

*Constructive and Co-operative Federalism?
A Series of Commentaries on the Council of the Federation*

**Getting Things Done in the Federation:
Do We Need New Rules for an Old Game?**

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Foreword

Canada's Provincial and Territorial Premiers agreed in July 2003 to create a new Council of the Federation to better manage their relations and ultimately to build a more constructive and cooperative relationship with the federal government. The Council's first meeting takes place October 24, 2003 in Quebec hosted by Premier Jean Charest.

This initiative holds some significant promise of establishing a renewed basis for more extensive collaboration among governments in Canada, but many details have yet to be worked out and several important issues arise that merit wider attention.

The Institute of Intergovernmental Relations at Queen's University and the Institute for Research on Public Policy in Montreal are jointly publishing this series of commentaries to encourage wider knowledge and discussion of the proposed Council, and to provoke further thought about the general state of intergovernmental relations in Canada today.

This series is being edited by Douglas Brown at Queen's University in collaboration with France St-Hilaire at the IRPP.

Harvey Lazar
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October 2003

Last July, Canada's provincial and territorial leaders, meeting in Charlottetown, adopted what they called a "plan to revitalize the Canadian federation and build a new era of constructive and cooperative federalism". The centerpiece of the five-point plan is the creation of a "Council of the Federation" – endorsing at least part of the original proposal put forward by Jean Charest, the newly elected Premier of Quebec. The council will comprise of the leaders of the thirteen Canadian provincial and territorial governments (hereafter I will call them Premiers). It will meet on a regular basis, and other provincial-territorial councils, such as those for health or finances, will report to it. Also under the umbrella of the Council will be a new secretariat for information and cooperation on fiscal imbalance. The new Council will not include the federal prime minister as a member, but rather would meet annually with the federal PM, following a jointly prepared agenda and co-chaired by the prime minister and the chair of the Council. In addition to agreeing on the need for these structured meetings, the Premiers also called for new procedures for consultation on federal appointments, for the devolution of powers to the territories, and for the

establishment of federal-provincial-territorial (FPT) protocols of conduct.

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In sum, the Premiers plan to beef up existing institutions and develop new ground rules for intergovernmental relations. These changes hold the promise of substantial improvement of relations among the provinces and territories, and between them and the federal government. Whether the promise is met depends on how much real reform is achieved. The communiqué of the Charlottetown meeting is light on detail and vague on important design issues that will have to be addressed. The Premiers agreed to have the first meeting of the Council in Quebec on October 24, 2003, where they may well agree on more details. How far they get then and in the coming months will turn on their ability to overcome some significant obstacles to reforming the mechanics of our intergovernmental relationships in Canada. The provincial and territorial premiers seem divided on just how much reform is needed or desirable. And Canadians are likely to be somewhat cynical: they have seen such proposals come and go—including the ambitious constitutional reforms debated in Charlottetown eleven years ago.

How serious are the Premiers about reform of intergovernmental relations, or is this just window dressing in preparation for a new federal government after Paul Martin takes the reins? Should Canadians support reform of intergovernmental relations, and to what extent are new rules and new institutions necessary? Are our provincial, territorial and federal governments prepared to give up some of their autonomy to undertake the “pooled sovereignty” that might be required for such new arrangements to make a difference? This paper addresses these questions. First I discuss why we need intergovernmental relations at all in the Canadian federation—the ongoing paradox of interdependence in a system of carefully divided jurisdictions. Second, I review the nature of the informal institutions and norms that have governed our relationships to now. Third I outline some key constraints to strengthening

intergovernmental relations, and how they are based in fundamentally competitive political values that will be hard to overcome, if indeed we want to do so. Last, I examine some specific reforms being proposed and other ones that would be needed if we really want more effective mechanisms for joint decision-making.

The Paradox of Federalism: Why Do We Need Intergovernmental Relations at All?

