INTERGOVERNMENTAL RELATIONS IN CANADA, SEEN FROM A HORIZONTAL PERSPECTIVE

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INTRODUCTION

Like any federation worthy of that name, Canada is essentially constituted of two levels of government, each autonomous or sovereign in the exercise of the legislative functions that are assigned to it by the Constitution. The division of legislative powers is, of course, characterized by a certain constitutional rigidity, in that it cannot be formally modified except by means of a relatively complex procedure requiring the participation of both of those levels of government[1].

One of the two levels of government in question is called central, as its jurisdiction extends throughout the State's territory. This level of government is thus centralized from a territorial point of view (*ratione territoriae*). In Canada, this level of government is composed of the Canadian Parliament and government, and of

[1] In Canada, the division of legislative powers cannot be modified except by agreement of the Parliament of Canada and at least two-thirds of the provinces (meaning seven of them) representing at least 50 percent of the total population of the provinces. This procedure is commonly called the *7/50 procedure*. In all federations, the division of legislative powers is relatively rigid, meaning that it can only be modified through a complex method; the precise method nonetheless varies from one country to the next.

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the institutions or organizations they have duly set up. It exercises its powers over the entire Canadian territory.

The other level of government making up a federation—any federation—is called decentralized, because it holds jurisdiction only over a part of the State. This level of government is decentralized from a territorial point of view (*ratione territoriae*). In Canada, it is constituted of 10 provincial parliaments (legislatures) and governments, and of the institutions and organizations that they, in turn, have duly set up. The institutions specific to each province only hold jurisdiction within that province's territory.

In any federation, intergovernmental relations can be examined from the perspective of the relationship that exists between the centralized (or federal) level of government and the decentralized (or provincial, in the case of Canada[2]) level of government. In that case, relations are being approached from a vertical perspective. Intergovernmental relations can also be examined from the perspective of the relationship that exists between the various entities that themselves constitute the decentralized order of government. In this case, these relations are being analyzed from a horizontal perspective.

In this essay, I intend to discuss precisely what we call horizontal federalism, that is to say, relations that decentralized entities (the provinces) maintain with one another. I will examine this question in its various facets. I will discuss the disparities that exist between Canadian provinces in socioeconomic, demographic and political terms. I will also examine intergovernmental collaboration as a value in itself. I will include some comment about the bicommunal and multinational character of Canada. This will next lead me to touch on the case of Quebec and on the aboriginal question. I will also discuss the question of knowing who the players are in the Canadian system, as well as the forms and modalities of

[2] In Canada as a whole, the federated States are called *provinces*. In other federations, the same situation is usually designated with a different term: states, regions, communities, länder, cantons, etc.

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intergovernmental relations. I will deal with the institutions and mechanisms that are causing "interprovincialism[3]" to develop in Canada. Lastly, I will explore the paths of the future in terms of horizontal intergovernmental co-operation in this country. But first and foremost, I will focus on the very particular situation brought about by the existence of the three Canadian territories: the Northwest Territories, the Yukon and Nunavut. These territories command my immediate attention because they play a significant role in the realm of intergovernmental relations, even though their legal status is highly ambiguous.

I. THE THREE CANADIAN TERRITORIES: AN IMPRECISE STATUS

At the time of Canada's birth, the *Constitution Act, 1867* set out the power of the Canadian government to admit into the Canadian union—in addition to the colonies and provinces of Prince Edward Island, British Columbia and Nova Scotia—Rupert's Land and the North-Western Territory[4]. These territories, at the time, were under the administration of the Hudson's Bay Company. In 1868, a British Parliament act authorized Canada to acquire the company's rights over Rupert's Land and the North-Western Territory[5]. In 1869, Canadian Parliament adopted the *Act for the Temporary Government of Rupert's Land and the North-Western Territory When United with Canada*[6]. In 1870, Canadian Parliament created a new province from part of these new territories and adopted the *Manitoba Act*[7]. On June 23, 1870, the British government adopted the *Rupert's Land and North-Western Territory Order*[8], which linked Rupert's Land and the North-Western Territory to the Canadian union and affirmed the Canadian Parliament's power to legislate for the

[3] The concept of *interprovincialism* does not exist in dictionaries; it has been invented from scratch. It is used here to describe the intensification of relations between provinces.
[4] See Article 146 of the *Constitution Act, 1867,* R.S.C. (1985), App. II, No. 5.
[5] The *Rupert's Land Act* (1868), 31-32 Vict. C. 105 (U.K.).
[6] The *Act for the Temporary Government of Rupert's Land and the North-Western Territory when United with Canada* (1869), 32-33 Vict. C. 3 (Can.).
[7] *Manitoba Act* (1870), 33 Vict. C. 3 (Can.). This act was ratified and confirmed by the *Constitution Act, 1871*, R.S.C. (1985), App. II, N° 11, Articles 5 and 6.
[8] *Rupert's Land and North-Western Territory Order*, R.S.C. (1985), App. II, No. 9.

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well-being and governance of that territory. The Northwest Territories were created in 1870. The *Constitution Act, 1871*, adopted by the British Parliament, authorized Canada's Parliament to create new provinces from these territories and to adopt dispositions concerning peace, order and the governance of any territory that is not part of a province[9]. In 1898, the Yukon territory was created by fractioning the Northwest Territories. The same thing happened for the provinces of Alberta and Saskatchewan, which were created in 1905 from the Northwest Territories.

On May 25, 1993, an agreement was reached on the territorial claims of Nunavut, in view of which the Government of Canada committed, after extensive negotiations with the Inuit, to create a new territory from the Northwest Territories. This territory was established in 1999 and given over to their control. The territory was Nunavut, which includes the land and islands located east of the Northwest Territories and in the Canadian Arctic which, from time immemorial, have been inhabited by the Inuit. It covers an area of nearly two million square kilometres, or about one-fifth of Canada's land. It is the result of the most significant territorial settlement to ever have been reached by an indigenous people in Canada.

So, in constitutional terms, the territories that are not set up as provinces (in other words, the Northwest Territories, the Yukon and Nunavut, as well as any other parts of the Canadian territory that are not included in a province, such as coastal waters) fall under the exclusive legislative authority of the Parliament of Canada, in respect of Article 4 of the *Constitution Act, 1871*[10]. While the status of the provinces is protected by the Canadian Constitution, the territorial administrations, like municipalities, are of course considered highly decentralized entities in terms of the Canadian Constitution, but they are not sovereign, and legislative powers are delegated to them with no guarantee of permanence[11]. In short, they exert only the powers that the Parliament of Canada wishes to delegate to them. As such, the

[9] *Constitution Act, 1871*, *supra*, Note 7, Articles 2 and 4.
[10] *Ibid.*
[11] *Hodge* v. *The Queen*, (1883-1884) 9 A.C. 117; *Canada Labour Relations Board et al. v. City of Yellowknife*, (1977) 2 S.C.R. 729. See also: R. Dussault and L. Borgeat*, Traité de droit administratif*, 2nd ed., Vol. I, Quebec, Presses de l'Université Laval, 1984, P. 210-219.

