate to its effectiveness and efficiency in providing useful information to decisionmakers.[3] The attributes of EA processes relevant to this chapter are those that may be affected by patterns of intergovernmental relations. The analysis that follows therefore assesses EA processes in terms of their ability to:

- generate the scientific and technical information necessary for predicting environmental effects and formulating recommendations to decisionmakers;
- accommodate a broad range of interests and values;
- operate in an efficient and timely manner, so as to minimize the costs of EA to government, project proponents, and intervenors;
- provide procedural certainty and predictability; and
- encourage and facilitate EA process innovation.

The central issue for this chapter is whether different patterns of intergovernmental relations contribute to the development of EA processes with these attributes.

GENERAL PATTERNS OF INTERGOVERNMENTAL RELATIONS: UNILATERALISM VERSUS COOPERATION

Unilateralism and cooperation represent polar opposites in intergovernmental relations. They are analytically inseparable, however, because the limitations of unilateralism constitute the incentive structure for cooperation. Unilateralism is assumed to be the baseline condition under which governments operate. Incentives to cooperate exist when unilateralism leads to direct costs or foregone benefits. Since cooperation requires effort by governments and may entail restrictions on autonomy, particularly if policy coordination is the result, it will be attempted only when clear benefits ensue in comparison with unilateralism.

This section sets out the general rationale for intergovernmental cooperation and examines the principal costs and benefits of unilateralism in relation to EA. These costs and benefits explain the efforts to improve intergovernmental cooperation regarding EA and set the stage for a more detailed examination of the implications of different patterns of unilateral and cooperative behaviour by governments.

Governments are most likely to cooperate under two circumstances. The first is when cooperation provides greater control over domestic policy agendas than does unilateralism.[4] For example, significant interdependencies and externalities may render independent policies relatively ineffective.[5] Under these circumstances, unilateralism is a costly strategy in terms of governments' ability to attain policy objectives. Cooperation may therefore increase policy effectiveness, even if it restricts autonomy in certain respects. Cooperation may also be a means of reallocating responsibilities within the latitude permitted by the constitution in order to better align policy instruments with resources and expertise or, in some cases, to respond to specific regional or national concerns.[6] Although this reallocation may

be a zero-sum game between federal and provincial governments in jurisdictional terms, it may nonetheless further the policy objectives of all parties.

Second, intergovernmental cooperation may occur in response to external pressure. When unilateralism imposes significant costs on concentrated and politically mobilized interests, they will seek to reduce these costs by inducing governments to cooperate.[7] Once again, it is the costs to government of unilateralism — in this case political and, perhaps, economic — that provide the incentive for cooperation.

The costs of unilateralism in EA relate primarily to problems of process overlap and duplication. These problems are the product of the constitutional division of powers, which gives both orders of government authority to conduct EA as an adjunct to decision making.[8] Since a broad range of government decisions may have implications for the environment, the potential for process overlap is considerable. Major projects located within provinces often require regulatory approvals or other action by both the federal and provincial governments. When these decisions are supported by EA, project proponents may be subject to dual requirements.

The problem of dual procedural requirements differs significantly from that caused by overlapping environmental standards. A company subject to different federal and provincial emissions legislation can generally meet its obligations by complying with the strictest standard. While extra costs may be incurred if reporting requirements or testing protocols differ, the mechanics of dual compliance are not particularly complicated. Where dual procedural requirements exist, however, there is no single highest standard with which the proponent can comply. Rather, the project application must pass through each stage of each EA process, even if the result is duplication of effort or the imposition of different planning and regulatory time frames. In the most extreme case, a project could be subject to entirely separate review processes, including public hearings, under federal and provincial EA regimes.

The risk that unilateralism will result in dual EA processes applying to the same project suggests the need for "vertical" (i.e., federal-provincial) coordination. This axis has, in fact, been the primary focus of intergovernmental attention to date. However, unilateralism in EA can also give rise to "horizontal" problems under two circumstances.

First, differences in processes among provinces may be administratively costly for proponents that operate nationally and may create competitive differences between provinces, thus distorting resource allocation in the economy or generating political pressure to lower standards in order to attract industry. The issues raised by interprovincial differences in EA are reviewed below in the discussion

of intergovernmental competition. Second, horizontal issues may arise where activities in one province have potential transboundary effects. While transboundary issues for EA are recognized in federal and some provincial legislation, this topic has yet to be a major focus of intergovernmental attention in Canada.[9]

Of the forces leading governments to choose cooperation over unilateralism, perhaps the clearest is the external pressure from industry to avoid the application of dual EA processes to projects. The principle of "one project — one assessment" is an article of faith among project proponents. While this principle does not require that ultimate decision making be combined, it points to a single or integrated set of requirements for the EA of each project.

Complementing this external pressure on governments is an internal policy objective. As government agendas are increasingly driven by fiscal considerations, a major attraction of federal-provincial harmonization is the potential to achieve greater efficiencies through combining efforts, eliminating duplication, or off-loading responsibilities and associated costs.

The provinces and the federal government also have strategic reasons for promoting cooperation. From the provincial perspective, cooperation is seen as a means of reducing federal involvement in environmental management. Behind the apparently neutral language of allocating EA responsibilities to the most appropriate order of government is an assumption on the part of some, if not all, of the provinces that most projects located within their boundaries should be subject exclusively to the provincial EA processes. There appears to be significant industry support for this view, at least in Alberta,[10] although it has been suggested that some of this opposition to federal involvement was actively fostered by provincial government officials.[11]

Cooperation is strategically attractive from the federal perspective for reasons relating to national unity. Faced with constitutional impasse, the federal government has committed itself to demonstrating that "rebalancing" of the federation can be achieved through non-constitutional means. While this rebalancing does not necessarily mean across-the-board decentralization, showing that federalism can "work" in the context of demands from Quebec and other provinces for greater powers implies an expanded provincial role in certain areas. It also requires demonstrating both the efficiency and the flexibility of federalism. Environmental management, including EA, is one area where visible progress may be made.

As an adjunct to decision making, EA could theoretically remain the subject of unilateral initiatives by the federal and provincial governments and thus avoid the intergovernmental realm altogether. In practice, however, the factors just reviewed make this an unlikely scenario. What, then, are the likely implications for EA of the choice between cooperation and unilateralism?

One advantage of unilateralism from a policy perspective is that it allows jurisdictions to operate as policy laboratories, developing and testing different approaches to common problems. Unilateralism may thus promote the process value of encouraging innovation. In addition, it may provide maximum flexibility for governments to adopt policies reflecting the preferences of their respective provincial or national constituencies. Unilateral action thus furthers the value of diversity that underlies federal systems. The EA process analogue is that unilateralism may maximize both the provision of information and the pluralism of interests and values that are brought to bear during project review. Independent processes can also act as checks on each other, filling in gaps left by the other and reducing the risk that issues and interests will be overlooked. These arguments suggest that, in some respects, two EA processes may indeed be better than one.

There is, however, a risk of considerable inefficiency where EA processes overlap. For example, proponents may be faced with duplicative requirements to provide information, undertake studies and public consultation, and respond to questions and concerns. Overlapping but uncoordinated processes may also reduce procedural certainty and predictability, increasing opportunities for unexpected delay. Efficiency and regulatory certainty are both core process values, particularly for project proponents. Furthermore, regulatory processes that are widely seen as imposing significant unnecessary costs on the public and private sectors may lose legitimacy and political support. Consequently, unilateralism where EA processes overlap may undermine the ultimate process value — the long-term viability of the process itself. These arguments suggest that the costs of unilateralism where EA processes overlap are likely to be unacceptable to both governments and project proponents. Some efforts at intergovernmental cooperation are therefore to be expected — a conclusion borne out by the recent history of intergovernmental relations in this area.

Before turning to cooperative models, however, the implications for EA of particular patterns of unilateralism will be examined in more detail. In addition to taking the form of completely independent action by governments, unilateralism may give rise to intergovernmental dynamics that reflect policy interrelationships. This latter possibility is explored in more detail in the following section.

UNILATERALISM IN THE INTERGOVERNMENTAL CONTEXT: CONFLICT AND COMPETITION

Conflict and competition are two general patterns of unilateral government behaviour in relation to EA. The discussion of each of these patterns in this section focuses on the driving forces behind the pattern of behaviour, the likelihood that it will persist, and its implications for EA. Conflict and competition are the result

of policy interrelationships; they occur when the pursuit of policy objectives leads governments to take into account or react to each other's actions. As is the case with unilateralism that is not a function of policy interrelationships, conflict and competition can be costly and these costs may be mitigated or eliminated through cooperative measures.

Conflict

Intergovernmental conflict occurs in the context of policy interrelationships when governments differ about objectives or instruments. EA conflict in Canada has been exclusively vertical (federal-provincial), although horizontal (interprovincial) conflict is possible regarding projects having transboundary effects. There are three principal sources of conflict.

First, conflict may occur when governments have significantly different attitudes toward environmental protection and economic development. If one government favours an expedited EA process that facilitates project approval while the other attaches greater importance to environmental protection, the former may view the latter's more elaborate and time-consuming process as an unnecessary brake on development. These conflicts may be particularly acute if the pro-development government is also the project proponent. Both the Oldman and Rafferty-Alameda conflicts involved provincial governments that were the project proponents.

Second, EA conflict may reflect broader jurisdictional issues. For example, when Quebec's minister of the environment denounced the *Canadian Environmental Assessment Act*[12] as a "totalitarian" measure,[13] there were clearly larger political and constitutional issues at play.[14]

Finally, conflict may be the result of the combined effects of inadequate EA processes, faulty coordination mechanisms and the different agendas of project proponents, interest groups, bureaucrats, and politicians. Add litigation and media coverage to this volatile mixture and the situation is ripe for protracted conflict involving governments and other parties.[15] Conflict of this type, however, is most likely a pathological phenomenon resulting from the convergence of particular circumstances.

While governments sometimes choose conflict of the first two types, conflict of the third variety is more likely to be thrust upon them. The extensive litigation surrounding the Oldman[16] and Rafferty-Alameda[17] dams was the result of environmental groups dragging the federal government into court, not a federal initiative to expand its role in EA. The effect of this litigation was to highlight the potential for overlap of EA processes and to oblige the federal government to intervene in provincially-sponsored projects that had already been subject to

provincial EA processes. While these cases proved to be important precedents in sorting out federal and provincial EA responsibilities, the governments involved would apparently have preferred to avoid this type of conflict. In fact, these cases were a catalyst for federal legislative reform and renewed efforts at formalizing intergovernmental cooperation.

How likely is it that intergovernmental conflict will be a continuing feature of EA in Canada? The prevalence and persistence of conflict about environment-development trade-offs depends very much on the political orientation of federal and provincial governments and the degree to which these differences are reflected in EA. Since the process issues raised by EA can, at least notionally, be separated from the substantive decision-making responsibilities of governments, there is some scope for overcoming conflict by establishing an efficient and coordinated EA process that both levels of government can live with, regardless of their ultimate views on economic and environmental priorities. Nonetheless, strongly divergent positions on these issues may heighten the likelihood of conflict focused on EA.

There is also likely to be continued resistance to an active federal presence in EA from certain provinces. While improved intergovernmental institutions and coordination may alleviate some of these tensions, they cannot be eliminated unless the federal government withdraws from the field. The environmental profile of the federal government will therefore continue to be a major determinant of federal-provincial conflict.[18]

The likelihood of conflict also reflects its costs and benefits as seen by governments. On the one hand, governments are aware that many Canadians are tired of intergovernmental bickering and that every proponent's worst nightmare is to see its project become the focal point for jurisdictional conflict and litigation over which it has little control and which may involve issues going well beyond the particular project. Governments are therefore subject to political pressure to avoid overt conflict and get on with the job of conducting EA in an effective and efficient manner. On the other hand, conflict can sometimes be exploited for partisan or strategic advantage. There is a long history in Canada of provincial politicians running elections against Ottawa and, under certain circumstances, the federal government may see advantages in presenting itself as the national environmental watchdog, even if conflict with provincial governments is the result.

Although the likelihood of intergovernmental conflict in relation to EA is difficult to predict, the costs and benefits of this conflict from the perspective of EA process values are fairly clear. The principal costs relate to the efficiency and predictability of EA processes. The risk of an unexpected and significant delay in the regulatory process is a major concern of project proponents and this risk increases significantly when overlapping EA processes become enmeshed in

intergovernmental conflict, especially if litigation ensues. Treating EA as a pawn in a broader game of jurisdictional rivalry also has little to recommend itself from an EA perspective.

An argument can be made, however, that environmental protection may benefit from intergovernmental conflict where one government is signalling its disagreement with the environmental priorities of the other, as reflected in the latter's EA process. In any particular instance, such conflict may trigger a debate about whether this checking function serves to correct process or policy deficiencies or merely to impose an unduly onerous regulatory burden on a project that has already been subject to adequate environmental review. Stepping back from the project-specific issues, however, some divergence in government objectives in the environmental area is likely inevitable and probably healthy. The value of this divergence from a process perspective is that it may help to ensure that a broad range of interests and values are accommodated in EA. The process design issue is whether this desirable pluralism can be achieved in a cooperative rather than conflictual setting.

Competition

Intergovernmental competition is defined here as occurring when the policy choices of one government take into account, but are not in direct conflict with, the policies of one or more other governments. Incentives for intergovernmental competition may lead governments to raise or lower regulatory standards, and the risk of unconstrained competition may result in support for common standard-setting or even federal regulation.[19] As defined here, competitive behaviour does not include simply learning from experience in other jurisdictions, the "independent laboratories" argument for decentralization within federal systems.

While conflict regarding EA is primarily vertical in Canadian federalism, the principal axis for competition is horizontal. The most common argument is that unrestricted competition may lead to a "race to the bottom" as provinces reduce environmental standards in order to attract geographically footloose investment.[20] The same competitive pressures could, of course, induce governments to compete for industry by designing more efficient and predictable EA processes, without eroding their effectiveness. Another possibility is that governments may compete in raising environmental standards in order to appear environmentally friendly. This phenomenon could occur vertically or horizontally.

The concern that intergovernmental competition may lead to competitive lowering of environmental standards appears to be based on two arguments: (i) environmental regulation is a principal determinant of industry location or capital flows and (ii) securing comparative economic advantage is a principal

determinant of environmental policy. Both arguments are difficult to sustain or refute empirically and both can be contested on theoretical grounds. Furthermore, their validity will likely depend on a host of specific and possibly transient factors. Finally, environmental standards might be lowered if decisionmakers think that such changes will influence industry location and investment flows, even if there is little evidence to support this belief. It is therefore important to subject the "race to the bottom" argument to close scrutiny.

To begin, consider the argument that industry will respond to changes in EA regimes by increasing investment in jurisdictions that offer cost advantages in this area. The postulated dynamic appears to rest on a number of assumptions when applied to individual firms or sectors:

- Industries that are (or could be) economically significant for a province are sufficiently footloose geographically that they can relocate (or redirect investment) in light of reductions of regulatory costs associated with EA.
- Environmental regulatory costs, notably relating to EA, are large enough relative to other cost-benefit considerations (e.g., availability and cost of natural resources, labour and other factors of production, proximity to markets, infrastructure, political and regulatory stability, etc.) to constitute a significant determinant of firms' locational decisions.
- The differences in environmental regulatory costs that are likely to emerge as a result of competition between provinces within Canada will be significant in a competitive context that, for many footloose industries, is defined not only by interprovincial but also by international differentials in the cost of doing business.

The complexity of the factors underlying these assumptions makes the existence and extent of any competitive advantage conferred by changes in particular environmental regulations, such as EA procedures, very difficult to determine.[21]

An argument might also be made that capital is more footloose than individual industries and that capital flows will respond to regulatory costs, leading to greater overall investment in low-cost jurisdictions. Here again, however, the argument requires considerable elaboration and empirical verification before one can conclude that competition for capital will result in a free fall of EA standards under a competitive scenario.[22]

Finally, there are likely to be significant counter pressures to any tendency to lower environmental standards for purely competitive reasons. While some Canadians are clearly willing to breathe dirtier air or give up wilderness for economic benefits, there are political limits to the extent to which governments in Canada could pursue a policy of creating pollution havens.

In sum, it is possible that competitive pressures may produce incentives to lower environmental standards, including the rigor of EA processes, in some circumstances. The theoretical arguments and empirical evidence relating to the race to the bottom phenomenon fall far short, however, of establishing that unconstrained unilateralism by provincial governments will lead to a general gutting of EA processes and the creation of pollution havens.

It should be noted that the risks of a competitive "race to the bottom" are only one reason why environmentalists generally oppose a shift of environmental management responsibilities from the federal government to the provinces. It has been argued, for example, that powerful local industries, notably in the resource sector, may exert greater influence over provincial governments than they can muster at the federal level.[23] While this dynamic can be explained in terms of the ability of powerful domestic interests to exercise the "voice" option, it may also be related to interjurisdictional competition to the extent that industry may use the threat of "exit" as a means of increasing pressure on provincial governments.[24]

If a race to the bottom is a possible — but unproven — cost of intergovernmental competition, what are the benefits? As noted, competitive pressures could lead to improvements in process efficiency. The existence of this dynamic is dependent on the same assumptions as the spiral of declining standards. It is also possible that intergovernmental competition to establish green credentials could create incentives to improve EA processes. As a general matter, however, this dynamic appears even less likely to occur than downward pressure on standards.[25] Furthermore, EA is not a natural area for horizontal competition of this type because it is difficult to establish readily comparable standards. A province may be able to demonstrate that it has the most stringent limits on waste discharge from pulp and paper mills or the highest standards for drinking water, but how does it show that its EA process is better than those in neighbouring jurisdictions? Given the number of process variables in EA regimes, making this argument in a politically saleable manner would be difficult in all but the most extreme cases.

Upward pressure on standards appears to be more likely in the context of vertical competition because the two processes are comparable on a project-by-project basis. For example, a government may be able to make political gains with green voters if its EA process subjects major projects to a more rigorous review, such as a public hearing, than does the other's process. Whether this dynamic will be triggered is likely to depend on a variety of factors, notably the level of public concern about environmental issues.

Intergovernmental competition could be limited by the establishment of common standards or procedures, either through agreement or by unilateral federal action. Although there are constitutional limitations on the latter option, the federal government has some leverage to establish standards as a condition for process

coordination in areas of overlap. This technique is illustrated by provisions in the *Canadian Environmental Assessment Act* for joint processes.[26]

In conclusion, the implications of intergovernmental competition for EA are difficult to determine. The assumptions underlying the competitive dynamic are far from self-evident and, even if valid, will vary according to a variety of circumstances. Furthermore, competition could lead to increasing as well as decreasing standards. As an empirical matter, verifying any of these dynamics is problematic given the difficulty in controlling for other variables that may affect locational decisions of industry or policy choices of governments. For EA outcomes, therefore, the existence of significant intergovernmental competition and its implications, if it does exist, are uncertain. Given this uncertainty, determining if cooperative arrangements aimed at limiting competition will promote EA process values is not easy.

Summary

The examination of intergovernmental conflict and competition as patterns of unilateralism yields few unambiguous conclusions regarding EA policy outcomes. In each case, process values may be positively or negatively affected. In the case of overlapping EA jurisdiction, however, the costs of both patterns of unilateralism combined with the general factors noted in the previous section suggest that there are strong incentives for some form of intergovernmental cooperation. The challenge for cooperation is to preserve the benefits of unilateralism — notably in areas of information provision, pluralism of interests and values, and process innovation — while addressing the efficiency and process certainty costs associated with overlapping EA regimes.

ALTERNATIVE APPROACHES TO INTERGOVERNMENTAL COOPERATION: COLLABORATION AND RATIONALIZATION

The key practical issues for intergovernmental relations in the area of EA concern the form that cooperation will take and how it will affect policy outcomes. This section reviews two models for intergovernmental cooperation that currently dominate the intergovernmental EA agenda. The first model, which has been the predominant form of harmonization in Canada, involves bilateral arrangements aimed at coordinating the federal and provincial EA processes, an example of collaboration using the framework introduced in Chapter 1. The second model, the latest version of which appears in the recent harmonization initiative sponsored by the Canadian Council of Ministers of the Environment (CCME), would bring about a more dramatic rationalization of EA responsibilities. In place of process

coordination, this second approach would establish a mechanism for process substitution that would result in the allocation of responsibility for implementing EA in particular circumstances to one or other order of government. This approach corresponds to the rationalization model in Chapter 1. This section examines the implications for EA of these two competing models of intergovernmental cooperation.

Collaboration through Bilateral Process Coordination: The Alberta Experience

Intergovernmental cooperation regarding EA in Canada dates back to the 1980s when a number of ad hoc agreements, either comprehensive or project-specific, were reached between federal and provincial governments.[27] The recent history of EA cooperation, however, originates with a CCME initiative.[28] Although conducted in a multilateral forum and beginning with a very general statement of EA principles, the CCME process culminated in a model framework agreement for *bilateral* federal-provincial EA cooperation.[29]

The framework agreement was intended to provide the basis for intergovernmental collaboration in the form of process coordination. The respective federal and provincial EA regimes were to remain unchanged and it was clear that any bilateral collaborative arrangement would have to meet the legal requirements of both governments. The objective was to mesh the systems together, using administrative techniques such as "single windows," coordinated timetables and procedures for project reviews, joint panels, and some limited delegation of functions where permitted by legislation.

The first agreement that followed the CCME framework was the *Canada-Alberta Agreement for Environmental Assessment Cooperation*, signed in 1993. This agreement sets out in quite general terms the principles and procedures to govern cases where the EA processes of both governments apply to a single project. In many respects it constitutes an agreement to agree, envisaging project-specific agreements in cases where public hearings are called for and relying heavily on cooperation at the administrative level in the earlier stages of the EA process. Attached to the general framework agreement are two subsidiary agreements dealing with joint panels and with designated offices and notification procedures.

Since the agreement was signed, the federal government has opened an office of the Canadian Environmental Assessment Agency in Edmonton and three project-specific agreements have been negotiated. The first agreement was reached in 1994 and established a joint panel review of the Pine Coulee water management project, conducted under the federal Environmental Assessment and Review Process (EARP) Guidelines Order[30] and the provincial *Natural Resources*

Conservation Board Act.[31] The second agreement, concluded in 1996, applied to the Cheviot Mine project. This project was reviewed by a joint Alberta Energy and Utilities Board and *Canadian Environmental Assessment Act* panel. Finally, an agreement was negotiated in 1997 to establish a joint Natural Resources Conservation Board and *Canadian Environmental Assessment Act* panel to review the Little Bow Project/Highwood Diversion Plan.

Both governments have also endeavoured to improve administrative coordination in such areas as providing early notification of projects that may trigger their respective EA processes and establishing a single window for the review of application material and the submission of deficiency requests. Each government retains authority to make its own process decisions, however, and joint activities such as hearings must meet the statutory requirements of each jurisdiction.

Officials from both governments take the view that significant progress has been made in improving EA cooperation since the signing of the Canada-Alberta agreement. This view appears also to be shared, with some qualifications, by industry.[32] Canada-Alberta harmonization has not, however, fully coordinated the two EA processes. While administrative matters can be resolved within its terms, structural differences between the two processes remain. These differences may be sources of friction, or they may be easily accommodated within a framework of process coordination.

One source of friction concerns the timing of the decision on federal involvement, particularly where the application of the federal process may be triggered by decision-making authority under the *Fisheries Act*. For reasons relating to the requirements this legislation and the level of detail provided at the early stages of project applications, the decision whether a particular project is subject to the federal EA regime may not be made until some time after the project has entered the Alberta EA process. This delay can result in uncertainty for all parties and difficulties in process coordination since, without the decision on applicability, the federal process cannot officially engage. As a result, federal officials may not be able to participate fully in a coordinated review and there is a risk that a late decision, in terms of the Alberta time frame, may upset scheduling. Alternatively, the Alberta process may have to be slowed down, so as not to get too far out of step with a federal review should one be required.

Proposed amendments to the *Fisheries Act* may resolve this problem to some degree by specifying more precisely the projects that will trigger applicability of the federal EA process.[33] If these amendments narrow the applicability criteria to catch only projects likely to have significant adverse environmental effects, they will be consistent with the principle that EA efforts should be focused on projects of this type.

A second source of friction between the processes is the federal "comprehensive study" stage, a relatively detailed post-screening review of the proposed project

that has no direct parallel in the Alberta system. In cases where a public hearing is required by Alberta, the federal comprehensive study can add a 60 to 90 day delay. Since one purpose of comprehensive study within the federal system is to avoid, where possible, the need for a public hearing, devoting time and effort to achieving this goal is of little value to provincial officials and project proponents. It may still make sense from the internal federal viewpoint, however, since a decision following comprehensive study not to hold a federal public hearing means that the federal government is not obliged to participate in — and help fund — a joint hearing.

From the perspective of a complete and timely review of a project that is going to a provincial hearing in any case, there is a strong argument for an early decision to forego the federal comprehensive study and proceed directly to a joint hearing. In this forum, full information and a diversity of perspectives can be brought to bear on the project and federal departments are able to undertake and present the analysis that would otherwise be part of the comprehensive study. It should be noted that coordination of this type, while structural in the sense that it involves adjustments to the key elements of the federal process, would not require legislative changes.

Both of these sources of friction relate primarily to the timing of the review. Timing is, however, a key issue for project proponents.[34] There is little doubt that for most proponents the costs associated with unexpected regulatory delay are far greater than costs of direct regulatory compliance, whether in EA or in other areas of environmental control.

Intervenor funding is a third area where the federal and Alberta processes differ significantly. Alberta's intervenor funding program is subject to strict legal limitations on eligibility and is administered by the review panel, either the Natural Resources Conservation Board or the Energy and Utilities Board. Its effect is to restrict funding to local intervenors or those that are "directly affected" by the proposed project, making it difficult for broad-based public interest groups to qualify. The Alberta process is funded by project proponents and awards are made after the hearing, although advances may be authorized in some cases. In contrast, the federal process is administered by a separate panel which allocates funds prior to the hearing. The process and criteria are more loosely defined, and broad-based groups may receive funding without demonstrating that they are local intervenors or are directly affected.

Whatever the substantive merits of these approaches, the point here is that this difference is readily accommodated in the process coordination model. Where a joint panel is convened, each government administers its respective intervenor funding program. Each is thus free to pursue its policy objectives, with coordination required only to prevent double-dipping by intervenors. In fact, the programs

are complementary, ensuring a broader range of information and greater opportunities for competing values and interests than would be provided by either system alone.

Cooperation between the federal and Alberta governments since 1993 has improved process coordination while maintaining the integrity of both EA systems. The experience with the Pine Coulee, Cheviot and Little Bow/Highwood agreements indicates that while some effort is required to formalize process coordination, conducting joint hearings is not particularly problematic. Furthermore, while these hearings are the most visible manifestation of cooperation, it seems that administrative coordination in areas of EA not involving public hearings, such as project screening, is also proceeding relatively well.

Remaining problems appear most likely to arise between the application stage and the hearing, notably in determining if a federal trigger exists and as a result of the delay that may be caused by the federal comprehensive stage. Some of these problems may simply reflect growing pains within the federal process itself. As experience with the two processes increases, they can be expected to improve in efficiency and compatibility.

In terms of the net costs and benefits of cooperative measures, process coordination appears to be quite successful. As illustrated by the Alberta experience, it has the potential to reduce significantly the costs of delays and uncertainty associated with overlapping EA regimes. Furthermore, process coordination preserves many of the valuable attributes of unilateralism. In particular, the direct involvement of both processes increases the likelihood that EA will provide the full range of relevant information to decisionmakers and will accommodate a diversity of interests and values. Furthermore, it promotes fallback and oversight roles for the respective processes. Process coordination thus appears to address many of the costs of overlapping EA regimes without sacrificing the benefits of process dualism in cases where both governments have jurisdictional interests and regulatory responsibilities.

