

SIPP Briefing Note

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Filling the Empty Vessel: *Defining the Mandate and Structure of a Council of the Federation* by Ian Peach*

At the 2003 Annual Premiers' Conference (APC) in July, Canada's thirteen Premiers (provincial and territorial) agreed to establish a Council of the Federation. The Premiers did not, however, suggest what the overall purpose and long-term mandate of the Council will be or how it will operate. The Council is thus currently an empty vessel. Yet, with two more meetings, on October 24 and in early December, the Premiers intend to reach an agreement that will fill this vessel and bring the Council into being. This is no easy task, as the Premiers will have to come to a unanimous agreement on the mandate, structure and decision rules for the Council. The real challenge, though, will be to ensure that their decisions the confidence of a skeptical public that intergovernmental collective action can better advance the national interest in building Canada's social and economic union than can the federal government acting alone.

Of the thirteen governments represented at the Annual Premiers' Conference, only Quebec seems to have thought seriously about the Council of the Federation (*see page 7*). The Quebec Liberal Party's conception of the Council is contained in the *Final Report of the Special Committee of the Quebec Liberal Party on the Political and Constitutional Future of Quebec Society, A Project for Quebec: Affirmation, Autonomy and Leadership*. The Quebec Liberal Party sees the Council as a body with "a vertical (federal-provincial)

dimension for matters of joint jurisdiction and a horizontal (interprovincial) one for issues under exclusive provincial jurisdiction. In every respect, regardless of the dimension concerned, it would give the provinces greater responsibility in the management of the common good of the Canadian state." (Quebec Liberal Party, p. 93) They also state that, "more than any other institution, this council would be the focal point for the continuous dialogue and cooperation between the provinces and the federal government." (Quebec Liberal Party, p. 96)

This Briefing Note will propose one way to fill the empty vessel, by suggesting a mandate, structure and set of decision rules for the Council of the Federation. I will also suggest some tactics that may allow the Council to achieve the goal of better managing the federation, as well as speculate on the likelihood of the provinces and territories being able to create a Council that will foster public confidence in mechanisms of intergovernmental collective action.

Defining the Mandate

The first question that must be answered is, "what is the critical task or tasks to which a Council of the Federation should devote its attention, not only because there is a need for new mechanisms to manage the federation but also because the

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Council might actually succeed?” While the Quebec Liberal Party’s conception of the Council’s mandate is very broad, and a mandate it could gradually grow into, the critical task is a much narrower, yet seemingly intractable, one – to replace the federal government’s unilateral use of its powers to intervene in areas of provincial jurisdiction with intergovernmental decision-making. The breadth of the federal jurisdictions over “the regulation of trade and commerce”¹ and “the criminal law”² have generated federal-provincial controversy at different times, but the provinces have most consistently objected to two implicit federal powers that, in many ways, can render the formal division of powers meaningless. These powers are the federal spending power and the federal power to negotiate international agreements. The Council may contribute to managing the federation by playing a role in such areas as the appointment of judges to the Supreme Court of Canada, the adjudication of disputes under the Agreement on Internal Trade, and the growth of provincial-territorial coordination on issues, but its value will ultimately be judged by the progress it makes in replacing federal unilateralism in these two areas with intergovernmental management of the social and economic union.

The provinces’ intergovernmental relations agenda for at least the last fifteen years has been marked by a consistent effort to subject the use of the federal spending power to intergovernmental mechanisms. This has sometimes been controversial; conventional wisdom in Canada has generally supported federal interventions to create national programs through the use of its spending power and the public has worried that taking this power away from the federal government would create a “patchwork quilt” of social programs. As more people, especially in regions that feel misunderstood and undervalued in the federation, are coming to realize, though, unilateral federal interventions in areas of provincial jurisdiction can have distorting effects. Federal officials too often have a limited understanding of the different ways policy problems manifest themselves in different regions, leading them to design programs that may be effective in the area they are

most familiar with (generally central Canada) but ineffective elsewhere. Equally problematic, federal spending too often encourages provincial governments to divert their policy-making energy (and budgets) away from the political priorities of their province’s electorate to the priorities of the federal government.

