The Democratic Content of Intergovernmental Agreements in Canada

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Introduction

Executive federalism has been a prominent institution in the Canadian political system for at least four decades. Defined by Kathy Brock as “...the arrangements used to negotiate agreements between the two levels of government for the provision of programs, services, and the co-ordination of policies,”1 the institution has been decried on several grounds. After the failed Meech Lake and Charlottetown Accords the practice was the subject of widespread denunciation.

One of the accusations made against executive federalism is that it is inconsistent with democratic decision-making. Donald Smiley, for instance, has written that

...it contributes to an unduly low level of citizen-participation in public affairs....it weakens and dilutes the accountability of governments to their respective legislatures and to the wider public....it frustrates a number of matters of crucial public concern from coming on the public agenda and being dealt with by the public authorities.2

Similarly, Jennifer Smith writes that “...the exercise has a behind-the-scenes quality that precludes widespread and informed public debate about whatever is at issue.”3 And David Cameron concludes: “...to the extent that intergovernmental forums develop a decision-making capability, they drift further out of the reach of democratic control and the processes of parliamentary accountability upon which our system is based.”4

On the other hand, Brock believes that “Intergovernmental agreements at all levels still remain the best means of ensuring co-operation on policy matters between the two levels of government.”5 Given Canada’s constitutional ambiguity, executive federalism may be the only way to proceed on important matters of policy. In addition, since the people who oversee executive federalism are elected politicians, the criticism that it is undemocratic may be overstated.

This paper investigates the charge that intergovernmental agreements (IGAs) are in conflict with the tenets of democratic government. It examines the content of two IGAs and the processes by which they came to be. It takes its lead from an article by Richard Simeon and David Cameron which
sought to assess the Social Union Framework Agreement (SUFA), an intergovernmental agreement signed in February 1999, against a number of democratic criteria.6

Specifically, the paper addresses the question: to what extent do the IGAs under examination adhere to the basic dimensions of democracy? It unfolds as follows: first, it explains some of the types, objectives, and motivations behind IGAs, as well as their legal status. It then sets out the democratic criteria that will be used to assess the IGAs. The heart of the paper follows. It examines two IGAs, the Canada-Wide Accord on Environmental Harmonization and the Labour Market Development Agreements, which are actually bilateral agreements between Ottawa and each province and territory.

The two IGAs were chosen as our case studies primarily because several scholars have produced a substantial body of literature on the two IGAs, thereby enabling us to draw upon a rich database in our investigation of their democratic content; secondarily, they exemplify the two main types of IGA in Canada, those that are Canada-wide and those that are bilateral. The Environmental Harmonization Accord was chosen also because the body that oversees it, the Canadian Council of Ministers of the Environment, is one of the country’s more serious efforts at confederalism. It thus represented an opportunity to determine the democratic inclinations of a confederal structure. On the basis of these cases, an assessment of the relationship between executive federalism and democratic government is offered.

Democratic content is, of course, not the only test to assess an IGA. Other criteria include whether the IGA strengthens or weakens the economic and social union and the extent to which it meets the standards of fairness and equal treatment. Discussions of those tests are beyond the reach of this paper. Here, we concentrate on democratic content.
Intergovernmental Agreements Defined

Intergovernmental agreements are an expression of executive federalism, encompassing all formal agreements between executive branches of government. They are a commonly used policy-making instrument in Canada; Johanne Poirier estimates that there are at least 1,000 federal-provincial agreements in force in Canada at the present time. She notes that of the 880 federal-provincial agreements in the registry of the federal Privy Council Office (PCO), only 13 per cent are actually Canada-wide; the vast majority of federal-provincial agreements are bilateral.

IGAs can also be horizontal, that is, negotiated by the sub-national units with each other and without the participation of the federal government. Some countries, such as Spain and Switzerland, prohibit the conclusion of horizontal agreements. Similarly, the American constitution prohibits the conclusion of interstate compacts without the consent of Congress.

Poirier has identified five functions performed by IGAs: substantive policy coordination, procedural cooperation, para-constitutional engineering, regulating by contract, and quasi-legislating. Many agreements play two or more of these roles.

Substantive Policy Coordination

According to Poirier, the purpose of agreements performing this function is “to rationalize the exercise of distinct but related competences, avoid duplication and coordinate policy initiatives.” Since, in federal systems, the constitution often empowers the central and sub-national levels to regulate in the same field or similar fields, the two levels of government will often negotiate IGAs to set out who can do what. As an example, Poirier cites the labour market development agreements signed between the federal government and each province. The provinces long argued that the federal government should not be involved in this field because they have sole jurisdiction over education, while the federal government has contended for just as long that its responsibility for national
economic development has enabled it to be involved in worker training. The labour market development agreements attempt to clarify the roles and responsibilities of each level in the labour force training field.

*Procedural Cooperation*

The agreements carrying out this task "provide for consultation or dispute resolution mechanisms, and can introduce multi-layered conferences or committees."¹¹ For instance, the Agreement on Internal Trade, signed by the federal government and all of the provinces and territories, plays a substantive policy coordination role, but it also performs a procedural cooperation function since it includes a dispute resolution mechanism.

*Para- Constitutional Engineering*

These agreements are concluded by governments as a way to avoid the much more difficult process of constitutional amendment. As Poirier notes, they “enable governments to structure their relations so as to bypass hard constitutional issues, or to find pragmatic solutions which would be unattainable in more visible and politically charged constitutional negotiations.”¹² An example here would be the SUFA, which was intended to clarify the roles of the federal and provincial governments in social policy without having to resort to constitutional negotiations.

*Regulating by Contract*

This function is performed in order to either give legitimacy to a federal initiative or enable the central authority to establish a nation-wide policy through its spending power. In the case of the former, the federal level may constitutionally possess the power to regulate in some field but, to increase the legitimacy of the federal action, it may seek an IGA with the sub-national units. With respect to the latter, the federal level may see a need to use its spending power to induce the sub-national units to accept the federal initiative. An example here is the conditional grants offered to the
provinces by the Government of Canada in order to ensure the development of a nation-wide social safety net.

Quasi-Legislating

IGAs may or may not be legally binding. In cases where an IGA is not, it still provides a set of norms that is meant to guide public servants until it is superseded, overturned, or terminated.

A critically important consideration in a discussion of IGAs is the role of legislative assemblies. While it is relatively common for legislatures to authorize ministers to negotiate IGAs, this authorization is not a formal legal requirement, since the Crown has the inherent power to conclude contractual agreements. According to Poirier, “The authorization serves essentially to identify the minister of the Crown who can act on behalf of the whole executive.”\(^ {13}\) Nor is an executive required to keep a legislature informed of the progress of negotiations. On those infrequent occasions when a legislature is called upon to ratify an IGA, it is essentially asked to ‘rubber-stamp’ the agreement since a legislative assembly cannot modify the contents of an IGA.

Notwithstanding the foregoing, a legislature in Canada does have the power to legislate so as to denounce an IGA unilaterally, “or to adopt statutory instruments that contradict the content of the IGA, provided it does so in clear and explicit terms.”\(^ {14}\) “In other words,” writes Poirier, “in the Canadian legal system, unilateral legislative action takes precedence over bilateral or multilateral agreements.”\(^ {15}\) Nothing “precludes a legislative assembly from acting in violation of [an] agreement.”\(^ {16}\) In addition, it is a basic constitutional principle that legislatures cannot bind their successors. Thus, unless an IGA is entrenched in the constitution, a legislature is not bound by the IGA.