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Minister of Indian and Northern Affairs of Canada is responsible for the general administration of the federal territories[12] even though major areas of action have been assigned to the territorial administrations, which are headed up by a senior official acting as a commissioner of the federal government and also as chief executive authority[13]. The same minister is responsible for the management of the territories' lands. Effectively, contrary to the provinces, the territories are not the owners of the lands and the resources located within their borders, except for those that are expressly given to them by the federal authorities or given as usufruct by Her Majesty in right of Canada[14]. In short, the territories not constituted as provinces form federal territories and are subject to the legislative authority of the Parliament of Canada. But the question of the administration of the Northwest Territories, the Yukon and Nunavut nonetheless requires a nuanced look today, since the principles of autonomy and governmental responsibility have been implemented there.

Let's take Nunavut as an example. The act through which the territory was created[15] establishes the responsibility of the Commissioner of Nunavut as a general administrator of the territory. In principle, the Commissioner exerts his powers in keeping with the instructions of the Governor-in-Council or the Minister of Indian and Northern Affairs of Canada, and executive power is assigned to him[16]. The legislature of Nunavut has also been instituted, made up of the Commissioner and elected members[17]. While the Commissioner is appointed by the federal government, the Legislative Assembly is, for its part, made up of elected members from each of the 19 current ridings[18]. Convention has it that the Commissioner holds about the same symbolic role as the Governor General of

[12] *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, C. I-6, Article 4.
[13] R. Dussault and L. Borgeat, *supra*, Note 11.
[14] For example, see the *Nunavut Act,* S. C. 1993, C. 28, Article 49.
[15] *Ibid.*
[16] *Ibid*., Articles 5-7.
[17] *Ibid*., Article 12. The same model applies to the other two territories. See the *Northwest Territories Act*, R.S.C. 1985, C. N-27, and the *Yukon Act*, S.C., 2002, C. 7.
[18] *Legislative Assembly and Executive Council Act*, S. Nu. 2002, C. 5, Article 3. See the Assembly's website: www.assembly.nu.ca

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Canada or the Lieutenant-Governor of a province[19], and the "premier" of the territorial government is the *de facto* head of the government[20]. In fact, the law provides for the creation of an executive board (or government) formed of the Commissioner and the people he designates following the recommendations of the Legislative Assembly[21]. This includes the 19 elected members mentioned above, and generally functions in keeping with the Canadian parliamentary model. But exceptions do exist in this realm and, since the Inuit tradition is to work by consensus, the members of the Legislative Assembly are independent, and both the "premier" and the other members of government are simply designated by their peers in the Legislative Assembly (or formally appointed by the Commissioner after being recommended by the Assembly)[22].

The *Nunavut Act*[23] gives the territory's legislature the power to legislate on most of the subjects that, according to the *Constitution Act, 1867*[24], were assigned to the provinces, such as the direct levying of taxes, municipal institutions, health, education, civil rights and property, the administration of justice, licences, and so forth, as well as all local affairs[25]. It is interesting to note that an "act" so adopted can be disavowed by the federal government in the year following its adoption[26]. The territory can also borrow money, but in practice, its tax base remains very modest and largely dependent on federal funds[27]. Contrary to a province, which benefits from legislative sovereignty, and even if the texts adopted by the Nunavut legislature bear the name "act," they remain delegated legislation. They must not

[19] See the commissioner's website: www.commissioner.gov.nu.ca/index_eng.html.
[20] While the people who *de facto* are at the top of executive powers in Nunavut and in the other territories are frequently called *premiers* and designate themselves as such, in the same way that provincial premiers do, I prefer to describe them as being *heads of territorial governments*, to properly illustrate the difference that exists in the Canadian system between the constitutional status of the territories and that of the provinces.
[21] *Nunavut Act, supra*, Note 14, Article 12.
[22] *Legislative Assembly and Executive Council Act*, *supra*, Note 18, Article 60.
[23] *Nunavut Act*, *supra*, Note 14.
[24] *Constitution Act, 1867, supra,* Note 4.
[25] *Nunavut Act*, *supra*, Note 14, Articles 23-27.
[26] *Ibid*., Article 28.
[27] For example, for the 2008 financial year, the budget forecasted revenues to the tune of $ 1,162.2 million, of which $1,080.9 million came from federal transfers. The document is available online: www.gov.nu.ca/finance/mainbudgets/2008.shtml.

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be perceived, legally speaking, as laws in the strict sense of the word, but rather as the result of a delegation of power by the Canadian Parliament—a delegation whose scope has never been contested[28].

Today, the Northwest Territories, the Yukon and Nunavut could only be constituted as provinces or annexed, in full or in part, to existing provinces if the 7/50 procedure were used, as stated in Paragraphs 42(1)e) and f) of the *Constitution Act, 1982*[29]. This renders the *official* transformation of the territories into provinces practically impossible to carry out in the current context[30].

While constitutional laws do not allow for the three territories' participation in Canadian constitutional power, new practices developed in Canada in the realm of constitutional reform seem to nonetheless be heading in the direction of allowing their participation in the negotiation of such reform. It is still less clear whether or not these practices will also make it necessary for the territories to approve the results of such negotiations before they become constitutionalized.

For its part, Paragraph 32(1) a) of the *Canadian Charter of Rights and Freedoms*[31] stipulates that the Charter applies in all the areas concerning the Yukon and the Northwest Territories. That disposition can probably be extended to Nunavut.

Despite the similarities that exist among the powers of the three territories and the provinces, the territories are not equal to the provinces in Canada. As I wrote earlier, while provincial autonomy is constitutionally protected, territorial autonomy

[28] Even though legislative power in Nunavut is expressed in the form of acts, legally speaking, they are in fact orders or regulations. Still, these are not subject to the examination and publication procedures stipulated in the *Statutory Instruments Act*, R.S.C. 1985, C. S-22, Article 2 (see the definition of "statutory instruments"). See also: P. W. Hogg, *Constitutional Law of Canada* (student edition), Toronto, Thomson Carswell, 2005, P. 342.
[29] *Constitution Act, 1982*, R.S.C. 1985, App. II, No.44. For a description of the 7/50 procedure, see *supra*, Note 1.
[30] There is currently no appetite in Canada for a reopening of constitutional negociations, properly speaking. The constitutional amendment procedure is such a heavy undertaking that it makes even the slightest constitutional reform very difficult, even if it is of limited scope.
[31] *Canadian Charter of Rights and Freedoms*, which makes up part I of the *Constitution Act, 1982*, *supra*, note 29.

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is not. The territories remain, legally speaking, the creations of the federal authorities. Their powers do not come directly from the Constitution itself, as is the case for the provinces, but rather from federal laws.

Regardless, political usage today tends to treat the three territories like the provinces. For example, the territories are part of the Council of the Federation—a situation I will touch on later—while even the federal government is not. It could be said that, concretely, political relations have become closer between the territories and the provinces than between the territories and the Canadian government. In fact, the territories are now an integral part of interprovincial discussions. They take a common front with the provinces in the main debates that place them in opposition to the federal government. The territories' heads of government speak of themselves as premiers in the same way their provincial "counterparts" do.