Intergovernmental relations arise naturally from the logic and design of federal systems of government. The genius of federal constitutions is that they allow for unity across a large territory and among diverse societies, by dividing governance between the union and its regional political communities—what we in Canada call our federal and provincial (and territorial) governments. The provinces take care of more local concerns or those more specifically tailored to their local society, and are fully sovereign in legislative and executive terms within the confines of their constitutional jurisdiction. The federal government is also fully sovereign in its legislative and executive functions as defined by the constitution. Democracy is thus compound, with a certain amount of creative competition and redundancy to be expected and encouraged among provinces and between them and the federal government.¹

But at the heart of all federal systems is the paradox that federalism is designed, as the late Daniel Elazar put it, for both “self-rule and shared rule”.² The self-rule consists of the separate and independent spheres of jurisdiction. The shared rule consists of the participation and representation of the regions or provinces in the federal or national government such as in the upper house or Senate of the federal parliament. It is also seen in some powers being essentially

¹ This argument was made originally by James Madison in the *Federalist Papers*, published during the debate leading to the founding of the United States Constitution in the 1780s. For commentary see Vincent Ostrom, *The Political Theory of a Compound Republic: Designing the American Experiment* (Lincoln, Nebraska, University of Nebraska Press, 1987).

² Daniel J. Elazar *American Federalism: The View from the States* (New York: Harper and Row, 1966).

shared between the federal and provincial governments. The shared rule aspect of the federal principle is weakly developed in Canada but strong in most other federations.

Our original constitution passed into law in 1867 did its best to avoid explicit concurrent jurisdiction in the new Canadian federation. There were some key exceptions from the beginning, such as agriculture and immigration. Also, federal and provincial taxation powers are nearly the same, so that unless the governments coordinate their tax policies, a tax jungle can take place. And in the area of criminal law, the federal Parliament is responsible for the content of the criminal code, while the provinces are responsible for administering it.

As time went on, and the role of government expanded, many more areas of law-making and public policy tended to overlap. The chief example is social programs, which are mainly the responsibility of the provinces, but the federal government assumes a role in the development of common national entitlements, such as for health care and social assistance.

In Canada as in other advanced federal systems, especially since the end of the Second World War, we have seen a complex of intergovernmental relations emerge to deal with the growing interdependence of governance. These relations, which cover practically all fields of policy, are particularly extensive in fiscal arrangements (tax sharing and intergovernmental grants), social programs, economic and regional development, the environment and international trade. These relationships can be *horizontal*, i.e. among the constituent units in a federation (states, provinces, cantons, etc.) or *vertical*, i.e. between the federal government and the provinces, or both. Whether one places more emphasis on interprovincial versus federal-provincial cooperation depends a lot on how much direct federal involvement is desirable or necessary to get things done jointly.

Newer federal systems such as Germany have incorporated into their constitutions specific institutions to deal with intergovernmental relations because they could predict the heavy weight they would bear. But Canada's much older constitution did not

foresee such a need, and has of course proven very difficult to reform. Instead Canada has had a more gradual evolution of institutions and processes to deal with intergovernmental management. These have been rather ad-hoc and informal, placing clear limits on what they achieve in terms of joint decision-making and the execution of shared responsibilities. In fact, Canada today has among the least formalized intergovernmental relations of all the federations.

"Intergovernmental" is also a term that some use to describe the detailed governance of managing interdependence among nation-states. The United Nations and its many allied agencies are essentially intergovernmental, in that they depend on the agreement and funding of their constituent members to get things done. In the past twenty years we have also seen the development of major supranational institutions, most notably the European Union, that have raised the standard for how nation-states can pool their sovereignty to achieve joint goals.