Some of the key factors that determine an IGA’s legal status include:\(^ {17}\)

- the subject matter – some issues can never be the object of a binding contract. For example, “An executive cannot contract so as to bind the exercise of its discretionary power to act in the public
interest."\(^\text{18}\) However, agreements that involve a transfer of money are more likely to be legally enforceable;

- the kind of language used – agreements that use very precise terms are more likely to be enforceable. Agreements that use “aspirational” language or that are declarations of intent or that use vague or general terms are less likely to be legally binding;
- presence of dispute resolution procedures – agreements that provide for recourse to the courts or to arbitration are more likely to be legally binding, while IGAs that provide for dispute resolution through negotiation or mediation may or may not be binding; and,
- reliance of one party – agreements are likely to be found enforceable if one of the parties has relied on the agreements to its detriment.

Steven Kennett adds a fifth factor: whether or not the IGA is embodied in legislation. If it is, then it has the full force of law. If not, the legal status of IGAs “depends on their characterization by the courts.”\(^\text{19}\)

Another important consideration in this discussion is the role of third parties. The courts have determined that IGAs are not beyond the reach of citizens. Indeed, Poirier points out that over the last two decades the courts have shown greater openness toward third parties, including citizens and interest groups, that seek “to challenge the conclusion, implementation and even content of IGAs....”\(^\text{20}\) For instance, although it lost the case, an interest group in the late 1990s successfully sought judicial intervention “to prevent a federal minister from concluding federal-provincial agreements, which implied, so the argument went, an abdication of federal responsibilities in the field of environmental protection.”\(^\text{21}\) In addition, citizens have successfully argued that IGAs may not have the effect of encroaching on their fundamental rights. Given these and other cases, Poirier concludes:

In an age of “Charter citizens” who have learned to appeal to judges to protect their rights, it seems plausible that citizens and public interest groups are increasingly going to turn to courts as a means of controlling the ever-growing impact of executive federalism. Whether parties to
an agreement want it or not, and whether judges themselves welcome the trend or not, IGAs are finding their way to court. Increasingly, judges are struggling to find ways of providing effective judicial review in relation to instruments which used to be understood as contracts from which third parties were considered uninterested outsiders, or as political devices to which judicial deference was owed.  

Poirier refrains from observing that, since the enactment of the Canadian Charter of Rights and Freedoms, judicial review has become a contentious issue. Supporters argue that judicial review protects the conditions that make democracy possible. “They conceive of these conditions as rights and argue that, absent robust judicial protection, rights will be eroded by Parliament or by others exercising power on behalf of the state.” Critics of judicial review claim that it subverts democracy by interfering with the will of the people “as expressed through the decisions of their political representatives.” Critics with a leftist perspective are also concerned that corporate and other powerful interests will be able to use the Charter “to constrain state actions necessary to address economic and social impediments to the fair and just treatment of citizens.”

Although judicial review has its shortcomings, in a federal system where governments are inclined to negotiate IGAs, it can ensure that the rights of citizens are not ignored by governments pre-occupied with their jurisdictional concerns. As Gerald Baier has written, “Citizens, too, need an outlet to enforce the federal bargain, particularly when governments co-operate too well.”

**Democratic Criteria**

In his book, *Making Democracy Work: Civic Traditions in Modern Italy*, Robert Putnam sets out to measure the vibrancy of Italian democracy. He uses two tests for assessment. The first he derives from well-known democratic theorists. Robert Dahl, for example, asserted that “the key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens.” Putnam elaborates: “Democracy grants citizens the right to petition their government in the hope of achieving some individual or social goal, and it requires fair competition among
different versions of the public interest.”  However, good government also “actually gets things done.” Putnam declares: “A good democratic government not only considers the demands of its citizenry (that is, is responsive), but also acts efficaciously upon these demands (that is, is effective).” So, in Putnam’s view, assessing democracy requires the use of two criteria: responsiveness and effectiveness.

Recently, the Centre for Canadian Studies at Mount Allison University published ten volumes on Canadian democracy. Included in the project, entitled “The Canadian Democratic Audit,” is a study of the extent to which Canadian federalism supports democracy. The organizers of the project recognized that such an audit, to be credible, “requires the setting of benchmarks for evaluation of the practices and institutions to be considered.” Three benchmarks were identified: public participation, inclusiveness, and responsiveness, the last also included in Putnam’s short list of benchmarks.

In her study of Canadian federalism and democracy, Professor Jennifer Smith begins by discussing each benchmark:

Inclusiveness raises the issue of which citizens are likely to be included in political and governmental activities and which citizens are not likely to be included in them. In other words, who is in? Citizens need not participate in political life, but should they choose to participate then they need to know what they can do. Participation refers to the kinds of activities in which citizens can engage should they be so inclined. What can they do? Responsiveness refers to governments. The concern is the extent to which governments can respond to the demands and concerns of the citizens and the ways in which governments respond. What can the citizens expect? In her discussion of inclusiveness, Smith focuses not on citizens but on institutions; that is to say, she focuses on the units that are formally included in the institutions of the federal government and those that are not. With respect to participation, Smith means citizen involvement in the policy-making processes between elections. And with respect to responsiveness, Smith means, first, the role of elections in ensuring responsiveness and, second, the competitiveness that exists between the federal
government and the provinces between elections which, according to Smith, also ensures responsiveness.

Particularly interesting in Smith’s contribution is her discussion of executive federalism, which is situated in the chapter on federalism and participation. Noting that much of the business of the federation is carried out in meetings of officials, Smith questions the democratic content of such a process. She writes:

These meetings mostly are held behind closed doors. They are scheduled when necessary rather than at predictable intervals. They are exclusive, by invitation only. And no mechanism of accountability is built into the process. If something is produced at the end of the negotiation, it has the status of a fait accompli. How would the ordinary person participate in any of this?  

Smith acknowledges that citizens do participate – albeit indirectly – in intergovernmental negotiations, through the politicians from the federal, provincial, and territorial governments. In addition, some members of the public are “represented by whichever interest groups are involved in intergovernmental processes from time to time....Indeed, interest groups are often consulted early on in the policy-development process and can find themselves closely involved in it at all stages.” Smith denies, however, that this level of public participation is adequate; “...no one would conclude that this amounts to a robust tradition of democratic participation.” In her assessment,

Since there is little opportunity for public debate during the process, the only possibility is at the conclusion, when the political leaders have reached agreement on an issue. But this is when the absence of accountability mechanisms exacts a price. The political leaders do not need to bring the agreement back to their respective legislatures for a vote on it.  

Clearly, Smith is deeply concerned about the ability of executive federalism, through IGAs, to bypass the legislative assemblies; “...executive federalism tends to produce done deals....The closed processes of executive federalism can have the effect of immunizing controversies between the two levels of government from public debate, because the legislatures are excluded from these processes.”
Another paper that sets out criteria for assessing democratic decision-making is one by Richard Simeon and David Cameron. They point to six conceptions of democracy from which criteria could be developed to determine the democratic nature of an IGA. Four of the dimensions have already been identified and one, as we shall see, is highly debatable.

The authors’ first dimension is called “democracy as effective governance.” In their view, intergovernmental relations need to be assessed in terms of the extent to which they facilitate the management of interdependence and are able to achieve effective co-operation and co-ordination; reduce overlap, duplication, and contradiction in the work of different governments; and allow for coherent, consistent policy in areas where jurisdictional and fiscal responsibilities are shared, such as health care or the environment.  

