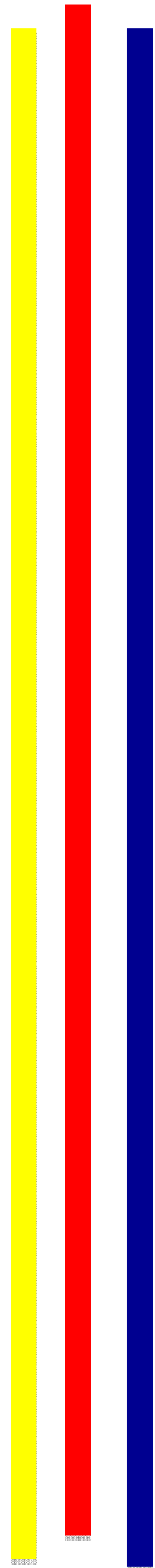

SPECIAL SERIES:

THE ROLE OF FEDERALISM IN PROTECTING THE PUBLIC'S HEALTH

CREATIVE FEDERALISM AND PUBLIC HEALTH

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Introduction

A series of recent challenges have highlighted the importance of public health as a key domestic and international policy concern. From the global threats posed by the human immunodeficiency virus pandemic and risk of pandemic influenza to Canada's own handling of the tainted blood tragedy, the severe acute respiratory syndrome outbreak and most recently the contamination of food with Listeria, it is evident that there are serious health, societal and economic consequences of failures in health protection.

Many public health threats migrate readily and, depending on the scientific properties of the threat, they may cross local, regional (states, provinces etc) or national borders. The failure to manage public health threats by one government can thus create a risk for others. Coordinating policies between orders of government is therefore a central component of an effective public health system (Wilson 2004). Surprisingly, however, public health federalism has not been systematically studied, either here in Canada, or in other federations.

Effective intergovernmental relations are crucial to the protection of the health of populations. For example, in the national severe acute respiratory syndrome report several comments were made in reference to the intergovernmental challenges in managing infectious disease outbreaks (The National Advisory Committee on SARS and Public Health 2003a, 2003b). Internationally, in an effort to coordinate response to public health emergencies across national governments the World Health Organization, with unanimous approval of its member states, issued revised versions of the International Health Regulations that impose substantial and extensive obligations on State Parties

(World Health Organization 2005a). Since the effective authority to implement the International Health Regulations is typically scattered among more than two orders (levels) of government in federal systems, implementing these Regulations may raise special challenges for such systems. Indeed, for this reason, the Government of the United States issued a reservation to the international agreement stating that it would implement the Regulations in a manner consistent with US system of federalism.(Wilson, McDougall, and Upshur 2006; United States Department of Health & Human Services 2006).

Response to infectious disease outbreak is but one of a series of public health concerns where coordinated approaches to manage the threats are being sought. Food safety, water safety, and air quality are others. All share some principles in common. First, the scientific properties of the public health threat determine the potential extent of spillover of harm from one jurisdiction to another and therefore should, in principle, influence the nature of the intergovernmental relationship that is most appropriate for managing the threat. Second, the health protection programs for responding to such threats should balance local/regional governance, where expertise and responsiveness as well as public confidence and trust may lay, with the need to have a coordinated national approach. These programs therefore have to be coordinated nationally among the several orders of governance but also, depending on the case, with foreign governments and international organizations. Furthermore, while it is relatively easy to state what should be done in principle, in practice it is sometimes less than clear “who is doing what” in relation to the management of these public health threats. This is in part because of constitutional ambiguity over which order of government is responsible for delivering various aspects of public health services and which order of government should be responsible for

financing the components of the public health system. Even when this is clear, the clarity alone does not necessarily lead to the desired public health outcomes

In many respects resolving the intergovernmental challenges in public health are more important and more complex than doing so for its cousin, health care. The externalities of failure in health care are limited and the constitutional division of powers relatively clear. However, while health care federalism has been the focus of much academic scholarship and policy analysis similar examination of intergovernmental relations in public health has been difficult to identify. Indeed, there has been no mapping of the relative roles of the federal, provincial/territorial government, and other orders of government in respect of many key health protection files. It is not clear where there are overlaps or gaps. And where gaps and overlaps are identified constitutional ambiguity and/or fiscal squabbling may stand in the way of governments reaching solutions.