These trends at the international level have two consequences for intergovernmental relations in Canada. First they provide some important models for ways in which our machinery of intergovernmental relations could be made more effective. Second, and more importantly, the evolving institutions of global governance are both cause and effect of a broader trend of *multilevel governance*. What this means is that the interdependence among governments within our federation that has been growing in the past century is now extended, through globalization and regional integration, to governing agencies beyond our borders. Increasingly what our governments deal with when they meet is not just domestic, national issues, but ones with broader international and global implications. The tidy distinction between domestic and foreign is gone, probably forever. Canada's ability to deal with issues such as softwood lumber, cross-border security, the Kyoto Accord, agricultural trade, SARS, and a host of others, depends on carefully meshed federal-provincial and international interactions. In this complex world there is much intergovernmental business to be done. The question remains: is the old way of doing things up to the task.

Executive Federalism in Canada: Getting Things Done In Spite of Ourselves?

Among federations there are significant differences in the institutions and underlying ethos of intergovernmental relations. These form a continuum between maximum independence and maximum interdependence. At the one pole governments retain their autonomy and interact in a competitive way. If coordination occurs at all, it is through the unseen hand of a political market. At the other pole, government actions are so intermeshed as to allow no independent freedom of action. This can occur in a vertical arrangement with provinces doing what the federal government demands because they have no choice. Or there can be a more horizontal “joint decision trap” – a phrase used by German political scientist Fritz Scharpf to describe the rules for some policy fields in the German federal system, where no government can act unless all of them agree to do so.³

Canada’s federal system is tilted more than most towards the competitive and more independent end of the spectrum. Ours is a relatively decentralized system, with more room for competition – among provinces, and between provinces/territories and the federal government – than would be tolerable elsewhere. This is despite the original plan of the founders of the federation for a more centralized system. They did not foresee the growth of provincial power and influence that arose from the courts’ protection of their jurisdiction, from the increasing scope of social and economic programs under provincial control, or from the continuing support that Canadians would give to strong provincial governments (especially but not confined to, Quebec). As noted already, the classic division of powers in our federation has weakened as interdependence has grown. But what has not weakened has been the propensity for competition among governments, and the jealous protection of jurisdiction and autonomy at both levels.

³ Fritz Scharpf, “The Joint Decision-Trap: Lessons from West German Federalism and European Integration” *Public Administration* (Vol. 66, 1988: pp. 239-78).

Our governments can act together when there is a very strong consensus. Academics have labeled the characteristic style of such actions as “executive federalism”. It is a direct result of the marriage between federalism and the British model of parliamentary government where the executive is embedded in the legislative branch, and where the Government that commands majority support in parliament can pass and execute laws and generally run the business of government with awesome, centralized control. Recent analysis of the Canadian version of the Westminster model emphasizes that our prime ministers (even without the cabinet) are becoming increasingly powerful actors – a pattern that holds true for the provincial governments too.⁴

Thus when the Prime Minister and Premiers do have the political will to reach agreement on a course of action, no matter how complicated, they are generally able to do so. Executive federalism has a long list of achievements, including the joint programs and fiscal arrangements that built the welfare state; extensive collaboration in regional development and trade promotion; a degree of success in constitutional reform such as in 1981-82; and so on. But there have also been major failures and protracted periods of conflict, such as over energy policy in the 1970s and 80s, and the Meech Lake and Charlottetown Accords.⁵

The high profile successes and failures of executive federalism obscure the extensive everyday relations among governments in Canada, occurring in meetings not of the first ministers, but in over 20 councils of ministers (e.g. health, finance, social services, agriculture, environment, etc.), and in an elaborate substructure of mirror deputy-minister councils, sub-committees, task forces and the like. There is also constant communication by phone, email, and formal correspondence. For the most part all

⁴ See Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

⁵ For constitutional issues, executive deal-making must also be approved by legislatures and increasingly by the public in a referendum. As demonstrated in the case of the Meech Lake and Charlottetown Accords, this approval is not automatic!

of this activity has a useful purpose and achieves its goals of relatively low level cooperation: exchange of views and information and much mutual attempt at persuasion. However, when intergovernmental relations attempt to reach an outcome that is more ambitious, such as a joint policy or coordinated program of action, the constraints and values in our system kick in to limit what can be achieved.

