

# **Inter-Governmental Relationships and Environmental Management in Canada: the 1995 Armonization Initiative**

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## INTRODUCTION

Of the 22 identifiable federal political systems in the world, Canada's is probably one of the most unique. For, unlike many other federal systems, Canada's is tending to be a rapidly decentralising federal system. Thus, while much attention has focussed upon the province of Québec and its often contentious relationship with the federal Government in Canada, sight should not be lost of the enormity of change which is speedily occurring in Canada's federal-provincial relationships.

Much of the change in inter-governmental relations in Canada is yet to emerge as significant alterations in fiscal inter-actions are taking place and these threaten to so diversify the existing federal system that in the long-term Canada may evolve into a much looser federative relationship. That relationship will evolve in large measure as a consequence of governments at all levels continuing to seek to "off-load" programmes and programme funding responsibilities in their almost obsessive pursuit of fiscal responsibility and deficit and debt management and reduction.

The federal Government's announcement regarding alterations in transfer funding to the provinces contained, initially, in its 1995 federal Budget is likely to alter significantly not only the quality of life in Canada over the next few decades but the very essence of the federal system because, in Canada [and, I would argue that this is characteristic of many other federal political systems], a central-style government is generally in the business of re-distributing money. With money comes the commensurate capacity to deliver public goods and services and with that capacity comes the correlate ability to retain political power which is, after all, a primary goal of any politician be he or she at a national, provincial or local government level. Indeed, it can be argued that one of the many contributing factors in the disintegration of the former Jugoslavian federation was the incapacity of the national or federal government to re-distribute wealth more equitably between component units of the federation. Similarly, the division of Czechoslovakia into two independent states hinged in some measure upon alleged failures to equally distribute wealth within the federation.

In the case of Canada, re-distribution of wealth within the country has been an absolute norm of the operational federal system. Historically monies were re-distributed in consequence of deals done "under a table" or in a "political back rooms". Money was moved from the federal government to specific provincial projects often in return for localized political support. Money, therefore, was a

type of federal "glue" holding together all component units in the political relationship. This is not an uncommon quality of federal systems (Birch, 1955). Political power could be retained by judicious dispensation of federal monies to politically supportive regions.

Almost invariably there will exist a revenue-expenditure imbalance in a federal political system. Economic, social and geographic conditions are never uniform within federal polities and issues of economic development and quality of life will vary widely as do individual capacities of component units to serve their respective populations. Indeed, even within component units there may exist significant regional variations. This is especially evident in a country such as Canada where province size frequently exceeds the geographical size of many independent countries (for example some provinces even have two time zones, eg. British Columbia and Ontario).

Yet there has been a realization that policy delivery may be more successfully undertaken at a regional or provincial level than at a full-fledged national level. Attitudes in this respect changed markedly after World War II when the provinces began to complain both about a growing federal intrusiveness and the lack of consultation over funding priorities. Yet there is another dimension to the issue. National standards of life quality are a matter of immense concern within a country in which population mobility has been the norm. In brief, if *all* Canadians are to have a reasonably comparable standard of living including access to public services, how is that assurance to be provided given fiscal inequalities? The role of the federal Government becomes crucial to assurances that standards of life and opportunities are generally equivalent for all Canadians. If the federal Government is seen both as "overseer" and as "fiscal resource redistributor" than, presumably, it can claim some right to require standardization of service quality and delivery. However, it is the provinces which bear immense constitutional responsibility for legislation in so many policy areas where equality of standards is at issue. In the late 1970's for example, in an effort to cushion some provinces from the economic impact of a world petroleum embargo, the federal Government launched a National Energy Policy which, among other things, included creation of a government owned petroleum exploration, development and distribution corporation (PetroCan -which has since been privatized) and an assurance that the "gate price" for petroleum and natural gas products would be essentially the same within provinces without oil and gas resources as it was within those provinces *with* such resources<sup>1</sup>. The issue of a federal Government obligation to assure equality of opportunity was a key feature of the National Energy Policy. However, it eventually succumbed to rampant

provincialism in the form of several western provinces hard-line on inter-governmental relations. The issue of national standards has become even more important due to the entrenchment of social and economic rights as well as the right to mobility within Canada in the 1982 constitutional Charter of Rights and Freedoms.

Historically, federal funds have been transferred to the provinces through either special grants ("pork-barrelling" as it is termed in some circles -'the buying of political favour') or grants-in-aid. Grants-in-aid have been characteristic of the Canadian federal system since its very inception in 1867. For example, original fiscal arrangements concluded as part of the Confederation agreement were weighted in favour of the Atlantic or Maritime provinces<sup>2</sup> from the very beginning (Graham, 1960; Maxwell, 1937; 1948; Perry, 1953; 1956). However, the grants-in-aid system did not adequately protect some provinces in Canada from the impact of the global depression in the 1930's. A Royal Commission on Dominion-Provincial Relations, which Tabled its Report on May 3, 1940, argued that more was required than simply grants-in-aid and the Royal Commission (known as the Rowell-Sirois Commission for its joint Chairs) argued forcefully for an *equalization* formula especially in policy areas such as education and social services.

The concept of an equalization formula for fiscal re-distribution was appealing because of the substantial differences in revenue generating capacities among provinces and because, especially after World War II, there was a growing mobility in Canada's population and people expected relatively equivalent standards throughout the country. Naturally there will always be debate over the basis upon which an equalization formula is developed.

But, as the provinces began to "feel their political way" after the highly centralized wartime period, they began to seek ways to pursue their own perceptions of political identity. Consequently, a move was made towards more formal inter-governmental funding formulas. Formulas which finally emerged included *equalization payments* based upon a complex calculation of need. Provinces were allocated funds somewhat related to need<sup>3</sup>. Other formulas, for example the Canada Assistance Plan (CAP) and Established Programmes Financing (EPF) were mutually negotiated and designed largely both to ensure national standards and opportunity and to provide funding in specific social policy areas. EPF which came into being in 1971, for example, covered post-secondary education and hospital care. All of this is now changing as the federal Government has 'blended' CAP and EPF into a new, reduced, funding arrangement.

In the 1995 federal Government expenditure budget it was announced that Established Programmes Finance (EPF) and Canada Assistance Plan (CAP) would be replaced by a block transfer funding scheme to be known as the Canada Health and Social Transfer (CHST). Further, it was announced that total entitlements hitherto available to the provinces through EPF and CAP would be reduced from \$30 billion in 1995-1996 over two years to \$25.1 billion by 1997-1998. And finally, that the current allocation which combined EPF and CAP would be maintained but that the allocation formula would be re-examined for 1997-1998 and changed, either partially or fully, to *per capita* entitlements thereafter. Ironically, a return to capitation as a basis for funding inter-governmental fiscal transfers is an echo of the original formula in the 1867 constitution. That capitation formula proved inadequate in the 50 years thereafter -indeed, a most remarkable mockery of *per capita* funding may be found in a 1907 Constitutional Amendment which assured the province of British Columbia that even if its actual population fell below a specified level its *per capita grant would not be diminished below that base population!* Nevertheless, there is a return to a funding formula which leaves open doubt about the long-term equity which will result. The 1997 expenditure budget, while offering modest concessions to specific federally supported programmes, did nothing to alter or reverse significant cut-backs in federal transfers to the provinces<sup>4</sup>.

Furthermore, there are some very serious questions about the federal capacity to exert "leverage" upon the provinces to comply either with federally mandated service quality standards or with standards developed in collaboration with the provinces. The argument has always been made that negotiated standards may meet only minimum accepted levels of quality (the inherent danger of consensus is that it may also be largely meaningless!). And, further, that a reduced fiscal role for the federal Government means effectively less capacity to exert compliance pressure.

It is anticipated that the effect of the funding formula changes on the overall level of services provided by provincial governments, and the specific effects on the level of health services, educational services and welfare programmes will be extremely consequential if not detrimental. Moreover, as the funding reductions and re-formulation take place "soft" policy areas such as environmental protection will be victimized. Already the Government of the province of Ontario has drastically reduced restrictions of land-use development, waste disposal, mining and resource based activities and even protection of

consumers from unhealthy food products by reduction of processed food inspection services<sup>5</sup>.

Despite a clear link between environmental quality and long-term health and, thus health care costs, there is reason to suppose that a concerned and ageing electorate will opt for public expenditures on immediate health care needs in preference to a less immediately perceived health-environmental quality linkage. That is the option which is being pursued by the current Government of Ontario as it removes many environmentally related restrictions upon mining and forestry development. Short-term political accommodation seems to be much more the prevailing impetus.

Implementation of the CHST and movement towards *per capita* funding in 1995-1996 will result in a net decrease in the level of social services provided by governments across Canada. Furthermore, it will place at risk the federal Government's ability to enforce and maintain national standards for health, education, and social assistance. And in the area of environmental protection the decline in service delivery probably will be very dramatic. Indeed, when this Report was first undertaken there was great optimism about prospects for the future of the delivery of environmental protection in Canada. That has changed somewhat but more will be said on this later.

As an aside, an analysis of the federal Government's CHST suggests three critical problems facing Canadian federalism. These problems largely will dictate the tone of environmental law and protection and the capacities of all levels of government in Canada to effectively deliver on environmental protection services over the long-term.

The most obvious problem facing policy makers and administrators in Canada is that cash is simply running out. For example, even if total provincial CHST entitlements<sup>6</sup> were to be frozen at its 1997-1998 level, CHST cash would decline and eventually disappear because tax-points [upon which provincial fiscal transfer 'entitlements' are based] are growing at approximately \$700 million a year. The federal Department of Finance estimates that available cash for the provinces could disappear by approximately 2012-2013.

This issue of capacity to deliver social services including environmental protection becomes more complicated simply because there is every possibility that some provinces will run out of cash much sooner than others. The provincial cash-flow problem will likely emerge because:

1. Some provinces have smaller initial entitlements per capita (a consequence of the application of a 1995-1996 allocation base rule); Québec, for example, would have the largest entitlement while Ontario would come close to the lowest entitlement;

2. Some provinces have tax points [another component of the equalization funding formula] which are worth relatively more due to greater levels of industrialization so they actually would have less cash in the long-term; and,

3. In some other provinces tax points are actually growing faster due to relatively significant alterations in patterns both of population and industrialization.

In practice, however, what all this means is that re-distributed funds available to provinces will continue to diminish over the next decade. That diminution will force all provincial governments to much more carefully selected priorities. Health care has proven to have been the most politically explosive policy area while environmental protection apparently has not garnered the same intensity of public support. And, while one may reiterate the potential for direct long-term linkages between individual health and quality of the environment (eg. carcinogens) the argument is difficult to make during times of severe budgetary constraint and governmental role re-definition.

Compounding the ever increasing general short-fall in funding is a second problem. Some provinces view the new federal allocation CHST formula as blatantly unfair. This is because the CHST has the same allocation formula as EPF and CAP. That is, since Ontario received 35% of EPF and CAP payments (combined) in 1994 it will receive 35% of CHST even though it has 38% of the population. EPF and CAP have been allocated in a manner which provides effective differential treatment in resource allocation for various provinces. EPF had always been provided on a *equal per capita* basis. CAP was allocated on a cost-sharing basis but was frozen for the 'have' provinces (this is usually termed "The cap on CAP"). Total provincial entitlement for 1997-98 were announced in the 1995 Federal Budget as set at a maximum total federal transfer of \$25.1 billion Canadian. Effectively this constitutes a form of zero sum game for it means that if some provinces are to be net beneficiaries from the CHST funding formula others will be net losers. Fundamental service equity issues are now pre-eminent within Canadian federal system and these have enormous consequences for the prospective delivery of environmental services across provincial and international boundaries. Regional inequality, linguistic conflict and the unique demands from Québec already strain the federal relationship but the reduction in long-term federal fiscal transfers to the provinces could prove disastrous if the argument that 'fiscal transfers' constitute a form of 'federal glue' have any validity.

