

INTERGOVERNMENTAL RELATIONS IN CANADA

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PART I: FRAMEWORK OF ANALYSIS

Relations among governments within a federation assume their distinctive form as a consequence of:

- the society of which they are a part,
- the constitutional regime within which they are set,
- the governmental institutions of which they are in part the expression, and
- the internal and external conditions that shape the life of the country at a particular time.

Part 2 will describe Canada's character and situation in the light of these factors.

While the formal structures of intergovernmental relations (IGR) can vary greatly from one federal system to another, all perform the same general function, namely, to manage the interface among constituent governments. One might categorize the diverse structures of IGR into four different types:

- intra-jurisdictional,
- inter-jurisdictional,
- judicial, and
- international and other types.

Part 3 will examine Canadian IGR within this general perspective.

Finally, the operation and practice of IGR may vary along the following dimensions:

- the degree of formal institutionalization,
- the extent to which they are decision-making in character, and
- the degree of transparency that prevails in their operations.

Part 4 will depict the practical operation of intergovernmental relations in Canada with reference to these three dimensions.

PART 2: CANADIAN FEDERALISM

a) History and Development of Federalism

Canada is a parliamentary democracy. The head of state is Her Majesty Queen Elizabeth II, represented in Canada by the Governor General at the federal level, and a Lieutenant Governor at the provincial level. Canada is the product of the 1867 union of four colonies in ‘British North America’: Nova Scotia, New Brunswick, Quebec and Ontario. Six other provinces joined Canada after the founding: Manitoba (1870); British Columbia (1871); Prince Edward Island (1873); Saskatchewan and Alberta (1905); and Newfoundland (1949). In addition, there are three northern territories: Yukon; the Northwest Territories; and Nunavut, which was carved out of the Northwest Territories in 1999.

Four great forces have shaped Canadian federal experience since the Second World War. The first is the construction, consolidation and then constraining of the Canadian welfare state. The second is the emergence in the 1960s of an activist form of liberal nationalism in Quebec. Parallel to that is the third factor, the “province building” enterprises of several Canadian provinces. The fourth and most recent is the aspiration for self-determination of Canada’s Aboriginal peoples. Clearly, these are not the only forces that have affected Canadian society, but they are the ones most relevant to a contemporary appreciation of Canadian federalism.

Canada was the first country to establish itself as a parliamentary federation – i.e., a federal system in which sovereignty is divided between central and regional governments, both constituted according to the principles of British parliamentary democracy. The Canadian system expresses a divided rather than a shared model of federalism, including watertight compartments for the division of powers; independent taxing authority for both orders of governments; and weak provincial representation at the centre. Canada’s system of parliamentary federalism has produced strong executive-led government in Ottawa and in the provincial capitals, which, combined with a weak Senate, has led to executive domination of relations between and among the federal partners.

Canada was founded in 1867 as a centralized federation, with the key powers of the day vested in Ottawa and a strong, paternalistic oversight role assigned to Ottawa vis-à-vis the provinces. Despite its origins, however, Canada has become highly decentralized. This has occurred for a number of reasons. First, judicial interpretation of the division of powers broadly favoured provincial governments over the federal government. Second, the country’s central institutions have been unable to represent adequately Canada’s regional diversity, and there has consequently been popular support for the assertion of provincial power, especially in the stronger provinces. Third, provincial areas of responsibility, such as health, welfare and education, which were of little governmental consequence in the 19th century, mushroomed in the 20th, thus greatly enhancing the role of provinces. Finally, post-WW II nationalism in Quebec has helped to force a process of decentralization from which the other provinces have benefited.

