

*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**

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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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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,

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<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>

From an institutional perspective the key distinction between interstate and intrastate federalism is how the provincial voice is expressed, through an intergovernmental forum or through a restructured upper house.

In his 1979 essay "From Interstate to Intrastate Federalism in Canada," Alan Cairns classified the various intrastate proposals advanced at that time into two categories, "provincial intrastate federalism and centralist intrastate federalism."<sup>3</sup> The former proposals argued for reform generally along the lines of incorporating the principles of the then West German Bundesrat into the Canadian Parliament. The latter approached reform along the lines of "making the central government more responsive to territorial diversities which bypass provincial governments."<sup>4</sup>

### 1. *The 2001 Quebec Proposal*

Five key provisions, taken from Quebec's specific recommendations, need to be taken into consideration in positioning this most recent proposal in the context of earlier suggestions.

1. "[T]he Council of the Federation would be an intergovernmental body within the executive branch of government, rather than the legislative one. To begin with, it could be created through administrative means, that is,

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<sup>2</sup> Alan C. Cairns, "From Interstate to Intrastate Federalism in Canada," Discussion Paper No. 5, Kingston: Institute of Intergovernmental Relations, 1979, p. 4.

<sup>3</sup> *Ibid.*, p. 11.

<sup>4</sup> *Ibid.*

without amending the Constitution. Then if it were appropriate, the Council could be modified to make it a truly constitutional body." (p. 93.)

2. "The members of the Council would be the prime minister, the premiers, and ministers or other representatives of the federal government and the provinces, depending on the issue." (p. 93.)
3. "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."<sup>5</sup> (p. 93.)
4. "Would the creation of the Council of the federation lead to the abolition of the Senate? Although that is a possibility, it certainly would not happen in the foreseeable future. A much more likely scenario is that the institutions would complement each other, one acting in the executive branch (the Council) and the other in the legislative branch (the Senate). ... [T]he Senate does not currently hold any of the responsibilities we propose to grant the Council." (pp. 92-93.)
5. "[T]he Council's mandate [would] cover not only the strengthening of the Canadian economic union, but also the consolidation of the social union .... [I]t should also play a role

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<sup>5</sup> The Chrétien government introduced the Regional Veto Act (Bill C-110) to the House of Commons shortly after the 1995 Quebec referendum. It divided the country into five regions for the purposes of determining a consensus for certain constitutional amendments. In addition to giving Quebec, Ontario and British Columbia a veto it also gives one to Alberta as the other two regions (the Atlantic and Prairie) require a majority of provinces representing a majority of the population.

An example of a qualified majority is a formula that would require a majority of the provinces representing 85% of the population. A formula along these lines would guarantee both Quebec and Ontario a veto, and in the not too distant future, British Columbia. Suggestions along these lines were made during the discussions on the amending formula during the Patriation process.

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 chamber. As will be seen below, the dichotomy between the executive or legislative alternatives has been a recurring theme in constitutional reform initiatives.

## 2. *The 2003 Annual Premiers’ Conference Proposal*

The Government of Quebec submitted its proposed Council of the Federation for consideration by the Premiers at the July 2003 Annual Premiers’ Conference (APC). As already discussed, Quebec’s original idea for a Council of the Federation was for the creation of a federal-provincial institution. After consideration at the 2003 APC, Premiers agreed to establish a purely interprovincial body.

What emerged from the 2003 APC meeting was a five point plan “to revitalize the Canadian Federation and to build a new era of constructive and cooperative federalism.” The five point plan includes:

1. Agreement in principle to create a Council of the Federation,
2. Annual First Ministers’ Meetings,
3. Provincial/Territorial consultation on federal appointments,
4. Devolution of powers to the Territories, and

5. Establishment of federal-provincial-territorial protocols of conduct.<sup>6</sup>

The Council of the Federation, as agreed to by the Premiers, is in effect the institutionalization of the Annual Premiers’ Conference. It will “comprise the 13 Premiers who will meet on a regular basis.”<sup>7</sup> Premiers scheduled the inaugural meeting of the Council for October 24, 2003 when they “will finalize the mandate and structure of the Council.”<sup>8</sup> The Council is to “initially focus on areas of common interest (to the provinces and territories) such as health care issues, internal trade, and the fiscal imbalance.” Assuming the Council of the Federation becomes operational, it will transform the APC from an annual meeting into a permanent organization with staff and budget. The Premiers agreed that the Premiers’ Council on Canadian Health Awareness, established in 2002, will come within the Council’s mandate. Since “similar provincial/territorial coordinating bodies” are also to fall within its mandate, the Council of Ministers of Education may also be included under its umbrella.