As a result, the question of intergovernmental relations in Canada, whether from a horizontal or a vertical perspective, cannot be examined without taking into account the three federal territories. In practice, the latter are playing a role that is increasingly affirmed and recognized by the other federative partners (i.e. the federal government and the provinces).

II. DISPARITIES BETWEEN CANADIAN PROVINCES

While they are all equal in legal theory, the Canadian provinces are notably different from one another in actual fact. Some of them are significantly more populated than others. This is the case with Ontario and Quebec, for the moment. For their part, the Atlantic provinces are home to only a small population.

Financially speaking, Alberta has seemingly limitless wealth, because it exploits natural resources (oil) that are only expected to be exhausted over a century from now. Its neighbour, Saskatchewan, also benefits (though less than Alberta) from the financial manna that comes from oil extraction.

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British Columbia is in the midst of major demographic and economic progress. Manitoba, located in the Western part of the country, just next to powerful Ontario, is having a difficult time of it. In the Eastern part of the country, the four Atlantic provinces remain vulnerable, in economic terms, while Newfoundland and Labrador and Nova Scotia have seen their revenues and fiscal capacity improve thanks to generous agreements reached with the federal government relative to the exploitation of offshore oil resources. The economic situation is improving somewhat in Quebec, although the public debt remains colossal.

The disparities between Canadian provinces are very real. We must not lose sight of them when we examine intergovernmental relations in Canada as a whole. The disparities have an influence, among other things, on the relations that each province individually maintains with the federal government. For example, the poorer provinces are more dependent than the others on money from the federal government, in the form of transfer payments and so forth. These provinces are therefore less inclined than the others, in principle, to encourage the limitation of federal spending power in provincial jurisdictions[32].

Of course, equalization makes it possible to redistribute wealth throughout Canada in order to reduce inequities and the financial disparities between provinces[33]. Nevertheless, that doesn't solve everything. Right now, it has plateaued, and for several years it has increased very little in percentage compared to the gross domestic product. As we might expect, the provinces that are not receiving equalization payments take a dimmer view of the increase of those payments than the provinces that do receive them. It is therefore markedly difficult for Canadian provinces to agree among themselves about certain contentious matters such as the solution to fiscal imbalance[34], where the question of reviewing equalization

[32] I must nonetheless admit that no province, other than Quebec, is really insisting on limiting federal powers to spend in provincial jurisdictions. Canadian public opinion is in good part against such limitation.
[33] The very principle of equalization is written into Paragraph 36(2) of the *Constitution Act, 1982*, *supra*, Note 29.
[34] Fiscal imbalance is a concept that refers to the variance that exists between provincial revenues and federal revenues, taking into account their constitutional responsibilities. The Government of

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payment increases comes up. The same is true, as I mentioned earlier, for the limitation of federal powers to spend in provincial jurisdictions.

In sum, the disparities between Canadian provinces as I have laid them out here make it more difficult for those provinces to reach consensus on various subjects, and that difficulty shows up among other things within the very heart of the Council of the Federation, an institution I will consider in detail later.

III. THE VALUES INHERENT TO INTERGOVERNMENTAL COLLABORATION

It is common knowledge that today, we live in an era of interdependence. The world is shrinking. This is not a time of withdrawal, but of collaboration. In this context, any community that is not open to the world may asphyxiate, eventually, in the long term.

The Canadian provinces and territories must also learn to better work together. They must get to know one another better, and show stronger mutual acceptance. Their efforts to attain certain common goals must be better planned and coordinated.

Dialogue is, I feel, a value in itself. It needs to be reinforced among the provinces and territories. This dialogue must pursue a certain number of purposes. First, it must create the possibility of information and expertise exchange. Such sharing

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Quebec estimates, accurately in my opinion, that this matter is not yet solved in Canada, despite the revision of equalization that was carried out in the frenzy of the 2007 federal budget, and even despite the fact that the financial crisis that is currently affecting the entire world has transformed the Canadian government's budget surpluses into deficits. According to Quebec, the solution to fiscal imbalance depends not only on increased equalization, but also on an increase in federal transfers for post-secondary education and social programs, and on a federal transfer to the provinces of tax points or tax room. Basically, this would mean revising equalization, federal transfers and the tax base in a way that would provide provinces with a certain financial stability, an acceptable fiscal capacity considering their responsibilities, and predictability in their budget planning.

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can itself address comparisons between the provinces in order to increase their efficiency in a given area of activity. This is the case for discussions about best practices, among others.

We sometimes have a tendency to see Canada as being made up of four major regions (Quebec, Ontario, the Atlantic and the West), or perhaps five (Quebec, Ontario, the Atlantic, the Prairies and British Columbia). This vision of the Canadian federation is not without a valid basis, as Canada is certainly marked by strong regionalist trends, which show up even in the area of partisan politics[35]. However, a conception of Canada that relies on four or five major regions must not cause us to lose sight of the fact that it is the provinces that hold legislative and executive powers and make up—along with the federal government—the constituant power (i.e. the power to change the Constitution) in Canada.

Regardless, the provinces very much like to share expertise with one another on a regional basis. With that in mind, we note that Quebec and Ontario have recently shown a desire to work more closely together, among other things with a view to reinforcing their influence compared to the provinces of Alberta and British Columbia, which are increasingly threatening in terms of economic competition and political power.

IV. CANADA'S BICOMMUNAL AND MULTINATIONAL CHARACTER

In addition to being made up of 10 provinces, three territories, and—from a certain perspective—four or five major regions, Canada can be seen as a bicommunal and multinational federation.

[35] I take as proof the creation of the Bloc Québécois, which elects members of Parliament only in Quebec, and that of the Reform Party, a Western political group that has merged with the Conservative Party of Canada.

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Bicommunal, because in this country there exist two major home societies, one Anglophone, the other Francophone. Each of them constitutes a majority—the first in Canada as a whole, the second in Quebec. Canada's bicommunal character does not, however, see itself expressed in the country's political institutions. A fortiori, this character is not recognized by the Canadian Constitution, aside of course from the area of official bilingualism[36] or by means of a few constitutional measures that bespeak a certain consideration of the identity-related specificity of Quebec[37].

But, as I wrote earlier, Canada is not only bicommunal; it is also multinational. This is true because of the fact that Quebec forms a nation within Canada[38]. It is also true because of the existence of aboriginal nations[39]. Even the Acadians feel that they form a nation.

Canada, however, has never really taken up its multinational dimension. It seems to prefer to deny it, in the interest of identity construction (nation building) that seems to leave space for no other national reality than the Canadian nation itself[40].

[36] The Canadian State recognizes two official languages: English and French. However, this applies only to the federal level of government. Among the Canadian provinces, only New Brunswick is officially (and constitutionally) bilingual. Quebec and Manitoba are, for their part, subject to a limited form of constitutional bilingualism, without being officially bilingual. On all these questions, see Article 133 of the *Constitution Act, 1867*, *supra*, Note 4; Article 23 of the *Manitoba Act, 1870*, *supra,* Note 7; and Articles 16 to 20 and 23 of the *Constitution Act, 1982*, *supra*, Note 29.