Although process coordination would thus appear to offer net benefits in terms of the core process values relative to unilateralism, such benefits could be outweighed if the transaction costs of negotiating and implementing intergovernmental EA agreements are excessive. The Alberta experience suggests that this is not the case, however. The CCME's model framework agreement clearly reduced transactions costs by providing a basis for federal-provincial negotiations. The bilateral context of these negotiations probably facilitated agreement by restricting both the complexity of process coordination issues (only two processes were involved) and the number of issues on the intergovernmental agenda (only two governments were involved). Transactions costs of process coordination can be expected to be progressively reduced over time as the processes mature and the

parties become more familiar with working together. These costs can also be materially affected by measures such as the establishment of the federal office in Edmonton. The experience in Alberta, along with the successful negotiation of bilateral agreements involving two other provinces,[35] thus indicates that the transactions costs of process coordination are manageable.

Rationalization through Process Substitution: The Recent CCME Initiative

The second model for intergovernmental cooperation in EA proposes a rationalization of EA functions, as opposed to coordinating the respective federal and provincial EA regimes in cases where they both apply to the same project. Under this model, governments must agree on a set of criteria whereby, for specified types of projects, only one jurisdiction's EA process applies. Although the other government may participate in that process, its role is more akin to that of an intervenor, rather than being an equal partner in managing a joint or coordinated process.

The process substitution approach can be traced back at least to the initial Canada-Alberta agreement on EA, signed in 1986.[36] Implicit in this model is federal passivity in relation to the EA of projects over which the province also has jurisdiction. This federal deference to provincial EA processes was successfully challenged by environmentalists during the ground-breaking litigation of the late 1980s and early 1990s surrounding the Oldman Dam in Alberta and the Rafferty-Alameda project in Saskatchewan. These cases decided that the federal government was obliged under the EARP Guidelines Order to conduct its own EA of the two projects in question.

This judicial affirmation that it was obliged to conduct EA under the EARP Guidelines Order prompted the federal government to enact, for the first time, a comprehensive EA statute. The *Canadian Environmental Assessment Act* provided an explicit and detailed legislative basis for federal EA and also contained a number of provisions designed to facilitate EA coordination with the provinces. The EA litigation and related intergovernmental conflict surrounding the Oldman and Rafferty-Alameda projects also resulted in renewed efforts to harmonize federal and provincial EA regimes. Although the *Canadian Environmental Assessment Act* reaffirmed the federal commitment to remain actively involved in EA, process substitution has remained alive as an option in intergovernmental negotiations.

The most recent incarnation of the process substitution approach is the CCME harmonization initiative that arose from the ashes of the EMFA. The EA component of this initiative went through several stages in late 1996 and 1997, beginning

with a proposal to negotiate a multilateral agreement establishing a "Canada-wide model" for EA. This approach, as described in the initial discussion paper,[37] had two principal objectives.

The first was to standardize EA processes. The discussion paper proposed establishing a common basis for deciding which projects will be subject to EA and "consistent Canada-wide standards for the content of an assessment and for the process used to achieve those standards for content."[38] Criteria were to be established for evaluating EA processes and amendments to legislation, regulations, policies and guidelines were expected to be forthcoming to implement the Canada-wide model.

The second objective was to replace process coordination with process substitution as the principal instrument of vertical harmonization. The discussion paper suggested that, following agreement on the Canada-wide model, federal and provincial EA regimes would be assigned responsibility for mutually exclusive categories of projects. When the federal government and a province both have decision-making responsibilities regarding a project, one jurisdiction's EA regime would be substituted for parallel or joint processes. Both governments would then rely on the designated EA process.

These two objectives were closely related. The intent was to diffuse, or at least defer, the jurisdictional conflict that had hampered EA harmonization in the past. The allocation of roles and responsibilities was to be put on the back burner on the assumption that, once a common model reflecting high EA standards was adopted and implemented in all jurisdictions, it would be a matter of indifference which process applied to a particular project. If this assumption proved to be correct, the jurisdictional stakes would be lowered and process substitution would presumably be less controversial.

The provincial agenda underlying this initiative was not hard to detect. The discussion paper noted that the proposed approach would "designate responsibility for the application of the model to a project to the jurisdiction best suited to implement it."[39] In applying this mechanism for process substitution, provinces could be expected to argue that their processes are best suited for virtually all projects except those coming within exclusive federal jurisdiction.

Provinces may also have seen a strategic advantage in moving the discussion into a multilateral forum. One might question, for example, why Alberta would have supported a process that required coordination across 12 other jurisdictions when it had already made significant progress in bilateral harmonization with the federal government. What did Alberta have to gain from a national model for EA? One possibility is that it saw greater opportunities for securing federal concessions in the context of multi-party discussions where a provincial common front was likely to emerge.

The CCME discussion paper released in November 1996 was followed in early 1997 by two successive drafts of a multilateral agreement on EA, the second of which was released on 24 March. It was immediately evident from these drafts that the idea of a national model for EA had been shelved. That this idea was stillborn is not surprising, given the significant obstacles to standardizing EA processes across Canada. Achieving agreement among all governments on a common approach to EA would not have been easy given the diversity of political priorities and ideologies across the country and the significant differences between EA regimes.[40] To give only one example, Ontario's EA regime does not normally apply to private sector projects and the government at the time was pursuing a policy of environmental deregulation. It was far from evident how this government's priorities would mesh with those of other provinces where EA applies to the private sector as a matter of course.

Reaching agreement would, however, have been only part of the challenge in achieving the objective of a standard national model for EA. Implementing a comprehensive and detailed national model through legislative, regulatory, and policy changes would have been an enormous task, complicated by different legislative and electoral timetables. There can be no guarantee that governments would be willing or able to pass the required amendments or that the different legislative and policy processes would produce results that conform with a Canada-wide model containing anything more than vacuous platitudes.

Finally, the idea of a Canada-wide model can be criticized at a more fundamental level. The problem with process standardization is that it runs counter to the federal principle that regional diversity is to be respected. In fact, one would expect interprovincial variation in EA regimes within a federal system where significant authority regarding resource use, industrial development and environmental protection is in provincial hands. These differences reflect variations in circumstances and political preferences across the country. Furthermore, there are potential advantages in allowing governments freedom to experiment with different approaches to EA. The adoption of a common national model that is sufficiently precise to be meaningful might well impede this type of process innovation that is one strength of the federal system.

Although the proposal for a national approach to EA did not survive beyond the initial discussion paper, the process substitution component of the CCME proposal was carried forward into the draft sub-agreement, which was subsequently finalized in January 1998. In particular, the sub-agreement indicates that a "lead party" will be designated for each project and the assessment process of that party will be used.[41] The criteria for identifying the lead party relate to the location of the proposed project. Projects within provinces will be subject to the federal process only if they are located on federal lands (e.g., national parks, national defence

lands, and Indian reserves).[42] Otherwise, the provincial EA process alone will apply.[43] Within the territories, the territorial government will be the lead party for proposed projects on commissioners' lands, subject to the application of land claims agreements.[44] This allocation of EA responsibility is, however, subject to a catch-all provision stating that the criteria for process substitution could be varied on the basis of a "best-situated" assessment, relying on a set of general criteria that includes reference to the capacity and expertise of the respective governments and the presence of transboundary considerations.[45] Even if this provision is used from time to time to apply the federal process, the implementation of this model would constitute a significant diminution of the federal role in EA.

The agreement states that the lead party will ensure that its process "generates the type and quality of information required to meet the legal environmental assessment requirements of the parties involved in an assessment" and "provides conclusions on the environmental effects of the proposed project required for decision-making by both parties."[46] Bilateral agreements are proposed to implement the agreement and the agreement states that the parties "agree to seek to amend their legislation and/or assessment processes as necessary to comply with their obligations under the terms of the Sub-agreement."[47] The latter provision is essential given the objective of implementing a process substitution model for EA cooperation. The objective is not a hybrid process, as results from process coordination, but rather the substitution of the lead jurisdiction's regime as *the* EA process. It is to be anticipated that legislative changes will be required in order to withdraw the other jurisdiction's process from the field in these circumstances. Certainly, there is nothing in the *Canadian Environmental Assessment Act* as currently enacted that anticipates a federal decision to defer entirely to a provincial EA process in the case of a proposed project on provincial lands to which the Act applies. Furthermore, any attempt to do so under the current legislation could result in litigation following the Oldman Dam and Rafferty-Alameda precedents.

The emergence of the process substitution model for rationalizing EA responsibilities in the latest CCME initiative indicates that there remains strong support for this approach, at least within certain provincial governments. Process substitution as an option for harmonization has thus apparently survived the Oldman and Rafferty-Alameda litigation, the enactment of the *Canadian Environmental Assessment Act*, and the progress in implementing the bilateral process-coordination approach in several jurisdictions. It is appropriate, therefore, to compare the process substitution and process coordination models in terms of their implications for EA process values.

PROCESS SUBSTITUTION VERSUS PROCESS COORDINATION

Process substitution and process coordination differ in several significant ways from the perspective of EA process values and policy outcomes. These differences can be highlighted through the analytical framework set out earlier in this chapter. Since process coordination is the model with which we have recent experience in several provinces, notably Alberta, this model provides a baseline against which process substitution can be assessed.

To begin, consider the costs to be addressed. The experience with EA process coordination in Alberta that was reviewed above suggests that this approach has reduced significantly the costs of interjurisdictional process incompatibility and overlap when compared with the situation of unilateralism. In fact, by coordinating the application review process, establishing an administrative single window, and providing for joint hearings when these are required, it has arguably addressed many of the problems associated with overlapping EA processes.

Experience with process coordination and with the respective federal and Alberta EA regimes is relatively short, so it is not surprising that some problems remain. These remaining areas of friction could, however, be largely eliminated through adjustments in process implementation and perhaps some legislative modifications. For example, greater clarity on the *Fisheries Act* trigger and a change in federal policy to forego comprehensive study and proceed directly to a joint hearing where a provincial hearing will be held in any case would significantly reduce the remaining problems with process coordination. The costs of the status quo, then, are not particularly high and could be further reduced within the process coordination model. The onus is therefore on those proposing process substitution to show that it can achieve significant net gains in terms of process values over those already obtained through process coordination.

Process substitution could further reduce the residual costs associated with process coordination in several ways. There would clearly be some efficiency gains from a proponent's perspective if only one government's EA process applies to a project. It may be that the hybrid EA regime resulting from process coordination is, at least at the outset, more complex and less certain than each individual process on its own. Furthermore, if project proponents are more familiar with one process than the other, there may be efficiency gains if the more familiar process is that of the lead jurisdiction under the process substitution model. For example, if project proponents within a province deal regularly with the provincial EA process and only occasionally with the federal one, they may prefer a harmonization model that applies the provincial process in all cases.

For a company that is more familiar with the federal process, however, this argument would cut the other way. This case could arise where, for example, a

company operates on provincial land but is subject to federal regulatory jurisdiction (e.g., an interprovincial pipeline company) or where a company operates in a number of provinces and would therefore prefer to be subject to a uniform federal EA regime for all of its operations, as opposed to having to adapt to differing provincial regimes. The process substitution criteria based on the location of the project on federal or provincial lands would not appear to accommodate either of these instances where the proponent would experience efficiency gains through the application of the federal EA process. This situation might, however, be addressed through the section of the agreement that permits governments to vary the determination of lead jurisdiction based on "best-situated" criteria.

Process substitution could also result in cost savings for governments. In particular, there are inevitably some costs associated with process coordination. These costs arise from the need for each jurisdiction to maintain basic EA capacity and also from the effort expended to engage in ongoing consultation, including the negotiation and implementation of project-specific agreements where required. These coordination costs can be expected to decrease, at least on a per-project basis, as the parties become more familiar with each other's EA requirements and as administrative practice (e.g., single window procedures) and formal precedents for cooperative arrangements (e.g., model project-specific agreements for joint panels) become established and refined. Process coordination costs will never, however, be completely eliminated.

The potential of process substitution to result in efficiency gains for government is based to some extent on the assumption that the single process meets the needs of all decisionmakers. The requirement that it do so, it should be noted, is explicitly stated in the CCME sub-agreement signed in January 1998.[48] If these needs are significantly different, however, the government whose process is eliminated may nonetheless have some additional costs that would otherwise have been subsumed within the EA. Furthermore, it is possible that complete process substitution will not be achieved because, for certain major projects, both jurisdictions will insist that their respective processes apply directly. In this event, the marginal gains over the process coordination model will be further reduced.

Process substitution may therefore have some advantages over process coordination in terms of cost savings for government and project proponents, although the magnitude of these savings is uncertain and they may not be fully realized for all projects. In terms of other process values, however, process substitution has potential disadvantages when compared with process coordination, notably in relation to the collection of relevant information, the accommodation of different interests and values, and the benefits of oversight and checking resulting from involvement of both governments' processes in EA.

As noted at the outset of this chapter, one of the key objectives of EA is the provision of adequate information to decisionmakers. Involvement of both processes may facilitate bringing all relevant expertise to bear on the project at issue since federal and provincial governments may have different technical capabilities and jurisdictional or policy interests. Although experts from both governments could participate in a process operated by only one of them, the ability of both sides to shape the process, focus the inquiry and contribute expertise may be more constrained than if a collaborative approach is developed through process coordination. The balance and comprehensiveness of EA can only be enhanced by the direct involvement of all affected jurisdictions, as opposed to conferring the entire responsibility on a single process.

Furthermore, process coordination seems more likely than process substitution to maximize the pluralism of values, interests, and perspectives brought to bear in EA. The job of EA practitioners involves more than just the collection of information. They are also required to determine what information is important, interpret and evaluate that information, weigh competing interests and values, and formulate general conclusions and recommendations. Where projects are found to be environmentally acceptable, the EA process may also specify terms and conditions of approval. In performing these functions, EA practitioners will likely be influenced by the political and policy orientations of their governments, the specific government policies relating to the issues before them, the use to which the outcome of the EA is to be put, and their own personal experiences, areas of expertise, and attitudes toward project-specific issues and the role of EA. Since all of these factors are likely to vary among individuals, EA processes, and governments, process dualism serves the objective of interest and value pluralism.

This point can be sharpened by noting that the involvement of two jurisdictions reduces the risk that the EA process will be captured by the interests and priorities of particular policymakers or other interest groups. If one level of government adopts a strongly pro-development policy, this orientation may adversely affect the rigor of its EA process or the way that information is interpreted and conclusions reached. For example, government policy may influence judgements regarding the significance of impacts or the level of public concern that are critical in determining the extent of EA scrutiny that a project receives. It is probably impossible to design legal rules or standards that will prevent a significant degree of subjectivity from entering the process at these points. EA will remain a highly discretionary process, operated by government officials with personal and institutional perspectives and constituencies. The best hope for avoiding regulatory capture is to incorporate pluralism directly into EA through the direct involvement of the EA regimes of all affected governments.

Process coordination has an additional advantage in comparison with a process substitution model, like that envisaged in the CCME sub-agreement, that would eliminate the direct federal role in the EA of most projects that are not on federal lands. Maintaining a federal role can provide a means of establishing some baseline national standards and consistency in EA through a mechanism that is considerably less cumbersome than applying a single model to 13 separate regimes. For example, the provisions in the *Canadian Environmental Assessment Act* governing joint panels set some procedural standards with which provinces have strong incentives to comply. A federal presence through the process coordination model could thus inhibit a "race to the bottom" dynamic, should the conditions for one exist. Involvement of both processes would also enhance the objectivity and credibility of the EA in cases where one government is the project proponent.

The efficiency gains that may be obtained through process substitution must therefore be weighed against the benefits foregone for other EA process values when compared with the collaborative model of process coordination. In addition to this evaluation of net costs or benefits, a comparison of the two models should also consider the transactions costs associated with each approach to intergovernmental cooperation.

As noted earlier, experience to date suggests that the process coordination model does not generate particularly high transactions costs, particularly as precedents for bilateral framework and project-specific agreements are established. In this area, however, the process substitution model may encounter significant obstacles. Aside from the technical issue of ensuring that the needs of the jurisdiction that is withdrawing from the field are met, transactions costs will increase significantly if process substitution becomes a matter of intergovernmental conflict or interest-group pressure. Put bluntly, if the federal government refuses to abandon the field in cases of jurisdictional overlap, the provinces are unlikely to achieve their strategic objective; if it does withdraw, environmentalists will do their best to block the agreement. Process substitution as proposed in the CCME sub-agreement is a very visible zero-sum game in relation to EA because the federal government will have to publicly abandon a significant portion of its current EA jurisdiction. Furthermore, as noted above, legislative changes will likely be required. This federal withdrawal may prove to be politically unpalatable, particularly without the promise of national standards.

It remains to be seen, of course, whether the federal government has the political will to continue to play an active role in EA and whether it will make available the necessary financial and human resources. The relative merits of process substitution versus process coordination will certainly be altered if one government lacks either the will or the resources to participate effectively in EA, with the

result that its involvement becomes a source of delay and unpredictability. Under these circumstances, EA may well benefit from the explicit acknowledgment by that government of its inability to assume EA responsibilities and the consolidation of process management in the hands of the other. In practical terms, however, this scenario implies a significant shift in federal government policy that has yet to be clearly enunciated.

In conclusion, the collaborative approach of process coordination and the rationalization of government functions promised by process substitution appear likely to have different implications for EA process values. While process substitution may result in efficiency gains for both project proponents and government and could produce a simpler and more predictable EA regime, this model brings with it the risk of significant foregone benefits in terms of important process values. In particular, the provision of complete information and analysis to decision-makers, the accommodation of multiple interests and values (including both government policies and other perspectives), and the opportunities for process diversity and innovation could all suffer under this model when compared with process coordination.

These foregone benefits, along with the additional transactions costs that may be incurred in securing bilateral process substitution agreements and the associated legislative changes, suggest reason to question the desirability of relying entirely on a single EA process when the interests and decision-making responsibilities of both orders of government are at stake. The net advantages of the process substitution model appear to be particularly dubious if process coordination is successful in addressing most of the costs associated with unilateralism. While process coordination may not yet have achieved its full potential in this respect in Canada, there is reason for optimism that this objective is within reach if interjurisdictional cooperation is pursued in good faith and with a view to creating a true federal-provincial partnership in conducting EA.

CONCLUSION

The analysis presented above reveals the difficulties of reaching unambiguous conclusions regarding the impact of certain patterns of intergovernmental relations on EA outcomes, measured in terms of process values. Two patterns of unilateralism were examined: conflict and competition. It was argued that while conflict may reinforce the pluralism of interests and values in EA, it may undermine efficiency and procedural certainty. The effects of intergovernmental competition are more uncertain, given the theoretical and empirical difficulties in verifying its underlying assumptions. Nonetheless, competition — if it occurs — may also be beneficial or detrimental to EA process values, depending on the competitive dynamic that emerges.

Out of this uncertainty, however, a more definitive conclusion can be drawn regarding likely developments in this area. Given the costs of unilateralism in the context of overlapping EA jurisdiction, there are strong incentives for governments to undertake cooperative initiatives. Some form of intergovernmental cooperation in EA thus seems virtually inevitable.

The key challenge is therefore to develop cooperative arrangements that reduce the clear and otherwise unavoidable costs of unilateralism while retaining its principal benefits. The two models for intergovernmental cooperation reviewed above have different implications in this regard. Collaboration via process coordination holds the promise of addressing in large measure the inefficiency and uncertainty that may result from overlapping EA processes while preserving the advantages associated with separate EA processes in terms of the adequacy of information available to decisionmakers, the pluralism of interests and values accommodated within the EA system, and the scope for process innovation. Rationalization or process substitution, on the other hand, appears likely to yield some further gains in process efficiency at the cost of significant risks to the other process values. This analysis calls into question the continued place of process substitution at the heart of the latest CCME harmonization initiative. In order to promote the full range of EA process values, governments should focus on improving bilateral mechanisms for coordinating EA regimes in areas of overlap rather than embarking on a strategy that proposes putting all of the project review eggs in a single jurisdiction's basket.

NOTES

1. The EMFA was abandoned during the winter of 1996. The initiative that produced this agreement is described in Fitzsimmons, "Harmonization Initiative of the Canadian Council of Ministers of the Environment."
2. Sadler, *Environmental Assessment in a Changing World*, p. 52.
3. Doyle and Sadler, *Environmental Assessment in Canada*, p. 24.
4. Moravcsik, "Preferences and Power in the European Community," p. 485.
5. Norrie, Simeon and Krasnick, *Federalism and the Economic Union in Canada*, pp. 123-24.
6. See, for example, the recent shift of manpower-training responsibilities from the federal government to certain provinces.
7. Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," p. 191.
8. Kennett, "Federal Environmental Jurisdiction after Oldman"; Leclair, "L'étendue du pouvoir constitutionnel des provinces et de l'État central en matière d'évaluation des incidences environnementales au Canada."

9. Kennett, "The *Canadian Environmental Assessment Act's* Transboundary Provisions."
10. Kennett *et al.*, *Overlapping Environmental Jurisdiction.*
11. Harrison, *Passing the Buck*, p. 137.
12. S.C. 1992, c. 37.
13. CP, "Judicial Warfare Promised: Environment Bill Passed by Senate."
14. See also Harrison, "The Regulator's Dilemma," pp. 495-96.
15. Hood, *Against the Flow.*
16. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.
17. *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 4 W.W.R. 526 (F.C.); upheld [1990] 2 W.W.R. 69 (F.C.A.).
18. Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," pp. 179-80.
19. Harrison, "The Regulator's Dilemma."
20. Kaufman, Muldoon and Winfield, *The Draft Environmental Management Framework Agreement and Schedules*, p. 15.
21. Benidickson, "Canadian Environmental Law and Policy," pp. 4-9.
22. Olewiler, "The Impact of Environmental Regulation on Investment Decisions," pp. 110-12.
23. Holtz, "The Public Interest Perspective," p. 111; Lucas, "The New Environmental Law," pp. 182-84.
24. Hirschman, *Exit, Voice, and Loyalty.*
25. Harrison, "The Regulator's Dilemma," p. 479.
26. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, ss. 12(4), 17, 40, 41.
27. Ross, "An Evaluation of Joint Environmental Impact Assessments."
28. Kennett, "Hard Law, Soft Law and Diplomacy," pp. 651-53.
29. CCME, *Draft Framework for Environmental Assessment Harmonization.*
30. SOR/84-467.
31. S.A. 1990, c. N-5.5.
32. Kennett *et al.*, *Overlapping Environmental Jurisdiction.*
33. Canada. Department of Fisheries and Oceans, *Discussion Paper on Standards for Habitat Delegation and Criteria for Projects Requiring Subsection 35 (3) Permits*, 10 September 1996.
34. Kennett *et al.*, *Overlapping Environmental Jurisdiction.*
35. Bilateral agreements were signed between Canada and Manitoba in 1994 and between Canada and British Columbia in 1997.
36. *Agreement Concerning Environmental Impact Assessments of Projects in Alberta with Implications for Canada and Alberta*, 15 May 1986.

37. CCME Environmental Assessment Subcommittee, *A New Approach to a Proposed Model for Harmonization of Environmental Assessment in Canada*, Discussion Paper.
38. Ibid., s. 3(b).
39. Ibid., s. 4.
40. A survey of some of these differences is found in Doyle and Sadler, *Environmental Assessment in Canada*, pp. 5-12.
41. Sub-Agreement on Environmental Assessment, ss. 5.4.0, 5.7.0.
42. Ibid., s. 5.6.1.
43. Ibid., 5.6.2.
44. Ibid., 5.6.3.
45. Ibid., 5.6.4.
46 Ibid., s. 5.7.0.
47. Ibid., 5.12.0.
48. Ibid., s. 5.1.0.

CHAPTER 6

Underlying Constraints on Intergovernmental Cooperation in Setting and Enforcing Environmental Standards

Alastair R. Lucas and Cheryl Sharvit

INTRODUCTION

This chapter examines the constitutional and legal limitations of federal-provincial collaboration via formal intergovernmental agreements. The Standards Sub-Agreement of the Canada-Wide Accord on Environmental Harmonization exemplifies the collaborative model introduced in Chapter 1 in establishing a process for joint federal-provincial standard-setting. However, we identify a fundamental legal trade-off inherent in this approach. On the one hand, the language of intergovernmental agreements must be relatively vague and hortatory to survive potential constitutional challenges for binding future governments. On the other hand, enforceability of the agreement, whether by signatory governments or third parties, demands quite specific language and commitments. In the end, we find that the standards sub-agreement errs on the side of generality. While it is thus likely to be relatively secure from constitutional challenge, it is unlikely to be interpreted as a legally binding commitment for either the federal or provincial governments.

This chapter considers various underlying factors that have been identified in the literature.[1] They include potential legal invalidity of intergovernmental agreements because the signatories lack the legal authority to enter into such agreements,[2] and constitutionally impermissible self-limitation[3] or delegation[4] of legislative or executive power to implement the agreements. For these reasons, intergovernmental agreements may not survive legal challenge. Undertakings of governments in interjurisdictional agreements may also be unenforceable because agreements lack the requisite character of legally binding contracts.[5]

To the extent that intergovernmental agreements to devise environmental standards have been considered, it has been merely within the broader category of intergovernmental agreements or harmonization agreements. However, adoption in January 1998 of the Canada-Wide Environmental Standards Sub-Agreement developed under the *Framework of the Canada-Wide Accord on Environmental Harmonization* provides an opportunity to assess the potential application of these constraints. For the purpose of this legal analysis the framing criteria of legality, enforceability, and transparency will be adopted. These represent core values in the Canadian legal system that are central to the constitution and the essential institutions of democratic government.

This analysis may shed light on whether standards based on intergovernmental agreement may be weaker, in a legal sense, than standards established by individual governments. "Weaker" is intended to include reduced certainty and stability because the intergovernmental agreements may introduce additional grounds for potential legal challenge of standards.[6] Further, standards may be weakened in the eyes of the public if they do not, or arguably do not, conform to agreed standards, yet the standards agreement cannot be legally enforced. If individual governments, after agreeing that a higher standard is appropriate, are free to choose not to enforce agreed standards within their jurisdictions, the public may lose confidence in environmental standards.

The main conclusions of the analysis are:

1. There is little scope for challenging the sub-agreement itself on grounds of unconstitutional delegation of legislative powers, but in any event, there is no need to do so because the sub-agreement is so general and vague that it is unlikely that it could have the effect of delegating legislative powers.

2. There is some potential for legal challenge to the sub-agreement on the ground of unconstitutional binding of future legislatures. Again, however, this question is unlikely to arise because of the sub-agreement's vagueness and generality. Equally, it is unlikely that the sub-agreement could be enforced by party governments or by third-party citizens because its vagueness and generality suggests that it was not intended to be enforced as a contractual instrument.

3. There may be potential to enforce the process under the sub-agreement of establishing agreed standards, to the extent that this process is reasonably clear and certain. This is particularly so if governments enact statutory provisions, such as provisions of the proposed amendments to the *Canadian Environmental Protection Act* (CEPA), that require adherence to intergovernmental agreements.

4. Standards imposed as conditions of specific approvals under federal and provincial environmental regulatory legislation may be challenged if they are based solely on agreed standards on the ground that the decisionmaker has unlawfully fettered its jurisdiction and denied procedural fairness.

5. The sub-agreement itself cannot be challenged on transparency grounds because the legal principles of procedural fairness that require notice and opportunity for response do not apply to generalized legislative functions, as opposed to fact-specific decisions, such as regulatory approvals.

