



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

### **Council of the Federation: An Idea Whose Time has Come**

#### **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  
Hugh Segal  
October 2003

In 2001 a Special Committee of the Quebec Liberal Party proposed the creation of a Council of the Federation.<sup>1</sup> Newly elected Quebec Premier Jean Charest put this proposal, in modified form, before the Annual Premiers Conference in July 2003. The concept of establishing an institution such as the Council has been raised before in the context of constitutional reform, particularly in the period between the 1976 Quebec election and the 1981 constitutional patriation agreement. More recently the matter was raised during the negotiations leading to the 1992 Charlottetown Accord. The purpose of this paper is to examine its antecedents. Others writing in this series of articles on the Council of the Federation (Council) will comment in greater detail on the specifics of the Quebec proposal.

#### **The Proposed Council of the Federation**

These earlier proposals fall into two categories, those that seek to constitutionalize the institutions of interstate federalism, specifically the First Ministers' Conference or those that seek to restructure the institutions of intrastate federalism, specifically the Senate. As Alan Cairns notes,

\*Peter Meekison is a Fellow of the Institute of Intergovernmental Relations. He is former Deputy-Minister of Federal and Intergovernmental Affairs, Government of Alberta, and Vice-President Academic University of Alberta.

<sup>1</sup> The Final Report is entitled, *A Project for Quebec – Affirmation, Autonomy and Leadership*. The Special Committee was chaired by Benoît Pelletier. The recommendations are found at p. 97.

From the interstate perspective federalism is viewed primarily in terms of the division of powers.... The political corollary of interstate federalism is that the key institutions of the central government do not have to be structured to reflect territorial particularisms but can operate essentially on the basis of national majorities.

From the intrastate perspective, by contrast, territorial particularisms are given an outlet not only by the control of a government at the state or provincial level, but also in the key policy-making institutions of the central government.<sup>2</sup>

Peter Meekison, *Council of Federations: An Idea Whose Time has Come*

in the negotiation and ratification of international treaties that deal with matters of both federal and provincial jurisdiction.” (p. 92.)

In summary, the Council, as envisaged in the Quebec paper was the formalization and institutionalization of the First Ministers’ Conference that also included a set of rules for decision making. Governments could establish the Council without a constitutional amendment by means of an intergovernmental accord signed by the first ministers or a more formal intergovernmental agreement. The Council could also be viewed as a potential constitutional amendment-in-waiting and as a possible alternative to the Senate. Thus, while the Council would be initially linked with the executive and intergovernmental relations, as it develops, at some point it could transmute into a legislative



federal provincial relations.<sup>13</sup> The 2001 Quebec proposal reflects both matters.

The end result of the more than three years of discussion was the June 1971, Victoria Charter. The Victoria Charter included a constitutional provision for the Prime Minister to convene an annual First Ministers' Conference.<sup>14</sup> This suggestion was initially raised by Quebec in 1968 and later expanded upon and agreed to by both Ontario and Alberta. There was no reference to the Senate in the Victoria Charter. Indeed, the Secretary's Report indicates that Senate reform received scant attention during the three-year review.<sup>15</sup>

While the intergovernmental negotiations were taking place, a Special Joint Committee of the Senate and House of Commons on the Constitution of Canada was holding public hearings on this matter. In its 1972 *Final Report*, the Special Joint Committee endorsed the idea of an annual First Ministers' Conference and noted that "more communication and fuller cooperation among all levels of government are imperative needs."<sup>16</sup> The Special Joint Committee also made some recommendations on Senate reform, including a provincial role in appointing one-half of the members, doubling representation of the four western provinces and giving the Senate a suspensive veto only.<sup>17</sup>

## 2. *Constitutional Negotiations: 1978-79*

The November 1976 election of the Parti Québécois resulted in the resumption of

constitutional discussions. This new round began in June 1978 when the federal government released two key documents, *A Time for Action* and Bill C-60, *The Constitutional Amendment Bill*. The former was the federal government's broad policy paper on constitutional reform whereas Bill C-60 outlined the details of a new constitution.

In Bill C-60 the federal government proposed abolishing the Senate and replacing it with a House of the Federation. The new House would exercise only a suspensive veto and would have increased representation from the four western provinces and Newfoundland. The provinces would appoint one-half the members of the House. In this regard, the House of the Federation is similar in design to what the Special Joint Committee recommended in its 1972 *Final Report*. In addition, the House would have certain special responsibilities, including ratification of appointments to the Supreme Court of Canada and certain other federal agencies. There would also be a "double majority" for legislative measures of "special linguistic significance."

Bill C-60 also included a new Part in the Constitution, "Federal-Provincial Consultation and Commitments." The provision from the Victoria Charter authorizing the Prime Minister to convene an annual First Ministers' Coee

with provinces ffected(bo)-786r the ex  
thedpeilaacto ypower475r-( )5.5fFinalso  
me(nts to(provinces(constitutionalbo)-7

<sup>13</sup> See Secretary's Report, *The Constitutional Review: 1968-1971*, Ottawa: Canadian Intergovernmental Conference Secretariat, 1974, p. 328 for the conclusions of this first meeting.

