

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

Some Personal Reflections on the Council of the Federation

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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.

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Canada's constitution, like that of every federation, has its strengths and weaknesses. Looking back now at the debates before 1867, the issue of intergovernmental relations received short shrift. Macdonald, who could be described as a "reluctant federalist" at best, insisted on an appointed Senate as a way to ensure federal primacy. The civil war in the United States, which had so dramatically traumatized the federation to the south, created a vital context for the Canadian discussion. From the power of disallowance to the strong "peace, order and good government" clause, to the federal control of the Senate, there was no question as to how the balance was to be tipped: the Canadian federation was to have a strong, even a predominant, centre. The provinces powers were to be seen as local in nature.

Macdonald had not counted on the potent combination of his former law partner, Oliver Mowat, and the Privy Council in London. Arguing Ontario's (and the other provinces) case for nearly thirty years, Mowat insisted that the provinces had full powers in their areas of sovereignty, and that the federation was a union of equals. These arguments were largely persuasive and, with the exception of war-time Canada's constitution has recognized a substantial degree of autonomy and power for the provinces in their areas of jurisdiction.

The last fifty years has seen the federal government expanding its sphere of influence through the use of the spending power, most

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notably through transfers in the fields of health, higher education and social services, and then finding the need to retrench these expenditures because of the higher deficits of the period after 1975. The provinces were happy to receive the generous transfers of the 1950s and the 1960s, which paid for the dramatic expansion of higher education and hospital and medical care. By the same token, the unilateral nature of the cutbacks of the 1970s, 80s, and 90s created a deep sense of grievance, which has lasted to the present day. I well remember Tommy Douglas's speeches in the House of Commons in 1978 on the subject of the Established Programs Financing Act.

It was no accident that Mowat was the architect of the first premiers conference in Quebec City in 1886. The Senate was not able to function as a "house of the provinces." A key weakness of the 1867 British North America Act was thus revealed, and our politicians have been wrestling with it ever since. No institutions were created which allowed regional and provincial concerns to be settled at the centre. The result has been a series of innovations: at times, strong regional and provincial Cabinet Ministers with the ear and confidence of the Prime Minister, at other times, the wooing of regional political parties, like the Progressives of the 1920s or, more recently, Social Credit and Reform. None of these has effectively restored the issue.

A whole slue of intergovernmental and sectoral administrative arrangements has marked the era since the 1950s. So too the federal provincial political conference, from first ministers on down, has become a notable feature of the political landscape. We are all familiar with the endless sessions that marked the patriation of the constitution and, the Meech Lake and, Charlottetown Accords. But they have their counterpart in numerous discussions on non-constitutional subjects.

When I became premier of Ontario in the fall of 1990, the country was recovering from the dramatic failure to effect the Meech Lake constitutional reforms. I attended my first premiers meeting in the summer of 1991, and it was there that I learned something of the background and ambiance of this uniquely

Canadian institution. A separate meeting for premiers and their families was established in the 1960s as a way for these first ministers to get together informally, to share experiences, and to allow for a relaxed social occasion where families could get to know one another. It was not, at the outset, supposed to be an event with a heavy political agenda.

By the time I got there in 1991, the institution had evolved. Families still came, but there was a formal agenda, and part of the meeting was televised. Extensive discussions were held among staff long before the meeting about the wording of the post-conference communiqué. The press were critical of any "off the record", "closed door" sessions (the no-no's of the post Meech world). The result was a series of formal speeches for the home audience of each premier.

The dynamic of intergovernmental meetings was naturally transformed by the intensity of the discussions that preceded the Charlottetown Accord in 1991 and 1992. Prime Minister Mulroney made some effort to get people together to talk about the economy before his retirement, but this was scuttled by deep arguments over federal cutbacks in transfers. Jean Chrétien's first federal-provincial meeting in December of 1993 was a success: he wanted to spend money on infrastructure and agreed to the idea of Team Canada, giving the premiers and the provinces a role in joint trade promotion.

The intensity of the experiences of Meech and Charlottetown created a strong esprit de corps among the premiers, reinforced by the unprecedented, and shared, challenge of the fiscal deficits of the 1990s. I well remember a late night session with premiers Romanow, Filmon, Harcourt and McKenna on our common difficulties, and the sense that Canadians had had enough of endless bickering about constitutional formulas and were looking for more effective ways of dealing with economic and fiscal problems.

When Daniel Johnson succeeded Robert Bourassa as Premier of Quebec in 1994, he raised the idea of a Council of the Federation. In essence it would take the informal annual

gathering of premiers and give their meetings and deliberations more structure, back-up, and weight. The proposal was endorsed by the premiers in Toronto at their summer conference in 1994, but the electoral victory of the PQ in that same year meant that any thought of practical reform went into the deep-freeze. It has taken the return of the Liberals to power in Quebec in 2003 to resurrect the idea.

In the meantime, the early honeymoon of the Chrétien government has been replaced by the usual *fin de regime* pointing of fingers. The federal government decided in 1995 to take billions out of transfers to the provinces, and to continue the discrimination against Ontario, Alberta and British Columbia through the so-called "cap on CAP". This cap continued for four more years and was subsequently estimated to have cost Ontario over 10 billion dollars. It poisoned the well of post 1993 goodwill. At the same time the election of the PQ in Quebec in 1994 and the Harris Tories in Ontario in 1995 had their own effect in changing the federal-provincial chemistry.

The result has been predictable: a steady deterioration in federal-provincial relations, for which both sides have to bear some responsibility. The federal government points to the agreement on the Social Union, the sea-change in the federal budget balance, and significant increases in health transfers in recent years as a sign of its good faith, and expresses bewilderment at what it sees as the contrived indignation of the provinces. For their part, the provinces point to a systemic pattern of under-funding, particularly for health care, since the mid-1990s (but really since 1977), and the complete unpredictability of federal behaviour. Talk of new funding - for daycare, for urban infrastructure - fills them with great foreboding as they contemplate yet another round of politically driven funding followed by a swing of retrenchment. The Social Union Framework Agreement, they say, is an empty shell.

A new Prime Minister and several new provincial governments, particularly in Quebec and Ontario, are creating a sense that change is possible once again. Hence the interest in

Premier Charest's proposal for a Council of the Federation.

The premiers have to be careful, however, about believing their own rhetoric. The evidence strongly suggests that Canadians are reluctant to take sides in federal-provincial disputes, and do not share their governments' preoccupations with who has what jurisdiction. Even in Quebec, they hold leaders collectively accountable for the efficient running of programs and delivery of services.

Dalton McGuinty's initial reaction that he wants to avoid a "provincial gang-up" is wise. The Annual Premiers' Conference, particularly in the late 1990s, was nothing more than a highly ritualized commentary and denunciation of how the federal government should do its job. No doubt the weak and fractious nature of the federal opposition made the premiers feel some obligation to fill the vacuum, and there was always some basis for the grouching, but grouching it was and the Canadian public was not particularly impressed.

All of which takes us back to Charlottetown in 1992, and even 1867. If we had been able to make the Senate an effective voice of regional concerns, on either occasion we would not be where we are. But that didn't happen. Hence the premiers' meetings, and the Council of the Federations. If it were wise, the federal government would welcome the latter idea, and then figure out how to make federal-provincial diplomacy more effective. It would not be a revolutionary move, but it could be a practical idea to make the federation work better.

But we should look at other federations, like Germany, and see the risks of gridlock and too little respect for jurisdictional division of powers. Everyone needs to proceed with a keen sense that the common goal is greater efficiency and more public support.