

# Introduction to IGR

J. Peter Meekison

In November 2000 a conference with the theme “Institutions and Mechanisms for the Coordination of Federalism: International Experiences” was held in Mexico City. This short volume is an extension of that conference and some of the papers included here were first presented in Mexico. The Forum of Federations was the both the conference organizer and sponsor.

The organizers divided the conference into three sessions. The first session examined the formal and informal institutions and mechanisms of intergovernmental relations. In this session there was special emphasis on the mechanisms for coordinating the activities of the principal office in charge of intergovernmental relations with intergovernmental initiatives from other government departments. The second session built on the first and focussed on how to avoid, manage and solve conflicts between the federal government, constituent units and their representatives in the federal legislature. The final session was devoted to a discussion of Mexico’s plan of action in the area of federalism, in particular intergovernmental relations. The international participants were specifically asked to give advice to the Mexicans on how they should proceed.

There were two groups of conference participants. The first consisted of representatives from then President-elect Vincente Fox’s transition office. These were the individuals charged with the task of developing a series of recommendations for President Fox’s consideration regarding changes that might be appropriate to the structure and processes of intergovernmental relations in Mexico. The second group consisted of the paper presenters. The presenters, from six different federations, were all non-elected individuals who had personal experience with the challenges of intergovernmental relations on a daily basis.

The purpose of the papers and presentations was to give the Mexicans a broad overview of intergovernmental relations and conflict resolution from a number of perspectives. The federations discussed at the conference included Canada, Australia, Germany, the United States, Argentina and Brazil. This cross-section of federal systems was selected to give the transition office an opportunity to discover for themselves the tremendous difference in approach to intergovernmental relations and the rich variety of structures and processes associated with intergovernmental relations. The participants represented both parliamentary federal systems and presidential/congressional systems. Most of the presentations were given from the perspective of intergovernmental relations as seen through the lens of institutions of the national government both executive and legislative. The Australian representative was the Director General of the New South Wales Cabinet Office who spoke from the perspective of a constituent unit.

The presentations to the 2000 conference were not formal papers on the subject of intergovernmental relations, nor were they lengthy academic treatises on the theory of intergovernmental relations. Instead they provided a description and analysis of the various structures of the mechanisms and processes of intergovernmental relations in place and some the challenges that the

individuals had personally experienced. In effect the presentations were directed toward practitioners. They did, however, generate a considerable degree of dialogue and debate about the subject between the Mexicans and the presenters and among the presenters themselves. Some parts of the discussion clarified information while others concentrated on particular structures or problem areas. The discussion at the conference was so animated that the conference organizers decided to publish the presentations to serve as a short reference work for practitioners in the field of intergovernmental relations. Given their recent experience with federalism, and to add an additional perspective on some of the challenges facing the Mexican government in this area, chapters on South Africa and Russia were added to the volume, although they were not represented at the original conference. The papers in the volume, apart from the Introduction, Conclusion, Russia and South Africa, are placed in the order in which they were presented at the conference.

The objective of the conference was to have all participants focus on some of the practical issues associated with intergovernmental relations in the individual federations. The Mexican participants opened the conference by posing two general questions to the other participants. The first question was, "How do intergovernmental relations work in the six federal systems represented at the conference?" The second question was, "Based on your individual experiences what advice can you give Mexico on how it should approach the organization and processes of intergovernmental relations?"

Once these questions were posed the presentations and ensuing discussion focussed on the following subject areas. What structures pertaining to intergovernmental relations exist in other federations? How and why did they come into existence? What do they do? How are they organized? What is their purpose? To whom do they report? What are some of the problems or challenges facing the different federal systems in the sphere of intergovernmental relations? How are intergovernmental disputes resolved? What is the difference between theory and practice? What are some of the most common or recurring themes in intergovernmental relations? How are intergovernmental relations co-ordinated at the national level? What are some of the political dynamics associated with intergovernmental relations? How are the skills and knowledge of public servants developed? How is the autonomy of state and local governments guaranteed? As one might expect, the list of questions raised was long and the time available to address them too short.