In 1956 the Tremblay Commission made the following recommendation:

At present, there is no organization which ensures co-ordination of provincial policies. Yet the provinces *should discuss among themselves, without the federal government’s participation, the problems which are properly within their resort.* That is the only means of working out a provincial policy, suited to each province but still Canadian in nature. Creation of a permanent Council of the Provinces on the model of the American *Council of State Governments* would fill a great need. Such an organization seems to us necessary for the preservation of Canadian federalism. If the provinces do not agree to co-operate among themselves, the country’s own interest will finally require the federal

<sup>6</sup> CICS News Release, “Premiers Announce Plan to Build a New Era of Constructive and Cooperative Federalism,” 44<sup>th</sup> Annual Premiers’ Conference, Charlottetown, July 9-11, 2003, Ref: 850-092/006. Note: the term for First Ministers’ Conference (FMC) was changed to First Ministers’ Meetings (FMM).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

government to take over the supreme command.<sup>9</sup>

The type of structure that might eventually emerge is certainly in accord with this recommendation.

However, one should not lose sight of the second point of the five point plan, the proposal for an annual First Ministers' Conference. As will be seen below, this idea has a long history. The APC communiqué provides some insights into the Premiers' thinking. The annual FMC is to be co-chaired and agendas are to be "jointly determined with standing items on health, trade, finance, justice and the economy."<sup>10</sup> Looking at the Premiers' positions on co-chairing and agendas for FMCs and their objectives for the Council, it is clear that they see the provincial and territorial governments collectively as the equal of the federal government. The very obvious overlap between the responsibilities assigned to the Council and the matters identified for discussion at the annual FMC is a clear indication that the provinces intend to develop a common front for presentation to the FMC.

The Council of the Federation as envisaged by the Premiers does not require any federal response. Implementation of the other four points, however, is dependent on the federal government's agreement. How the federal government will eventually respond to them remains to be seen.

## Constitutional Reform 1968-1982

From 1968 through to the 1992 Charlottetown Accord, Canadians were involved in what Peter Russell has characterized as a constitutional odyssey. This journey has two distinct phases. The first phase is the series of negotiations that began in 1968. The 1976 election of the Parti Québécois, and its commitment to hold a referendum on Quebec's place in Canada, forced governments to resolve the matter of constitutional reform. This phase ended with the Constitution Act, 1982, an agreement rejected by Quebec. Thus, at least as

far as Quebec was concerned, the constitution remained unfinished business.

The second phase began in 1986 with efforts to start a new round of constitutional discussions, the objective of which was to secure Quebec's agreement of the 1982 Constitutional amendment. There were two major initiatives in this phase, the Meech Lake Accord, 1987-1990, followed by the Charlottetown Accord, 1991-1992. Both initiatives ended in failure. Constitutional reform discussions essentially came to an abrupt end in 1992 with the rejection of the Charlottetown Accord.

Throughout this quarter century of discussion and debate, several attempts were made to constitutionalize the institutions of intergovernmental relations. There were also efforts to reform the upper house. In both instances proposals for institutional change or entrenchment either built on preceding suggestions or ventured into new territory. Some proposals were made after extensive public consultations others were put forward by individual governments. Whatever their genesis, the various proposals discussed below are the antecedents of the proposed Council of the Federation.

### 1. *The Victoria Charter: 1968-1971*

The concept of a Council of the Federation, or some kind of intergovernmental institution along the lines that Quebec has proposed, can be traced back to the very first constitutional conference convened in February 1968. The federal government's policy position was spelled out in a document tabled by Prime Minister Lester Pearson, *Federalism for the Future*.<sup>11</sup> The document was short on detail but it signaled a willingness to discuss both Senate reform and "perfecting the machinery by which intergovernmental consultations take place."<sup>12</sup>

At the end of that conference, First Ministers agreed to examine a number of questions where constitutional reform might be desirable. Two of the matters to be considered were reform of institutions linked with federalism, including the Senate and Supreme Court and mechanisms of

<sup>9</sup> Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems*, 1956, Vol. 3, Bk. 2, p. 302. Emphasis added.

