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Cooperative Federalism

I wish, first of all, to start with a disclaimer. I am not a specialist in oceans governance issues and case law. I was asked to provide a larger context for this debate focusing on the ways in which “cooperative federalism” can work and how federal systems operate.

I therefore think I should also say at the outset that the term cooperative federalism can be very misleading, at least in the Canadian case. It refers primarily to periods when the federal government was flush with money and the provinces received subventions under very general headings, and were then able to spend the money transferred as they saw fit. Or it may refer to periods when there is disagreement on some major issues, which trigger concessions on others. For example, after the near death experience of the Quebec referendum in 1995 there was a desire to “renew the federation” and the Canada-wide Accord on environmental harmonization emerged in 1998. So there can be kiss and make up periods of cooperation which may not last.

Since the late 1960s the pendulum on environmental issues has, according to Kathryn Harrison, “twice swung from cooperation to conflict and back.” Conflict was in vogue when the Canadian Environmental Protection Act was passed in the late 1980s: the environment minister stated in the House that “We do have authority and the federal government intends to exercise it. We do not intend to do it by committee.”

A classic non-environmental example of major swings in policy and cooperation is the Canada Assistance Program (CAP). Established in 1966 it was seen by many as a key example of how our federal and provincial governments could cooperate to better serve the needs of citizens and their governments. It was initiated by a dominant federal government offering half-price matching dollars to the provinces for social spending. Starting in 1990 the federal government placed increasing restrictions on the CAP (the cap on CAP) despite provincial protests, and the Supreme Court affirmed that parliament could cut such established programs as it saw fit, and it did. This era of cooperative fiscal federalism was over. When federal money started to flow again, it frequently went into high profile federal programs even though they directly affected areas within provincial jurisdiction. In particular I think of the Millennium Scholarship Foundation, the CFI, and the Canada Research Chairs Program. These were very worthwhile programs but were not developed cooperatively. Other forms of collaboration, such as the Equalization Program written into the Constitution Act of 1982, are extremely complex. The rules governing equalization are understood by only a few academics, experts, and finance officials and discussions of fiscal imbalance remain incomprehensible to most Canadians, as do the realities of federal-provincial bureaucratic life. So, too, I suspect do the realities of oceans governance.

What I am saying is that federalism itself is complex and its actual operations are often misunderstood. Cooperative federalism is a term used episodically in our history. But as a key concept it is not particularly helpful. What it amounts to is the recognition that it is almost always possible in the Canadian system to do what you want to do if the Premiers and the Prime Minister agree, if the federal government has funds available, or if there is sustained public outcry. Then things change and then it takes bureaucrats who stay on task and make a sustained effort to make things work.

What therefore remains a defining feature of Canadian federalism is what political scientists refer to as intergovernmental or “executive federalism”. Cabinet governance and the division of powers under Section 91 and 92 drive this. Executive federalism makes the formal division of constitutional powers less relevant. It blunts the inherently legalistic nature of federalism implicit in the formal division of powers and it affects the Supreme Court’s role as constitutional arbiter. And in Canada’s case the Court has usually, I believe, taken a fairly balanced approach—although not all here may agree.

Our formal division of powers, and our federal institutions, and our traditions of executive dominance at federal and provincial levels, do affect the ways in which we approach collaboration. They can drive us to unilateralism, or to collaboration, or to rationalization and disentanglement, or to judicial remedies. All have been tried, with varying degrees of success.

In the brief time that remains to me I want to illustrate this in two ways. Firstly, by mentioning aquaculture as a case study. Secondly, by mentioning the approaches possible in other federal systems specifically the United States and Germany. I will then conclude with several general observations about our expectations with regard to renewed collaborative federalism in oceans and marine governance.

In the case of aquaculture, Rayner and Howlett and others have noted that Canadian aquaculture was founded on the basis of the provincial right to determine how property and resources are used, and this right was then “hemmed in by” the federal power to protect wild fisheries, navigation, and shipping. We got regulatory overlaps, duplication of authority, and the mechanisms of inter-governmental and executive federalism then had to be brought to bear to try to solve problems. Provincial governments were often pro-development and were advised by industry advisory groups, and the federal government used its jurisdictional powers to try and protect the wild fisheries and other water users. DFO was responsible for habitat, the provinces for licenses and siting, and the federal government for the management of environmental impact studies. We had two jurisdictions butting heads. Attempts to resolve this problem and change these relationships are reflected in many of the documents attached to the conference package, and the paper by Ricketts and Harrison illustrates clearly the initiatives that were taken and the turf wars that arose over any proposed transfer of resources in these and other areas. The complexities of oceans governance arrangements from a provincial standpoint are also set out in the paper by Alley and Topelko. What the development of aquaculture shows, often, is non-collaborative federalism and reliance upon old approaches.

