

CANADA

Expert

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I. GENERAL QUESTIONS

1. How is the federation formally called (regional, federal state, other...)?

Federal

2. Since when has the power been decentralized in your federation? Was the decentralization established in its origins or in a later time?

1867; with the adoption by the British Parliament of the British North America Act, 1867 (now called Canada Act, 1867)

3. Has decentralization been formally abandoned or practically inoperative in any historical phase?

Never

4. Which are the deep reasons in the adoption of a politically decentralized system?

Various. But the main reason was, in 1864, to allow a mainly Francophone British colony (Lower Canada: now Québec) to co-exist with three Anglophone ones (Upper Canada: now Ontario, New Brunswick and Nova Scotia). Also vast extent of the territory to govern.

5. Could you point out the main phases of the system and the main characteristics?

6. How many territories or main territorial communities compose the federation? Do they all have the same nature (for instance, states) or do they have different nature and position (for example, states, federal capital, colonial lands, communities with a specific regime of autonomy)?

Ten (10) provinces; 3 territories (Yukon, Nunavut and Northwest Territories). The provinces all have the same constitutional status, except for the specifications explained below as far as the province of Quebec is concerned. The territories are strictly under Federal delegated jurisdiction and thus, have no constitutional status as such, at least for the time being.

7. Do they have singular features (for historical, linguistic, geographical, political, legal or economical reasons)? Do these singular features have political or legal consequences? In other words, how have the differences between the main territorial communities been approached from the perspective of uniformity/diversity or asymmetry/symmetry?

The province of Quebec has a majority of Francophone speaking citizens. The Constitution recognizes this distinctive character in terms of special linguistic (e.g. s. 133 Constitution Act 1867), religious (e.g., s.93 Constitution Act 1867) and legal norms (civil law instead of Common law is the legal system in the province of Quebec as far as public law is concerned). These provisions carry constitutional as well as legal consequences. They also have considerable political significance for the history and the contemporary evolution of Canada. This state of asymmetry is not widely acknowledged in the legal and constitutional literature and runs against the dominant political Canadian discourse outside Quebec.

II. CONSTITUTIONAL LAW

1. Do you have a written Federal Constitution?

Yes, the Canada Act, 1867

2. What is the procedure for its elaboration, ratification and amendment?

The procedure is set in Part V of the Canada Act, 1982. The procedure varies according to the subject matter of the amendment. In some cases, the unanimous consent of all provinces and of the Federal authorities is required, while in other cases (the general rule) the consent of two-thirds (2/3) of the provinces representing at least fifty per cent (50%) of the population is sufficient. In some other cases (rare), amendments can be achieved only by a restricted number of provinces, by the provinces themselves or only by the federal authorities.

3. To what extent can states participate in the process of elaboration, ratification, or constitutional amendment?

Depending of the subject matter of the amendment, the consent of the provinces is usually sought except for amendments of a strict federal nature (s. 44).

4. Which have been the most important amendments or the main constitutional phases until now?

No significant constitutional amendment since 1982, that is since the date of the adoption of the amending procedure by the British Parliament.

5. Do you have any complementary constitutional federal rules? If so, which are the most important?

I am not sure I understand what is meant by “complementary constitutional federal rules”. Legal but non constitutional rules in Canadian law include notably: ordinary imperial statutes, ordinary federal and provincial statutes, caselaw and the royal prerogative. However, please note that these rules are not “federal” rules, as your questions states.

6. Are "constitutional conventions", namely, unwritten binding agreements or rules of conduct, recognized in your system? Could you mention the most important?

Yes they are but their constitutional status does not give them any legal status except when they are subsequently recognized by legal rules or instruments. They are far too numerous to indicate even the most important (e.g. principle of responsible government, ministerial responsibility, etc.); these conventional rules form the essence of our system of government both at the central and provincial orders.

7. Are there any written state constitutions?

No, not yet. However nothing would prevent a province from adopting its own written constitution. Quebec has often discussed this possibility but has never acted so far.

8. What is the procedure for its elaboration, ratification and amendment?

S. 45 of the Constitution Act, 1982. A resolution to that effect is adopted by the provincial legislature; The Governor general of Canada (i.e. the Monarch) then make the proclamation of the amendment, upon the recommendation of the Canadian federal government (s. 48).

9. To what extent can the federation intervene in these procedures?

It cannot intervene in any way, except to recommend the amendment if the provincial resolution has been properly adopted.

10. Could any federal organism provisionally suspend some of their provisions?

Difficult question; probably not. However, the courts could be tempted to intervene but their impact would be uncertain. The Federal government could be tempted to intervene, but the basis of such intervention could very well be constitutionally obsolete (and does not apply, strictly speaking, to “resolutions” of the legislatures).

11. Are state constitutions bound by federal rules other than the Federal Constitution? If so, which are they?

I take it here that you are still referring to “written” state constitutions. If there were such written state constitutions, they would have to respect the Canadian (federal) constitutions in all respects; the provincial constitutions would also have to respect all the rules applicable to the provinces under the general set up.

III. CONTENTS OF THE FEDERAL CONSTITUTION. DOES THE FEDERAL CONSTITUTION:

1. expressly recognize federalism or political decentralization as a constitutional principle or value?

No, not as such (“expressly”) in the text of the constitution. However, the courts in their reading of the constitutional texts have done so.

2. design a map of the territorial organization? In other words, does the Federal Constitution identify or enumerate the territories and/or the communities that conform the federation?

It did so for the four original provinces in 1867. Subsequently, it was left to British imperial statutes to identify the joining colonies. See Canada Act, 1982, Annex.

3. enshrine the autonomy of the states? If so, in which way?

No, not as such (“expressly”) in the text of the constitution. However, the courts in their reading of the constitutional texts have done so.

4. recognize states or main territorial communities the capacity to federate among them? If so, can they establish links or celebrate conventions among them without the participation of the federation?

I am not sure I understand what is meant by this question. The 1867 Constitution left the door open for new territories to join the Canadian federation. However, they needed to get the approval of the Canadian federal authorities as well as that of, in some cases, of the British authorities.

5. fully define the whole system of decentralization, or is this system thought to be developed to a great extent by future federal provisions? If so, which are they?