While the use of the federal spending power can have distorting effects, it is also hard to deny that there is, at times, a legitimate national interest in areas of provincial jurisdiction that justifies federal intervention to create national objectives. This is especially so where these objectives facilitate people’s ability to move between provinces in a way that maximizes their well-being and value to society. Completely eliminating the federal spending power would be as harmful to the federation as leaving it unconstrained, as even the Quebec Liberal Party recognizes (Quebec Liberal Party, p. 69), but there is merit in seeking to subject its use to an intergovernmental process, as long as that process both protects the national interest in the social and economic union and minimizes the distorting effects of federal interventions.

Constraining the federal spending power, by subjecting it to intergovernmental decision-making processes, has been tried several times in recent history, without success. The Charlottetown Accord included extensive provisions devoted to preventing the federal government from unilaterally exercising both its power to spend in areas of provincial jurisdiction and its power to cease to spend in areas it has entered.³ This Accord’s failure, of course, brought an end to efforts to address federal-provincial-territorial relations issues through constitutional amendment, at least for the foreseeable future.

With the possibility of formal constitutional amendment gone, provincial and territorial governments turned their attention in the late 1990s to the possibility of restraining the federal spending power through an administrative agreement. This culminated in the February, 1999 signing, of the Social Union Framework Agreement (SUFA)

¹ *Constitution Act, 1867*, subsection 91(2).

² *Constitution Act, 1867*, subsection 91(27).

³ See, for example, the proposed amendment to section 37 of the *Constitution Act, 1982* and the proposed sections 93A, 93B, 93C and 93D of the *Constitution Act, 1867* contained in the draft legal text of the Charlottetown Accord.

by all First Ministers except the Premier of Quebec. Unfortunately, this agreement, too, must be judged a failure. While the federal government could be said to have observed the letter of the SUFA, they in no way could be said to have respected its spirit. This has made provinces who had never been enthusiastic supporters of the agreement even less interested in fully respecting their obligations under it. As well, the federal government has demonstrated on several occasions that, having once committed to such obligations as advance notice and intergovernmental consultation, it had no desire to extend these obligations to other sectors; it does not view the SUFA as establishing general binding norms of intergovernmental behaviour. Finally, the difficulty of getting the federal government to agree to an intergovernmental dispute resolution mechanism for enforcement of the *Canada Health Act* led to a long delay in the promised third-year review of the SUFA, left provinces further dissatisfied with the level of federal commitment to intergovernmental management of the social union, and jeopardized the SUFA itself.

If anything, provinces and territories have been even less successful in having their concerns about the federal government's authority to negotiate international agreements addressed through intergovernmental negotiations than they have been in having the spending power addressed. Until recently, provincial calls for the federal government to negotiate a formal role for the provinces in the negotiation of international agreements had been a perennial part of Annual Premiers' Conference communiqués. Indeed, at the time the North American Free Trade Agreement was negotiated, certain provinces threatened to challenge the constitutionality of having the federal government negotiate and implement the agreement. While provinces are now often included in Canadian delegations in international negotiations, the form of that participation is determined unilaterally by the federal government on a case-by-case basis, and no formal provincial role has ever been negotiated. The absence of a federal-provincial agreement on how Canada negotiates and implements international agreements as a federal state not only serves to alienate those regions who feel their voice is not adequately heard within the federal government (as has occurred in Western Canada over

federal assent to the Kyoto Accord) but, by leading provincial governments to seek out strategies to frustrate the implementation of Canada's international agreements, makes it difficult, if not impossible, for Canada to negotiate effectively as a state in the international arena.