The result is that Canada has powerful and sophisticated governments both in Ottawa and in the provinces, engaged in competitive processes of community building, and social and economic development at both levels. Managing this system requires elaborate forms of intergovernmental coordination. At times, relations dissolve into bitter intergovernmental conflict.



b) Constitutional Provisions Relating to Federalism

Canada's two principal constitutional documents are the *Constitution Act, 1867* and the *Constitution Act, 1982*. The *Constitution Act, 1867*, formerly known as the *British North America Act*, was an Act of the British Parliament that created Canada out of the four original provinces and provided the federal and parliamentary structure. It is in this document that one finds the general provisions for the distribution of powers, as well as the establishment of Parliament, the provincial legislatures and the courts. The *Constitution Act, 1982* patriated the constitution from the last vestiges of British authority by introducing a Canadian amending formula. The Act also introduced an entrenched Charter of Rights and Freedoms to which all governments and legislatures are subject.

Sections 91-95 of the *Constitution Act, 1867* allocate powers between the federal and provincial governments. In these sections, the broader and more comprehensive assignment of authority was to the Parliament of Canada (Section 91), and any power not specifically allocated by the constitution was deemed to fall to the federal Parliament (the residual power). The powers exclusively assigned to the provinces (Section 92) were meant to be specific and limited. Broad judicial interpretation, however, has turned the "property and civil rights" power of the provinces (Section 92(13)) into a kind of residual power of its own.

Federal legislative powers are found chiefly in Section 91 of the *Constitution Act, 1867*, which opens with a sweeping grant of authority, stating: Parliament may "make laws for the peace, order and good government of Canada" in relation to all fields not explicitly assigned to provincial legislatures. The drafters of the constitution then listed 29 heads of power that form part of the general grant of authority to Parliament. In the years since 1867, however, the courts have declined to confirm this broad understanding of the Peace, Order and Good Government or POGG power. Instead, they have relied heavily on the 29 enumerated heads of power and have restricted POGG to three principal situations: where the distribution of authority leaves a legislative gap (e.g., offshore mineral resources or federal language policies); where the matter is of 'national concern', but not caught within any of the enumerated federal powers (e.g., marine pollution or aeronautics); and where there is a national emergency (e.g., apparent civil disorder or acute inflation in the economy).

PART 3: THE STRUCTURE OF INTERGOVERNMENTAL RELATIONS

Canada is seriously deficient in its institutions of intra-state federalism. The first-past-the-post electoral system has helped to produce and to sustain a highly fragmented party system in which regional parties with strong local support do far better in garnering seats in the House of Commons than do broadly based national parties with shallow, widely dispersed electoral support. Even the Liberal Party of Canada, the only Canadian political formation with a claim to national reach, finds itself over-represented in Ontario, taking 101 of 103 seats in the 2000 general election, and under-represented in the Western provinces of Alberta and British Columbia. Canada's lower chamber, the House of Commons, is a relentlessly partisan chamber, where party members vote, not according to their own judgement, but according to the requirements of party



loyalty. Their capacity, therefore, to place the many different needs of their federal communities on the floor of the chamber for debate and resolution is very limited.

The federal Cabinet, which historically performed a significant role in the maintenance of regional and French-English accommodation now does this task only to a very limited degree. There used to be powerful regional chiefs who represented the interests of their part of the country in Cabinet, who were responsible for delivering the vote at election time. This system has evaporated as more and more power is concentrated in the hands of the Prime Minister and his senior officials. The office of the Canadian Prime Minister is arguably the most powerful executive position of any of the Western democracies. So powerful is the Prime Minister that a federal official said recently that Cabinet, once the central decision-making body for the country is now little more than a focus group for the Prime Minister.¹ The pronounced weakness of intra-federal institutions in the Canadian federation has meant that the responsibility for intergovernmental relations is placed almost exclusively on the shoulders of the executive – the Prime Minister, his cabinet ministers in their sphere of responsibilities, and their officials.

Inter-jurisdictional IGR, then, is the order of the day in Canada. What are the structures or formal institutions that shape the relations between the federated entities? The answer is that they are few, and relatively weak: the First Ministers' Conference; the Annual Premiers' Conference; and various ministerial councils. There are no constitutional or statutory requirements to hold such meetings, and in the early years after Confederation very few were held. As government functions expanded and the means of communication improved, more and more of these meetings occurred; they are now the prime vehicle for the conduct of the business of the Canadian federation. These will be discussed more fully in the next section of this report.