[37] Here, I am thinking specifically of Article 94 of the *Constitution Act, 1867* (*ibid.*), which recognizes *a contrario* the civilian tradition in Quebec private law. I am also thinking of Article 59 of the *Constitution Act, 1982* (*ibid*.), which stipulates that Paragraph 23(1)a) of that act will apply only to Quebec should it decide so. This measure deals with education in the official language that is a minority in a province, meaning English in Quebec. The other stipulations of the aforementioned Article 23, dealing with the same subject, do however apply to Quebec.

[38] By a motion approved by a very strong majority, the Canadian House of Commons recognized that the Quebecois form a nation within a united Canada. This resolution, however, has no constitutional value.

[39] The Aboriginals are recognized as peoples in Articles 35 and 35.1 of the *Constitution Act, 1982*, *supra*, Note 29. Paragraph 35(2) of that act specifies that the term a*boriginal peoples* designates First Nations or Indian bands, the Inuit and the Métis.

[40] For many Canadians, there can be only one nation in Canada: the Canadian nation. For most Quebecers, Quebec forms a nation, in the sociological and political sense, within another nation: Canada. Canada's multinational character has never really been admitted by federal authorities. A fortiori, there is no explicit mention of it in the Canadian Constitution.

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I will come back, below, to the question of Quebec and that of aboriginal peoples. At this stage, allow me to simply say that nothing up to now has indicated that intergovernmental relations in Canada are engaged in a bicommunal or multinational dynamic. Rather, they rest on the principle of equality among provinces, which I have already touched on. In saying this, I do not wish to insinuate that the presence of a majority Francophone society such as Quebec and of numerous aboriginal peoples has no impact on intergovernmental relations in Canada. It does have an impact. But this influence is neither institutionalized nor formalized in any way, save the linguistic duality I mentioned earlier and the recognition of certain collective rights of a constitutional nature in favour of the aboriginal peoples[41].

The Canadian federation is, like many other societies in the world, marked by numerous paradigms. Among them, note the following: collaboration *versus* autonomy, unity *versus* diversity, flexibility *versus* constitutionalism, Canadian identity construction (nation building) *versus* multinationalism, Canadian nation *versus* Quebec nation, consistency *versus* innovation, provincial equality *versus* specificity of Quebec, convergence *versus* the right to difference, formalization *versus* adaptability, harmonization *versus* asymmetry, and so forth. While these concepts are placed in opposition here, they are not always contradictory or incompatible. For example, collaboration between federative partners can be carried out with great respect for their autonomy. As for Canadian identity, it can be constructed while taking into account the multinational character of Canada. Likewise, the Quebec nation is contained within the Canadian nation; the two can cohabit very well.

[41] Beyond Articles 35 and 35.1 of the *Constitution Act, 1982* which I mentioned earlier (*supra*, Note 39), it is useful to read Article 25 of the *Act*. These measures enshrine the existing rights—ancestral or treaty-based—of aboriginal peoples, or shelter them from the *Canadian Charter of Rights and Freedoms* (*supra*, Note 31).

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V. THE INSTITUTIONS AND MECHANISMS UPON WHICH "INTERPROVINCIALISM" IS FOUNDED

Intergovernmental agreements (also called administrative agreements) are the primary instrument of relations between governments in Canada. These agreements can be global or general, sector-based or ad hoc. Through them, collaboration is built between provinces, and between provinces, the territories and the federal government.

When they concern the relations between the federal government and one or several provinces, administrative agreements allow a certain form of asymmetry to develop in the Canadian federal system. This asymmetry is desirable, though it should not be without limits[42].

Of course, when they apply to relations between the provinces themselves, administrative agreements essentially serve to reinforce their collaboration. They are then all the more welcome, because they rely on the free consent of the signing provinces and thus they respect their autonomy and priorities in every way, which is not always the case for agreements concluded between the provinces and the federal government[43].

Now, as for institutions in service to intergovernmental relations, very little exist in Canada. Among them, the Council of Ministers of Education and the Council of the Federation are particularly noteworthy. While the former has targeted functions, as

[42] Unlimited asymmetry would quickly imperil the very survival of the federal relationship. In essence, *asymmetrical federalism* can only authorize asymmetry of a limited scope if it wishes to remain federalism.

[43] In its negotiations for administrative agreements with the provinces, the Canadian government usually attempts to impose various conditions, even when the subject at hand is in the province's exclusive jurisdiction. These conditions may be more or less restrictive. It also attempts to subject the provinces to various forms of accountability reporting. Most of the time, Quebec considers that these conditions and accountability go against the principle of provincial autonomy, which is, as we know, essential to federalism.

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its name indicates, the latter has a wider vocation. It merits a few moments of attention.

In April 2003, when the Liberal government was elected in Quebec, the Canadian federation was experiencing serious problems that hindered the effectiveness of intergovernmental relations and the quality of federal relationships.

A revitalization process for Canadian federalism was launched in July 2003, on the occasion of an annual conference of provincial premiers and heads of territorial governments. A few months later, on December 5, 2003, in Charlottetown, the provinces and territories signed the founding agreement of the Council of the Federation.

With a view to the continuity of the annual premiers conference, the Council of the Federation nonetheless gave an official and institutional basis to this practice, which was begun in 1960 and which became a tradition, while demonstrating the provinces' and territories' desire to move forward with the interprovincial dynamic that was set in motion 40 years prior.

The Council works in the environment of government-to-government relations. The premiers take turns acting as chairpersons with one-year terms.

From an institutional point of view, the Council of the Federation filled a major void in Canadian federalism. Its creation is based on the principle that the very existence of the provinces, as autonomous governments, is a concrete manifestation of the values inherent in federalism.

The Council of the Federation facilitates the adoption of common, coherent and concerted positions among the provinces (and territories). By managing to develop a veritable partnership, provincial governments can thus ensure better control of their own jurisdictions and engage more deeply in the areas of shared jurisdiction between provincial legislatures and the federal Parliament. This can only contribute

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to reaching better balance in the relationships between the provinces and territories, and also with the federal government. As a by-product, the general climate of intergovernmental relations will improve.

One of the objectives of the Council of the Federation is to promote relations between governments founded on the respect of the Constitution and the recognition of diversity within the federation. In the preamble to the founding agreement, it is written that the recognition of the existence of differences between the provinces and the territories implies that the governments may have different priorities and choices in their policies. The Council defines itself not only as a place for discussion, concertation and common action, but also a place for mutual recognition and for the respect of differences.