THE CANADA-WIDE ENVIRONMENTAL STANDARDS SUB-AGREEMENT

The Environmental Standards Sub-Agreement is one of the first three sub-agreements to be negotiated under the *Accord on Environmental Harmonization Framework Agreement* (the accord). The latter specifically contemplates such sub-agreements and specifies that they are to address management components or issues on a "Canada-wide partnership basis."[7] They are to specify roles and responsibilities in the context of a "one-window" implementation approach.[8] Roles and responsibilities are to be determined — ultimately by negotiation — but having regard to the following non-exclusive list of criteria:[9]

- scale, scope and nature of environmental issue
- equipment and infrastructure to support obligations
- physical proximity
- efficiency and effectiveness
- human and financial resources to deliver obligations
- scientific and technical expertise
- ability to address client or local needs
- interprovincial/interterritorial/international considerations

Provisions of the accord also specify that governments undertaking roles and obligations under the sub-agreements must commit to report publicly on these obligations.[10] Further, where roles and obligations are accepted by a level of government, the other level "shall not act in that role" for a period to be determined by the sub-agreement.[11] Finally, where a sub-agreement assigns specific roles and responsibilities to a level of government, the other level must "review and seek to

amend"[12] their legislation, policies, and existing agreements to provide for implementation of the sub-agreement.

The standards sub-agreement appears to be consistent with the requirements for sub-agreements specified in the accord. It establishes the objective of continual development, improvement, and attainment of "priority" Canada-wide standards for environmental quality and human health.[13] "Standards" include qualitative or quantitative standards, guidelines, objectives and criteria.[14] The scope of the sub-agreement thus extends beyond legally enforceable quantitative standards. Principles upon which Canada-wide standards are to be developed are listed. In addition to those identified in the accord, these are:[15]

- Pollution Prevention
- Basis in Science
- Adherence to the Precautionary Principle
- Equity
- Results Orientation
- Flexibility
- Sensitivity to a Sustainable Development Context, and
- Provision for Public and Stakeholder Participation

Within these principles, as defined, the sub-agreement establishes a framework and elements of a process for setting priorities, and developing and implementing Canada-wide standards.[16] The process provisions are very general — an effective and efficient process, to be agreed upon by ministers on a case-by-case basis. However, the process clearly contemplates a significant, though incompletely defined role for the Canadian Council of Ministers of the Environment.[17]

Implementation of standards under the sub-agreement is ultimately by endorsement of the responsible ministers.[18] Specific measures to implement standards that principally concern intraprovincial matters are stated to be at the "discretion of the responsible government,"[19] whereas standards applicable to issues that have transboundary effects are to be the subject of further agreement as to time frame and attainment.[20]

Under the heading "Accountability," the governments agree to participate in the process; to ensure that "agreed standards are met" (with flexibility to adapt their regimes as necessary); to report to the public; not to act where the other level of government has accepted obligations, and if unable to fulfill obligations, to develop an alternative plan.[21]

LEGALITY

The concept of legality is founded on the rule of law and encompasses the requirement that governments and public officials act according to law.[22] This gives teeth to the concept of accountability. It means acting in a manner consistent with the dictates of the constitution, with statutory powers and duties and with statutory and common law substantive and procedural requirements.

From another perspective, there is an obligation on public authorities to engage the fabric of statute and common law to support their actions. This principle of validity requires that every official act be justified by law. Canadian courts have affirmed at the constitutional level that a government cannot develop regulatory requirements and purport to apply them to citizens without clear statutory authorization.[23] At the level of administrative law — which deals with the principles and procedures by which regulatory actions themselves may be subject to judicial review — the validity principle has also been affirmed. Government officials have not been permitted to rely on high office, or political responsibility for assessing the public interest, to justify regulatory decisions that cannot be supported by reasonably clear statutory authority.[24]

An example involving environmental requirements is *Curragh Resources Inc. v. Canada (Minister of Justice)*,[25] in which the Federal Court of Appeal held that while the minister of indian affairs and northern development had legal authority under the Federal Environmental Assessment Review Process Guidelines Order to require additional security as a condition of water licence approval, the minister of fisheries and oceans lacked similar decision making power. The court concluded that the latter minister was not a "decision-making authority" who was dealing with a "proposal" under the Guidelines Order. Another perspective on legality is provided by the Supreme Court of Canada's decision in *Friends of the Oldman River v. Canada (Minister of Transport)*.[26] There, the federal ministers were held not to be justified in adopting what was effectively a policy of selective discretionary environmental impact assessment, when the Environmental Assessment and Review Process (EARP) Guidelines Order imposed a legal duty to apply the environmental assessment requirements.

A final aspect of the legality principle follows from the concept of validity. If a government official acts outside statutory authority, that official's actions are no different from that of a private citizen. Consequently, if injury occurs to private parties as a result of such acts, the government official may be liable for damages suffered by those parties.[27] Liability will depend on establishing the elements of the action on the facts, and ultimately on proving the harm alleged.

In the remainder of this section the legality of the sub-agreement is assessed. Conformity with constitutional, statute, and general law norms, is considered first.

The following section then examines the legality of the sub-agreement in the sense of capability of legal enforcement.[28] The first step in this legal analysis is to identify the constitutional and legal context of the sub-agreement. This will lead to identification and formulation of specific legality issues.

Intergovernmental Agreements

Intergovernmental agreements have become commonplace in modern Canadian intergovernmental relations.[29] A significant number of these agreements are in the field of natural resources and environmental management.[30] These agreements have a variety of objectives, ranging from reallocation of resources at a constitutional or quasi-constitutional level, such as the federal-provincial agreements on offshore natural resources,[31] to agreements on administrative delegation or cost-sharing, such as those concerning administration of the federal *Fisheries Act*.[32] Common motivating factors in all of these agreements are a desire to achieve consistency and to fill apparent gaps created by the constitutional allocation of legislative powers and by fiscal imbalances between levels of government.

Fiscal considerations aside, it is therefore useful at this point to look, at least briefly, at constitutional jurisdiction in relation to environmental standards. What are the respective federal and provincial powers, and what is the nature of gaps or overlaps? In particular, the possibility that exclusive federal jurisdiction exists to set minimum national standards must be examined. If the federal government does have this power, while federal and provincial cooperation would no doubt still be appropriate, the need for formal intergovernmental agreement may be questionable.

Constitutional Jurisdiction over Environmental Standards

Establishment and enforcement of environmental standards is a subject of shared constitutional jurisdiction.[33] This legislative power is an element of the respective federal and provincial jurisdiction over environmental management. Without a lengthy excursion into constitutional law principles and analysis, it is sufficient to affirm that provincial jurisdiction over environmental management is extensive — based on exclusive jurisdiction over property and civil rights in the province, local works and undertakings, and management of public lands and resources. Federal jurisdiction is in a sense "intensive," based upon environmental protection and management being closely and functionally related to a range of relatively narrow exclusive federal powers, such as fisheries, navigation, and extra provincial works and undertakings. In addition, exclusive environmental jurisdiction

arises out of federal property, and matters of "national concern" under the essentially residual "peace, order, and good government" power (POGG). The criminal law power is another source of federal jurisdiction over certain environmental matters.

There are obvious areas of overlap. One is different federal and provincial standards, each constitutionally valid, being applied to the same activity. For example, provincial environmental standards, and federal standards enacted under exclusive federal powers such as fisheries (in the case of regulations under the *Fisheries Act*) and POGG/Criminal Law (in the case of certain CEPA regulations) may apply to the same activity.

In this situation, the different standards under the respective federal and provincial statutes are considered to be validly enacted in different constitutional "aspects."[34] However, the "exclusivity" principle underlying the division of legislative powers requires that conflicts be resolved. This is the function of the doctrine of paramountcy, which accords ultimate primacy to the federal power.[35] However, juridical interpretation has narrowed the concept of conflict to situations in which there is express contradiction or conflict in operation so that the subject of the statutory requirements is placed in breach of one requirement by complying with the other.[36] In the case of environmental standards, contradictory duties can be avoided by persons subject to both federal and provincial standards merely by complying with the higher standard. What judicial guidance exists, suggests that this approach is likely to lead to concurrent operation of federal and provincial standards laws.[37] It is unlikely that federal standards will be found to be paramount so that competing provincial standards are of no force and effect.

What about federal residual power? If sufficiently broad federal standard-setting jurisdiction exists, based on the national concern element of the peace, order, and good government power, is the entire intergovernmental initiative on Canada-wide standards represented by the sub-agreement necessary? If not, the sub-agreement may mask an apparent abdication of federal legislative power and leadership responsibility. Any such exclusive federal power could, and ideally should, be exercised following thorough federal/provincial and public consultation. Provincial administration and enforcement of federal minimum standards might then be the subject of intergovernmental agreement.

Does the federal government have jurisdiction to set Canada-wide environmental standards? If so, what is the scope and nature of such jurisdiction? First, it is clear that the basic division of powers imposes limitations on federal standard-setting and enforcement powers. There is no federal power that can be related directly to standards as a subject. On the other hand, specific federal powers such as fisheries do include environmental regulation and therefore standard-setting powers.[38] But charting federal standard-setting powers in relation to certain discrete

subjects of federal responsibility is not helpful if the concern is lack of consistent Canada-wide standards. Therefore, it must be asked whether the federal government has jurisdiction to establish minimum Canada-wide standards. If these are ambient standards,[39] as opposed to, for example, discharge standards, they would arguably be more consistent with the national responsibilities of the federal government and would minimize intrusion on clear provincial powers to set standards directly related to provincial lands and works. Such federal power could be exercised to prevent the emergence of pollution havens and to meet concerns about a general "race to the bottom" by provinces in their standard-setting.

The federal government lacks extensive jurisdiction to enact and enforce minimum national standards within provinces. Such jurisdiction could, because of its scope, only be based on the national concern aspect of the federal peace, order, and good government power. It must be concluded, however, that while in some circumstances the POGG power may support federal standard-setting with respect to certain substances, the subject of national standards for ensuring a minimum level of environmental protection for Canadians is unlikely to meet the test of national concern, distinctness and scale of impact on provincial jurisdiction established by the Supreme Court of Canada.[40] Legislation that sets environmental standards by prohibiting certain activities or the possession of substances and penalizing those who discharge a prohibited substance or amount, may be within the federal government's criminal law power.

On the basis of scientific evidence and the risk of pollution havens and unsustainably low provincial standards, minimum national standards may be recognized as addressing a matter of national concern. This reasoning would parallel that of the Supreme Court of Canada in the *Crown Zellerbach* case in relation to marine pollution.[41] However, the difficulty is that minimum Canada-wide standards as a subject matter of legislation lacks "singleness, distinctiveness, and indivisibility."[42] Rather it is a diffuse subject that when examined encompasses elements of natural resource and environmental management, public health protection, national economic considerations, facilitation of international and interprovincial trade and commerce, national industrial strategy considerations, and regulation of particular industrial activities. Many of these elements are reflected in the efficiency, predictability, and consistency objectives and in the polluter pays, and results-oriented principles in the accord, and in the environmental quality and human health objectives in the standards sub-agreement.

This analysis is supported by the Quebec Court of Appeal's decision as well as the minority Supreme Court of Canada opinion in *Canada (Attorney-General) v. Hydro-Québec*,[43] in which the PCB's Interim Order under the *Canadian Environmental Protection Act* (CEPA), was held not to concern a distinct POGG subject matter and therefore to be *ultra vires* Parliament. The court was not prepared to

recognize that legislative focus on substances that present a serious risk to human health is a sufficient limitation for the purpose of the distinctiveness test. It adopted the view of the Supreme Court of Canada majority in *Crown Zellerbach*[44] that consideration of "provincial inability" to deal with the issue in question is not a definitive test, but merely a factor to consider in determining whether a matter has the requisite distinctiveness, singleness, and indivisibility.

The final test, namely scale of impact on acknowledged provincial jurisdiction, also operates against federal jurisdiction to set minimum national standards.[45] Such a federal power would cut deeply into provincial environmental jurisdiction to regulate local industrial activities and natural resource development on private and public lands — powers that are fundamental to provincial autonomy.[46] Ambient standards would not impact on provincial operations directly, but would constrain and shape the specific quantitative standards and operating requirements that would be necessary to ensure that ambient standards are met.

While choosing not to discuss whether the Interim Order or Part II of CEPA could be upheld under the national concern doctrine, a majority of the Supreme Court of Canada stated generally that "[a] discrete area of environmental legislative power can fall within [the national concern] doctrine" so long as it meets the criteria of singleness, distinctiveness, and indivisibility and a scale of impact on provincial jurisdiction which is reconcilable with the distribution of powers under the constitution.[47] The majority found as a general principle that "the Constitution should be interpreted so as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."[48]

The minority, representing four of the nine justices, agreed with the lower courts that the national concern doctrine could not be relied upon to uphold the impugned provisions. The four justices found it impossible "to specify precisely what it is over which the law [the enabling provisions in CEPA] purports to claim jurisdiction."[49] The definition of "toxic substances" in s. 11 and of "substance" in s. 3 were found to be too wide to be aimed at a specific form of pollution. This suggests that if the federal government were to legislate with respect to a particular form of pollution, or specific identifiable substances, it is possible that it could be upheld under POGG. The scope of the legislation must be sufficiently narrow that its boundaries are easily identifiable and do not encroach unnecessarily upon provincial jurisdiction. The test for "singleness, distinctiveness, and indivisibility" might have been met had "toxic substances" been defined narrowly, so as to "guarantee that only the most serious, diffuse and persistent toxic substances will be caught by the regulatory power conferred" by the challenged provisions.[50]

Any sweeping standards legislation passed by the federal government would be seen as an interference with provincial powers that cannot be justified under

POGG.[51] Whereas in *Crown Zellerbach* a distinction was made between fresh water and marine waters, the minority in *Hydro-Québec* found that Part II of CEPA failed the test because there is "no analogous clear distinction between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of the harmful effect or on the basis of their extraprovincial aspects."[52] Federal standards legislation must minimally intrude upon provincial powers if it is to be upheld under POGG, and thus the federal government would have to frame standards legislation narrowly so as to ensure that it is only regulating substances that could not be adequately regulated by the provinces.[53] It was thus fatal in the view of the minority that Part II of CEPA could allow regulation of substances which have only temporary and local effects.[54] Federal legislation cannot be upheld under POGG if it sets standards respecting substances that may only affect the province within which they originate. The minority concluded that "the appellant bears a heavy burden to demonstrate that provinces themselves would be incapable of regulating such toxic emissions."[55]

The other possible source of jurisdiction to set federal standards and enforce them within the provinces is the criminal law power. There are two requirements which a law must meet in order to be upheld under s. 91(27) of the *Constitution Act, 1867* (the criminal law power): they must contain prohibitions backed by penal sanctions; and they must be aimed at a "legitimate public purpose"[56] which means "some evil or injurious or undesirable effect upon the public against which the law is directed."[57] The Justices of the Supreme Court of Canada unanimously concluded in *R. v. Hydro-Québec* that the protection of the environment itself is a legitimate public purpose and that the federal government need not rely on the protection of human health to uphold environmental legislation.[58]

Though the federal government has some jurisdiction to set environmental standards under the criminal power, that jurisdiction is not wide. This power could only support discharge standards and even in the context of discharge standards the legislation must be tailored to meet certain requirements. In determining whether federal environmental legislation can be upheld under the criminal law power, one needs to determine whether the impugned provisions or legislation are best characterized as regulation or prohibition, and only legislation based on the latter may be upheld as an exercise of the federal government's criminal law power.[59] If a court can be convinced that the legislation prohibits the introduction of toxic substances into the environment "except in accordance with specified terms and conditions," or under certain exemptions, it will be seen as prohibitory.[60] However, if the legislation is seen by the court as generally regulatory, the prohibitions being merely ancillary to the regulatory scheme, it will not be upheld under the criminal law power.[61]

With respect to setting standards, then, federal legislation can validly set discharge standards if it prohibits discharges in excess of a certain amount and imposes penal sanctions for discharges which exceed the set standards. Ambient standards cannot be upheld under the criminal law power because it would be impossible for the federal government to impose a prohibition and penal sanctions regarding ambient standards. Neither will the courts likely find that the criminal law power supports any federal legislation setting environmental discharge standards through prohibition and penal sanction. It must be kept in mind that even under the criminal law power the courts will protect provincial autonomy. Part II of CEPA was held to be a valid exercise of the criminal law power because "[s]pecific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers."[62] However, the majority also seems concerned with protecting federal jurisdiction: "I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power."[63]

This analysis tends to confirm that jurisdiction to establish even minimum ambient environmental standards is indeed divided. However, this does not mean that there is necessarily a significant problem of overlap or conflict of federal and provincial standards or of inaction by particular jurisdictions. It does show that if such problems exist, as a matter of constitutional law, *some* form of intergovernmental cooperation would be necessary to effectively address the problems. Against this constitutional backdrop, the legality of the standards sub-agreement will now be examined in terms of legal authority and enforceability.

Interdelegation of Legislative Powers

The objectives of consistency, efficiency, predictability, and clarity are apparent in both the standards sub-agreement and the accord. In the sub-agreement, the expressed principle of "equity" is defined as achievement of a "consistent" level of environmental quality across Canada.[64] The accord specifically refers in its objectives clause to, "reviewing and adjusting Canada's environmental management régimes to accommodate environmental needs, innovation, expertise and capacities, and addressing gaps and weaknesses in environmental management."[65]

The sub-agreement is not a constitutionalized agreement. There is no expressed intention by the levels of government to enact ratifying legislation. Nor is the sub-agreement merely concerned with administrative and enforcement responsibilities

related to a particular statutory regime. Rather, it is intended to operate at the policy level and to structure, or at least influence the levels of government in exercising their respective constitutional powers in relation to environmental standards.

The sub-agreement is not an interdelegation of legislative power.[66] It is made clear that specific measures necessary for standards in relation to intra-provincial environmental effects are "at the discretion of the responsible government."[67] Standards in relation to interjurisdictional or Canada-wide environmental issues will be the subject of negotiation and further agreement.[68] Constitutional powers of the respective levels of government are thus respected.[69]

In fact, these provisions understate and constrain exclusive federal legislative jurisdiction in relation to interjurisdictional environmental matters. It is clear, for example, that environmental aspects of such things as extra provincial transportation facilities are within exclusive federal jurisdiction.[70] As shown above, while federal POGG jurisdiction probably does not include general authority to establish minimum national standards, the federal government does have exclusive jurisdiction in relation to environmental management of subjects such as marine waters (including marine waters within provinces) which meet the national concern/indivisibility/scale-of-impact test.[71] It also has jurisdiction over some matters as a result of the criminal law power. However, the list of federal "functions" in the sub-agreement is limited to standards related to federal lands, international standards, and standards that require a product/substance approach.[72]

There is no interdelegation to joint federal-provincial environmental standards authorities. This regulatory authority interdelegation technique has been constitutionally approved in relation to such matters as potato marketing[73] and motor transport.[74] In the environmental field, it supports the joint review panel provisions of federal and provincial environmental assessment statutes.

The standards sub-agreement does contemplate a role for CCME. However, this role is at the policy level, with attendant administrative support.[75] No powers that can be remotely described as legislative are delegated to CCME. All Canada-wide standards developed under the sub-agreement's process will be submitted to the ministers for their "consideration and endorsement." Neither the sub-agreement nor the accord contain voting provisions for CCME decisions. In practice, CCME Council of Ministers decision making has been consensual, so that governments, through their ministers, effectively retain a veto on standards decisions. The result is that power in relation to environmental standards at the policy level is retained by the individual ministers and at the legislative level by Parliament and the provincial legislatures.

Nor is the CCME given powers or duties to directly implement and enforce standards by promulgating regulations and making decisions. The sub-agreement neither confers such powers, nor contemplates in any way that they will be vested in the council by federal and provincial legislation.

Binding Future Legislatures

The analysis above shows that the sub-agreement is not vulnerable on the constitutional ground of invalid interdelegation of legislative powers. There is simply no interdelegation of powers. There may, however, be another fundamental constitutional defect in the sub-agreement to the extent that it appears to bind future governments.

The accord provides that when specific roles or responsibilities are assigned to one order of government, the other order will "seek to amend as necessary their legislation, regulations, policies and existing Agreements to provide for implementation of that Sub-Agreement."[76] In the standards sub-agreement there is an analogous commitment, but the obligation is more ambiguous, namely to ensure that standards are met, with "flexibility" in how the standards are met, having regard to local priorities and unique situations.[77] Both the accord and the sub-agreement provide that when obligations and roles are accepted and are being discharged by one order of government, the other order, "shall not act in that role for the period of time" determined by the relevant agreement.[78]

It is clear that a government cannot bind itself as to future legislative action.[79] Such power to bind future legislatures would be a denial of parliamentary sovereignty and potentially destructive of the parliamentary system. However, self-imposed "manner and form" requirements, such as special majority voting requirements, or consultation provisions, for the adoption of future statutes or regulations, would be valid if clearly enough expressed.[80]

Thus, neither Parliament, nor the provincial legislatures can absolutely bind themselves either to enact particular standards, or to refrain from acting where the other order of government has assumed obligations and roles concerning standard-setting or enforcement of standards. They must remain free to exercise their sovereign legislative powers. However, to the extent that the sub-agreement requires a *process* of intergovernmental consultation, involving consideration of the principles set out in the sub-agreement, as opposed to any commitment that the results are binding, such a process may be binding. This may be regarded as a manner and form requirement, analogous to referenda or voting requirements that judicial decisions and constitutional scholars suggest are likely to be binding.[81]

Binding Future Executive Branches of Government

To the extent that such binding action or forbearance is within the executive — that is, Cabinet or ministers — as opposed to the legislative power of governments to make regulations or orders, it is likely to be invalid, though this is not completely clear. It is arguable that agreed standards established by provincial or federal regulation under powers delegated by the relevant environmental statute, wholly in reliance upon obligations undertaken under the sub-agreement could be set aside in judicial review proceedings at the instance of affected parties. The basis would be lack of jurisdiction to exercise the discretionary statutory regulation-making power resulting from fettering that discretion by reliance upon the sub-agreement obligations.[82] However, the Supreme Court of Canada has held that courts should not inquire into the motives or the validity of the beliefs of Cabinet when it promulgates subordinate legislation.[83]

It is clearer that decisions such as permits or other regulatory approvals made under discretionary statutory powers cannot be fettered by agreed standards. Legally correct exercise of such discretion by authorized decisionmakers under federal or provincial environmental statutes requires that the substantive merits of each application be considered. Agreed standards could be a factor, and even a critical factor, but not the sole consideration in decisions that establish permit standards.[84] If, of course, agreed standards are explicitly legislated by any government, they must be followed by its regulatory authorities, and no issue of legality arises.

It is noteworthy that this is an issue even if it is conceded that the terms of the standards sub-agreement are not clear and certain enough to be enforceable. If a decisionmaker *believes*, incorrectly, that it is bound by agreed standards and acts solely on that basis, there may still be an unlawful fettering of discretionary power.

Is the Standards Sub-Agreement Intended as a Constitutional Matter to Bind Future Governments?

It is by no means clear that these provisions of the standards sub-agreement and the accord are *intended* by the parties to bind future legislatures or executive officials. First, the implementation obligation in the standards sub-agreement is ambiguous. It merely requires parties "to ensure that standards are met through the application of their respective environmental management programs."[85] Further, in choosing how to ensure that agreed standards are met: "governments have the flexibility to adapt their management régimes to the priorities and unique situations within their borders."[86] This is not the language of specific legal obligation.

More telling is clause 4.5 of the sub-agreement by which governments agree that:

> in instances where a government is *unable to fulfill its obligations* under this Sub-Agreement, *the concerned governments* shall develop an alternative plan to ensure that no gaps are created within the environmental management régime.[87]

In developing these alternative plans:

> the *concerned governments* will *jointly* identify issues to be addressed, collaborative mechanisms and a plan of action including timeframe for implementation of the plan.[88]

This suggests that the apparent obligations may be little more than hortatory provisions, or at most, best efforts undertakings to move toward standards goals. Note, that in the event of such inability on the part of governments to fulfil obligations, the obligation is modified from a specific standards obligation to "no gaps ... within the environmental management régime,"[89] which may encompass non-standards measures such as phased compliance agreements.

Also, the alternative plan is to be developed not by the government in default but by the "concerned governments," presumably meaning all governments, or at least those governments that have a particular interest in the issue. This means further consultation, and a further level of agreement, or an amendment to the standards sub-agreement.

It may be concluded that the intention to bind governments in a constitutional sense to enact and enforce agreed standards and forebear from enacting standards where the other level of government has undertaken the responsibility is at least questionable. These provisions of the sub-agreement may not be specific and unqualified enough to be enforceable as contractual obligations. If so, the constitutional prohibition on binding future legislatures or executive members would not be relevant. However, if this interpretive analysis is correct, it also casts doubt on the enforceability of the standards sub-agreement as a legal instrument to the extent that it is intended to merely bind governments to a "manner and form" *process* for standard setting, and not to constitutionally invalid obligations to legislate standards, that will be agreed upon under the sub-agreement in the future. This question of whether the sub-agreement can be enforced to any extent is considered in the next section.

CAN THE STANDARDS SUB-AGREEMENT BE LEGALLY ENFORCED, AND IF SO, BY WHOM?

In the previous section, the perspective was *attacking* the standards sub-agreement itself or agreed standards established under the sub-agreement. Here, the

perspective is *upholding* the sub-agreement, that is whether and to what extent, the standards sub-agreement can be enforced as a contractual instrument — an agreement that creates enforceable legal rights in the party governments, and perhaps in "third-party" citizens or environmental organizations. If a government fails to follow the procedures under the sub-agreement, or simply ignores the sub-agreement, can it be judicially required to comply?

Standing

As a first step, it can be affirmed that this question is not hypothetical merely because governments are not likely to seek formal judicial enforcement of intergovernmental agreements. It is clear that third-party individuals or corporations would have standing to enforce the standards sub-agreement in provincial superior courts if they are directly affected by decisions of provincial environmental regulators based on statutes, regulations or orders that implement the standards sub-agreement.[90] Private parties not directly affected in this sense may be granted discretionary public interest standing based on the "genuine interest" and no better suited plaintiff criteria for challenging actions of public authorities, established by the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance).*

For example, a public interest environmental organization could, on the basis of advocacy, or public consultation process activity in relation to the standards sub-agreement itself, activities in relation to the implementing legislation, or involvement in standards issues arising under that legislation, very likely establish the necessary "genuine interest" and the likelihood that no party with a more direct interest will initiate a challenge. The attack would be on the implementing statute or regulation on the basis that it was intended to be consistent with the intergovernmental agreement that it implements.[91] It could not be directly on the validity of the agreement to legislate or forebear from legislating standards because, as discussed above, ordinary, non-constitutionalized intergovernmental agreements like the standards sub-agreement cannot limit the legislative power of the party governments. It is possible, in principle, that the *process* of standard-setting under the sub-agreement could be enforced. However, the relative vagueness of this process would make it difficult to establish non-compliance.

Capacity to Enter into the Sub-Agreement

The legal validity of the sub-agreement requires that its signatory governments have the necessary statutory authority to enter into this obligation. While such authority may in some circumstances be drawn from non-statutory prerogative

powers, where a statute authorizes a particular body or official to enter into intergovernmental agreements, that provision must be complied with.[92]

On the federal side, s. 7 of the *Department of the Environment Act* authorizes the minister, with the approval of the Governor in Council, to enter into agreements with the government of a province or any provincial agency respecting the carrying out of any programs for which the minister is responsible. This should include establishment and enforcement of environmental standards.[93] For substances within the purview of the *Canadian Environmental Protection Act* (CEPA), there is a similar ministerial power to enter, with Cabinet approval, into certain intergovernmental agreements.[94]

Legal validity and thus enforceability requires that the minister, not, for example, the deputy minister, execute the sub-agreement, and that the Cabinet approval requirement be complied with. If not, the sub-agreement could, like the federal-provincial agreement to settle differences concerning assessment and regulation of the Rafferty-Alameda Dam, be declared unenforceable.[95] Other clear statutory preconditions to entering into the agreement must also be complied with. For example, the 1997 proposal to amend CEPA would have required notice, comment and public consultation in execution of the standards sub-agreement.[96]

Is the Standards Sub-Agreement an Enforceable Contract?