<sup>10</sup> CICS News Release, *Ibid*.

<sup>11</sup> Lester B. Pearson, *Federalism for the Future*, Ottawa: Queen's Printer, 1968.

<sup>12</sup> *Ibid.*, p. 42.

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

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<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.

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' Conference was included. The Bill also made it clear that the agenda for such conferences, "shall be decided by those composing the conference." The Part also included a requirement for the government to consult with provinces affected by the exercise of the declaratory power. The final section was a provision which would allow Parliament to make payments to provinces constitutionally binding, thus limiting Parliament's authority.

The proposals for the House of the Federation generated considerable debate. As a result of comments and criticisms, the then federal Minister of Justice, Marc Lalonde, issued a more detailed commentary on and defence of the proposed new House.<sup>18</sup> The main reason advanced by the federal government for replacing the Senate was "the country and Parliament need a second chamber that will function as a politically effective regional forum...."<sup>19</sup> The

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<sup>18</sup> Marc Lalonde, *Constitutional Reform: House of the Federation*, Ottawa: Canadian Unity Information Office, August 1978.

<sup>19</sup> *Ibid.*, p. 3.

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.<sup>20</sup>

Federal-provincial conferences will continue to be essential for the effective coordination of federal-provincial policies, programs and activities; but to the extent that the new House fulfills its role successfully, it will share with these conferences the function of expressing and reconciling regional views about federal policies and legislation.<sup>21</sup>

The notion that the second chamber and institutionalized federal-provincial conferences (in this case First Ministers' Conferences) would establish some kind of sharing or equilibrium with respect to the expression of regional views was certainly reflected in Quebec's proposed Council of the Federation.

In addition to the federal government's position paper and Bill C-60, a number of other suggestions for reform of the institutions of Canadian federalism were also forthcoming. The Canadian Bar Association, the Governments of British Columbia and Ontario respectively, the Canada West Foundation and the Task Force on Canadian Unity (Pepin-Robarts) all released position papers or reports. These documents included recommendations for institutional reform as part of a more general series of reform proposals. With respect to the type of institutional reform recommended, at that time the preference was to replace the Senate with a new institution based on the provincial intrastate federalism model, an institution patterned after the then West German Bundesrat or upper house.

Each of these documents was released in 1978-1979. Their purpose was to influence the course of federal-provincial constitutional negotiations that resumed with a First Ministers' Conference in October 1978. For example, the Government of British Columbia tabled a series of position papers at that conference, one of which proposed the creation of a House of the Provinces, based on equal regional representation. British Columbia advanced its idea of a five-region Canada with British Columbia being one of the regions and therefore received 20 per cent of the seats. At the same time the government of Alberta released its position paper, *Harmony in Diversity*. Alberta recommended an entrenched First Ministers' Conference and was completely silent on upper house reform.<sup>22</sup>

The federal government established the Task Force on Canadian Unity (Pepin-Robarts) in July 1977. Its report, *A Future Together*, was released in January 1979 and was the last of the five documents referred to above.<sup>23</sup> The report was also preceded by extensive public consultation. Thus its authors were able to take into consideration the recommendations of the other papers and public input. Unfortunately it was released shortly before the follow-up February 5-6, 1979 constitutional conference. As a result, it did not really have much effect at that conference.

The Pepin-Robarts Task Force recommended the creation of a Council of the Federation. As they indicated, their proposal "is similar to the [other] proposals ...."<sup>24</sup> They selected the name, Council of the Federation, "because it could combine the function of a second legislative chamber in which provincial interests are brought to bear, and a means of institutionalizing the processes of executive federalism (with their confederal character) within the parliamentary process."<sup>25</sup> The Council was a legislative chamber and would replace the Senate. Provincial representation was "roughly in accordance with their respective populations but weighted to

<sup>20</sup> Ibid., p. 4.

<sup>21</sup> Ibid., p. 22.

<sup>22</sup> In August 1982 the Government of Alberta released a second position paper, *A Provincially-Appointed Senate: A New federalism for Canada*.

<sup>23</sup> Task Force on Canadian Unity, *A Future Together*, Ottawa: Minister of Supply and Services Canada, 1979. The Task Force Report is most frequently referred to as the Pepin-Robarts Task Force Report.