In February 2004, the Council of the Federation adopted a working plan in which it set out a certain number of priorities, still valid today, including the reorganization of financial federalism or, more specifically, the solution of the problem of fiscal imbalance[44]. The working plan also dealt with the reinforcement of the Canadian economic union and with the participation of the provinces (and territories) in the appointment processes for members of certain central institutions, such as the Senate and the Supreme Court of Canada—processes that currently fall under the unilateral power of the federal government. Lastly, the working plan touched on the provinces' participation in the negotiation of international agreements when their jurisdictions are affected, as well as on their role in relations between Canada and the United States. Clearly, the Council's work very much deals with matters of major interest.

In sum, the Council of the Federation is an institution that encourages cooperation among the provinces and territories. While it has demonstrated its effectiveness to date in certain matters[45], the Council deserves to be reinforced in the future.

[44] See the comments above, in Note 34.
[45] The Council of the Federation proved itself in September 2004 during the negotiations between the provinces, the territories and the federal government for an increase in federal transfer payments for health care. The results obtained by the provinces and territories were conclusive.

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Among others, it would be helpful if its office had more human and physical resources at its disposal than it currently does. That would allow it to better fulfil its triple mission, which consists of helping provinces to fully take charge of their own constitutional jurisdictions in the context of common concerns, strengthening the provinces (and territories) in their dealings with the federal government, and pushing for the provinces' greater participation in the definition and construction of the Canada of the future.

VI. THE PLACE OF QUEBEC AND THE ABORIGINAL PEOPLES IN CANADA, SEEN FROM THE PERSPECTIVE OF INTERGOVERNMENTAL RELATIONS

It is curious to note that some people believe that Quebec society is hostile to Canada, when in fact it is an ardent defender of the Canadian Constitution, the sharing of the powers it lays out, and the provincial autonomy it stipulates. In the same vein, people sometimes think that Quebec likes to be isolated, to keep to itself, whereas in reality it invests much energy into the improvement of intergovernmental relations. Among other things, it was on Quebec's initiative that the Council of the Federation was created[46]!

In fact, since the election of a federalist government in 2003, Quebec has been determined to work positively, along with all its federative partners, to revitalize Canadian federalism. More now than ever, Quebec wants to contribute to the emergence of a new federal dynamic in Canada. Quebec is even the province that's pushing hardest for the reinforcement of the Canadian economic union, mainly through the elimination of trade barriers between the provinces and territories.

[46] The Government of Quebec is behind the creation of the Council of the Federation. It took its inspiration from the report of the Special committee of the Quebec Liberal Party on the political and constitutional future of Quebec society, entitled A project for Quebec*: Affirmation, Autonomy and Leadership*, adopted and published in 2001 by the Quebec Liberal Party. See P. 91-96 of this document.

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In short, it is Quebec that, of all the Canadian provinces, insists the strongest on the respect of the federal principle and the federative spirit. This is no surprise, because the need to preserve the special identity of Quebec was one of the reasons for which the federal model was chosen at the time of Canada's founding, instead of the unitary model[47]. The Supreme Court of Canada itself recognized it in the following terms:

> Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today.
> […]
> The social and demographic reality of Quebec explains the existence of the Province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.[48]

I wrote earlier of the current Quebec government's ambition to revitalize the Canadian federation, in collaboration with its federative partners. This ambition is in keeping with Quebec's pursuit of a certain number of precise goals:

1) Develop stronger and more sustained solidarity among the Canadian provinces and territories, such that they become able to work together more harmoniously.
2) Work to render the provinces and territories able to better influence the evolution of the Canadian federation and take part more actively in the elaboration of the major orientations and

[47] The choice to become a federation, which was made in 1867 with regard to Canada, resulted among other things from a consideration of the identity-related needs of Lower Canada (today, Quebec). The legislative union (or unitary State) so very much wanted by Sir John A. Macdonald, one of the main architects of the political compromise that led to the birth of Canada, came up against the identity-related aspirations of Quebec above all, but also against the Atlantic provinces' thirst for autonomy.
[48] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, p. 244 and 251-252.

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decisions regarding the country, among other things using the Council of the Federation to do so.

3) Lead the Canadian government to better respect the fundamental principles of federalism, including the autonomy of the provinces in the exercise of powers within their jurisdictions. This will be accomplished, among other things, by limiting federal spending power in the provincial jurisdictions.

4) Create new synergy among the Canadian provinces and the territories, founded on mutual understanding, open-mindedness and the search for compromise.

5) Encourage the striking of a better balance between the two levels of government in Canada.

6) Focus on creativity and innovation in the arrangement—or, I should perhaps say, the rearrangement—of federative relations; question dogma and preconceived ideas.

On that last point, I would like to mention that the European Union provides an excellent example of daring, courage and imagination in the arrangement of relations between member States. Clearly, there is a major difference between the European Union, a supra-statal entity, and Canada, a federal State. I nonetheless feel that Canada should show the same creativity in its manner of practising and implementing federalism as the European Union does in organizing the relations among its many member States. In other words, the Canadian federation must show itself capable of renewal and of resolutely engaging in its own reform. It must not fear change.

Of course, Quebec hopes that a future reform of Canadian federalism would finally allow Quebec's specificity, founded on its national characteristics, to be recognized in the Canadian Constitution. This recognition has been the prime objective of the governments that have held power in Quebec in recent years, regardless of their political affiliation. It is worth noting, in passing, that Quebec's desire for the greater

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respect and recognition of its unique identity within Canada is highly legitimate. It is supported by the idea that, if Quebec is enriched in its profound identity by its adhesion to the Canadian federation, the latter is equally enriched by the presence within it of Quebec as a nation[49].

As for the Aboriginals, I have already said that their rights were recognized by the Canadian Constitution. The Supreme Court of Canada gave great weight to them. Until now, the recognition of those rights in the *Constitution Act, 1982*[50] constitutes without a doubt the biggest victory obtained in Canada by Aboriginals. Another major victory should not be ignored, though. I spoke of it earlier. I am referring to the creation of Nunavut, which forms the only territory whose government is elected by an Aboriginal majority in Canada: the Inuit[51]. Like Quebec, it is inhabited by a population the majority of which speaks a language other than English[52].

When it comes to Aboriginal participation in constitutional power, it must be mentioned that the *Constitution Act, 1982* was amended in 1983 to recognize that federal and provincial governments are bound by a commitment to principle according to which, before any constitutional amendment concerning Aboriginals is made, the Prime Minister of Canada must convene a conference bringing together the provincial premiers and himself, place the question of the proposed amendment on the agenda, and invite the representatives of aboriginal peoples in Canada to take part in the work related to the question[53]. However, the political practices that have been applied since 1983 in Canada go even further than the

[49] In this sense, it might be said that Quebec's specificity is a strong Canadian value. It should be promoted and recognized as such.
[50] *Constitution Act, 1982, supra*, Note 29.
[51] In 2006, the population of Nunavut numbered 29,325, of whom 24,640 were Inuit. On this point, see: Statistics Canada, Aboriginal peoples, 2006 Census, available online at www.statcan.gc.ca.
[52] In 2006, more than 25% of Nunavut residents declared an Inuit language, either Inuktitut or Inuinnaqtun, as their first language. More than 60% identified this language as being the language most often spoken at home. On this point, see: Statistics Canada, Languages, 2006 Census, available online at www.statcan.gc.ca.
[53] This is Article 35.1 of the *Constitution Act, 1982, supra*, Note 29. This stipulation was added to the terms of the *Constitution Amendment Proclamation, 1983* (TR/84-102).