A federal-provincial-territorial Council of the Federation has the greatest potential of any proposal to date to convert intergovernmental conflict into productive joint policy-making by creating a forum for intergovernmental debate and joint management of the social and economic union. Part of the reason the SUFA has failed is likely the lack of a shared institutional interest within the Ministerial Council on Social Policy Renewal (a body of Ministry mandated by the First Ministers in 1996 to spearhead an intergovernmental effort to modernize Canada's social safety net) in seeing the agreement respected and strengthened. The successful negotiation of the federal-provincial-territorial National Child Benefit program, the high point of social policy reform in the late 1990s, can at least in part be explained by the institutional interests of the Ministerial Council. The Council developed an institutional commitment to the successful negotiation of the National Child Benefit to prove its value in fostering social policy renewal to a skeptical social policy community. A Council of the Federation that sees a similar institutional interest in proving its value in simultaneously bolstering the principles of federalism and improving the social and economic union may ultimately be able to restrain federal unilateralism where it affects areas of provincial jurisdiction. Success, however, rests on both structuring the Council carefully and creating a carefully thought out, and highly tactical, agenda.

Structuring the Council

If the main objective of the Council of the Federation is to restrain federal unilateralism, its composition and decision rules will have to meet two requirements: decision-making will have to demonstrate that collective action need not cause a deterioration in the benefits of the social and economic union to citizens, and decisions made in the Council will have to apply to the federal government.

One of the critical hurdles to overcome in creating an intergovernmental process that will protect and promote a national social and economic union is that the standard decision rule in intergovernmental fora is unanimity. Steven Kennett notes:

The requirement of unanimity for intergovernmental agreement increases the number of policy and political variables to be coordinated and also creates incentives for governments to threaten to veto as a means of securing an agreement more favourable to their respective interests. Furthermore, the experience of the European Union suggests that abandonment of the unanimity requirement for decision making is necessary for significant progress in securing economic and social integration among independent governments. (Kennett, p. 52)

It is unrealistic, especially in Canada, to expect that collective action could protect and foster the social and economic union if action could only be taken if all governments participate. Thus, a more flexible decision rule will be necessary, at least for most decisions, for the Council to be able to function in a way that reflects Canadians' preferences. On the other hand, the rule of a simple majority that is contained in the SUFA is also problematic. As William Robson and Daniel Schwanen have noted,

If the agreement empowers provinces with roughly one-seventh of Canada's population, in conjunction with a federal government oriented around the desires of swing voters in those same provinces, to decide how residents of other provinces will be taxed and what social programs they will receive, the Canadian federation will suffer from more friction in the future, not less. (Robson and Schwanen, p. 4)

In the face of the problems with both unanimity and simple majority rules, it seems likely that the so-called "2/3 and 50" formula⁴ would serve the federation well as a decision rule for the Council of the Federation. While the regional veto formula of the federal *Constitutional Amendments Act*⁵ has the merit of flexibility, it gives the largest provinces, which are likely to have the fewest incentives to cooperate in managing the spillover effects

of provincial policies, a veto with which they can block progress. The "2/3 and 50" formula is not perfect; it still gives the large provinces a significant influence over the outcome of the intergovernmental debate, as they would inevitably demand of any decision rule. Nonetheless, it is likely the most generally acceptable decision rule that can be devised and reflects the reality that no "national" program or "national" agreement could exist if it applied to fewer than 2/3 of the provinces or less than 50 percent of the population.

To meet the second requirement that the decisions of the Council of the Federation apply to the federal government, the Council must be a federal-provincial-territorial, rather than strictly provincial-territorial, body. Doubtless, the Council would still have some value to the social and economic union as a purely provincial-territorial body coordinating provincial and territorial policies that affect are social and economic union. This is not its critical task, however, and it is hard to imagine that the federal government would voluntarily constrain its ability to use its unilateral powers by abiding by a process it was not involved in designing.