This Project

We sought to address these concerns by conducting a series of case studies on public health and Canadian federalism. We focused on public health security (health protection) as opposed to health promotion. Table 1 below lists the subjects, the case studies and authors.

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Table 1: Case Studies

Subject	Specific Case Study	Author
Blood	Post-Krever Inquiry blood system	Kumanan Wilson, Jennifer McRea Logie, Harvey Lazar
Drinking water	Multi-barrier strategy for clean drinking water	Jonathon Bertram and Aaron Holdway
Air safety	Canada-Wide Standards for Particulate Matter and Ground-level Ozone	Karen Thomas
Food safety	Food biotechnology governance	Melissa Gabler
Disease migration	Tuberculosis and First Nations' populations	Michael Orsini
Immunization	National Immunization Strategy	Jennifer Keelan
Emergency preparedness	Emergency Preparedness and Response relating to infectious disease threats	Chris MacLennan
Health surveillance	National health surveillance system	Christopher McDougall

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Each of these case studies does three things:

- describes the nature of intergovernmental relations that exists in the area of public health;
- classifies this intergovernmental relationship or regime; and
- evaluates the effectiveness of the intergovernmental regime on the basis of its effects on policy, democratic principles and practices, and the workings of the Canadian federation.

For all of these case studies the intent was to conduct a descriptive and evaluative analysis guided by a modified version of a framework developed by Harvey Lazar and Tom McIntosh(Lazar and MacIntosh 1998). They defined intergovernmental regimes by reference to two sets of variables. The first is the extent to which the intergovernmental relationship entails either *independence* or *interdependence* between the federal and provincial orders of government. The second is the extent to which the relationship reflects the idea that both orders of government are, or are not, sovereign in their own constitutional spheres and hence the extent to which a *hierarchical* or *non-hierarchical* relationship prevails between the two orders of government.

In the real world, hierarchy and non-hierarchy and independence and interdependence are rarely distinguishable as black and white. Taking account of this qualification, the term hierarchical is used to reflect two underlying factors. The first is whether one order of government has the effective capacity to impose policy or program obligations on the second order of government in respect of matters where that second order of government has legislative competence under the division of powers in the constitution. The second is whether the first order of government uses that effective capacity against the will of the other order of government (or at least against the will of some governments from the

other order). Note that in this methodology unilateral action by either order of government when it is acting within its own constitutional competence is not considered hierarchical.

Two types of considerations are relevant to knowing where on the independence/interdependence continuum a program or policy may be. One is the extent to which there is joint federal-provincial decision-making, implementation or funding. The other is the extent to which, despite the absence of joint federal-provincial activity, the actions of one order of government may impact the other and influence its choices. Where that influence requires the second order of government to make modest adjustments only to its program, the relationship is more independent than interdependent. Where the influence effectively "forces" important changes in the priorities or structures of the second order of government, the relationship is more interdependent.

In scenarios in which there is no interdependence and no hierarchy, the relationship is described as disentangled federalism. In scenarios in which there is interdependence and the relationship is hierarchical, the relationship is described as unilateral federalism. In scenarios in which there is interdependence and the relationship is non-hierarchical, the relationship is described as collaborative federalism (Table 1). In the cases where there is hierarchy with independence, the term used is beggar-thy-partner-federalism (although we did not take into account this form of intergovernmental regime at the outset of the project). For public health, because of the importance of local public health activities, a similar analysis may also have to be conducted of federal-local and provincial-local relationships. Where appropriate, we also considered the role of trans-national and supranational organizations, for example, the World Health Organization.

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Table 1
Descriptive Analysis Framework: Characterization of Intergovernmental Relationships

	Federal-Provincial Relationships		
	Interdependence	**Hierarchical**	**Form of Relationship**
Federal-Provincial	Yes	Yes	Federal-Provincial Unilateral
Federal-Provincial	Yes	No	Federal-Provincial Collaborative
Federal-Provincial	No	No	Federal-Provincial Disentangled
	Federal-Local Relationships		
	Interdependence	**Hierarchical**	**Form of Relationship**
Federal-Local	Yes	Yes	Federal-Local Unilateral
Federal-Local	Yes	No	Federal-Local Collaborative
Federal-Local	No	No	Federal-Local Disentangled
	Provincial-Local Relationships		
	Interdependence	**Hierarchical**	**Form of Relationship**
Provincial-Local	Yes	Yes	Provincial-Local Unilateral
Provincial-Local	Yes	No	Provincial-Local Collaborative
Provincial-Local	No	No	Provincial-Local Disentangled
	Confederal Relationships		
	Interdependence	**Hierarchical**	**Form of Relationship**
Provincial-Provincial	Yes	No	Interprovincial Collaborative
Local-Local	Yes	No	Interregional Collaborative