While the perspective here is whether the sub-agreement creates constitutional binding obligations that can be enforced, the analysis is much the same as above where the question was whether the sub-agreement can be challenged on the ground that it is invalid as a matter of constitutional obligation. In both cases, the sub-agreement must be interpreted to determine the intention of the parties. Though there may be more judicial flexibility on the constitutional issues to review evidence of context for a purposive interpretation consistent with fundamental constitutional values, by contrast with the narrower contractual interpretation that places greater emphasis on the plain meaning of the words of the agreement, the interpretive processes are broadly similar.

Generally, courts have characterized intergovernmental agreements as instruments in the nature of contracts. They have not, however, done this explicitly, and have been content to determine on a case-by-case basis whether or not intergovernmental agreements create enforceable legal relations.[97] It is clear that principles of contract law and contract interpretation have proven significant when these issues have arisen. Thus, factors that have been considered by courts include: (i) whether the agreement concerns ordinary commercial subject matter such as property or supply of services, (ii) the language of the agreement, and (iii) whether

standard contract terms such as arbitration or other dispute resolution provisions, default clauses, indemnity provisions, and *force majeure* clauses have been included.[98]

Looked at in light of these factors, the standards sub-agreement is seen to be more political and hortatory than contractual in character. The subject of development and enforcement of environmental standards is essentially a subject for policy and legislative action. Agreement to abide by specified standards would be a more likely and suitable subject of a traditional contract.

There is little in the language of either the accord or the standards sub-agreement to suggest intention to enter into binding contractual relations. The accord begins with the headings "Vision," "Purpose of the Accord" and "The Objectives of Harmonization," then "Principles." The stated purpose is to provide a "framework to achieve the vision and to guide the development of Sub-Agreements." Similarly, the sub-agreement begins with Objectives, Scope, and Principles. Objectives are expressed in terms of environmental quality and human health and an "approach"[99] for development and implementation of standards, rather than mutual obligations. This is the language of aspiration and political commitment, not legal obligation.

Even where the term "agree" is used, it is under the heading "Accountability" as opposed, for example, to "Covenants" or analogous language of contract.[100] Even this "agreement" is so qualified and vague that it may lack the certainty and precision necessary to create legal obligations. The apparent obligation "to ensure that [agreed] standards are met,"[101] is qualified by the statement that governments have the "flexibility to adapt their management régimes to the priorities ... within their borders."[102] This appears to contemplate a complete alternative to the process established by the sub-agreement. Further, if any government is unable to fulfil obligations under the sub-agreement, "the concerned governments shall develop an alternative plan."[103] This plainly contemplates an alternative process — one that is not an obligation of the government in "default," but a shared obligation of the party governments or at least those "concerned" with the issue. And the alternative plan is not plainly in relation to standards, but to "ensure that no gaps are created within the environmental management régime."[104] These provisions cast considerable doubt on the "agreement" to ensure that standards are met.

This is analogous to the reasoning and conclusion of the Ontario Divisional Court in relation to the Canada Assistance Plan (CAP), a federal-provincial agreement concerning social assistance. The court concluded that by agreeing under the CAP to provide "basic requirements," a basic level of assistance, to persons who receive welfare assistance in Ontario, the province did not agree to a dollar figure of "basic assistance" level that could be enforced.[105] Though the CAP expresses the "concern" of all Canadians about adequate assistance to persons in

need and a "desire" to extend assistance naturally through cost-sharing, the terms of the agreement were not clear and specific enough to establish a basic dollar subsistence level.

Even at a process level, there is vagueness and uncertainty in the language. In setting out the process responsibilities of the respective levels of government, including provision of scientific and technical support, and specification of the areas or subjects for implementation responsibilities, the sub-agreement states that "*in general*, the *main functions* of [the federal government and the provincial and territorial governments] include ..."[106]

There are provisions for amendment with the consent of the governments in both the accord and the sub-agreement. Provisions are included for "withdrawal," not, for example, "termination," on six-months notice.[107] There are also provisions for entry into force of the agreements.[108] No term is specified. There is only a provision in both agreements for review after five years to "evaluate its effectiveness and determine its future."[109]

Neither the accord, nor the sub-agreement contains an explicit dispute settlement term. Nor is there a *force majeure* or emergency clause to limit obligations where unexpected events prevent performance of contractual obligations. The closest the governments come to clauses of this kind is the "alternative plan" provision discussed above. This is essentially a policy and political solution as opposed to a contractual dispute settlement mechanism or a contractual escape clause designed to deal with significant unexpected changes of circumstances.

It must therefore be concluded that it is unlikely that the standards sub-agreement could be enforced directly by the party governments, or indirectly through actions by third parties in relation to the implementing standards legislation. The sub-agreement should be seen as merely a hortatory document or an expression of political intent by the governments. Whether it will be followed should be understood not as a question of legal obligation, but merely a matter of political will.

TRANSPARENCY

The concept of transparency encompasses the common law principles of procedural fairness[110] and the constitutional principle of fundamental justice.[111] Also encompassed are the values of clarity and certainty. This is reflected in the procedural fairness principles, in the presumption against interference with vested rights in the absence of clear statutory authority, and in the principles of constitutional vagueness under s. 7 of the *Canadian Charter of Rights and Freedoms*.

Statutory transparency provisions, such as express disclosure and consultation requirements in environmental statutes, publication requirements in regulatory

statutes and access to information legislation, must also be taken into account. These principles prevent the enforcement of secret law. They also provide rights of notice and opportunity to be heard to parties directly affected by regulatory decisions such as enforcement orders. It is not clear, however, how far these notice, access, and participation rights apply to the negotiation and implementation of intergovernmental agreements.

Ensuring transparency, including timely public access to information and public consultation and input, is vital if intergovernmental agreements such as the standards sub-agreement are to win the public acceptance and legitimacy necessary to ensure effective implementation. Accountability of governments and government officials in harmonizing environmental standards is likely to be enhanced by a reasonably transparent process.

As a matter of law, however, there is no general legal duty on persons who negotiate, nor on responsible officials who execute, intergovernmental agreements to disclose or to provide public notice and opportunities for input.[112] The common law principles of procedural fairness,[113] which impose these duties in relation to persons likely to be affected[114] on public officials and authorities that exercise statutory decision powers, do not apply to "legislative" functions[115] that involve generalized actions that affect broad segments of the public.

This does not mean that transparency requirements of this kind cannot be legislated, though at present there are no such requirements that apply to the standards sub-agreement. Specific public notice and consultation provisions for intergovernmental agreements are not common. An example, should a provision of this kind ultimately be enacted, is provided by sections 9 (2)-(4) and 10 (4)-(6) of Bill C-74, the proposed amendments to CEPA.[116] These provisions would require that any federal-provincial agreement on administration of the Act or on equivalency of CEPA regulations and provincial environmental laws, before being entered into, be published by the federal minister in the *Canada Gazette*. Within 60 days, any person could then file comments or could file a notice of objection that may, in the discretion of the minister, trigger an inquiry and report by a Board of Review.[117] There would be no unconstitutional binding of future Parliaments because these would be seen as manner and form requirements rather than substantive commitments.[118]

Even at the level of implementation, there are no transparency requirements for agreed standards as explicit as those included in the 1997 proposals to amend CEPA. If new legislation is required to establish and provide for enforcement of agreed standards at either level of government, the ordinary legislative process ensures publication, access, and opportunity for public and legislative debate. But if implementation is at the level of regulation making or statutory orders or decisions, in the absence of specific statutory requirements, the principle is the

same as for the standards sub-agreement itself. The threshold to invoke common law procedural fairness safeguards is unlikely to be met, because the making of regulations or general orders has broad public impact and is therefore legislative in character as opposed to party- and issue-specific determinations or adjudications.[119] Provincial and federal regulations or statutory instruments legislation do require formal filing and official *Gazette* publication.[120] But this is after the fact. Some statutes require other specified procedures. For example, under CEPA, regulations to add substances to the list of toxic substances must, before promulgation, be referred to a federal-provincial advisory committee for advice.[121]

A final category of transparency provisions is the federal and provincial access to information statutes. Some negotiating stage information may, upon formal application, be available on the standards sub-agreement and on subsequent specific standards agreements. But this would be limited by "federal provincial relations" or similar exemptions in the access to information statutes.[122]

Disclosure may also be legally required, at the instance of affected parties, if information concerning agreements on standards is integral to the effective operation of processes such as environmental impact assessment established by environmental statutes. This was the case in *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan.* The Saskatchewan Court of Appeal ordered that information, including discussions relating to federal and provincial standards, concerning four water resources projects at different stages of completion, be disclosed to the Action Foundation. This was ordered notwithstanding an order issued by the Saskatchewan minister under the *Environmental Assessment Act* that barred disclosure. The court emphasized that the Act unequivocally required public input on proposed developments before any ministerial decision on them, with a view to promoting environmental protection and public acceptance. Informed public participation could only be possible if participants have access to relevant information other than that specifically exempted by statute.[123]

Legal transparency requirements aside, governments engaged in intergovernmental agreement processes may agree to disclose proposed agreements for comments and even go farther and establish consultative groups or stakeholder advisory bodies. This is precisely what was done in the CCME harmonization process that produced the accord and the standards sub-agreement.

From the beginning of the harmonization initiative, public information and consultation have been extensive.[124] This includes the broadly representative National Advisory Group, and the process of public consultations that included electronically available draft materials, meetings with stakeholders, a major multi-stakeholder meeting, and open regional meetings of the Lead Representatives Committee that steered the initiative. Public consultation continued, with input invited on the accord and standards sub-agreement drafts. Public input has been

also invited on the Initial Candidate List for Development of Canada-Wide Environmental Standards.

Though it raises no potential grounds for legal action based on procedural fairness principles, one concern with the consultation process should be noted. Donna Tingley has pointed out that a significant change of course in proposed legislation, made after extensive public consultation, is likely to undermine public confidence in the consultation process and in the government departments concerned.[125] The accord and standards sub-agreement represent a departure from the original Environmental Management Framework Agreement, with its multiple schedules, which was the subject of the bulk of the harmonization initiative's public consultation to date. Whether the new agreements are ultimately perceived by members of the public involved in the consultation process to be a significant change of course remains to be seen.

There is thus little legal basis for challenge by members of the public to either the standards sub-agreement itself or to potential implementing legislation on procedural fairness grounds of lack of notice or opportunity to make submissions. Statutory requirements for regulation-making and access to information provisions must, however, be complied with. There are no statutory transparency requirements that affect the standards sub-agreement or future agreements on standards, though notice and comment provisions were included in the proposed CEPA 1997. Voluntary, non-legally binding public consultation programs have provided considerable transparency in the development of the accord and the standards sub-agreement.

CONCLUSION: ARE AGREED STANDARDS MORE SUSCEPTIBLE TO LEGAL CHALLENGE?

Does the fact that federal or provincial environmental standards are based on an intergovernmental agreement like the standards sub-agreement weaken the standards by making them more susceptible to legal challenge than standards set by individual jurisdictions? Challenges could come from parties holding or seeking environmental approvals under federal or provincial legislation who consider the standards to be unnecessarily stringent. Another source of challenge is citizens and public interest groups who consider agreed standards to be too weak, or who wish to require governments to implement agreed standards. We have seen that intergovernmental agreements themselves may potentially be the subject of challenge because they attempt constitutionally impermissible interdelegation or self-limitation of legislative powers. However, analysis of the standards sub-agreement shows that it is not likely to be interpreted as intended to produce such interdelegation or self-limitation. Nor, so long as the sub-agreement is properly

executed by the minister of the environment and approved by Cabinet, will there be a question of lack of statutory authority to enter into the agreement.

Potentially, intergovernmental agreements may, provided they are clearly expressed and create specific and relatively certain obligations, be enforced by party governments themselves, or by third parties recognized to have public interest standing. In the case of the standards sub-agreement, this is unlikely because the sub-agreement is expressed in general language, and lacks recognized words of obligation and provisions for dispute resolution and default normally found in documents intended to produce binding legal obligations. The sub-agreement is merely an expression of the government's intention to cooperate through a particular process and forum. It is hortatory and guiding rather than legally binding.

At the level of implementation, in general, the fundamental sovereignty of federal and provincial legislatures would prevent legal challenge of legislated standards on the ground of inconsistency with standards established under the sub-agreement. A provision such as s. 2(l) of the amendments to CEPA proposed in 1997, which specifically requires the government of Canada to: "act in a manner that is consistent with the intent of intergovernmental Agreements and arrangements entered into for the purpose of achieving the highest standards of environmental quality through Canada," might, if enacted, provide a basis for legal challenges of federal standards.[126] No similar provisions have been identified at the provincial level. It may, for example, be possible to challenge federal transfers made under other intergovernmental agreements, if they are specifically tied to standards under the sub-agreement, on the basis that the empowering federal legislature must be interpreted as authorizing payments only when standards consistent with the sub-agreement are in place.[127] However, in the absence of such specific arrangements, such an indirect attack on legislated provincial standards is speculative.

To the extent that implementation of standards is by regulation, there is some authority to suggest that standards may be challenged on the basis of inconsistency with agreed standards to the extent that authority for the implementing regulation depends on the statute intended to recognize and to implement the agreement. However, this is not completely clear, since courts have also recognized extensive executive discretion in making delegated legislation. Results will depend on the specific terms of the implementing statute and regulation.

Finally, standards established in individualized approval decisions that establish specified discharge standards as conditions of approvals, may in some circumstances be challenged if agreed standards are relied upon completely by the decisionmaker. This would have the effect of unlawfully fettering the discretionary power of decision, unless the decisionmaker considered the full range of relevant factors, including the agreed standards.

The analysis thus shows that the standards sub-agreement could potentially be subject to legal challenge either directly on constitutional grounds or on grounds of failure by signatories to comply with authorizing legislation. There are also potential grounds for legal challenge at the implementation level, particularly in relation to regulations and regulatory approval decisions intended to implement the standards sub-agreement. There is little basis for challenge either at the agreement or implementation level on the ground of failure to provide transparency in the form of participation or procedural fairness opportunities. It is worth noting that should legislation similar to the proposed amendments to CEPA be enacted, it may establish statutory obligations on the federal government concerning public notice and response in relation to proposed agreements, and more fundamentally a duty to act consistently with (not to comply specifically with) intergovernmental agreements such as the standards sub-agreement.

These *potential* grounds for legal challenge of statutes, regulations, and regulatory decisions to implement standards do add grounds not available to challenge single jurisdiction standards. Challenges to intergovernmental standard agreements themselves are unlikely, but are possible, particularly if the attack is on authority to enter into agreements. However, the interpretive analysis of the standards sub-agreement shows that these additional grounds for legal challenge are not likely to be available because the sub-agreement is not a legally enforceable instrument. It is simply too vague in its language and content to be an enforceable contractual instrument. The same conclusions would likely apply to any agreements entered into pursuant to the sub-agreement setting actual standards. These are likely to contain the same kind of language as the sub-agreement and accord, and the focus will be on ambient standards and therefore there would not be any automatic impact on specific regulation in the provinces. Further, the sub-agreement, as noted above, gives the provinces flexibility in the measures they take to adopt the any agreed-to standards.

Thus, the conclusion is that the sub-agreement is not likely to weaken agreed standards by making them legally challengeable to a greater degree than single jurisdiction standards. From the standpoint of effective environmental management this is in one sense a positive conclusion. But from another perspective — that of public confidence in the harmonization process and the process under the standards sub-agreement — it raises concerns. If the sub-agreement is not a legally enforceable agreement at all, but merely a statement of purpose and political commitment by the governments, how secure are these commitments likely to be as the priorities of the party governments shift over the longer term?

Ultimately though, there is a line within a broad policy choice band that must be chosen by the governments in negotiating the course of intergovernmental cooperation in establishing standards. Constitutional dictates and the norms of

parliamentary government push governments in the direction of general and hortatory agreements like the standards sub-agreement. On the other side, the need for relatively clear, certain, and stable relationships and processes requires the use of more precise, and potentially enforceable contractual language. Any legal analysis of the sub-agreement must be understood within this broader constitutional and intergovernmental relations context. It is, by no means, clear that legal enforceability is or should be an end in itself.

NOTES

1. Some of the relevant literature includes: Gertler, "Lost in (Intergovernmental) Space," p. 254; Northey, "Federalism and Comprehensive Environmental Reform"; Kennett, "Hard Law, Soft Law and Diplomacy"; Jaeger, "Back to the Future"; Kennett, "Federal Environmental Jurisdiction After Oldman (Case Comment)"; Hanebury, "Environmental Impact Assessment in the Canadian Federal System"; Bankes, "Cooperative Federalism"; Kaufman *et al.*, *The Draft Environmental Management Framework Agreement and Schedules.*
2. Bankes, "Cooperative Federalism," p. 798; Gertler, "Lost in (Intergovernmental) Space," p. 254; *A-G Canada v. Sask Water Corporation,* [1991] 1 W.W.R. 426 (Sask. Q.B.).
3. Bankes, "Cooperative Federalism," p. 802.
4. Gertler, "Lost in (Intergovernmental) Space," pp. 267-70.
5. Saunders, *Interjurisdictional Issues in Canadian Water Management,* pp. 91-96.
6. Tingley, *Models and Instruments for Harmonization,* p. 3, emphasizes the need for harmonization agreements to be "legally watertight" if rationalization of environmental management systems is not to be undone by expensive and lengthy litigation.
7. Sub-Agreements, cl. 1.
8. Ibid., cl. 2.
9. Ibid., cl. 3.
10. Ibid., cl. 5.
11. Ibid., cl. 6.
12. Ibid., cl. 9.
13. Standards Sub-Agreement, cl. 1.1.1.
14. Ibid., cl. 2.1.
15. Ibid., cl. 3.1.1 - 3.1.8.
16. Ibid., cl. 5.2.
17. Ibid., cl. 5.2.2, 7.1, 7.4.
18. Ibid., cl. 5.3.1.
19. Ibid., cl. 6.1.
20. Ibid., cl. 6.2.

21. Ibid., art. 4.
22. See Dicey, *The Law of the Constitution*, ch. 4.
23. *Reference Re Anti-Inflation Act,* [1976] 2 S.C.R. 373, pp. 433-35.
24. *Roncarelli v. Duplessis*, [1959] S.C.R. 121, pp. 155-56.
25. *Curragh Resources Inc. v. Canada (Minister of Justice)*, (1993) 11 C.E.L.R. (N.S.) 173, pp. 192-95.
26. *Friends of the Oldman River v. Canada (Minister of Transport)*, (1992) 7 C.E.L.R. (N.S.) 1, pp. 22-25.
27. Liability could be based on established tort concepts such as negligence, or on the less clearly formulated concept of abuse of discretion: *McGillivray v. Kimber,* (1915) 52 S.C.R. 146; *Harris v. Law Society of Alberta,* [1936] S.C.R. 88.
28. Dicey, *The Law of the Constitution*, "Can the Standards Sub-Agreement be Legally Enforced and if so by Whom?"
29. See Canada, Federal-Provincial Relations Office, *Federal-Provincial Programs and Activities*.
30. See Blackman *et al.*, "The Evolution of Federal/Provincial Relations in Natural Resources Management"; Bankes *et al.*, "Energy and Natural Resources," p. 53.
31. These include the Canada-Newfoundland Atlantic Accord, 1985; the 1982 Canada-Nova Scotia Offshore Agreement; and the Canada-Nova Scotia Offshore Petroleum Resources Accord, 1986. See Hunt, *The Offshore Petroleum Regimes of Canada and Australia*.
32. See Parisien, *The Fisheries Act: Origins of Federal Delegation*.
33. Lucas, "Constitutional Powers," p. 3:38.
34. In *Interprovincial Cooperatives Ltd. v. R.*, [1976] 1 S.C.R. 477, pp. 497-98, Laskin J. and two other judges among the majority expressed the view that the federal Chlor-Alkali Mercury Regulations did not pre-empt the field because the federal Act was aimed at establishing a penal sanction in the general public interest, whereas, the Act establishing the allegedly conflicting provincial standard was concerned with civil redress.
35. See Hogg, *Constitutional Law of Canada*, ch. 16.
36. Ibid.; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, p. 151; *Multiple Access v. McCutcheon,* [1982] S.C.R. 161, p. 191.
37. This may be inferred from the comments of Pigeon J. and two other judges in *Interprovincial Cooperatives Ltd. v. R.*, pp. 515-16.
38. Concerning the "deleterious substance" standard in the main water quality provision of the *Fisheries Act* (s. 36(3)), see *R. v. Northwest Falling Contractors Ltd.*, [1980] 2 S.C.R. 292, p. 301.
39. Cl. 2.2 of the Standards Sub-Agreement identifies ambient environmental standards as its primary focus.
40. Particularly in *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 and elaborated in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

41. Ibid., p. 436. The predominantly extra-provincial and international character and implications of marine pollution rendered it a matter of national concern.
42. In *Crown Zellerbach,* ibid., pp. 436-38, the court held that the distinction between pollution of salt water and pollution of fresh water was sufficient to render marine pollution a single, indivisible matter.
43. *Canada (Attorney-General) v. Hydro-Québec*, (1995) 17 C.E.L.R. (N.S.) 34 (Que. C.A.), p. 52.
44. *R.* v. *Crown Zellerbach*, p. 434.
45. The scale of impact test requires that the matter have reasonable and ascertainable limits regarding its impact on provincial jurisdiction. In *Crown Zellerbach*, ibid., pp. 437-38, the distinction between salt and fresh water meant that federal regulation of marine pollution would have minimal impact on provincial jurisdiction.
46. A concern expressed by La Forest J. in his dissenting judgement in the *Crown Zellerbach* case, ibid., pp. 455-56.
47. *R. v. Hydro-Québec,* (1997) 151 D.L.R. (4th) 32 at para 115.
48. *R. v. Hydro-Québec* at para 116. See also *Friends of the Oldman River v. Canada (Minister of Transport)*, p. 64.
49. *R. v. Hydro-Québec* at para 67.
50. *R. v. Hydro-Québec* at para 72.
51. Concern with protecting provincial ability to legislate respecting the environment seems to be the reason why the majority chose to decide *Hydro-Québec* under the criminal law power. If a matter of national concern it is within Parliament's exclusive jurisdiction, while the criminal power only enables "discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health" (para 128, 131).
52. *R. v. Hydro-Québec* at para 75.
53. *R. v. Hydro-Québec* at para 76.
54. *R. v. Hydro-Québec* at para 76.
55. *R. v. Hydro-Québec* at para 76.
56. *R. v. Hydro-Québec* at para 35.
57. *Reference Re Validity of Section 5(a) of the Dairy Industry Act,* [1949] S.C.R. 1 at 49.
58. *R. v. Hydro-Québec* at para 43 for the minority, and at para 128 for the majority. The Court split 5/4, however, on whether the provisions of CEPA were aimed at regulating (minority) or prohibiting (majority) environmental pollution.
59. *R. v. Hydro-Québec* at para 61.
60. *R. v. Hydro-Québec* at para 87. See *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), 127 D.L.R. (4th) 1.
61. *R. v. Hydro-Québec*, majority at para 87, minority at para 53.
62. *R. v. Hydro-Québec* at para 147, p. 151.
63. *R. v. Hydro-Québec* at para 154.

64. Standards Sub-Agreement, cl. 3.1.4.
65. Accord, The Objectives of Harmonization, cl. 3.
66. Such interdelegation would be constitutionally impermissible: *A-G Nova Scotia v. A-G Canada*, [1951] S.C.R. 31.
67. Standards Sub-Agreement, cl. 6.1.
68. Ibid., cl. 6.2.
69. Ibid., cl. 6.8 and 6.9 set out the main federal and provincial "functions" under the sub-agreement. Also, principle 9 of the accord states that "nothing in this Accord alters the ... authority of the governments" as set out in the constitution. Article 4.4. of the sub-agreement contains a similar statement.
70. See *Central Western Railway Corp. v. United Transportation Union,* [1990] 3 S.C.R. 1112; Lucas, "Constitutional Powers," pp. 3:15-3:16.
71. *R. v. Crown Zellerbach Canada Ltd.*
72. Standards Sub-Agreement, cl. 6.8. The industrial sector is mentioned only in cl. 6.9 which sets out main provincial functions.
73. *PEI Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.
74. *Coughlin v. Ontario Highway Transport Board,* [1968] S.C.R. 569, p. 569.
75. Standards Sub-Agreement, cl. 5.1.1 (establishment of priorities), 7.1 (administration and review of sub-agreement).
76. Accord, Sub-Agreements, cl. 9.
77. Standards Sub-Agreement, cl. 4.2.
78. Accord, Sub-Agreements, cl. 6; Standards Sub-Agreement, cl. 4.4.
79. Hogg, *Constitutional Law of Canada*, p. 262.
80. Ibid., pp. 263-64; *R. v. Mercure*, [1988] 1 S.C.R. 234, p. 278; *A.G.N.S.W. v. Trethowan*, [1932] A.C. 526 (P.C. Aust.), although this issue is not completely clear, as Hogg points out, ibid., p. 264.
81. Hogg, *Constitutional Law of Canada.*
82. See Saunders, *Interjurisdictional Issues in Canadian Water Management,* p. 99. *Canadian Environmental Law Association v. Canada* (Minister of the Environment), (1999) 30 C.E.L.R. (N.S.) 59 (Fed. T.D.).
83. *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, p. 112. It was held that the court should not inquire into the validity of the beliefs of Cabinet when exercising its political discretion to make an Order in Council extending harbour boundaries.
84. *Lavender and Son Ltd. v. Minister of Housing and Local Government*, [1970] 1 W.L.R. 1231 (QBD), pp. 1240-41.
85. Standards Sub-Agreement, cl. 4.2.
86. Ibid.
87. Emphasis added.
88. Ibid., cl. 4.6.
89. Ibid., cl. 4.5.

90. See, e.g., *Sunshine Village Corp. v. Canada (Minister of Canadian Heritage)*, (1996) 20 C.E.L.R. (N.S.) 171, pp. 191-93.
91. Bankes, "Cooperative Federalism," p. 802.
92. Ibid., pp. 800-01, citing *A-G Canada v. Saskatchewan Water Corporation*, [1991] 1 W.W.R. 426, where in entering into an agreement with the Saskatchewan Water Corporation, the federal government failed to comply with the Cabinet approval requirement of s. 7 of the *Department of the Environment Act.*
93. *Canadian Environmental Law Association v. Canada* (Minister of the Environment), (1999) 30 C.E.L.R. (N.S.) 59 (Fed. T.D.).
94. *Canadian Environmental Protection Act,* ss. 98, 99.
95. *A-G Canada v. Saskatchewan Water Corporation*, pp. 454-55.
96. Section 9. Bill C-74, *The Canadian Environmental Protection Act, 1997,* was given first reading on 10 December 1996, and died on the parliamentary order paper with the call of the federal election in April 1997.
97. Saunders, *Interjurisdictional Issues in Canadian Water Management,* pp. 91-95, citing *A-G B.C. v. Esquimalt and Nanaimo Railway Co*, (1950) 1 D.L.R. 305, (P.C.) and *Re Interpretation of a Certain Agreement Entered into Between Canada and Alberta on 29 March 1973*, [1983] 1 F.C. (Fed. T.D.).
98. See Saunders, *Interjurisdictional Issues in Canadian Water Management,* pp. 95-96.
99. Sub-Agreement, cl. 1.1.2.
100. Ibid., article 4.
101. Ibid., cl. 4.2.
102. Ibid.
103. Ibid., cl. 4.5.
104. Ibid.
105. *Masse v. Ontario (Ministry of Community and Social Services)* (1997), pp. 111-12.
106. Sub-Agreement, cl. 6.8, 6.9. Emphasis added.
107. Ibid., cl. 7.3.
108. Accord, Administration, cl. 5; Standards Sub-Agreement, cl. 7.2.
109. Accord, Administration, cl. 7; Standards Sub-Agreement, cl. 7.4.
110. Persons affected by non-legislative decisions of public authorities are entitled to appropriate procedural protections encompassing notice, reasonable opportunity to be heard, and a fair and impartial decisionmaker. See Evans *et al.*, *Administrative Law*, Part II.
111. Under s. 7 of the *Canadian Charter of Rights and Freedoms.*
112. Jones and de Villars, "The Applicability of the Duty to be Fair to Legislative Functions and to the Decisions of Cabinet," pp. 208-10.
113. Procedural fairness rights include the right to reasonable notice, a fair opportunity to be "heard," orally or in writing, and an impartial decisionmaker (ibid., pp. 230-31).
114. Not to members of the public generally.

