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Process Before Product: A New Federal-Provincial Logic for a New Century

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**PROCESS BEFORE PRODUCT: A NEW FEDERAL-PROVINCIAL
LOGIC FOR A NEW CENTURY**

Abstract: In this article, Irvin Studin of Osgoode Hall Law School and formerly of the Privy Council Office, notes with concern the increasing rarity of formal Canadian first ministers' meetings and argues that the growing complexity of the Canadian federation requires a standing first ministers' forum and a robust supporting intergovernmental bureaucratic infrastructure in order to drive meaningful, sustained advances in the multiple policy areas that transcend constitutional jurisdiction.

Keywords: Canadian federation, provincial-federal government relations, constitutionalism

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PROCESS BEFORE PRODUCT: A NEW FEDERAL- PROVINCIAL LOGIC FOR A NEW CENTURY

Irvin Studin *

It has been said that each of the Thirteen Colonies, prior to the American Revolution, had stronger ties with the British motherland than with any of the other twelve. The notion would seem to suggest, for Canadian purposes, that geographic proximity is an insufficient condition for meaningful unity; and that strategy may well overcome geography to create unlikely unity. Of course, the more complex the unity at stake, the greater the import of the strategy—which is where the Brits got it wrong, and where Canadian leaders, from Macdonald to Harper, have had to get it very right.

One of the cardinal tautologies of this early new, globalized century is that the Canadian state, much like its constituent provinces and territories, has become very complex indeed. This complexity means that there is nary a policy issue that fails to straddle the discrete constitutional responsibilities assigned to the federal and provincial governments—mainly as described in sections 91 and 92 of the *Constitution Act, 1867*. National security, health care, the environment, economic productivity, strategic infrastructure, Aboriginal questions, immigration, even foreign policy and international commerce—all have very tangible and material federal *and* provincial components. (Multilateral constitutional reform, evidently, is another such policy domain—one that may again before long acquire a certain political currency.)

Enter strategy: Shadowing this increase in the complexity of the federation, over the last twenty years, has been a paradoxical and marked

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diminution in the number of formal policy meetings—so-called first ministers’ meetings or conferences—between the Prime Minister and all of the provincial premiers. The genesis of this diminution can likely be traced back to the failed constitutional negotiations at Meech Lake and Charlottetown (the latter indeed attempting to constitutionalize regular first ministers’ meetings). Having said this, the conventional *strategic* wisdom that has seemed to sustain the paucity of such meetings consists in the presumption of sitting prime ministers that formal first ministers’ meetings can only issue in misery for the federal government. Indeed, a prime minister is more likely to be inclined to deal with each of the premiers on a bilateral, informal or ad hoc basis, depending on the policy file in question—if only to avoid the traditional political and media build-up and high expectations associated with formal first ministers’ meetings in Canada, or to simply avoid the media altogether. He or she may also see the formal first ministers’ meeting as a public, largely contrarian forum for exorbitant, little reciprocated, and often highly elastic ‘asks’ by the provincial premiers—in other words, centrifugal stresses on both the federal purse and the integrity of federal constitutional powers. Prime Minister Harper, for his part, might add the original nuance that, on his view, certain first ministers’ meetings can only tend toward unnecessary encroachments by one level of government on the constitutional competences of another.

The result of this strategic logic, predictably, has been that Prime Minister Jean Chrétien had formal first ministers’ meetings very irregularly—indeed, less than one per year in power, and only one (on health care) in his final three years; Paul Martin had only one—also mainly on health care—in his two years in office; and Stephen Harper has to date also, after more than two and a half years in power, only had one, largely in camera, first ministers’ meeting. (NAFTA, NATO and G-8 summits have all been held with greater frequency; as have, on the provincial side, meetings of the Council of the Federation and those of regional provinces and American states.) And there is no evidence that another first ministers’ meeting will be held before the next general federal election.

One might suppose that such terribly infrequent gatherings of Prime Minister and premiers should pass with negligible consequence for the governance of Canada. (For good measure, we might easily presume

that representatives of First Nations and perhaps even municipal governments could well have a place at such a table—the said complexity oblige.) Such a supposition, however, is belied by two critical realities: first, as mentioned, most of Canada’s key policy files straddle the federal-provincial divide; and second, and most importantly, because of the mass and complexity of the government bureaucracies that run these files, meaningful forward movement on any file can only consist in a sustained, serious process that mobilizes the machineries of governments at both federal and provincial levels. And the most muscular mobilization of government bureaucracies occurs strictly through stable executive interest, pressure and direction—in particular, direction from the head of government.