<sup>24</sup> Ibid., p. 97.

<sup>25</sup> Ibid., emphasis added.

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 of first ministers may so designate....”<sup>28</sup> In addition, they recommended the establishment of “a federal-provincial committee on intergovernmental policy issues.”<sup>29</sup> While formation of the Council was dependent on a constitutional amendment, the federal-provincial recommendations could be done through either agreement or amendment.

### 3. *Constitutional negotiations 1980-1982*

The 1978-79 round of federal-provincial constitutional discussions ended with the February 1979 First Ministers Conference. Federal elections were held in 1979 and 1980. A few weeks before the end of the 1980 federal election the Constitutional Committee of the Quebec Liberal Party released a paper outlining the Party’s constitutional position. The paper was entitled, *A New Canadian Federation*, and was commonly referred to as the “Beige Paper.” The party agreed to establish a committee to prepare a report at its November 1977 policy convention.

Following the election of its new leader, Claude Ryan, in April 1978 the committee started its work. Given the fact that the Parti Québécois was planning to hold its referendum in the spring of 1980 it is understandable that the provincial Liberal Party would set out its vision for the future direction of Canadian federalism. It is also a reasonable assumption that constitutional discussions would resume at some point after the federal election and this policy paper would be factored into those discussions.

The “Beige Paper” defined a number of goals for constitutional reform. One was “the creation of an intergovernmental body which permits the participation of the provinces in the government of the nation.”<sup>30</sup> The intergovernmental body “would be known as the ‘Federal Council’ to emphasize the fact that it is conceived as a special intergovernmental institution and not as a legislative assembly controlled by the central government.”<sup>31</sup> The “Beige Paper” also recommended the abolition of the Senate and that Parliament become a unicameral legislature.<sup>32</sup> The proposal, that the Federal Council have no legislative responsibilities, is the major difference between the Pepin-Robarts Report and the “Beige Paper” recommendations. While there are differences in details such as the distribution of the weighted vote, until the various proposals were subjected to the rigours of constitutional negotiation and drafting it is impossible to predict what the final structure and powers of the resultant institution, or for that matter institutions, would be.

A few months after the federal election, the Government of Quebec held its referendum on sovereignty-association. Constitutional discussions resumed in June 1980, following the defeat of the referendum. While Senate reform was one of the matters included on the agenda, discussions on the nature of the reform were inconclusive. The “best efforts” draft proposed a Council of Provinces with equal provincial representation along with the continuation of the existing Senate. Mechanisms of intergovernmental relations were not on the agenda. In September 1980 the negotiations

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., p. 129. Note: the specific recommendations with respect to the Council are found at pp. 128-9 of the Task Force Report.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation*, January 1980, p. 22, referred to as the “Beige Paper.”

<sup>31</sup> Ibid., p. 52. See Chapter 9 of the “Beige Paper” for the complete discussion of this institution, pp. 51-56.

<sup>32</sup> Ibid., pp. 46-47.

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, 1980 a few days after First Ministers had agreed to the resumption of constitutional discussions. The "report was approved in substance by the committee before the beginning of the First Ministers' Conference on September 8, 1980...."<sup>34</sup>

The Standing Committee reviewed the various proposals on Senate reform that had been produced. While acknowledging the need for Senate reform, the Standing Committee rejected the provincial intrastate federalism approach advocated by the Pepin-Robarts Task Force and the "Beige Paper" proposal. They stated that "After intense but dubious attempts at institution-building designed to meet a deeply-rooted provincial grievance a more recent current of opinion is rediscovering the federal-provincial conference, an old and unique Canadian mechanism that could easily provide a practical solution with the minimum of institutional disruption."<sup>35</sup>

Accordingly, they recommended an intergovernmental solution as an alternative. They proposed that the First Ministers' Conference be entrenched in the constitution and be known as the Federal-Provincial Council. Their proposal went much further than the provisions of the Victoria Charter. The Federal-

Provincial Council would exercise "an *overseeing role* that would enable provincial governments to approve federal proposals directly affecting provincial areas of jurisdiction *before* such amendments are formally considered by Parliament."<sup>36</sup> This provision would include the exercise of federal extraordinary powers "notably the emergency and spending powers." They recommended "approval of proposals by the council require a vote representing both a majority of the provinces and a majority of the population."<sup>37</sup> As chance would have it, they were prescient in their suggestion, as a variant of this formula -- became the general formula for constitutional amendments.