115. *Knight v. Indian Head School Division No. 19*, (1990) 43 Admin. L.R. 157 (S.C.C.), p. 176.

116. *Canadian Environmental Protection Act*, 1997, Bill C-74, First Reading 10 December 1996, died on the parliamentary order paper April 1997.

117. Ibid., ss. 333-41.

118. See section, *Binding of Future Legislatures*, p. 145 in this volume.

119. *Knight v. Indian Head School Division No. 19*, p. 176.

120. The *Statutory Instruments Act*, ss. 5-6, and e.g., the *Alberta Regulations Act*, ss. 2-4.

121. *Canadian Environmental Protection Act*, s. 34(1).

122. *Access to Information Act*, s. 14; e.g., Alberta, *Freedom of Information and Protection of Privacy Act*, s. 20.

123. *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan*, (1992) 7 C.E.L.R. (N.S.) 165 (Sask. C.A.), p. 180.

124. See Fitzsimmons, "Harmonization Initiative of the Canadian Council of Ministers of the Environment," pp. 12-15.

125. Tingley, *Conflict and Cooperation on the Environment*, pp. 34-35.

126. It is unlikely that such a provision would be invalid as unconstitutionally binding future Parliaments, because the obligation is to act in a manner "consistent" with the intent of intergovernmental agreements, not in specific conformity with intergovernmental agreements. In this way the discretion and ultimate supremacy of future Parliaments is maintained.

127. *Re Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607; Bankes, "Cooperative Federalism," pp. 805-06.

CHAPTER 7

Gorillas in Closets? Federal-Provincial *Fisheries Act* Pollution Control Enforcement

Kernaghan Webb

INTRODUCTION

In Canada, water pollution control is an area of environmental protection where both federal and provincial governments have well-established constitutional authority to promulgate legislation, and both have done so. When taken together, the most notable impression of the current layering of federal and provincial water pollution control legislation is that there is significant constitutional, legislative, and operational overlap. From the mid-1970s to the present, a number of different administrative agreements have been put in place by different combinations of federal and provincial governments in an attempt to better coordinate compliance and enforcement activities. The basic implementation approach pursued within and outside these administrative agreements has been for the provinces to take the lead enforcement role using their own legislation, with federal *Fisheries Act* pollution provision enforcement occupying a back-up role.[1] Where *Fisheries Act* pollution prosecutions have taken place, they led to some of the largest fines against polluters in Canada, and have arguably helped to stimulate not only improved environmental behaviour from the private sector, but also (in some cases) apparent increased enforcement efforts from provincial agencies.

In this sense, the federal *Fisheries Act* enforcement role might *appear* to resemble that of a feared "gorilla in a closet," who occasionally is released on a lagging regulatee (and indirectly, a provincial regulator) to considerable effect, but is otherwise kept behind closed doors, where its muffled roars provide sufficient impetus to spark action in many circumstances. In environmental circles, the gorilla-in-a-closet metaphor was first used to describe the US Environmental

Protection Agency (EPA) in its relations with the states and regulated sectors.[2] But, as discussed in Harrison's chapter in this volume, the approach of the US EPA vis-à-vis state agencies has on the whole been considerably more aggressive and structured than is that of Environment Canada vis-à-vis the provinces regarding water pollution control. Environment Canada has not been as systematic in its relations with the provinces, nor has it followed EPA's lead in making extensive, consistent use of a set of "carrots and sticks" to induce enforcement.

Whether an Americanized approach to federal-provincial enforcement is desirable or feasible in Canada is a question indirectly explored here. The chapter's main objective is to examine the impact of intergovernmental relations on enforcement of water pollution control standards, and in particular, to analyze how the federal and provincial water pollution control regimes operate in practice, with attention being devoted to analyzing the effectiveness, efficiency, and fairness of maintaining an active and fully functional federal *Fisheries Act* pollution enforcement capacity in addition to the existing provincial water pollution control enforcement presence. To do this, an examination is undertaken of the constitutional underpinnings to the federal and provincial legislation, the actual legislation in place, federal-provincial arrangements to coordinate implementation, data concerning enforcement, and perspectives of federal and provincial officials as revealed by a survey undertaken by the author. The position taken here is that when one looks beyond the complex and varied thicket of agreements in place to examine the actual activities, the federal and provincial governments seem to be moving toward a more coherent, coordinated, effective, and efficient approach to water pollution control enforcement, but that many changes could be made to realize these objectives more fully.

THE STATUTORY REGIMES

The Federal Fisheries Act Pollution Control Provisions

Although the subject matter of water pollution control is addressed in other federal statutes, such as the *Arctic Waters Pollution Prevention Act*, the *Canada Shipping Act*, and the *Canadian Environmental Protection Act*, it is the *Fisheries Act* pollution provisions that are and have been for many years the centrepiece of federal environmental protection efforts as they pertain to water. A general prohibition against the deposit of deleterious substances into water frequented by fish has been included in the *Fisheries Act* since 1868.[3] The penalties for depositing substances contrary to the Act have been regularly increased, from $2,000 or one year in prison in 1960-61, to $300,000 or six months imprisonment for summary

conviction offences, and $1 million or three years imprisonment for indictment today.[4]

By s. 36(4)(a), no person contravenes the basic prohibition contained in s. 36(3) if a regulation has been put in place which authorizes deposits under stipulated conditions. In the 1970s, regulatory emission standards were developed for six industry sectors: the pulp and paper, petroleum refinery, chlor-alkali, meat and poultry processing, metal mining, and potato-processing sectors. In practice the coverage of the standards was considerably less than "industry-wide," since the regulations applied only to new or expanded operations while existing operations were often subject to only non-legal guidelines.[5] In addition, a number of site-specific regulations have been issued over the years.[6] The pulp and paper effluent regulations were amended in 1992, and after a transition period, now apply to virtually all mills in Canada (separate, more stringent standards were established by regulation for the Port Alberni pulp and paper mill in BC). The new pulp and paper regulations issued in 1992 were the first significant indication of renewed federal interest in developing emission standards under the *Fisheries Act* since the original mini-flurry of emission regulations was completed in 1979.

The original six "sector" regulations were developed in close consultation with the provinces and the private sector.[7] In this sense, it can be argued that an attempt has been made to obtain provincial "buy-in" to federal standards, and thus provincial cooperation for administration of federal standards should follow. In many cases, the regulations and guidelines established for these six sectors became national baseline standards, the terms of which were eventually reflected in provincial permits and regulations.[8] While the *Fisheries Act* is the main federal water pollution control tool, the six industry sector emission regulations promulgated pursuant to it pales in comparison to the more than 50 broad industrial categories that have been regulated under the US *Clean Water Act*.[9]

Courts have stipulated that, for the *Fisheries Act* pollution provisions to be constitutionally upheld as valid federal legislation under the "Sea Coast and Inland Fisheries" heading of the *Constitution Act, 1867*, there must be a clear link between restrictions on deposits and harm to fish.[10] To some extent, this rather narrow constitutional foundation constrains and distorts federal efforts, since, for example, a body of water can be severely polluted by lethal doses of toxic chemicals, yet escape attention under the *Fisheries Act* if the water contains no fish. Furthermore, not all kinds of wastes detrimentally affect fish even though they are harmful to the water environment as a whole (e.g., phosphates). For this reason several federal water pollution regulations have been promulgated pursuant to federal legislation that possesses a constitutional foundation other than the sea coast and inland fisheries power.[11] As discussed below, provincial legislation is not similarly constrained.

From an enforcement standpoint, however, the *Fisheries Act* has a number of important strengths. First, as federal legislation, it applies to water frequented by fish anywhere in Canada, including the north, as well as interjurisdictional, coastal, and inland waters in all provinces. Federal facilities and responsibilities such as reservations, airports, military bases, harbours, and nuclear plants are also subject to the Act. The *Fisheries Act* pollution provisions are a source of Canada-wide standards, and if applied in a rigorous and consistent manner, can decrease the opportunity for "pollution havens" developing in any region. Second, because the basic prohibition against deposits of deleterious substances is written in such sweeping terms, it can be applied to virtually any emission situation,[12] as long as one can prove potential harm to fish.[13] Third, because versions of the basic prohibition against deleterious deposits have been in place for an extended period of time, a considerable body of case law has been built up concerning how the provision should be interpreted. As a result, many of the ambiguities have been addressed and judicial or statutory clarifications have been made. Fourth, where convictions are obtained, the penalties are substantial. Some of the heaviest fines imposed on polluters in Canada have been pursuant to *Fisheries Act* prosecutions.[14] Fifth, federal legislation such as the *Fisheries Act* can be applied to agencies of the federal Crown, whereas provincial legislation is subject to some constraints.[15] Sixth, private prosecutions are possible under the *Fisheries Act*, and are the subject of regulations whereby one-half of the proceeds of any fine imposed are awarded to the private informant.[16]

This having been said, the *Fisheries Act* pollution provisions are not without drawbacks. In comparison with other federal environmental statutes operating in areas of overlap with the provinces, there is very little explicit recognition of the provinces or guidance contained in the *Fisheries Act* pollution provisions concerning cooperative arrangements with the provinces. For example, there is no authority in the *Fisheries Act* for federal withdrawal of regulations where a province offers "equivalent" protections, as provided by the *Canadian Environmental Protection Act*.[17] In the absence of such provisions, the ability of the federal government to induce the provinces to fully integrate federal standards into provincial permits and implementation may be reduced.[18] Finally, the *Fisheries Act* as a whole is a statutory responsibility of the minister of fisheries and oceans, with Environment Canada being allocated responsibility for implementation of the pollution provisions only pursuant to an administrative agreement.[19] It is the minister of fisheries and oceans — not the minister of environment — who has the authority to designate officials as authorization officers, or as fisheries officers or inspectors, or to order modifications. This detracts from the ability of the minister of environment to act in an independent, assertive manner with respect to pollution control responsibilities.

Provincial Water Pollution Control Regimes

Through a combination of constitutional powers, including legislative authority over property and civil rights in the province, matters of a local or private nature in the province, and local works and undertakings, as well as proprietary powers in light of their status as major natural resource owners, the provinces have considerable authority to develop water pollution regulatory regimes within their jurisdiction. While each province's pollution control regulatory structure is different in the details, the basic approach is the same: namely, a general prohibition against the deposit of "polluting materials," "waste," or "contaminants" that may impair the quality of the water or receiving environment, unless a permit or other type of licensing arrangement is in place, or a discharge regulation has been issued.[20] Some provinces have created general "multi-media" environmental protection statutes which prohibit deposits of waste into air, land, and water, but again the basic licensing or emissions regulation approach is used as in the water-specific statutes. Typically, the definition of "polluting materials," "impairment," "harm" or "adverse effect on the natural environment" is expansive.[21] In contrast to the *Fisheries Act*, where the phrase "deleterious substance" is more narrowly defined in terms of harm only to fish or man's use of fish, the broad provincial definitions can cover a wider range of harm or injury. This more comprehensive definition of environmental impairment is made possible by a broader constitutional foundation for provincial environmental legislation.

In comparison with sector-wide emission regulations such as those issued pursuant to the *Fisheries Act*, the licensing approach favoured in many provincial water pollution regimes permits the development of individuated standards for each polluter, which gives administrators the ability to allow for differences in production processes, receiving waters, and other distinctive circumstances. On the other hand, the individuated standards made possible through the licensing approach may make it more difficult to maintain consistency within and across jurisdictions.[22] At the federal-provincial level, attempts have been made (with varying degrees of success) to promote consistency by incorporating federal standards into provincial control orders or licences.[23]

While this was not the case in the early 1970s, nowadays virtually every province has an extensive range of reactive and proactive powers, and significant penalties for breach of its terms. Proof of harm to water quality or harm to plants, fish, or other animal life presents a broader threshold than proof of harm to fish. Some jurisdictions have developed separate enforcement units, and over time have built up extensive experience with the provincial provisions.[24] As stated at the outset, provincial legislation operating on its own would generally appear to be sufficient to maintain or improve water quality within each jurisdiction. However,

provincial pollution legislation may be less effective at addressing instances of water pollution that emanate from out-of-province sources, as well as from federal facilities (e.g., airports, military bases) or federally regulated entities (e.g., nuclear plants, trains, and airlines).[25]

Operating in a mirror fashion to the federal *Canadian Environmental Protection Act* (CEPA), some of the newer provincial pollution control legislation expressly acknowledges and attempts to address issues of federal-provincial overlap. An example of this mirror legislation is the Alberta *Environmental Protection and Enhancement Act* (EPEA). Section 20 of the EPEA authorizes the provincial minister of the environment to enter into agreements with Canada relating to any matter pertaining to the environment. The EPEA also includes citizen request and investigation provisions and sanctions similar to those contained in the federal CEPA. This has led to the withdrawal of certain federal CEPA regulations since Alberta standards, citizen request and sanctions, and enforcement programs are considered equivalent.[26] No similar provisions are included in the *Fisheries Act*.

COMPLIANCE AND ENFORCEMENT: EXPLORING THE CONCEPTS

Two key concepts that underlie understanding of the range of activities undertaken by government to implement environmental laws are *compliance* and *enforcement*. As used by Canadian regulators, *compliance* is usually taken to mean the state of conformity with the law, and can be achieved voluntarily or through enforcement. *Enforcement* refers to the activities used to compel offenders to comply with the law and includes inspections, investigations, directions and orders, warnings, suspensions of licences, ticketing, injunctions, and prosecutions.

In many ways, compliance information about individual regulatees — their operations, outputs, emission control techniques, effect on the receiving environment, and so forth — is the foundation for enforcement actions. Where two or more agencies each obtain their own ambient environment and compliance information, and regulatees are compelled to supply different sets of information to each (perhaps pertaining to different outputs, compiled in a different format and measured at different intervals), there is tremendous potential for duplication, frustration, and misunderstandings.[27] Because of this, federal and provincial environmental agencies are increasingly turning their attention to coordinating their data systems. A potentially promising development in this regard is creation of common, integrated electronic data systems (EDS). In theory, a common EDS would allow individual regulatees to simultaneously transmit their emissions reports electronically to both federal and provincial agencies, while minimizing

direct contact with government officials (although verification of the accuracy of data and actual site visits are still necessary, of course). A joint EDS would also allow either level of government to retrieve the latest information regarding any particular polluter from a common source, thus ensuring that enforcement agencies are making decisions based on the same data. As discussed later in this chapter, several recent federal-provincial agreements are focused on joint EDS arrangements.

Even where common data systems are developed, there is still potential for different enforcement decisions to be undertaken by federal and provincial agencies. The reasons for this are varied. As a point of departure in explaining this variation, it deserves emphasis that the enforcement of pollution control laws is rarely a simple, mechanical process. In most circumstances, authorities have a wide variety of options open to them, and discretion over their use.[28] The nature of the enforcement response might vary depending on such factors as the degree of damage caused, whether or not the act was intentionally committed, efforts of the alleged violator to rectify the problem and notify authorities, whether the discharge was the first or a repeat violation, the quality of the evidence, available resources, perceptions of the general and specific deterrence value of bringing action, and whether another enforcement agency or law might be better suited to address the violation.[29]

Because different legislation contains different standards and uses different approaches to control pollution, the range of options open to each agency is different. For example, as we have seen, the preferred regulatory approach developed under the *Fisheries Act* is sector-wide effluent standards, which tend to de-emphasize the issue of varying receiving environments[30] in favour of uniform end-of-pipe controls. In contrast, the licensing approach used predominantly at the provincial level allows for more individuated tailoring of emission controls to meet the unique circumstances of each polluting operation, and also gives officials more levers to stimulate compliance (e.g., suspension of licence, new conditions in a licence). Thus, federal officials have a more limited array of enforcement response choices.

The varied array of enforcement options available is not the only explanation for why federal and provincial responses to the same incident might be different. The regional versus national interests of provincial and federal agencies, the varying resources and sophistication of provincial and federal agencies, and the oft-times conflicting political persuasions of federal and provincial governments, are other important factors in enforcement decisions. On the one hand, the diversity of responses available and varying perspectives may be beneficial to environmental protection, since one level of government may have a "check and balance"effect

on the other. For example, a strong argument can be made that prosecutions under the *Fisheries Act* against Suncor (which were followed by prosecutions under Alberta's *Clean Water Act*) focused attention on the provincial enforcement practices in Alberta and marked a turning point leading to creation of a new specialized provincial enforcement unit, development of an enforcement policy, and new more effective environmental legislation.[31] At the same time, however, there is potential for conflicts, needless duplication, and unfairness.

The diversity of interests, responsibilities, and capabilities which underlie federal and provincial environmental legislation represent a challenge to intergovernmental harmonization. One technique designed to increase certainty and consistency in implementation is publication of compliance and enforcement policies which set out how agencies intend to implement the law. At the federal level, a compliance and enforcement policy has been issued for the *Canadian Environmental Protection Act*, but not for the pollution provisions of the *Fisheries Act* (despite many attempts to create such a policy). Environment Canada officials have suggested in interviews with the author that they are informally following the same approach for *Fisheries Act* enforcement as that set out in the CEPA policy. However, since the "informal" policy is unpublished, there is little assurance that all federal officials will adhere to it, as well as tremendous potential for variations in "understandings" about how the policy should apply. At the provincial level, the survey undertaken for this chapter revealed that five of ten provinces have compliance policies in place.[32] While the terms of the existing federal and provincial policies are not identical they are similar in approach, and provide a good point of departure for harmonization discussions.

A second technique to better harmonize federal and provincial enforcement actions is through formal arrangements. With respect to emergencies, coordinated response approaches (e.g., a single toll-free telephone number for reporting environmental occurrences) can increase efficiency and effectiveness in addressing pollution incidents as they arise. In addition to coordinated reactive strategies, it is also possible to jointly develop proactive enforcement approaches, such as strategies to target particular sectors, pollutants or regions.[33] Although better coordination of federal and provincial authorities with respect to compliance and enforcement is undoubtedly a worthy aim, efforts of federal enforcement agencies to work with regions should not come at the expense of national consistency of treatment across Canada, since this detracts from perceived fairness in the eyes of both regulatees and the community.

Measuring effectiveness of compliance and enforcement activities is a matter of considerable importance to government and the public, yet it presents a considerable challenge. A compilation of enforcement statistics, while useful, may not tell the whole story since different regions may be at different levels of industrial

development, and different agencies have different enforcement responses and resources at their disposal. Moreover, enforcement actions may be avoided at one level due to agreement by another level of government to use its enforcement powers. This makes interjurisdictional comparisons difficult. Still, the information gleaned from such data can be revealing. Within any particular agency, comparisons over time of enforcement activities — e.g., status of compliance statistics,[34] inspections, investigations, warning letters, inspector directions, prosecutions and convictions[35] — can be revealing of trends. Similarly, cross-jurisdictional comparisons of enforcement data can suggest problem areas. Cross-jurisdictional data concerning percentage of licencees in compliance, the nature of waste discharges, ambient environmental quality, health and deformities of certain species, and reported cases of human health problems can also provide important signals about the strengths and weaknesses of environmental protection programs, although it may be difficult to conclusively attribute improved or deteriorating environmental quality to the actions of one agency. Failure to systematically collect and report such information removes an important diagnostic tool from the hands of decisionmakers, regulatees, and the public, decreases opportunity for public accountability, and in the process minimizes the likelihood that the most effective, efficient, and fair approaches to compliance and enforcement will be developed. In conducting research for this chapter, the author was dismayed by the general lack of systematic collection and publishing of compliance and enforcement data. Publicly accessible, province- and nation-wide, up-to-date databanks of this nature should be a high priority.

In conclusion, a significant challenge facing environmental authorities is the development of consistent compliance and enforcement approaches when the tools at their disposal vary, as do the resources, priorities, levels of industrialization, and the data on which to make informed decisions concerning implementation. Systematic, coordinated collection of compliance data is an important foundation for effective, efficient, and fair enforcement approaches and in this regard, the establishment of joint electronic data systems is a potentially promising development. Public compliance and enforcement policies represent an important technique for structuring discretion and providing clear signals to other regulators, regulatees, and the public on how the law will be implemented. The fact that no such policy exists for the *Fisheries Act* pollution provisions, and only five of ten provinces have put in place compliance and enforcement policies, is a deficiency which needs to be addressed promptly. Systematic, cross-jurisdictional data permitting comparisons of compliance status and enforcement activity, discharges, ambient environmental quality, and public and ecological health problems is another integral diagnostic tool which can improve implementation.

FEDERAL-PROVINCIAL ENFORCEMENT AND ADMINISTRATIVE ARRANGEMENTS

Federal-Provincial Arrangements in the 1970s

The Supreme Court of Canada has held that, pursuant to s. 34(2) of the *Interpretation Act* and ss. 504 and 785 of the *Criminal Code*, the provincial Attorneys-General have the power to conduct prosecutions under the *Fisheries Act*.[36] Some provinces, such as British Columbia, have made regular use of offences under the *Fisheries Act* as a supplement to enforcement actions under their own legislation, while others, such as Quebec, have not. Technically, there is no barrier to such actions, and thus in theory, a withdrawal of federal enforcement capability need not mean a termination of enforcement activity under federal legislation such as the *Fisheries Act*.

There has been a long tradition of administrative delegation of *Fisheries Act* powers from the federal to provincial governments dating back to the beginning of the century, although arrangements pertaining to the pollution control provisions are of more recent vintage, commencing in the 1970s. Scholars have noted that even in the early 1970s, federal officials generally ceded primary enforcement responsibility to the provinces.[37] Following agreement on a general approach by federal and provincial environment ministers at a Canadian Council of Resource and Environment Ministers (CCREM) meeting in 1973, seven of ten provinces signed bilateral accords with the federal Department of Environment designed to "ensure comprehensiveness and reduce duplication" concerning federal and provincial environmental quality programs.[38] Without specifically naming the *Fisheries Act*, the accords expressly assigned front-line pollution control responsibilities to the provinces and generally attempted to create a "one window" approach to program delivery (the non-accord provinces — BC, Newfoundland, and Quebec — operated under similar, but non-written arrangements).[39] Among other matters, the accords included provisions regarding minimum standards (provinces to establish and enforce requirements at least as stringent as national baseline standards) and enforcement.[40] With respect to enforcement, by the terms of the accords the federal government was to take action only with respect to federal facilities, at the request of the provinces, or where the province could not fulfill its accord obligations. The stipulated enforcement responsibility for federal facilities reflects an area where there is no or minimal overlap with provincial responsibilities, the allowance of federal action "at the request" of the provinces recognizes a primary enforcement role for the provinces in areas of overlap, while the provision for federal enforcement where provincial accord obligations are not met appears to be an acknowledgment of a residual federal responsibility.

A 1980 court case held that the accord "had no foundation in law" and therefore federal enforcement actions were not constrained by the terms of the accord.[41] The case arose after a federal prosecution was initiated against Canadian Industries Ltd. (CIL) for alleged violation of the *Fisheries Act* chlor-alkali regulations. Federal officials had become concerned about alleged violations of the regulations, but provincial officials had declined to prosecute, so a federal action was considered necessary. At trial, CIL claimed that federal personnel were prevented from bringing prosecutions by the terms of the accord. The trial judge held that under the accord, the federal government retained a residual enforcement capacity, but on appeal the New Brunswick Court of Appeal simply concluded that the accord was entered into without legislative sanction or executive authority and therefore did not have the force of law.

The CIL case provides a good illustration of the divergent perspectives of federal and provincial authorities concerning a pollution incident, and some of the problems associated with informal accords: namely, a low public profile (the accords were never even published in the *Canada Gazette*), and an uncertain status and effect in the eyes of the two levels of government, the private sector, and the public. This combination of factors is a recipe for problems with the perceived fairness, effectiveness, and efficiency of the agreements. An earlier study by the author concluded:

> Because Accords have no legal effect, the federal-provincial obligations created therein depend for their observance exclusively upon the goodwill of the two parties involved. Both federal and provincial officials can disregard the terms of the Accord and suffer no legal consequences: a province can refuse to meet federal baseline standards, neglect to enforce a federally-approved provincial permit, or fail to supply federal officials with important information. Federal authorities can prosecute under federal legislation without consulting their provincial counterparts. In turn, the compliance strategies of both federal and provincial authorities can be disrupted or even defeated when either government chooses to ignore the terms of the Accord.[42]

Other studies concerning implementation of these accords suggest they had the intended effect of reducing intergovernmental conflict and duplication, but fell far short of achieving national consistency in standards or enforcement. Harrison has observed that "despite a record of widespread, persistent non-compliance ... the federal government only rarely intervened," and concludes that "The flaw of the approach lay not in the objective of reconciling delivery of environmental programs, but in the almost complete absence of federal oversight."[43] This explanation leads to questions about what constitutes adequate or effective oversight, and whether subsequent intergovernmental arrangements can improve on the accords.

Federal-Provincial Arrangements in the 1980s

In the 1980s, the accords variously lapsed, against a backdrop of a certain amount of federal-provincial confrontation — although this confrontation seems to have been more at the political than the administrative level, and more in relation to programs other than those pertaining to water pollution and the *Fisheries Act*.[44] It is difficult to say what if any effect these conflicts on other environmental fronts played on the shape of federal-provincial relations and activity vis-à-vis *Fisheries Act* and provincial water pollution control. Although the accords lapsed in the 1980s, the basic approach to federal-provincial coordination continued, with provinces assuming the lead and federal government occupying a support role. In some provinces, certain matters were the subject of new, written agreements[45] but in others the province-led, federal-support approach carried on in the absence of written arrangements.

A 1985 review of government programs commonly known as the Neilsen Task Force review led to conflicting conclusions concerning environmental programs.[46] One overview report of regulatory programs concluded that there were significant federal-provincial overlaps in environmental regulation, too often resulting in confusion and conflicts. It also recommended that the federal government consider deleting what is now s. 36(3) of the *Fisheries Act* and assigning control over all industrial effluent to the provinces.[47] Another report focusing specifically on the environment concluded that "an extensive array of interactions and agreements ... has done much to overcome the muddy divisions of jurisdiction ... and to promote effective use of the resources of both levels of government. The study team favoured continuation of this approach."[48]

A review of implementation of federal standards via provincial permits for the year 1987 revealed significant problems:

> A comparison of provincial permits for pulp and paper mills with federal regulations in five provinces, comprising roughly 90 per cent of mills nationally, revealed that in 1987 only 40 per cent of provincial permits matched federal standards.[49]

Moreover, actual levels of compliance with federal standards were considered less than satisfactory.[50] In light of the conflicting Neilson Task Force studies on the need for overlapping federal and provincial water pollution regimes, as well as data suggesting the cooperative approach of provincial delivery of federal standards was not working, as 1990 grew near, the stage was arguably set for a reappraisal of this approach.