A greater degree of institutionalization has occurred within government bureaucracies. Starting in the 1960s, federal and provincial governments began equipping themselves with specialized organizations staffed with persons possessing expertise in the conduct of federal-provincial relations. These took – and take – a variety of different forms, from full-scale (though small) ministries to specialized units within the central agency serving the first minister.

The appeal to the courts as the umpire in the federation is a last-ditch means of regulating the relations between federal actors. Given the zero-sum character of the judicial dispute resolution process, Canadian governments are not inclined to go to court casually. However, there is an evolving jurisprudence that has arisen out of cases brought before the Judicial Committee of the Privy Council (JCPC) in England, which, until 1949, was Canada's ultimate appellate body. Since 1949, the Supreme Court of Canada has been the final appellate body. Decisions of the JCPC during the first half of the 20th century generally favoured an expansion of provincial power. Supreme Court decisions in the latter half of the century, have not overturned the JCPC's legacy. In recent cases having to do with the regulation of tobacco, the environment, and firearms, the Court has responded favourably to the federal government's expansive use of the criminal-law power.

The forces of globalization are re-shaping most societies, federal countries and IGR being no exception. The three North American federations – Canada, the United States and Mexico – have combined to create in the North American Free Trade Agreement (NAFTA) an international entity which will have a continuing impact on all of the constituent units of the three federal systems. This emerging reality became evident during the negotiations that led to the signing of the Canada-U.S. Free Trade Agreement in 1988. New intergovernmental processes within Canada had

to be constructed to provide for effective input from both orders of government, particularly the provinces. In addition, the growth of quasi-intergovernmental international bodies and the emergence of complex multi-tiered political structures that transcend the parameters of states requires consideration in any thorough review of IGR in federal systems, Canada's included. It is no longer adequate to restrict one's analytic gaze to the domestic intergovernmental arrangements of the Canadian federation, ignoring the powerful, structural relationships which bind Canada into the international and North American political and economic system.

The quest of indigenous peoples in Canada for self-government raises complex conceptual and policy issues concerning the appropriate relationship that might be established between these emergent political entities and the traditional structures and processes of Canadian federalism. Aboriginal peoples seek to relate to Canada on a government-to-government basis. While the full meaning and implications of this aspiration are still very much being worked out, it is already having a significant impact on IGR in Canada.

PART 4: THE PRACTICE OF INTERGOVERNMENTAL RELATIONS

Intergovernmental relations in Canada have been the main way that many of the country's most important domestic policy questions have been resolved. While federalism was effectively suspended from 1939-45 so that Ottawa could prosecute the Second World War, peacetime development has been profoundly shaped by the interactions between Canada's two orders of government. A classically Canadian form of executive-dominated intergovernmental relations mediated the stresses and strains the country encountered in the post-war period (mentioned in Part 2 above). Despite the seriousness of the tensions and the intensity of the processes by which they were addressed, there was remarkably little institutionalization of the forums utilized for this purpose. As was said above, these forums have no constitutional or statutory foundation, and their utilization and salience have ebbed and flowed according to the preferences of the political actors and the circumstances of the day.

- **First Ministers' Conferences (FMC).** At the pinnacle of the system is the FMC, a gathering of provincial premiers and the Prime Minister of Canada. It is called at the pleasure of the Prime Minister, who chairs the sessions. It has no continuing institutional support, no staff serving it, no routine procedure for following up on business and reporting back. Sometimes the FMC – or a portion of it – is held in public, usually at the Ottawa Conference Centre. Sometimes, it is small and private, and may amount to no more than a dinner at 24 Sussex Drive, the home of the Prime Minister. FMC's were held frequently in the latter part of the Trudeau period, and even more frequently during the Mulroney prime ministership. The current Canadian Prime Minister, Jean Chrétien, has called relatively few, and, when he has, they have been of the informal, Sussex Drive variety.
- **Annual Premiers' Conference (APC).** Initiated at the instigation of Quebec in 1960 as little more than a regular summer retreat for provincial premiers and their families, the APC has evolved into a significant intergovernmental institution, moving into promi-