No; the texts of the Constitution do not “fully define the whole system of decentralization”; they define very little in fact. It was left to the interpreters of the constitutional texts as well as to the political actors to give a meaning to these provisions.

6. allow the exercise of the right to self-determination or the separation of states or other territories?

No, not “expressly”. However again, the courts in their reading of the constitutional texts have done so, but under strict conditions.

IV. INSTITUTIONAL ISSUES

- 1. Do states participate in the election, appointment or cessation of the federation's chief? Is there any other relationship between this figure and states or main territorial communities? Which one?**

No.

- 2. Is there any Senate or second legislative assembly that represents the states? If so, does it exercise its representative role effectively? Why? What functions does the Constitution attribute to this legislative assembly?**

There is an Upper house in the Canadian Parliament. It is called "Senate". It can hardly be said that it represents the Canadian provinces, however. Rather it is along the lines of the British House of Lords, since its members are not elected. It participates to the federal legislative process. Surprisingly, the Canadian constitution does not explicitly attribute any specific powers to the Senate.

- 3. How are states represented in this chamber? Do they have the same kind of representation on the basis of the number of votes or seats? Does any state have a special position in this chamber (for instance, exclusive initiative or veto prerogatives, etc.)? How representatives are organized in this second chamber, according to their territorial origin or to their political groups?**

The text of the Constitution (s. 22, Constitution Act, 1867), specifies that the Senate has four divisions, one each for Ontario and Quebec, one for the Maritime provinces and one for the Western provinces. Each division is represented by 24 senators. Therefore no province has a special position in the Senate. Senators only represent themselves and do not speak on behalf of anybody else – or of provincial interests for that matter.

- 4. Do states have legislative initiative over federal subject matters? Is their consent required for the enactment of certain federal acts? In other words, do they have a veto? If so, what kind of veto?**

No. They have no legal impact whatsoever over federal subject matters. In the political realm, however, things are sometimes different.

- 5. Is there any neutral judicial court (Constitutional Court, Supreme Court, etc.) that protects the allocation of powers between the federation and the states?**

Yes. The Supreme court of Canada. It is not, technically, a constitutional court but, rather, the general and ultimate court of appeal of the land. In this function, it becomes the ultimate constitutional arbiter with regard to the reading of the Canadian constitution and, therefore, of the allocation of powers between the federation and the provinces.

- 6. Do states participate in the process of designation of its members?**

No. However, there are rules that dictate from which provinces should the persons appointed come from.

- 7. How do you assess the influence of this court upon the current system of political decentralization?**

Huge. It is in fact the source in almost all respects of the current state of the distribution of powers in the Canadian federation.

8. Broadly speaking, could you tell whether its case law has been most favorable to the interests of the federation or the states? Are there any subject matters or historical phases in which this phenomenon occurred?

Since 1949, when the Supreme court of Canada became the court of final resort in Canada, it has had a strong centralizing influence and is usually favorable to federal interests. Before 1949, the Judicial Committee of the Privy Council, in London, was the final court; for most of the time it provided a provincial reading of the Constitution.

9. Can ordinary lower courts interfere in conflicts of powers between the federation and the states?

Yes. When asked, most lower courts (and judges) can rule on issues relating to the distribution of powers between federal and provincial authorities.

10. Which legal mechanisms do the federation and the states have to protect their powers? Are they recognized only against legislative acts, or against regulations and administrative decisions or omissions as well? Could you tell whether the safeguards and procedural position of the federation and the states are symmetrical? In other words, can the federation challenge state acts before a court? And vice-versa?

The provinces' powers and the federation's powers are sovereign under Canadian constitutional law; they need no other protection. It means that once these powers are exercised, they stand as long as they are not successfully challenged in a court of law. That is true for all forms of decisions, legislative, executive or administrative, by action or by omission. Federal and provincial authorities are on the same footing in all respects. Before a court of law, provincial action can be challenged by all, including the federal authorities; the reverse is also true. In practice, Federal authorities rarely directly challenge provincial action, while it is quite common for provincial authorities to challenge the constitutional (or legal, for that) validity of federal statutes or action.

11. Has the federation a veto against state legislative acts, regulations or decisions?

Maybe. Under s. 90 of the Constitution Act, 1867, a federal power to disallow provincial statutes existed. This power was frequently exercised after 1867, but has never been exercised since 1943. It is generally considered as legally and constitutionally extinguished and could therefore not be used nowadays.

12. And the states against the federation?

No.

13. Can a state bring a conflict of powers against another state before a court?

Yes. See supra.

14. In each state, which is the legitimate organism –legislative, executive, etc.- to bring judicial actions to protect state powers?

Any, really if it has the legal power and personality to do so.

15. Can local entities or municipalities bring judicial actions to protect their autonomy against federal or state acts or rules?

Yes.

16. Are there any other institutions or individuals legitimate to challenge federal or state legislative acts, regulations, rules or decisions on the basis of a conflict of powers?

Any person (physical or legal) can do so, providing it has the locus standi (a direct interest) to do so. In constitutional cases, the traditional standing rules are sometimes extended by the caselaw.

17. Who is in charge of the official appointment of the main state authorities (the chief of the state, government, parliament or legislative assembly, judicial power of the state, etc.)? Does the federation intervene in the process of appointment?

Provincial mechanisms regulate all aspects of the appointment of provincial authorities and the federation does not intervene in any way in the process of appointment except for the designation and appointment of the Monarch's representative in the province (done by the Monarch upon the recommendation of Canadian federal authorities).

18. Does the judicial power follow the allocation of powers? In other words, are there federal and state courts with jurisdiction to solve federal and state cases respectively?

No. The distribution of judicial powers between federal and provincial authorities does not follow the logic of the distribution of powers. It is a rather complex system under which the administration of justice is a provincial power; generally speaking, courts are therefore under provincial jurisdiction even if the appointment of judges is for some courts a federal responsibility and for other courts a provincial jurisdiction.

19. Regarding state courts, is the appointment of judges, magistrates and administrative staff a state power? Do states enjoy legislative power to regulate these issues?