Tactical Considerations

This need to make the Council a federal-provincial-territorial body leads to what is a key tactical question: how do the provinces and territories convince the federal government that it is in its interest to join the Council of the Federation? The replacement of the former Parti Quebecois government in Quebec with a Liberal government and the upcoming change in Prime Minister may well increase the federal government's interest in participating in new intergovernmental mechanisms. There is even some chance that federal officials are beginning to accept the need to establish a more mutually respectful federal-provincial-territorial relationship. Most importantly, the provinces and territories will have to convince a skeptical public that all governments, acting collectively, will be both more

⁴ See *Constitution Act, 1982*, subsection 38(1). In the case of the Council, the formula would require that 2/3 of the jurisdictions (be they provinces or territories) to which any agreement would apply that have, in the aggregate, 50% of the population of those jurisdictions, plus the federal government, agree to any proposal or, in the case of new national social programs, participate in the program.

⁵ See *Statutes of Canada 1996*, c. 1

legitimate and more effective in promoting the social and economic union than the federal government acting alone and that the federal government would be irresponsible not to join the Council. If the provinces and territories can begin to build their credibility with the public, the federal government may be willing to participate in the Council of the Federation. Of course, to get the federal government to join, the provinces and territories must first invite them, which does not seem to be their current intention.

The provinces and territories will need to build the Council's credibility with the public and the federal government gradually, through a series of small efforts that should be focussed on better engaging citizens in the intergovernmental process. Citizen engagement was certainly seen as important enough at the time the SUFA was negotiated to warrant a separate section in the agreement, but, due to the lack of institutional commitment to realize this agenda, nothing has been done to better engage citizens in, "developing social priorities and reviewing outcomes." (*A Framework to Improve the Social Union for Canadians*, Part 3) A good starting point for this effort would be to mandate the Council to define some principles to guide the process of intergovernmental relations (likely drawn from the SUFA), as the Premiers called for at the 2003 APC (Canadian Intergovernmental Conference Secretariat, p. 2) and commit to undertaking a public consultation on these principles. This consultation could engage the public in a discussion of whether the proposed principles would protect the public interest in strengthening the social and economic union. The provinces and territories could then invite the federal government to participate in both the negotiations and the public consultation. It is hard to imagine how such a process would fail to increase the provinces' and territories' credibility with the public. If the federal government refuses to participate, the Council would be in an excellent position to chastise the federal government for being arrogant and irresponsible, while if the federal government participates, it becomes locked into a paradigm of intergovernmental collective action.

Along with principles around process, the provinces and territories should also insist on the negotiation of some principles by which governments, acting through the Council, could determine when the national interest was sufficient to justify use of the federal government's powers. Such principles would establish the conditions under which the process principles would be triggered. The challenge for the provinces and territories in this proposal, of course, is that they would have to accept that there is a national interest that does sometimes justify federal intervention in areas that are otherwise in provincial jurisdiction. Further, they would have to be prepared to abide by their agreement about when these conditions arise. Given, however, that much of the Canadian public firmly believes there are such circumstances, for the provinces and territories to deny it could fatally damage the credibility of intergovernmental collective action.

Nice Theory, but Can it be Done?

While these suggestions are logical in the abstract, they must overcome three major challenges, any one of which could cause the Council of the Federation to fail. The first challenge will be getting all provinces and territories to agree on a mandate, structure and agenda, and especially to agree on a decision rule that does not require unanimity. The importance of moving away from unanimity in decision-making if the Council is to be effective has already been noted. The European Union experience indicates that it is possible to create decision rules that operate at less than unanimity, but the European example differs significantly from most intergovernmental arrangements.

Equally significant will be the challenge of getting the federal government to become a member of the Council of the Federation and, further, fetter its discretion by subjecting its unilateral powers to intergovernmental processes. As mentioned earlier, the current moment may be propitious. History, however, indicates that one can never be sure how long federal interest in

intergovernmental processes will last before the federal government's instinct to unilaterally exercise its power, and secure exclusive political credit for its actions, reasserts itself.

