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Backgrounder

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Half Full, at Best:

*Challenges to the Council
of the Federation*

Ian Peach

The Backgrounder in Brief

Premiers will have to provide Canadians with some early demonstration that they should put their faith in the Council of the Federation as a tool for making national policy. The premiers must now demonstrate that the Council is more than just a formalized lobbying body and that they actually intend to use it to improve the social and economic union for all Canadians.

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On December 5, 2003, in Charlottetown, Canada's provincial and territorial premiers signed a Founding Agreement establishing the Council of the Federation. The premiers described the agreement as "historic". They said that "the Council will make a difference to Canadians and break new ground" (Canadian Intergovernmental Conference Secretariat (CICS), 2003). It is far too early for Canadians to determine whether the Council of the Federation will, in fact, become a historic development in public policy in Canada or will be relegated to the scrapheap of historic failures, along with other "historic" agreements, such as the Meech Lake and Charlottetown Accords, the Agreement on Internal Trade (AIT), and the Social Union Framework Agreement (SUFA). In the coming months and years, the Council will have to prove itself by effectively responding to the substantive, and substantial, public policy challenges facing Canada's governments.¹

At first glance, the Founding Agreement for the new Council of the Federation gives the overwhelming impression of a lack of substance (Box 1). The media reports of the premiers' meeting suggest that the participants believe a more cooperative inter-governmental relationship is a positive end in itself and "will make Canada work better" (Canadian Broadcasting Corporation (CBC), 2003b). Many Canadians, however, argue that a more cooperative relationship is worthwhile only if it brings about desired improvements in our social and economic policies. The risk is that these will be sacrificed for the sake of achieving intergovernmental harmony. Both what the Founding Agreement says and what it does not say should make Canadians skeptical about the value of the accord. To begin with, the Council of the Federation is made up solely of the 13 premiers. For a Council to be effective in improving federal-provincial-territorial policymaking, it should include not only the premiers but the prime minister.² If the litmus test of the next prime minister's term is "how the prime minister responds to requests by the Council," as Alberta Premier Ralph Klein — as quoted by Allison Dunfield in the *Globe and Mail* on December 5, 2003, — said, it is odd that prime ministers are not part of the Council. To be sure, the premiers anticipate "special meetings" of the Council to which they would invite the federal government (Council of the Federation Founding Agreement, section 11) and Paul Martin, the prime minister as I write in the midst of a federal election campaign, has already indicated his interest in holding annual First Ministers' Meetings and having the agenda for

1 It is possible to build such a body; in Australia, the Council of Australian Governments has, since its founding in 1992, matured into a substantive intergovernmental policymaking and policy coordination institution. Interestingly, the Council of Australian Governments is composed not only of the Prime Minister and the State and Territorial First Ministers, but also the president of the Australian Local Government Association.

2 There is a school of thought in Canadian federalism scholarship that would dispute the legitimacy of having the federal government involved in policymaking in areas of provincial jurisdiction. While this "disentanglement" school has the virtue of adherence to our constitutional text, it is inconsistent with Canadians' widely expressed desire for national policies and their belief that the federal government is the only government capable of making such policies. Thus, the more valuable task for provinces and territories is to constrain the federal government to only make national policy in consultation with them and to prove to the public that provinces and territories, in cooperation with the federal government, are more effective in making national policies that reflect the national interest than is the federal government acting alone.

Box 1: *Objectives and Mandate of the Council of the Federation*

The Founding Agreement for the Council of the Federation includes four objectives and a six-point mandate for the Council. Specifically, the Founding Agreement states:

Objectives

3. The Council of the Federation is being established to address present and future challenges facing the federation in order to better meet the changing needs of Canadians by:
 - a. strengthening interprovincial-territorial co-operation, forging closer ties between the members and contribution to the evolution of the Canadian federation;
 - b. exercising leadership on national issues of importance to provinces and territories and in improving federal-provincial-territorial relations;
 - c. promoting relations between governments which are based on respect for the constitution and recognition of the diversity within the federation; and
 - d. working with the greatest respect for transparency and better communication with Canadians.

