

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

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Managing Interdependencies in the Canadian Federation: Lessons from the Social Union Framework Agreement

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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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Framing the Question

At their July 2003 annual meeting, the thirteen provincial and territorial premiers announced that they were creating a new Council of the Federation to provide "leadership in tackling the issues that matter to Canadians and are crucial to the future of the country." The members of the Council are the premiers themselves and they committed to meeting "on a regular basis" with a view to strengthening provincial and territorial collaboration. The premiers also declared that they would focus initially on areas of common interest such as health care and internal trade as well as fiscal imbalance.

The premiers have been meeting every summer for over four decades. And while their annual get-together was once relatively light fare, over the last decade the Annual Premiers' Conference has played a more significant role in national leadership. In recent years, moreover, premiers have been meeting more often than once a year as required by the enhanced level of activity that they have generated amongst their ministers and officials. One question that arises, therefore, is whether the Council of the Federation initiative is anything more than the Annual Premiers' Conference under a new name. Is it old wine in a new bottle? Or is it something genuinely new and different in the governing of the federation?

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Heavily influenced by Quebec premier Jean Charest's proposals, the premiers' July announcement presented the Council concept as one component of a "plan" to "revitalize" the federation and "build a new era of constructive and cooperative federalism for Canadians." At that time, the premiers, amongst other things, also called for annual first ministers' meetings, an enhanced consultative role for the provinces and territories in key federal appointments, and "protocols of conduct" to guide the behaviour of all governments in their relations with one another to avoid unilateral actions. When put into this wider context, the Council of the Federation is seemingly intended to move the federation to a more collaborative set of relations between federal, provincial, and territorial governments.

What then are the prospects that the premiers' initiative will make a difference in the governance of the federation? And what kind of difference should be expected or is desired? Indeed, what do the premiers mean by "collaboration"? This is one of a series of articles that seeks to shed some light on these questions and does so by focusing on the record of federal-provincial-territorial (FPT) collaboration under the provisions of the 1999 Social Union Framework Agreement (SUFA). That agreement, signed by Ottawa, all provinces except Quebec, and the two older territories, calls for "mutual respect among orders of government and a willingness to work more closely together to meet the needs of Canadians." The agreement covers many of the issues that a Council of the Federation will presumably deal with, including health care and other social programs, as well as some aspects of the financial arrangements related to those social programs. Writing about SUFA about three years ago, I suggested that "if implemented effectively, it offers the promise of better social policy (in the sense of more coherent and better-informed policy), more effective management of the federation and a better functioning democracy. The question that requires consideration, therefore, is whether it will fulfill these promises."¹

¹ Harvey Lazar, "The Social Union Framework Agreement: Lost Opportunity or New Beginning?" a paper presented at the conference "The Changing

Now that we have four and half years of experience under SUFA, how should Canadians assess its record? What lessons have been learned from this instrument of intergovernmental collaboration? And what do these lessons suggest about the future prospects for a Council of the Federation?

Assessing SUFA: Impact and roadblocks

Let's begin by recalling that SUFA is mainly about the *process* of governing -- how governments should relate to one another and to citizens in the making of social policy. It has a section on principles and another on "mobility within Canada" (sections 1 and 2). Almost all of the rest is about how governments are to behave. Section 3, for instance, concentrates on "public accountability and transparency," section 4 on governments "working in partnership for Canadians," section 5 on the role of the "federal spending power," and section 6 on "dispute avoidance and resolution." Section 7 called for a review of the agreement and its implementation after three years (now completed).²

What has been SUFA's impact? First, it has had little effect to date on the content of social policy. The main area of public debate in social policy in recent years has had to do with publicly insured health care (its funding, scope, quality and timeliness). I do not know of a single analyst outside of government who would argue that the intergovernmental content of the health accords reached by first ministers since 1999 have been significantly influenced by SUFA. An exception to this general point about the content of social policy has to do with mobility policy, where there seems to have been genuine progress in improving the ability of workers to move between provinces. But as already noted, mobility is the only policy issue dealt with directly by SUFA itself.