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stipulations of the *Constitution Act, 1982*[54], by giving Aboriginals a veritable right of veto on any constitutional amendment affecting their status or rights.

The ultimate goal of Canada's aboriginal peoples is to increase their political autonomy to the point of forming a third level of government. This third level of government was effectively what they were offered by the Charlottetown Accord of 1992, but there was no follow-up to that.

The Aboriginals seek to improve their relations with all the active governments in Canada, that is to say, with the Canadian government itself—which holds the obligation to act as their fiduciary—as well as with the provincial and territorial governments. For several years now, the main organizations representing Aboriginals have been meeting the provincial premiers and the territories' heads of government on an annual basis, just before the summer meeting of the Council of the Federation begins. This meeting with the Aboriginals has become a sort of tradition. It offers the clear advantage of further raising awareness among the provincial premiers and territories' heads of government regarding the problems Aboriginals face, and to create closer relationships between them. Even the federal government seems to now want to develop the reflex to invite Aboriginal representatives to take part, with those of the provinces and territories, in the most important discussions for the country's governance and its future. All these meetings between first ministers (i.e. the Prime Minister of Canada and the premiers of the ten provinces), the three territories' heads of government, and the Aboriginal leaders are highly useful because, after all, the quality of interpersonal relations between them plays a key role with regard to intergovernmental relations in Canada. Truth be told, the quality of such interpersonal relationships sometimes makes all the difference in the success or failure of intergovernmental relations themselves.

[54] *Constitution Act, 1982*, *ibid*.

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VII. THE PLAYERS, FORMS AND MODALITIES OF INTERGOVERNMENTAL RELATIONS IN CANADA

The players in Canadian intergovernmental relations are, as their name indicates, essentially the governments rather than the parliaments. The expression *executive federalism* is frequently used to explain this reality, which is not specific to Canada. In general, parliaments themselves act only to crystallize the agreements reached between governments in legislative form, or to change domestic law based on those agreements.

As for judicial bodies, in particular the Supreme Court of Canada, they play a fundamental role with regard to the interpretation and application of the Constitution and of laws, quasi-constitutional or otherwise, whether they are federal or provincial[55]. As such, the courts are not players in intergovernmental relations. However, this is true except for the fact that in the past, some courts have prompted governments or political players in general to engage in or pursue negotiations. This is the case in Aboriginal matters, where the Supreme Court of Canada and other courts did not hesitate to pressure governments and Aboriginals to take the route of negotiation instead of pursuing legal proceedings. This was also the case in 1981, in the context of discussions about the "repatriation" of the Canadian Constitution[56]. It could happen again if, one day, Quebec were to seek to secede from Canada[57].

[55] Laws said to be quasi-constitutional are laws that take primacy over laws of the same level of government, either because the legislator itself stipulated so, or because jurisprudence recognizes such primacy.

[56] In 1981, in a highly significant decision, the Supreme Court of Canada declared that the "repatriation" project of the Canadian Constitution, which at the time was supported only by the Canadian Parliament and by two of the 10 provinces, was legal but broke with constitutional conventions. This had the effect, no doubt desired by the Court without being said outright, of bringing the political players back to the constitutional negotiation table. That is what happened in November 1981. This federal-provincial conference, spoken of as a last chance, resulted in an agreement between the federal government and all the provinces, except for Quebec, and led to the "repatriation" of the Canadian Constitution. For this decision, see *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R 753.

[57] In 1998, the Supreme Court of Canada made a statement about the legality of a process for the unilateral secession of Quebec. It concluded that, when it comes to Canadian constitutional law, a clear vote on the part of Quebecers on a clear question would lead, in the case of a secessionist

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I wrote earlier that the Aboriginals are taking an increasingly stronger place as full partners in Canadian intergovernmental relations. But what of municipalities, non-governmental organizations (NGOs), interest groups and social movements?

Municipalities do not currently have a role in intergovernmental relations, strictly speaking. They are the creatures of the provinces[58]. Their powers are delegated to them by provincial legislatures. Over the last 10 years, however, we have seen the Canadian government show a greater interest in municipalities, to the point of wishing to invite them to take a seat at the table where major national decisions are made. The federal government's goal with regard to municipal affairs remains rather nebulous. Presumably, it only wants to recognize the major role that municipalities play in the lives of Canadians and in Canada's social and economic evolution. For its part, the Government of Quebec suspects the federal government of wanting to dilute the provinces' influence in discussions and negotiations by adding other partners and seeking to place the interests of the municipalities in opposition with those of the provinces. In short, the Quebec government believes that the federal government, in flirting with the municipalities, is only seeking to use a well-known strategy: divide and conquer! Regardless of the true motivation behind the Canadian government's interest in municipalities, we can imagine that in the future, when prosperity once again reigns, it will not hesitate to use its presumed spending power or intervene in other ways in regard to municipal matters.

As for NGOs, interest groups and social movements, they have no more voice than municipalities when it comes to intergovernmental relations as such. However, as we might imagine, they may have a certain influence over decision-makers, meaning, for our purposes, over the federative partners themselves.

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victory, to an obligation on the part of political players in Canada to negotiate the terms of the secession on the basis of a certain number of principles inherent to the Canadian Constitution. The Canadian constitutional amendment procedure would then apply to constitutionalize the result of such negotiation, in particular to render official the secession of Quebec. For this decision, see: *Reference re Secession of Quebec*, *supra*, Note 48.

[58] The provinces hold exclusive jurisdiction when it comes to municipal affairs, as per Paragraph 92(8) of the *Constitution Act, 1867*, supra, Note 4.

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In essence, the federal and provincial governments are clearly the masters of the game when it comes to intergovernmental relations. However, this so-called executive federalism is the subject of much criticism. Among other things, some accuse it of lacking transparency and call for a democratization of intergovernmental relations.

It is true that intergovernmental meetings are usually held behind closed doors. Cases of television coverage are relatively rare. These meetings have never been open to the public. This is why some citizens accuse the first ministers and the other political players involved in such conferences of making important decisions regarding the country's future on the sly, without informing them.

The criticism aimed at executive federalism seems to me to be greatly exaggerated. First, because federal-provincial and federal-provincial-territorial conferences, meetings of the Council of the Federation and other meetings with first ministers or ministers always end with a news conference and are given plenty of media coverage before, during and after they are held. As for the rest, the fact that these meetings are usually held behind closed doors encourages honest discussion and reciprocal concessions.

The opening of intergovernmental relations to other players, such as municipalities and NGOs, should be done only with great care. It risks weighing down these relations and making it even more difficult to reach conclusive results. While transparency and democratization are trendy concepts, we must not seek to apply them to intergovernmental relations without carefully measuring the impact they may have on those relations, for instance when it comes to reaching consensus and making decisions.