After classifying the nature of the relationship, the case studies then assess the impact of that relationship on the public interest, which is defined by reference to three factors: policy effectiveness

(health and economic); democratic values and processes: and federalism. Table 2 provides some of the criteria used to determine the impact of the form of intergovernmental regime on each of these factors.

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Table 2 Factors Determining the Impact of the Intergovernmental Regime on the Public Interest

POLICY EFFECTIVENESS

Health

- Impact on number and extent of gaps related to provision of public health services
- Coordination of public health activities (managing or eliminating overlaps as appropriate) to avoid spread of threats
- Flexibility and responsiveness of system

Economic

- Eliminating duplication/ reduction in overlaps
- Improvement in economies of scale

DEMOCRATIC VALUES AND PROCESSES

- Protection of the rights of majorities
- Protection of the rights of minorities
- Involvement of stakeholders in the decision-making process
- Transparency
- Accountability

FEDERALISM

- Respect for jurisdictional sovereignty/division of powers under the Constitution
- Reconciling disputes over access to public health information
- Fair distribution of costs of public health initiatives
- Effectiveness of intergovernmental communication in dealing with public health threats that cross borders

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The classification system is intended to provide us with a way of understanding the nature of the intergovernmental relationship or regime for different public health cases. Before knowing whether a relationship "works" or "does not work", we need to have a description of what the relationship looks like. Sometimes the relationship is easy to classify. In other cases it is highly complex and our effort to apply the methodology to the facts of the relationship requires supporting text to reflect the nuances. For example, in a particular case, the intergovernmental process for setting the strategic decision framework (for example, agreeing on who does what and who pays for what) may be collaborative but implementation of decisions arising from that framework disentangled. Whether simple or complex, we need the classification to help us understand the nature of the intergovernmental regime that we are evaluating and how well it is serving the public health needs of Canadians

Blood Safety

The first of the case studies we conducted was in blood safety. The blood supply is an example of a complex public health system and demonstrates some of the challenges in applying the analytical framework. We examined the nature of intergovernmental relationship in blood safety following the reform of the blood system in the aftermath of the Krever Commission, particularly as it pertained to policymaking regarding the threat of variant Creutzfeldt-Jakob disease to Canadian blood safety. We made the following observations(Wilson, McCrea-Logie, and Lazar 2004). Federal involvement in blood safety is primarily through the creation of safety regulations which is authorized by the Food and Drug Act(Food and Drugs Act (R.S. 1985). The local governance components of the blood system are the regional blood operators. These operators are under the governance of Canadian Blood Services, a not-for profit Crown Corporation and the national operator of the blood system. Importantly, Quebec opted out of the national blood system and created its own provincial version,

with Hema-Quebec as its operator(Wilson 2006). The provinces' responsibilities are primarily as a funder of the blood system. The provinces approve 3 year rolling budgets put forward by Canadian Blood Services. The roles and responsibilities of federal and provincial governments in the blood system have been formalized through an intergovernmental agreement.

We struggled with the classification of the nature of intergovernmental relations in blood safety. We settled on identifying the existence of an interdependent, hierarchical relationship between the federal government and the provinces(Wilson, McCrea-Logie, and Lazar 2004). This in retrospect may not have been completely accurate. The reason for this classification was the potential for the federal government to impose a coercive relationship on the provinces. By passing regulations concerning the safety of the blood supply, the federal government could, and has, created significant costs for the provincial governments, who are required to pay for new safety measures, over which they have little input(Wilson and Hebert 2003; Wilson and MacLennan 2005). By doing so the federal government would also divert money from other provincial priorities in blood safety (for example reducing transfusion reactions, perhaps the greatest health risk posed by blood transfusions)(AuBuchon and Petz 2001). However, while appearing to be inequitable, this relationship was mutually agreed upon and formalized through a Memorandum of Understanding. Furthermore, the federal government was acting within its constitutional jurisdiction. Federal authority over blood safety is based on the Food and Drug Act which is supported by section 91(27) of the Constitution Act which gives the federal government power over criminal law(Jackman 1996; Braen 2002). Furthermore, as the post Krever blood system has evolved, federal involvement has appeared to have become more limited. In the immediate aftermath of the creation of the new system, as was evident in the vCJD related decision-making process, the federal government played a leading role in introducing policy to protect the safety of the blood system. However, more recently Canadian Blood Services has

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independently introduced measures to protect the blood supply without the requirement of federal advisories or regulations.