If the increasing gap between "need" and "capacity" is to be addressed, the federal Government will have to face two basic conundrums. First, it must determine an optimal level for CHST transfers in order to stabilize the long-term cash value of those CHST transfers. Since tax points grow and vary over time it should be fairly apparent that the overall level of CHST transfers must grow commensurately unless it is a federal Government expectation that as provincial economies are stimulated into growth the federal Government will be able to off-load proportions of the CHST or to alter -at its discretion- the basis upon which the CHST is calculated. The federal Government will need to find a formula-level of entitlements which can grow over time so that the federal Government continues to remain a player in the social policy arena. This is basically a political call and will depend both upon stresses within the federation and upon the volatility of policy issues, eg. health care. During forthcoming federal and provincial elections. Second, the level of funding that will be adequate in order for the federal Government to maintain an assurance of pre-defined national standards in areas within provincial responsibility needs to be determined. The federal Government will need to assure a basic level of cash funding in order to induce provinces to adhere to and to maintain national standards in all areas of public policy. This requires sufficient cash to defend the CHST as equitable while protecting mobility rights of Canadians within the country. The fiscal impacts on the provinces will require a new allocation formula that is fair if national standards pertaining to environmental protection are to be assured. If 'fairness' and 'equity' cannot be assured than the prospect of harmonization of environmental policies across Canada probably will diminish.

Ultimately the argument runs something like this: in the old days the federal Government put up 70% to 80% or 100% of funding for programmes which it deemed in the national public interest. Provinces were invited -or 'seduced' onside by the lure federal money ("any federal money is good money" I once heard a Deputy Minister in the province of Newfoundland remark!). Because of its fiscal predominance, the federal Government could exert leverage and thereby negotiate nationally applicable standards for service delivery, eg. environmental impact standards. Money bought friends and the federal Government bought many a political friend with re-distributed tax dollars. Naturally those political purchases usually rebounded to the benefit of the incumbent federal political party. Now things are changing dramatically because as the federal Government reduces its role in funding -40%, 30% or even 0%-provincial governments increasingly are querying the right of the federal Government to set and seek to enforce national standards. The battle has been



brutal in the field of health care as one provincial Government (Alberta) in its pursuit of debt reduction and its promotion of market-driven ethics, has virtually dismantled the universal health care system. Indeed, in August 1996 a special summer session of the Alberta legislature, called for another reason, became a focal point for criticism of the provincial Government's piece-meal destruction of medicare. Five years ago the federal Government used its fiscal clout to keep the Alberta medicare system in line with national standards. To-day that clout increasingly is an exercise shadow-boxing although provincial electorates seem to be having a clear impact upon even the most regressive provincial governments. The Premier of Alberta, for example, faced with the need to call a provincial election<sup>7</sup>, has sought unsuccessfully to obtain something termed a "Charter of Health Care Rights" in order to assure provincial voters that, despite appearances, his Government ostensibly is not destroying or undermining the health care system.

Increasingly, in the aftermath of two failed attempts to reform their Constitution<sup>8</sup>, Canadians have tended to return to the style of intergovernmental process which was, in any case, emerging even prior to negotiation of the 1987 Meech Lake Accord. In other works I have described this process as one, rooted in classic 'Executive federalism', as "bureaucratic federalism"<sup>9</sup>. Political Executives make formal decisions. But the processes whereby problem areas are identified, analysed and reported upon, are essentially responsibilities of career-based public officials. Bureaucratic federalism is a term employed to depict the intricate, sub-political, co-ordinating machinery entrusted with the day-to-day management of public policies which involve intergovernmental issues. Public officials can exercise daily contact within a broad policy area or, as is more normally the case, within the host of daily and often routine policy implementation areas. Thus, while we speak of "environmental policy", in practice "environmental policy" consists of a myriad of operational units and activities. For example, 'water quality' may involve inter-governmental committees of public servants covering topics as diverse as acid rain, trans-boundary water pollution, palatable drinking water, irrigation, meteorology and climatic monitoring, snowfall and watershed monitoring and so forth. Sub-committees of line departmental officials specializing in very specific topics is the usual daily fare in inter-governmental relations in Canada. The term "bureaucratic federalism" seeks to capture the flexibility of that relationship and does not imply an intergovernmental process mired in red-tape or bureaucratic inertia.

As attempts to achieve formal constitutional change have faltered, governments at all levels in Canada have sought solutions which one might

describe as "service-centred federalism" or "service-based federalism". This is essentially *aconstitutional* in nature although it may have profound, conventional, constitutional consequences. Providing service-based results via administrative interaction and initiative may preclude the necessity for reference to formal, and often traumatic, constitutional change<sup>10</sup>. Service-based federalism is inordinately pragmatic and focussed upon problem solving and delivery of quality public services. The key to "service-based federalism" is essentially the process of viewing policy delivery problems and opportunities from a relatively distinct perspective. Take one policy or policy-component area, no matter how small, and develop a co-ordinate policy delivery and problem solving regime.

Bureaucratic federalism is a logical component of what is often termed "Executive federalism"<sup>11</sup>; thus, if elected Ministers make policy decisions, it is largely their career public servants who both prepare advice in support of those decisions and who, eventually, are responsible both for implementation of policy decisions and for evaluation and recommendations in respect to changes which may be required.

## **THE CANADIAN SETTING**

Canada's Constitution was proclaimed on July 1st, 1867. Like most constitutions of the 19th and early 20th centuries, many issues of contemporary public policy simply were inconceivable. Especially in North America where a frontier mentality was pervasive and where presumptions of unlimited resources prevailed, environmental issues were simply not on either the political, economic or even social agenda. Abundances of water, land and natural renewable and non-renewable resources created a context whereby disposal of waste products was simple and inexpensive. And, when one had thoroughly exploited a resource, one simply moved to another location and began again. Only in 1941 when an international arbitration confirmed that a mineral smelting plant in Canada was the cause of extensive defoliation in the United States did governments in North America begin to examine the consequences of modern industrial technology upon the human and natural environment<sup>12</sup>.

But, determining jurisdiction in respect to responsibility for environmental issues within the Canadian federal constitution has been both interpretive and politically pragmatic with heavy stress upon the latter<sup>13</sup>.

The interpretative constitutional component emerges from those provisions of the Canada's constitution [*The Constitution Act, 1982 (as amended)*] whereby competencies are assigned. Specifically, Section 91 (federal jurisdiction) and Section 92 (provincial jurisdiction). In ordinary terms, environmental issues falling entirely within a province (eg. control over waste tailings lagoons from mines) fall easily within provincial jurisdiction. However, where the consequences of an environmental hazard transcend provincial or international boundaries, they fall within federal jurisdiction. But the issue is not so nearly precisely defined as constitutional competencies might suggest. For example, a decision by a provincial Government to dam, or divert water from, a river which may cross a provincial or international boundary is both a provincial matter and a federal matter. Given the validity of riparian rights in both common law and international law, such a decision must involve both levels of government. A case in point may be found in the province of British Columbia where cyanide (employed in the gold refining business) leached into the Similkameen River from the now abandoned Nickel Plate Mine in Hedley, B. C. Downstream a few kilometres from the village of Hedley the river crosses the border into the United States. Regulation of sediment ponds fell within provincial jurisdiction but the consequences of leaching from the ponds fell within federal jurisdiction as the river is a boundary water. Clearly inter-governmental problem solving machinery is essential for rapid rectification of accidents and correction of problems.

If one seeks to clearly identify federal and provincial competencies it is not entirely simple as competencies often result either from judicial interpretation or from mutual agreement and, in that respect, more recently, mutual agreement to reduce regulatory overlap. Sometimes this has been a matter of simple practicalities while at other times recourse to the courts has been necessary. In Canada, while there is no formal constitutional court (as in Germany) the Supreme Court of Canada does entertain constitutional questions arising in one of two ways. First, constitutional issues may emerge in the course of virtually any proceeding within the judicial system. That is fairly normal and relatively straight forward. Second, however, Canada has available a rather unique device called "judicial reference". A constitutional question may be referenced by any government (federal or provincial) to a court within its jurisdiction for a "judicial opinion". Such reference opinions, while not legally binding, are undoubtedly highly influential in terms of defining the rules of constitutional relationships. The ability to offer judicial opinion on "the rules" of constitutional relationships opens the way to subsequent political negotiation accommodation in respect to achievement of formal results (Bzdera, 1993; Brown-John, 1984; 1994a). Some notable cases in Canada wherein the Supreme Court has offered opinions which

were influential is subsequent political resolution of problems include: *Reference re: Ownership of Off-Shore Mineral Rights* [1967] SCR 792; *Reference re: Continental Shelf Off-Shore Newfoundland* [1984] 1 SCR 86; *Reference re: Resolution to Amend the Constitution* [1981] 1 SCR 753<sup>14</sup>.

The Supreme Court also has participated significantly in defining competencies for environmental issues. For example in *R. vs Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401, the Court employed the "provincial inability" test as a means for assigning a role to the federal Government in environmental protection. This case served as the federal lever for federal Government efforts to regulate environmental issues across provincial boundaries and even, to some extent, within provinces where federal Crown lands were involved.

Generally, however, Canadian constitutional competencies can be defined generally as follows:

Federal Government Legislative Competencies relate to:

- exclusive jurisdiction on federal lands and Native (Indian) peoples' reserves<sup>15</sup>;
- the capacity to tax [Section 92(2)] "by any mode or system" and to spend accordingly;
- exclusive jurisdiction over inter-provincial and international trade and commerce;
- regulate navigation and shipping on coastal and in-land waters;
- regulate offshore and inland fisheries;
- regulate agriculture a jurisdiction shared *concurrently* with provincial governments;
- criminal law including regulation for the protection of human health and safety;
- regulation of works within a province deemed to be works of national importance;
- regulation of such matters as inter-provincial oil, natural gas and water pipelines;
- gathering of data through the national census which data may have a relationship to environmental issues and concerns;
- treaty powers [the federal Government has an exclusive capacity to "sign" international treaties and agreements but "ratification" will depend upon legislative competencies; thus, federal signature of an environmental agreement which required provincial legislative implementation, would necessitate federal-provincial agreement *in advance* of formal ratification;

-general powers defined as falling within the "POGG" provision of the Constitution [POGG is the general "Peace, Order and Good Government" clause of the preamble of Section 92 of the Constitution].

Provincial governments legislative competencies relate to:

- 1.exploration, development, conservation and management of non-renewable natural resources including forestry resources;
- 2.development, conservation and management of sites and facilities in the province for the generation and distribution of electrical power;
- 3.taxation "by any mode or system" of exploitation of some natural resources such as minerals, forests and hydro-electric power;
- 4.taxation by "direct" means of any facility or industry exploiting natural resources;
- 5.formal education which could include environmental awareness curricula;
- 6.all matters of property and civil rights;
- 7.any local work or public undertaking, eg. sewage disposal and domestic water supplies;
- 8.all matters of a local or municipal or private nature such as land use and property zoning, highway and road construction, drainage systems;
- 9.agriculture which, again, is a shared or concurrent jurisdiction with the federal government; and, insofar as it is relevant, immigration matters which is also a concurrent jurisdiction, eg. protection of life and health.

For the federal Government, however, the move into environmental protection has been undertaken with some reluctance. As Harrison (1996) argues, federal involvement has vacillated as public opinion and the activities of interest groups have focussed upon environmental issues. Through most of the 1970's and into the mid-1980's the federal Government actively retreated from involvement in environmental regulation and monitoring. Yet, in consequence of diverse mega-development projects by several provinces<sup>16</sup>, the Supreme Court decision in the *Crown Zellerbach* case and fears arising from an array of environmentally hazardous accidents<sup>17</sup> propelled governments throughout Canada to explore not only immediate solutions but longer-term intergovernmental mechanisms for preventing environmental disasters and for cleaning up those which might occur. An assortment of initiatives have been taken by governments at all levels in Canada and while constitutional controversies have been prominent in the public mind, in practice significant headway has been made in terms of delivering public policy in the environmental field.