Federal-Provincial Arrangements in the 1990s

Since the late 1980s, the key forum for federal-provincial discussion of existing intergovernmental concerns has been the Canadian Council of Ministers of Environment (CCME), the replacement for CCREM. In 1991, the CCME finalized a document entitled a "Statement of Interjurisdictional Cooperation on Environmental Matters." In a background note to the Statement, the following discussion of its *raison d'être* is included:

> It is important, therefore, that governments work cooperatively on environmental matters. It is also important that the roles and relationships of the federal, provincial and territorial governments be well understood. *General accords and issue-specific agreements have been very useful in clarifying responsibilities, in improving the efficiency and effectiveness of regulatory and decision making processes, and in taking advantage of the respective strengths and capabilities of each jurisdiction.*[51] [emphasis added]

It is clear from this statement that, whatever reservations some commentators (including the author) might have had regarding the effectiveness or inadequacies of accords in the 1970s and 1980s, the first ministers did not share them. The position taken here is that accords and agreements have *the potential* to improve efficiency and effectiveness, when developed and implemented through appropriate channels, and operating within institutional structures which encourage adherence to their terms and discourage non-compliance.

The "Statement of Interjurisdictional Cooperation on Environmental Matters" itself is very brief (three pages in total) and general, consisting of a preamble acknowledging that both levels of government have authority and responsibilities regarding the environment, a set of principles to guide cooperation, and then a grouping of objectives based on the principles. Concerning objectives, the governments agree to work together through a strengthened CCME toward harmonized legislation, standards, strategies for emergencies, and "the development of bilateral accords and issue-specific agreements to promote environmental cooperation between and among governments."[52] Since the issuance of the Statement in 1991, there has been a flurry of new intergovernmental agreements developed that have attempted to coordinate water pollution control — at the CCME level, within regions, between individual provinces and between the federal government and particular provinces.[53] As the CIL case demonstrates, any such agreements which purport to fetter the discretion of either level of government from acting pursuant to legislative responsibilities may be susceptible to court-based challenges.[54]

Because some of these agreements are discussed elsewhere in this volume[55] and due to space limitations, only one will be examined in depth here. The Federal-BC Pulp and Paper Agreement is selected for analysis because pulp and paper mills are considered major water polluters in Canada, are located in nine of ten provinces, and in recent years have been the subject of intergovernmental administrative agreements in several provinces.[56] Indeed, the pulp and paper sector is one of the few sectors that has been the subject of comparatively sustained interest by Environment Canada.[57] While not identical to its counterparts in other regions, the approach taken in the BC agreement is well developed, and could become a model for other sectors and in other provinces.

BC Pulp and Paper Agreement. The "Agreement on the Administration of Federal and Provincial Legislation for the Control of Liquid Effluents From Pulp and Paper Mills in the Province of British Columbia" was signed in September of 1994 and expired on 31 March 1996. According to interviews with officials, even though the agreement has expired, both levels of government are attempting to adhere to its spirit and intent until a new agreement can be put in place. Unlike equivalency orders issued under CEPA, the draft and final version of the pulp and paper agreement were not published in the *Canada Gazette,* nor was a statement of the probable regulatory impact of the agreement. Thus, while the BC pulp and paper agreement is apparently authorized by law, it lacks the visibility or transparency of conventional statutory instruments such as CEPA equivalency orders.

The purpose of the BC pulp and paper agreement is to establish a cooperative arrangement for the administration of pulp and paper effluent control regulations under both the federal *Fisheries Act* and CEPA, and provincial regulations under the *Waste Management Act*, and to establish a single window for the industry.[58] Throughout the document there is general recognition that the lead role is to be played by the BC Ministry of Environment, Lands and Parks (MELP). There is emphasis in the agreement that, while the parties are to cooperate fully, nothing in its terms limits or reduces the authority or discretion of the respective ministers to act. In maintaining a residual federal enforcement capacity, the agreement is not unlike the accords of the 1970s discussed earlier.

The agreement obligates the parties to work cooperatively on environmental quality standards and criteria relevant to pulp and paper effluent, and information sharing. The province is to be the single contact with respect to conveying monitoring requirements of both parties, but mills are to continue to send reports to both federal and provincial offices until an integrated data reporting system can be established. This integrated data reporting system represents one of the most novel and innovative aspects of the agreement, although a similar approach is

attempted in the Quebec agreement, discussed below.[59] After some start-up problems, this data reporting system has been put in place for most mills.[60] Essentially, the federal government has "piggybacked" — bought access to and space on — a provincial computerized data system. More will be said about the implications of electronic data integration later in the chapter.

The agreement stipulates that generally the province will include federal regulatory requirements in the issuance and amendment of provincial permits. According to interviews with officials, this has in fact been done.[61] The agreement contemplates that at some point in the future, provincial officers might be appointed as "authorization officers" under federal effluent regulations, but none has been so designated to date.[62]

The agreement requires that a planned inspection program be jointly developed, with the plan including a schedule indicating frequency and timing of inspections. In keeping with the general approach of the agreement, the objective of the plan is to coordinate federal and provincial efforts and minimize the administrative burden on the two levels of government as well as the private sector. The provincial government is to be the single window for carrying out the inspection program, with the federal government participating in a selected number of joint inspections in accordance with the plan. However, the agreement explicitly acknowledges that each party can conduct additional inspections, with notice given to and results shared with the other parties. According to federal officials, the joint inspection plan has been developed.

Parties are obliged under the agreement to notify each other promptly of any alleged non-compliance, and to consult regarding appropriate responses. The province is generally to lead with respect to investigations, although consultations and cooperation with the federal government are to be attempted. As with prosecutions, the federal government retains the right under the agreement to conduct its own investigations, but is to consult with MELP and share results. The agreement stipulates that where either the federal or provincial agencies proposes to recommend prosecution, consultation should first take place with their counterpart at the other level of government. The agreement requires that federal and provincial governments are to coordinate their use of non-prosecutorial sanctions (e.g., warnings, directions, orders, amendments, cancellations) and use provincial delivery mechanisms wherever possible. With respect to spills, the parties are obligated to inform each other immediately, and keep each other informed of the containment, cleanup, and remediation efforts. According to interviews with federal officials, this notification approach has generally been followed. All samples collected for the purposes of administering the federal regulations are to be tested in Environment Canada laboratories at Environment Canada's expense.

The province is to supply the federal government, by the end of each calendar year, an overview compliance report on each of BC's pulp and paper mills to which the federal regulations apply, summarizing compliance information and spill events including any enforcement action proposed or taken. According to federal officials, effective 1995-96, the province supplied a compliance report to the federal government.

A management committee and coordinators have been established to oversee administration of the agreement. In expectation of costs incurred by the province in implementing aspects of federal regulations of approximately two person-years, Canada paid $175,000 to BC MELP. In its objective of developing "one window" implementation of federal and provincial water control standards, with provincial government in the lead role but the federal government maintaining residual enforcement capability, the BC agreement is not significantly different from the accords originally passed in the 1970s. In terms of the low visibility of the agreement, this too is similar to the almost invisible profile of the 1970 accords. There are, however, several significant differences:

- the agreement has a clear foundation in law, although as mentioned earlier, the less public process of promulgation (when compared with statutory instruments such as CEPA equivalency orders) detracts significantly from its transparency;
- in contrast to the generality of the accords in the 1970s, the agreement addresses in greater detail the various aspects of administration, from compliance monitoring through to formal enforcement actions;
- the agreement has laid the foundation for development of a joint data gathering system, which should minimize the need for direct governmental contact with polluters and ensure that both federal and provincial governments are literally "reading off the same page" with respect to compliance data; and
- the agreement provides for the transference of funds from the federal government to the BC government to defray provincial expenses in meeting federal monitoring requirements. This is a significant breakthrough since it provides the province with a financial impetus to carry out federal objectives. Even if this funding is inadequate, as provincial officials have maintained, it nevertheless represents a first step toward a fee-for-service arrangement between the two levels of government with respect to provincial administration of federal standards. From a federal standpoint, the ability to withhold payment of funds where there has been non-fulfillment of terms in the agreement potentially represents an important lever to stimulate provincial cooperation.

Bilateral agreements concerning administration of pulp and paper regulations have also been reached between the federal government and Quebec, Alberta, and Saskatchewan.[63] These agreements adopt a similar approach to that of the Canada-BC agreement. However, only the Canada-Quebec agreement involves a similar joint data system and a transfer of federal funds. This is ironic, since the Alberta and Saskatchewan agreements involve a greater transfer of administrative responsibilities from the federal government to the provinces, in that provincial officers have been designated authorization officers under the *Fisheries Act*.[64] Despite the absence of a joint data system and transferral of federal funds, interviews with federal officials and review of annual reports suggest that to date there has been satisfactory compliance with the terms of the agreements in both Alberta and Saskatchewan.[65] In contrast, the joint Quebec-Canada data system has not been operationalized to date and the Quebec government has been late in submitting annual inspection programs to the federal government.[66]

IMPLEMENTATION IN PRACTICE

Thus far, the chapter has described the legal and administrative structure for federal-provincial enforcement cooperation. In this section, data concerning *Fisheries Act* pollution provision administration and enforcement is set out and analyzed, in order to provide some insights into how the legal and administrative structures work in practice. Data is derived primarily from a survey of federal and provincial heads of enforcement, as well as statistics provided by Environment Canada. Following a brief discussion of survey methodology and limitations, an overview analysis of the main survey findings is provided. Environment Canada enforcement statistics are then examined. Then, key regional findings are discussed.

Overview of Survey Methodology and Results

A five-page, 17-question "*Fisheries Act* Pollution Provision Enforcement Survey" was mailed to the heads of enforcement of each of the ten provincial environmental agencies, as well as federal counterparts in Environment Canada.[67] The survey solicited responses concerning the perceived role of the *Fisheries Act* pollution provisions in each jurisdiction, enforcement activities under the *Fisheries Act* and provincial legislation, the existence, form, and content of intergovernmental arrangements, and the opinions of the respondents regarding the strengths and weaknesses of the *Fisheries Act* pollution provisions and current approaches to its enforcement. Although all ten provinces and all Environment Canada regions

responded, the survey has significant limitations, and should therefore be viewed as preliminary, the basis for further study.[68]

Two tables have been prepared which provide snapshots of the key findings of the survey. Table 1 is a summary of provincial responses to the survey. Table 2 is a summary of federal Environment Canada regional office responses. Note first that eight of ten provinces and three of five Environment Canada regions described the *Fisheries Act* pollution provisions, and enforcement activity pursuant to these provisions, as playing a minor role in protecting water resources in their jurisdiction. Several qualified this characterization by saying that the role was nevertheless important as a supplement to provincial legislation and enforcement. Only in British Columbia was there significant reported use of the *Fisheries Act* pollution provisions by provincial officials. However, even in this one jurisdiction, provincial enforcement activity under provincial legislation exceeded provincial enforcement of the *Fisheries Act*.

In other jurisdictions, enforcement activity under provincial legislation tended to exceed that of *Fisheries Act* enforcement activity by a considerable margin. The one exception was Newfoundland, where enforcement activity under the *Fisheries Act* was minimal (an estimated two or less prosecutions per year), but enforcement activity under provincial legislation was even less (zero). Generally, either Environment Canada or the Department of Fisheries and Oceans was perceived as the lead agency with respect to *Fisheries Act* pollution provision enforcement. Thus, whatever administrative arrangements may stipulate about single windows and provinces acting as lead enforcement agencies, the federal presence is still perceived as dominant in many regions. The fact that there is considerable variation in provincial responses as to identification of either Environment Canada or the Department of Fisheries and Oceans as the lead enforcer might be explained by the split in federal departmental responsibilities between s. 35 (fish habitat protection) and s. 36(3) (pollution control).

From the standpoint of understanding the role played by intergovernmental agreements in *Fisheries Act* enforcement, it is instructive to consider the provincial and federal responses to the question asking the respondents whether there are administration and enforcement agreements (written or oral) in place between the two levels of government. The response of one province which is the subject of an extensive written agreement was that no agreements were in place (Saskatchewan).[69] All four Atlantic provinces answered that only oral agreements were in place — a surprising answer given that a "Federal-Provincial Framework Agreement for Environmental Cooperation in Atlantic Canada" had been signed by federal and provincial ministers on 31 May 1994. The failure of the Atlantic respondents to note the existence of the Atlantic agreement can perhaps be explained by the fact that it is a framework agreement which provides for annexes specifically

TABLE 1: Fisheries Act Pollution Provision Enforcement Survey – Provincial Responses

Prov.	*Q1*	*Q2*	*Q3*	*Q4*	*Q5*	*Q5(a)*	*Q5(b)*	*Q5(c)*	*Q5(d)*	*Q5(e)*	*Q6*	*Q10*	*Q11*
Ont.	Minor role	2	N/A	Environment Canada	Ontario Water Resource Act	173 charges/ 27 cases	N/A	No	No	Yes	No	No opinion	Yes
Que.	Minor role	1-2	1-2	Environment Canada	Environment Quality Act, Wildlife Conservation and Development Act	20/150	10/50	No	Yes – 1989, 1993, 1994	No	No, but Prov Officer= Fishery Officer	Same	Yes
Sask.	Minor role	1-2	5	Saskatchewan Environment and Resource Management	Saskatchewan Litter Control Act	4	2	Yes – RCMP and local police	No	Yes	No	More	No
Man.	Minor role	Less than 1	Less than 1	Environment Canada	Manitoba Environment Act	5	10	No	No	Yes	No	More	No
Alta.	Minor	0-3	N/A	Alta. E.P.	Env'tal P and E Act	1	17	Yes RCMP	1988, 1993	Yes	Yes	N/A	N/A
Nfld.	Major/ minor role	DFO	0	DFO and Environment Canada	Newfoundland Environmental Control Act	0	0	No	N/A	No	Yes oral informal	Same	Yes
NB	Minor role	Less than 5	N/A	DFO	Clean Water Act	7-10	35-40	Yes: NB Nat Res.	Yes 1990	Yes	Yes oral	No opinion	No

... *continued*

TABLE 1 *(... continued)*

Prov.	*Q1*	*Q2*	*Q3*	*Q4*	*Q5*	*Q5(a)*	*Q5(b)*	*Q5(c)*	*Q5(d)*	*Q5(e)*	*Q6*	*Q10*	*Q11*
NS	Minor	Less than 5	50-100	DFO/DOE	NS Env't Act	5	20-50	RCMP	Yes 1995	No	Yes oral	More	N/A
PEI	Minor role	3 or 4	15-20	DFO	PEI Environmental Protection Act	3 or 4	3 or 4	No	No	No	Yes Oral	No opinion	Yes
BC	Major/ minor role	101 charges	475 actions	Prov/DFO DOE	Water Act/ Forest Code Waste Mgmt Act	46/4/63	268/11 9/136	No	Yes	No	Yes written	More	Yes

Notes:
Q1 - Does *Fisheries Act* play major, minor, or no role in protecting water resources in your jurisdiction?
Q2 - How many *Fisheries Act* prosecutions in your jurisdiction?
Q3 – How many *Fisheries Act* enforcement actions other than prosecutions?
Q4 – Which department or agency has lead on *Fisheries Act* enforcement?
Q5 – Most water pollution enforcement done by your office is pursuant to what legislation?
Q5a – How many prosecutions?
Q5b – How many enforcement actions other than prosecutions?
Q5c – Can any other agency bring actions pursuant to this legislation?
Q5d – Does current approach to enforcement represent a change from previous years? When? Why?
Q5e – Is there a written, public enforcement policy available for this legislation?
Q6 – Is there a written or oral arrangement for enforcement of *Fisheries Act*?
Q10 – Has enforcement under *Fisheries Act* in last ten years gone up, down, or same?
Q11 – Is it necessary that there be *Fisheries Act* pollution provisions, or would provincial legislation be sufficient?

TABLE 2: Environment Canada Regional Office Responses to Selected Survey Questions

Region	*Q1*	*Q2*	*Q3*	*Q4*	*Q6*	*Q10*	*Q11*
Ontario	Major role in federal jurisdiction	5	51 insp 7 invest 6 warns 1 direct	Environment Canada	Yes – oral	More	Yes
Prairie Region Alberta Saskatchewan Manitoba (NWT not included)	Minor role	1-2	6-8	Environment Canada	Yes – written for Man. and Sask. (P and P sub)	More	Yes
Atlantic Region Nova Scotia, PEI New Brunswick, Newfoundland	Minor role	Less than 5	124 insp 8 invest 8 warns	Environment Canada	Yes – oral and written	More	Yes
Quebec	Minor role	1-2	Less than 10	Environment Canada	Yes – written P and P	More	Yes
British Columbia	Minor role	8-10	50-60	Environment Canada	Yes – written various P and P	More	Yes

pertaining to compliance: no annexes have been put in place. Moreover, interviews with several Atlantic environment officials revealed that they felt the Atlantic agreement had been eclipsed by new expected CCME agreements. Technically, however, the 1994 agreement remains in force until 1999 or such time as it is formally terminated by the parties. The statements of officials about the non-applicability of the 1994 agreement suggest that they may view such agreements as of a lower order and status than laws.

Federal and provincial respondents were also asked whether there was a continuing need for *Fisheries Act* pollution provisions in their jurisdiction, or whether provincial legislation would be sufficient. Five provinces indicated that there was a continuing need for the *Fisheries Act* provisions (Ontario, Quebec, Newfoundland, Prince Edward Island, and British Columbia), three responded that provincial legislation would be sufficient (Saskatchewan, Manitoba, New Brunswick), and two declined to answer the question (Alberta and Nova Scotia). Of the five that indicated that the *Fisheries Act* was still needed, several elaborated on their answer by saying the provisions were necessary to address federal concerns (e.g., federal facilities, lands, interjurisdictional pollution). All the Environment Canada respondents felt *Fisheries Act* enforcement was still needed, although many said that the provisions were only needed to address specific concerns, and in a back-up capacity.

Environment Canada Enforcement Statistics

Table 3 provides a snapshot view of enforcement actions (inspections, investigations, warning letters, inspector's directions, prosecutions, convictions) undertaken by Environment Canada under the *Fisheries Act* pollution provisions from 1990 to 1996. The statistics suggest a significant downward trend from 1990 to 1994, with only a partial recovery the next two years. The drop corresponds to trends in inspections and investigations. The small annual number of prosecutions (averaging between six and seven per year) is hardly an overwhelming federal presence. In fact, an argument can be made that six prosecutions annually is barely sufficient to signal to regulatees and provinces that *Fisheries Act* enforcement represents a real and not simply a theoretical possibility. While numbers of prosecutions have remained stable, convictions have increased. This improvement in conviction rate might reflect better case selection and presentation. Certainly, there have been some significant convictions in recent years.[70]

Table 4 provides a regional breakdown of Environment Canada prosecutions under s. 36(3) of the *Fisheries Act* over the period 1988 through 1996, derived from a list of all prosecutions provided by the Office of Enforcement, Environment Canada. The data suggests that the majority of federal *Fisheries Act*

TABLE 3: Environment Canada – Enforcement Actions – *Fisheries Act* Pollution Provisions – 1990-1996

Fiscal Year	*Inspections*	*Investigations*	*Warning Letters*	*Inspector's Directions*	*Prosecutions*	*Convictions*	*Total Enforcement Actions*
1990-91	1059	47	17	4	7	3	1137
1991-92	682	66	15	2	5	3	773
1992-93	517	77	29	2	7	5	637
1993-94	420	55	11	0	5	8	499
1994-95	585	25	27	1	6	8	652
1995-96	548	30	18	3	8	8	615

Note: Data from: Reporting and Information Division, Environment Canada, 3 January 1997.

TABLE 4: Regional Breakdown on Environment Canada Prosecutions under s. 36 of *Fisheries Act*, 1988-1996

Region	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*	*1995*	*1996*	*Total*
Ontario						1	1	1	2	5
Prairies					2	1		1	1	5
Atlantic	1	5	2	3		5	1		1	18
Quebec				2		1		1	1	5
BC		2	2	3	4	1	3	1	3	19

Note: Derived from Environment Canada, Office of Enforcement, Legal Activities (List of all prosecutions since 1988), (Reporting and Information Management Division, November 1996).

prosecutions are undertaken in the British Columbia (19) and Atlantic (excluding Quebec) regions (18). While BC prosecutions have remained fairly constant over time (about two per year), Atlantic prosecutions have tapered off in recent years (about three per year over the period 1988-91, and 1.4 per year over the period 1992-96). This might reflect increasing provincial capability in some of the Atlantic provinces.[71] Prosecutions in Ontario, the Prairies and Quebec have been minimal: a total of five over the period 1988-96 in each region. Environment Canada's prosecutorial focus on the Atlantic and BC regions perhaps reflects the greater importance attributed to and perceived federal responsibility for commercial fisheries, which tend to be located on the two coasts. Unfortunately, this *de facto* enforcement strategy is evident only by aggregating data from Environment Canada's Office of Enforcement listing of legal activities. In short, it is no replacement for a public, widely disseminated compliance and enforcement policy.

Survey Results: British Columbia

Both the federal and provincial governments are active in the area of water pollution control and fish habitat protection in British Columbia.[72] Indeed, as mentioned earlier, Canada-wide enforcement data supplied by Environment Canada indicate that since 1989 there have been more s. 36(3) prosecutions by Environment Canada in BC than in any other jurisdiction. The high priority given to environmental protection seems to be the result of a combination of interrelated factors: the relatively pristine nature of the water system and indeed the entire BC ecosystem, the importance of the fishery and the environment as commercial resources, the clear federal constitutional responsibility for commercial fisheries, the heightened public sensitivity and concern about environmental matters, and the comparatively robust BC economy.

While provincial legislation and regulations such as the BC *Waste Management Act*, *Forest Practices Code*, and *Water Act* are all used extensively by provincial agencies to protect the water resource, there is also significant use of the *Fisheries Act* by provincial agencies. Provincial respondents described the role of the *Fisheries Act* pollution provisions as major in terms of prevention (with compliance with the *Fisheries Act* usually included in provincial permits) and minor in terms of enforcement.

The willingness of provincial officials in BC to bring enforcement actions under the federal *Fisheries Act* — to a degree not found in other provinces — is deserving of some comment. First, it seems to indicate a tacit acknowledgment by provincial officials in BC of the value and technical strengths of *Fisheries Act* prosecutions.[73] Second, provincial use of the *Fisheries Act* also suggests an apparent lack of provincial concern that this use will be perceived as "improper"

TABLE 5: Enforcement of *Fisheries Act** and Provincial Environmental Legislation** by BC Ministry of Environment, Lands and Parks Officials, 1994-1996***

Year	*Charges Under Fisheries Act*	*F.Act Warnings, Investigations*	*Charges Under Provincial Acts*	*Provincial Act Warnings, Etc.*
1994	68	535	100	408
1995	57	670	97	499
1996	101	475	113	523

Notes:
*Sections 35 and 36.
**BC *Water Act*, *Forest Practices Code*, and *Waste Management Act*.
***Based on information supplied by BC Ministry of Environment, Lands and Parks Officials.

recognition that the federal government has a legitimate and useful role to play in environmental protection within the province. This stands in sharp contrast with Quebec, where an effort seems to be made by both federal and provincial officials to minimize the federal presence. Third, the BC experience provides a demonstration that a rationalized federal-provincial environmental system with provincial enforcement of federal environmental legislation is potentially workable. However, without there being a national, published enforcement policy in place for the *Fisheries Act*, there is a risk that provincial use of federal laws could produce inconsistent enforcement practices from region to region.

Environment Canada officials located in BC estimated that four to eight *Fisheries Act* pollution prosecutions were undertaken each year by Environment Canada in BC, and another 50 to 60 warning letters and other non-prosecutorial enforcement actions. Joint federal-provincial investigations, cooperative targeted enforcement efforts (e.g., the Fraser River Action Plan), and simultaneous prosecutions under federal and provincial legislation, are not uncommon.

According to provincial respondents, the BC Ministry of Environment Lands and Parks (MELP) has the lead role in *Fisheries Act* pollution provision enforcement:

> In theory, the responsibility is shared for non-tidal waters with DFO leading where the primary resource is salmon and MELP leading where the primary resource is non-salmon. Responsibility for Marine waters is also shared for industrial discharges and DFO leading for habitat issues. This "sharing" doesn't always work — because DFO won't do it and Environment Canada doesn't have sufficient staff. Examples: DFO has a Northeast B.C. "Desk" in Vancouver, staffed by technical staff only —

> no enforcement personnel — their involvement confined to referral comments and very few (one) remediation orders. In Kootenay region, MELP is the sole agency responsible for enforcement of the Fisheries Act. There is no DFO or DOE presence in this region, except on an ad hoc basis.

Evident in this response is a certain amount of frustration over an apparent lack of federal commitment or resources to carry out statutory responsibilities. Noteworthy as well is the tangle of government agencies involved in *Fisheries Act* implementation, and the different responses and responsibilities depending on the species of fish concerned, the nature of the receiving water, and the nature of the harm (industrial discharge or alteration to fish habitat). According to interviews with Environment Canada officials located in BC, it is Environment Canada that has the lead with respect to s. 36 enforcement, with a focus of attention being industrial discharges such as pulp and paper, mining, petroleum refineries, as well as from operations of federal responsibilities such as harbours, railways, and airports.

A number of federal-provincial written arrangements pertaining to implementation of the *Fisheries Act* are in place, including the 1981 spills agreement,[74] an agreement pertaining to laboratory analysis services,[75] and an agreement concerning pulp and paper effluent, discussed earlier. The existence of the *Fisheries Act* pollution provisions (and the existence of federal officials from DOE and Department of Fisheries and Oceans [DFO]) was described by MELP officials as advantageous in the sense that sharing of knowledge and information provide an opportunity for joint investigation and the use of the most appropriate enforcement tools. However, reservations were expressed by provincial respondents about existing intergovernmental agreements: "the current agreement with Environment Canada is ... too 'wishy washy' and should be reviewed and tightened-up to reduce problems." MELP officials offered two suggestions for how *Fisheries Act* pollution enforcement could be improved: downward delegation of decision-making authority within DFO and DOE to streamline decision making at field levels, and withdrawal of an active federal enforcement role (e.g., MELP officials said "Give the province full authorities, i.e., Fishery Inspector status; and some moderate funding for enforcement. Use DFO and DOE biologists for expert witnesses, where they have the expertise and we don't.") The suggestion was also made that occasionally DFO will "pop up" in a region where they have no presence (in the opinion of the Ministry of Environment and Energy), and interfere with an investigation. A better approach, according to one provincial respondent, would include a harmonized agreement, with the province as first response, and the federal government performing in an auditing capacity.

In summary, BC provincial environmental agencies engage in a considerable amount of compliance and enforcement activity, both under their own legislation and under the *Fisheries Act*. Federal enforcement activity is more limited, and

can be characterized as back-up to provincial enforcement. Key federal concerns are the salmon fishery and certain industrial sectors. While there was some evidence of federal-provincial irritation pertaining to implementation and enforcement, there is little indication that federal legislation or activity is perceived as an intrusion into a matter of exclusive provincial sovereignty.