nence as the frequency of FMC's has declined. Held every August under a rotating chairmanship, this association of provinces and territories has in recent years become a full-fledged intergovernmental meeting, professionally supported by civil servants, preparing and receiving position papers, issuing communiqués, and launching projects to be undertaken by the relevant ministers. It has an on-going agenda of work that connects one meeting to another. While much of its focus appears to be on the alleged inadequacies of the Government of Canada, it directs autonomous policy work as well. It was at one of these meetings that the social-union initiative was begun, which resulted in the Social Union Framework Agreement (SUFA), to be discussed below.

- **Ministerial Council.** Ministerial councils, sometimes federal-provincial-territorial, sometimes purely provincial-territorial, have existed for many years, but in recent years they have greatly increased in number, have become more institutionalized, and have played a more formal role in carrying out mandates assigned by first ministers. These workhorses of the system now operate in fields such as social-policy renewal, forestry, transportation, education, and the environment.
- **Meetings of Officials.** The meetings of elected representatives described above are supported and paralleled by a large number of meetings of senior and middle-rank officials in all the relevant fields. Held almost entirely out of the public view, they are indispensable to the proper functioning of the federation.

The pace and intensity of intergovernmental meetings at the senior levels of deputy ministers, ministers, and first ministers have varied considerably over time with the changing policy agenda, and the political interest of governments. Between 1973 and 1984, there was a slow increase from about 40 to 60 meetings a year, with a peak of 103 in 1979. During the tenure of Prime Minister Mulroney, who had a strongly stated commitment to co-operative federalism, the number never dropped below 82 per year, with peaks of 130 in 1985-86 and 127 in 1992-93. The frequency dropped slightly after the Liberals under Jean Chrétien were re-elected (and slumped to 47 in the freeze following the 1995 Quebec referendum).²

In the latter part of the 1990s a style of IGR emerged in Canada that might be characterized as collaborative federalism. It arose in part as a result of the failure to achieve constitutional reform in the late 1980s and early 1990s. This is a style of IGR by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behaviour through the exercise of its spending power, but by some or all of the 11 governments and the three territories acting collectively.

A number of the issues unsuccessfully addressed in the failed Meech Lake and Charlottetown Constitutional Accords re-emerged in the intergovernmental arena – the economic union, the social union, “who does what” jurisdictionally, and the spending power. They received expression, however, not as constitutional clauses, but as intergovernmental “accords,” “declarations,” and “framework agreements.” The earliest example of this style of IGR is the Agreement on Internal Trade (AIT), signed in 1994 and implemented in 1995. Although a non-binding political arrangement, its structure and content mirror the approach of such international trade agreements as the NAFTA.

The Social Union Framework Agreement is another example of this approach. The agreement was signed in 1999 by Ottawa and all the provinces and territories except Quebec. It con-

tains: a statement of general principles; a mobility provision applying to the social-policy field; rules governing the exercise of the federal government's spending power; and general procedures for dispute avoidance and dispute resolution.

In 1996, Ottawa offered to withdraw from the field of labour force training. Provinces were offered responsibility for a wide range of 'active labour market' programs, along with the associated funding, and could choose between a co-management model or complete devolution. Five provinces opted for co-management, while four chose full devolution. In the case of this policy field, it is Ontario that is the odd province out, refusing to reach an agreement until the question of the fair distribution of federal money is resolved to its satisfaction.