Just as the federal executive—the Prime Minister, in particular—greases the wheels of the federal bureaucracy, so too must there be *sustained* and reasonably *concurrent* political ‘oxygen’ from all of the country’s heads of government in order to advance interlocking or cross-jurisdictional files of national import. Absent such ‘oxygen’ across all governments, attempts to advance pan-Canadian policy files will amount to niche projects; in essence, mere pokes or small dents—themselves often incoherent or inconsistent across the governments—in the national policy infrastructure. In the worst case, such initiatives, typically mooted by the federal government, will reduce to naught. A media release will be issued about *soi-disant* intergovernmental cooperation. Political and bureaucratic incentives to deliver meaningfully on the file will be small, and accountability for results paltry. The media and general public, conflating intergovernmental calm (indeed, stasis) with a healthy federation, will fail to complain.

So the dearth of first ministers’ meetings in Canada—the said conventional strategic wisdom—may well make for good politics, but it often makes for poor national policy. The Prime Minister, and indeed some of the premiers, may be spared the notorious “trip to the dentist” of which Jacques Parizeau once contemptuously spoke. Ten (or thirteen or more) men and women will not need to stare down the one, and the one will not need to rely on opportunistic coalitions to save face in front of a public that mercilessly awaits a ‘deal’. Such good politics, however, fails to move the federation forward in concrete policy terms. Major interlocking issues are dealt with, if at all, either strictly on an intra-

jurisdictional basis or via sporadic agreements or arrangements between two or more provinces (such as through the Council of the Federation) or between the federal government and one or more provinces. But no bona fide pan-federation planning and oversight mechanism exists—a strange state of affairs indeed.

Granted, bureaucrats from all levels of government meet often, and standing fora for meetings among cabinet ministers of the various governments do exist. Still, the deliverables issuing from such meetings and fora are more often than not transactional rather than transformative—all in virtue of the brute fact that it is only the centre of government, led by the Prime Minister or the respective premiers, that can approve transformational change, and, even more saliently, drive such change over an adequate period of time.

What's to be done?

The conventional strategic wisdom currently has it that the Prime Minister meets with the premiers on an as-needed basis, and preferably as seldom as politically necessary. Product (outcomes) are privileged over process, and politics is privileged over policy. And yet, paradoxically, for the very absence of serious, sustained intergovernmental process, product and policy have been poor; that is, not in keeping with the scale of the complexity at stake.

The famous Martin first ministers' meeting of 2004 on health care is paradigmatic in this regard. A *single* meeting of first ministers was called to “fix health care for a generation”. The bureaucracies of the federal and provincial governments—mostly at their very apexes—were collectively mobilized for a very brief moment in preparation for the meeting: to lay the policy groundwork, as it were, for the final political deal. The deal was made, for better or worse, and because there was no plan for a repeat of this elite political forum on health care (the deal, after all, was to be a generational fix), the participant bureaucracies were demobilized. Whatever intergovernmental (bureaucratic and political) best practices—consultations, policy development, trust—were developed in the lead-up to the first ministers' meeting were discarded, with little strategic consideration given to the great expense of reinventing the entire wheel whenever the next big meeting should be convened.

Indeed, it is this very reinvention of the procedural wheel that makes the dominant strategic logic of first ministers' meetings so difficult to justify in policy terms. For the one-off dynamic (or one-off 'game', to use the economics parlance) only serves to exaggerate the stakes of each discrete meeting, lending each meeting to impossible asks by premiers (or even Prime Minister), outlandish political hyperbole ("fix for a generation") and overly fastidious expectations by both media and public for a glamorous dénouement. The deal that fails to materialize or measure up to these enormous expectations is invariably condemned. The health of the federation—even national unity—is questioned.

The alternative scenario is equally problematic. An important one-off deal materializes, and is in keeping, more or less, with the exigencies of most parties. Everyone goes home happy, more or less. But who ensures that the policy goals of the deal, nationally speaking, are advanced over time? The federal spending power notwithstanding, in the context of a deal that is not to be revisited in the foreseeable future at a formal first ministers' meeting, each government—federal and provincial—is left to its own devices to implement elements of the said deal as it sees fit, answering only to its particular electorate—however vaguely. In extremis, a post-deal intergovernmental (bureaucratic) task force may continue to oversee the progress of the deal, but this task force, in the absence of a future audience with the Prime Minister and premiers, will have lost much of the political 'oxygen' or momentum (indeed, incentives) that existed in the lead-up to the deal-making first ministers' meeting. (Of course, let us not forget that, given the current scheduling of first ministers' meeting, the important deal of which we speak will be rare indeed.)

