

## ENVIRONMENTAL HARMONIZATION: A GUIDE TO THE FUTURE OF CANADIAN FEDERALISM?

BY PATRICK FAFARD

The "harmonization" of federal and provincial roles with respect to the environment has been a priority for Environment Ministers for the last several years. However, to date little progress has been achieved.<sup>1</sup> Nonetheless, recent efforts to "harmonize" environmental policy are about much more than environmental protection. The environmental policy harmonization exercise may hold clues to the future management of the federation. In effect, the efforts to harmonize federal and provincial roles with respect to the environment are indicative of the possibilities and the dangers associated with efforts to redesign the system of Canadian intergovernmental relations.

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### THE POSSIBILITIES

In November 1993, the Canadian Council of Ministers of the Environment (CCME)

agreed to make harmonization a top priority. They directed their officials to work on a new "Environmental Management Framework for Canada". Both the drafting process and the agreement itself are suggestive of some of the ways in which we might redesign the system of Canadian intergovernmental relations.

With respect to process, following the instructions from Ministers, a discussion paper was released setting out a series of general principles to guide harmonization. An elaborate committee of federal and provincial officials was then established. The Lead Representatives Committee (LRC) was instrumental in developing what was to become the Environmental Management Framework Agreement (EMFA) and the eleven schedules that accompanied the Agreement. The operating procedures of the LRC are notable because they reflect recent trends in intergovernmental negotiations in Canada in which the emphasis is on transparency, public participation and, unfortunately, considerable complexity. For example:

\* The LRC brought together all provinces, including Quebec, and had an independent chairperson, an official from the Government of Alberta.

\* The LRC created an elaborate structure to assist it in developing an agreement. The LRC met monthly in different parts of the country. As many as 125

officials were members of 14 sub-committees that developed different aspects of the main text and the schedules.

\* Early on, a National Advisory Group (NAG) was established made up of 16 people from environmental non-governmental organizations (ENGOS), business, industry, municipalities, and universities. The NAG provided advice and feedback to the LRC with respect to public consultation and the substance of the draft agreements.

*It is striking that in this Agreement the federal government was willing to distinguish between that which is "federal" and that which is "national". In a very explicit fashion, Ottawa recognized that the policies and programs that it enacted, while applicable across the country, were not synonymous with national policies, the latter being the responsibility of both orders of government acting in concert.*

\*The work of the LRC was supplemented by public consultations. Individual members of the LRC and other officials met with stakeholders on a regular basis. Several public workshops were held to solicit input from stakeholders and in-

terested parties. In addition, the CCME Secretariat made extensive use of the Internet to disseminate draft copies of the EMFA and to invite comments from stakeholders and the general public.

In other words, by the usual standards of intergovernmental negotiating, the development of the EMFA was a remarkably open and consultative process. However, as will be described below, the process used to negotiate the Agreement, and the decision-making processes proposed by it, are still subject to criticism on democratic grounds.

While the negotiating process leading to the EMFA was important, the substance of the EMFA is also significant for those who are interested in reforming Canadian intergovernmental relations. Although much of the Agreement is concerned with defining the interests and responsibilities of the federal and provincial governments, the EMFA does set out a process to develop "national" policies. Very strict distinctions are made among federal, provincial, and "national" responsibilities. The latter term is explicitly defined to mean that the common interest is shared by federal, provincial, and territorial governments or that, even if one order of government had the lead role, shared decision making is required or desired by that order of government (Article 1.1). It is striking that in this Agreement the federal government was willing to distinguish between that which is "federal" and that which is "national". In a very explicit fashion, Ottawa recognized that the policies and programs that it enacted, while applicable across the country, were not synony-

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mous with national policies, the latter being the responsibility of both orders of government acting in concert. Moreover, in being party to the EMFA, the federal government would have acknowledged that for truly national policies to be initiated, some form of shared decision making would be required. Unfortunately, the concept of "national" policies as defined in the EMFA was not carried over into the Canada-Wide Accord that is currently before the Ministers.

## THE DANGERS

The EMFA, had it been signed, would have broken new ground in the conduct of intergovernmental relations in Canada. Nevertheless, the Agreement as drafted by officials had a number of weaknesses. These may have contributed to the rejection of the Agreement by Ministers of the Environment. Moreover, some of the weaknesses apply equally to the current Canada-Wide Accord on Environmental Harmonization. In other words, the pattern of recent environmental negotiations suggests certain dangers that are inherent in almost any process of intergovernmental decision-making.

First, the EMFA was largely silent on the decision rule that was to be used in the development of national policies. The EMFA would have created a series of committees responsible for policy development, coordination, and implementation. However, nowhere was there an explicit statement of a decision rule. In the absence of such a rule, it is almost certain that unanimity would have been the norm. This would have given Ottawa and each of the provinces a veto over the

development and implementation of national policies. The net result would have likely been a very slow decision-making process.

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Second, the EMFA and the current Canada-Wide Accord would allow for the establishment of national policies jointly decided by the two orders of government. Although this is arguably a useful innovation in the conduct of intergovernmental relations, for some critics of the EMFA this reference to national policies represents a *de facto* constitutional amendment. Critics have argued that, by creating na-

tional decision-making processes, the EMFA would have created a new level of government, one that would be illegitimate, unaccountable and unworkable.<sup>2</sup>

Third, the original EMFA and now the proposed Canada-Wide Accord, add to the democratic deficits of Canadian governments. The increased use of intergovernmental agreements represents a challenge to democratic accountability. Intergovernmental policymaking, because it is one or more steps removed from the "regular" political process within a single jurisdiction, is less open, less transparent, and inherently less democratic. In other words, intergovernmental policymaking exacerbates the democratic deficit of contemporary governance.<sup>3</sup>

Reform of the federation is currently a priority for both Ottawa and the provinces. Recent efforts to harmonize federal and provincial roles with respect to the environment demonstrate both the possibilities and the dangers associated with efforts to redesign the system of Canadian intergovernmental relations. For example, while Environment Ministers and their officials have broken new ground in distinguishing between that which is "federal" and that which is "national", both the negotiations leading to agreements and the agreements themselves are subject to criticism on democratic grounds. However, no one ever said that redesigning the federation would be easy. Perhaps all we can do is try and learn from what has been done in environmental policy and see how it might be applied in other areas.

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## NOTES

1. For a summary of recent events and an analysis of the successes and failures of the harmonization exercise, see P.C. Fafard, "Green Harmonization: The Success and Failure of Recent Environmental Intergovernmental Relations" in H. Lazar, ed., *Canada: The State of the Federation, 1997* (Kingston: Institute of Intergovernmental Relations, Queen's University, forthcoming).
2. See Canadian Institute for Environmental Law and Policy, "The Environmental Management Framework Agreement—A Model for Dysfunctional Federalism? An Analysis and Commentary", CIELAP Brief Number 96/1, February 1996, p. vii. This document can be found at the CIELAP Web site: [www.web.apc.org/cielap](http://www.web.apc.org/cielap).
3. The term democratic deficit or democracy deficit is usually applied to decision making in the European Union (EU). For an introduction to the issues in an EU context, see M. Newman, "Democracy and the European Union" in V. Symes *et al.*, eds., *The Future of Europe* (London: Macmillan, 1997), at 15-42. For a discussion of the inherent democratic deficit of Canadian intergovernmental relations, see R. Gibbins with the assistance of K. Harmsworth, *Time Out: Assessing Incremental Strategies for Enhancing the Canadian Political Union*, C.D. Howe Institute, Commentary 88 (February 1997).