But difficulties arise from an ill-defined bifurcation in legislative jurisdiction. Thus, policy making tends itself to be highly diffused. First, the environmental policy community tends to be rather diverse. There are well defined and clear interest groups such as Greenpeace, Ducks Unlimited, Canadian Wildlife Federation, Audubon Society, and more recently several national and provincial parks have associated "Friends" Societies which support activities within those parks. But even when one identifies that diversity of environmental interest groups there is also a counter-balancing array of powerful economic industry interest groups ranging from commercial water users to forestry, hunting, mining and agriculture to say nothing of powerful interest groups such as the Business Council on National Issue and the Canadian Chamber of Commerce and even trade unions for whom jobs rather than environment is a dominant consideration.

Yet the policy community and related stakeholders on environmental issues is uncertain both in terms of identity and in terms of prospective political consequences. The Government of Ontario's recent move toward diminishing requirements for environmental impact analysis and reducing regulation of waste disposal -including elimination of citizens' actions group participation in siting of waste disposal dumps- has not fully filtered down into the public mind. Should Ontario have another PCB spill-type environmental crisis then the public may again become more actively aware of environmental threats. And, a further consideration, of course, has been that strident defence of the environment by such groups as Greenpeace (now in its 26th year) can, and does, alienate persons who have a predilection for compromise.

Peripheral policy community stakeholders, that is persons or groups with "amateur" or general environmental interests (for example, the Butterfly Collectors Association) are never well placed to become active participants in the policy process. Local butterfly naturalists, for example, are much more intent in counting and classifying butterflies than they are in lobbying governments to protect the natural habitat of some butterfly species. The same could be said of narrowly defined interest groups in a vast array of environmentally related policy areas. That there is a direct relationship between quality of butterfly habitat and environment is an important consideration but it is not one likely to garner much active support both in consequence of the lack of vast numbers of persons engaged in butterfly counting and in consequence of such interest groups to translate their concerns into political action.

Native Canadians have become interested and active in environmental protection to the extent that many native communities still depend upon traditional

lifestyles such as hunting and fishing. In addition, environmental issues emerge tangentially for native Canadians when traditional burial sites are disturbed, for example, by mineral exploration companies<sup>18</sup>. Petroleum exploration in the Arctic, for example, always posed the threat of damaging oil spills and the long-term consequences they would pose for local ecology. The massive oil spill in Alaska from the ship the *Exxon Valdez* vividly drove home the precarious nature of arctic-type ecology and the damage which even a relatively small oil spill can cause.

A second problem emerges from the diversity of interests in the environmental policy community. Because interest groups can focus upon a particular provincial government, for example, the New Democratic Party Government in British Columbia is currently engaged in another battle with Greenpeace [Greenpeace being a natural ally of the NDP, but that notwithstanding, the battle continues!] over "clear-cut logging", gains in environmental protection can be made on a province-by-province basis. It is an interesting phenomena that groups such as Greenpeace can count socialist-premised political parties such as the NDP as natural allies; yet, when those *simpatico* political parties occupy power, the natural ally interest group seems intent on pressing its cause almost to an extreme degree thereby undermining that very relationship. AS environmentalists in Ontario have now discovered, if you embarrass your friends too much they may be thrown out of office and then be replaced by a much less sympathetic government. Recent political history in the province of Ontario should suggest that even environmental interest groups should exercise some discretion in choice of issues and in intensity with which issues are pressed.

The diversity of interest groups and some uncertainty over constitutional jurisdiction means that policy outcomes can be quite varied across the country. And, the federal Government which had only a somewhat tenuous basis for its claim to be involved in environmental issues (trans-boundary jurisdiction) does not have a capacity to impose national standards or to even solve national environmental problems without the close co-operation of provincial governments. Thus, despite the decision in the *Crown Zellerbach* case, the federal Government still requires active co-operation and collaboration from provincial governments to achieve relative national environmental protection standards.

A third problem, alluded to earlier, relates to long-term funding. In budgetary terms "a budget is a translation of policy objectives into monetary terms". For the environmental area that translation of objectives across the

country is very uneven. Taking the cases of Alberta and Ontario and to a lesser extent New Brunswick, environmental issues not only have received a lower priority but, as some governments "re-invent" their roles, environmental issues take both a less important place at the fiscal resources allocation trough and they can, and do, become a secondary concern for persons seeking to protect more widely perceived higher priorities, for example, education and health care. The latter is a potent public policy issue due to the growing number of older and retired citizens as a proportion of overall population.

For an older person it takes a major commitment to agree that their immediate health care needs should be placed behind their grand childrens' environment quality. Moreover, as the proportion of the population in the retired or pre-retired category continues to grow there is a commensurate political consequence. The number of active voters concerned with health care is increasing while the number of voters concerned with long-term environmental issues actually may be diminishing. The saliency of the environment as a political issue may be diminishing partially due to the diminution of numbers of actively concerned voters.

Finally, there is a simple but vexing problem. We tend to speak about "environmental issues" as if there was some singularity in approach to the field of environmental protection. Even a casual overview of the range of interest suggest a corresponding diversity of issue areas. Water resources, for example, mean different things to different groups. For bird lovers "water resources" connoted marshlands to be protected in order to preserve shoreline habitats and wildlife. The same water resource is viewed by groups interested in hunting -from sports to native persons- as a major corollary of their sustained recreational or survival interest. But water resources may also have a different meaning for commercial fishermen, or a pulp and paper company seeking to dispose of wastes or, a logging company seeking to move timber. And, the problem takes on other dimensions for municipal governments faced both with a need for potable drinking water and a need for sewage disposal. Thus, to address the issue of "water" insofar as it relates to environment and quality of life, effectively is to address several distinct dimensions of the same theme.

The inherent incompatibility of perceptions of environmental issues suggests that, perhaps, unlike any other area of public policy environmental issues trigger more diverse interests and many more diverse interest of what might be termed the abstract "public interest". Furthermore, when governments are profoundly committed to economic development and the related issue of job



creation, the tangible interests associated with employment and an healthy economy can very easily subsume the more eclectic interests associated with the abstraction 'a clean environment'.

Canada's efforts to develop deliverable environmental policies across such diverse interests and across multiple jurisdictions [and, I have not even hinted at the municipal government role in environmental policy beyond a reference to water supplies and sewage disposal]<sup>19</sup> has been a fascinating case study.

## **GOVERNMENTAL RESPONSES TO ENVIRONMENTAL ISSUES**

Environmental issues became matters of public debate and policy decision making during the late 1960's. Federal legislation included *The Canada Water Act*, *The Clean Air Act*, *the Arctic Waters Pollution Act*, *The Pest Control Products Act*, *The National Inland Waters Act* and amendments to *The Canada Shipping and Fisheries Act*. In 1975 the federal Government approved *The Environmental Contaminants Act*<sup>20</sup>. Meanwhile, at the provincial level virtually every province was moving rapidly into legislation for environmental protection and regulation (Doern, 1977, 1990; Winfield, 1994). But legislation also required operationalization and, for most governments in Canada, this meant creation of new, or enhancement of existing, environmental impact or assessment processes. For example, in December, 1973, the federal Government established an Environmental Assessment and Review Process (EARP) to be undertaken by all federal departments and agencies. Unfortunately it was not mandatory and EARPs were designed to be integrated with existing departmental practices and policies (Mitchell and Turkheim, 1977; Lang, 1979). The federal Government also became active internationally (eg. the Stockholm Conference on the Environment in 1972; the Canada-United States Great Lakes Water Quality Agreement, 1972; the United Nations Environmental Programme, 1975) and, domestically through support for specific environmental projects, for example a federal loan to the province of Ontario in 1971 to deal with Great Lakes pollution problems (Dwivedi, 1974).

Very briefly, the federal *Fisheries Act* is based upon the federal Government's designated constitutional responsibility for sea coasts and inland fisheries. The Act prohibits disposal of dangerous or deleterious substances of any type. "Deleterious substances are considered to be those which, when added to water, render it 'deleterious to fish or to the use by man of fish that frequent that water'". (Nemetz, et al., 1981). The Act provides for fairly sweeping powers

by which Cabinet [the Governor-General-in-Council or Minister] may regulate substances which are considered deleterious to fish. Fish spawning grounds are singled out for particular attention as these are basis for the management of fish stocks. Logging has been especially problematic for spawning fish as soft wood logs such as fir, cedar, spruce and pine tend to lose their thick bark relatively easily. The bark sinks to bottom of streams and can entirely cover the essential river-bed sands where spawning fish deposit eggs. The potential for conflict between federal regulations under the *Fisheries Act* and provincial regulation of logging industries has been realized on several occasions.

The *Canada Water Act* was intended to permit development, in collaboration with the provinces, of "water quality management areas". For waters entirely under federal jurisdiction the federal Government is empowered to act without provincial participation. The Act was very broadly worded thereby empowering the federal Government to respond quickly to establish water quality regimes and to regulate water usage within federal jurisdiction.

The *Clean Air Act* was also very loosely worded in order, again, to permit rapid responses to trans-boundary air borne pollutants. The Act also permitted the federal Government to pursue concerns about trans-boundary acid rain pollution carried by prevailing winds from industrial regions within the United States especially those in the Great Lakes basin. The Act empowered the Minister to formulate ambient air quality objectives as a persuasive device for inducing Canadian industries to self-regulate. This form of suasion was reinforced, if required, by broad inspection, information and data collection powers.

The *Arctic Waters Pollution Act* had both an environmental purpose and a political purpose. The Act ostensibly was designed to protect a very fragile ecology against misuse and abuse by petroleum exploration companies. But the Act also provided the federal Government with a basis for regulating shipping in arctic waters. Such shipping included a challenge by the Americans who claimed that the Northwest Passage (rarely traversed due to immense polar ice fields) was an international waterway. An attempt to send an experimental mega-tanker *The Manhattan* through the Northwest Passage failed thereby eliminating the passage as a prospective water route for shipment of oil from the north slope of Alaska to the eastern American seaboard. Americans have since constructed a trans-Alaska pipeline to Valdez and oil cargoes now move along the west coast. The Act, therefore, had a secondary political mission (assertion of territorial jurisdiction over arctic waters) as well as an environmental purpose. Similarly,

Canada's extension of environmental protection jurisdiction to 200 nautical miles was designed to protect Canadian coastlines from uncontrolled trans-shipment of petroleum products and to force agreement on management of fish stocks. Coincidentally, the assertion of environmental protection jurisdiction also raised unresolved issues of territorial claims involving both the United States (Alaska boundary extension, Georges Bank in the Nova Scotia Bay of Fundy region) and France (the French territory of St. Pierre et Miquelon). More recently, it has involved a very heated contest with Spain over illegal Spanish fishing and abuse of fish-stocks off the Grand Banks of Newfoundland<sup>21</sup>.

The *Environmental Contaminants Act* was jointly administered by two federal ministries, Environment Canada and Health and Welfare Canada. The Act was intended to control development of new products which might pose environmental hazards (Franson and Lucas, 1977). If, in the opinion of either Minister, a dangerous or potentially noxious substance was likely to enter the environment in quantities or concentrations considered dangerous. The Act authorized a Minister to "require" commercial producers of that substance or class of substances to notify the federal Government and, if necessary, to conduct tests to meet requirements set by the Minister or Ministers. Manufacture and import of industrial dioxins, for example, fell within this Act. Interestingly, the Act provided that consultation should take place with the provinces and the affected industry in respect to proposed regulations.

The *Pest Control Products Act* imposed requirements, emerging from concerns about the commercial and agricultural use of DDT, for registration of all pesticides and for the creation of regulations on storage, packaging and labelling. The *Hazardous Products Act* may be employed to reinforce dangerous product sale and use<sup>22</sup>.

At the provincial level in Canada it is safe to assert that all provinces have in place fairly comprehensive environmental regulation regimes.

British Columbia, for example, established a Pollution Control Board under the 1967 B.C. *Pollution Control Act*. Ontario produced a *Water Resources Act* in 1970 and an *Environmental Protection Act* in 1971 (amended several times thereafter). Alberta and Saskatchewan each developed water and air pollution control acts during the 1970's. The Alberta *Clean Air Act* (1971) established a Director of Pollution Control to regulate operation and construction of industries likely to cause air pollution. An Alberta *Clean Water Act* (1971) was followed by an *Hazardous Chemicals Act* (1978).