The Constraints on Co-Decision

If our history is that our governments have an occasional ability to achieve intergovernmental results of some substance, why can't we be more confident that this can occur more consistently, and be less contingent on the alignment of unusual political forces? Three main constraints prevent more systematic success. First and most significant is the continuing strong political culture of autonomy and competition. A major rationale for the Canadian federation has been the protection of a national French-speaking minority and the preservation of the autonomy of provincial communities. Over time this rationale has been strengthened, particularly against the competing rationale of Canadian nation-building, by court judgments preserving provincial jurisdiction and by the success of the provincial governments in sustaining electoral support for their role. Indeed, as a result of the tension between provincial and national communities, and between Quebec and the rest of Canada, Canadians seem more tolerant of conflict and seem to recognize it as the price to be paid for diversity. The tension extends to intergovernmental relations. Not only are they an arena for the working out of differing visions of the country, but also the goals, means and style of relations becomes part of the contested ground of Canadian federalism.

The second major constraint is institutional, rooted in the working rules of our intergovernmental relations.⁶ Partly because our nineteenth century constitution did not foresee

⁶ The term "working rules" and its application to the institutional dynamics of Canadian federalism originates with Martin Painter, "Intergovernmental Relations: An Institutional Analysis" *Canadian Journal of Political Science* 1991, vol. 24: pp. 269-88.

the need, and partly because of the competition values just described, Canadian governments do not have well developed machinery for making collective decisions. There is no entrenched constitutional or legal provision for intergovernmental bodies; and no formal decision rules for the ad-hoc and informal mechanisms that exist.⁷ In the absence of their formal establishment, relations are ad-hoc and rudimentary. The provinces chafe at the lack of regularly scheduled meetings with the federal government, which can take place only with federal consent, and the sometimes shallow nature of consultation. Agendas are often set unilaterally. For its part the federal government often sees such meetings as merely "fed-bashing", and not efforts to make genuine compromises for joint action. When governments meet, decisions are usually taken, if at all, by consensus only, which tends to produce lowest common denominator outcomes (one reason why intergovernmental communiqués are so anodyne). And on some major decisions the convention is unanimity, so that all it takes is one party to disagree for action to be delayed or denied. Another consequence of the lack of legal formality is that intergovernmental agreements generally remain political accords only. They can be changed at will by either party, or ignored as both parties wish, and often do not survive an election. On the whole, these rules – or rather the lack of more effective working rules – create continuing disincentives to achieve collaborative results.

The third constraint, linked to the previous two, is democratic. Executive federalism as practiced in Canada and elsewhere is, by definition and structure, executive-dominated.⁸

⁷ There are some important exceptions that point to how strong intergovernmental processes could be. These include the amending procedures in the *Constitution Act, 1982* (although complicated in 1996 by the Chrétien government's adoption of political rules for its use); the legislated rules for cooperation in the *Canada Pension Plan*; and the operational rules of the Canada-Newfoundland Offshore Petroleum Board.

⁸ The term "democratic deficit" which arose out of the European Union context has been applied to Canada as well, but the two situations do differ substantially. In Canada unlike in the EU, there is a federal government that is wholly responsible to a directly elected Parliament. If intergovernmental

It tends to be secretive and bureaucratic, and as an extension of executive government, keeps the legislatures at bay. As a result, the politics of intergovernmental relations, especially the most visible relations among first ministers, suffer from defective accountability and representation. Where complicated intergovernmental agreements result in shared responsibility, direct accountability is blurred. Or in a context such as health care, where no one disputes shared responsibility but where agreement is hard to achieve, the public witnesses the debilitating spectacle of competitive blaming. Representation is also at issue, particularly for highly symbolic issues such as constitutional negotiations, where the concentration of decision-making among first ministers alone is perceived as a problem.