If I now look at arrangements in the United States it is clear that the structure of the US federal system has led to different outcomes. One of the paradoxes of US federal developments is that the original separation of powers notwithstanding--which gave the states all residual powers other than the short list assigned to Congress—Congress has assumed a predominant role, greatly assisted by judicial interpretation and the inter-state commerce clause. From the Clean Air Act of the 1970s on, Congress has assumed a leadership role in enforcing national standards. In 1970 the states themselves were given the option of implementation of the Act, and there were carrots offered (grants-in-aid) and a large stick was also available: states that did not implement the standards would lose their highway grants. This sort of pattern of national standards and arm-twisting has remained, even under Republican regimes that were trying to weaken federal authority vis-à-vis the States. But we must also remember that the US senate plays a key legislative role that helps to legitimize federal actions, and an individual province is often more powerful than a single state, especially if it is Ontario or Quebec. Canadian provinces have not been subject to this kind of arm-twisting and blackmail, and the Canadian government has not set the same type of national standards. The US approach has been described as functional federalism, with the states implementing, often in different ways, national standards. This occurs even within a system that has multiple points of legislative blockage and very strong interest group lobbying power. The Canadian approach by contrast was still rooted in jurisdictional federalism. These issues are clearly set out in “Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada” edited by Fafard and Harrison, published in 2002.

The central point that I am making is that federal politicians respond to public and party pressures within an institutional environment that shapes their responses. In Canada, when Ottawa and the provinces agree, things can happen. If they don't agree, we face serious problems. In the United States not all States have to agree and things do still happen. Regional collaboration is not unusual and there can be pivotal legal challenges that bring about change as well. Current US responses and approaches since 2002 are summarized and discussed in the paper by Hershman and Russell, and I shall not dwell on the regional approach they discuss. I think their arguments reinforce what I am saying.

Finally the effect of institutional arrangements can be seen even more starkly in the German system. The formal structures in Germany emphasize collaboration. In a recent paper on the role of the German upper house, the Bundesrat, in which the Lander governments are directly represented. Thomas Konig notes that while the 16 Lander governments directly participate in policy making at the federal level, federal policy-making co-governs the regional level by laws, regulations and administrative orders implemented by the Lander. The legal competence for spatial planning lies in the Lander and the municipalities. The federal national Government has only the competence to set the general framework of spatial planning. An illustration of this is the Integrated Coastal Zone Management of the Oder Estuary region. We must also remember that cooperative federalism in Germany does indeed take place in the national legislature. It does so through a very effective conciliation committee process. It deals with controversial cases, but Konig notes that the success rate of legislation is very, very, high. This may mean compromise and modest change—but it is change for all and it is implemented by all.

My time is almost up, and so I will move to a very general conclusion. We are not going to change the nature of the Canadian federal system. We are not going to waltz into the sunlit uplands of a new era of cooperative federalism. We have to move away from confrontation; we have to try to rationalize and disentangle, and there has to be ongoing collaboration that leads to practical and effective outcomes that move us away from ad hoc approaches. We need people who stay in the same jobs and can make things happen: we might call them policy entrepreneurs. Applying lessons from Germany is a stretch. Learning from the success of US outcomes is far more likely, even if we will not, or cannot, take quite the same approach to federal-provincial affairs. The American Coastal Zones management approach, in which the federal government sets the overall goals and then provides funding and gets out of the way as the states implement effective measures, is a model that I think holds promise for us. Public pressure for action on oceans management is high, industries need certainty, and the availability of far more accurate information will be invaluable. I would settle for Burkean pragmatism as long as it means action not avoidance and obfuscation and buck-passing, and as long as we try to move away from the legal, jurisdictional, and other squabbles of the past, and focus on best practises.

I have shied away from larger theoretical questions about the role of courts and institutions as dependent or independent variables. I have not had time to deal with public opinion and interest group or stakeholder activity, the need for far better publicly available information, and for well-informed political leadership. These factors will, I am sure, will arise over the course of our discussions.

Malaspina's Institute for Coastal Research has been founded as an attempt to foster interdisciplinary debate and to bridge the gap between science and the social sciences and the humanities. At Malaspina, due to our involvement also with shellfish aquaculture, we are acutely aware of the need for well-informed decision making and improved public and stakeholder awareness of both scientific and social issues. I would like to end by recognizing Dr. Bill Pennell, who has been central to our coastal research work, and I would also like to recognize our recently arrived Canada Research Chair, Dr. Grant Murray, whose work is on coastal community development.