<sup>14</sup> The Victoria Charter is contained in the Secretary's Report, pp. 375-396. The Secretary's Report includes a summary and chronology of the officials' discussions on mechanisms of federal-provincial relations, pp. 103-108, and the evolution of this provision.

<sup>15</sup> See Secretary's Report, pp.140-143 for a summary of the discussion on the Senate.

<sup>16</sup> See Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Final Report*, Fourth Session, Twenty-eighth Parliament, 1972, Chapter 21, "Intergovernmental Relations," p. 54. The Committee was established in 1970 but its *Final Report* was presented in 1972 after the Victoria Charter had been rejected by Quebec.

<sup>17</sup> *Ibid.*, Chapter 13, "The Senate," pp. 33-36.

Peter Meekison, *Council of Federations: An Idea Whose Time has Come*

Lalonde document also included the following comments which attempted to link a restructured second chamber with First Ministers' Conferences. It stated

With neither the Senate nor the Commons filling an unfettered role as a regional forum, the public debate and reconciliation of regional differences regarding national policies is being increasingly taken over by federal-provincial negotiations or so-called executive federalism.

Executive federalism does, however, have a number of drawbacks.

favour smaller provinces.”<sup>26</sup> Provincial governments would appoint their representatives who would act on instruction. Federal cabinet ministers could participate in the Council’s deliberations but only as non-voting members. While the Council would exercise a suspensive veto on legislation, its powers also included a special role in the ratification of treaties, the exercise of the federal power, certain federal appointments including Supreme Court judges.

To the Pepin-Robarts Task Force the creation of the Council “does not mean that the necessity for intergovernmental meetings and conferences will evaporate.” Accordingly, the Task force also recommended an annual First Ministers’ Conference and in addition the convening of a conference “at the request of any government which secures the agreement of a simple majority of the other ten.”<sup>27</sup> Furthermore the Task Force made a recommendation linking the Council and First Ministers’ Conferences. “The Council should be used as forum for the discussion of general proposals and broad orientations arising from conferences of the first ministers on the economy and any other proposals the conference

ended in deadlock, following which the federal government embarked on the unilateral patriation of the constitution. The resolution tabled in the House of Commons in October 1980 did not include any reference to Senate reform or annual First Ministers' Conferences, other than those convened to discuss constitutional reform. The final result of the initial negotiations, parliamentary deliberations, court challenges and the final federal-provincial agreement reached in November 1981 was the Constitution Act, 1982.

In November 1980, a few weeks after the patriation resolution was tabled in Parliament, the Standing Senate Committee on Legal and Constitutional Affairs submitted its *Report on Certain Aspects of the Canadian Constitution*.<sup>33</sup> The Standing Committee was asked to study Senate reform on June 19,



agreed that other subjects would not be added. Any kind of institutional reform by means of a constitutional amendment would have to be considered at some undetermined time in the future.

## **The Macdonald Commission Report 1985**

The 1985 Report of the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) recommended the entrenchment in the Constitution of an annual First Ministers' Conference. To the Macdonald Commission, "The FMC would not be a legislative body, and its decisions would not be binding on governments. Rather than legislate, it would seek a common policy framework. Formal voting rules, as such, would not be necessary."<sup>39</sup> The Commission appears to have viewed the FMC as more of a coordinating body and not an overseeing one.

They also recommended the creation of Ministerial Councils to support the work of the FMC. These Ministerial Councils were to meet regularly. They specifically suggested "three central Ministerial Councils be established in the fields of Finance, Economic Development and Social Policy." Not surprisingly the "Council of Ministers of Finance stands as Commissioners' prototype for the other councils." In addition, the Commission recommended various degrees of support for these Councils such as "a new federal-provincial body of tax experts, the Tax Structure Committee" to assist Finance Ministers. The Economic Development Council was expected to set up a Federal-Provincial Commission on the Economic Union. This body "would monitor the state of the Canadian economic union, conduct research to identify barriers and possible areas for harmonization and report publicly to the Ministerial Council on these







provincial dispute over the implementation of the Kyoto accord also underscores the salience of this matter.

What distinguishes the 2003 APC proposal for a Council of the Federation from the foregoing is the decision to establish an interprovincial mechanism. At the same time the Premiers indicated that they want a more structured First Ministers' Conference. Thus it would appear that two intergovernmental institutions are envisaged, an interprovincial/territorial one and a federal/provincial/territorial one. The two institutions would obviously be linked in some fashion. What is evident in the provincial/territorial approach is their strong desire for an interprovincial structure where common positions can be developed. This strategy has been much more evident at the Annual Premiers' Conferences since the mid-eighties. They have been reasonably successful in forging a common front and getting the federal government's attention. Given the emphasis on

fiscal imbalance they may feel more comfortable in first identifying their position and then presenting it to the federal government, an approach suggested by the Tremblay Commission in 1956.

The 2001 Quebec paper proposed that, "The Council would have a vertical (federal-provincial) dimension for matters of joint jurisdiction and a