Second, and more troubling, is that there is little public evidence that the process of making social policy has itself been substantially altered. For example, in the last two FPT health accords

Nature of Democracy and Federalism in Canada", University of Manitoba, Winnipeg, April 13-15, 2000. http://qsilver.queensu.ca/sps/WorkingPapers/files/sps_wp_03.pdf

² http://www.sufa-review.ca/e_reports.htm

(2000 and 2003), the federal prime minister acted in a largely unilateral manner with respect to the amount of additional federal funding and the purposes for which that money should be spent. (The role of provinces seems to have been largely confined to saying “yes” or “no” to the amount and negotiating for enhanced flexibility on how it might be spent.) Where SUFA may have made a difference is in the still evolving accountability provisions in health care. Even there the slow pace of action by governments in fulfilling their accountability commitments (e.g. jointly agreed comparable indicators for public reporting, a new Health Council) speaks to the belief among some provinces that these FPT exercises were not sufficiently collaborative. This concern is perhaps best summed up in the understated language of the FPT Ministerial Council on Social Policy Renewal earlier this year when it observed in its report that “government to government consultation can be improved.”³

To be sure, it inevitably takes time to turn the ship of state around and get governments to do business differently. In line departments, such as those responsible for health, social service and labour markets, insiders often argue that business is being conducted in a way that is increasingly respectful of SUFA’s provisions. The recent intergovernmental review of SUFA pointed to the early childhood development and National Child Benefit files as examples of effective SUFA implementation, and others have suggested that recent social housing initiatives are a further illustration of an effective SUFA-like process.⁴ While it is hard to know whether these unquestionably collaborative initiatives would have been equally collaborative in the absence of SUFA, the fact that such claims emanate from a range of governments lends plausibility to this view.⁵

Nonetheless, it is difficult to conclude that there has been an improved climate in Canadian intergovernmental relations since 1999,

³ FPT Ministerial Council on Social Policy Renewal, Three Year Review, Social Union Framework Agreement, page 13, http://www.sufa-review.ca/e_reports.htm

⁴ Ibid.

⁵ Based on author’s interviews with current and former federal and provincial officials.

especially in relation to files that involve large amounts of money. The federal government’s approach to major federal cash transfers to provinces continues to be largely unilateral, based on Ottawa’s judgment of what it can afford, tempered by its sense of what the public believes to be fair. While the federal government may be in technical compliance with its SUFA commitments to consult at least one year prior to making significant changes in funding, and other limitations on the use of the federal spending power, its “take it or leave it” approach to financial negotiations with the provinces on health care is difficult to reconcile with the SUFA language of mutual respect. I am also not aware of any meaningful federal-provincial discussion regarding the Canada Health Transfer that is supposed to be established by March 31, 2004.

Five significant roadblocks have stood in the way of SUFA fulfilling its potential. One stems from the very process that led to SUFA. The agreement was the result of a provincial initiative that had its origins in the 1995 federal budget. In that budget, finance minister Paul Martin announced major reductions in cash transfers to the provinces for social programs, including health. The provinces believed that they had been unfairly singled out in the federal spending cutbacks. The initiative that they subsequently launched eventually culminated in SUFA. While this initiative involved an expressed desire to improve FPT collaboration, provinces also attempted to negotiate some fairly stringent restrictions on the federal government’s use of its spending power and new procedures for managing disputes. When Ottawa came to the negotiating table, however, it was able to water down provincial demands relating to the spending power and it had its own set of demands (including those related to mobility and accountability provisions). The main point here is that provincial and federal governments had different objectives when they agreed to SUFA. These differences, while understandable, in effect mean that there is still to this day an ongoing negotiation among governments as to what SUFA means and how it should be implemented.