What became readily apparent from the discussion is that intergovernmental relations are a common characteristic of each federation. This reality should hardly come as surprise to anyone who has studied federalism. What is of interest are both the similarities and the differences in approaches to the subject. For example, there were ongoing references to the various constitutional provisions such as the division of powers and how the federal legislature was structured. There were references to the important role of courts with respect to constitutional interpretation and dispute resolution. Issues associated with fiscal federalism, such as equalization and revenue sharing, received attention. There were a number of references to the role of local governments. What was very evident was the importance of the executive branch to the process and practices of intergovernmental relations.

The differences were particularly evident when examining the organizations each federation had developed to deal with intergovernmental relations. The dominant role of First Ministers' Conferences in Canada and Australia provide one example. While there is a German equivalent to the FMC, its activities should be considered in the context of the pivotal role the Bundesrat plays

in the German federal system. In the case of the United States, Brazil and Argentina, the importance of the President in intergovernmental relations was very evident. While a similar observation can be made about the Canadian and Australian Prime Ministers, the focus of the Presidents appeared to be more often on their Congresses than on the states.

My role at the conference was to provide some comments on dispute resolution from the Canadian perspective. The balance of this introductory chapter looks at this matter.

In Canada, discussion and analysis of intergovernmental relations are generally limited to federal-provincial and interprovincial relationships. The federal-municipal and the provincial-municipal dimensions, for the most part, do not usually attract the same degree of analysis in the study of Canadian federalism as do the federal-provincial or the interprovincial perspectives. The Canadian provinces have strongly discouraged federal-municipal relationships and this perspective is not addressed in my comments. That said, it should be realized that in a number of other federations local governments are given far more recognition and weight in the overall sphere of intergovernmental relations.

While intergovernmental relations are a fact of life in federations, the nature of these relationships varies considerably and ranges from harmonious to strained to antagonistic. While the term “co-operative federalism” conveys an image of tranquility and harmony, the reality of the intergovernmental relationships may be far different. When things work, they are taken for granted or become simply parts of the landscape. When disputes arise they have a very high public profile. Even though they are eventually resolved, they tend to be remembered and referred to, sometimes for many years.

What are some of the common sources of intergovernmental conflict? I have identified ten areas which, in my estimation, have produced the vast majority of intergovernmental conflicts within the Canadian federal system. They include:

1. disputes over constitutional jurisdiction;
2. disputes over revenue-sharing or the issue of vertical fiscal imbalance;
3. disputes arising from horizontal fiscal imbalance;
4. disputes over the exercise of the federal spending power;
5. disputes over regional development policies and the question of which provinces benefit most from federal spending;
6. disputes over the control of natural resources;
7. disputes arising from cultural, linguistic or religious differences;
8. conflicting ideologies between political parties;
9. clash of personalities;
10. the lack of intergovernmental consultation and the resulting unilateral action by either order of government.

Obviously there are others but the ten categories listed above identify the principal cause of major intergovernmental disputes within the Canadian federal system. While there is a very obvious federal-provincial dimension, these ten sources are equally applicable to interprovincial disputes, a recent example being the growing, and increasingly public, quarrel between those provinces receiving equalization payments from the federal government and those that do not. As the papers in this



volume show, other federations have experienced disputes in these areas as well. As one might expect, disputes over fiscal issues in their various manifestations are prominent and recurring.

Federal-provincial disputes may be bilateral, regional or multilateral. Disputes also vary in their intensity, complexity, importance, and the extent of provincial support or opposition for a particular position. For example, during the 1980-81 patriation dispute, two provinces supported the federal government's approach and eight opposed it. In 1990 when the federal government introduced the cap on the Canada Assistance Plan, Ontario, British Columbia and Alberta felt aggrieved. The disputes between Quebec and the federal government over the ability of Quebec to establish the Quebec Pension Plan or over federal transfers to universities are other examples.

The nature of the dispute often suggests the possible remedy. These would include avoidance, intergovernmental negotiations, legislative action, referring the matter to the courts or constitutional amendment.