We may, perhaps, more effectively be able to describe the system of federalism if we consider the blood safety case study within a framework that involves 1. Creating a new system for managing blood supply; 2. Making rules within that system; and 3. Delivering the product. First the creation of the new framework was federal-provincial collaborative. Second, the rule making by Ottawa is harder to classify but it entails interdependence in the sense that it relies on others to pay for and deliver the product or implement the rules. The question this poses is whether this would be unilateral or collaborative rulemaking. It is collaborative since Ottawa is acting within its constitutional jurisdiction and with provincial concurrence. But if Ottawa imposes regulations and costs that create a strong negative reaction from the provinces, the classification moves more towards a hierarchical relationship and could perhaps be described as coercive collaboration.

The relationship between the local governments and the provinces is equally complicated if we are to view the Canadian Blood Services as being representative of the local governments. Canadian Blood Services is allowed to exceed federal standards with respect to safety, which they have done on several occasions, also creating costs for provincial governments(Wilson, McCrea-Logie, and Lazar 2004). This again is formalized through the Memorandum of Understanding between the provinces/territories and the federal government. Therefore decisions by Canadian Blood Services can influence provincial spending and be viewed as coercive by the provincial governments. However, ultimately the provinces have to approve the Canadian Blood Services budget, although refusing to support funding for safety measures would be politically challenging. Therefore, technically the relationship is collaborative, although again the potential for coercive collaboration exists.

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The evaluative framework was more effective in application to the case study than the descriptive framework. We determined the complex system of intergovernmental relationships to be largely beneficial and a key component of the successful transition of the blood system after the release of the recommendations from the Krever Commission. The separation of funding from decision-making allowed for aggressive early interventions to combat emerging threats – for example, Creutzfeldt-Jakob disease, West Nile virus and the potential threat of severe acute respiratory syndrome(Wilson 2007). The ability to do so protected the Canadian blood supply and re-established confidence of the public. The autonomy of the Canadian Blood Services facilitated more direct interaction with consumer groups. The main areas in which deficits existed was in the economic consequences relating to the adoption of comparatively cost-ineffective safety measures and on principles of federalism because of the potential for creating unfunded mandates for provincial governments by the passing of federal regulations.

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Revised Blood System Analysis

Table 3: Allocation of Roles and Responsibilities in Blood Safety

	Federal	Provincial/ territorial	Operator
Agenda setting	X		X
Legislative authorities	X		
Funding responsibilities		X	
Delivery of Service			X

Table 4:

Nature of the Intergovernmental Relationship in the Blood System

	Interdependent	Hierarchical	Form of Relationship
Federal-provincial	Yes	No	Collaborative – with some unilateral components
Provincial-operator	Yes	No	Collaborative
Federal-operator	Yes	No	Collaborative – with some unilateral components

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Table 5:

Effectiveness of Intergovernmental Arrangements in Blood Safety

Policy	
Health	• Considerably improved coordination of activities • Clear roles and responsibilities • Cost considerations are secondary to health considerations (safety of blood supply) when considering the introduction of safety measures
Economic	• Economies of scale advantages to a decentralized system of multiple provincial blood systems • Separation of funding and regulatory functions increase the likelihood of introducing cost-ineffective safety measures
Democracy	• Improved accountability over previous system • Minorities better represented than majorities • Improved transparency over previous system
Federalism	• The current arrangements are broadly consistent with the division of powers in the constitution • Potential for conflict due to unfunded mandates, although this is less of an issue as decision-making has evolved • No clear intergovernmental dispute resolution mechanism • Flexibility in intergovernmental relations that has accommodated Quebec's preference to operate its own blood system • Effective competitive federalism and collaboration between Quebec and the rest of Canada

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Complexities of Public Health Federalism