The Federal-Provincial Council would also exercise "a *coordinating role* illustrated by current federal-provincial meetings of finance ministers where an attempt is made at reaching a consensus on the broad orientation of fiscal policy."<sup>38</sup> The Standing Committee considered decisions in this role to be advisory and non-binding.

In some respects the recommendations of the Standing Committee for the creation of a Federal-Provincial Council are similar to the 2001 Quebec proposal for a Council of the Federation. One notable difference is with respect to the exercise of a veto. The former expressly rejected the idea of a single province having a veto whereas the latter adopted the regional veto as its decision making model. The other difference is that the former was expected to be included as part of a larger constitutional amendment package whereas the latter, at the outset, is a non-constitutional body which would limit the scope of its authority.

For the purposes of this discussion the Constitution Act, 1982 as such is not particularly relevant, since none of the proposed reforms to that point was considered for inclusion. Essentially the constitutional reform agenda had been reduced to the matters included in the draft resolution. At the November 1981 First Ministers' Conference the only documents under consideration were the draft resolution and the amending formula prepared by the "group of eight." At the beginning of the conference it was

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<sup>33</sup> Standing Senate Committee on Legal and Constitutional Affairs, Report to the Senate of Canada, *Report on Certain Aspects of the Canadian Constitution*, Ottawa: Minister of Supply and Services Canada, November 1980.

<sup>34</sup> *Ibid.*, p. 1.

<sup>35</sup> *Ibid.*, p. 15.

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<sup>36</sup> *Ibid.*, p. 18, emphasis in original.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, emphasis in original.



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 matters."<sup>40</sup>

The structure and areas of responsibility assigned to the FMC as envisaged in the

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<sup>39</sup> Royal Commission on the Economic Union and Development Prospects for Canada, *Report, Volume Three*, Ottawa: Minister of Supply and Services, 1985, p. 265. The section on the First Ministers' Conference is found in Volume Three, pp. 260-269.

<sup>40</sup> *Ibid.*, p. 267 for the quotations in this paragraph.

Macdonald Commission Report, with the exception of the review of international treaties, is not inconsistent with what Quebec outlined in its 2001 position paper. Since the Quebec approach is non-constitutional in nature, the matter of decision making remains open, in that the Council of the Federation cannot bind its members. Since the Macdonald Commission Report was presented, the federal and provincial and territorial governments signed the Agreement on Internal Trade in 1994 and the Social Union Framework Agreement in 1999.<sup>41</sup> The Ministerial Councils and their supporting bodies established by the two agreements are similar to the Secretariats proposed to support the Council of the Federation.

## **Constitutional Negotiations 1987-1992**

### *1. Meech Lake 1987-1990*

Since Quebec did not agree to the Constitution Act, 1982, constitutional reform remained unfinished business. At the 1986 Annual Premiers' Conference in Edmonton, the Premiers agreed that their top constitutional priority would be immediate consideration of Quebec's five conditions. In addition, they indicated some matters for discussion in subsequent negotiations, including Senate reform.

In April 1987 First Ministers agreed to the Meech Lake Accord. Certain provisions are relevant to this discussion. In particular, the text included a provision for an annual First Ministers' Conference on the economy. Although the wording is more specific than what is found in the 1971 Victoria Charter, the Premiers at their Annual Premiers' Conference had usually called for the convening of such a conference. In February 1985, Prime Minister Mulroney committed to convene an annual First Ministers' Conference on the economy for the next five years. In effect the Accord was a reflection of what was already occurring and what had received support over the years.

The Meech Lake Accord also included a section that required annual First Ministers' Conferences to discuss further matters where constitutional reform was considered necessary.

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<sup>41</sup> While Quebec signed the Agreement on Internal Trade, it did not sign the Social Union Framework Agreement.

One issue that was specifically mentioned was Senate reform. In the years between the Constitution Act 1982 and the Meech Lake Accord there had been a profound change with respect to Senate reform.