So the absence of a standing or permanent first ministers' process means that there is patently no *systematic* framework for regular, substantive advancement of complex, pan-Canadian policy issues. Conventional wariness of process compromises—or indeed negates—product. And yet this wariness of process fails to appreciate the great potential policy virtues of a serious, stable first ministers' structure.

First and foremost, such a stable first ministers' process would, like most stable processes, over time develop a forward agenda or work plan. If Prime Minister and premiers meet twice or thrice a year on a standing basis (by *formal* intergovernmental agreement), the forward

agenda might credibly stretch one or two meetings into the future. The one-off game of today's first ministers' meetings dies. The political and bureaucratic planning horizons begin to stretch beyond the immediate. The paradigm shift begins to take shape.

The agenda and forward agenda may, depending on the founding intergovernmental agreement, be set by the Prime Minister alone or the Prime Minister in consultation with the premiers. *Ab initio*, as they do today, both the federal and provincial sides invariably come to the negotiating table with typical jurisdictional asks—centripetal for the federal side, centrifugal for the provincial sides. But these conflicting polarities or positions may be softened and, *over time*, even fused through the development of agendas—current and forward—consisting of *small, incremental* deliverables for each first ministers' meeting. Avoiding, in the main, one-off 'big ticket' deliverables, it is these more modest policy increments that, over the course of several first ministers' meetings, lead to important transformations in pan-Canadian policy. The incrementalism lowers the political stakes and potential conflict at each individual meeting, all the while diminishing the cost of failure—that is, the cost of a 'no deal' at a given meeting—and lending itself to a smoother, longer-term stream of policy deliverables. (*Pace* political theatre, from a strictly policy standpoint, a boring first ministers' meeting in the context of a continuous stream of boring first ministers' meetings, is good news. A disappointed media quickly catches on. Public expectations are recalibrated.)

Critically, where we today have ad hoc working groups mobilized in response to, or in the aftermath of, infrequent first ministers' meetings, the very act of standing up a permanent first ministers' process (an 'indefinite game', as it were) necessarily leads to the development of serious supporting bureaucratic structures. Multiple intergovernmental (bureaucratic) working groups and committees are mobilized, led or driven in most cases by central agencies under the imprimatur of the Clerks of the Privy Council and the provincial Executive Councils, given the sustained political interest of Prime Minister and premiers. (Contrast this with the current intergovernmental culture in which the average Privy Council policy analyst, outside of the secondary Intergovernmental Affairs section of the shop, virtually never speaks to his or her analogues in the provinces.) The minutiae of complex cross-jurisdictional issues are cycled

through these intergovernmental working groups in order to develop the policy bulwark that supports the deliverables of each first ministers' meeting. The incremental character of these deliverables and the credible existence of a forward agenda in which there are subsequent incremental deliverables for which a given intergovernmental working group is responsible together result, in due time, in strong working relationships—indeed, in trust. As such intergovernmental, bureaucratic trust matures, and as the interacting bureaucracies, energized and protected by standing political interest (itself synergistically a function of the very existence of this important process), recognize the indivisibility of many of their most difficult policy files, all participating governments become, for all practical and intents and purposes, *locked* into the process. A new federal-provincial paradigm governs. And with time, the incentives for defection from the process by any one player—even with changes in government—become increasingly small.

Where we today have little high-level follow-up on individual deliverables issuing from first ministers' meetings, the combination of the forward agenda and the incremental deliverables would allow individual policy issues to regularly return to the negotiating table for further consideration by Prime Minister and premiers (and, as suggested, possibly First Nations and municipal representatives). After having considered a given issue or deliverable at a given first ministers' meeting, the Prime Minister and premiers would provide robust direction for a future stream of largely bureaucratic work on that same issue, as well as for its return for airing at a future first ministers' meeting. This to and fro or up-down-up-down, political-bureaucratic feedback between first ministers' meeting and working groups may repeat itself several times—that is, over the course of several first ministers' meetings. And it is this expectation of return to this elite table that greases the wheels of the intergovernmental, bureaucratic working groups and committees. Moreover, it is this same expectation of return that, far more meaningfully than the current regime of public reporting, lends itself to a serious form of political accountability for the various governments. The head of government—Prime Minister or premier—is no longer simply answerable to the public (or to the public via Parliament or the provincial legislature), but to his political peers in the other governments. The incentives or demands for performance are high. Slowly but surely, real progress is made on major pan-Canadian policy files—just as one should expect in this complex country of ours.