This would appear to be a rather limited conception of the effective governance test. It is certainly different from Putnam’s view. Effective governance means not only whether the two levels of government are co-operating and eliminating duplication but also whether, because of the IGAs, they are accomplishing their goals in a given policy field. Is health care improving? Are workers being adequately trained? Is the air cleaner? Are interprovincial trade barriers coming down? These are the kinds of substantive questions that must be posed under the effective governance test, as well as those indicated by Simeon and Cameron. A thorough evaluation of the extent to which the IGAs have been successful in solving problems and delivering services is beyond the scope of this paper. However, it is possible to review some of the existing research to make some comments on their effectiveness.

Simeon and Cameron’s second dimension is termed “democracy as responsive government.” This means that governments meet the basic expectations of the citizens. In addition, “A democratic assessment must also ask, among other things, which interests are promoted or undermined by the practices of federalism.” This aspect speaks to the issue of which groups and citizens the government is responding to. Clearly, a government that favours élite interests will foster a kind of democracy different from one that favours citizen interests.
The authors point to a consistent theme in the federalism literature, namely, that federalism is “fundamentally conservative.” They note that many interest groups oppose collaborative models of federalism, which are, in effect, models of executive federalism, because they entail a “rush to the bottom.”

With respect to the SUFA, Simeon and Cameron are uncertain about its responsiveness. However, referring to the SUFA as a “quasi-constitutional document,” they suggest that the fact that the governments’ commitments were articulated at all in an agreement “means that citizen groups of all kinds may be able to invoke them to lend strength in their battles against individual governments.”

A third aspect of democracy is termed, “democracy as representative government.” This aspect has two requirements: transparency and accountability. According to Simeon and Cameron:

Transparency suggests that the decision-making process should be open and visible, not hidden behind a veil of secrecy. Accountability requires that citizens be able to hold governments responsible for their successes and failures, ultimately at the ballot box. Transparency implies not only that the conduct of intergovernmental relations should be open to the public, at least to some degree, but also that citizens should know which level of government is responsible for what and which level has done what. Executive or collaborative federalism tends to obscure the roles of the federal and provincial governments.

With respect to accountability, a major concern is the accountability of the provincial and territorial governments when the federal government transfers large amounts of tax dollars with few or no conditions attached. How is the federal government to be accountable to Parliament and to citizens when it cannot account for the substantial amounts it sends to the sub-national units? Simeon and Cameron argue that for Ottawa to demand accountability from the provinces “could imply a level of federal monitoring and control of provincial activities that would rightly be considered an entirely unacceptable intrusion into provincial autonomy.” Unacceptable to whom? It would be hard to
argue that citizens would find unacceptable federal demands that provinces account for the transfers intended, say, for health care.

Simeon and Cameron note that the SUFA does commit the governments to enhancing their transparency and accountability. However, it is significant that, “The emphasis is on ‘each government’s’ accountability to its own constituents rather than the collective accountability of governments to Canadians generally.”42

Another aspect of democracy is called “democracy as public deliberation.” This conception focuses on citizen participation in the policy development process. Simeon and Cameron suggest that the practice of executive federalism tends to make it more difficult for citizens and interest groups to participate in the process because of the tendency of public policy-makers to become preoccupied with “the institutional interests of governmental bureaucracies and executives.”43 The authors quote Roger Gibbins who observed that collaborative or executive federalism “at least at the margins [would] reduce the role and effectiveness of legislatures, of political parties, interest groups and the public.”44

Simeon and Cameron point out that the SUFA does include a commitment by governments to ensure public participation in determining social priorities and policies. However, they note further that there is nothing in the Agreement on “whether and how citizens and groups will be incorporated into *intergovernmental mechanisms and processes*.”45 [Emphasis added.] The authors do not explain how such mechanisms and processes could be established.

Related to the previous aspect is direct democracy. This perspective says that, in intergovernmental disputes, “the ultimate arbiters and decision-makers should be citizens.”46 The authors suggest that, in light of recent constitutional history, “...no major constitutional change will be made without popular ratification.”47 However, anything short of constitutional amendment is not likely to be subject to direct democracy.
Finally, Simeon and Cameron discuss “democracy as recognition of distinct communities.” In this discussion, the authors appear to be trying to stretch the meaning of democracy, and in so doing, they reveal their bias. That is to say, they appear to be trying to justify special status for Quebec by couching it in the language of democracy. In a somewhat obscure passage, they write:

“More fundamentally, if we think of Canada as a multi- or binational society, in which both Quebec and Aboriginal peoples have powerful claims to distinct status, then majoritarian views, whether imposed by the national government or by intergovernmental agreement, become highly problematic. If respect for difference, rather than simple majority rule, is the hallmark of contemporary democracy, then democratic federalism must entail substantial degrees of asymmetry.”

A little later, referring to the SUFA, they state:

“To the extent that the agreement fails to recognize the multinational character of Canada, or the broad consensus of Quebeckers that it is the National Assembly that should determine the character of the province’s social policy, it undermines the democratic claims of the agreement.”

The argument is not convincing for several reasons. First, in its essence, democracy simply means that the people rule. It is not about recognizing distinct communities. When the authors write that “…democratic federalism must entail substantial degrees of asymmetry,” what they mean is that in the Canadian context the governmental élites of certain collectivities must have substantially more powers than the governmental élites of other collectivities. Since when does democracy mean giving additional powers, (that is, preferential treatment), to certain élites? More to the point, substantial asymmetry does not promote citizen participation in the political process. On the contrary, it implies withdrawal from participation, at least from the federal level.

Secondly, Canada is clearly a multinational and multicultural society. Indeed, within Quebec and within the Aboriginal communities, there are collectivities that would describe themselves as nations, distinct from others. It is reasonable to ask Simeon and Cameron how far they would extend asymmetry. In this regard, the words of former Prime Minister Pierre Trudeau are worth noting:
If we had tried to identify each of the minorities [or internal nations] in Canada in order to protect all the characteristics that made them different, not only would we have been faced with an impossible task, but we would shortly have been presiding over the balkanization of Canada. The danger inherent in this would have been particularly acute in the case of minorities that are in a position to be identified with a given territory, like the Celts in Nova Scotia, the Acadians in New Brunswick, the French Canadians in Quebec, and the Indians and Inuit in the Far North.  

Thirdly, democratic federalism does not have to be substantially asymmetrical in order to demonstrate respect for differences, such as differences based on gender, ethnicity, language, race, and religion. However, respecting differences does require protecting citizens’ rights, which is what constitutionally entrenched bills of rights, like the Canadian Charter of Rights and Freedoms, are intended to do.

Finally, given the extraordinary degree of fiscal and political autonomy that all Canadian provinces enjoy, according a special status to Quebec hardly seems necessary or justifiable.

One cannot say that the recognition of distinct communities is a fundamental aspect of democracy. Nor can one conclude, as Simeon and Cameron do, that, because an IGA does not give Quebec special status or recognize “the multinational character of Canada,” – as they define it – the IGA has less democratic content. Therefore, “democracy as recognition of distinct communities” is rejected as a criterion for democratic assessment.

From the foregoing, we can distil four criteria or tests to assess the democratic content of an IGA. One criterion is responsiveness, identified by all of our political scientists. Here, we lean toward the meaning of responsiveness set out by Putnam and Simeon/Cameron. Thus, the paper tries to determine if the IGAs are responding to citizen demands and concerns. The difficulty with trying to determine responsiveness, of course, is that what is responsiveness to one citizen is unresponsiveness to another. However, it is possible to at least make some comment on which citizens and groups the IGAs are a response to.
A second test – effectiveness – is discussed by Putnam and by Simeon/Cameron. However, here we stress Putnam’s conception of effectiveness and we try to see if the IGAs are actually producing results. Are they accomplishing something for the citizens of Canada?