Federal authorities appoint judges of the various provinces' superior courts and courts of appeal. Provincial authorities appoint judges of the other provincial courts. Federal authorities also appoint judges of the Federal court of Canada (which has a restricted statutory jurisdiction) as well as of the Supreme court of Canada. Administrative staff for the courts is appointed by provincial authorities except for the Federal court and the Supreme court of Canada.

20. Is there any body of self-government of the judicial power? If so, which is its composition? What functions does it have?

Such bodies exist both at the federal and provincial levels, respectively for federally-appointed and provincially-appointed judges. Their composition varies at the federal level and in the various provinces. The functions include ethics, discipline and training.

21. Who is responsible for the provision of material resources to the administration of justice (federation or states)?

Provincial authorities are responsible for the provision of material resources, including staff, for the administration of justice, since, under the Constitution, it is a provincial responsibility. Federal authorities have a similar responsibility, but only for the Federal court of Canada and the Supreme court of Canada.

22. Which are the criteria for the allocation of resources?

To my knowledge the criteria are not defined anywhere. History-based budgets are the main approach to resources planning.

23. Can federal courts review state court's decisions? In what circumstances?

As explained above, there are as such no federal courts (as in other federations) in Canada. The jurisdiction of the Federal court of Canada has no relationship, in practice, with provincial courts; that court cannot review any other court's decision. Of course, the Supreme court of Canada being the last resort general court of Appeal in Canada, it can and does review on a regular basis provincial courts' decisions.

24. Are there others mechanisms for state participation in federal institutions or functions? Do states participate or are represented in relatively autonomous federal organisms, regarding, for instance, citizen's rights or intervention in the economy (independent agencies with regulative, financial and arbitration powers, etc.)?

No; nothing that obviously comes to mind.

25. Can states freely convoke a referendum regarding political or legal measures? Are there any constraints? In other words, does the federation have any power over this field?

Provinces can indeed initiate a referendum on any matter considered fit, including any political, legal or even constitutional measure. The only caveat is that such referenda cannot have but a consultative value, the democratic institutions in our system of governance not being able to abdicate their powers, even in favor of the people. The same applies to both provincial and federal authorities; various laws define the rules under which these referenda function.

26. Is there any pro-state provision concerning symbolic issues (flags, protocol, languages, etc.)?

Generally speaking, symbolic issues are the respective responsibility of each order of government, federal and provincial.

V. THE ALLOCATION OF POWERS

N.B.: In this section, I presume the questions are asked with regard to the explicit constitutional norms as defined in the constitutional texts and as interpreted by the courts.

1. Is the system of allocation of powers mainly enshrined in the Federal Constitution? Is it secured by the Federal Constitution?

Yes. It can be found in the constitution text, namely in the Constitution Act, 1867, s. 91 and following. These sections can only be amended by recourse to the amending procedure (Constitution Act, 1982, Part V, section 38 and following – See supra).

2. Which is the basic design of the system (a list of federal powers, a list of state powers, a double list, other solutions)?

A list of exclusive federal powers (s. 91), a list of exclusive provincial powers (s. 92) and some shared powers (s. 92A (2); 92A(3); 94A and 95).

3. Is there any constitutional provision concerning residual powers, namely, "new" subject matters, not allocated either to the federation or to the states by constitutional law? If so, where are allocated the residual powers (federal or state level)? Is it actually effective?

The verbatim of s. 91 seems to indicate that federal Parliament has power over all matters not otherwise assigned exclusively to the legislature of the provinces; if it was really the case, the list which follows would be useless. It would mean – and has been interpreted as such by the courts – that residuary powers lie with Federal authorities. In fact, it has been the case, but only to a certain extent. Brand new topics over the years (airplanes, airports, radio, television, etc.) have been interpreted as falling under federal jurisdiction, being residuary and by their nature of a “federal nature”. Other

topics such as pollution, social insurance programmes have been found as falling under provincial jurisdiction because of their “local” or “provincial” nature. Thus, the residuary powers clause is relatively effective, but only to a certain extent.

4. Are there any rules or principles that presume that the power is vested in a certain level of governance?

No explicit rule or principle.

5. Is there any rule that gives preference to federal law in case of conflict with state law? If so, has it been actually applied?

Yes. It has been consistently applied and recently reinforced by judicial ruling.

6. Are there other general rules? Which are they?

I am not sure that there are any other general rules.

7. Does the Constitution allow making more flexible the allocation of powers by mechanisms other than constitutional amendment? In other words, can the federation, by itself, transfer or delegate powers to states? Through which mechanisms?

Explicitely, in the constitutional text, no such possibility exists. However, it was allowed by judicial interpretation. It is done through what is called administrative delegation (interdelegation) or through the incorporation mechanism. Interdelegation is allowed from one level of government to the other, providing it is strictly administrative (i.e. no legislative role for the delegate) and is not given to the legislative order. The other technique (referential legislation) is when a legislative body incorporates for its own purposes the legislation of another legislative body. Both techniques can be used in either direction by provincial and federal authorities.

8. What role did all those mechanisms play on the evolution of the federation?

Relatively minor role except in a few technical fields such as interprovincial transport (trucking), agricultural products marketing or fisheries.

9. How have the decisions regarding the material, economic and human resources to be transferred as a consequence of a transfer or delegation of powers been taken?

I am not sure I understand the question as it stands. Generally, interdelegation or legislation by reference do not involve the transfer of resources. In some cases the order of government which works for the other receives financial compensation. In some cases recently, human resources were involved and federal civil servants were transferred to the Quebec civil service.

10. Has any subject matter been fully attributed to just one of the territorial levels of governance –federal or state-?

It is in theory possible. In practice, it has not happened to my knowledge, at least on any important subject matter

11. Is the technique of "shared" powers recognized (both federation and states have legislative powers, although federal law takes precedence over state law in case of conflict)?

Articles 92A (2); 92A(3); 94A and 95 of the Constitution Act, 1867 explicitly establish such fields of shared jurisdiction. They deal, respectively, with the exportation of natural resources, old age pensions and benefits, agriculture and immigration. In practice many more fields are considered as shared, by

judicial interpretation or sheer practice (e.g. environment and health which are in theory provincial fields but where Federal authorities widely legislate and intervene).