In fact in most policy fields intergovernmental relations must co-exist with a broad set of processes in which the public has increasing input to policy formation –whether that is through stakeholder consultation, interest group lobbying, polls and focus groups, or legislative committees and caucuses. It is not surprising that when governments face the complicated task of maintaining these kinds of consultative processes simultaneously with an intergovernmental process, the alternatives of dropping the latter and going it alone or of achieving more limited goals becomes very attractive indeed. Thus the democratic rationale for avoiding intergovernmental outcomes is reinforced by a broader administrative rationale. Inevitably governments prefer to deal directly with their own electorates through unilateral actions designed for them alone rather than through complex intergovernmental arrangements.

How Can We Move Forward?

So we come to recent calls for reform. The Premiers announcement in July has its origins in the position of the Quebec Liberal Party (QLP) before the last Quebec election, and in general trends in federal and interprovincial relations during the Chrétien era. The QLP issued a paper

in October 2001 calling for a new federalism “de concertation et de coopération”⁹, consisting of a better effort to manage global interdependence, a respect for the federal spirit (i.e. respect for provincial jurisdiction), a better fiscal balance between the federal and provincial governments, and more concerted interprovincial cooperation. The paper also called for a new Council of the Federation as a permanent forum for collaboration among the federal partners, presumably including the federal government. Its task would be to coordinate intergovernmental relations in such areas as internal trade, social union, broad economic management and international relations. The Council would be backed up by a permanent Secretariat-General, with three sub-secretariats.

The QLP position, now apparently the official policy of the Government of Quebec, marks an important point of departure. By taking the lead on the reform of intergovernmental relations, Quebec signals a renewed interest in federalism. By emphasizing interprovincial as much as federal-provincial relations, it reinforces the trend since 1995 for greater interprovincial collaboration for its own sake, as well as to strengthen a common front with respect to Ottawa. And while not forgetting the traditional constitutional positions of Quebec, the new position adopts the conventional wisdom that nonconstitutional reform is the better way to proceed.

There have also been calls for reform outside Quebec. The Premiers of New Brunswick and Alberta called for a renewed collaboration in early 2003, as did the recent report of the Newfoundland and Labrador Royal Commission on Our Place in Canada released in July. In surveying recent trends in intergovernmental relations in Canada, the latter concluded that the current federal government no longer seems interested in cooperative approaches, in regular intergovernmental exchange and in reaching national (i.e. federal and provincial) consensus. The report recommends “more organized and regularly scheduled First Ministers’ meetings for a better

decision-making, as occurs in the EU’s Council of Ministers, were to become more prominent in Canada, the same criticisms would undoubtedly emerge.

⁹ *Un Plan d’Action: Affirmation, Autonomie at Leadership* (Quebec: Comité spécial du Parti libéral du Québec sur l’avenir politique et constitutionnel de la société québécoise, 2001).

functioning federation”.¹⁰ Also in September 2003 the Canada West Foundation issued a report *The West in Canada: An Action Plan to Address Regional Discontent*, which endorsed the proposed Council of the Federation, and urged the federal government to engage with it, including through an annual first ministers conference, with provincial and territorial input to the conference agenda and format.¹¹

Thus the Premiers current initiative responds to some strong advocacy coming from Quebec, the Atlantic Provinces and the West, for a fresh start at more cooperative federalism. It also comes consciously at the end of the Chrétien era, anticipating new federal leadership under Paul Martin. The Chrétien governments, in reaction to fatigue with constitutional politics after 1992, and faced in any case with the withdrawal of Quebec from many intergovernmental forums, put less emphasis on formal first ministers meetings. The Prime Minister has preferred more informal gatherings such as the Team Canada missions abroad, or short meetings on specific issues such as health care. Ironically, the Chrétien approach to avoid formal first ministers conferences contributed to the strengthening of the Annual Premiers Conference. The provinces now expect that a federal government led by Paul Martin will have a greater appetite for more elaborate intergovernmental institutions.