A third test, discussed by Smith and by Simeon/Cameron, is participation. In this paper, following Smith, participation means the degree of citizen involvement in policy development.

The final criterion is drawn from Simeon and Cameron’s discussion of “democracy as representative government.” The objective here is to determine if transparency and accountability were demonstrated in the making and implementing of the IGAs.

**The Agreements**

**The Canada-Wide Accord on Environmental Harmonization**

Signed in 1998 by the federal, provincial and territorial governments, except the government of Quebec, this Accord commits the signatories to achieving specific goals, identifies principles of environmental management, and delineates the roles and responsibilities of each level of government.

The Harmonization Accord was made necessary in large part because the Canadian constitution is silent on which level of government has responsibility for environmental policy. Thus, both levels have enacted environmental legislation when it was in their interest to do so, and both levels ‘passed the buck’ to the other level when it was in their interest to do that. The courts have confirmed that both levels of government have the constitutional authority to enact environmental legislation. Justice LaForest made this clear when, in R. v. Hydro-Quebec, he wrote:

In Crown Zellerbach, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment.... 51
The constitutional sources of provincial authority in environmental matters are the property and civil rights power and provincial jurisdiction over natural resources. The constitutional sources of federal authority reside in a number of specific heads of power, e.g., fisheries, navigation, and agriculture, as well as its trade and commerce power, its criminal law power, the international treaty-making power, and the peace, order and good government provision.

The Environmental Harmonization Accord is comprised of three documents. First, there is the Accord itself, which is a brief document containing six parts: Vision, Purpose, Objectives of Harmonization, Principles, Sub-Agreements, and Administration. Then, there are three Sub-Agreements, dealing with Environmental Standards, Environmental Assessments, and Inspections and Enforcement. Thirdly, there is an Annex, which deals with Public Accountability and Stakeholder Participation.

The provincialist thrust of the Accord has been pointed out by a number of writers. Professor Harrison, for instance, concludes:

...the Canada-Wide Accord promises rationalized, “one-window” implementation of national standards, with that window primarily staffed by the provinces. It thus suggests a future in which the provinces once again will assume primary responsibility for enforcement both of their own and of the federal government’s regulations....In particular, it is significant that the standards sub-agreement envisions “Canada-wide” standards developed jointly by the federal and provincial governments as an alternative to “federal” standards, thus redefining the federal government’s role from one of primary responsibility for setting national standards...to participation as one of 13 governments seeking consensus on standards. The sub-agreement envisions that individual jurisdictions, expected to be the provinces in most circumstances, will develop implementation plans for particular Canada-wide standards, and that those plans need not be uniform across jurisdictions. 52

Decentralism is also a feature of the Inspections and Enforcement Sub-Agreement. Prior to the Accord, the federal government, aware of provincial sensitivities, left enforcement activities to the provinces. The result has been “weak and uneven patterns of enforcement.”53 This is not likely to change with the Accord since the Sub-Agreement gives the provincial governments a larger role in this area.
The Environmental Assessment Sub-Agreement also has a provincialist emphasis, as Mark Winfield points out:

The environmental assessment sub-agreement also reflects the themes of one-window delivery and the devolution of federal responsibilities to provincial and territorial governments....The federal government is limited in acting as a lead party to where federal approvals are required for projects on federal lands. Provinces are to be the lead parties for all other assessments.\(^5\)

The administration of the Accord falls to the Canadian Council of Ministers of the Environment (CCME). All governments in Canada are represented on this Council, which was established in 1964. It is headquartered in Winnipeg and is funded by all governments through an established funding formula. Its constitution stipulates that decision-making is to be done on a consensus basis. The presidency of the Council rotates annually.

### i. Responsiveness

All governments seek to be responsive. The question is: to which citizens, groups, and institutions does a government seek to be responsive? For this paper, the question is: to which groups, citizens and institutions does the Canada-Wide Accord on Environmental Harmonization respond? For an answer, we turn to the works of Patrick Fafard and Kathryn Harrison.

Fafard reviewed a number of submissions to the CCME Secretariat that were presented during the negotiation of the Accord. He also reviewed the testimony of various witnesses that appeared before the House of Commons Standing Committee on Environment and Sustainable Development. Fafard found widespread support among environmental interest groups for a vigorous federal role in environmental protection. For instance, the Canadian Institute for Environmental Law and Policy (CIELAP) argued that, “the federal government must also retain responsibility and capacity for providing leadership and action on international and national environmental issues. These responsibilities should not be transferred to the CCME.”\(^5\) Conversely, the groups also argued that, because provincial governments tend to be close to provincial resource-based economic interests, their
enthusiasm for environmental protection is minimal. Thus, many were wary of an agreement that would weaken the capacity of the federal government to develop and implement environmental policy. They expressed support “for a considerable degree of independent action on the part of the governments, particularly the federal government.” According to Fafard,

Independent action by Ottawa is deemed to be desirable on the assumption that the federal government is more likely than provincial governments to strive to ensure high levels of environmental protection. Moreover, ENGOs [environmental non-governmental organizations] were also willing to accept overlap and duplication in federal and provincial environmental policy. Such overlap would allow for a degree of intergovernmental competition to fill gaps in existing environmental policy or strengthen the regulatory regime as governments engage, as they did to some extent in the late 1980s, in a “race to the top.”

On the other hand, Fafard found that “Organizations representing business and resource industries...while supportive of intergovernmental cooperation are even more supportive of allocating to provincial governments responsibility for inspections and environmental assessment.” Fafard concludes that “…by and large, the result is more in keeping with the preferences of powerful organizations representing business and industry than it is in keeping with the preferences of ENGOs.”

Kathryn Harrison’s work also speaks to the issue of responsiveness. Echoing Fafard, Harrison points out that in 1996,

Over 90 environmental groups issued a joint statement urging the federal government to reject the Accord, depicting it as an “abandonment of the federal role” in environmental protection. Opponents raised the spectre of national standards set at the lowest common denominator, a race to the bottom among the provinces given discretion to implement those standards, and transformation of the CCME into a new but unaccountable third order of government. Here, Harrison also questions the appropriateness of the role that the CCME would be playing.

In January of 1998, on the eve of the signing of the Accord, environmental groups again conveyed their opposition to the Accord; more than fifty sent a letter to the prime minister asking him not to proceed with the Accord.
Professor Harrison emphasizes that the Accord was not a response to citizen demands for governments to do something about environmental deterioration. Rather, she demonstrates that heightened public concern generates unilateral legislative activity, and that intergovernmental cooperation occurs when the salience of environmental issues to the public recedes. Indeed, in 1993,...

...when both federal and provincial environment ministers were confronting deep cuts to their budgets, waning public attention to the environment, and pressure from investors anxious about the prospect of overlapping federal and provincial requirements, the CCME launched a “harmonization initiative” with the goal of eliminating overlap and duplication. Interestingly, the impetus for this initiative came from the federal government.  