Mandate of the Council

4. In pursuit of these objectives, the Council will:
 - a. serve as a forum where members can share and exchange viewpoints, information, knowledge and experiences;
 - b. provide an integrated and coordinated approach to federal-provincial-territorial relations through the development of shared common analysis and positions, where appropriate;
 - c. reinforce the work of sectoral intergovernmental forums by providing direction, when appropriate, on issues that are of concern to the Council;
 - d. analyse actions or measures of the federal government that in the opinion of the members have a major impact on the provinces and territories. This could include joint review and comment on bills and acts of the Parliament of Canada, as is currently done by provinces and territories individually. One of the purposes of this analysis is to support productive discussions with the federal government on issues of importance to Canadians;
 - e. develop a common vision of how intergovernmental relations should be conducted in keeping with the fundamental values and principles of federalism; and
 - f. address any issue of priority which, in the opinion of the members, requires the pooling of expertise, a greater dialogue between them or the co-ordination of their actions.

those meetings jointly set by the federal and provincial and territorial governments (CBC, 2003a). These gestures from the premiers and prime minister are a relief after the intergovernmental tensions of the Chrétien era. Still, we are a long way from integrating a meaningful federal-provincial-territorial Council of the Federation into the fabric of Canadian political institutions.

If Annual Premiers' Conferences (APCs) are any guide to the behaviour of premiers in the Council of the Federation, a provincial-territorial Council will simply establish hard-line positions on the need for the federal government to provide provinces and territories with larger, and unconditional, transfers. This would not constitute "exercising leadership on national issues of importance to provinces and territories and in improving federal-provincial-territorial relations," one of the premiers' objectives for the Council (Council of the Federation Founding Agreement, paragraph 3[b]), nor would it create a "more amicable" federal-provincial-territorial relationship, as Quebec Premier Jean Charest predicts (Dunfield, 2003).

The premiers have brought under the aegis of the Council a Secretariat for Information and Co-operation on Fiscal Imbalance and the Premiers' Council on Canadian Health Awareness (Council of the Federation Founding Agreement, sections 18, 19). The former is a lobbying exercise for tax-point transfers to ease provincial budgeting; the latter was responsible for the less than completely honest advertising campaign against the federal government's reductions in health care transfers. That these are now part of the Council reinforces suspicions that its chief purpose is to institutionalize the lobbying of the federal government for more money. This, understandably, raises skepticism about Ontario Premier Dalton McGuinty's statement that "you're not just going to see us going to Parliament Hill with our hands out and asking for more; you're going to see us a lot more regularly working together and deciding how it is that we can bring about some real changes" (CBC, 2003b).

It should also be a concern that the Founding Agreement states "the decisions of the Council will be reached by consensus, in accordance with the established practice of the Annual Premiers' Conference" (Council of the Federation Founding Agreement, section 10). A consensus rule gives tremendous bargaining power to holdout jurisdictions, which can use the threat of their disagreement to seek more favourable terms, generally at the expense of a policy agenda that reflects Canadians' policy preferences and desires. As well, the policy content of intergovernmental decisions is too often sacrificed to achieve agreement when the decision rule is consensus. The evidence for this is in the APC communiqués themselves, which are notable largely for their lack of specifics on policy proposals, or, for that matter, to the Founding Agreement itself.³

The Founding Agreement has four objectives for the Council, all of which are very general, and an equally imprecise, six-point mandate, but no agenda. Premiers did identify two initial priorities for the Council's efforts — achieving fiscal sustainability for medicare and strengthening the Canadian economic union. Unfortunately, the provinces' record on both of these priorities would not lead Canadians to anticipate significant strides from the Council.

³ Annual Premiers' Conference communiqués can be found on the Canadian Intergovernmental Conference Secretariat website, www.scisc.gc.ca.

The first priority is “improving health care for Canadians, by addressing health care reform and sustainability” (CICS, 2003). It is true that health care sustainability is a national priority, but there are significant ideological differences among provinces on this issue. Partly because of these differences, premiers’ efforts at jointly improving health care over the past number of years have devolved into alternately complaining about the federal government’s cuts to transfers (as with the Premiers’ Council on Canadian Health Awareness) and demanding larger transfers. Neither of these actions constitutes significant policy innovation to better secure health care’s sustainability for Canadians.

The second priority is “strengthening the economic union, including enhancing internal trade, improving labour mobility, and harmonizing and streamlining regulation” (CICS, 2003). As with improving health care, this is a laudable goal. In fact, premiers, along with the prime minister of the day, considered this a laudable goal when they signed the AIT in 1994. It has been nearly 10 years since this agreement was signed, yet internal trade still remains an issue. Why? Because, in spite of the first ministers’ laudable intentions in 1994, the AIT has fallen victim to the transient nature of political will — a particular problem when governments are asked to limit their ability to provide an economic benefit to a particular group of citizens for the sake of the overall national interest. There is no particular reason to believe that the Council of the Federation will succeed where the AIT (which, by the way, already has a secretariat to provide the necessary institutional support to implement and enforce the agreement) has failed.