A second and related roadblock relates to the large differences of opinion that remain between the federal government and the provinces concerning the fairness of the intergovernmental fiscal arrangements that underpin FPT

partnerships on social programs. The provinces perceive that there is a vertical fiscal imbalance that unduly favours Ottawa. This means that provinces believe Ottawa collects far more tax revenue than it needs relative to its expenditure responsibilities leaving too little tax room for provinces in respect of their more onerous obligations. Ottawa disputes this view pointing, for example, to recent provincial tax reductions and the fact that provinces have the constitutional authority to tax all of the most lucrative tax bases. Provinces also complain that they are exposed to more downside risk when the economy weakens than is appropriate. These disputes affect the attitudes of both orders of government in their implementation of SUFA.⁶

Third, there is a fundamental dispute about the role of the FPT Ministerial Council on Social Policy Renewal in overseeing the way SUFA works. The federal government sees this Council as playing a modest role, reporting on trends and best practices with the serious work of improving social programs remaining the responsibility of sector ministers. A number of provinces would prefer that the Ministerial Council exercise a much larger leadership role, including the setting of priorities for social policy. There is nothing in SUFA that assigns such a substantial role to the Ministerial Council and Ottawa, perhaps correctly, fears that the provincial approach would reduce its freedom of action beyond the modest restrictions now inherent in the agreement. (This is an example of the ongoing negotiation about the nature SUFA referred to above.) The federal government also worries that such an approach would unduly hamper the freedom of action of sector ministers. The result has been an impasse about “whole-of-government coordination” that has made it difficult for the Ministerial Council to agree on whether and when to meet and what to discuss. From 2000 to 2003, therefore, it met only once (in person) due mainly to the ongoing wrangle about its appropriate role.⁷ This problem, it is worth adding, is similar to the difficulties in

effecting overall FPT coordination in respect of the Agreement on Internal Trade.

Fourth, until 2003, FPT governments have differed strongly about how to implement the dispute avoidance and resolution provisions of section 6 of SUFA.

The fifth roadblock has to do with the fact that SUFA has no public profile even though the agreement calls on governments to “ensure effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes.” Moreover, when there are improvements in the content of social programs, as has been the case in relation to child benefits and early childhood development over the last couple of years, the public announcements understandably focus on the substance of the new arrangements, not on the intergovernmental process through which these improvements are reached. The lack of visibility of SUFA to the public takes the pressure off of governments in making the agreement function as effectively as it might.

These obstacles are above and beyond the usual factors that can divide governments such as differences in interest, wealth, ideology, party affiliation, and personality. As a result, and as already noted, during its more than four years in place, SUFA has had at best a modest record (if that) of improving FPT relations in the making of social policy. It has also done little to improve governments’ record of involving citizen organizations effectively in the FPT decision making process.

Is SUFA then a flop and, if so, what might this imply for the potentially more ambitious Council of the Federation? For those who may have had high hopes of an early payoff from SUFA in terms of either improved intergovernmental relations or better social policy, the word “flop” may be a reasonable assessment of its impact.

But for those who understood that SUFA required all governments to change voluntarily long-established and deeply ingrained modes of behaviour, it is still much too soon to conclude that SUFA is a failed experiment. There was never strong reason to expect that signatures on a piece of paper would alter entrenched modes of

⁶ For a full discussion of this issue, see Harvey Lazar and France St-Hilaire (eds.), *Money, Politics and Health Care*, forthcoming through McGill-Queen’s University Press.

⁷ It has also met through conference calls, especially in the context of the SUFA three-year review.

intergovernmental behaviour quickly. But if governments proceeded in good faith, then gradually there might be some improvements. Indeed, the three-year review of SUFA has led the FPT Ministerial Council on Social Policy Renewal to make recommendations for some clarifications to SUFA processes that could conceivably bring about such improvements.

Perhaps the last point to be made about SUFA is that enhanced intergovernmental collaboration, as called for by that agreement, is not necessarily synonymous with more harmonious intergovernmental relations. Collaboration suggests that governments have come to recognize their interdependence in certain areas and that they are willing to attempt to work together because of that interdependence. Working together does not mean, however, that governments will somehow magically reach agreement. As noted above, governments may come at issues with different interests, ideologies, party affiliations, and personalities. Indeed, differences among governments are normal and intergovernmental conflict can be constructive when it exposes competing ideas to public deliberation. In any case, conflict among governments almost always precedes agreement. In this sense, conflict and cooperation are not opposites but rather go hand-in-hand. Consequently, for those who believe that intergovernmental conflict is inherently undesirable, it is better to minimize areas of FPT collaboration and to have governments act as independently of one another as is practicable (what has been referred to as “disentanglement”). In this sense, interdependence and independence are the true opposites and not cooperation and conflict. SUFA recognizes that interdependence among orders of government is substantial and therefore provides a framework both for intergovernmental joint action (collaboration) as well as dispute avoidance and conflict resolution.