If the Canada-Wide Accord was not a response to pressure from citizens and interest groups, what was it a response to? It seems likely that the federal government, deeply engaged in deficit cutting, saw an IGA with a provincialist thrust, as a way to reduce expenditures. It is also likely that it wanted to placate the provinces, which saw the environment as an irritant in federal-provincial relations. For their part, the provinces were undoubtedly concerned about recent court decisions that confirmed a robust federal role in environmental policy. Also, according to Harrison, the provinces were eager to achieve national standards in order “to avoid competition to set more stringent standards, and to prevent less aggressive provinces from undercutting their environmental standards to entice investors.” What the Accord seems to represent, therefore, is a response not so much to the concerns of citizens and interest groups as to the anxieties of, first, governments and, secondly, industry.

ii. Effectiveness

Before one can comment on the effectiveness of the Accord, it is necessary to set out its overall aims. They are identified in the first three sections of the Accord, namely, the Vision, the Purpose of the Accord, and The Objectives of Harmonization. The Vision of the Accord reads as follows: “Governments working in partnership to achieve the highest level of environmental quality
for all Canadians.” The Purpose of the Accord is “To provide a framework and mechanisms to achieve the vision and to guide the development of sub-agreements pursuant to the Accord.” The Objectives of Harmonization are to “enhance environmental protection; promote sustainable development; and achieve greater effectiveness, efficiency, accountability, predictability and clarity of environmental management for issues of Canada-wide interest....” The Accord, therefore, was established to achieve management related goals, e.g., policy and regulatory harmonization, and substantive goals, e.g., the highest level of environmental quality.

In 2003, a consultant engaged by the CCME submitted a five-year review of the Accord. Not surprisingly, the review was a laudatory one; not surprisingly, because the consultant, prior to his retirement in 2001, was “intimately involved in the development of the Accord, and the Standards themselves.”63 Thus, the report states:

In summary, it is evident that the Accord and its various sub-agreements have had a positive impact on environmental management in Canada. Cooperation between jurisdictions on all levels (professional, policy, and management) has been increasing in the environmental field, and the results in terms of improved environmental standards/quality are just now becoming clear. The Canada-Wide Standards process also benefited from the ability to coordinate efforts on emission reductions for several pollutants which, in certain instances, may arise from the same sources.64

The report concludes that the Accord “...has undoubtedly made a significant contribution to environmental management in Canada.”65

However, the review points out that “Many of the Canada-Wide standards have implementation dates some years in the future, and the benefits of the expected emission reductions (and other implementation modes) will only be truly evident in some cases if appropriate and adequate monitoring regimes are in place.”66

It is also noteworthy that the review contained no comments from stakeholders, such as business and industry and environmental groups. The generally positive review of the CCME’s
consultant must be considered alongside other important reports. For instance, the 2004 report of the federal Commissioner of the Environment and Sustainable Development states:

...I am concerned at signs that Canada’s environmental status and reputation may be slipping. For example, the Conference Board of Canada rated the relative performance of 23 member countries of the Organization for Economic Cooperation and Development (OECD) on a range of environmental issues, using OECD data. On that basis, Canada’s overall environmental performance was downgraded from an already disappointing twelfth-place ranking in 2002 to sixteenth in 2003. Pollsters have also noted a decline in Canadians’ confidence that their country is showing strong leadership on world environmental issues.67

In other words, the country’s environmental performance declined even though the Harmonization Accord had been in place for four years.

iii. Participation

As mentioned earlier, participation refers to the degree of citizen involvement in policy making. In the present context, citizen participation has three meanings:

- the opportunities for direct citizen involvement in the formulation of the Harmonization Accord;
- the opportunities for direct citizen involvement in the implementation of the Accord; and,
- the opportunities for the involvement of citizens, through their elected representatives, in the formulation, ratification and implementation of the Accord. This aspect of participation requires that the appropriate legislation be formally presented to legislators in Parliament or the provincial legislatures.

With respect to the first dimension above, it appears that consultation with citizens and interest groups was not extensive. Indeed, Patrick Fafard quotes one interest group leader, who was also a member of the National Advisory Group set up to advise the government officials, as saying, “we were ignored totally.”68 This is consistent with Richard Simeon and David Cameron’s observation
that, in battles between the federal and provincial governments, “...citizens are largely outside the game, more bystanders or cannon fodder than participants.”

Since the adoption of the Accord, interest groups have fared better. This is because the Accord, the Sub-Agreements, and the Annex include provisions for public participation. For example, among the Principles listed in the Accord is Principle five, which states: “openness, transparency, accountability and the effective participation of stakeholders and the public in environmental decision-making is necessary for an effective environmental management regime[.]” The Annex affirms, under *Objectives of Stakeholder Participation*, that

> The goal of stakeholder participation is to obtain, consider, and provide feedback on the ideas of people with an interest in Harmonization issues, and offer opportunities to influence decisions before they are made. An effective stakeholder participation process should capture, acknowledge and respond to the full spectrum of stakeholder interests, and result in more informed and credible decision-making.

The Annex also sets out the *Principles* for participation as well as the *Mechanisms of Participation*.

As a result of these provisions, public involvement in the implementation of the Accord has been significant. The five-year review of the Accord reports that “Substantial efforts were made by the standard development committees to involve stakeholders in their deliberations....” Kathryn Harrison agrees and in a 2002 article she wrote:

> It is worth noting...that the CCME has undertaken extensive consultations in support of each of these new Canada-wide standards. In the three years since the Accord was signed, the CCME has sponsored 22 national stakeholder consultations. 71

So, while stakeholders may not have been able to participate in the formulation of the Accord, they are participating extensively in its implementation.

This brings us to the third meaning we have attached to citizen participation, that is, the opportunities for citizens’ involvement, through their elected representatives, in the formulation, ratification and implementation of the Accord. It appears that the degree of formal legislator involvement was minimal. No legislature of the governments that signed the Accord ratified the
Accord. This is a particularly glaring omission in the case of the federal government, since environmental deterioration is a national problem meriting the attention of the national legislators. As noted at the beginning of the paper, the tendency of the drafters of IGAs to bypass legislatures is a major concern of political scientists. Former Prime Minister Pierre Trudeau shared this concern and in arguing against confederalism, he wrote:

First, there exists in a federal state a Parliament which has been chosen by all citizens, and which because it has been directly elected is uniquely able to represent the “national interest” of the citizens – as distinguished from their “provincial interests.” Only in a “confederal state,” where the directly elected Parliament is replaced by intergovernmental conferences of state ministers or other delegates, is it necessary to define the national interest by political negotiation rather than by public election. It is in the nature of federalism, in other words, for the citizen to look to Parliament for an expression of his national or extra-provincial interests.

However, with respect to the Environmental Harmonization Accord, there was some legislator involvement in its preparation. This took two forms. First, the negotiation of the Accord was the responsibility of the elected politicians, that is, cabinet ministers. They, not bureaucrats, signed the Accord. Secondly, at the federal level, the House of Commons Standing Committee on the Environment and Sustainable Development undertook a thorough study of the harmonization initiative, reporting in December 1997. It pointed to a number of flaws in the initiative from the federal perspective. Although the Committee’s effort constituted an uncommon demonstration of legislative independence, it did represent involvement by some elected representatives in the intergovernmental harmonization process. Still, there can be no denying that the absence of formal ratification by any legislature is a substantial gap in the democratic process that produced the Accord.

iv. Transparency and Accountability

In this paper, these two related concepts mean the following:
• the intergovernmental decision-making process is open and visible;
• citizens can hold governments, including intergovernmental bodies, responsible for their failures and shortcomings;
• governments answer to their legislatures and, indirectly, to their citizens; and,
• governments answer to other governments on their obligations and pledges.