One of the most intriguing objectives of the Council of the Federation is “working with the greatest respect for transparency and better communication with Canadians” (Council of the Federation Founding Agreement, paragraph 3[d]). If this means that the Council should be a vehicle to better engage Canadians in debating national policy issues that will become the subject of inter-governmental decisions, this is commendable, though it is not clear how the premiers propose to achieve this objective. It is important to remember that by signing the SUFA first ministers (except Quebec, which was a non-signatory) have already committed their governments to “ensure effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes” (A Framework to Improve the Social Union for Canadians, Part 3), yet no such mechanisms have been put in place. As well, the lack of transparency in the wording of the objective of “working with the greatest respect for transparency and better communication with Canadians” itself creates skepticism about whether premiers are actually seeking to improve citizen engagement in national policy debates.

These examples of first ministers’ past failures to substantially improve policy-making in Canada through new intergovernmental agreements also brings up one of the oddest aspects of the premiers’ announcement of the Council of the Federation. The news release and press reports suggest that premiers are, in some ways, imagining the Council as a separate entity, and that the Council will cause them to address issues that they have failed to tackle effectively in the past. For example, Premier McGuinty is quoted as saying that “it should lead us to addressing, for example, inter-provincial trade barriers” (Canadian Press, 2003). In fact, the Council is the premiers themselves. The steering committee is provincial deputy ministers, who are effectively the steering committee for organizing APCs

now. The fact that the Council may assign specific tasks to ad hoc committees of ministers is no different than first ministers' current practice, for example in creating the Ministerial Council on Social Policy Renewal in 1996. If premiers have been unable to sustain the political will to ensure that the AIT and the SUFA exert a real influence over provincial and territorial policies, it is hard to see why the Council of the Federation will generate a different result.

Is the Council of the Federation a hopeless exercise? In the same way that it is far too early to call the Council "historic", it is too early to dismiss the Council entirely. Thus, press statements that the Council is "the provincial and territorial alliance aimed at squeezing more funds out of Ottawa" (CTV News, 2003), or "a shameless power grab" (Toronto Star, 2003), are overly cynical, though skepticism is clearly warranted. Premiers did recognize in the Founding Agreement that the Council may have to evolve "to ensure its maximum effectiveness" (Council of the Federation Founding Agreement, section 20), though the evolution will be difficult to effect because of the consensus rule. The wisest statement reported from any political leader in December was from Quebec's Intergovernmental Affairs Minister Benoit Pelletier. The Toronto Star quotes him as saying, on December 3, that "we must wait maybe for next year, perhaps the beginning of 2005, before we can analyse decisions of the Council. ... It's the first new institution of the provinces since the premiers' meetings in 1960. To be frank, we shouldn't expect too much right at the beginning" (Canadian Press, 2003).

On the other hand, premiers will have to provide Canadians with some early demonstration that they should put their faith in the Council as a tool for making national policy. Premiers must be cognizant of the need for their work plan to demonstrate that the Council of the Federation is more than just a formalized lobbying body and that they actually intend to use it to improve the social and economic union for Canadians. After all, various premiers did promise that "the objective of the Council of the Federation is to improve the quality of life of Canadians" (Dunfield, 2003) and that "we are more committed than we have ever been to working together to bring about better outcomes for Canadians" (Morris, 2003); Canadians have a right to hold them to those promises. What, ideally, should the work plan identify as the Council's priorities?

A valuable starting point would be for the Council to reach out and engage Canadians in a public dialogue, focusing particularly on two critical subjects. First, it should seek the public's views on what are our national policy priorities. Secondly, it should seek to identify a set of principles that would define the legitimate purposes of federal intervention in areas of provincial jurisdiction and, as importantly, when federal intervention would not be justified. As well, the SUFA already contains rules defining how intergovernmental relations in the social policy field should be conducted. Governments have already made commitments to joint planning and collaboration; reciprocal notice and consultation on policy and program changes; equitable treatment of all provinces and territories in new national programs; funding predictability; dispute avoidance and resolution, and process rules for the creation of new national programs (A Framework to Improve the Social Union for Canadians, Parts 4-6). It would be useful to have a public dialogue on whether these should become general rules for the conduct of intergovernmental relations.

To be meaningful to Canadians, the work plan must also focus on substantive issues. Premiers must prove to Canadians that the Council of the Federation is a vehicle that can improve the social and economic union and, by extension, people's lives. The Ministerial Council on Social Policy Renewal had the right idea in 1996, when it negotiated the National Child Benefit as its first order of business. Creating a new substantive social program established the Ministerial Council as a valuable policymaking body. Unfortunately, it has since squandered its reputation and disappeared from public consciousness by focusing its energies on the implementation and monitoring of the SUFA, a piece of arcane intergovernmental mechanics.