12. Are there any subject matters in which legislative power is exclusively attributed to the federation, while executive power is attributed to the states? If so, is the regulative power regarded as legislative or executive power? Can federal legislation determine state administrative organization and practice?

No; this situation does not happen in Canada.

13. Are there any subject matters in which the federation can establish principles or basis for the state legislation? If so, has the federation made an extensive use of this power? Is there any mechanism to correct that situation?

No; this situation does not happen in Canada.

14. Does the federation have an own administrative organization on the state territory? How strong is that administration? In which fields does it act?

Yes, it does. The federal administration deals with all issues falling under federal jurisdiction in the province. It is fairly important and the federal administration in any province works closely with the central administration in the federal capital, Ottawa.

15. Can the state administration exercise any federal power delegated by the federation? If so, are state administrative bodies hierarchically dependent of the federal administration?

See answer #6 above on the exercise of delegated powers by provincial authorities.

16. What mechanisms of review are reserved to the federation to secure that states correctly enforce federal law?

None; this situation does not happen in Canada. In domains, such as the administration of justice for instance, where provincial authorities apply federal laws, the only relevant mechanism to induce compliance of provincial authorities is the financial means (grants, no payment of transfers, etc.); these mechanism are not part of the constitution law of the country.

17. What are the general limits of state powers?

Those imposed by the distribution of powers between the federal and provincial authorities and those imposed by the Canadian Charter of Rights and Freedoms upon all provincial legislatures (and Federal Parliament).

18. In your opinion, what are the most important federal powers?

Power over: External affairs, Defense, Taxation (direct and indirect), Criminal law, Transnational and international commerce.

19. In your opinion, what are the most important state powers?

Power over: Property and civil rights (i.e. private law), Commerce, Health, Education, Social affairs and programmes, Taxation (direct), Environment.

20. Have any of these federal or state powers been extensively interpreted?

All of them!!!

21. Does the Constitution provide the transfer of sovereign powers to regional or international organizations?

It does not explicitly, nor implicitly, I would think.

22. Does it address this issue in the domestic legal system, taking into account the decentralized structure of the federation?

Again, it does not do so explicitly. The reading of the Constitution by the courts, however, states that if Federal authorities are the only competent ones to sign treaties at the international level, within Canada, each order of government stays within its own sovereign legislative realm as far as the enforcement of the treaty is involved. In fact, it has created, specially since the second world war, a state of confusion under which Federal authorities have often bypassed provincial authorities to enforce internally the obligations it had subscribed to externally.

23. Does it give the states the right to ratify international treaties or agreements? If so, in which conditions? How is the international responsibility of the federation addressed?

The Canadian constitution does not do so explicitly. In practice, it is not possible. However, over the years, the province of Quebec has managed to impose its presence on the international stage, through the signature of a few multilateral instruments within la Francophonie and sits as a full fledge government within its instances, alongside representatives of the Canadian federal government and those of another Canadian province. This field is one of the (very) gray zones of Canadian federalism, although it is rarely invoked by the provinces, except Quebec and jealously guarded, as far as possible, by Federal authorities.

VI. LOCAL AND MUNICIPAL GOVERNMENT

1. Does the Federal Constitution recognize local or municipal autonomy? And the state Constitutions? If so, which term is it used to refer this autonomy? What substantially follows from this constitutional recognition?

In Canadian law, there is no such constitutional recognition of local or municipal autonomy. They strictly detain delegated powers from provincial authorities and are, in all respects, submitted to provincial authority. The same goes, in effect, to “state” constitutions, since there are no such written and explicit constitutions for any Canadian province.

2. Are the local representatives democratically elected by the people of the municipality or local entity? If not, which is the method for the election?

Yes. Local (municipal) elections are held every four years and every person living within the municipality’s boundaries is entitled to vote.

3. Are local entities under federal or state control?

They are strictly under provincial (state) control and, in theory at least, are even prevented from dealing directly with federal authorities.

4. If so, are these controls limited to issues of legality or do they also cover issues of opportunity?

Provincial control is for all purposes, mostly restricted to broad policies or to the interface between other provincial powers (ex: motor vehicle traffic, police, etc.) and delegated municipal powers. Legality control is mainly conducted through the courts and the judicial review process.

5. Can municipalities or other local entities challenge federal or state law or other decisions, on the grounds that they violate their autonomy? Before which bodies or courts?

Yes, they can and they effectively regularly do so. The arguments they raise cannot be that their autonomy is violated, though; rather it is based on strictly legal grounds or constitutional arguments relating to the distribution of powers (i.e., the province cannot exercise a given power which belongs to Federal authorities) or human rights (the provincial statute violated one of the basic liberties or freedoms otherwise guaranteed by constitutional or quasi-constitutional norms). The challenges are conducted before the appropriate judicial courts, generally the Superior courts of each province.

6. Is the design of the local government (kind of local entities, organization, powers, human resources, etc.) under federal or state power?

Strictly under provincial (state) authority.

7. What local subject matters or functions are allocated to the federation and the states?

As experience shows in Canada and elsewhere (ex: United States), there are, in my opinion, no such things. In Canada generally, what is considered “local” (i.e. sidewalks, streets, libraries, etc.) are under provincial jurisdiction and subsequently delegated, as explained before, to local authorities.

8. Can the federation establish direct bilateral relationships with municipalities or other local entities?

In theory, the constitution is silent on this matter. In practice, municipalities being creatures of the provinces, the provinces are allowed to prevent them from having direct relationships with federal authorities and some do so: Quebec does so. Contracts and official relationships have to be authorized by the provincial authorities. However, unofficial relationships are frequent at the personal levels.

9. Can the federation intervene upon their activities by exercising federal powers concerning a particular sector or through its spending power?

As will be explained subsequently, the federal spending power is not yet officially recognized by Canadian constitutional law. However, it exists in reality and federal authorities are tempted to use it and do actually from time to time propose to municipalities programs based on their spending power (particularly in the field of supporting, renovating or improving local infrastructures). In most provinces, provincial authorities then, under provincial statutes, have to intervene to approve such federal spending before it is accomplished.

10. Are there "city-states" in your system? According to which provision? Is their regime equivalent to the states' one? Apart from these city-states, are there any municipalities with a particular autonomous regime? Which ones? Which is the basis for the recognition of this regime?