The Harmonization Accord, its Sub-Agreements and the Annex do contain clauses on transparency and accountability. Principle five, quoted earlier (page 22), is one such provision. In the Environmental Standards Sub-Agreement, at section 4.3, governments indicate that they will “report to the public on plans for the attainment of the Canada-wide Environmental Standards based on the established timelines and other performance criteria, and on progress in attaining them[.]” The Annex, while acknowledging the accountability of Ministers, also stresses their accountability to their own constituencies. For instance, under the section entitled, Individual Government Accountability, the Annex states: “Each Minister remains responsible to act and to be held accountable within his or her jurisdiction.” Similarly, under the section, Legal Accountability, the Annex declares:

There can be no infringement on the powers and authorities of each Minister. The Accord and Sub-agreements are political agreements, and are subordinate to Ministers’ legal obligation to apply the laws for which they are responsible. The legal accountability of Ministers to their constituencies remains unaltered.

Despite the statements of intent, the deliberations of the CCME, including those that produced the Accord, have been held in secret. Given the sensitivity of the issues being discussed, and given the pledges in the Accord, the Sub-Agreements and the Annex, a degree of secrecy is probably necessary, unavoidable, and not too worrisome.

The real concern that the Accord presents in terms of transparency and accountability is that no government can be held responsible for the deterioration of Canada’s natural environment. As Simeon and Cameron point out, “…the citizen has no way to hold the intergovernmental system itself
to account, except indirectly.”  Recalling the Conference Board of Canada’s assessment of the environment; which government in Canada does a citizen hold accountable for the obvious failure in environmental policy and regulation? To say that all governments are responsible is to say that no government is responsible.

A second concern with an IGA like the Environmental Harmonization Accord is that it could result in collusive behavior and ‘groupthink’ on the part of governments. Without the stimulus of intergovernmental competition, the individual governments may refrain from making important and necessary demands on each other, and refrain from entertaining innovative proposals. As Kathryn Harrison points out, “...healthy competition among jurisdictions seeking to impress the same voters” enhances democratic accountability.

Notwithstanding the absence of the healthy competition she refers to, Harrison is somewhat optimistic regarding the accountability of the Accord’s signatories for three reasons.

First, federal environmental statutes since the late 1980s have become more specific with respect to duties, deadlines, and mechanisms for citizen participation....It will thus be more difficult for the federal government to retreat should it be inclined to do so. Second, the CCME has...attached firm deadlines and detailed reporting requirements to its intergovernmental standards. As a result, it will be easier for federal and provincial governments to hold each other accountable for their commitments. Third, the CCME has made a concerted effort to provide opportunities for public input to its deliberations in recent years. Environmental groups with both a place at the table and access to individual jurisdictions’ reports to the public will be in a much stronger position to hold both orders of government to account should their commitment to Canada-wide standards wane in the future.

The threat of federal unilateralism and a threat of court action are additional ways of ensuring the accountability of the Accord’s signatories.

*The Labour Market Development Agreements*

In May 1996, the federal government formally offered to devolve responsibility for labour force training to the provincial and territorial governments. The offer also included cash: $1.5 billion
to be made available to the provinces and territories if they agreed to deliver five types of “active employment measures,” namely, wage subsidies to employers; earnings supplements to recipients of Employment Insurance (EI); income subsidies to recipients starting their own businesses; projects undertaken by community organizations that hire EI recipients; and loans and grants to individuals for training.

The issue of which level of government ought to have jurisdiction over labour force training (also called worker training, labour market training, or adult occupational training) has been a contentious one for many years. On the one hand, the provinces long argued that worker training fell within provincial jurisdiction because of their responsibility for education. Quebec, in particular, had insisted on the need for devolution. In 1990, Premier Robert Bourassa obtained unanimous support in the Quebec legislature for a motion calling for devolution. On the other hand, the federal government has argued that its responsibility for national economic development required it to be involved in labour force training. Indeed, former Prime Minister Lester Pearson was unequivocal: “...the training and re-training of adults for participation in the labour force are well within the scope of federal jurisdiction...”

Despite their disagreement over jurisdiction, the two levels were able, until 1996, to live under an arrangement whereby Ottawa would “purchase seats” in training entities, mostly provincial community colleges. However, in 1995, Prime Minister Jean Chrétien agreed to withdraw the federal government from labour force training. To take advantage of the federal devolution offer, each province and territory had to negotiate a bilateral agreement, called a labour market development agreement (LMDA), with Ottawa. The agreements set out the details of the transfer of responsibility. (Ontario and Ottawa have yet to complete their negotiations).

The devolution was not total. The federal government reserved a number of areas for itself, as indicated in the following clause (2.2) from the Canada-Alberta LMDA:
Canada will retain responsibility for the delivery of insurance benefits under Part I of the Employment Insurance Act and for the national aspects of labour market development such as responding to national emergencies, activities in support of interprovincial labour mobility, the promotion and support of national sector councils, the operation of the national labour market information and national labour exchange systems, and innovative projects designed to test new approaches to improving the functioning of the labour market in Canada.

In addition, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and the Yukon chose not to agree to a full transfer of dollars and responsibilities but instead opted for a co-management arrangement of labour market programs with the federal government.

Devolution gave new life to a long-dormant, federal-provincial body called the Forum of Labour Market Ministers (FLMM). It is co-chaired by the federal minister and a provincial minister and the provincial co-chair rotates annually. The FLMM has the following objectives:

1. to promote interjurisdictional cooperation on labour market issues and to provide a forum to establish and meet common goals;
2. to promote a highly skilled workforce with portable qualifications through the development and expansion of interprovincial standards;
3. to facilitate Canada’s adaptation to changes in economic structure and skill requirements; and,
4. to provide an interjurisdictional link to participatory structures such as labour force development boards.

i. Responsiveness

It is clear that the devolution of labour force training was a response to the demand of the government of Quebec for control of training. Indeed, it was during the Quebec secession referendum campaign of October 1995 that Prime Minister Jean Chrétien explicitly recognized that the provinces had primary responsibility for worker training. Shortly after the referendum’s outcome, the Prime
Minister stated that the federal government would take no new training initiatives without the agreement of the provinces.\textsuperscript{77}

The Prime Minister's commitment was a total reversal of Liberal Party policy as stated in the Party's 1993 Red Book, entitled \textit{Creating Opportunity}. This election document devoted a great deal of attention to active labour market policy measures, including worker training measures; as Rodney Haddow put it, the proposals “suggested that the Chrétien Liberals envisioned an important continuing role for Ottawa in labour market training, despite the precedent of the Charlottetown Accord.”\textsuperscript{78}

However, faced with a resurgent Parti Québécois and jolted by the narrowest of victory margins in the referendum, the Prime Minister was forced to agree to withdraw the federal government from labour force training.

There does not appear to be evidence to show that Canadian workers, unions and employers wanted the federal government to devolve responsibility for training to the provincial and territorial governments. Indeed, some evidence suggests the opposite. For instance, the business and labour co-chairs of the now-defunct Canadian Labour Force Development Board (an advisory body set up by the federal government in 1989 with a board of directors comprised of representatives from business, labour, the equity-seeking groups, and government) warned the Joint House of Commons-Senate Committee on the Constitution (the Beaudoin-Dobbie Committee) that,

\begin{quote}
If the field of training is redivided in a way that excessively diminishes the federal role, existing programs will be less coherent, less useful to clients and less productive....There is an important role for the federal government in the field of training that stems both from the federal government’s responsibility for economic management and the desirability of coordinated Canada-wide labour markets and labour market programming.\textsuperscript{79}
\end{quote}

For Canadians who wanted the federal government to remain involved in training, the LMDAs represent unresponsiveness.