Up to patriation the provincial intrastate federalism model had tended to dominate the discussion. The 1980 Senate Standing Committee Report rejected this approach. In September 1981 the Canada West Foundation produced a report which laid the foundation for a Triple EEE Senate.<sup>42</sup> In 1984 the Special Joint Committee on Senate Reform unanimously rejected this approach.<sup>43</sup> The Macdonald Commission categorically rejected the Council of the Federation model recommended by the Pepin-Robarts Task Force and others.<sup>44</sup>

In 1985 the Alberta Select Special Committee On Upper House Reform released its report, *Strengthening Canada: Reforming Canada's Senate*. The Alberta Select Special Committee recommended an elected, equal, and effective Senate.<sup>45</sup> They made it clear at the very beginning of their report that, "while the Senate should be the institution through which people of the provinces can participate in national-decision making, the Senate should not be a forum for intergovernmental discussion. To fulfill that function, First Ministers' Conferences should assume a constitutionally entrenched place in our Parliamentary system."<sup>46</sup>

The Special Joint Committee of the Senate and House of Commons reviewing the Meech Lake Accord reinforced these positions. They

were "of the view that there is widespread support for an elected Senate that would more equally represent the provinces of Canada and that could then justify the use of its powers."<sup>47</sup> From the foregoing it would appear that the idea of a reconstituted second chamber, along the lines proposed by the Pepin-Robarts Task Force and others, was no longer a viable alternative.

## 2. *The Charlottetown Accord 1991-1992*

After the failure of the Meech Accord the federal government reassessed its approach to constitutional reform. The end result was a vastly expanded list of subjects for inclusion in the review. The federal government released its position paper, *Shaping Canada's Future Together*, outlining a comprehensive agenda for reform in September 1991. Among other matters, the position paper included proposals for both Senate reform and the creation of a Council of the Federation.<sup>48</sup>

As stated in the federal position paper, "The impetus for senate reform stems first and foremost from the conviction held by many Canadians that federal decision-making is not sufficiently responsive to regional diversity."<sup>49</sup> The other reason given for reform was the fact that the Senate was not an elected body. The essence of the reform proposal was to look at the method of election of Senators, the distribution of seats, its legislative authority and other special powers. There was no suggestion that the reform should restructure the Senate along the lines proposed by the Pepin-Robarts Task Force. For all intents and purposes the various proposals to establish the Council of the Federation as a revised upper house of the federal parliament had been rejected.

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<sup>42</sup> Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership*, Calgary: Canada West Foundation, September 1981. The study gives a good overview of the various upper house reform proposals to that date.

<sup>43</sup> *Report of the Special Joint Committee of the Senate and House of Commons on Senate Reform*, January 1984, Issue No. 2 of the Minutes and Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on Senate Reform, Second Session, Thirty-second Parliament, 1983-84. See pp. 17-19.

<sup>44</sup> Macdonald Commission, *Report, Volume Three*, p. 88.

<sup>45</sup> Alberta Select Special Committee On Upper House Reform, *Strengthening Canada: Reforming Canada's Senate*, Edmonton: 1985, Second Printing, Plains Publishing Inc: Edmonton, January 1988, p. 1.

<sup>46</sup> *Ibid.*

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<sup>47</sup> The Report of the Special Joint Committee of the Senate and House of Commons, *The 1987 Constitutional Accord*, Ottawa: Queen's Printer September 17, 1987, p. 95. Issue No. 17, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on The 1987 Constitutional Accord.

<sup>48</sup> Canada, *Shaping Canada's Future Together: Proposals*, Ottawa: Minister of Supply and Services Canada, 1991. The proposals on Senate reform are found at pp.16-21 and the proposals on the Council of the Federation at pp. 41-42.

<sup>49</sup> *Ibid.*, p. 17.

The Council of the Federation as outlined in the federal proposals went beyond previous recommendations to entrench an annual First Ministers' Conference. The Council would be an intergovernmental body entrenched in the constitution. It was made clear that "*the Council would not be another layer of government.*"<sup>50</sup> The justification for establishing such an institution was premised on the need "to improve the management of the interdependence of government actions inherent in our federal system."<sup>51</sup>

While not a legislative body, the Council would be empowered to make certain decisions. The Council's decision making process was patterned after the general amending formula found in Section 38 of the Constitution Act, 1982; federal approval and at least seven provinces representing 50 percent of the population. Thus each province would have one vote. There was no weighted system of voting. The territories would participate but would not have a vote. The "Council would be composed of ministerial representatives from the federal and each provincial government; government representatives could vary depending on the nature of the issues being discussed."<sup>52</sup> As worded, the proposal would not preclude the participation of First Ministers. It would not have a permanent staff but would use the services of the Canadian Intergovernmental Conference Secretariat.