The constitutional amendment procedure is already a heavy one in Canada, to the point that many have lost all hope of ever seeing a reform of Canadian federalism from a constitutional standpoint. If we were to further weigh down intergovernmental relations as a whole, regardless of whether the relations in

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question deal with subjects of a constitutional nature, we would make it even more of a delicate process to reach political compromise, and in so doing we would slow down the country's progress. In addition, while executive federalism is the object of criticism in Canada, it has never been accused of lacking political legitimacy. Nobody has ever really alleged that it fails to respect the elementary rules of justice and equity.

In the past, in certain constitutional reform projects, it has been proposed that Canada should equip itself with a mechanism for "constitutional entrenchment"[59] of administrative agreements, when that is desirable. The Meech Lake Accord stipulated the "entrenchment" of a sole agreement in the country's Constitution: the Ottawa-Quebec agreement on immigration. None of this led anywhere. Regardless, I believe that such ideas are valid and they merit being considered once again.

Now, with regard to the forms that intergovernmental relations may take, and their modalities, they are obviously quite diverse. As such, these relations are sometimes bilateral, sometimes multilateral. At times they focus on a simple exchange of information or expertise, whereas at others they focus on the development of implementation of policies. Sometimes they aim to develop common positions on a subject, and sometimes they aim to prevent conflict between the federative partners themselves. They can be federal-provincial-territorial, or simply provincial-territorial, or purely regional. They sometimes bring together first ministers, sometimes ministers, sometimes only civil servants. Of course, the further down in the hierarchy of public administration, the less formal the intergovernmental relations. Still, it can be seen that these relations are continuesly becoming more formal, regardless of the hierarchical authority of the people involved.

[59] The term *constitutional entrenchment* is evocative. It simply refers to the writing of a measure into the Constitution.

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In the vast majority of cases, decisions are made unanimously. Decisions may, however, be made on the basis of a large consensus rather than unanimity. In those cases, it's not unusual to see the dissident partner insist that its concerns, reservations or nuances be formally noted[60]. The Canadian Intergovernmental Conference Secretariat provides high-quality support to a large number of conferences, as well as providing simultaneous interpretation services.

The agenda for intergovernmental meetings is developed either among all the participants or by the political entity that is chairing the meeting. As for the decisions that are made, they are usually detailed in communiqués. They may at times be set out in political agreements in due form. This has happened in the past for decisions regarding constitutional matters.

When it comes to settling differences between the two levels of government, there is no Canada-wide mechanism, as in there is no single mechanism that's applicable regardless of the circumstances and the subject at hand. Still, certain intergovernmental agreements include mechanisms for settling differences as applicable to specific situations. This is true for the agreement on internal trade. It's also true for the agreement on social union. By the way, in the case of the agreement on social union, the mechanism has never been implemented, as it is the case for the agreement itself.

While it is good when political players agree together on mechanisms for settling differences applicable to certain specific agreements, I do not believe that there is a need to create a general-scope mechanism. I believe, rather, that we should insist more strongly on the *moral* obligation of federative partners to respect a certain code of conduct in their relationships with one another. My statement on this matter is related to the concepts of conviviality, loyalty or federal courtesy, which we find in the constitutions of some countries. The concept is based on a

[60] For a certain time, Quebec made extensive use of the so-called asterisk method to express its concerns regarding agreements with the federal government to which other provinces consented more easily.

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certain number of rules or principles that political players commit to respecting in order to ensure a federative practice that better aligns with the federal principle and is more strongly inspired by the federative mindset. At this time, the government of Canada is working on a federalism charter project, the nature of which has not yet been explained, but that could very well contain a code of conduct similar to the one I mention here. I believe that it would be a good thing to reiterate to Canadians, in the form of a charter if necessary, that federalism is important for the country, and that it is important for political players to conduct themselves in a way that is fully compatible with the federal principle and spirit.

I also wrote earlier that when it comes to intergovernmental relations, we should avoid useless conflicts between the two levels of government. This does not, however, mean that everything can always be harmonious at all times. Conflicts are inherent to federalism. They aren't necessarily negative, either. What we need is to avoid seeing them become bitter or systematic.

The fact of provinces fully holding their ground in their areas of jurisdiction should not be perceived, as such, as being a threat to the federal government, nor, a fortiori, as being a declaration of war against it. On the contrary, such affirmation by the provinces is perfectly normal in a federative system.

The 2003 creation of the Council of the Federation was founded precisely on the principle that the provinces should show renewed and strengthened leadership in their own areas of jurisdiction. It was founded on the premise that by developing more common positions in their own jurisdiction, the provinces would end up acting on those positions with greater effectiveness, thus avoiding federal interference. As I wrote earlier, another Council of the Federation goal was to strengthen the provinces (and territories) vis-à-vis the federal government in order to encourage a better balance in relations between the two levels of government. Truly, if the provinces hold their positions in their own jurisdictions, this can have only positive effects on Canadian federalism, from both the horizontal and vertical perspectives.

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In Canada, in general, Francophones—especially those in Quebec—see the Canadian Constitution in a different way than do Anglophones. As such, the former tend to see the Constitution as a contract between federative partners. This contract is founded on political compromise, historical or contemporary, and is virtually sacred; it must not be changed or worked around. It must also not be modified except by constitutional process, which implies prior political negotiation.

Anglophones, on the other hand, have a more pragmatic way of seeing the Canadian constitutional framework. For them, the Constitution is not an absolute. It is only a guide. In some ways, it is only the result of a political agreement reached at one specific time. It must evolve, adapt to the changing circumstances that are par for the course of living in society. It is up to both to the courts and political players to steer this evolution. Above all, the Constitution, as seen by Anglophones, should not be an impediment to the country's progress. This leads them to favour paraconstitutional solutions to work around the Constitution and find solutions to specific problems that come up.

In other words, while Francophones hold a more global, contractual and structural view of the Constitution, Anglophones take a more pragmatic, time-bound and modulable view of it. This leads the former to favour an originalist approach with regard to the interpretation and application of the Constitution, while the latter take a more evolutionary approach to the matter. While the originalist approach can be faulted for freezing the Constitution in time, the evolutionary approach, on the other hand, poses the inconvenience of dismissing political compromises, leaving too much space for judges as opposed to elected officials, and opening the doors to arbitrary decisions.

Culture and other components of identity have a lot to do with the ways that individuals understand the Constitution and federative relations. These components explain, in good part, the differences in attitude that exist in Canada between Francophones and Anglophones when it comes to their ways of seeing

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intergovernmental relations. Legal traditions, such as civil law and common law, serve only to reinforce these differences.

VIII. FUTURE PATHS FOR INTERGOVERNMENTAL RELATIONS IN CANADA

It goes without saying that the reform of Canadian federalism will continue to be the most fundamental issue in intergovernmental relations in the future. We must specify, however, that contrary to what some may believe, such reform does not necessarily require constitutional amendment as such. On the contrary, much can be accomplished in Canada in terms of remodelling the federative system without needing to touch the Constitution. In fact, a good many issues can be solved in a non-constitutional manner, meaning without engaging in the constitutional amendment procedure. Administrative agreements, which I discussed earlier, are one of the means that political players have at their disposal for rearranging Canadian federalism and helping it progress without recourse to the delicate and laborious process of constitutional amendment as such.