On the other hand, it can be argued that the consensus among Quebec’s political, labour and business élites that labour market training ought to be Quebec’s responsibility is a genuine reflection
of Quebec public opinion. However, there is no reason to believe that Quebecers were displeased with the pre-LMDA arrangement.

It should also be noted that, prior to the LMDA process, the federal government had been responsive to provincial demands for more autonomy in worker training. Indeed, since 1919, when the federal government passed its Technical Education Act, it has shared responsibility for labour force training with the provinces; the 1919 Act authorized Ottawa to provide funds to the provinces on a matching basis, pursuant to formalized agreements between Ottawa and each province. From 1966 to 1982, federal training policy was based on the Adult Occupational Training Act (AOTA). Again, provincial involvement was substantial. According to Rodney Haddow, “Ottawa gave each province considerable influence over decisions about how the AOTA budget would be allocated within its boundaries.” In 1981, the report of the Task Force on Labour Market Development pointed out that the Manpower Needs Committees, which were established in each province as a result of the AOTA and were comprised of federal and provincial officials, played “a central role” in the planning and administering of the federal training program in each province. Moreover, according to Herman Bakvis, the former Human Resources Development Canada (HRDC), like its predecessors,

has always been quite decentralized in its operations...and front-line service managers have typically enjoyed considerable discretionary authority in how they deliver programs....This culture of decentralization and local empowerment has always been there to a considerable degree....

What the foregoing suggests is that provincial involvement in the development and delivery of federal labour force training policy was always quite substantial. One can conclude, therefore, that the LMDAs represent not responsiveness but rather capitulation in the face of a secessionist threat.

ii. Effectiveness

It is significant that the Canada-Quebec Agreement is the only one to have a separate section entitled, “Objectives of agreement,” and to identify the first objective as being to offer “the population
of Québec high-quality labour market services.” The others, except the Canada-Nova Scotia LMADA, include a similar comment but it is located within the Preamble, (what is termed “Recitals”). They also have sections entitled “Purpose,” or “Principles and Objectives,” or “Purpose and Scope of Agreement,” but the first items of these sections are of an administrative nature, setting out the desire of the federal and provincial governments to implement Part 2 of the Employment Insurance Act or to work cooperatively to design and implement certain employment programs.

The absence in most of the Agreements of a clear statement of objectives, related to substance, reflects the fact that their creation had little to do with advancing skill levels in Canada, or ensuring the availability of skilled labour, or reducing unemployment, or helping workers improve their job prospects and standards of living. Rather, they had to do with intergovernmental relations, in particular relations between the federal and Quebec governments. Harvey Lazar, former Director of the Queen’s University Institute of Intergovernmental Relations, said as much in his report on a 2002 conference on LMADAs convened by the Alberta government:

I know of no independent commentator, for example, who believes that the federal government entered into the FPT [Federal-Provincial-Territorial] LMADAs mainly because it was convinced that they would improve labour market outcomes. Rather, the desire to remove active labour market measures as an irritant in federal-Quebec relations drove the federal government’s agenda.

This being the case, it is very difficult to attach credibility to evaluations of the LMADAs. Since they are a national unity issue, evaluators employed or engaged by government, federal or provincial, will be reluctant to offer serious criticism or suggest that perhaps a different regime ought to be considered.

Reinforcement of Lazar’s point comes from an unlikely source. In a 1997 speech to the Montreal Press Club, former federal Minister of Intergovernmental Affairs, Stéphane Dion, offered a defence, albeit somewhat half-hearted, of the pre-devolution arrangements. He stated:

Canada obviously didn’t sit on its hands for 31 years before taking an interest in job training. Federal-provincial agreements have been signed which, while perhaps not perfect, could not have been all that bad, since Canada is second in the world in terms of labour force
competitiveness, according to the most recent index of the International Institute for Management Development (IMD). 85

In other words, Dion argues here that the pre-devolution system seemed to serve Canada well. Why then change it by formally devolving jurisdiction? The answer, of course, was the perceived need to respond to Quebec’s demand.

Given the foregoing, how does one assess the effectiveness of the LMDAs? One way is to do what Dion did, that is, to look at the annual competitiveness rankings of the IMD. The ranking of Canada on one competitiveness factor – Availability of Skilled Labour – is particularly revealing. The following table shows Canada’s ranking for selected years.

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As Table 1 indicates, from 1996 to 2004, the years of devolution, Canada’s ranking on the Availability of Skilled Labour actually fell from 15th place to 26th place. Doubtless, other factors contributed to the decline and doubtless some will argue that the LMDAs have not been in force long enough to have a significant impact, but surely the precipitousness of the decline must be seen as a warning signal.

iii. Participation

Unlike the process that led to the Canada-Wide Accord on Environmental Harmonization, the process that produced the LMDAs did include an opportunity for federal MPs and Senators to give their input into the devolution of labour force training and into the shape of the Agreements. This is because the legislation authorizing the federal government to enter into agreements with the provincial
governments was presented to Parliament prior to negotiations. The legislation is the 1996 Employment Insurance Act, section 57(2) of which authorizes Human Resources and Skills Development Canada (HRSDC) to

work in concert with the government of each province in which employment benefits and support measures are to be implemented in designing the benefits and measures, determining how they are to be implemented and establishing the framework for evaluating their success.

Section 57(3) requires HRSDC to “invite the government of each province to enter into agreements for the purposes of subsection (2)....” Section 61(2) forbids HRSDC from providing “any financial assistance in a province in support of” labour force training “without the agreement of the government of the province.”

The Employment Insurance Act also requires HRSDC to monitor and assess the effectiveness of the benefits and assistance provided under the Act, including assistance provided by the LMDAs, and the assessment report must be submitted to Parliament annually. Thus, MPs and Senators have an opportunity to criticize and comment on the Agreements, (including the desirability of the arrangement itself if they should choose to get into this).

In this regard, Ursule Critoph, in a study of the impact of the LMDAs on women undertaken in 2002, emphasizes that, “The legal framework remains squarely within the purview of the federal government under the EI [Employment Insurance] legislation.” Thus, while it is highly unlikely that the federal government would try to reclaim its former authority in the labour market policy domain, it is federal legislation that made the LMDAs possible and therefore federal legislators can change it if they think it desirable to do so.

Professor Thomas Klassen, in his careful analysis of the LMDAs, expresses concern about the impact of LMDAs on “democratic values.” He argues that “...the role of citizens and legislators in strategic planning will be significantly reduced under the LMDAs as more decisions are made by officials and less information is made available to citizens and politicians.” Klassen suggests further
that, “The weak evaluation provisions of the agreements mean that the annual reports to Parliament or provincial legislatures will contain little useful information to make fundamental, hence political, decisions.”

What about citizen participation in labour market policy formation? To what extent is it enhanced by the new arrangement? Certainly, the demise of the Canadian Labour Force Development Board, a result of devolution, has meant fewer opportunities for citizen involvement in policy-making. The FLMM, which has become the main player on the national scene of labour market policy, is a forum open only to government ministers and their officials and has shown little enthusiasm for drawing labour, business, and other groups into its deliberations. Indeed, its list of objectives, identified earlier, does not include any mention of involving stakeholder organizations.