In Québec, while environmental protection legislation is comprehensive, judicial recourse also has been employed under provisions of the Québec *Civil Code*. Employing a concept somewhat similar to the common law premise about "common nuisance", the courts have allowed actions against environmental polluters under a civil law premise known as *troubles de voisinage*. An enterprise, regardless of its title to land, is considered responsible for damages to immediately adjacent areas caused by its activities which exceed, in normal judgement, usual inconvenience.

Some provinces, for example, New Brunswick, have been faced with unique environmental problems and these have resulted in unique responses. New Brunswick's forestry industry has been severely threatened over the years by a devastating creature known as the "spruce budworm". This threat to the industry has forced the provincial Government to undertake somewhat drastic responses including massive aerial sprays. Controversy invariably surrounds such enormous efforts to control a devastating pest (Thompson, et al., 1979).

But the issues surrounding environmental protection increasingly have become more complex as concern over acid rain mounted and, later, ozone depletion and the problem of CFCs (stratospheric ozone depletion) and global warming (carbon dioxide emissions) were identified. Furthermore, growing concern with resource management took on increased meaning as North Americans began to fully appreciate the "limits to growth" which were clearly emerging on the continent. Divided and uncertain jurisdictions, along with growing public concerns (and, it would follow, political consequences), suggested that there were both practical and political advantages in both leading in environmental protection and in promoting sustainable development and growth.

Another factor which was beginning to come into play in Canada was the changing status and role and, public expectations about that status and role for native peoples - "First Nations". Eastern James Bay Cree and Western Paigan Indians of Alberta had both demonstrated grave concerns about the environmental impacts of large-scale mega-projects. Jurisdiction over the affairs of native Canadians is a constitutional responsibility of the federal Government although land settlements may fall within provincial jurisdiction where there is no existent treaty between native peoples and the Crown (this generally includes native peoples in British Columbia, for example). Thus, environmental concerns of native Canadians almost by definition became issues of federal Government interest irrespective of the provincial jurisdiction within which the natives peoples

resided (Stevens, 1987). And, native peoples' leaders, with a few exceptions, have demonstrated a significant regard for the fragility of their respective environments.

## **RESPONDING TO ENVIRONMENTAL POLICY ISSUES**

Development of Canada's natural resources both in terms of exploitation and passive use certainly dates from the 19th Century and earlier<sup>23</sup>. However, a study in 1971 (MacNeill) conducted under the auspices of the federal Privy Council Office concluded that public concerns over environmental issues were not being adequately assuaged by jurisdictional uncertainty and conflict<sup>24</sup>. The arguments for a federal initiative included concerns about inter-provincial (trans-boundary) and international (trans-boundary, high seas, territorial waters, Arctic waters) environmental problems, concerns over trans-polar community issues (the activities of nuclear submarines in arctic waters<sup>25</sup>, exploration for oil and natural gas) and, as noted, emerging concerns of native Canadians all compelled Canada's federal and provincial governments to consider practical means for dealing with environmental issues. Another important consideration was the simple matter of costs associated with environmental protection and disaster prevention and clean-up. As American experience demonstrated with the *Exon Valdez* tanker disaster, where clean-up is required as a consequence of an environmentally consequential accident costs can be astronomical.

Precedents for inter-governmental policy co-ordination in Canada can be traced back as far as the first meeting of federal and provincial Finance Ministers held in Québec City in 1907. Certainly irregular meetings of the Prime Minister of Canada with provincial Premiers can be traced to attempts by Prime Minister MacKenzie King to cajole the provinces into transferring more provincial jurisdictions to the federal Government. The 1941 Constitutional amendment transferring responsibility for Old Age Pensions to the federal Government was a case in point. Generally, however, the provinces did resist the temptation to transfer jurisdiction to the federal government and, in the long-run, that has proven to have been important in terms of defining provincial roles in the federal system.

However, the 'true path' of provincialism in Canada became much more clearly evident under the Prime Ministership of John Diefenbaker in the early 1960's. Diefenbaker was the first western Canadian to occupy the Prime Ministership and brought to the position a different conceptual view of federalism.

His first initiatives included radical re-definition for fiscal relationships between the federal Government and the provinces. Concepts such as formula funding replaced *ad hoc* federal grants-in-aid funding initiatives. For Diefenbaker the provinces were significant players in the delivery of public policies although, like most other national political leaders, he did acknowledge the importance of national standards and equality of services and opportunities for all Canadians.

At a national "Resources for Tomorrow" Conference in October, 1961, Prime Minister Diefenbaker proposed creation of a national resource council to aid in the development, management and renewal of Canada's natural resources. Further, he proposed that such a council should have a permanent secretariat to stimulate research and to provide a central focus for co-ordination of ideas and policies. At conclusion of the Conference, senior bureaucrats from across Canada began work on developing Mr. Diefenbaker's proposals. Eventually this activity bore fruit with creation in March 1964 of the Canadian Council of Resource Ministers (CCRM). From the very beginning the basis for decision making was to be responsible resource Ministers and the process was to be that of consensus building. As Ministers met only once or twice a year, a co-ordinating committee and a permanent Secretariat existed to facilitate work.

By 1968 the CCRM had expanded its role to include to include studies on both environmental and resource issues and, on means for improving inter-governmental relations. Annual Reports of the CCRM during the late 1960's and into the 1970's suggest an organization defining its role as pro-active in both policy and institutional terms. Indeed, so extensive was the discussion about the role of the CCRM that by 1971 the CCRM had been re-defined and re-named as the Canadian Council of Resource and Environment Ministers (CCREM). The link between resource management and environment was acknowledged. And, the political imperativeness of environmental issues certainly became clear after the election of 1968 when Pierre Trudeau became Prime Minister of Canada (Dwivedi, 1972-73; Lundqvist, 1974).

Another national Conference in 1973, "Man and Resources", organized by CCREM, among other things raised two key additional issues. First, there was a recognition that environmental quality guidelines were essential if the practical advantages of policy co-ordination were to ensue. Second, it was becoming abundantly apparent that public concerns about resources and environment were being translated into demands for greater public participation and consultation<sup>26</sup>. Ironically, it was this latter pressure which caused much grief for elected politicians. The "Man and Resources" Conference itself became a forum for

attacking the failures of provincial governments<sup>27</sup>. Strangely, the very success of the CCREM in developing the "Man and Resources" Conference led to basic questions about the purpose and burgeoning size of the Council's Secretariat. Furthermore, environmental issues soon began to take a second seat to energy issues after 1973. At the federal Government level, for example, the Department of the Environment was reduced to junior status and suffered major staff and budget reductions by 1977 (Brown, 1992). Until the early 1980's, therefore, the CCREM continued to persist but often at the sufferance of governments pursuing energy resource development. By 1985 various issues, while still co-ordinated through CCREM, were being considered separately. Thus in its Annual Report for 1984-1985 the CCREM provided separate accounts on the activities of the Council, energy Ministers, mines and minerals Ministers, environment Ministers and wildlife Ministers. Jurisdiction was being splintered not only constitutionally between governments but even further within governments.

A 1987 national Task Force on the Environment and the Economy provided renewed impetus for restructuring the processes of intergovernmental resource management and environmental protection. Release of the Report in September 1987 eventually led to a re-definition of the role of CCREM. By October 1988 wildlife and forestry Ministries had detached themselves from the CCREM and the environment Ministers decided to re-focus the Council, re-defined its role and re-name it. Thus, by 1989 the Canadian Council of Ministers of the Environment (CCME) had come into being. Eventually it was headquartered, on purpose, distantly from Ottawa and more or less at the east-west geographical centre of Canada, Winnipeg, Manitoba.

Since 1990 a key effort of the CCME has been to lead in developing processes and machinery for intergovernmental co-ordination of environmental policies and activities. CCME is a Council of 13 Ministers. Reporting directly to it is a mirror Council of Deputy Ministers. The Secretariat and a Management Committee reports to the two senior Councils. Three Committees serve the Council of Deputy Ministers (and, in practice, the Council of Ministers): Strategic Planning; Environmental Protection; and, of greatest interest to this project, something known as "Lead Representatives Committee on Harmonization" (LRC). It is to the work of this latter Committee that we turn to examine the current state of policy co-ordination on environmental issues in Canada to-day.

Since its inception the CCME has been actively involved in the promotion of environmental protection and, more recently in sustainable development. Through the period 1988-1991 the Council was largely guided by a Report

(adopted in the autumn of 1987) from a national Task Force on the Environment and the Economy (NTFEE). Spurred by that more comprehensive direction, the CCME released its own Strategic Overview in 1992. This was intended to guide the Council over the next five years.

Recommendations in the Report were divided into two *implementation phases*. Phase One was described as "laying the foundation" and encouraged all levels of government to engage in development of round tables on environmental issues and their relationship to the economy. There was also an expression of the hope that conservation strategies could be developed. Phase Two was dubbed the "future agenda" and sought to link environmental and conservation issues with longer-term sustainable development. This latter Phase was to include more wide-spread leadership from both governments and industry as well as better communication and education on sustainable development issues (NTFEE, 1988).

Among other things, the National Task Force Report recommended creation of federal-provincial "round tables" on the environment and the economy. There was also a continuation of work on issues identified by the former Council of Resource and Energy Ministers -such matters as management of toxic and hazardous wastes and the impact of such waste disposal upon air and water quality. An Advisory Committee on Environment and Economy was created in October 1988 to provide feedback on implementation of Task Force recommendations efforts. This Advisory Committee reported back to the CCME in October 1989.

The Advisory Committee's 1989 Report is interesting in many respects because it did identify jurisdictional problems. For example, in the area of "conservation strategies" [a theme which emerged in the Bruntland Report] the Advisory Committee suggested that conservation strategies involved integration of policies pertaining to resource protection, resource management; resource development and a positive linkage to maintainable sustainable development. Conservation strategies should also include broadly-based formal consultative processes designed to ensure public input to developmental programmes and prospective policies. In its 1989 Report to the CCME the Advisory Committee identified a key emerging issue. It stated that (p. 11):

A blunt assessment of the current rate of progress in the development of national, provincial and territorial conservation strategies raises a strong note of concern; unless an immediate priority is placed on completing conservation strategies, fewer than half of Canada's jurisdictions will have strategies in place by 1992.



The CCME's contribution to the development of conservation strategies really began in 1989.

A volume titled: *Conservation Strategies: A Compendium of Canadian Experiences*, essentially offered suggestions on what it was anticipated would be effective conservation strategies. By 1992, however, the impetus to develop conservation strategies had basically been subsumed under more pressing considerations.

In the post-Meech Lake Accord collapse a mood of pessimism infused inter-governmental relations in Canada (Brown-John 1991b). Surveys conducted among senior provincial public servants revealed an immense sense of failure with the then emerging inter-governmental consultative processes. The processes as they were emerging were largely consultative. Within line provincial departments Deputy Ministers (Permanent Secretaries) found that their relationships with their federal counterparts were much more productive. Traditionally, meetings of provincial policy area Ministers or their Deputy Ministers with federal equivalents had been very much dominated by the latter. Agendas were set by federal officials often with little or no consultation with provincial counterparts: "Ottawa announced and the provinces received".

The advent of inter-governmental units largely after 1971, often attached to the Office of the provincial Premier added a new dimension to inter-governmental relations. Relationships between provincial line departments and their federal equivalents became less diffused and more closely integrated into an overall provincial inter-governmental strategy. Often the relationships, especially where inter-governmental offices were involved, became confrontational as provincial governments, particularly those in western Canada and, of course, Québec sought to alter the basic federal relationship. The process saw full fruition in the weeks leading up to conclusion of the Meech Lake Constitutional Accord when inter-governmental officials pre-tested the basic ingredients of a prospective Accord at a meeting of officials in Ottawa.

The process of inter-governmental consultation, negotiation and even consensus building tends to characterize inter-governmental relations in Canada. But, in some respects, it has achieved its most characteristic iteration in the more formal structure of the Canadian Council of Ministers of the Environment (CCME). Yet even CCME has proven at times a victim of its political masters.