Similarly, the Council's work plan should not give a prominent role to proving that there is a vertical fiscal imbalance or that federal reductions in transfers to the provinces are to blame for public concern over health care sustainability. The public is tired of hearing politicians lay blame on one another; Canadians want to see improvements in priority social and economic policies. Since it is generally accepted that the top policy priority of Canadians is the sustainability of health care, the Council's work plan should include the consideration of the various federal and provincial reports on health care reform and sustainability that have come out in recent years and the negotiation of a national plan to actually improve health care delivery.

This plan should include the development and promotion of an effective primary care system, to keep people out of doctor's offices and hospital emergency rooms to the greatest extent possible; a national health promotion strategy; a plan to control prescription drug costs; a response to costly inter-jurisdictional competition for health care professionals, and a discussion of how to implement alternatives to the fee-for-service payment of doctors for the delivery of publicly funded health care. All of this could be placed under the rubric of a strategy to improve the quality and cost-effectiveness of health care for all Canadians. Ultimately, if the Council were successful at developing an effective national plan to improve health care delivery, provinces and territories would be in a good position to argue for replacing the current, and controversial, federal government administration of the Canada Health Act with intergovernmental administration through the Council.

Strengthening the internal economic union by enhancing trade and labour mobility is also a worthwhile project, though it is not the national priority that health care is. It is also too fraught with the potential for inter-provincial-territorial conflict that would result in the failure of these discussions, and could jeopardize the whole Council of the Federation project.

We have now had a chance to see the Council's first work plan, which premiers released at the conclusion of their February 23-to-24 meeting. Is it to be a source of hope for the future effectiveness of the Council or of frustration? On the positive side, the internal trade work plan is extremely detailed, to the extent of identifying responsible premiers and completion dates for each element of the work plan (Council of the Federation, 2004). This level of detail should drive governments to at least attempt to abide by the work plan, as they may otherwise face embarrassing questions about why they have failed. While not reaching this level of detail, the premiers did direct health and finance ministers to report on a four-point research agenda by the time the Council meets again July 28-to-30 (CICS, 2004). Thus, there is some hope that the Council will drive a serious discussion of health

care reform. The one glaring omission in all of this, though, is any consideration of how to effectively engage citizens in these policy debates. If the Council is truly to increase transparency and improve communication with Canadians on important issues of national policy, it cannot continue to ignore the public's legitimate role in national policymaking.

Premiers also must think seriously about two other issues, even though they may never appear on a work plan. To make the Council of the Federation effective, the premiers have to seriously consider replacing the consensus requirement for decisions with a qualified majority rule, such as two-thirds of the provinces and territories with 50 percent of the population, and creating some authoritative enforcement mechanism to ensure that agreements reached in the Council are acted on by all provinces and territories that are parties to the agreement.

As already mentioned, a rule of consensus makes meaningful, substantive policymaking tremendously difficult; it leads to a style of bargaining that can best be described as bribery in response to extortion. Such behaviour cannot be described as good, principled intergovernmental policymaking. This change will not be easy, but it is essential if the Council of the Federation is to become a substantive policymaking body. As well, if premiers are to both make and keep commitments to limit their policy discretion in the national interest, their agreements will have to survive the fading of political will that has rendered both the AIT and the SUFA largely irrelevant.

This requires the agreements to be enforceable. The most appropriate way to enforce them would seem to be through the creation of an independent enforcement mechanism under the auspices of the Council of the Federation.

Premiers have identified such diverse issues as changes to Senate and judicial appointments, national emergency and disaster relief programs, crime, and education as matters that they would also like to see discussed in the Council of the Federation. While these may be worthy topics of conversation, even the more focused work plan I have suggested would be an ambitious agenda for the first year or two of the Council, if the work is tackled with a serious commitment to make better public policy. To attempt more would likely only divert the Council's energy and resources from Canadians' real priorities.

History tells us there is good reason to be skeptical, yet the potential for the Council of the Federation to improve the governance of the country is enormous. Premiers know as well as anyone that Canadians are tired of intergovernmental bickering; they must also recognize that Canadians have little faith in the premiers' ability to make good public policy through intergovernmental negotiation. If the Council is to avoid becoming a failure, it is essential that it develop into a policymaking body; it must be a more serious, substantive forum than the existing APCs. In short, premiers have to prove that the signing of the Founding Agreement was, indeed, an "historic" moment. This may well be a tall order.

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