The environment is another area in which both orders of government exercise broad jurisdiction. All governments (again except Quebec) signed the Canada-Wide Accord on Environmental Harmonization and a set of Sub-agreements on Canada-Wide Standards, Inspections and Environmental Assessment in January 1998. Despite strong misgivings by a parliamentary committee, the opposition of leading environmental groups, and a Supreme Court ruling that strengthened Ottawa's ability to use its criminal law power in environmental regulation the governments signed the Accord. The Accord can be amended only with unanimous consent, although parties can withdraw with six months notice. While expressing the commitment to "achieve the highest level of environmental quality within the context of sustainable development," the primary emphasis is on overcoming duplication and overlapping by creating a "one-window" set of delivery mechanisms, which would provide any given service at only one level. Allocation of responsibilities was to be based on such criteria as proximity and the ability to meet client and local needs.³ Thus, the federal government has delegated most (but not all) of its environmental regulation and assessment activities to the provinces. A similar "harmonized, collaborative intergovernmental approach" has been adopted in other environmental issues, such as implementing Canada's environmental commitments under the Kyoto Protocol regarding climate change and the development of national strategies to deal with smog and acid rain. (It should be noted that oil and gas producing provinces are deeply hostile to emissions standards that would affect these industries.) These developments have sharply reduced intergovernmental conflict in the environmental field. "However, their positive effects on the actual protection of the environment have been far less clear,"⁴ particularly in light of weak infrastructure in some small provinces, and major cutbacks in environmental enforcement activities in others.

International trade policy – both with respect to the North American Free Trade Agreement and to global bodies such as the World Trade Organization – also engages both federal and provincial interests and policies. International trade and commerce is a clear federal jurisdiction, but (unlike the U.S. or Australia) the constitution has been interpreted to mean that the federal power does not extend to imposing the terms of international agreements on the provinces when they involve provincial jurisdiction. As international treaties have moved beyond tariffs to broader issues of subsidies, procurement and regulation of businesses, the potential impacts on the provinces become wider. As a result, some provinces have called for direct participation in Canadian negotiating teams, most recently in possible discussion of a North American energy regime. Ottawa has refused to permit this. But on the other hand, Ottawa has taken considerable pains to involve the provinces fully in trade policy, and to consult closely with them (and with industry) as agreements are being negotiated. As Grace Skogstad concludes, "The extensive efforts

to build a domestic, interprovincial consensus” has lent support and legitimacy to the outcomes, and has meant that individual provinces are “less inclined to take unilateral efforts to secure best possible outcomes for their province at the expense of a coherent national trade strategy.”⁵

These and other examples demonstrate the variety of forms that collaboration can take, and the variability of its outcomes. Collaborative federalism is, in reality, a deepening and broadening of executive federalism, and many of the concerns and criticisms that apply to the latter apply to the former as well. The processes and arrangements that have been put in place to permit collaborative federalism may move IGR closer to an actual decision-making model, although the constraints on moving seriously in that direction are severe. But to the extent that intergovernmental forums develop a decision-making capability, they drift further out of the reach of democratic control and the processes of parliamentary accountability upon which our system is based. Finding a way of applying the principles of responsible government to an executive-dominated federal system continues to be a central democratic challenge for Canada.

1. Donald Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999), p. 3.
2. For a much fuller discussion of intergovernmental relations in Canada, see: David Cameron and Richard Simeon, “Intergovernmental Relations and Democratic Citizenship”, in B. Guy Peters and Donald J. Savoie eds., *Governance in the Twenty-First Century: Revitalizing the Public Service* (Montreal: CCMD/McGill Queen’s University Press, 2000), pp. 58-118. The data in this paragraph are drawn from that article on page 82. The original source of the information is the Canadian Intergovernmental Conference Secretariat website for 1998.
3. This analysis is drawn from Mark S. Winfield, “Environmental Policy and Federalism,” Herman Bakvis and Grace Skogstad, *Canadian Federalism*, pp. 124-137.
4. *Ibid.*, p. 131.
5. “International Trade Policy and Canadian Federalism: A Constructive Tension?” Herman Bakvis and Grace Skogstad, *Canadian Federalism*, pp. 159-177.