Survey Results: Quebec

The provincial environment agency (the Quebec Ministry of Environment and Wildlife) holds the lead enforcement role with respect to water pollution control in the province. There are an estimated 20 water quality-related prosecutions undertaken each year under the provincial *Environment Quality Act,* with another ten non-prosecutorial enforcement actions, as well as 150 prosecutions under the *Wildlife Conservation and Development Act* plus 50 non-prosecution enforcement actions. These enforcement actions are all undertaken by the provincial Ministère de l'environnement et de la faune. There are not more than two *Fisheries Act* pollution prosecutions undertaken by Environment Canada's Quebec office each year, and less than ten non-prosecutorial enforcement actions. Survey responses revealed no *Fisheries Act* pollution or habitat-related prosecutions carried out by provincial officials, although Quebec's 500 wildlife conservation officers are authorized to act as fishery officers under the *Fisheries Act.*

Environment Canada enforcement action is concentrated on the St. Lawrence River basin region, and on industrial emissions. In 1991, after many years of non-compliance, Environment Canada brought a s. 36(3) action against Tioxide Canada Inc. and several of its directors, for emissions of titanium oxide, a very toxic effluent, into the St. Lawrence River.[76] In 1993, Tioxide entered a guilty plea and was fined $1 million dollars. In addition, the court ordered the company to pay $3 million for the conservation and protection of fish and fish habitat near the plant. The company was also ordered to keep the polluting portion of its plant closed. According to federal officials, the fine is the largest monetary penalty in Canada for an environmental infraction. Provincial officials did not participate in the enforcement action and, according to one federal official, this lack of participation tarnished their image. It is also said to have been a stimulus for the province to reach an agreement with the federal government on administration of pulp and paper enforcement.

Provincial officials do not engage in enforcement actions under the *Fisheries Act,* and there is no evidence of cooperative, joint federal-provincial enforcement efforts such as in BC. Indeed, as discussed above, implementation of the Canada-Quebec agreement concerning administration of pulp and paper regulations has been less successful than in other provinces. Federal officials interviewed indicated

that political considerations (i.e., perceptions that the federal government is "intruding" on Quebec's "sovereignty") play a large role in explaining the extremely low-profile role of Environment Canada in the province.

Survey Results: Prairies

Environment Canada has a combined Prairies and Northern Region, but since the focus of this study is on federal-provincial arrangements, only activity in the Prairies region will be considered here. As discussed above, in both Saskatchewan and Alberta, formal arrangements concerning the control of deleterious deposits under the *Fisheries Act* have been in place since 1994 between the federal minister of fisheries and oceans, the federal minister of environment, and the provincial environmental minister. Interviews with officials suggest that adherence with the terms of the agreements is generally good. In Manitoba, although there is no formal agreement, Environment Canada officials indicated in their survey response that a cooperative approach is often taken. The provincial respondent indicated that there was no oral or written agreement in place between the parties. In practice, interviews with federal officials revealed that most enforcement activity under the *Fisheries Act* is done by the provinces. Neither federal nor provincial governments engage in significant numbers of prosecutions under either federal or provincial legislation.[77] Joint investigations and enforcement actions are not uncommon, and cooperation between the two levels of government seems to be good. The relatively low level of industrialization and lesser importance of the commercial fisheries in the prairies might be factors in explaining the comparatively integrated and non-conflictual nature of federal-provincial relations in the region.

Survey Results: Ontario

Most of the water pollution control activity in Ontario is undertaken by the Ontario Ministry of Environment and Energy (MOEE) under their own legislation. In 1996, MOEE brought 173 charges (27 cases) under the *Ontario Water Resources Act*. The Ontario Ministry of Natural Resources (MNR) also brings actions pursuant to this provincial legislation. MOEE and MNR also bring a small number of enforcement actions under the *Fisheries Act* pollution provisions (in 1996, a total of two charges in one case). According to recent information, the MOEE is currently undergoing considerable budget cutting.[78] How exactly this might affect enforcement capability is not entirely clear at this moment, but it might mean that the importance of federal enforcement actions under the *Fisheries Act* (and other legislation) will increase.

The Ontario regional environmental protection office of Environment Canada estimates that annually there are five *Fisheries Act* pollution provision prosecutions in Ontario, along with 65 non-prosecutorial enforcement actions. There is no formal, written arrangement in place between federal and provincial environmental offices at the moment, although there is apparently one being developed. Informally, Ontario region Environment Canada officials and MOEE officials often share information, and coordinate inspection and investigation activities, with MOEE usually in the lead role. One federal official reports that since the passing of the new federal pulp and paper regulations in 1992, federal and provincial officers have informally agreed that Environment Canada would take the lead in responding to non-compliance incidents arising from the regulations. There have been several successful federal *Fisheries Act* prosecutions of pulp and paper mills in recent years, undertaken with provincial cooperation.[79]

According to one Ontario MOEE official, a strength of the current overlap of federal and provincial water pollution legislation is the ability of both authorities to proceed with prosecutions, or for federal enforcement to augment provincial prosecutions, although this same official conceded that there is potential for duplication. While the official would like to see more "education" as to which level of authority is responsible for what activities, he maintained that *Fisheries Act* enforcement is necessary, and suggested that the federal role should focus on interjurisdictional watercourses. Federal officials who responded to the survey suggested that more formal arrangements with the province and DFO would be useful, as per an arrangement currently being drafted. They also were in favour of a public compliance policy for the *Fisheries Act* pollution provisions. Generally, the perception among Ontario Environment Canada staff was that the *Fisheries Act* is needed to ensure national standards, address federal works and undertakings, and also to act where the province is unwilling or incapable of acting. The perception of the author was that provincial legislation and enforcement capability was good (although recent cutbacks may negatively affect this), so that the province was able to respond to most incidents of pollution, and federal enforcement was seen as a useful but minor supplement. In contrast to Quebec, there were no indications in survey results or interviews with officials that federal legislation or enforcement was perceived as an "intrusion" on Ontario "sovereignty."

Survey Results: Atlantic Region

Survey results presented in Tables 1, 2, and 3 suggest that on the whole there are not a large number of prosecutions or non-prosecutorial enforcement actions undertaken under either the *Fisheries Act* or provincial water pollution legislation in the Atlantic region. This is potentially disquieting when comparisons are made

with the active federal and provincial enforcement activity on the Pacific coast. The obvious possible explanations for this discrepancy are a considerably less robust economy in Atlantic Canada than in BC, less industrial activity, and less well resourced provincial agencies. For the most part, *Fisheries Act* enforcement is undertaken by the federal government, and provincial legislation is enforced by provincial officials, although there appears to be generally good cooperation between federal and provincial officials. According to Environment Canada's Head of Enforcement for the Atlantic region, in 1995-96, there were four Environment Canada *Fisheries Act* prosecutions, and 124 non-prosecutorial enforcement actions. This compared to a total of 17 prosecutions under the combined provincial legislation of the Atlantic region, and between 60 to 90 non-prosecutorial enforcement actions. Provincial respondents from New Brunswick, Nova Scotia, and Prince Edward Island described *Fisheries Act* provisions and enforcement as playing a minor but important role in their region. In Newfoundland, lack of provincial resources is explicitly given as a reason why federal *Fisheries Act* enforcement has played an important role in the province and should continue to do so.

As discussed earlier, federal and provincial officials described the arrangements in place for the coordination of enforcement actions and the sharing of information as informal in nature, although a written framework agreement is technically in effect until 1999. With the exception of Newfoundland, the general approach is for provincial authorities to lead, with the federal Department of Environment playing a back-up role.[80]

Regional Survey Results: Synthesis

Taken together, the regional survey results suggest a generally cooperative relationship between Environment Canada and provincial authorities, but considerable diversity in degrees of cooperation, in the types of arrangements and in the actual implementation roles and activity from region to region. British Columbia is the only region where there appeared to be considerable enforcement activity by both federal and provincial agencies, using legislation from both levels of government. Although the active provincial enforcement presence in BC might suggest that federal resources would be better expended elsewhere, it is also possible that provincial activity has been stimulated by the comparatively active federal presence. Newfoundland represents an illustration of a different dynamic: a comparatively active federal government and a much less active provincial authority. It would appear that in Newfoundland the federal government is assuming a more aggressive role to compensate for a lack of resources and perhaps technical capability at the provincial level. This is different again from the situation in Quebec where federal activity is minimal and provincial activity is only

moderate. Results from Quebec suggest that some federal officials would prefer to take a more aggressive enforcement role and to act unilaterally more often, while provincial officials are providing only the minimum level of cooperation with their federal counterparts. The main explanation would appear to be a heightened sensitivity to federal activity as intrusions into areas of Quebec sovereignty. Ontario would seem to represent an example of a jurisdiction where federal enforcement activity is minimal because provincial activity is generally adequate. However, the announced cutbacks to the provincial agency may compel the federal government to take a more active role. Alberta and Saskatchewan seemed to have the most advanced formal arrangements for coordination, including delegation of some federal authorization responsibilities to provincial officials. In these two provinces, cooperation in enforcement activities seemed to be good.

CONCLUSIONS

The main objective of this chapter has been to analyze in a preliminary way how overlapping federal and provincial water pollution regimes work in practice in Canada. To do this, the constitutional underpinnings to the legislation, the legislation itself, coordinating agreements, compliance and enforcement activities, and the perspectives of federal and provincial officials have all been examined. The results suggest a complex, dynamic relationship between the two levels of government, differing from one region to another, and from one sector to another. While a certain amount of variation is arguably warranted and perhaps even to be applauded — in recognition of differences in laws, ecosystems and the economy from one region to another — the conclusion reached here is that some changes to the current approach could lead to a more transparent, fair, and effective national enforcement regime.

Because the *Fisheries Act* applies to any body of water frequented by fish in Canada, the Act offers the prospect of consistent, Canada-wide standards and application. Data gathered for this study supports the conclusion that, while federal enforcement efforts are generally very modest — in the nature of a back-up to provincial actions — Environment Canada has been known to engage in prosecutions when provincial enforcement action is not forthcoming. In this sense, an argument can be made that federal enforcement can step in when provincial enforcement action is absent to ensure that minimum national standards are met. However, actual numbers of federal prosecutions across Canada are so small that it is not clear a minimum federal enforcement presence has been maintained.

Because the legislative authority for the *Fisheries Act* pollution provisions rests on the constitutional power over the fisheries, there may be greater federal interest and enforcement activity where that responsibility is directly and seriously

threatened — such as with respect to pollution affecting the commercial fisheries, located largely on the coasts — rather than concerning water pollution in smaller inland water bodies holding commercially unimportant numbers of fish. Thus, the consistency of application of the *Fisheries Act* to all incidents of pollution may be distorted somewhat because of its constitutional basis. Statistics showing greater Environment Canada enforcement actions in the Pacific and Atlantic regions than in the Prairie provinces, Ontario, or Quebec, seem to support this conclusion.

From a legal perspective, the pollution provisions of the *Fisheries Act*, and associated regulations make only minimal reference to the provinces. Nor is the legislation particularly flexible in allowing for intergovernmental delegation of responsibilities. This is in contrast to the *Canadian Environmental Protection Act* (CEPA), with its explicit authorization of the federal government to enter into equivalency or administrative agreements with the provinces. Yet even though the *Fisheries Act* includes no express capability to enter into equivalency agreements, in practice considerable efforts have been expended by both levels of government to develop and implement agreements designed to coordinate water pollution control activities and minimize overlap and duplication. The first generation of these agreements, developed in the 1970s, were notable for their extremely low profile, broad and ambiguous language, and dubious legality. The agreements currently in place vary considerably from region to region, but tend to have a more clear legal basis, more detail, and more precise obligations. They continue to have low visibility. Indeed, as we have seen, survey results provide examples of senior provincial officials being unaware of their existence, or downplaying their importance.

Generally, the objective of these agreements has been to create a "single window" where the provinces have the lead, while the federal government assists the provinces in investigation and analysis, provides federal input into provincial permits, exchanges compliance data with the provinces, and maintains a residual enforcement capacity. Probably the most important developments which distinguish the 1970s agreements from those in place today are the move toward considerably more elaborate sector-specific arrangements, increasing emphasis on creation of shared federal-provincial electronic data systems, and the move to formal delegation of federal authorization powers to provincial officials (as in Alberta and Saskatchewan). In spite of the introduction of these agreements during the period 1991-96, Environment Canada enforcement actions did not lessen over this period (total numbers remained consistently low throughout this time).

Some commentators have suggested that where government power is fragmented, such as in a federal system, it tends to result in incoherent and wasteful policy outcomes.[81] Others have suggested that the split in jurisdiction inherent in

federal systems introduces an element of rigidity into the public policy process, and decreases the consistency and coherence of public policy.[82] In some ways, examination of the Canadian federal-provincial water pollution control regimes in action appears to support these criticisms. Certainly, the wide variety of arrangements in place would seem to be evidence of an incoherent policy, and may contribute to structural, regional obstacles to national consistency. And simultaneous federal and provincial actions, as in British Columbia, could be interpreted as indicative of wastefulness.

But other interpretations of this same evidence can also be made. If one examines the relations, roles, and activity of federal and provincial governments over time, it is possible to see a move toward greater coherence, less inconsistency, and less wastefulness. The sophistication of provincial legislation, and administration, seems to be improving over time. Most provinces now have very comprehensive and effective water pollution legislation, significantly overhauled or entirely modernized since the mid-1980s. Five of ten provinces now have compliance and enforcement policies in place for this legislation. Thus, provincial enforcement capacity is increasing, which allows the federal government to assume a more strategic, supplemental role. In addition, the nature of federal-provincial agreements has changed, as they too have become more sophisticated. The sector-specific agreements, and the development of joint electronic data systems are perhaps the two most promising developments in the 1990s.

This is not to suggest that there is not significant room for improvement. The starting point is publication of a compliance and enforcement policy for the *Fisheries Act* pollution provisions. The key elements of this enforcement policy are evident by reviewing existing federal-provincial agreements, the survey results, and Environment Canada's enforcement data: taken together, they show that the federal government is choosing to focus its energies and resources on protection of waters where commercial fisheries are located (e.g., the coasts), on certain key sectors with a high national profile (e.g., pulp and paper), on nationally significant incidents of pollution (e.g., Environment Canada's prosecution of Tioxide in Quebec), and on development of electronic data systems which minimize the need for direct federal interventions. The agreements, survey results, and enforcement data also show that Environment Canada is prepared to engage in prosecutions where provincial enforcement actions are not forthcoming, but would seem to prefer to supply technical assistance to provincial prosecutions. By articulating this approach in an enforcement policy, Environment Canada would provide clear and explicit guidance to its own officials, those of other federal and provincial departments, the private sector, and the general public. And the likelihood of coherent, consistent enforcement action would be increased.

In addition, changes to the current approach to development and implementation of federal-provincial agreements would likely increase their profile, status,

and effectiveness. Assuming they do not improperly fetter prosecutorial discretion, the new sub-agreements to the Canada-Wide Accord may provide a useful template for more consistent and coherent federal-provincial enforcement agreements. The formal process for putting in place "equivalency agreements" provided under CEPA is a more transparent and visible approach to rationalization of intergovernmental resources, and may attract more respect, than the lower profile administrative processes used to put in place many of the current *Fisheries Act* arrangements. However, once a CEPA equivalency agreement is in place, the federal government effectively loses any practical ability to bring enforcement actions on matters that are the subject of the agreement. This contrasts to the administrative agreements for the *Fisheries Act*, where residual federal enforcement capability is maintained. Building on the current BC and Quebec experiments with joint electronic data systems (EDS), more systematic, integrated, nationwide use of EDS holds considerable promise as a means of gaining up-to-date compliance information about regulatees with minimal intrusion and burden on regulatees. Integrated, publicly accessible, provincial and national compliance, and enforcement databanks could enhance accountability and improve the ability to determine problems in fairness, effectiveness, and efficiency. More systematic and concerted use of the federal spending power — for example, funding of provinces who engage in federal enforcement activities — could also be used to stimulate provincial cooperation. The fact that the federal government has provided financing to several provinces to assist in establishing the joint electronic data systems is perhaps a sign of increasing willingness to make use of this spending lever.

At the outset of this chapter, the suggestion was made that some view federal *Fisheries Act* pollution provision enforcement as resembling a gorilla in a closet, occasionally released on a lagging polluter but otherwise effective as a "behind closed doors" threat to provinces and polluters alike. As matters currently operate, this is highly debatable. Seven or eight prosecutions by Environment Canada each year across all of Canada may very well not be enough to sustain an effective presence, or to maintain a critical mass of experts on enforcement at the federal level: in short, the gorilla may not be getting out of his or her closet enough, and may need to be fed more. A formal and visible *Fisheries Act* compliance and enforcement policy could put some discipline on when the gorilla is released from the closet. And finally, federal-provincial agreements developed through a formal process akin to that used for equivalency agreements authorized under CEPA, which make more systematic use of electronic data systems, and more consistently use the federal spending power as a lever, are likely to induce more consistent provincial adherence to the terms of those agreements. In other words, these proposed improvements may encourage the provincial "gorillas" to carry out their share of enforcement responsibilities.

If these suggested changes to the current federal-provincial water pollution control regimes are implemented, there is a greater likelihood that both the federal and provincial gorillas would be effective whenever they came out of their respective closets, be seen to be behaving in a fair, consistent and coordinated fashion, and minimize the likelihood of wasteful federal-provincial gorilla warfare.

NOTES

Note that research for this chapter was completed in 1996, and thus subsequent developments are not reflected in the text. Special thanks to Krista Forrester for assistance in preparing the survey on use of the *Fisheries Act* pollution provisions by federal and provincial officials, and Lolita Bobb for her assistance in carrying out the survey and aggregating responses. Thanks also to the many federal and provincial officials who took the time to respond to the survey, the editors of this volume for their helpful comments, and Ellen Baar of York University for her suggestions. Finally, thanks also to Carleton University Department of Law for logistical assistance, and to Queen's University Institute for Intergovernmental Relations for financial assistance. Any errors or omissions are those of the author. The opinions expressed represent only those of the author.

1. Note that federal pollution control enforcement also takes place through federal legislation other than the *Fisheries Act*. This is briefly discussed later in the chapter. Note also that the habitat protection provisions of the *Fisheries Act* (which are extremely important to environmental protection, but do not directly address polluting behaviour) are not discussed in this chapter.
2. See Dehihns, "Defining and Implementing Effective Federal/State Local Relationships," p. 160; and Stanfield, "Ruckleshaus Casts EPA as 'Gorilla' in State's Enforcement Closet"; and Harrison, ch. 3 in this volume.
3. Originally ss. 14(2), now ss. 36(3). For a discussion of the history of the *Fisheries Act* pollution provisions, see Webb, *Pollution Control in Canada*, esp. pp. 11-13. For discussion of early use of the *Fisheries Act* pollution provisions, see McLaren, "The Tribulations of Antoine Ratte," p. 203.
4. See Webb, *Pollution Control*, pp. 11-13 for a more detailed discussion.
5. Environment Canada Regulatory Review: mines, p. 40; petroleum, p. 96; meat and poultry, potato processing, p. 147; Estrin and Swaigen, *Environment on Trial*, p. 523.
6. For example, Alice Arm Tailings Deposit Regulations, SOR/79-345, 10 April 1979; see also Port Alberni pulp mill standards.
7. Estrin and Swaigen, *Environment on Trial*, p. 523. Note that no consultation with the affected public took place. This is in contrast to the 1992 regulations, which were subject to a more open and public consultation process.
8. Environment Canada Regulatory Review, mines, pp. 42-43; petroleum, pp. 97-98; meat and poultry, and potato, pp. 147-48.
9. Harrison, "The Origins of National Standards: Comparing Federal Government Involvement in Environmental Policy in Canada and the United States," in this volume.

10. See *Fowler v. The Queen,* [1980] 2 S.C.R. 213; *R. v. Northwest Falling Contractors Ltd.,* [1980] 2 S.C.R. 292.

11. For example, phosphates regulations were passed pursuant to Part III of the *Canada Water Act,* RSC 1985, c. C-11. Part III of the *Canada Water Act* and the phosphates regulations were later folded into the *Canadian Environmental Protection Act.* See also *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations* SOR/92/-267 and *Pulp and Paper Mill Defoamer and Wood Chip Regulations* SOR/92/-268, both of which are promulgated pursuant to the *Canadian Environmental Protection Act.*

12. For example, the BC Court of Appeal has held that "if a teaspoon of oil was put in the Pacific Ocean, and oil was a deleterious substance, that would constitute an offence." Per *R. v. McMillan Bloedel (Alberni) Ltd.,* (1979) 47 C.C.C. (2d) 118 B.C.C.A. at p. 121.

13. Or man's use of fish. For discussion of proof problems, see Webb, *Pollution Control in Canada,* at pp. 39-42.

14. For example, in 1993, Tioxide Canada Inc. of Quebec was convicted pursuant to the *Fisheries Act* pollution provisions, and was ordered to pay a $1 million dollar fine, plus $3 million for the conservation and protection of fish and fish habitat near the plant. Per *R. c. Tioxide Canada Inc.,* [1993] A.Q. no. 852 (Cour du Québec, Chambre criminelle et pénale). In 1996, Corner Brook Pulp and Paper Limited of Newfoundland was convicted and fined $750,000 for violation of the 1992 pulp and paper effluent regulations.

15. See, e.g., discussion in Lucas, "Constitutional Powers," paras. 3.16 and 3.94. On the other hand, provincial legislation may be applied to federally regulated undertakings to the extent that it does not sterilize a federal undertaking or interfere with its essential functions to substantial degree. (Ibid., para. 3.38.)

16. *Penalties and Forfeitures Proceeds Regulations,* CRC 1978, c. 827. Private prosecutions have taken place, and in some cases seem to have stimulated federal, provincial, and private action. See discussion in Webb, "Taking Matters Into Their Own Hands."

17. Pursuant to s. 7 of the *Department of Environment Act,* the federal minister of environment has the authority, with the approval of the Governor in Council, to enter into agreements with a provincial government respecting the carrying out of programs for which the minister of environment is responsible. A similar power is available to the minister of fisheries through s. 5 of the *Department of Fisheries and Oceans Act.* This is a more generic power than the federal-provincial agreement and equivalency provisions set out in CEPA. Arguably, equivalency is qualitatively different since federal regulations no longer apply.

18. There are only minimal references or opportunities for direct provincial delegation in the Act. By ss. 36(5)(f), regulations can be made prescribing the persons who may authorize the deposit of any deleterious substances. This provision has been used to designate provincial officials as authorization officers under the *Pulp and Paper Effluent Regulations*: see ss. 7 and 16-18 of the pulp and paper regulations. In both Alberta and Saskatchewan, provincial officers have been designated as authorization officers: per SOR/96-293. Pursuant to s. 37(2), the minister can order modifications to works that are likely to result in harm to fish. By s. 37(4), the minister is to consult with provincial governments before making such authorizations.

19. For further discussion of the administrative arrangement, see Webb, "Industrial Water Pollution Control," pp. 156-62.

20. See e.g., s. 30(1) of the *Ontario Water Resources Act*, RSO 1990, c. O.40; New Brunswick *Clean Water Act* SNB 1989, c. C-6.1, s. 12.

21. For example, according to s. 28 of the *Ontario Water Resources Act*, water quality is impaired if the material discharged or deposited causes, or may cause, injury to any person, animal, bird, or other living thing as a result of the use or consumption of any plant, fish, or other living matter or thing in the water, or in soil in contact with the water.

22. It may also necessitate the development of administrative infrastructure allowing for appeals of terms of licences.

23. See, e.g., Environment Canada Regulatory Review, pp. 42-43, 97-98, and 147-48. For case study discussions of federal attempts to use Ontario control order, BC permitting, and Alberta regimes as a means of furthering federal objectives, see pp. 803-15 of Webb, "Taking Matters into their Own Hands." When licensing structures are established, processes to allow for appeals of director's or manager's original decisions concerning licences are also established. Generally, a licensing type of approach is a more labour-intensive approach to pollution control, but it gives environment officials greater flexibility to address distinctive circumstances.

24. For example, Ontario, BC, Alberta, and New Brunswick.

25. See *Central Western Railway Corp. v. United Transportation Union*, [1990] 3 S.C.R. 1112. See generally Lucas, "Constitutional Powers," para. 3.16 and 3.94. Courts have held that provincial pollution legislation may be applied to federally regulated undertakings to the extent that it does not sterilize a federal undertaking or interfere with its essential functions to substantial degree: *TNT Canada Inc. v. Ontario*, (1986) 1 C.E.L.R. (N.S.) 109, Lucas, "Constitutional Powers," para. 3.38. Note that in New Brunswick, the *Clean Water Act*, SNB 1989, c. C-6.1, expressly applies to both Her Majesty in right of the Province and Her Majesty in right of Canada, per s. 2.

26. See Alberta Equivalency Order, SOR/94-752, and "Order Declaring That the Provisions of Certain Regulations Made Under Subsection 34(1) of the Canadian Environmental Protection Act Do Not Apply in the Province of Alberta," *Canada Gazette* Part I, 128(30), 23 July 1994.

27. "The main complaint heard from industry during this review is not about the requirements they must meet; rather, it is about the burden of having similar federal and provincial regulations, and of having to deal with a variety of regulators, all asking for compliance data and information in a slightly different way or at different time intervals. They find dealing with more than one level of government for similar purposes to be both wasteful and irritating" (Environment Canada Regulatory Review, p. 24). For an excellent discussion of how comprehensive data management programs can assist regulators, regulatees, and the public in environmental decision-making, see Sparrow, *Imposing Duties*.

28. "It is completely wrong to suppose (as is sometimes done) that the institution of prosecutions is an automatic or mechanical matter." See Williams, "Discretion in Prosecuting," p. 222.

29. See discussion of such factors in Webb, "Taking Matters into their Own Hands," pp. 780-81; see also "Enforcement Response," in Alberta Enforcement Program, s. 7.
30. For example., discharging a quantity of effluent into a small lake may have different environmental consequences than discharging that same quantity into an ocean.
31. Webb, "Taking Matters into their Own Hands," pp. 809-15.
32. Ontario, Saskatchewan, Manitoba, Alberta, and New Brunswick.
33. For example, in BC, federal and provincial officials have worked together to address pollution problems on the Fraser River, per discussions with federal and provincial officials.
34. For example, Environment Canada has issued Compliance and Enforcement Reports, available on the "Green Lane" Website, which show the status of compliance with the law, over time. Federal and provincial officials may also generate status of compliance statistics in fulfillment of obligations under federal-provincial agreements: e.g., see s. 2.5.2, report of unauthorized releases in "1995/1996 Annual Report on the Canada-Alberta Agreement for the Control of Deposits of Deleterious Substances Under the Fisheries Act."
35. Data concerning federal-provincial *Fisheries Act* pollution provision enforcement activity is provided later in the chapter.
36. *R. v. Sacobie and Paul* (1979), 51 C.C.C. (2d), p. 430.
37. See comments to this effect in Woodrow, "The Development and Implementation of Federal Pollution Control Policy Programs in Canada, 1966-1974," footnotes 23-25 on p. 427 and 152-55 on p. 478.
38. See preamble to the New Brunswick Accord, as discussed in Webb, *Industrial Water Pollution Control in Canada*, pp. 174-75. All the accords are substantially the same as the New Brunswick Accord, which will be used throughout discussion here.
39. See Webb, *Industrial Water Pollution Control*, pp. 173-75.
40. For example, ss. 12, 16-19 and s. 14 of the New Brunswick Accord, as discussed in ibid., pp. 176-85.
41. *R. v. Canadian Industries Ltd.*, (1980) 2 F.P.R. 304, as discussed in ibid., pp. 182-84.
42. Ibid., p. 185.
43. Harrison, *Passing the Buck*, p. 107; see also Huestis, "Policing Pollution"; Canadian Environmental Advisory Council, *Enforcement Practices of Environment Canada*.
44. See, generally, discussion in Harrison, *Passing the Buck*.
45. For example, the Canada-BC "Understanding Between Canada and British Columbia Concerning Federal/Provincial Responsibilities in Oil and Hazardous Material Spills" 1981.
46. The following discussion derived directly from Nemetz, "The Fisheries Act and Federal-Provincial Environmental Regulation," pp. 402-03.
47. See Task Force on Program Review, *Management of Government*, pp. 203-04, reported in ibid.
48. See Task Force on Program Review, *Improved Program Delivery*, p. 25, reported in ibid., p. 403.