Thus, while some provinces did move forward with development of conservation strategies, CCME had lost the impetus in terms of development of a national conservation strategy. Indeed, in the post-Meech Lake Accord period the idea that a conservation strategy could serve as a basis for planning national environmental and sustainable development agreements seems to have faded from the environmental intergovernmental policy agenda.

Yet not all was in disarray. The NTFEE recommendations that "round tables" be encouraged found some support. Indeed, as far back as 1988 a National Round Table on Environment and Economy had been launched. In many respects this National Round Table opened the door to the later much more broadly defined environmental policy community. Based upon premises of broad consultation and consensus building the National Round Table (NRT) served to identify diverse interests and it acted as a facilitator of consultation and agreement through consensus building. The NRT functioned through a variety of task forces and sub-committees. Membership invariably was well-balanced and included spokespersons for a diverse array of policy community interests. Sectoral round tables (eg. forestry) have served to focus both conflict and conflict resolution (NRT, 1993).

The Round Table concept has not been without criticism (Howllet, 1990). Composition was criticized largely because appointments to the Round Tables were made by governments thereby opening the way to petty patronage through Cabinet and Ministry preferences. As well, the close working relationship between industry and government usually meant that industry representation was dominant while less prominent interests often were excluded. Furthermore, in practice the Round Tables began to respond to government initiatives rather than lead initiatives. Agendas were prepared within Ministries, Ministers would offer platitudes and concurrence of Round Tables would be taken as tacit approval of any policy initiative. Indeed, by 1993 British Columbia could announce that it was winding-down its round table as its mandate had been achieved. Little solid evidence was ever provided in support of that claim but it was clear that the British Columbia Round Table was becoming something of an impediment to a provincial Government desperately seeking to weave its way through a minefield strewn with powerful forest and processed wood companies and increasingly more strident environmental interest groups.

The same type of battle raged in the province of Ontario until the current Conservative provincial Government was elected in 1995. Since that election environmental regulation and protection is being rapidly dismantled and as

recently as August 1996 the Government of Ontario authorized logging in the last remaining stands of original white and red pine trees left in the province<sup>28</sup>. Round Tables do not serve provincial governments intent on unrestricted economic development.

The relationship between the NRT and CCME initially was very positive. However, over time the relationship deteriorated as CCME continued to seek national accommodation while the Round Tables increasingly came to represent single, often narrowly defined, provincial interests. There was also the issue of duplication of activities and the inevitability of conflicts emerging from those activities. In some cases, the NRT became simply one among many interests consulted by CCME in its efforts to develop policy direction. For example, in a 1993 Report on liability for contaminated waste disposal sites, the NRT was essentially peripheralized by CCME (CCME, 1993). Another obvious problem was that as the Round Tables were products of provincial bureaucracies these same bureaucracies took great pains to set and to manipulate Agendas. Thus, CCME, as a prospective national environmental policy facilitator and co-ordinator became less influential in defining agendas which were increasingly more politicized by provincial Ministries and their local industry associates. CCME also increasingly sought to direct its work to specific issues while Round Tables increasingly became forums for broad, often direction less, discussions. Broad environmental issue discussions were wonderful for public relations but were valueless for the development of specific policy issue responses. Essentially, therefore, the focus of environmental policy initiatives tended towards CCME where senior officials and responsible Ministers could meet, discuss and decide behind closed doors and away from the glare of media and the invective of irate environmental interest groups.

Thus, the re-definition of the CCME's role after 1988 meant that the Council was to become more involved in a wider range of environmental and sustainable development issues. Thus, in March 1990 the Council of Environment Ministers adopted a *Statement on Interjurisdictional Co-operation on Environmental Matters* and at the same time the Council finalized something known as *The National Packaging Protocol*. The Protocol outlined a plan for the reduction of consumer product packaging waste by 50% by the year 2000. In retrospect the objectives of that Protocol largely seem to have been forgotten despite significant efforts to encourage re-cycling of glass, paper and plastic wastes.

Incidentally, there is evidence of a trend here which has become somewhat characteristic of inter-governmental relations in general in Canada. The trend is the tendency to employ terminology and even characteristic practices from the field of international law and international relations; thus, "Protocols" of agreement; "ratification" of agreements; the use of "signature" to an agreement as "agreement in principle" to be followed by formal participant party "ratification". The trend to employ the terminology of international law and relations has been observed in other federal jurisdictions and can be viewed positively as an acknowledgement of the relative status of component units as "sovereign entities within the limits defined in formal constitutional assignment of legislative competencies".

During 1990 and 1991, the federal Government was engaged in the process of developing something known as "The Green Plan". The "Green Plan" was a much publicized and promoted federal Government initiative. Indeed, the federal Minister personally attended many of the very public hearings around the Canada, Public participation was encouraged, focus groups were involved and, in principle, inter-action of various groups was supposed to result in new federal directions in environmental policy. The problems with the "Green Plan" were both the cosmetic nature of the activity in terms of encouraging high levels of public expectation about prospective policy outputs and the inevitably characteristic problem of longevity of focus due to the political life expectancy of the average federal Minister of the Environment. All too frequently much publicized policy direction initiatives disappear from the policy agenda when the lead Minister rotates within Cabinet or leaves Cabinet or when a Government is defeated in an election.

Further compounding the problem was the simple fact that a well publicized federal environmental initiative neither paid significant heed to constitutional jurisdictions nor did it encourage the active public to realistically consider jurisdictional issues. Thus, in perhaps a normal behavioural manner, "the active environmental public policy community" was encouraged to believe that a federal Government initiative could carry over into provincial jurisdictions. This was at a time when the CCME itself was seeking to actively resolve jurisdictional problems and to reconcile conflicts over inter-provincial environmental problems. In addition, CCME was continuously monitoring environmental issues with a view to providing directions to policy makers (IRPP, 1992).

The monitoring function or "State of the Environment" (SOE) was an area wherein CCME came to play a prominent role. Long-standing complaints about the state and condition of Canada's environment had been made by assorted environmental interest groups over the years. At a 1993 meeting organized by CCME participants urged the CCME to develop a national clearing house and/or data bank containing environmental information (Peat Marwick, 1993). Some provincial governments had been offering generalized SOEs as far back as the early 1970s and a more comprehensive SOE was prepared by the federal Government in 1986. The problem with assorted SOEs and even with a national SOE is that comparison has political drawbacks. Cross-jurisdictional comparisons highlight discrepancies. With the ease with which information can be moved via national media, such comparisons lead to allegations that one jurisdiction may not be doing as well as another jurisdiction. Of course, in terms of comparative federalism it has always been argued that such cross-jurisdictional comparisons also have merit. Thus, provinces can be viewed as "laboratories" for experiments in new legislative directions. Historically, for example, the province of Saskatchewan led Canada in development of innovative social legislation. However, once legislation is in place and apparently successful in one province there is strong political pressure to "copy-cat" that success into another jurisdiction. Ironically, the dismantling of Canada's social welfare system which is being led by conservative governments in Alberta and Ontario is also very much a product of cross-jurisdictional comparisons. Thus, the enormous advantage of federal relationships can work both ways to build and to destroy.

SOEs held the prospect of similar political comparisons and, thus, from the perspective of CCME cross-jurisdictional comparisons could prove counter-productive. The prospect of embarrassing provincial governments while simultaneously seeking to promote co-operation was daunting.

In 1992, in its *Strategic Overview* (CCME, 1992) the Council sought to establish specific goals and to prioritize those goals.

Building partnerships;

Building a vision of Sustainable Development and integrating that with environmental issues;

Overcoming jurisdictional fragmentation, overlap, duplication and conflict; and,

Adjusting to Canada's global position and international realities.

Prospective CCME activities pursuant to these goals were prioritized as 'high', 'medium' and 'low'. High priorities were assigned to such matters as air

quality, global warming, environmental assessments and impact analysis, and liability issues emerging from contaminated waste disposal sites. Medium priorities included waste management and technical advancements in waste management technology including harmonization of regulation. Finally, lower priorities included the politically dangerous field of SOE reporting. Particular issues such as incorporating the views and concerns of native peoples began to emerge after 1992.

Key areas such as the linkage between a healthy economy and a healthy environment eventually garnered high priority as the symbiosis of the mutual relationship became more evident. Furthermore, increased criticism over jurisdictional disputes between the federal Government and several provinces - some of which, as noted earlier, required resolution by the Supreme Court of Canada- more or less forced the CCME to actively engage in cross-jurisdictional harmonization. For example, even in the area of inter-provincial trade it was not uncommon for provinces to employ environmental quality standards to restrict the free movement of commerce among provinces. "Non-tariff" barriers to trade are common in relationships between states in the United States. But in that federal jurisdiction, the presence of a constitutional "commerce clause" has facilitated federal intervention to reduce some artificial barriers to the free flow of goods and services. But this is not the case in Canada where the relevant provisions of the constitution have been much more restrictively interpreted.

Consequently, negotiations among provinces over matters seemingly as innocuous as quality of the environment have been linked, often to surreptitious provincial broad policy agendas which incorporated a wide range of provincial jurisdictional claims and bargaining positions. And, such integration as might have occurred could only transpire at the level of First Ministers' Conferences which are held, generally, but once a year and which have crowded agendas covering all aspects of the management of the federal system from macro-constitutional to critical issues such as transfer payments and agreements on basic fiscal issues.

Consequently, the capacity of CCME to facilitate co-operation and consensus building on environmental issues was invariably constrained by related economic and even constitutional issues which were well outside the competence and capacity of CCME to control. Indeed, as an aside at this point, CCME is somewhat politically vulnerable at this point in time because, as suggested earlier, as governments seek to manage debts and current account deficits environmental policy issues have been generally assigned a reduced

importance. Evidence in support of this may be found in major operational funding reductions for CCME's activities.

Inter-provincial trade negotiations, on occasion, have been rancorous. Adding to the problem has been a separatist provincial government in Québec which has employed virtually any pretext, no matter how irrelevant or even ludicrous, to convince its residents that federalism does not work and that the solution to all problems is separation from Canada! For example, a federal Government requirement that Phase II of the massive James Bay hydro-electric development needed an impact assessment -as most of the land involved is claimed or administered by native peoples whose fate falls within federal jurisdiction- was greeted by the Québec Government as another example of the federal Government trying to thwart Québec's pursuit of self-interest and sovereignty<sup>29</sup>. The argument was absurd but it served to illustrate the complexity of dealing with environmental issues which are invariably linked with broader political and economic agendas. Indeed, in a fit of nationalistic pique the Québec Government even boycotted a critical annual meeting of provincial Premiers where significant progress was made on reduction of inter-provincial barriers to free trade, These barriers can range from local government requirements that goods and services contracts be awarded locally rather than to the lowest competitive bidder to matters such as varying regulatory standards and professional qualifications.

The CCME was also peripheralized when the North American Free Trade Agreement was concluded between Canada, Mexico and the United States. Responsibility for carrying-out environmental responsibilities under NAFTA was assigned to trade Ministers. CCME, as a Council of Environment Ministers, was effectively by-passed thereby suggesting that environmental quality considerations were to take second or even tertiary place to free trade.

Nevertheless, pressure has remained for some form of integration of policy making, decision making and policy implementation in the environmental and sustainable development public policy area. The Bruntland Commission, for example, had stressed the dangers of fragmented decision making in the environmental field. The CCME in both the 1992 and 1993 environmental scan workshops had concluded that institutional accommodation was required to manage environmental concerns:

...positive environmental measures introduced by environmental ministries are being counteracted by forestry, agriculture, energy, economic development, and finance ministries. In short, ...the environment ministries must reach out to other

ministries just as the other ministries need to involve the environment ministries (CCME, 1992; 83).

*Intra-governmental* harmonization was proving as vexing as *inter-governmental* harmonization. Even within their own provincial jurisdictions environmental Ministers, while ostensible occupants of high-profile ministerial portfolios, were not 'in the loop' of high-powered Cabinet Ministers.