Lessons from and Implications of SUFA for a Council of the Federation

Like SUFA, the Council of the Federation is ostensibly intended to influence intergovernmental behaviour. The composition of the Council of the Federation and of SUFA

differs, however, in three respects. First, the Council is a more senior body, being made up of heads of government (not the case for SUFA). Second, as initially proposed by the Annual Premiers’ Conference, the Council is to be an inter-provincial/territorial (or “horizontal”) body, not a FPT (“vertical”) organization, whereas SUFA is a vertical arrangement. This is a crucial difference. However, the 2001 Pelletier report proposed that the Council should have a vertical dimension as well as a horizontal one.⁸ Whether or not provinces and territories will invite the federal government to join the Council when Paul Martin becomes prime minister, for the time being the horizontal dimension is what is to be implemented. Finally, Quebec did not sign SUFA and the Quebec Liberal Party signaled when it was in opposition that it too would not have signed the deal that was on the table. In contrast, Quebec is not only to be a member of the Council of the Federation but is its leading proponent. From the viewpoint of federation management and leadership, this too is a huge difference.

Taking account of these differences, what might Canadians expect from a Council of the Federation bearing in mind the SUFA experience? There is no simple answer to this question. One thing that can be said, though, is that to the extent that the Council remains a horizontal body, it will acquire significance relative to the status quo only if the participating provincial and territorial governments are willing, from time to time, to pool their sovereignty and act jointly. For instance, a soon-to-be-published analysis of the Annual Premiers’ Conference makes clear that this body does *not* serve as a vehicle for joint inter-provincial/territorial joint action.⁹ Instead, almost all of its efforts are focused on developing common positions for discussion and negotiation with the federal government.

Are there items and issues where it might make sense for provinces, either all ten or smaller groups, to act jointly and independently of the federal government? The answer is assuredly

⁸ Special Committee of the Quebec Liberal Party on the Political and Constitutional Future of Quebec Society, *A Project for Quebec: Affirmation, Autonomy and Leadership, Final Report*, produced under the direction of Benoit Pelletier, October 2001.

⁹ Peter Meekison, “The Annual Premiers’ Conference: Forging a Common Front”, to be published in *Canada, The State of the Federation, 2001-02*, forthcoming.

“yes.” Provinces might find it efficient and less costly, for example, to create a single body to purchase pharmaceuticals for their varying drug programs. Or they might find it cost-effective to jointly develop tests to measure student achievement (an area they have worked on over the years through the horizontal Council of Ministers of Education of Canada). These types of measures could be especially useful to smaller provinces while in no way derogating from the needs of the larger ones. In such examples, an opting-in mechanism could allow some provinces and territories to participate while those that were not interested could stay out.

A horizontal council could also focus on inter-provincial learning and promoting best practices. As well, it might also serve as a spur to removing internal restrictions on inter-provincial trade, investment, and labour. But this would only be the case if the Council had the power to impose its will on recalcitrant provinces through an agreed set of voting rules (say, two-thirds of the provinces representing some minimum share of the population).

While the most obvious way to enforce voting rules would be through a constitutional amendment, an alternative would be for all provincial legislatures to enact ‘mirror’ legislation that sets out their commitment to an inter-provincially negotiated set of voting rules (rules that might differ from one type of issue to another as is the case for the European Union). While a provincial legislature could always exercise its sovereignty and amend its legislation so that it was no longer subject to the voting rules, there would be lots of political pressure on such a province to think twice, or three times, before scuttling its participation in the negotiated rules of the game. If provinces were to negotiate such a set of rules, this would create the possibility of national action through provinces acting alone. Such action could affect the dynamics of the federation and perhaps over time help make the federal-provincial relationship a more equal partnership.