49. Harrison, *Passing the Buck*, p. 107.
50. See Harrison, "Is Cooperation the Answer," p. 227.
51. CCME, *Statement of Interjurisdictional Cooperation on Environmental Matters*, p. 4.
52. Ibid.
53. For example, a draft "Environmental Management Framework Agreement" (EMFA) and ten draft schedules were developed by CCME over the period 1993-95. One of the schedules addressed the issue of compliance. As discussed in this volume, the draft EMFA was eclipsed by the draft "Canada-Wide Accord" (CWA), and sub-agreements (1996-97). Regional level agreements include the "Western Accord on Environmental Cooperation," (1991) and the "Federal/Provincial Framework Agreement for Environmental Cooperation in Atlantic Canada," (31 May 1994). Bilateral federal-provincial agreements include the Canada-Saskatchewan and Canada-Alberta "Administrative Agreements for the Control of Deposits of Deleterious Substances Under the Fisheries Act" (1994), as well as various sector and activity specific agreements: the "Quebec-Canada Agreement on the Administration of the Federal Pulp and Paper Mills in Quebec" ("Entente entre le gouvernement du Québec et le gouvernement du Canada sur l'application au Québec de la réglementation féderal sur les fabriques de pâtes et papiers") (6 May 1994, expired January 1996 but is expected to be renewed); "Agreement on the Administration of Federal and Provincial Legislation for the Control of Liquid Effluents From Pulp and Paper Mills in the Province of British Columbia" (September 1994, expired 31 March 1996. Expected to be renewed in 1997); Alberta-Canada and Saskatchewan-Canada "Releases" Sub-Agreements (Annex 2) and "Pulp and Paper Effluents Sub-Agreements," (Annex 6); Alberta-Canada and Saskatchewan-Canada "Compliance Promotion and Compliance Verification Sub-Agreement," (Annex 3); BC-Canada "Laboratory Services Agreement" (December 1995).
54. Consider, e.g., s. 5.2 of the Canada-Wide Environmental Inspections Sub-Agreement (promulgated pursuant to the Canada-Wide Accord on Environmental Harmonization), which states as follows:

    > When a government has accepted obligations and is discharging a role, the other order of government shall not act in that role for the period of time as determined by the relevant implementation agreement. Legislative authorities are not altered through this sub-agreement.

    It is not entirely clear how a stipulation that parties "shall not act" can be reconciled with the statement that "Legislative authorities are not altered." If a residual enforcement capability is maintained (which specifies that each level of government continues to have the ability to act at any time), then there would appear to be no strong arguments that discretion is being improperly fettered.
55. The EMFA and Canada-Wide Accord are discussed in ch. 1 in this volume; and the legality of the Canada-Wide Accord is discussed in Lucas, ch. 6 in this volume.
56. BC, Alberta, Saskatchewan, and Quebec. At the time of writing, a federal-Ontario agreement was also contemplated.
57. The 1992 revised pulp and paper regulations represent the only one of six sector-wide *Fisheries Act* emission regulations to be updated since their original promulgation in the 1970s.

58. Article 2. Pursuant to article 1, "single window" is defined as "a mechanism whereby the pulp and paper industry is provided with a single contact with governments via British Columbia on the administration of federal and provincial" regulations.
59. See discussion of article 6 of the Quebec agreement below.
60. Per interviews with officials.
61. It should be emphasized, however, that no actual verification of how consistently federal concerns were reflected in terms of permits was attempted by the author as part of this study. As discussed earlier, Harrison's earlier study made such a review and found that provincial permits in five provinces, including BC, did not consistently include federal requirements.
62. In both Alberta and Saskatchewan, provincial *Fisheries Act* authorization officers have been designated, per SOR/96-293.
63. "Entente entre le gouvernement du Québec et le gouvernement du Canada sur l'application au Québec de la réglementation fédérale sur les fabriques de pâtes et papiers," 6 mai 1994. Canada-Alberta and Canada-Saskatchewan "Administrative Agreement for the Control of Deposits of Deleterious Substances under the *Fisheries Act*" (Alberta:1 June 1994; Saskatchewan: 15 September 1994).
64. Per SOR/96-293.
65. See, e.g., "1995/1996 Annual Report on the Canada/Alberta Agreement for the Control of Deposits of Deleterious Substances Under the Fisheries Act."
66. Per interviews with federal officials.
67. A copy of the survey questions is available from the author.
68. Most notably, the survey was not distributed to regulatees, ENGOs, or community representatives. Thus, the data collected represents only a governmental perspective on enforcement. Moreover, although effort was taken to ensure that the most senior and knowledgeable officer responded, it is impossible to say with certainty that the best-suited person did in fact respond. Several of the officials stressed that the data they were supplying concerning enforcement actions may not be entirely accurate. Because enforcement actions (especially prosecutions) frequently take lengthy periods of time to complete (i.e., many months, if not years) it is difficult to ascribe a particular action to a particular year. As well, definitional ambiguities and inconsistencies render cross-jurisdictional comparisons difficult. For example, some respondents reported total numbers of "charges" rather than prosecutions. It is possible that a single prosecution will involve dozens of charges.
69. This can perhaps be explained by the lack of knowledge of the particular survey respondent. An argument can also be made that the wrong official responded, and a different answer would have been forthcoming had the right bureaucrat responded. However, the survey was directed to the "Director of Enforcement," and was in fact answered by the assistant deputy minister of environment. This suggests that the Canada-Saskatchewan agreements certainly did not make a significant impact on at least the particular senior official who responded to the survey.
70. Notably, Tioxide, in Quebec, and Corner Brook Pulp and Paper Limited, in Newfoundland. Both of these cases are discussed below.

71. In July 1990, a dedicated Investigations and Enforcement Branch was established in New Brunswick. The New Brunswick *Clean Water Act* (SNB 1989, c. C-6.1), came into effect in 1989. The Nova Scotia *Environment Act* (SNS 1994-1995, c. 1) came into effect in 1995. The Prince Edward Island *Environmental Protection Act* (RSPEI 1988, c. E-9) was passed in 1988. Newfoundland is in the process of consolidating all its environmental legislation.
72. Due to space limitations, the focus of attention in this chapter is on BC, with selected comparisons to other regions.
73. This having been said, several provincial officials have indicated that provisions in new provincial forestry legislation will decrease the need to use the fish habitat protection provisions of the *Fisheries Act*.
74. BC-Canada "Understanding...Concerning.....Spills" cited earlier.
75. BC-Canada "Laboratory Services Agreement" cited earlier.
76. *R. c. Tioxide Canada Inc.*, [1993] A.Q. no. 852 (Cour du Québec, Chambre criminelle et pénale.
77. Survey results indicate that there were a total of ten water quality-related prosecutions under the combined provincial legislation of Alberta, Saskatchewan, and Manitoba in 1996, and approximately six federal *Fisheries Act* pollution prosecutions during the same period.
78. Sheppard, "Why Turn the Clock Back on Pollution, " p. A21.
79. E.g., *R. v. Noranda Forest Inc.*, (1995), as reported in "Prosecutions under the Canadian Environmental Protection Act (CEPA) and the Fisheries Act (FA) — Ontario Region" at http://www.ec.gc.ca/enforce/prosecu/english/ont-reg.htm.
80. One of the most significant pollution prosecutions in recent years was the 1996 prosecution of Corner Brook Pulp and Paper Limited in Newfoundland. The mill was convicted under s. 36(3) of the *Fisheries Act* of discharging acutely lethal effluent contrary to the 1992 pulp and paper regulations and was fined $750,000. The court ordered that a $500,000 fine be imposed, and an additional $250,000 be levied in order to ensure compliance with the *Pulp and Paper Effluent Regulations*. The court also agreed with Environment Canada's recommendation that the $250,000 be distributed among three local organizations with environmental interests. In addition, the court ordered the company to complete the new treatment system. Failure to comply would result in an additional fine of $500,000. The company provided the court security of $500,000 to guarantee its compliance with this order. The company had been out of compliance with the new regulations since December 1995 because it had failed to complete the construction of a new effluent treatment system. Per Environment Canada press release, "Corner Brook Pulp and Paper Limited Pays $750,000 for Pollution Violations," 14 May 1996. Provincial officials acted in a support capacity to the federal prosecution.
81. Scharpf, "The Joint-Decision Trap," p. 257.
82. Norrie, Simeon and Krasnick, *Federalism and the Economic Union in Canada*, pp. 147-48.

Conclusion

CHAPTER 8

Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada

Patrick C. Fafard

Public debates about Canadian politics often revolve around issues of federalism and intergovernmental relations. All too often, Canadian politics is reduced to not much more than federalism; intergovernmental relations become Canadian politics. This is reflected in the study and teaching of Canadian politics and government where much attention is paid to institutional arrangements, specifically federalism. There is a large literature on the division of powers, intergovernmental relations, fiscal federalism, and related subjects. There is an even larger scholarly literature on what has come to be known as "national unity" and successive efforts to reform the federation often by means of constitutional change.

Despite this, ironically enough, there are comparatively few academic studies of the impact of the particulars of Canadian federalism and intergovernmental relations on specific policy fields. Even in areas of shared jurisdiction, either *de jure* as in the case of agriculture and immigration, or *de facto* as in the case of postsecondary education and environmental policy, there are a comparatively limited number of detailed analyses of the patterns of intergovernmental relations. Not surprisingly, therefore, there are even fewer synthetic accounts which seek to describe and analyze the broad patterns of intergovernmental relations across a wide set of policy areas. This volume has been designed to begin to fill this gap in the scholarly literature and, more generally, contribute to a more informed public debate about what is possible and desirable with respect to good intergovernmental relations.

As described in some detail in Chapter 1 and by the various contributors to this volume, the last decade has been a period of rather intense intergovernmental relations with respect to environmental policy. In the past decade, the relationship

between the two orders of government with respect to environmental policy has rarely been out of the news. In the late 1980s there was sharp conflict over environmental assessment and other legislative proposals. This gave way to a period of intense negotiations leading to the Statement on Inter-jurisdictional Cooperation, the failed Environmental Management Framework Agreement, and more recently, the Canada-Wide Accord and its various sub-agreements.

To make sense of these varying relationships, at the outset of this volume we argued that a review of the many ways in which Ottawa and the provinces have sought to manage environmental policy in Canada suggests a series of distinct formal patterns of intergovernmental relations. We suggested that these formal patterns or, if you will, these "rules of engagement," can be grouped into three broad categories: collaboration, disentanglement, and unilateralism. In general, the history of environmental policy in Canada is one where the relations between Ottawa and the provinces have moved from a pattern of predominant unilateralism (1970), to collaboration (early 1970s), to disentanglement (mid-1970s to early 1980s), then repeated the cycle from unilateralism (late 1980s), to collaboration (early 1990s), and finally to a renewed effort at disentanglement.

At the same time, the Canadian experience with the development and implementation of environmental policy suggests that, the formal patterns notwithstanding, governments have developed a variety of more informal intergovernmental arrangements that are in fact what links the two orders of government with respect to environmental policy. In Chapter 1 we suggested that there are four possibilities here: independence, conflict, competition, and cooperation. For example, while Ottawa and the provinces negotiated a formal intergovernmental agreement to collaborate in the early 1990s, this does not mean that cooperation prevailed. On the contrary. In some specific areas and with individual provinces the informal relationship remained one of conflict. Conversely, even though the Canada-Wide Accord and its sub-agreements are predicated on a considerable degree of disentanglement, as demonstrated in the chapter by Kernaghan Webb, in specific areas there are many examples of day-to-day cooperation and continuing entanglement which may prevail for some time. More generally, there is a certain irony in the fact that, in order to achieve the disentanglement that is envisaged by the Canada-Wide Accord, Ottawa and the provinces have had to extensively cooperate to define the various sub-agreements to the accord. Similarly, in the case of the sub-agreement on environmental assessment, in order to achieve a degree of disentanglement, the federal and provincial governments have undertaken to enter into a series of detailed bilateral agreements. In effect, disentanglement "on the ground" requires extensive prior cooperation or, if you will, entanglement.

In order to develop further this distinction between formal structures and actual patterns, this volume was designed to explain how and why these structures

and patterns came about and to investigate their impact on policy outcomes. In other words, this volume was designed to provide answers to two central questions. In Part One of this volume the chapters sought to investigate what might explain the observed variations in the formal structures and actual patterns of Canadian intergovernmental relations in the area of environmental policy. Thus, the chapters by Van Nijnatten and Harrison consider the implications of institutional arrangements while a third chapter by Fafard focuses on organized interests. In Part Two, the emphasis shifted to an examination of the impact of these intergovernmental relationships on actual environmental policy outcomes notably with respect to environmental assessment (Kennett), standard-setting (Lucas and Sharvit), and enforcement (Webb).

These analyses suggest a number of ways in which we might explain the observed variations in the formal structures and actual patterns of Canadian intergovernmental relations in the area of environmental policy. Kathryn Harrison's comparison of Canada and the United States suggests that historically, in both countries, the overall model is nominally one of disentanglement, or rationalization with the federal government assuming responsibility for setting national standards and subnational governments taking the lead in implementation. However, in practice the US federal government has played a much larger role in standard-setting and rationalization has been achieved in a top-down manner, the US states' new role being imposed upon them. In contrast, rationalization in Canada has been achieved much more by mutual agreement between Ottawa and the provinces.

What explains this divergence? Harrison argues that institutional factors alone and in combination with societal forces can best explain the differences in intergovernmental relations concerning the environment in the two countries. Specifically, the constitutional division of powers gave the US federal government a stronger role in setting national standards than is the case for the Canadian federal government. Similarly, state governments are less able to resist federal involvement than are Canadian provinces. The former are individually less powerful and their voices are undercut by intrastate avenues for the expression of regional interests. Harrison also argues that the greater initial involvement and persistence of the environmental policy role of the US federal government is explained by a combination of institutional and societal factors as public interest and concern about environmental policy have waxed and waned. At the peak of public attention to the environment in the early 1970s, the division of powers between Congress and the Executive prompted an unusual bidding war that lead to a more assertive federal role than the players on either side had anticipated. Yet that same division of powers, and the multiple veto points it entails, subsequently allowed both branches to block proposals from the other to weaken the federal government role once public attention had waned. In contrast, in response to similar

shifts in public attention to the environment, the Canadian parliamentary system made it easier for the federal government to make bold promises during the peaks of public concern about the environment and quietly retreat from its previous commitments as public attention and concern has diminished.

In another comparative analysis, Debora Van Nijnatten compares intergovernmental relations concerning the environment in Canada, Germany, and Australia. Like Harrison she emphasizes the importance of institutional arrangements to explain the formal structures and actual patterns of intergovernmental relations with respect to environmental policy. She suggests that Canada and Australia are slowly becoming more like Germany with formalized institutional arrangements and an emphasis on allocating functional responsibilities in national standard-setting. However, institutional arrangements in Germany remain the most effective at reaching intergovernmental agreement, ensuring agreements with high standards, and actually implementing and enforcing those standards. Expressed in terms of the categories introduced in the introductory chapter, Van Nijnatten argues that the formal structures in both Germany and Australia tend to be ones that emphasize collaboration. The actual patterns of intergovernmental relations tend to cooperation.

While the first two chapters in Part One are comparative and tend to focus on societal and institutional arrangements, the chapter by Patrick Fafard takes a somewhat different approach and seeks to answer the following question: What patterns of intergovernmental relations do different interest organizations seek to encourage with respect to environmental policy making in Canada? Analysis of the submissions of key interest organizations with respect to the CCME harmonization initiative suggests that ENGOs support a considerable degree of federal unilateralism and are wary of extensive intergovernmental collaboration and/or disentanglement. Organizations representing business and resource industries, on the other hand, while supportive of intergovernmental cooperation are even more supportive of allocating to provincial governments responsibility for inspections and environmental assessment via disentanglement. However, the Fafard chapter also suggests that interest organizations representing both the environmental movement and business and industry are not interested in patterns of intergovernmental relations as such. Rather, these patterns are a means to an end. In the case of ENGOs the goal is higher levels of environmental protection. In the case of resource industries, the goal is a move to voluntary and self-regulation, negotiated compliance, if not outright deregulation.

Having sought to explain the different formal and informal patterns of intergovernmental environmental relations in Part One, the chapters in Part Two of this volume change the focus and consider the actual impact of different styles of intergovernmental relations on the details of environmental policy in Canada.

In a detailed analysis of the environmental assessment sub-agreement of the Canada-Wide Accord, Steven Kennett begins with a modified version of the analytical framework outlined in Chapter 1 and makes a distinction between two broad models of intergovernmental interactions, one based on unilateralism leading to either conflict or competition and one based on cooperation leading to bilateral process coordination or rationalization by means of process substitution. Kennett then argues that the story of environmental assessment (EA) in Canada is one of a move from unilateralism to collaboration to rationalization. Federal and provincial unilateralism in the late 1980s was replaced by an attempt at intergovernmental collaboration in the early 1990s through bilateral process coordination. More recently the trend has been to the rationalization of government involvement in EA by means of process substitution.

In their careful analysis of the Standards Sub-Agreement of the Canada-Wide Accord, Alastair Lucas and Cheryl Sharvit consider the legal basis of the sub-agreement. Their analysis anticipates a situation where third parties will seek to challenge any regulatory actions taken by the federal or provincial governments pursuant to the sub-agreement. Based on a tightly argued analysis of the sub-agreement, they conclude that because it is written in a comparatively vague and general way, the sub-agreement is not likely to be vulnerable to a legal challenge. Thus, they conclude that the sub-agreement is not likely to lead to a weakening of agreed environmental protection standards by making them subject to challenge in the courts. This is a positive conclusion. However, they also observe that the very vagueness of the sub-agreement will do little to raise public confidence in the sub-agreement and, more generally in the Canada-Wide Accord. Which leads them to ask, "If the sub-agreement is not a legally enforceable agreement at all, but merely a statement of purpose and political commitment by the governments, how secure are these commitments likely to be as the priorities of the party governments shift over the longer term?" In a more general way, this chapter speaks directly to the subsequent legal challenge of the Canada-Wide Accord launched led by the Canadian Environmental Law Association.[1] While the analysis of Lucas and Sharvit does not deal with the broader accord, many of the same arguments could be made with respect to the accord. This suggests that while the legal challenge will not be successful, it raises questions as to the utility and applicability of a largely hortatory accord when, as Lucas and Sharvit suggest, future governments are less inclined to live up to the spirit if not the letter of environmental intergovernmental agreements. In terms of the analytical grid introduced in Chapter 1, the analysis of Lucas and Sharvit suggests that the standards sub-agreement is the result of a considerable degree of cooperation and intergovernmental bargaining. The actual impact of the sub-agreement is unclear but will more than likely allow for considerable and continuing independence as

the governments who are party to the sub-agreement continue on much as they had before. Because the standards sub-agreement is not binding on the signatories and is largely hortatory, and this arguably applies to the Canada-Wide Accord and the other sub-agreements reached under the accord, while the formal pattern is one of cooperation, the actual relationships will likely be highly variable.[2]

The final chapter in Part Two considers the actual enforcement of environmental legislation specifically with respect to water pollution. Kernaghan Webb offers a detailed analysis of the enforcement of the water pollution provisions of the federal *Fisheries Act* and the enforcement of related provincial water pollution legislation. Based on an analysis of the constitutional basis of the *Fisheries Act*, the legislation itself, the various federal-provincial coordination agreements that have been negotiated in the last two decades, actual compliance and enforcement activities, and interviews with federal and provincial officials, Webb concludes that water pollution is an area where there exists a complex, dynamic relationship between the two orders of government, one that differs from region to region and from sector to sector. In formal terms, there would appear to be limited interaction between Ottawa and the provinces with respect to water pollution. For example, the *Fisheries Act* includes no express capability to enter into equivalency agreements with provincial governments. In formal terms the relationship between the two orders of government with respect to the enforcement of water pollution controls appears to be one of considerable unilateralism. In practice, Webb's detailed analysis suggests considerable efforts by both Ottawa and the provinces to coordinate water pollution control activities and minimize overlap and duplication. However, it would be wrong to conclude that the actual pattern is one of intensive cooperation across the board. As Webb notes, the implementation of successive waves of federal-provincial agreements has been uneven to the point where, in some cases, senior provincial officials responsible for water pollution control are unaware of the existence of such agreements or downplay their importance. Similarly, while Ottawa and the governments of Alberta and Saskatchewan have developed formal arrangements for the implementation of the key sections of the *Fisheries Act*, in Quebec the pattern is much more one of disentanglement and federal disengagement.[3] In more general terms, despite efforts to rationalize, a great deal of entanglement remains between the environmental regulation activities of the two orders of government. Webb's analysis suggests that top-down efforts to reform intergovernmental relations through formal agreements do not always have the intended effect on the behaviour of "street level bureaucrats."

BROADER IMPLICATIONS

The formal and informal patterns of intergovernmental relations with respect to the making and implementation of environmental policy in Canada do not develop in isolation from the broader scene of intergovernmental relations in Canada. As described in more detail in Chapter 1, what has and has not come to pass in intergovernmental environmental relations is partly the result of broader changes in federal-provincial relations and public administration in Canada. Arguably, the relationship is a two-way street. The fact that the federal and provincial environment ministers have been able to negotiate and conclude a broad harmonization agreement and proceed with the development of a series of sub-agreements is a significant indication that Ottawa and the provinces can work together. However, we must be careful to not overstate what has been accomplished. As suggested in various ways in the chapters by Harrison, Webb, Kennett, and Lucas and Sharvit, the Canada-Wide Accord and its subsequent sub-agreements are significant but do not, in and of themselves, signal a new dawn in federal-provincial relations.

In fact, the story of intergovernmental relations told by the various chapters in this volume suggests that there may be a gap in some of the overinflated rhetoric about a new style of intergovernmental relations developed by Ottawa and the provinces subsequent to the 1995 Quebec referendum. For example, Kernaghan Webb's analysis suggests that even front-line officials enforcing environmental regulation may be unaware of the efforts for their bureaucratic and political masters to rationalize federal and provincial roles. Thus, while the Canada-Wide Accord may have been heralded as a breakthrough in intergovernmental cooperation, and some may wish to look to it as a sign of similar progress in other policy fields, the day-to-day actions of the two orders of government and the limited legal impact of the accord suggests caution.

Moreover, there are limits to our ability to extrapolate to other policy fields from the recent patterns of intergovernmental relations in the field of environmental policy. Most importantly, environmental policy is largely about regulation and enforcement. Thus, the patterns of intergovernmental relations found here cannot be directly extrapolated to other, non-regulatory policy fields. For example, while it would be interesting to reflect on how the story of environmental intergovernmental relations may inform the current efforts to craft a new federal-provincial relationship in social policy or health policy, the latter are inherently more about spending, and intergovernmental transfers, and less about regulation. However, it may be possible to extrapolate from the environment field to other areas of regulation such as consumer protection and food safety.

It is important to note one of the key omissions of this volume. While we hope that the various chapters presented here have made a contribution to the study of

intergovernmental relations, the authors and editors deliberately chose to employ a conventional definition of Canadian intergovernmental relations as being limited to the federal and provincial governments. Virtually nothing has been said with respect to the roles of municipal and regional governments in the field of environmental policy. More importantly perhaps, this volume is silent on the extent to which the development of aboriginal self-government in Canada adds greater complexity to the articulation and enforcement of environmental policy. It is important to note that First Nations' organizations were among the critics of the doomed Environmental Management Framework Agreement and were equally critical of the fact that they were largely excluded from the development of the Canada-Wide Accord. While this may be understandable given the limited authority of existing First Nations' governments, it is not a sustainable position as First Nations take on a greater role in resource management and environmental regulation either as a result of agreements with the federal government[4] or with individual provincial governments.

The analysis presented in this book also suggests that fears about the intergovernmental regime around environmental policy creating a "third order of government" are overstated. The agreements are limited, are political in nature, and do not unduly limit the scope of what the federal government can do if there is sufficient political will. If anything, the scope of the federal authority to act in matters environmental is expanding. For example, in a recent decision, the Supreme Court of Canada rejected a challenge of the constitutional basis of the *Canadian Environmental Protection Act* initiated by Hydro-Québec.[5] In upholding the federal legislation, not only did the court support the present division of legislative powers between federal and provincial governments, it extended federal jurisdiction over the environment by expanding the federal criminal law power. Similarly, the new *Nuclear Safety and Control Act* will have the effect of expanding the scope of federal jurisdiction over uranium mining and nuclear facilities as the federal government begins to regulate both the nuclear and non-nuclear aspects of mining and electricity generation.[6] It remains to be seen if the federal and provincial governments can negotiate a regulatory regime that will minimize the overlap and duplication of the uranium mining industry in Canada.

The evidence and analysis presented in this volume suggest that while national ENGOs continually express concern about the extent to which provincial governments are hostage to powerful local industries, this concern should not lead to a simple characterization of all provincial governments as being beholden to local resource industries and business interests. Among other things, we need to distinguish between those cases where a government simply caves in to the industry pressure and those cases where the government is being responsive to often quite

reasonable requests from industries who want to explore alternatives to simple command and control regulations.

In general, the development and enforcement of environmental policy in Canada have been marked by quite dramatic shifts over time as the roles and responsibilities of the two orders of government have evolved, as their enthusiasm for environmental policy has waxed and waned, and as Ottawa and the provinces have tried to put some order to an area of *de facto* shared jurisdiction. The result has been intensive intergovernmental relations as the two orders of government have, formally and informally, emphasized cooperation, conflict, disentanglement, competition, or various combinations of each. The analysis presented in this volume suggests that there is much that can be learned from environmental policy making as we collectively search for what is possible and what is desirable with respect to good intergovernmental relations and, ultimately, good government in Canada and in other federations.

NOTES

The author would like to thank Keith Banting for his comments as rapporteur for the research confence at which the papers in this volume were first presented. These comments inspired this chapter. The author would also like to thank Kathryn Harrison for comments on an earlier draft of this paper.

1. The Canadian Environmental Law Association launched a challenge of the Canada-Wide Accord on Environmental Harmonization in the Federal Court of Canada in early 1998.
2. Alternatively, the medium- to long-term effect of the Canada-Wide Accord and the associated sub-agreements may be to encourage a devolution of responsibility for environmental protection from Ottawa to the provinces. Harmonization of federal and provincial environmental policy may allow the federal government to limit its role. And if neither order of government is willing to allocate sufficient resources to the regulatory task at hand, there will be a gradual weakening of environmental protection in Canada. I am grateful to Kathryn Harrison for this alternative interpretation of the accord and the sub-agreements.
3. The 1999 annual report of the Commissioner of the Environment and Sustainable Development is expected to include an evaluation of federal-provincial interactions under the terms of the *Fisheries Act*.
4. On 12 February 1996, Canada and 13 Chiefs signed a Framework Agreement on First Nations' Land Management. The framework agreement allows the signatory First Nations to opt out of the land management sections of the *Indian Act* and establish their own regime to manage their lands and resources. As part of the transfer, the First Nations will be required to establish environmental protection and environmental assessment regimes. The House of Commons passed legislation implementing the framework agreement in March 1999.

5. *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.
6. The *Nuclear Safety and Control Act* received Royal Assent on 20 March 1997 and, at the time of writing had yet to be proclaimed pending the finalization of the accompanying regulations.

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