No.

11. Can states create "intermediate" local entities between municipalities and states? Are there any intermediate local entities in your system?

Yes, the provinces can create whatever local or “intermediate” local entities. In the province of Quebec, the system of “urban communities” used to exist until recently (2000); the system of County regional municipalities still exists in rural areas.

12. Do they exist only in some states or in the whole territory of the federation?

I do not know. Similar entities probably exist all over Canada.

13. Are states free to establish their territorial limits? What powers do they have? To what extent are they dependent on the states?

The legal status of such entities is absolutely the same than for all municipalities. Therefore the provinces can establish any territorial limit for them. That is that they are creatures of the provincial states and have all the powers expressly devolved by the provinces to them. When they are established, they are usually not dependent on the province, but rather, are financed by municipal or local funds and taxpayers.

14. What is the system for the election or appointment of the chiefs of their governmental bodies?

The systems vary enormously. In Quebec for instance, some leaders are appointed by the provincial state (prefects) while most are chosen by the local authorities which are members of the regional body. However, leaders are not usually directly elected by the population.

15. Can the federation intervene in the organization, powers or financing of these intermediate local entities? How? For which purposes?

No, for the reasons explained above.

16. How are local powers determined?

Local powers are determined by the provincial legislature in the various general statutes relating to the municipal powers and, in some cases, in particular statutes relating to a given municipality (Montreal, Quebec city and Laval).

17. Can local governments provide services or perform federal or state powers? If so, which legal mechanisms coordinate their collaboration (delegation, assignment, etc.)? In which subject matters can this form of collaboration exist?

In theory yes; in practice, it very rarely happens. If it was to be done with federal authorities, it would have to be accomplished through what is called administrative inter-delegation and it would have to be previously approved by provincial authorities. With provincial authorities, things would not be so complicated; any provincial-municipal contract would be sufficient if the municipality of otherwise legally capable of providing the services (through a general enabling statute or a particular statute).

18. Are local governments obliged to cooperate? Do they have a right to receive financial funds from the federation or the state that asks for the collaboration?

If such a duty was imposed by provincial law, municipalities would have to comply; they would have no right to be financially compensated for the supplementary services offered; in practice, however, some sort of financial deal would be worked out.

19. Do local governments have normative or regulatory power? Which other general powers do they have? What powers are lacking?

Local governments, as explained above, have all the powers which are delegated to them by the provincial authorities. These include so-called “regulatory” and “normative” powers, as long as they are explicitly granted to them by the enabling provincial statute. In practice, they usually have very extended powers, including those of direct taxation (i.e. the raising of moneys through direct taxes). It

can be said that, generally speaking, they have all the powers necessary for the exercise of their statutory responsibilities.

VII. INTERGOVERNMENTAL RELATIONS

- 1. Does a principle of collaboration or constitutional loyalty among the different political and administrative authorities exist in your federation? If so, where is recognized (constitutional law, convention)? Which is its content and what consequences follow from this principle? To what extent is there a hierarchy among the different administrations?**

No such principle exists, legally, constitutionally or even conventionally speaking. It does not mean that the courts could not eventually recognize such principle.

- 2. Does the Federal Constitution establish a system of intergovernmental relations between the federation and the states? If so, through which mechanisms? Are these mechanisms established in other constitutional or legislative provisions?**

No, not explicitly at least. Usage only has established a system of intergovernmental relations between Canadian, provincial and federal, governments. The uses consist mainly of intergovernmental conferences and meetings at all levels (civil servants, deputy ministers, ministers and prime ministers). On a day-to-day basis, there are an innumerable number of relations between the various governments at all levels. Finally, one must note the existence of literally thousands of agreements of all sorts between all orders of governments. In the case of transfer payments and of equalization, however, intergovernmental relations are defined by statutory (that is, legislative) provisions. Transfer payments have no formal constitutional basis, while the principle of equalization (but not its modalities) can be found in the Canadian constitution.

- 3. To what extent are institutional practices or conventions important on this matter?**

How can the concept of “institutional practices” be defined? If it is equivalent to usages, as explained above, they are quite important. I do not think, however, that they turn into “constitutional conventions” as they are understood in our British-type of government.

- 4. Generally, which is the importance of intergovernmental relations for the dynamics of the system?**

Intergovernmental relations are, of course, most important for the evolution and the dynamics of the system, particularly in the context of the Canadian constitution which is extremely rigid as far as its amending process is concerned. It means that the necessary flexibility in a “new” and evolving reading of the constitution is more or less confided to courts and political and administrative actors. In other terms, in some cases, intergovernmental relations compensate for the rigidity of the amending process; however, in many other cases, unilateralism can also become a very important factor affecting federal-provincial relations.

- 5. To what extent do they allow to make more flexible the formal allocation of powers?**

As explained above, intergovernmental relations have a role to play to help governments, federal and provincial, in the effective implementation of their constitutional responsibilities. This phenomenon has become more crucial specially in the recent years. Before that, constitutional powers were essentially interpreted more in terms of exclusiveness and conflicts; now for the last twenty-five years, complementarity and interface have had a strong influence on the reading of the Constitution both by the courts and federal authorities, allowing for a greater federal say in traditional exclusive provincial powers.

- 6. Are there organisms to coordinate the horizontal collaboration among states?**

Yes, in most sectors; however, there is no general organism coordinating all relations between the provinces. In most sectors, there is at least one annual conference (or meeting) of the ministers responsible in the various provinces; sometimes, they meet on a more frequent basis. They discuss topics of common interest and in some sectors will sometimes call for joint action on a given topic of concern or call for an intervention (usually in the form of more money) of federal authorities.

7. Does the federation participate in these organisms?

Generally not. Federal representatives are sometimes invited for the last part of such meetings or, more often, a subsequent federal-provincial meeting is organized.

8. Is an authorization required for their creation? How the states are represented? Are they important for the system?

No authorization is required for the setting up of interprovincial cooperation mechanisms.

9. Which role do local governments play in the system of intergovernmental relations? In which organisms of collaboration do they participate?

For all practical purposes, local governments play no role whatsoever for the formal system of intergovernmental relations. If they have any say in the intergovernmental process, it is through their voluntary lobbying organizations.