The third challenge, and perhaps the greatest, will be to get all governments to abide by the rules of this new process over the long term and not succumb to the temptations to cheat or shirk their obligations. For governments to make meaningful commitments, they must be confident that their partners in the federation will not later cheat. To create this confidence, authoritative enforcement mechanisms will be necessary. International precedent and our own history with intergovernmental agreements, however, suggests that empowering the Council with authoritative enforcement powers, to ensure that the agreed-upon obligations are actually met in practice, will be tremendously difficult.

The lack of effective enforcement mechanisms is one of the most serious weaknesses of not only the SUFA but also the Agreement of Internal Trade. These agreements reflect a general difficulty in getting governments to agree to subject themselves to authoritative enforcement mechanisms. As Kennett notes, "enforcement remains, therefore, a difficult and perhaps intractable problem for the decentralized approach to securing the social union." (Kennett, p. 62) It may be that the threat of a return to unilateral federal enforcement of social union commitments through the spending power may incline the provinces and territories to take intergovernmental enforcement more seriously, as seems to have happened in creating the intergovernmental mechanism to resolve disputes under the *Canada Health Act*. The difficulty of creating this enforcement mechanism, though, also suggests that the federal government will be reticent to replace its existing unilateral enforcement power with

an intergovernmental mechanism. Further, unless the intergovernmental enforcement mechanism holds out a credible prospect of vigorously enforcing commitments that protect the social union, the public would likely support federal reticence.

Conclusion

Clearly, it is possible, if improbable, that the Council of the Federation could become an effective new mechanism for managing the social and economic union. Given the lack of any other realistic prospect for more cooperatively managing the federation, the Council is a worthwhile experiment. Still, one should be careful not to raise expectations too high too quickly; the disappointment that could ensue if the Council does not immediately live up to its potential could seriously harm the intergovernmental environment. As a final note, I would suggest that it is highly unlikely the Premiers will be able to fill the empty vessel that is the Council of the Federation, or at least fill it with credible substance, by early December, no matter how ambitious their desires. The negotiations that will have to take place over the mandate, priorities, structure, decision rules, funding and tactics of the Council will be at least as complex and difficult as the negotiation of the provincial-territorial consensus on the SUFA, which took approximately two years. To think that the provinces and territories can create an effective Council of the Federation in the five months between the Annual Premiers' Conference and their December meeting requires a considerable suspension of disbelief – one that belongs to the world of the movies, not the real world of intergovernmental politics.

References

- A Framework to Improve the Social Union for Canadians: An agreement between the Government of Canada and the Governments of the Provinces and Territories, February 4, 1999.
- Canadian Intergovernmental Conference Secretariat; "Premiers Announce Plan to Build a new Era of Constructive and Cooperative Federalism", News Release – 44th Annual Premiers' Conference, Charlottetown, Prince Edward Island, July 9-11, 2003, July 10, 2003.
- Kennett, Steven; *Securing the Social Union: A Commentary on the Decentralized Approach* (Kingston: Queen's University, 1998).
- Quebec Liberal Party; *A Project for Quebec: Affirmation, Autonomy and Leadership* (Montreal: Quebec Liberal Party, 2001).
- Robson, William B.P. and Daniel Schwanen; "The Social Union Agreement: Too Flawed to Last", C.D. Howe Institute Backgrounder (Toronto: C.D. Howe Institute, 1999).

Quebec's Vision for the Council

The Quebec Liberal Party outlined its proposal for the Council of the Federation in the Final Report of the Special Committee of the Quebec Liberal Party on the Political and Constitutional Future of Quebec Society, "*A Project for Quebec: Affirmation, Autonomy and Leadership*" (the Pelletier Report), which was released prior to the Quebec election. The following are some key statements related to the Council of the Federation contained in the Pelletier Report.