Other major issues, more tightly framed than the general reform of federalism but no less complex, are also appearing on the horizon when it comes to intergovernmental relations. Among others, these include the solution to fiscal imbalance, the limitation of federal spending power, and the provinces' participation in the negotiation of major international agreements or treaties, and in certain international forums[61]. In passing, it's worth mentioning that all the aforementioned questions can be dealt with easily and to great satisfaction by non-constitutional means. This leads me to mention that while intergovernmental relations in Canada were mostly absorbed by the constitutional question until 1992—the year that the last attempt at constitutional reform, the Charlottetown

[61] Quebec wishes, among other things, to speak with its own voice, via the intermediary of the Canadian delegation if necessary, in international forums that affect its jurisdictions, if not its specificity.

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Accord, failed—since then they have been focused on subjects of a non-constitutional nature.

Intergovernmental relations have served in the past, and could again serve in the future, to tackle major goals, such as the better distribution of wealth throughout Canada with a view to greater social justice, environmental protection and the reduction of greenhouse gases, the reduction of overlaps and duplications within the two levels of government, and the development of national standards or goals in areas deemed to be strategic. As I wrote earlier, intergovernmental relations could also make it possible to develop a certain form of asymmetry in Canada. Such asymmetry, when properly framed, can offer a better accounting for the diversity inherent in Canadian federalism in general, and for the specificity of Quebec in particular.

Intergovernmental relations in Canada contribute, in large part, to the constitutional distribution of legislative powers, which was established by the *Constitution Act, 1867*[62]. They contribute to arbitrating and clarifying that distribution. This arbitration and clarification are all the more important in that many questions surrounding the sharing of legislative powers touch on the detailed management of the jurisdictions and responsibilities of the two levels of government and on the relationship between these levels: fiscal relations and the distribution of financial resources, the development of public policies, trade and investment, infrastructure, and so forth. As for the rest, the distribution of power is not and could not be absolutely watertight. Not only do lines get crossed here and there—as in, the federal government steps over the line into provincial jurisdictions, and vice-versa—but in addition, there are grey zones, meaning situations for which it is extremely difficult to precisely determine which level of government holds jurisdiction.

While I am very happy to note that the Aboriginals are currently playing a stronger role with regard to intergovernmental relations in Canada, I nonetheless decry the fact that this is not the case for another major group: Francophone minority

[62] *Constitution Act, 1867*, *supra*, Note 4.

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communities. The latter are left to their own devices in these relations. They are never invited to meet with first ministers, even to discuss with them about the problems they are facing and their potential solutions. And the first ministers would gain great advantage from listening more closely to them …

CONCLUSION

In Canada, intergovernmental relations are more or less formalized, in the sense that they are recurrent, fairly solemn and well structured; they are taken seriously and they rest on well-established traditions and practices. On the other hand, they are not strongly institutionalized, meaning they function via very few permanent institutions. These relations are numerous, they express themselves through many different forums[63], and they touch on a long list of topics, at times in provincial jurisdictions, at times in federal ones, and at times in shared jurisdictions. Should we, in Canada, lean towards greater formalization, or the stronger institutionalization of intergovernmental relations? This could be a good thing, but we should take care not to complicate or weigh down relations between the governments. Canada is already a complex enough country as it is!

Not to mention that the Aboriginals will be called upon in the future to play an even stronger role in intergovernmental relations. This is entirely inevitable, as they constitute a growing dimension of Canadian federalism. We must find ways to arrange the presence of Aboriginals in intergovernmental relations without weakening the influence of the provinces themselves along the way. We must also eventually manage to develop a federative theory that better includes the Aboriginal reality as part of Canada.

[63] I am making a distinction here between permanent institutions devoted to intergovernmental relations and other forums. The latter are made up of a long list of time-bound conferences held between first ministers, ministers or functionaries, of meetings of various sorts, and even of annual conferences, but they are not institutional per se.

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While earlier I reproached the Canadian federation for lacking in creativity, I must admit that, overall, intergovernmental relations in Canada are of high quality, and they provide tangible, if incomplete, results. Among other things, these relations have a veritable emulation effect. They stimulate healthy competition between governments. Also, it is worth noting that they usually serve to reduce tensions between governments themselves and in society in general, rather than stoking them or creating new ones. In short, it can be affirmed that despite their weaknesses and imperfections, intergovernmental relations have a positive effect on the evolution of Canadian federalism.

When I explore the future paths for intergovernmental relations in Canada, the question of the provinces' role within the Canadian federation comes immediately to mind. In Canada, like in any other federal State, the existence of the federated States tangibly manifests the principle of federalism. In the case of Canada, the provinces themselves are at the origin of the federal project. They are the ones that, in October 1864 at the Quebec Conference, and even before, chose this form of government. They constituted the Canadian federation and brought it to life. If only for that, the provinces are and should remain at the heart of Canadian federalism.

This is also why I believe it is important for Canadian federalism to evolve in a way that is more respectful of the provinces' autonomy. The provinces have every interest in taking more charge as full partners in Canadian federalism. Unfortunately, they too often have the reflex of eclipsing themselves, making themselves small in comparison to the federal government, to which they generally attribute hierarchical superiority despite the fact that the federal principle, classically speaking, places them on an equal footing, at least in legal theory.

In Canada like in any other federation, the definition of the common good and of national interest must not be left in the hands of a single level of government, that is the federal. Rather, these things must be defined collaboratively between the two

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levels of government, via institutions and mechanisms that encourage intergovernmental collaboration.

The vast majority of Quebecers are ready to make positive contributions to the construction of the Canada of the future, as long as they feel that their identity is better respected and valued in the Canadian union. It would be unfortunate if, because they experience a lack of respect for who they are, Quebecers were to end up refusing to influence Canada's evolution, failing to recognize themselves as part of it, and digging the chasm between the "two solitudes[64]" even deeper. For myself, I do not believe that Quebec must withdraw from Canada or be indifferent to it. I believe instead that it must exercise all the leadership of which it is capable in this country.

The Canadian Constitution is a work in progress, among other things because the Government of Quebec has still not endorsed the *Constitution Act, 1982*[65]. The scope and quality of intergovernmental relations in Canada at this time nonetheless leads me to hope that one day, the work that is constitutional reform will be completed. Until then, intergovernmental relations will doubtless help the country to progress by non-constitutional paths, in keeping with political agreements. In a certain way, these relations already show Canadians' political maturity, because they work via dialogue, collaboration and compromise. They have demonstrated their value in the past in a great many ways. Let us put them to the service of a much-desired reconciliation between Quebecers and other Canadians.

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[64] The expression *two solitudes* is often used to describe the chasm that separates Quebec from the rest of Canada, whether due to identity clashes or different perceptions of Canadian federalism and its future.
[65] *Constitution Act, 1982*, *supra*, Note 29.

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