As governments put flesh on the bones of their proposals in the coming weeks a number of issues will need to be addressed. First, which governments will in fact be included in the Council? Apart from the provinces and territories, should the federal government also join? What about the idea of larger cities or other municipalities being represented? And what about aboriginal governments? The larger the potential mandate, the more players will seek to be involved.

Second, how elaborate should the institutional structure be? Should the Council oversee and have reporting to it other

intergovernmental forums? Should it have an independent secretariat? The Premiers have already agreed to a Quebec-based secretariat for the next two years to deal with fiscal balance issues. But many premiers seem to dislike the idea of an independent bureaucracy to manage intergovernmental collaboration. They have certainly resisted creating such new structures up to now.

Third, should governments be considering intergovernmental institutions that can truly achieve regular co-decision? What form would that take? Emerging practice elsewhere suggests that federal systems such as Canada do need to adopt a process of “pooling sovereignty” to respond substantively to increasing interdependence and to have effective multilevel governance. The ingredients of that process could vary¹², but might include such reforms as:

1. Having voting procedures in the Council of the Federation such as qualified majority votes, to reach agreement more quickly and more substantively (an example of a qualified majority is the procedure in the Constitution Act for amendments having the support of seven of ten provinces with 50 percent of the population).
2. Improving the enforcement of intergovernmental agreements by embedding them in uniform federal and provincial legislation.
3. Building on and strengthening the dispute settlement provisions in the Agreement on Internal Trade and the Social Union Framework Agreement.
4. Improving on ways to achieve coordination and harmonization of policies across the provinces without federal involvement (e.g. more recourse to mutual recognition schemes).

¹⁰ *Our Place in Canada*, Report of the Royal Commission on Renewing and Strengthening Our Place in Canada (St. John’s: Government of Newfoundland and Labrador, 2003).

¹¹ Canada West Foundation *The West in Canada* (Calgary: CWF, 2003).

¹² For more discussion see this author’s *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Montreal: McGill-Queen’s University Press, 2002); and B. Timothy Heinmiller “Finding a Way Forward in the study of intergovernmental policy-making: review essay” *Canadian Public Administration* Fall 2002, 45(3): 427-33

Of course, getting agreement to proceed with these sorts of changes would involve the very same unreformed rules of intergovernmental relations that one is trying to change, with all of the constraints noted above. Thus it seems unlikely that such reforms would be adopted quickly or across the board, but they could be tried in selected policy fields first, for example in the Agreement on Internal Trade, or the Social Union Framework.

The realist might well conclude that little will come of such ideas. The Council of the Federation may become nothing more than a continuation of the Annual Premiers' Conference by another name. Alternatively, federal engagement could return practice to the Mulroney era when annual first ministers' conferences were the norm – but no more. Canadians and their governments may not be ready for European-style co-decision. They may continue to fear joint decision traps, where any kind of locked-in decision process will erode their autonomy.

Yet if reform is only cosmetic, the default position will continue to be competitive federalism. This will not be good enough to manage the complexities of interdependence in the world of global and regional integration. Whether the issue is a national plan for dealing

with climate change and greenhouse gas emissions; negotiating deeper regulatory integration in North America; handling a continuing series of global public health threats – Canada will fall further behind if it does not have the capacity to participate effectively in multilevel governance.

Our political culture with its incentives for competition and partisan conflict, and the preference for direct accountability to one's own electorate, will not wither away. There is a chance, however, that a new generation of political leadership could adopt a fresh, cooperative approach. Wariness about the increased bureaucratization and potentially reduced democratic transparency of stronger intergovernmental mechanisms is justified, but it can be tempered by building in stronger accountability features to specific intergovernmental forums, agreements and other instruments. To conclude, a window of opportunity is opening for Canadian intergovernmental relations. Some of the old rules of the game could be changed to improve our ability to get things done in the federation. If the past is any guide, that window will not stay open for long. It is time for careful consideration of the options and forward movement to make the system work better for everybody.