However, notwithstanding some exceptions, there is little in the history of the Annual Premiers’, the Council of Maritime/Atlantic Premiers, or the Western Premiers’ Conference to suggest that provinces are interested in inter-provincial collaboration in a substantial way.

There is much more evidence in their record to indicate that they would use a “horizontal” mechanism largely as a way of developing common positions to put to Ottawa. Or as seen from the federal perspective, it might well be a place where provinces plan their strategies to “gang up” on Ottawa. If this were to be its role, then it is hard to see any value-added relative to the status quo, since the Annual Premiers’ Conference already does the job.

This brings us to the idea of the Council as a vertical body even though this is not the proposal that the provinces and territories now have on the table. If Mr. Martin were offered and were to accept such an invitation, we would have a FPT body with the same composition as the SUFA except for two crucial things. Quebec would be in. And representation would be at the level of heads of government.

What might we expect in that case? First, as just seen, SUFA teaches us that new intergovernmental arrangements and institutions do not lead automatically to new modes of behaviour. Creating a FPT Council of the Federation would not therefore move Canada inexorably toward a new era of FPT harmony. Second, any adjustments and improvements in behaviour that might occur are likely to be gradual. Third, SUFA’s biggest failings have come where large sums of funding are being negotiated. This is not surprising as money issues generally entail a ‘zero sum’ game (where one side’s gain is another’s loss). There is no reason to think that a new institution would make financial negotiations much easier. SUFA is more effective, however, where money issues are settled and policy and program content are being developed. This is often a ‘positive sum’ game that enables both parties to see gains and a Council of the Federation could reinforce these kinds of gains. Finally, there is bound to be controversy about the extent of the role of citizens and interest groups in the functioning of the Council and related questions of accountability, as there is under SUFA.

The case for a FPT Council of the Federation should not be based on the hope of achieving intergovernmental harmony (“peace in our time”) but on the fact that the world continues to shrink with the result that interdependencies are growing. For example, one area where interdependencies

are flourishing is across international borders and with this there is a growth in international governance. Much of this governance impinges directly or indirectly on items that are wholly or partly the responsibility of the provinces under the constitution. The federal government has the authority to negotiate and ratify international agreements in such areas but lacks the authority to implement them. For implementation it often requires provincial support.

Consider some of the extraordinary events of 2003 in Canada. The SARS virus appears to have entered Canada from Asia and managing it involved not only several layers of authority in Canada but also the World Health Organization and health authorities in the US. The massive loss of export markets for Canadian cattle and beef as a result of the BSE could only be dealt with through coordinated interactions between federal and Alberta authorities and continuous interaction between Ottawa and the governments of major markets. The ultimate solution to the softwood lumber dispute with the United States will require similar federal-provincial cooperation. The power blackout in Ontario appears to have had its origins in the US and minimizing the risk of future similar incidents is likely to involve both federal and regional governments (provinces and states) on both sides of the border. Dealing with threats of terrorism requires provincial cooperation with the federal authorities which, in turn, must work closely with security agencies in other countries.

For the most part, the above examples do not entail 'zero sum' games. Moreover, over time, it is reasonable to expect that more Canadian decision making will entail solutions that require negotiations with foreign governments or international institutions. This growth of international interdependency leads inexorably to a need for appropriate institutional developments in federation management. As Ron Watts has pointed out in his article in this series, Canada lags behind a number of other federations in creating the infrastructure for managing interdependencies.¹⁰ Effective FPT collaboration through a Council of the

Federation could be a win-win-win proposition -- for Ottawa, for provinces and territories, and most importantly for the people of Canada.

A FPT Council of the Federation might also play the role that several provinces wish the FPT Ministerial Council on Social Policy Renewal to play in respect of social programs. It is easier to envisage heads of government giving direction, and setting priorities, in this area than it is for less senior ministers. It is easier for sector ministers to respond to heads of government than it is to another group of ministers who are not necessarily their seniors.

For reasons already stated, a FPT Council of the Federation is less likely to be effective in dealing with fiscal disputes between federal and provincial governments. This is not to argue that the Council should avoid tough issues but only to suggest that giving this subject priority might be a difficult way to get started.