The Council's mandate was as follows:

- to vote on proposed federal legislation under the proposed new head of power to enhance the functioning of the Canadian economic union;
- to vote on common guidelines for fiscal harmonization and co-ordination, and make decisions on improved processes for future collaboration in this area;
- to make decisions on the use of the federal spending power on new Canada-wide shared cost programs and

conditional transfer in areas of exclusive provincial jurisdiction.<sup>53</sup>

The first responsibility was predicated on an amendment to Section 121 of the Constitution Act, 1867, the intent of which was the removal of internal trade barriers. Even with the constitutional amendment, the mandate as outlined is similar in its intent to that proposed by the Macdonald Commission. With the exception of a role in treaty ratification, the mandate of the Council in the 1991 federal document is comparable to the 2001 Quebec proposal.

The process of constitutional negotiations during the Charlottetown round was considerably different than the Meech Lake negotiations. A Special Joint Committee of the Senate and House of Commons (Beaudoin-Dobbie Committee) held public hearings on the federal proposals contained in *Shaping Canada's Future Together*. In addition, a series of "Renewal of Canada Conferences" were convened in five different cities across Canada. Four of these conferences, or mini constituent assemblies, were convened to examine the different themes in the federal proposals followed by a fifth, the purpose of which was to develop a synthesis of the conclusions of the other four.<sup>54</sup> These conferences were concluded prior to the Beaudoin-Dobbie Committee submitting its final report.

One of the conference themes was institutional reform. That gathering was held in Calgary. Two of the institutions studied were the Senate and the Council of the Federation. Given the conference venue, it was not surprising that there was considerable support for Senate reform, particularly an elected Senate. With respect to the Council of the Federation there was little support. One of the criticisms was that it would create a "third layer of government." Another was a "distrust of executive federalism, or at least of extending and institutionalizing it," while another was, "because the Council of the Federation 'muddied the waters' it could make reform of the Senate less likely or less effective."<sup>55</sup> Given the lack of support for the idea of a Council of the

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<sup>53</sup> Ibid.

<sup>54</sup> Government of Canada, *Renewal of Canada Conferences: Compendium of Reports*, Ottawa: Constitutional Conference Secretariat, March 1992.

<sup>55</sup> See Ibid., *Renewal of Canada: Institutional Reform*, p. 5 for the summary of the discussion the Council.

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<sup>50</sup> Ibid., p. 42, emphasis in original.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

Federation, it was not even considered in at the fifth and final conference held in Vancouver.

In its *Report of the Special Joint Committee on a Renewed Canada*, the Beaudoin-Dobbie Committee stressed the importance of the “management of interdependence.” Accordingly, they recommended the inclusion of an annual First Ministers’ Conference to discuss economic and social matters. The Committee adopted the same language as contained in the Meech Lake Accord and but added the word “social”. This change reflects another section in their report, a recommendation to include not only a provision in the constitution on the economic union but also one on the social union. It should be noted that the federal proposals made no reference to the idea of a social union.

The final stage in the Charlottetown drafting process was taking the Beaudoin-Dobbie Committee Report and turning it into a constitutional agreement. The draft legal text based on the August Charlottetown Accord was released on October 9, 1992. Three provisions in the draft legal text are especially relevant to the idea of the management of interdependence.<sup>56</sup>

The first is the provision for an annual First Ministers’ Conference. The second is the inclusion of a new provision in the constitution committing legislatures and governments “to the principle of the preservation and development of the Canadian social and economic union.” Following this commitment was a list of ten policy objectives. The final section in this provision was a directive to the First Ministers’ Conference “to establish a mechanism to monitor the progress made in relation to the (ten policy) objectives.” The third provision was entitled ‘Framework For Certain Expenditures By The Government Of Canada.’ The government of Quebec initiated the inclusion of this provision. The development of the framework was an attempt to put some controls or limits on the exercise of the federal spending power in areas of exclusive provincial jurisdiction. The final section in this provision was also a directive to the First Ministers’ Conference “to review the progress made in achieving the objectives set out in the framework once each year.”

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<sup>56</sup> The three sections in order of their discussion are Sections 37.1, 36.1 and 37. They are found at pp. 44-47 of the draft legal text.