The issue of conflicts between governmental ministries, between governments and between economic development and environmental priorities dominates the whole field of environmental public policy in Canada. For example, what constitutes an "environmental impact assessment" is far from normative. A move, for example, by the province of British Columbia in 1993 to put in place environmental assessment legislation was dominated by the provincial Minister's desire to have his regulations in place before pending federal legislation in order that his province's version of environmental assessment would take precedence should federal and provincial regulations come into conflict (*The Globe and Mail*, June 29, 1993, p. B2). This, of course, emphasizes the problem of vagueness in constitutional de-limitation of jurisdiction. Where federal fisheries regulations might conflict with provincial regulations relating to waste disposal of pulp plant effluents, the province sought to protect its economic concerns in preference to federal responsibilities for off-shore fisheries.

Other examples abound of conflicts in interpretation of what constitutes an effective environmental impact assessment. For example, a province of Nova Scotia coal powered generating plant known as the Point Aconi project received a cursory one-day public hearing despite protests from environmentalists. And, in Québec, an attempt by the Québec Environmental Hearing Board to conduct an environmental impact assessment of something known as the SOLIGAZ development was turned down by the province's environment Minister (*The Globe and Mail*, March 28, 1992, p. B4). The Oldman River dam project in Alberta received permission to construct a dam in 1986; the comprehensive environmental assessment was not completed until 1990 and Alberta in collaboration with five other provinces challenged a federal Government effort to introduce a federal environmental impact assessment. Meanwhile, construction of the dam continued. The Supreme Court ordered a federal environmental assessment but that scarcely delayed construction. Similarly in Saskatchewan a dispute over environmental assessment during construction of the Rafferty-Alameda hydro and irrigation dam was sent to the Supreme Court and while a federal environmental assessment was ordered, construction continued.



Provinces, therefore under the imperative of economic development have demonstrably placed environmental concerns much lower upon the policy agenda. It was surprising therefore, that in 1993 the Canadian Council of Environment Ministers actually concurred in directing their senior staff to prepare a draft agreement for harmonization of policy delivery in the environmental field. Perhaps the environment ministers were beginning to appreciate that the public's patience with jurisdictional 'turf wars' was wearing thin.

## **THE HARMONIZATION INITIATIVE OF CCME<sup>30</sup>**

Harmonization of environmental management was identified as a major priority in November, 1993. Intended to reduce duplication and minimize jurisdictional overlap, the Council of Ministers directed that a committee of senior federal, provincial and territorial officials [the Lead Representatives Committee (LRC)] develop guidelines to enhance environmental protection in Canada. The LRC subsequently began work on an Environmental Management Framework Agreement (EMFA) which contains 11 Schedules. These 11 Schedules are listed later in this discussion. Each Schedule Title is accompanied by a brief descriptive note. Each Schedule contains, as an Appendix, a relatively complete list of applicable provincial and territorial legislation and regulations.

The EMFA is the product of a developing, although often sporadic, history of seeking co-operation among levels of governments in Canada. In 1990, for example, CCME developed a *Statement of Interjurisdictional Co-operation on Environmental Matters*. This *Statement* served as a basis for mutual co-operation in the effort to develop national and even international approaches to environmental problems. In the period between 1990 and 1995 several co-operative agreements were reached: The National Contaminated Sites Remediation Programme; the National Packaging Protocol; The National Action Plan to Phase Out CFCs; The Canadian Water Quality Guidelines; and, The National action Plan to Encourage Water Use Efficiency. In addition, acting as co-ordinator and lead management agency, CCME actively aided in preparing for Canada's participation at the United Nations Conference on Environment and Development (UNCED) in 1992 and CCME is involved in the follow-up, development of a Canadian Biodiversity Strategy. Indeed, by 1993 an Environment Canada [the federal department] inventory listed several hundred agreements encompassing over 80 intergovernmental activities. Yet many problems remained.

Federal fisheries management legislation often conflicted with provincial industrial development initiatives (eg. Phase II of the James Bay Hydro electric project). And, as Fitzsimmons (1995) has noted: "despite these success, federal and provincial officials became increasingly concerned that they were treating symptoms of the problem, rather than its causes". Ironically, the burgeoning list of intergovernmental agreements increasingly reduced opportunities for public consultation -the process became less transparent as it became more complex (although CCME is now endeavouring to rectify that problem with Internet access).

Furthermore, as the 1990's dawned, governments throughout Canada began to introduce significant cost reductions in their respective efforts to manage debts and deficits. Governments and senior public officials all began to examine means to reduce regulatory overlap and introduce greater efficiencies into delivery of environmental services and policies. By mid-1993 federal and provincial Finance Ministers had more or less agreed upon the need to impose fiscal constraints upon all their respective governments. It followed that environment Ministers and their senior officials would not be far behind.

Consequently, in August 1993, senior officials proposed to their Ministers a fundamental re-think of the manner in which responsibilities were assigned for resolving environmental issues. Conceptually, the proposal sought to minimize jurisdictional differences while emphasizing capacities and strengths in terms of delivery of environmental services and managing policies. In light of failure to amend Canada's Constitution through the two attempts known respectively as the Meech Lake Accord and the Charlottetown Accord, it was clear that rationalization of environmental policy would have to take place *despite* constitutional jurisdictional competencies. Responsibilities would flow to that level of government best able to deliver the service<sup>31</sup>.

At the Council of Ministers' meeting in November, 1993, an officials' Paper titled: *Rationalizing the Environmental Management Framework* was presented. The Paper proposed development of an Environmental Framework Agreement for Canada for consideration at the next Ministerial meeting in May, 1994. Almost simultaneously, Canada's First Ministers [provincial Premiers and federal Prime Minister]<sup>32</sup> were engaged in developing what became known as the *Efficiency of Federation Agreements* which were approved by the First Ministers (except Québec) in July 1994. The emerging CCME Environmental Framework

Agreement was to be an instrumental component of these broader Federation Agreements.

Meanwhile CCME was developing the projected Environmental Management Framework Agreement through a process of line officials' activities, CCME Secretariat co-ordination, establishment of a National Advisory Group (16 individuals from across Canada) which provided comment upon draft of a Paper titled: *Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles* which had been prepared by a task group of officials on the structure of the proposed EMFA. Between August 1994 and May 1995 the LRC conducted its work through employment of 14 subcommittees and over 125 officials not including hundreds of others across the country who contributed to the project. A draft Agreement was available in December 1994 and that draft was submitted to public consultation (over 1,000 persons identified with environmental groups or having relevant expertise were engaged in the consultative process). The stakeholders net was cast wide<sup>33</sup> and the door was opened widely for all comments, submissions and suggestions. By May 1995, well ahead of schedule, the EMFA accompanied by 11 Schedules was ready for Ministerial review at the Ministers' Council meeting. Outstanding issues were returned to the LRC and additional work was undertaken in anticipation of the Ministers' next Council meeting in October 1995. The Agreement was not made public in detail during that period as the federal Government wanted it examined by an House of Commons Standing Committee. Canada's then Environment Minister, Hon. Sheila Copps MP, expressed concern that the overall EMFA initiative would undermine national standards and, thus, a comprehensive national perspective (Kennett, 1995). As of this date (September 1996) the EMFA has not been agreed to by all levels of government in Canada although it was anticipated that this would take place in some form at the May, 1996, meeting of the Council of Ministers (Matas, 1996). That, instead, the Ministers chose to opt for caution in respect to the Harmonization Agreement and to produce instead a *Communiqué* which appears to have effectively slowed the process by diversion. More will be said on this later.

## **THE ENVIRONMENTAL MANAGEMENT FRAMEWORK AGREEMENT (EMFA)**

In principle, the EMFA would effectively achieve, by administrative action, some of what could not be achieved by formal constitutional amendment in Canada. In some respects this is in keeping with two well established traditions in Canadian federalism: 1) the trend towards administrative management of the

federal system; and, ii) the tendency to stress the 'political' qualities of federalism over formal juridical and constitutional issues<sup>34</sup>. This is what may be referred to as "service centred federalism" or "service based federalism", that is a federal relationship where the primary objective is serving the public and resolving issues irrespective of jurisdiction. In most respects the EMFA is a pragmatic approach to complex and important political and quality of life issues.

The EMFA encompasses 11 functional areas:

1. *Monitoring*: data gathering, an environmental database, interpretation and access to data;

2. *Environmental Assessment*: the process of identifying and evaluating environmental impacts of projects or activities and the process of public consultation thereupon;

3. *Compliance*: the spectrum of tools available to enforce compliance with environmental legislation;

4. *International Affairs*: preparation, negotiation, implementation and/ or amendment of international environmental agreements;

5. *Guidelines, Objectives and Standards*: environmental quality codes for environmental management processes;

6. *Policy and Legislation*: choice of policy instruments and co-operation inter-jurisdictionally;

7. *Environmental Education/Communications*: to provide all Canadians with information on applicable laws, outstanding issues, government policies and technical procedures;

8. *Environmental Emergency Response*: pertains to the capacities of various levels of governments to respond to accidental discharges of pollutants especially where health hazards are contemplated;

9. *Research and Development*: data analysis, development and application of ecological technologies;

10. *State of the Environment Reporting*: interpretation of economic, social and environmental data and the implications thereof including trends in education;

11. *Pollution Prevention*: development of pollution prevention programmes including voluntary and educational activities.

Each of the eleven functional areas was defined as a Schedule to the Agreement. The draft Agreement and 10 of the 11 Schedules were released for public discussion in October 1995. The Agreement was discussed at the May, 1996, meeting of Environment Ministers and officials were directed to prepare *only* a draft umbrella agreement as well as two "sub-agreements on inspections, standards and environmental assessment" (CCME, 1996a). Initially, in light of

comments and public discussion the Ministers agreed to defer further discussion until their next meeting in 1997.

According to the CCME over 1,600 copies of the draft Agreement were circulated to individuals within the policy community. A period of three months was given for comment in a host of forums including CCME's "home page" on the World Wide Web [www.ccme.ca/ccme]. There are also four public E-mail discussion groups available for review of the Harmonization Agreement. Some 60 written submissions were received along with comments at several workshops.

CCME organized the comments according to source and commonality of theme, thus:

Business and Industry expressed views about:

- I. the importance of achieving clarity, consistency and predictability in legislation and regulation;
  - II. the need to recognize and facilitate voluntary environmental protection initiatives;
  - III. the need to view industry as a partner in environmental management;
- and,
- IV. the need for strong federal leadership in specific areas of environmental protection and regulation.

Strong views emerged from many of the non-governmental environmental groups including the Canadian Environmental Network and the Canadian Institute for Environmental Law and Policy which submitted an 89 page analysis and commentary.

Environmental Non-Governmental Organizations expressed views about:

- I. the possibility that the proposed harmonization Agreement seeks to solve a problem which does not exist, in other words, there is at issue a fundamental question about the rationale behind the proposed Agreement;
- II. the probable devolution of federal Government environmental roles and responsibilities<sup>35</sup>;
- III. the prospect of a "new level" of government which is viewed as illegitimate, unaccountable and unworkable;
- IV. the absence of direct involvement for native peoples and their role in the management of the environment in Canada; and,

V. the responsive nature of the proposed Agreement, that is, it contains little in the way of an address the real emerging environmental problems and protection requirements.

Aboriginal or Native Peoples expressed views about:

- I. the lack of a specific relationship between environmental concerns and outstanding land claim agreements and self-government agreements;
- II. the lack of specificity in respect to northern territories; and,
- III. accommodation of the new northern territory of Nunavut.

Academics, Experts and Other Persons expressed views about:

- I. jurisdictional overlap and the role of the federal Government in ensuring applicability of national minimum standards; and,
- II. the lack of attention to the concerns of municipal governments and their limited fiscal resources.

Other concerns about the proposed Harmonization Agreement related to such matters as citizen participation ("process transparency"), the boycott of national forums by the separatist Government of Québec; the lack of clearly enunciated dispute resolutions processes; and, almost predictably, the simple fact that such consensus agreements often achieve only the lowest common denominator of consensus and that results, effectively, in a very mellow mask behind which provinces can do -as they are doing- more or less as they choose.

