COMPARATIVE TERRITORIAL POLITICS

Constitutional Politics and the Territorial Question in Canada and the United Kingdom

Federalism and Devolution Compared

Edited by Michael Keating and Guy Laforest

Comparative Territorial Politics

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Michael Keating · Guy Laforest
Editors

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palgrave
macmillan

Editors
Michael Keating
Centre on Constitutional Change
University of Edinburgh
Edinburgh
UK

Guy Laforest
Laval University
Quebec City, QC
Canada

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Preface

Canada and the UK are both multilevel political systems. One is officially federal while the other has an asymmetrical system of devolution, without constitutional limitations on the power of the centre. Despite these formal differences, the two systems of government have much in common. They are both parliamentary systems sharing a common heritage and both are advanced welfare states. They share many of the same dilemmas as they adapt to changing economic, social and political conditions in the modern world. These include the management of national diversity; territorial equity and welfare; the distribution of resources and taxation; legal disputes over the powers of the two levels and their resolution; intergovernmental relations; and the process of constitutional change.

In the chapters that follow, we review these issues in a comparative key, looking at the experience of the two cases and putting them in a broader context. Canada and the UK are not only interesting in their own right but they provide a focus for examining issues of spatial rescaling, state transformation and federalism, which are of wider relevance across the world.

This book is the product of a collaboration between the Royal Society of Edinburgh and the Royal Society of Canada as part of a partnership agreement. These two societies assembled teams of scholars from Canada and Scotland to address contemporary issues in federalism and devolution. Starting with case studies from the UK and Canada,

they were asked to produce comparative chapters examining common features and differences. The project was also supported by the Centre on Constitutional Change (Edinburgh and Aberdeen) and the Chaire de Recherche du Canada en Etudes Québécoises et Canadiennes (Montreal). We are grateful for their support and to the colleagues who discussed our draft chapters and contributed ideas. It is our intention to continue this collaboration and enrich the comparative understanding of constitutional change in our two countries and their component nations.

Edinburgh, UK — Michael Keating
Quebec City, Canada — Guy Laforest
March 2017

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Contributors

George Anderson is a fellow at the Centre on Democracy and Diversity, Queen's University, and former Deputy Minister (Permanent Secretary), Intergovernmental Affairs, in the Government of Canada.

Keith Banting is emeritus professor of political science at Queen's University, Canada and Fellow of the Royal Society of Canada.

David Bell is professor of economics at the University of Stirling and Fellow of the Royal Society of Edinburgh.

Eugénie Brouillet is professor of law at Laval University.

Jim Gallagher is former Director General for Devolution in the UK government and Fellow of the Royal Society of Edinburgh, now at Nuffield College, Oxford.

Ailsa Henderson is professor of politics at the University of Edinburgh.

Michael Keating is professor of politics at the University of Aberdeen and Fellow of the Royal Society of Edinburgh.

Guy Laforest is professor of political science at Laval University and Fellow of the Royal Society of Canada.

Nicola McEwen is professor of politics at the University of Edinburgh.

Tom Mullen is professor of law at the University of Glasgow.

Lori Thorlakson is associate professor of political science at the University of Alberta.

Stephen Tierney is professor of law at the University of Edinburgh.

François Vaillancourt is professor of economics at the University of Montreal and Fellow of the Royal Society of Canada.

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CHAPTER 1

Federalism and Devolution: The UK and Canada

Michael Keating and Guy Laforest

Introduction

There was a time when students of government could make a clear distinction between unitary and federal states. Unitary states possessed a single legislature and government, with a monopoly of law-making authority. Municipal or local levels of government could exist below the state, but they were typically creatures of statute without constitutional entrenchment and confined to administrative matters. Federal systems, by contrast, had two orders of government both constitutionally entrenched. There was a clear division of competences between them so that neither could encroach on the powers of the other. Canada and UK seemed to correspond closely to these ideal types. Canada was founded as a federation with its own constitution, although full control of its amending formula was only fully handed over to Canada in 1982. The federal

M. Keating (✉)
University of Aberdeen, Aberdeen, UK
e-mail: m.keating@abdn.ac.uk

G. Laforest
Laval University, Québec, Canada

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principle runs through politics and shapes political life. In the United Kingdom, there was a unitary parliament at Westminster, with boundless legislative powers, limited only by the inability of any one parliament to bind its successors. Territorial structures of administration and local government could be changed by a stroke of the legislative pen. There was not even a written, codified constitution to constrain Westminster sovereignty. The legacy of A.V. Dicey, who had insisted that federalism was a weak design of government and inconsistent with parliamentary sovereignty, lay heavy. Although there is a British federal tradition (Burgess 1995) from the idea of Imperial Federation in the early twentieth century, to ideas of Home Rule All Round as an answer to the Irish and Scottish questions and to European federation, none has ever formed part of the political mainstream. Instead, federalism has remained the 'f' word, a foreign idea unsuited to British conditions.

In the early twenty-first century, the distinction is less clear cut. Many unitary states have decentralized and in Europe an intermediate or 'meso' level of government has emerged, with an ambiguous constitutional status. Spain has its 'state of the autonomies', while Italy is a regionalized state with a recurrent debate on the merits of federalism. These reforms have been motivated by a combination of considerations of effective government and the management of national diversity. Established federal systems, for their part, have gone through decentralizing and centralizing phases. The expansion of government, and particularly the welfare state, in the twentieth century, often escaped the old divisions of competences, designed for a simpler age. Observers detected a move from coordinate federalism, in which each level has its own competences, to cooperative federalism in which both levels operate across a wide range of responsibilities, requiring them to cooperate (Laforest and Lecours 2016). Systems of fiscal equalization emerged to share resources across the national territory.