This still leaves the question: how would a FPT Council of the Federation differ from First Ministers' Conferences and Meetings. The answer is that "it all depends". In recent decades the frequency and utility of First Ministers get-togethers has been determined by the style and preferences of the federal prime minister. To oversimplify, Mr. Mulroney was inclined to call them frequently and M. Chrétien has not been so inclined. The governance of the federation should not be so heavily affected by these kinds of personal preferences.

In any case, a vertical Council would differ from the current First Ministers' Conferences and Meetings only if it were explicitly designed to do so. And inevitably, this means institutionalizing it -- that is, agreeing on the frequency and regularity of meetings and having an intergovernmental understanding about how agendas are to be set, who chairs the meetings and how decisions are to be taken and disputes resolved. It also requires clarifying channels of accountability for results and thus raises questions of transparency. These are easy concepts to put on paper but to varying degrees all are contentious. Agreeing to establish a FPT Council of the Federation is itself therefore bound to be a difficult and acrimonious endeavour.

¹⁰ Ronald Watts, *Intergovernmental Councils in Federations* at the following link http://www.iigr.ca/pdf/publications/304_Intergovernmental_Council.pdf

Moreover, it defies imagination that such a Council would have staying power without an administrative arm to give it that endurance for the long haul. Part of the reason for SUFA's at best modest record of achievement is the lack of a secretariat to keep pushing the agenda. Inevitably, some governments will worry about the costs of "another level of government" and the risk of such an appointed body thwarting the will of democratically elected governments. Well, on this point, it is a question of choosing one's poison. If there is a strong case for a vertical Council, then it needs to be able to do its job and this requires that it have the administrative muscle to make things happen. To be sure, the size and budget of the secretariat would have to be managed. And while too big would entail danger, too small risks irrelevance.

The argument here is that the growth of interdependencies complicates the task of governing the Canadian federation. While many would prefer a disentangled federation, the world is moving in the opposite direction. The Council of the Federation concept is one possible response to that increased interdependency, or at least it is in its vertical guise.

It is important, however, to be clear that a more systematic approach to FPT collaboration, as anticipated by the Council concept, will not lead to an era of warm and fuzzy intergovernmental relations. To the contrary, the larger the intergovernmental agenda, the more there is to dispute. At the same time, to the extent that decisively better public outcomes require governments to work together, shying away from the intergovernmental table in order to avoid conflict is not the appropriate response.

To work *effectively*, either in its horizontal or vertical forms, there are two essential requirements for such a Council. The first is mirror legislation among participating governments that would give vertical and/or horizontal agreements some form of political protection against unilateral withdrawal by a signatory party. The second requirement is that heads of government learn to soften the discourse of FPT discussions. There is a language of brinkmanship that too often surrounds intergovernmental discussion that needlessly raises the temperature and the stakes.

This is reflected, for example, in the readiness of previous Quebec leaders to play the nationalist card too swiftly, the Alberta government to play the alienation card unnecessarily, the Atlantic provinces to focus on the emotive side of fiscal or fisheries issues unduly, and the federal government to cloak itself too often in the garb of the nation's saviour. There may well be times when governments judge they have no choice but to play high stakes poker. But the tone of day-to-day intergovernmental exchanges and indeed of Council meetings needs to be business-like for the most part. When issues are not resolved, they can be put on the backburner and brought forward on another day.

Establishing an *effective* Council entails a major transformation in the governance of the federation. Establishing a FPT Council that is only a warmed over First Ministers' Conference with current decision rules (consensus), current dispute resolution rules (until recently absent), current accountability provisions (ambiguous), an uncertain schedule of meetings (as is the case now with first ministers get-togethers), and a feeble secretariat is easier to achieve. But this second course is not an effective response to the growth of interdependencies. One lesson from the SUFA experience, however, is that the second kind of Council is more likely than the first.

In 2003 we have or are about to have a substantially new cast of characters leading our governments. And how they choose to tackle the challenges of federation management is not pre-ordained. Leadership makes a difference. Getting from "here" (weak intergovernmental bodies) to "there" (more effective institutional arrangements) will require that they display imagination, political will, and the patience to work things through together.