## Conclusion

The rejection of the Charlottetown Accord by the Canadian people in October 1992 brought an end to Canada’s constitutional odyssey. In the years since then there has been no inclination or interest on the part of governments to resume constitutional discussions. Nevertheless, as Harvey Lazar has noted “the period since then [Charlottetown] has been overwhelmingly focused on the idea that Canadian federalism can reinvent itself through non-constitutional means.”<sup>57</sup> The Council of the Federation, which is presented as a non-constitutional reform proposal, is the most recent example of this approach.

As demonstrated above, the evolution of the idea of a Council of the Federation has taken many twists and turns since the 1971 Victoria Charter. With the evident rejection of the provincial intrastate model, which emerged around the same time as the federal decision to unilaterally patriate the constitution, what continued to surface was a series of recommendations with respect to the First Ministers’ Conference. Even the Pepin-Robarts Task Force Report made reference to the need for that institution to continue. The Quebec proposals have clear antecedents in the Pepin-Robarts Task Force Report, the 1980 Senate Committee Report, the Macdonald Commission Report and the Charlottetown Accord. Table 1 summarizes the proposals since 1971.

The one issue that is not addressed in these reports or at the 2003 Annual Premiers’ Conference is international agreements. One must look to other sources for support for its inclusion. Something along the lines suggested by Quebec in 2001 has been on the agenda of the Annual Premiers’ Conference for a number of years. The provinces have been pressing the federal government to conclude an intergovernmental agreement “on the provincial-territorial role in the negotiation, implementation and management of international agreements.”<sup>58</sup> The federal-

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<sup>57</sup> Harvey Lazar, “Non-Constitutional Renewal: Toward a New Equilibrium in the Federation,” in Harvey Lazar (ed.), *Canada: The State of the Federation 1997 – Non-Constitutional Renewal*, Kingston: Institute of Intergovernmental Relations, 1998, p. 3.

<sup>58</sup> Canadian Intergovernmental Conference Secretariat, News Release, “International Agreements,” Annual Premiers’ Conference, Quebec City, August 11, 1999.

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 horizontal (interprovincial) one for issues under exclusive provincial jurisdiction." (p.93.) Given recent and possible changes in provincial governments and the change in leadership of the federal government, it is somewhat premature to predict what intergovernmental structures may eventually emerge. Whatever shape the final structure takes the management of interdependence will continue to be a major concern of all governments. At a very minimum the interprovincial structure will become operational.

**Table 1**  
**Summary Of Intrastate And Interstate Proposals**  
**1971-2003**

Year And Document	Intrastate Proposal	InterstateProposal
1971 – Victoria Charter		First Ministers' Conference
1972 – Spec. Joint Com.	Upper House (Centralist)	First Ministers' Conference
1978 – Canada West Found.	Upper House (Provincial)	
1978 – Government of ON	Upper House (Provincial)	
1978 – Bill C-60	Upper House (Centralist) House of the Federation	First Ministers' Conference
1978 – Canadian Bar	Upper House (Provincial)	
1978 – Government of BC	Upper House (Provincial)	
1978 – Government of AB		First Ministers' Conference
1979 – Pepin-Robarts	Upper House (Provincial) Council of the Federation	First Ministers' Conference
1980 – "Beige Paper"	Abolish Upper House	Federal Council
1980 – Senate Committee	Upper House (Centralist)	Federal-Provincial Council
1981 – Canada West Found.	Upper House (Centralist)	
1982 – Government of AB	Upper House (Provincial)	
1984 – Spec. Joint Com.	Upper House (Centralist)	
1985 – AB Special Com.	Upper House (Centralist)	First Ministers' Conference
1985 – Macdonald Report	Upper House (Centralist)	First Ministers' Conference
1987 – Meech Lake		First Ministers' Conference
1991 – Shaping Canada	Upper House (Centralist)	Council of the Federation
1992 – Renewal of Canada	Upper House (Centralist)	
1992 – Beadoin-Dobbie	Upper House (Centralist)	First Ministers' Conference
1992 – Charlottetown	Upper House (Centralist)	First Ministers' Conference
2001 – Quebec Liberal Party		Council of the Federation – Federal/Provincial/Territory
2003 – Annual Premiers' Conference		Council of the Federation – Provincial/Territorial and a First Ministers' Conference