Avoidance is possibly the best approach. Unfortunately it is too often ignored as a strategy. For example, if governments accept the fact that unilateral action in a sphere of intergovernmental relations, such as the exercise of the federal spending power, is likely to precipitate an adverse reaction, the obvious solution is to avoid confrontation by giving advance notice and, if possible, providing for some kind of advance consultation. Most governments, like people, react negatively to unpleasant surprises, particularly when the surprises are incorporated in part of a budget and cloaked with the mantle of budget secrecy.

Another way to avoid disputes is to refrain from name-calling and gratuitous public insults. It is difficult to resolve disputes or find a common ground if people are not speaking to each other. In short, avoidance is about anticipating and understanding the causes of conflict and taking the appropriate steps, if possible, to prevent conflict from occurring.

Another way of avoiding, or at least minimizing, disputes includes regularly-scheduled meetings of ministers and officials to discuss matters of mutual interest. Perhaps the best example in Canada are the meetings of Ministers of Finance and their deputies. This interaction has been continuous since 1941, leading to what Steven Dupré refers to as "trust ties" amongst those involved in the process. This does not mean that matters negotiated have been conflict-free, far from it – but what it does mean is that those involved come to know and trust each other. They have ongoing opportunities to exchange views and search for workable solutions. A great deal of information is exchanged and those involved in the processes experience and face common problems, whether they be inflation, tax policy or deficit reduction. The personal relationships that develop have been an important factor in overcoming many of the irritants which arise and which have the potential of escalating into more serious problems.

Recent intergovernmental agreements can also be considered a form of dispute avoidance. An obvious example is the 1995 Agreement on Internal Trade, which includes, as part of the Agreement, a section on dispute resolution. A second example is the 1999 Social Union Framework Agreement. It also included a section on dispute resolution and avoidance. No specific process has yet been developed but efforts to formulate a mechanism are continuing as part of the review of the Agreement. What should be understood is that the subject matter of both agreements – interprovincial trade barriers and the exercise of the federal spending power – have been contentious issues for years affecting both interprovincial and federal-provincial relations. The agreements represent a negotiated solution with the intention of decreasing, if not eliminating,

such disputes. Should differences arise, the agreement provides for its own processes for dispute resolution. The experience in Canada is so recent it is too early to say with certainty whether or not it will be successful. The expectation, however, is that this kind of intergovernmental agreement will lead to significant reduction in the number of intergovernmental disputes.

Disputes inevitably arise. Some are clearly accidental. In others instance it is evident from the very beginning that the party is well aware of the intergovernmental ramifications of their actions. Such disputes are often a result of unilateral action, a careless remark or an unexpected policy initiative.

When major intergovernmental disputes occur how do governments manage them in Canada? There is no specific script for governments to follow. While each dispute is different, however, there are some common threads the critical one being the need for intergovernmental dialogue and negotiations. In the federal-provincial arena, the first question to be considered is the extent to which all provinces are affected and, if they are, the extent to which the issue is of concern to them.

For example, in the fall of 1980, after the federal government indicated its intention to proceed unilaterally with patriation of the constitution, the provinces convened a special meeting of premiers. It was clear from that meeting that the provinces were not of one mind on a provincial response. Some provinces were opposed to the federal government's action, some were uncertain and others were supportive of it. The key here is that the provinces considered a unified provincial response. The Annual Premiers' Conference serves as an important institution for addressing provincial concerns.

Eventually, the eight opposing provinces agreed on a two-part strategy. The first was to develop an alternative proposal to the one being pursued by the federal government. The second was to challenge the federal action in the courts. The 1981 Supreme Court of Canada decision opened the door to a negotiated settlement at a First Ministers' Conference in November 1981. The final agreement included portions of the province's alternative plan. The end result was the Constitution Act, 1982, which, among other things, included the Charter of Rights and an amending formula.

The 1980 National Energy Program (NEP) provides a second example where intergovernmental negotiations were critical to resolving a major dispute, in this instance, a bilateral dispute between the governments of Canada and Alberta. While the NEP also negatively affected the province of Saskatchewan, the main protagonists were Canada and Alberta. The Government of Canada announced the NEP after a series of inconclusive meetings on the renewal of the Canada-Alberta energy pricing agreement. Alberta responded to the federal initiative through a number of policy decisions including curtailing crude oil production, stopping oil sands development and commencing a court challenge on the constitutionality of a proposed federal export tax on natural gas. The underlying policy objective of the provincial response was to force the federal government back to the negotiating table. Negotiations eventually resumed and an energy agreement was reached in the fall of 1981, approximately 10 months after the NEP was announced.