Professor Klassen agrees that citizen participation is not enhanced by the new arrangement. Furthermore,

Under the new regime, the federal government has little incentive to seek advice since its role in policy-making is much reduced, and in any case is focused primarily on ensuring savings to the EI account. From the viewpoint of democracy the new regime implies less involvement from politicians, and less participation by stakeholders and the general public in setting strategic policy.

Such a development might not be too worrisome if the stakeholders had the opportunity to influence provincial labour market policy. But Klassen notes a “lack of interest of many provincial governments” in setting up formal bodies like the Canadian Labour Force Development Board. In addition, only in the Canada-Quebec Agreement is mention made of involving the employment partners in the management of active employment measures. On the other hand, Klassen also contends that “stakeholder groups have more opportunities for participation on operational policy” in the provinces where devolution has gone furthest.
iv. Transparency and Accountability

Using the meaning of these two concepts set out earlier, (on page 24), we can make some comments on the transparency and accountability of the LMDA structure and process. First, with respect to the openness and visibility of the intergovernmental decision-making process, one could not say that decision-making within the FLMM is open and transparent. It has already been noted that the FLMM has demonstrated little interest in hearing from stakeholder groups. This was confirmed at the 2002 conference on the LMDAs where participants heard criticism that the “federal-provincial relationship is a closed shop.”

However, as mentioned, the federal Employment Insurance Act requires HRSDC to submit monitoring and assessment reports to Parliament. Thus, citizens, interest groups and legislators do have opportunities to critique the LMDAs and the LMDA structure.

The problem identified in the discussion of the Harmonization Accord is present here too; that is, that it is very difficult to hold an intergovernmental arrangement accountable. As noted, Canada’s record on worker training is not a stellar one. Which level of government does a concerned citizen or interest group hold responsible for this situation? If the answer is that all governments are responsible, this puts enormous pressure on the resources of groups and individuals if they wanted to try to get more government support for worker training.

If, on the other hand, worker training policy were the responsibility of one level of government, say the federal government, the “target” of accountability would be very clear. Citizens and interest groups would know who to lobby and they could concentrate their resources on one government, not several. Executive federalism, in other words, does not make it easy for the attentive public.
Democratizing the Process

Our modest proposals for democratizing IGAs flow fairly obviously from the preceding investigation. First, IGAs ought to be subject to ratification by the House of Commons and the sub-national legislatures. Preceding such ratification should be careful examination by legislative committees. In addition, members of the legislatures should be kept informed of the progress of negotiations and consulted on negotiation strategy. Of course, some IGAs are considerably more important than others, so it is not necessary that all IGAs be submitted for legislative scrutiny and ratification. However, those that involve substantial sums of money or that involve the transfer of jurisdiction should be among those to be examined by legislators. Framework agreements like the Social Union Framework Agreement should also be subject to legislative review.

Secondly, IGAs should ensure that stakeholders have opportunities to give their input to decision-makers on the implementation and evaluation of IGAs. Again, it would not be necessary for all IGAs to include this stipulation, only the more significant ones. Both case studies highlight the importance of this proposal. First and foremost IGAs are about responding to the needs of governments, not citizen needs. Stakeholder participation can ensure that the preoccupation of government negotiators with their own interests does not become extreme.

Johanne Poirier makes another suggestion that merits consideration. She proposes that “an explicit legal framework governing the conclusion, ratification, modification, publicity and archiving of IGAs” be established, presumably by all governments. This could have a democratizing effect if, say at the federal level, framework legislation stipulated that all significant IGAs must be examined and ratified by the House of Commons, and must include clauses on stakeholder participation and accountability.

Finally, in the interest of accountability and therefore of democracy, policy-makers at both levels of government should, before negotiating an IGA, carefully consider whether the IGA is
necessary in the first place, and whether it is preferable for one level of government to assume full responsibility for a policy domain. The Agreement on Internal Trade is an example of an IGA that may not have been necessary, given the federal government’s constitutional jurisdiction over the regulation of interprovincial trade.

Other political scientists have made a similar argument. Simeon and Cameron, for instance, urge greater attention to the clarification of roles and responsibilities and they approvingly quote John Richards who wrote: “Accountability matters. One – and only one level of government should be responsible for any particular domain of social policy.”

Roger Gibbins, in criticizing intergovernmentalism for the way it erodes the importance of legislative assemblies, has proposed increased decentralization as an alternative to IGAs. In Gibbins’s view, decentralization is incompatible with the establishment and maintenance of national standards, unless the country is “prepared to sacrifice democratic accountability, to impose a dense layer of intergovernmental agreements between citizens and the governments they elect, and to run the risk that a new pattern of intergovernmental arrangements will work to disengage Quebec from the rest of Canada.” However, according to Gibbins, decentralization alone – that is, increasing provincial powers – would make possible the regional differentiation of public policy and ensure the accountability of governments to electorates (that is, the provincial electorates). Of course, the opposite - increased centralization - would also ensure the accountability of government to an electorate (the national electorate), and it would promote the equality of treatment.

Clearly, a return to the days of “watertight compartments” is not possible, but it is highly desirable that governments, in their relations with one another, demonstrate more interest in the accountability aspect of democracy.
Conclusion

The objective here has been to assess the democratic character of IGAs. The democratic criteria used were responsiveness, effectiveness, participation, and transparency and accountability, and the agreements examined were the Canada-Wide Accord on Environmental Harmonization and the bilateral Labour Market Development Agreements.

With respect to responsiveness, the IGAs were an attempt to meet the demands of the provincial governments and, in the case of the Accord, the preferences of business and industry. Neither can be said to be a response to the needs and concerns of citizens or the groups within civil society.

On effectiveness, the Environmental Harmonization Accord has been a success or a failure, depending on which assessment one looks at. The CCME’s evaluation is positive but an international comparison suggests that Canada’s natural environment has deteriorated during the life of the Accord. Full-scale evaluations of all LMDAs have yet to be completed but, again, an international comparison shows that on at least one competitiveness factor, Availability of Skilled Labour, Canada’s ranking fell during the life of the LMDAs. It bears repeating that government-sponsored evaluations of the LMDAs are suspect since their creation had more to do with intergovernmental relations than with skill development.

The third criterion was participation. Here, the results are mixed. While the Accord was produced with minimal legislator involvement, it provides for extensive citizen and interest group involvement. In the case of the LMDAs, the reverse holds: they came about because of federal legislation but the Forum of Labour Market Ministers has been referred to as a “closed shop.”

Finally, with regard to transparency and accountability, the Accord makes a considerable effort to satisfy these two criteria. The FLMM, however, has demonstrated little interest in making itself accountable, although the annual monitoring and assessment reports required by the federal
legislation do give MPs an opportunity to question the federal labour market minister. Generally speaking, however, it was shown that it is exceptionally difficult to hold an intergovernmental arrangement accountable. In general, one can conclude that the democratic content of the two IGAs studied is not substantial. To enhance the democratic character of IGAs, the paper offered a number of proposals for reform.
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Endnotes

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63 Electronic communication to author, March 17, 2005.
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Ibid., p. 251.


The reference here is to the Canada-Quebec Labour Market Agreement in Principle. Before agreeing to a full LMDA, the governments negotiated an agreement in principle first. The full Canada-Quebec LMDA does not contain this section.


Stéphane Dion, *Straight Talk, Speeches and Writings on Canadian Unity*, Montreal and Kingston, McGill-Queen’s University Press, 1999, p. 216. It is not clear where Mr. Dion got his information since “labour force competitiveness” is not among IMD’s list of competitiveness factors.


Ibid., p. 190.

Ibid., p. 191.


Ibid., pp. 143-145.
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