10. Do different governments or administrations usually participate in organisms or entities with legal entity (public or private: consortiums, associations, foundations, private societies, etc.)?

They can and, in some cases, they do. Governments and administrations can participate in both public and private ventures, whatever shape they take or legal status they have.

11. Is this joint collaboration usual for developing public works, managing services, or financing of activities?

There is no set model for such endeavors. When it is done, it is usually through crown corporations (i.e. State - provincial or federal - institutions) investing in private ventures through the buying of vast amounts of shares.

12. Which legal regime is applicable?

In some cases, the legal entity benefits from a governmental status and can enjoy, among other things, many immunities. In other cases, no immunities can be enjoyed and the entity is treated like any other person (physical or moral). The applicable jurisprudence on this point can be of the greatest complexity.

VIII. TAXATION

1. What is the level of state autonomy regarding incomes?

In Canada, provincial autonomy can be fairly important with regard to the provinces' capacity to raise taxes. In fact, under the constitution, provinces have full sovereignty with regard to "Direct taxation within the Province in order to the raising of a Revenue for Provincial Purposes", as well as for the borrowing of money.

2. Can they establish taxes? If so, are there any constraints? In other words, can they make use of the same kind of taxes (official prices, rates, extra charges, etc.) that the federation establishes? Can they use both direct and indirect taxation?

Provinces can and do establish taxes – and on a grand scale! All forms of taxation are acceptable under the Constitution, providing they are of a direct nature. Such taxes include: income taxes, property taxes, consumption taxes, value added taxes (VAT), amusement taxes and so forth. It is said in Canada that only two things are sure in life: death... and taxes...

3. Can they establish taxes over subject matters already charged by the federation?

Of course; then they can choose to come before or after federal taxes. For provincial sales taxes, for instance, it is calculated after the federal levies and includes the latter for the purpose of calculation of the provincial taxes. In other terms, taxpayers pay provincial taxes on the federal taxes already paid.

4. Can states ask for credit or issue public debit within the state or federation without the authorization of the federation?

Yes and they do so massively.

5. Can they do this abroad?

Yes and they do so massively.

6. If the federation has the power to authorize these operations, which are the legal basis that regulate this?

A priori, I am far from sure that Canadian federal authorities could have the power to prevent a province from raising moneys abroad. In any case, to my knowledge, they have never asserted such a right.

7. To what extent are state incomes important in contrast to the transfers that the states receive from the federation? How are these transfers regulated?

In concrete, financial terms, it is difficult to answer such a question. Overall, it would appear that for the year 2002-03, federal transfer to provinces and territories will amount to about 17,5% of their fiscal revenues and will represent an amount of about 34,7 billion dollars. Federal transfers are usually regulated by formulae which are most of the time contained in statutory provisions (Federal laws), including federal budgetary laws. In some cases, Federal decrees also regulate the transfer of payments to provincial authorities. All these techniques are more or less unilateral in that federal authorities do not need previous provincial approval before deciding the levels of transfer payments to be done to the provinces. It is a more or less unilateral process.

8. Do states participate in federal taxes? If so, in which taxes and to what extent do they participate? When states participate in federal taxes, do they have any kind of normative power (for instance, power to fix deductions, exemptions, discounts, etc.)?

Again, I am not too sure of what is considered as provincial participation in federal taxes. The only mechanism getting close to such participation – if I understand the concept - is the mechanisms through which provincial income taxes are levied by federal authorities at the same time than federal income taxes. It is the case in all provinces except Quebec as far as individual income taxes are concerned and except Quebec, Ontario and Alberta for corporate taxes. With such ways of proceeding, the provincial income tax is a percentage point levied under the same fiscal principles than the federal income taxes. The moneys levied by the federal authorities are then transferred to the province where

they originated. In the provinces where the exercise of provincial income taxes were retained (Quebec, Ontario and Alberta), a taxpayer has to file two income tax reports, each according to different rules.

9. Do states receive direct transfers or funds from the federation?

Of course. See answer before last.

10. What criteria are used to determine the amount of these transfers?

Some transfers, the main being equalization, are unconditional by definition. The level of such transfers is usually determined by defining a given amount to be paid on a per capita basis. Once established, the amount is multiplied by the population of the province as defined in the latest census. The number of new citizens and the circulation of persons can thus make a considerable difference in the amount of moneys unconditionally transferred to provincial authorities.

In the case of conditional transfer payments, the techniques vary enormously from one sector to the other. Some of the main sectors have to do with health, social services and post secondary education; other less important sectors have to do with basically all aspects of federal and provincial jurisdiction thus creating a vast and most complex web of financial relations between the two orders of governments. The question here becomes that of the extent to which Federal authorities can impose conditions in the exercise of their spending power in provincial fields of jurisdiction, which is one of Canada's constitutional law's unanswered burning question. Federal authorities will usually impose conditions which are, in fact followed by all provinces, even those, such as Quebec, which do not accept the legitimacy and the legality of such spending.

11. Do states participate in the determination of the amount of transfers? If so, through which mechanisms?

Usually not, as has been seen above. Sometimes, however, provinces are consulted by federal authorities in federal/provincial conferences and other consultative forums.

12. Can the federation intervene in what the transferred funds will be allocated to? If so, in which subject matters? To what extent? Generically or specifically? Can the federation determine their management or procedure?

Federal authorities, by definition and as seen above, in unconditional transfer payments will not and cannot intervene in any way to control the way in which the transferred funds will be spent by provincial authorities. As seen above, in the case of conditional transfers, the legal and constitutional question of whether Federal authorities can impose conditions at all and if so, to what extent, is not solved yet. In this context, it is sure that federal authorities have preferred to remain on a rather "safe" course and impose only "general" conditions, although in rarer cases the conditions can become fairly specific. It would therefore be difficult to think that the federation could determine their management or procedure. The educated guess in constitutional circles is that the courts will eventually accept the existence of a conditional federal spending power, providing that the conditions do not amount to an indirect control over a field of jurisdiction belonging to the provinces. The test will probably be close to that of American constitutional law in similar matters.

13. In general, how has the federal spending power determined state powers? What is its percentage with regard to state incomes?