Why then the difficulty in classifying the nature of intergovernmental relations? There are several explanations. First public health involves a complex interaction between many different policy sectors. Within the field of blood safety, blood safety regulation is one function, and could be viewed as falling within the health protection component of public health activities and therefore be within federal jurisdiction. However, blood safety implementation at the local level may fall to a large extent under the domain of the health care system which is within provincial jurisdiction. As described, if we had divided blood safety in this manner, we might have identified the regulation of blood safety as representative of disentangled federalism, with each order of government working within its own constitutional jurisdiction, and blood safety implementation as being representative of collaborative federalism. The food biotechnology working paper successfully demonstrates this form of decomposition of functions within a specific policy area. Another explanation for the challenges in classifying the nature of federalism in public health is the ambiguity over constitutional authority. There is no clear authority over public health in the constitution(Jackman 1996). Federal authority is derived primarily from the criminal law provisions. Potential authority also exists through the quarantine power and the national concern and emergency branches of the "peace, order and good government" clause(The National Advisory Committee on SARS and Public Health 2003b; Attaran and Wilson 2007). Provincial powers are related to authority over "property and civil rights" as well as over "matters of a local or private nature" within the province. Therefore determining whether the federal government is working within its constitutional jurisdiction is difficult to ascertain. Moreover, in some instances the federal government may have potential constitutional power and choose not to use it. The emergency response and health surveillance case studies examine these instances. The TB/disease migration case study identifies the belief of many in public health that the federal

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government should more directly involve itself in Aboriginal public health, which is within its constitutional jurisdiction. In other instances the federal government has the requisite constitutional authority and has passed legislation and chooses to use the authority – as in food biotechnology and blood safety. In yet another case the federal government has authority, passed legislation but does not use it. The case study on air safety examines this scenario, where potential authority to legislate exists under the Canadian Environmental Protection Act but is seemingly not being used to its full potential(Attaran 2000). Finally, the federal government may believe it does not have constitutional authority and seek other means to provide national guidance – the case study on immunization examines this scenario.

In all of the case studies one theme is clear – a degree of national coordination is necessary and desired. However the federal government does not want to be overly intrusive in achieving this because it recognizes it must rely on local public health resources to get the job done 'on the ground'. In order to achieve this balance, in the face of constitutional ambiguity, public health officials have to identify innovative mechanisms to achieve the benefits of coordination with the advantages of local public health efforts. Arriving at this goal has occurred through a sort of "creative federalism". In its original context in the United States, creative federalism referred to aggressive cooperation and federal involvement in state matters in the 1960's to 1980's(Cater 1968). A modern Canadian analogy would include federal or national initiatives in which collaboration and coercion are combined in areas of unclear or shared constitutional jurisdiction to achieve national plans with reliance on local and provincial capacity. The case studies will explore the various mechanisms by which this is being attempted in a multitude of different public health policy arenas. For each of these cases studies it is worth considering the following questions: (1) what level of federal leadership is being demonstrated, (2) in areas in which federal leadership is being demonstrated, what instruments

are the federal government using to assume leadership and how coercive is the relationship with the provinces and territories.

Shining some light on intergovernmental relations in public health

We hope that these case studies will provide insights into what forms of intergovernmental relationships work and what forms do not work given the nature and scientific properties of the public health threat being managed. For example, is a particular form of federalism best suited for threats such as infectious diseases, which can rapidly cross local, regional and national borders? Is another form of federalism more appropriate for threats such as poor air quality or contaminated water which have much more local negative effects, although still have the potential to cross borders? For issues in which regional spillovers and externalities are more likely than national ones, is a form of regional cooperation crossing over national borders preferable to federal government involvement? Obviously the ultimate form of federalism that is chosen will be influenced by the degree of constitutional authority the federal government may perceive that it has and, as importantly, is willing to use. International treaties may also influence how aggressive the federal government may choose to be in attempting to achieve policy objectives. Importantly, again, these case studies were conducted at various times over the past 5 years. Public health governance is a constantly evolving area and the initiatives may dramatically change. Nevertheless identifying how a public health initiative was evaluated at a given period in time and the progress since that date can provide useful insights into the success of the form of federalism being utilized.

A fundamental purpose of government is to preserve the security of its citizens. Protecting the public's health is a central component to preserving this security and government, therefore, must be structured in a way to best achieve this goal. The goal of this series is to provide guidance to

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policymakers as they attempt to structure relationships among governments to best deliver Canada's public health programs.

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