The Council of Ministers met in Toronto in late May 1996. In the meeting *Communiqué* they expressed the view that henceforth CCME would have a "more focused vision". "Ministers agreed that emphasis will continue to be placed on cooperation and coordination between member jurisdictions, particularly relating to consistent standards and guidelines, policy development, processes and strategies, and data management".

Officials were directed to prepare an accord for the next meeting "which would include objectives and principles for effective environmental management". And, the Ministers "also agreed to develop multilateral agreements on inspection, environmental assessment and standards development to demonstrate how the principles of the accord will be applied". Efforts will be made to ensure harmonization of respective environmental instruments such as legislation and regulations.

The Ministers did approve a "pollution prevention strategy" especially insofar as concerns toxic substances. The strategy would involve re-cycling, appropriate cost-accounting methodologies, partnerships and a commitment to "strong government leadership". Included in this general area is something termed "packaging stewardship" which essentially is an euphemism for transfer of responsibility for regulation and re-cycling of packaging materials over to the affected industries. Termed "extended responsibilities" the ministers appear to have more or less abandoned responsibility for regulating the packaging materials and its disposal or re-cycling.

The *Communiqué* also contained a very bland statement on environment, health and occupational safety. The Ministers endorsed "more active partnerships in these areas". This statement probably reflects the direction in which the Ontario Government, for example, was heading at the time the Council met. That province's minister of the Environment was Chair and in the weeks after the Council meeting the Government of Ontario both reduced occupational health protection regulation, eliminated funding for occupational health diagnostic clinics, and then Tabled legislation (some of which has been withdrawn) which would have permitted individual employers to negotiate health and safety standards on an individual factory or plant basis, that is, as part of a collective agreement where agreements existed or simply as part of a job retention agreement.

Finally, the Ministers expressed concerns about climatic change and progress being made towards a cleaner environment through cleaner vehicle fuel emission standards.

In practice, the EMFA could have a profound impact upon both the quality of life in Canada and upon the very operation of the federal political system. Whether, in light of the *Communiqué* of May 31st 1996 this will actually come to fruition is another ver moot question. Some concerns have been expressed about the stress upon consensus building within the EMFA -the fear being that consensus often can be an euphemism for 'lowest common level'. Nevertheless, the EMFA could result in a practical transfer of many operational federal functions to the level of the provinces. Concerns have been expressed, however, about this form of decentralization partially because it relates more to transferring responsibility for fiscal arrangements and partially because it is seen by many observers as part of the long-term process of dismantling and undermining Canada's world class social welfare net, Environmental protection is very much part of the quality of life and dismantling the social welfare net also translates into an attack upon environmental protection. The Government of Ontario already has

demonstrated a callous disregard for environmental issues as it pushes its version of "market-driven" government into the Canadian political system.

A strong and active CCME should ensure that, at minimum, continuity in collaborative and co-operative actions among the provinces will ensue. Kennett (1995) has suggested that the EMFA -also referred to as the "Harmonization Initiative"- is federalism by administrative means. This is an argument I have been making for some years (Brown-John, 1991a, 1991b, 1992a, 1992b). Ultimately, whether CCME will be permitted to make such innovative inroads into environmental protection is disturbingly uncertain since May 31, 1996.

Since the May, 1996 meeting, Environment Deputy Ministers and their technical officials have been actively at work following the directions set forth by the Ministers. By late August and early September, 1996, a Draft "National Accord on Environmental Harmonization" had been developed. The Draft Accord offers a Vision of governments working in partnership to achieve "the highest level of environmental quality for all Canadians". The Vision is the sort of political vision one would expect after all to suggest anything but "the highest quality" would be politically meaningless.

An essential component of the Draft National Accord on Environmental Harmonization is a statement of Objectives. Under three statements of principle six objectives are enumerated, viz:

The objectives of harmonization are to:

-enhance environmental protection;

-promote sustainable development; and

-achieve *greater efficiency, effectiveness, accountability, predictability and clarity* [my emphasis] in Canada, by:

1. Reviewing and adjusting Canada's environmental management regime to accommodate environmental needs, capacities, expertise and fiscal realities;

*Comment: the linkage between 'needs' and 'fiscal realities' suggests, in light of fiscal issues discussed earlier, the prospect that needs will be defined as minimal or, at best, needs will be defined in terms of limited fiscal capabilities; the reference to 'expertise' suggests a sharing of data and expert research and technical knowledge -this is an area already a practical reality in some other public policy areas within Canada where provincial governments often share rather than duplicate research and findings.*



2. Delineating the respective roles and responsibilities of the Federal, Provincial and Territorial governments within an environmental management partnership;

*Comment: Of course this is one of the primary reasons for the harmonization initiative; Canadians are proving less and less tolerant of claims that constitutional jurisdiction bars a level of government from providing a specific service; constitutional jurisdiction surely will be respected, but a move towards a more service-centred federal relationship will offer the prospect of less conflict and duplication and more efficiency in ensuring delivery of services conducive to environmental protection.*

3. Developing and implementing nationally consistent environmental measures in Canada, including policies, standards, objectives, legislation and regulations, using a co-operative approach;

*Comment: In some respects this is the proverbial bottom-line because if Canada's environmental policy establishment is unable to assure residents, regardless of jurisdiction, that they will not be disadvantaged or the quality of their lives impaired, then the Ministers and CCME will have failed; if provinces were unrestrained in establishing environmental standards, then two possibilities would seem to result, i) trans-boundary pollution would be economically viable, eg. To export problems to another jurisdiction; and, ii) competition could ensue-much as it once did in respect to varying rates of taxation and as it still does in terms of inducements to locate industries -easing environmental legislation as an inducement for industry to locate in weak environmental regulation areas is already a problem in the North American Free Trade Agreement and in the Canada-US Free Trade Agreement where, in the former, Mexican environmental legislation is weak and, in respect to the latter, many southern American states have inconsequential environmental and labour legislation.*

4. Identifying and addressing gaps and weaknesses in environmental activities;

*Comment One is tempted to ask the question here, if CCME for example identifies a "gap" or "weakness" will the Ministers have the collective will to 'require' alterations in the practices of one of their collective jurisdictions?*

5. Preventing inter-jurisdictional disputes; and

*Comment: Once more this is a key feature of the harmonization process; inter-jurisdiction disputes occur both due to constitutional bifurcation and, due to economic and social policy goals variations; resolving inter-jurisdictional disputes in Canada has enormous political ramifications and it will be interesting to see*

*whether Canada's environment Ministers have the will to engage in dispute resolution in a sometimes highly charged political context.*

6. Ensuring all Canadians can be confident that the quality of their environment is respected by neighbouring jurisdictions.

*Comment: Whether this will encompass international issues as well as inter-provincial is not entirely clear; what is clear, however, is that if international is included in "neighbouring" then the peripheralization of CCME in the North American Free Trade negotiations and subsequent Agreement does not necessarily augur well for resolving very complex trans-boundary and shared resources (eg. The Great Lakes) issues with the United States.*

Federalism is essentially the management of conflict and political decision making. The Draft National Accord, along with the two tentative Sub-Agreements (CCME, 1996d; 1996e) could be significant steps (albeit, NOT 'great leaps for humankind'!) forward not only in terms of managing complex public policy issue areas but in terms of managing a complex political system. Canadians, again, are demonstrating to the world that while federal political systems may have their stresses and strains, they can be made to function and to achieve the primary purposes of any governmental system -serving the public.

CCME (1996c) have advised Canadians that it is the intention of all senior levels of government in Canada "to prepare a new multilateral approach to harmonization of Environmental Assessment" and, further, to "undertake to modify their respective legislation, regulations, guidelines and processes to reflect the new [multilateral] approach". Streamlining processes, reducing costs, satisfying demands for environmental assessments, recognition of aboriginal environmental issues, meeting international standards and facilitating development of an environmental assessment industry, are all lofty goals. Whether the political will and fiscal resources will be there when the public need is evident is quite another matter. At the moment the political will appears to be lacking as provincial governments, ostensibly in the interests of deficit reduction, slash environmental protection and monitoring budgets.

Trendy to-day, in the more neo-conservative "market economy" is disengagement of government, deregulation and the introduction of often questionable voluntary industry standards and guidelines. Industry capture of the environmental protection responsibility, combined with industry sponsored environmental audits, places both environmental protection and inter-governmental co-operation of universal standards in serious jeopardy. The

province of Alberta, for example, privatized publication of its Guidelines on Hunting and Fishing in the province. The private producer of the Guidelines then solicited commercial advertising for the publication. A very prominent advertiser was a notorious convicted poacher and dealer in animal body parts. Voluntary industry standards, which have worked to effectively exclude serious environmental concerns have made a mockery of the CCME's Harmonization Initiative.

One cannot help being somewhat sceptical of prospective Ministerial Harmonization Accord when the Ministers themselves have been much less than absolutely forthright in pursuing even the motherhood objective of "the highest level of environmental quality for all Canadians". If Ministers have spent so much time, and consumed so much of the effort of their technical officials, and they have not yet achieved a broadly based environmental harmonization consensus to this point, can Canadians realistically expect much improvement in future?

Federalism can be made to work when there is a broad understanding of the purposes of various levels of government. That consensus on purpose -the "will to succeed"- must exist or much of what will purport to be an harmonization of jurisdiction and process will be meaningless in practice.

## NOTES

Persons interested in commenting or learning more of the CCME Harmonization Initiative are invited to log-on to the CCME Internet Home Page or participate in any one of four discussion group via e-mail. The Internet address is: [www.ccme.ca/ccme](http://www.ccme.ca/ccme).

1. Alberta, by far, has the largest oil and natural gas reserves in Canada. It is followed by Saskatchewan, British Columbia, Manitoba and Ontario. The National Energy Policy sought to develop alternate reserves on federal Crown lands in the Arctic and to assist the provinces of Newfoundland and Nova Scotia with off-shore developments. These latter have proven costly and in large measure have been put on hold as the global per barrel price of oil has fallen thereby making exploitation of off-shore reserves less attractive. Montréal, in the province of Québec, has always had a large petroleum refining industry using Trinidadian and Venezuelan crude oil.

2. A note of clarification. "Atlantic provinces" refers to all four Canadian provinces more or less surrounded by the Atlantic ocean: Nova Scotia; New Brunswick; Prince Edward Island; and Newfoundland. The term "Maritime provinces" generally does not include Newfoundland which joined Canada's federation in 1949. And, as if to add to the distinctiveness of Newfoundland, it is one-half time zone earlier than the other three Maritime provinces -life is always "one-half hour earlier in Newfoundland".

3. The problem of funding is closely linked to revenue generation or, most specifically, taxation which is by far the largest source of revenue for all governments. As the federal Government has a much greater capacity to tax -"by any mode or system"- it is commensurately more able to generate revenue and, thereby, to dominate the taxation field. However, the provinces bear the preponderance of responsibilities for delivery social and educational services (Sections 92 & 93). There is, as a result, a continuous imbalance between revenue capacity and legislative competency. In one area, natural resources, this was partially rectified in a 1982 constitutional amendment (Section 92A) which permitted the provinces to raise revenues by taxation of mining, hydro-electric and forestry industries "by any mode or system" of taxation -the wording formula available to the federal Government in Section 91(2).

4. Ontario, for example, has seen federal funding for MEDICARE shrink from 52¢ of every dollar spent in 1980 to 32¢ for every dollar spent in 1995. This has resulted in a significant degree of re-structuring of health care services including hospital closures. Many argue that the quality of Canada's universal and equitable health care system is in jeopardy. See Maclean's, "Frustration in Ottawa". December 2, 1996, p. 62-64.

5. The pressure to reduce environmental regulation is almost unceasing. On September 16, 1996, the Canadian Broadcasting Corporation carried a national news story to the effect that mining companies were launching a concerted effort to reduce the amount of government regulation which they allege is deterring them from mining development. The issue arose in connection with development of a diamond mine in Canada's Northwest Territories and the delays the development company experienced as native peoples' land and environmental issues were resolved. Environmental protection is being diminished in Canada under the pretext of "deregulation" and the neo-conservative assumption that "deregulation" will translate into a more competitive market system and, in turn, that will generate new employment. So far, in Ontario at least, despite deregulation unemployment rates continue to climb.