Legally and technically, very little, as has been seen above. Practically, very much in some fields such as health where the federal system of conditional transfer payments has for all purposes imposed a rather uniform system of health care in each province throughout Canada. The same can be said in other fields such as legal aid for instance. As for the percentage of federal transfers with regard to state incomes, it amounts to about 17,5% (see above).

14. How does this system work regarding other federal and state transfers to local governments?

It is difficult to say precisely. However, it is certain that it is much more negligible since there are relatively fewer transfer payments by provincial authorities to local authorities and even less so from federal authorities.

15. What follows from the principle of “tax solidarity” among states? In other words, what kind of economic contributions do the states make to the federation? How does this system work, on the basis of which criteria?

In Canada, the mechanism providing for the redistribution of revenues from one province to the other is called equalization. Under that very complex formula, the tax revenue basis of each category of taxes in each province is calculated on a per capita basis. An average national is then established for each predefined tax category. For any given province, is then calculated how above or under this tax basis is in comparison with the national average, always on a per capita basis; the same calculation is then made for each predefined category, the plus being compensated by the minus. At the end, one finds a positive or a negative amount which is then multiplied by the population of the province. If it is positive, the province pays; if it is negative, it receives the money.

16. Can the federation unilaterally compensate the debts that states owe to the federation (for example, reducing federal transfers)? If so, in which fields do this power exist? Do states have any safeguards (right of audience, judicial actions, etc.)?

The question is difficult to imagine in Canada's case, since for all purposes there are no transfer payments from the provinces to federal authorities. But of course, if any amount was due by the provinces or, more usually, if federal authorities had overpaid the province and sought to obtain a reimbursement, it would simply reduce the amount due from the amounts to be paid. In theory, the provinces could probably challenge such a move before the courts if they thought that it is illegal or unconstitutional. In practice, the main forum will be the public opinion.

17. Who is in charge of the management, liquidation and collection of taxes?

Each government which levies its own taxes.

18. Can local governments collect taxes on behalf or by order of the federation or the state where they are located? To what extent and in which fields is this method used? To what extent is it relevant?

It is unheard of in a Canadian context.

19. What is the percentage of public spending in which each level of government –federal, state and local- incurs? How would these percentages change excluding the spending on defense, education, health, pensions and administration of justice? How many civil servants or administrative officials have each level of territorial government? Which are the figures excluding the above-mentioned fields?

20. To what extent are the relationships between levels of governance regarding the tax system satisfactory? Which elements are more satisfactory? Which elements are less satisfactory? At present, is there any trend that should be noticed?

Generally speaking, relationships exist between levels of governance regarding the tax system but are in many respects fairly minimal and remain of a technical nature. One will have understood that, for all purposes, the systems work and develop in parallel fashion. The average Canadian taxpayer is satisfied since he or she only files one income tax form in all provinces, except for Quebec. The less

satisfactory element is the disjunction between the tax base of the governments and their constitutional responsibilities and powers. In other words, it means that federal authorities currently raise too many taxes for their needs while the provinces raise too little. Therefore, the provinces need the federal money and conditions become attached, creating substantial levels of frustration in many provinces. There are also the different tax philosophies between some provincial governments and their federal counterpart (some more liberal provinces insist on having fewer taxes and fewer services to become more competitive with the United States, while others insist on keeping strong and interventionist governments – thus calling for high levels of taxation).

21. Can the federation establish the maximum or specified levels of state indebtedness or budgetary deficit?

No, it would be unthinkable, since the provinces are fiscally sovereign.

22. Can the federation establish the maximum wage of public officials (federal, state, local, etc.)?

Only as far as federal public officials are concerned since they have no other jurisdiction over minimum or maximum wages of provincial or local bureaucrats.

23. Are there coordination mechanisms among the different levels of governance?

No formal coordination mechanisms exists; informal conferences exists at all levels of the civil services in each province and innumerable day to day relations.

24. If so, are there institutions with a political nature (for instance, an assembly of territorial representation –Senate-, governmental institutions -councils of prime ministers-, etc.)? Are there mechanisms of technical coordination? (i.e., deductions in quotes of subcentral taxes in central taxes, etc.).

No.

IX. LANGUAGES

(Section to be addressed only in those systems where their multilingual reality is somehow legally recognized)

1. Does the Federal Constitution recognize more than one official language in the whole federal territory? If so, which are they?

Yes. The Canadian constitution recognizes both French and English as Canada's official languages in the whole Canadian territory. Such recognition is only valid as far as federal jurisdictions are concerned. Provinces have full jurisdiction over linguistic matters within their territory and as far as provincial jurisdiction and private relationships are concerned.

2. At the federal level, are they officially used on equal basis in the whole territory of the federation by the different authorities? Are they equally used in private? Why?

In theory, both languages should be used all over Canada in federal jurisdiction. In practice, federal services in the other official language can be easily obtained in Quebec, New Brunswick and in the Ottawa area. In all other places, English is the only language effectively used; then it is of course, always possible to explicitly require to obtain services in French but they will be provided with much delays and many difficulties.

3. Does the federal Constitution or law establish linguistic citizens' rights or duties?

Yes. The Canadian constitution gives to Canadians a certain number of linguistic rights. See section 93 (Education rights) and 133 (Languages before Federal parliament and Quebec legislature) of Constitution Act, 1867; section 23 (Minority Language Educational Rights) and 27 (Multiculturalism)

of the Canadian Charter of Rights and Freedoms. The Official Languages Act, a federal legislation, gives to Canadians a certain number of linguistic rights. It is said to ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions; set out the powers, duties and functions of federal institutions with respect to the official languages of Canada; and support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society.

4. Beyond recognizing or not more than one official language, does the Federal Constitution recognize the existence of other languages and the need of protecting them as well?

No, not directly at least. However, s. 27 of the Canadian Charter of Rights and Freedoms, recognizes multiculturalism as a constitutional value. In this context the protection and enhancement of multiculturalism does include the recognition of the intrinsic value of other languages and linguistic groups. However, the groups do not have the same constitutional protection enjoyed by the French and English languages.