The sovereignty of the provinces in their area of legislative jurisdiction is one of the key principles of federalism. ... As a result, any application of federalism that aims to subject the provinces to federal authority or upset the balance in federal-provincial relations is an anomaly in relation to the federal formula. (page 42)

Some of the problems we currently face extend beyond the jurisdiction of each order of government and can only be resolved through joint action. It seems to us that federalism characterized by cooperation and joint decision making would give Canada the tools it needs to deal with such problems. (page 56)

When exercised wisely, federal spending power is not harmful; however, it becomes harmful when it is exercised immoderately or results in federal requirements and priorities being unilaterally imposed on the provinces. ... **As far as we are concerned, if the federal government is going to exercise its spending power in areas in which the provinces have exclusive jurisdiction, it must respect the wishes of the provinces.** (page 69; emphasis in original)

The Committee is proposing a special mechanism for federal-provincial cooperation – the creation of a Council of the Federation. This council would play a major role in relation to federal and provincial coordination of policies, decisions and other measures that would have a significant impact on Canada's economic policy. The Committee believes that the Council of the Federation should deal with social issues as well as economic ones. It is therefore proposing that the Council's mandate cover not only the strengthening of the Canadian economic union, but also the consolidation of the social union. The Council of the Federation should also play a role in the negotiation and ratification of international treaties that deal with matters of both federal and provincial jurisdiction. (pages 92-93)

The Council would have a vertical (federal-provincial) dimension for matters of joint jurisdiction and a horizontal (interprovincial) one for issues under exclusive provincial jurisdiction. In every respect, regardless of the dimension concerned, it would give the provinces greater responsibility in the management of the common good of the Canadian state. ... In some cases, voting within the Council could be conducted according to the "regional veto" formula..., meaning that the consent of the federal government, Quebec, Ontario, British Columbia, the Atlantic region and the Prairie region would be necessary. In other cases, which would have to be identified and agreed to by all the partners in the federation, unanimous consent or a qualified majority might be required. (page 93)

More than any other institution, this council would be the focal point for the continuous dialogue and cooperation between the provinces and the federal government that would make it possible to redefine our economic and social relations, and develop them so that we may move towards a new Canadian vision founded on joint decision making. (page 96)

The federal principle allows for the emergence of values and objectives that are common to all Canadians, and must rest on a will to live together that ensures Canada's cohesion and its preservation as a state, and a viable political and economic unit; however, it also allows the development and fulfilment of Quebec's particularity. (page 124)

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The Saskatchewan Institute of Public Policy (SIPP) was created in 1998 as a partnership between the University of Regina, the University of Saskatchewan and the Government of Saskatchewan. It is, however, constituted as an institute at the University of Regina. It is committed to expanding knowledge and understanding of the public-policy concerns in Canada with a particular focus on Saskatchewan and Western Canada generally. It is a non-profit, independent, and non-partisan Institute devoted to stimulating public-policy debate and providing expertise, experience, research and analysis on social, economic, fiscal, environmental, educational, and administrative issues related to public policy.

The Institute will assist governments and private business by supporting and encouraging the exchange of ideas and the creation of practical solutions to contemporary policy challenges. The Founding Partners intended the Institute to have considerable flexibility in its programming, research, contracting and administration so as to maximize opportunities for collaboration among scholars in universities and interested parties in the public and private sectors.

The Institute is overseen by a Board of Directors drawn from leading members of the public, private and academic community. The Board is a source of guidance and support for SIPP's goals in addition to serving a managerial and advisory role. It assists SIPP with fostering partnerships with non-governmental organizations, the private sector and the expanding third sector.

Saskatchewan enjoys a long and successful tradition of building its own solutions to the challenges faced by the province's citizens. In keeping with this tradition, the Saskatchewan Institute of Public Policy will, in concert with scholars and practitioners of public policy, bring the best of the new ideas to the people of Saskatchewan.

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