6. The word "entitlements" has crept into the lexicon of inter-governmental fiscal relations in Canada. It is a term borrowed from the field of inter-governmental relations in the United States. In that country the relationship of the federal Government to the States is somewhat more characteristic of a "State-dependency". Thus, the word "entitlements" carries with it connotations akin to 'charitable hand-out'. Employment of the term in the Canadian context as a means for describing sums transferable to the provinces from the federal Government seems somewhat inappropriate as, I would argue, Canada's provinces have a considerably more influential role in both the tax system and in the negotiation of inter-governmental agreements than do their American State counterparts. An annual meeting of Canada's provincial Premiers is a significant political event [see comments in an editorial in *The Vancouver Sun*, August 22, 1996 on the power of provincial Premiers] whereas an annual meeting of US State Governors is largely a non-event.

7. An Alberta provincial election was held March 11, 1997. It saw the Conservatives swept back into office.

8. The "Meech Lake Accord" (1987) and the "Charlottetown Accord" (1992). On the former see Cohen, (1990); Brown-John, (1989) and on the latter Brown-John, (1992b, 1994).

9. "Bureaucratic federalism", the ongoing, or daily, processes whereby federal political systems are managed by career public servants. This would include an elaborate structure of senior and middle management bureaucrats serving, as part of their normal daily employment, to manage policy delivery in a federal political system. See Brown-John, (1991a, 1991b, 1991c).

10. Administrative decentralization is a relatively recent phenomena in Canada hence my suggestion that Canada is moving towards a decentralized federal system. Indeed, one might argue that such decentralization offers the prospect of Canada becoming a model for complex federating (e.g. Spain) or federal states (e.g. Belgium). For more on decentralized administration see Cameron (1994).

11. One of the most astute commentators on Canadian federalism was the late Donald V. Smiley. He is generally credited with coining the term "executive federalism" in the Canadian context [Smiley, 1980 at 52-53 & 91-119]. Smiley described executive federalism as follows:

"The [Canadian] constitution has permitted and in some cases facilitated new balances to be struck in federal and provincial powers as the relative vigor and effectiveness of the two orders of governments shifted and as the importance of the responsibilities assigned to them by the constitution changed. In this ongoing process explicit constitutional amendments and new delineations of federal and provincial powers through judicial review have been less important than the interactions among governments which I shall designate...as 'executive federalism'".

Smiley constantly stresses the importance of "constitutional flexibility" as a pre-requisite to operational executive federalism.

12. The *Trail Smelter Arbitration* (Canada-United States) (1938, 1941), Reports of International Arbitration Awards, iii, 1905.

13. The debate over environmental legislation in the Australian federal system has raised the issue of pragmatism and politics as key features in the emerging federal-state relationship in that country. Pragmatic political solutions to public problems seems to be a quality of flexible federal systems. One could argue that those systems are also most adaptable and, perhaps, most likely to persist. See Barrie (1992); Fowler (1993) (1994); Commonwealth (1992).

14. For comment upon some of these constitutional references I recommend Russell (1982).

15. On August 21, 1996, for example the Supreme Court of Canada rendered decisions on three cases involving exploitation of natural resources by native peoples. The cases centred upon claims by native peoples that they could sell fish caught for purposes other than their own personal use. Native exploitation of fisheries is restricted to those which were central to the lives of specific native communities prior to arrival of European settlers. *The Vancouver Sun*, August 22, 1996, p. 1. Unlike the decision of the Australian Supreme Court in the *Mabo Case* the Supreme Court found that only limited rights prevailed from the period prior to arrival of Europeans. In the *Mabo Case* the Australian Court ruled that a system of governance was in place at the time Europeans arrived and that claims that aboriginal lands were *terra incognitas* were not valid. Thus rights had been extinguished by colonization; the Canadian court appears not to have followed that line of reasoning in defining native rights.

16. For example, the province of Québec's enormous Phase I of the James Bay hydro-electric project; the Alberta Government's Oldman River project which was opposed by several native peoples' groups; and, the Saskatchewan Government's Rafferty-Almeda dam project which involves a Canada-United States boundary river.

17. The wreck of a flag of convenience registered oil tanker, *The Arrow*, in Nova Scotia in 1970; a fire involving toxic PCBs at St. Basile-le Grande, Québec and a transport truck leakage of PCBs along an Ontario highway, all contributed immensely to public concern about environmental protection and disposal of hazardous and toxic wastes. Furthermore, a fire in a river in Cleveland, Ohio, USA emphasized the fragility of the Great Lakes eco-system and led to vigorous activities to protect that special environment.

18. This issue of protection of traditional burial sites has emerged in the West James Bay region of South Hudson Bay, Ontario, where diamond exploration companies have damaged burial sites during the process of staking mineral claims. Environmental issues are of immense concern to native Canadians not only because they pertain to traditional activities but also because so many native communities -many of which are artificially devised as many peoples did not live in large urban style communities- have major problems with waste disposal and water supplies.

19. Municipal governments in Canada are creatures of provincial governments. They have no entrenched constitutional status and their terms of competence are defined by provincial statute.

20. For the most part, while the existing two territories (Yukon and Northwest Territories) are internally self-governing, federal legislation is applicable. However, many intergovernmental bodies in Canada include participants from the two territories often as full participants and on other occasions as active observers. As the territories (a third territory will soon be in existence as the Northwest Territories is divided in two and the eastern region becomes Nunavut] increasingly take control over their own governance environmental issues

will require full consultation and co-ordination among 14 Canadian governments [10 provinces; 3 territories; one federal].

21. Spain, of course, has claimed that Canada violated its right to exploit the high seas. Indeed, Spain even managed to involve some of its partners in the European Community. However, when it became clear to some EC members that other Members (notably Ireland and Britain) agreed with Canada and they too were angry with Spain over its continued abuse of North Atlantic fish stocks, Spain was forced to seek a fishing quota compromise. Spain also has had problems with Morocco and Namibia over the same issue. A Spanish fishing vessel was arrested by Canadian authorities and Canada did take the issue of Spain's abuse of natural resources to the United Nations.

22. During the late 1960's Canada and the provinces began compilation of a land-use inventory (McCormack, 1971).

23. Resource exploitation really began long before European settlement on the continent as Atlantic fisheries were a major attraction in the 15th Century. Wildlife and timber resources followed as Europeans sought animal furs and timber for ship construction. Thereafter, mineral and agricultural resources were pursued during the 19th Century. It was during the latter part of that Century that governments responded to public concerns about resource management with establishment of natural wildlife and forest preserves. The first national park in Canada was established in Banff in 1885. The province of Ontario established Algonquin provincial park in 1892. And, concerns over management of the Great Lakes as a trans-boundary resource came to the fore in 1909 with creation of the International Joint Commission.

24. The 1969 federal Liberal Government Speech From The Throne contained a pledge by the new Government to take an active stand on environmental issues. Public Opinion polls in the preceding year gave impetus to this pledge as Canadian public opinion overwhelmingly supported environmental protection.

25. American and Soviet nuclear submarines made numerous underwater trips through Canadian arctic territorial waters. On most occasions, for their respective security reasons these trips were rarely made known to Canadian authorities. Furthermore, the United States refused to concede that the Northwest Passage, traversed only rarely by ships, was entirely within Canadian territorial waters. An unsuccessful attempt was made to force the high seas issue when the United States sent a ballast laden tanker, The Manhattan, into the Northwest Passage. When the ship became trapped in polar ice it required rescue by the Canadian Coast Guard. The United States has not abandoned its claim to international status for the waters but Canada, by extending its territorial jurisdiction for protection of the environment essentially has precluded any further United States attempts to force the issue. It is often somewhat surprising to many overseas observers that Canada and the United States still have unresolved boundary disputes.

26. Several provincial governments had taken steps to ensure that environmental issues were both visible and involved public input. Provincial Ministries of the Environment were either added to existing line departments or created de nouveau. While regulatory environmental assessment agencies were being established both to force compliance with the growing body of environmental protection legislation and to provide avenues for public input into resource developments which might impair or threaten environmental quality. For background on some early provincial resource and environmental agencies see Brown-John (1981).

27. The Toronto *Globe and Mail* recorded that such an attack upon a provincial Government took place at such a Conference. The Government of Manitoba was attacked for its failure to take into account the social and ecological costs associated with hydro-electric development on the Churchill River in northern Manitoba.

28. Actual cutting of the 200 year old pine trees began in mid-September, 1996. Logging companies argued that it was healthy for old trees to be removed so that new, more vigorous, trees could thrive. Environmentalists attacked the logging operation as an assault upon the heritage of the people of Ontario. Logging companies carried the day and environmentalists succumbed to the "creation of jobs" argument.

29. There is an interesting point to be noted here and that is that there is absolutely no basis in international law for the separatist assumption that pursuit of self-determination (even if it were a critical issue) necessarily leads to sovereign independence. No relevant United Nations Security Council or General Assembly Resolution absolutely links self-determination to a right to declare independence. Furthermore, decisions of the International Court of Justice seem to support the view that unilateral declarations of independence can flow only when constitutional barriers exist to the expression of the full panoply of rights and cultural self-determination.

30. For the moment, material for this section is drawn from Fitzsimmons (1995); Kennett (1995) and Matas (1996).

31. Conceptually, this is somewhat akin to the controversial European Community “subsidiarity” concept entrenched in Section 3(b) of the 1992 Maastricht Treaty. Fowler, in his country study on Australia in this volume notes that in Australia the 1992 Inter-Governmental Agreement on the Environment “was deliberately designed to reflect the ‘subsidiarity principle’, a concept formulated in the European Community”. In practice the concept of subsidiarity emerged from a late 19th Century Papal Encyclical; see Toth (1992).

32. In 9 of 10 provinces the First Minister bears the title: Premier; in Québec, however, the Premier is known as the “Premier Minister”. The change apparently was designed to enhance the status of Québec’s government; in practice, all it has done is add confusion! Québec’s neo-nationalists indulge in the fantasy of words of aggrandizement, the provincial capital city “Québec City” becomes “the national capital” while “the province of Québec” becomes “l’état Québec”.

33. Whether all “Stakeholders” effectively included those who would be considered part of the environmental policy community is another issue and one not entirely easy to resolve. For example, is it the obligation of CCME to search out and find all possible groups which have an environmental policy interest? Or, is the onus for such a search a responsibility of the groups and interests within the policy community? Personally, I am inclined towards the latter view so long as CCME or like organizations are open and transparent in process and create no abnormal or unusual barriers to access to information, surely the obligation to “be informed” rests with those in the policy community.

34. I have addressed this latter issue elsewhere but to reiterate, the argument is as follows. Canadian federalism is delightfully political. Thus, while decisions of the Supreme Court are taken most seriously - Canada does employ References to the Court for non-binding opinions- and, while efforts to reform the Constitution have been attempted, not always successfully, there has been a tendency in light of judicial determinations to seek accommodations which are clearly political. Thus, while the Supreme Court of Canada ruled in favour of the federal Government’s status as an “international personality” in a case involving jurisdiction over off-shore oil and gas exploration, subsequently the federal Government and the affected provinces worked out a compromise political deal which seems to have accommodated the fundamental interests of both sides to the dispute. The same trend appears in the current move towards administrative solutions to vexing jurisdictional issues. This I referred to earlier as “service-centered federalism”.

35. At the 1996 Annual Meeting of Provincial Premiers in Jasper, Alberta, August 21-23, 1996, a proposal prepared by the Government of Ontario which would have seen the provinces attempt to pressure the federal Government into greater decentralization, was shelved for future consideration. Thus, while the Federal Government appears to be decentralizing especially when matters of money are at issue, the majority of provinces do not appear willing at this time to support extensive decentralization. Québec’s Premier did express the view that decentralization was worth considering but his agenda in that respect is far different than is that of Ontario. Environmental groups may need to keep watching the trend but there does not appear to be great enthusiasm at this point in time.

Furthermore, some provinces are fragmenting the environmental protection process through privatization and voluntary standards and this has contributed to a significant lack of interest in national environmental protection standards.

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