5. Could you tell, approximately, the quantitative importance of these diverse linguistic communities?

The Anglophone community is of about 16,1 M (60%); Francophone, 6,6 M (24,6%); allophone, 4,1M (15,2%).

6. Do state constitutions recognize official languages different from those recognized by the Federal Constitution?

No provincial constitutions or laws recognize any other language than French or English. The status of these languages vary from province to province: most are unilingual English, except New Brunswick (officially bilingual) and Quebec (bilingual under the Canadian Constitution, unilingual under its own linguistic legislations).

7. If not, are they allowed to do it?

They certainly can since, within their jurisdiction, provinces are sovereign concerning linguistic matters, providing, of course, the provisions of the Canadian Constitution and, particularly, those of the Canadian Charter of Rights and Freedoms are respected.

8. Are federal and state official languages on an equal footing?

I am not sure I understand the question as asked.

9. Can states establish linguistic duties to citizens and companies different from those established by the federation?

Absolutely, always under the same principle explained above that within their jurisdiction, provinces are sovereign concerning linguistic matters. The same caveat concerning the respect of constitutional norms applies.

10. Can states exclusively or mainly use an official language different from the one established by the federation as official?

Absolutely, always under the same principle explained above that within their jurisdiction, provinces are sovereign concerning linguistic matters. The same caveat concerning the respect of constitutional norms applies.

11. Broadly speaking, which is the linguistic system regarding education?

In Canada, education is a provincial matter falling under strict provincial jurisdiction. It is the same, as just explained for linguistic matters. It means, combining both principles that the provinces can do almost whatever they want concerning the linguistic dimensions of education, always subject, however, to the applicable constitutional provisions. Before 1982, they mainly affected education in Quebec and Ontario but the protection was drafted in religious terms which, for many purposes, happened to coincide with the various linguistic groups (See s. 93, Constitution Act, 1867)..

12. To what extent are legislation and administrative practice adapted to the multilingual reality of the federation?

At the federal level, in theory at least, it can probably be said that legislation and administrative practice are adapted to the multilingual reality of the federation. The reality, however, is very different, as has been explained before.

13. To what extent are they the origin of conflicts between the different levels of governance or among the population?

It is difficult, in the Canadian context, to pretend that legislation and administrative practices are the origin of conflicts between the different levels of governance or among the population. It is the fact that different linguistic groups co-exist which causes conflicts and difficulties; these linguistic groups claim rights which the constitution provides or not and call for the courts to decide of their existence and limits.

14. Are the different languages an important identity symbol of the state?

Absolutely; the French and English languages are enormously important, at least symbolically, in the Canadian culture. In fact they were more or less the pretext for which a federal structure was chosen for Canada in 1864 and 1867. Since then, through history, debates have most of the time been held along linguistic and cultural lines.

X. GLOBAL ASSESSMENT AND ADDITIONAL COMMENTS

15. At present, how is the level of political decentralization generally assessed? What is your assessment?

The various points of view vary enormously on this question. In many provinces and for most Anglophone citizens of Canada, the country is often perceived as being too (or at least enough) decentralized; they do not perceive a greater centralization as a particular threat, quite the contrary. In Quebec, however, the situation is almost exactly the opposite where the general sentiment is that there should be more decentralization, if not for some outright independence, from the rest of Canada.

16. What are the main historical claims by states? To what extent are they satisfied?

The main historical claims must be seen in Canada from the perspective of Quebec and its population. It seeks to obtain all the powers necessary in order to protect and enhance its cultural and linguistic distinctiveness. Since the early days of conquest by the British occupant in 1763, Quebecers have sought to protect these traits. The federal system was seen in 1864 as an answer to these preoccupations. The subsequent judicial interpretation of the 1867 compact has been frustrating for many French Canadians. After 1962, they have managed to turn themselves into a political force and exercise a certain political power; assertions of greater constitutional responsibilities for Quebec were then made. Since then, the various successive Quebec governments have literally pushed the Canadian constitution to its ultimate decentralizing logic; at the same time, by the late sixties, a separatist movement appeared and substantially influenced the evolution of Canada's federal system. Two referendums later and one lost by the separatists by a very narrow majority, Canada's federal system

has remained relatively immune from substantial explicit changes, the federalist forces conceiving their role as keepers of the integrity of the system. Any attempts to substantially modify the equilibrium of the Constitution (Meech, Charlottetown) was met with strong opposition in many quarters, including in Quebec. A new generation of politicians will probably attempt to change the dynamics in order to meet Quebec's demands pragmatically within the next few years. Whether it can be done, remains unsure.

17. What are the risks and main opportunities for the development and consolidation of the system of political decentralization?

For the time being there seems to be some form of constitutional reform blockage in Canada, while the so-called "separatist" threat seems to be receding after the election of a staunchly federalist government at the provincial level in Quebec and while as far as a change of leadership does not materialize at the federal government's level. There are currently no risks of any serious decentralization process in Canada.

18. What are the main trends of development? Which is the likelihood of them coming true?

The main trends of development are fairly difficult to identify in federal-provincial terms. Challenged from the outside by the phenomenon of globalization and the emergence of supranational and regional trade blocks, the Canadian federal government is more preoccupied by keeping some form of overall legitimacy in the light also of always greater pressure from the provinces for greater fiscal leeway in order to properly exercise their constitutional responsibilities in particular relating to health and education matters. In other words, the Federal government is under siege from below (provinces) and above. The best strategy is clearly, in this context, to avoid touching with the distribution of powers set up.

19. Generally, would you say that the system is becoming more centralized, decentralized or that it is in a relative equilibrium?

Certainly more centrally as time goes by, although it can probably be said that the Canadian system remains a relatively decentralized federal system

20. Would you like to add any additional comment about the political decentralization of the federation that was not mentioned in the Questionnaire? Would you like to make any suggestion about the structure or the contents of it?

No.

21. Would you mind listing particularly remarkable literature -on the basis its prestige, depth, clarity, approach-, which allows to achieve a better knowledge of your federal system?

In Canadian constitutional law, the best – and by far – book is that of prof. Peter Hogg, Canadian Constitutional Law, Carswell Canada, 2002. On fiscal powers in Canada, see:

<http://www.desequilibrefiscal.gouv.qc.ca/fr/document/publication.htm>