There are some obvious similarities between the two disputes outlined above. Both occurred after earlier federal-provincial negotiations proved unsuccessful or inconclusive. Both resulted from unilateral federal action. Both led to a provincial policy response. The patriation dispute involved an intense round of interprovincial meetings followed by a federal-provincial meeting.



Both included reference cases to provincial courts of appeal and eventually a decision by the Supreme Court of Canada. Both led to a resumption of federal-provincial negotiations and resulted in a negotiated agreement. Finally, both disputes, although resolved, have left their mark on federal-provincial relations.

Having observed and participated in the negotiations of the two examples I have given, I have formed some strong views on what works best. Even after a major dispute erupts, my view continues to be that a negotiated agreement is the most desired and, if past experience is a guide, the most probable outcome. What is necessary to achieve this objective? Firstly, it is essential that there be open lines of communication between the two sides to the dispute. Secondly, it may be necessary for officials to do a great deal of preparatory work identifying all the issues that need to be addressed, terminology used, data required, assumptions made and the main points of contention, what one can refer to as “clearing out the underbrush.” This proved very effective in the energy negotiations when both sides working together conducted a detailed analysis of the different assumptions and consequences on which the two different positions were based. Thirdly, an effort should be made to dampen expectations as to probable outcomes and to refrain from dire predictions. Finally, the parties to the dispute must determine when and on what they are prepared to compromise and look for new and innovative solutions. The parties also need to be cognizant of the fact that agreeing to renew negotiations itself signals a willingness to seek some kind of agreement and a tacit acceptance that resolution of the dispute is the preferred alternative.

In the two examples given above, part of the overall provincial strategy was to refer certain questions to the courts for their opinion. There is an element of risk associated with any decision to involve the courts in a federal-provincial dispute for the simple reason the courts may not give the desired answer to the questions asked. What is evident is that the courts do have an important and continuing role to play in resolving intergovernmental disputes.

In certain situations intergovernmental negotiations may either be the wrong approach or simply not be an effective method for resolving disputes. Obvious examples are situations where clarification of legislative jurisdiction or constitutional law is essential. In such circumstances the courts have been given or have assumed the responsibility to settle the matter. The patriation reference case is one example, another is the reference case on Quebec’s right to secede from Canada. Other examples are the reference cases over control of offshore mineral rights. One finds a similar role played by the courts in other federations as a number of the authors indicate. In some situations the need for a court decision is clear or inevitable. What is less clear are those instances where resort to the courts is in reality acceptance or recognition of the failure of intergovernmental diplomacy.

Finally one cannot overlook legislation or constitutional amendment as a means of resolving or avoiding disputes. For example, in 1996, shortly after the 1995 Quebec referendum, the federal parliament approved the Regional Veto Act that gave Quebec, and the provinces of Ontario, British Columbia and Alberta, a veto over certain constitutional amendments. Another example was the five-year review process of the Canadian Environmental Assessment Act. In 1999, the provinces were invited to provide comments on and to suggest amendments to the Act as part of the review process. Discussions between the federal and provincial environment ministers resulted in the Government of Canada accepting some provincial suggestions and rejecting others. Constitutional amendment is the most difficult method of resolving disputes and has not been a

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particularly effective alternative in Canada. That said, Section 92A, which formed part of the Constitution Act, 1982 is an exception to this general observation. The constitutional amendment, which deals with provincial jurisdiction over natural resources, reversed two Supreme Court of Canada decisions that had adversely affected the provinces.

Dispute resolution is a subject of importance to all federal systems as indicated in many of the papers. While the courts are always available to assist in this area, it is of equal importance to consider ways to avoid disputes. In addition, the use of mediation and alternative dispute resolution techniques to settle some disputes provide new and promising alternatives to intergovernmental relations. The value of ongoing and frequent intergovernmental meetings should not be discounted. In the final analysis, effective intergovernmental relations are dependent on strong personal relationships and mutual trust and respect between individuals.