More widely, there has been a transformation of the state and a rescaling of both economic and social systems and of government (Keating 2013). The unitary nation state was, in principle, a territorial demarcation that bounded an economic system, a national society based on shared identity and a set of governing institutions. Actors, including business and labour, were locked into the national boundary and so had strong incentives to strike social compromises on economic and social policy. This is no longer true. Economic change is subject to global forces but at the same time it is shaped by local and regional factors below the level of the state. Welfare and social solidarity, often

built at the level of the nation-state, are being challenged by the ability of business to relocate, while issues of social justice are often framed at the local and regional level in the form of protests around closures or the local impact of global change. The process of social and economic change increasingly escapes the purview of governments at all levels, hence the search for new spaces for regulation and policy-making, above and below the state. Political movements based on demands for territorial recognition and autonomy have re-emerged, often using social and economic arguments to modernize historic demands for self-government. This is a challenge faced both by federal and unitary states. The outcome is that the relationship between territory and power has become more complex and contested both in unitary and federal systems.

The United Kingdom and Canada provide instructive examples of these processes. Canadian federalism has evolved greatly since 1867 and currently faces institutional and policy challenges, whether to do with Quebec, the West and particularly with regards to the status of Aboriginal peoples. Despite its unitary constitution, the United Kingdom was always concerned with territorial management. Indeed it was never a clearly unitary state, since there were distinct systems of law and administration in Scotland, Northern Ireland and, to a lesser extent, Wales. Since the end of the twentieth century, under the pressure of increased territorial divergence, it has been transformed by devolution into a decentralized polity, with self-governing legislatures and executives in Scotland, Wales and Northern Ireland.

Devolution and Federalism

In the twenty-first century, then, both Canada and the United Kingdom are complex multi-level states. Yet constitutional lawyers have traditionally argued that federalism is fundamentally different from devolution. In a federal state, the division of powers in constitutionally entrenched and legally enforceable. Under devolution as practised in the United Kingdom, the Westminster Parliament remains sovereign in all matters, merely lending devolved powers, which can be taken back by the centre. In practice, the distinction is less clear. Canada has gone through phases of expanding federal power and intrusion into provincial competences, and its constitution is open to interpretation (Gagnon 2009). On the other hand, it has always been politically difficult for Westminster to take back powers against the wishes of the devolved governments in Scotland, Wales and Northern

Ireland and it has never done so. These conventions have, over the years, been reinforced and given legislative underpinning. Nor does it normally legislate in devolved spheres, in spite of claiming the right to do so. Under the Sewel Convention, Westminster does not legislate on devolved matters for Scotland, an understanding that has been extended to Northern Ireland and Wales and formally recognized in the Scotland Act (2016) and the Wales Act (2017). The Northern Ireland settlement is underpinned by an international agreement with the Republic of Ireland, deposited at the United Nations. While these conventions have largely held since 1999, their constitutional status is far from clear. The UK Supreme Court, which rules on the competences of the devolved bodies (but not of the centre) has rarely been called on to pronounce on these matters, but in its January 2017 ruling on the need for parliamentary sanction for withdrawing from the European Union, it noted in passing that the Sewel Convention was merely a 'political' arrangement with no binding effect.

In one respect, UK devolution even goes further than its Canadian equivalent, in that Scotland and Northern Ireland (and in future Wales) have a 'reserved powers' model in which the devolved legislatures have competences in all matters except those expressly reserved for the centre. There are, moreover, no equivalents of those federal departments in Ottawa, which cover provincial competences. In important fields like health, environment and agriculture, there are no UK departments, only departments for the four component nations.

Canadian provinces, unlike the UK devolved territories, have had significant tax powers, giving them a wide scope for setting their own policies. The initial design for UK devolution left almost all tax powers at the centre. Now devolved territories, with Scotland in the lead, are gaining their own independent sources of revenue.

One significant difference does remain, however, in that devolution in the United Kingdom applies only to Scotland, Wales and Northern Ireland, with England, accounting for 85% of the population, ruled directly from the centre. Proposals for the government of England's city regions have been called devolution but this is a misnomer as they do not have the same federalizing logic. The result is that federalism is a more significant element in Canadian state-wide politics than in those of the UK, where devolved concerns are easily overlooked in London. If the UK is moving towards federalism, it is of an asymmetric type which Canada, in spite of demands from Quebec, has always rejected, apart some distinct competences in matters like immigration (Paquet 2016).

Federalism and devolution address range of issues in the design of government. The first is the recognition and expression of national diversity in plurinational states, in which more than one national group exists and demands recognition. The United Kingdom is an explicitly multinational union, in which national communities are recognized in England, Scotland and Northern Ireland (formerly all Ireland). Canada has long been seen by some as a bargain among two founding peoples, previously seen as English and French-speaking but latterly between 'English Canada' and Quebec. To this duality has been added demands by aboriginal peoples for recognition and self-government, and a sharper focus on multicultural diversity.

The second issue concerns decentralization of power in the interest of balancing and limiting central power. There are two elements of this, which Elazar (1987) called self-rule and shared rule. The former implies a constitutional division of competences to allow the lower level to a degree of autonomy. The latter concerns the need for the lower tier to have a role in policy-making in the central government, which may be achieved in a variety of ways including second chambers or intergovernmental committees.

The third aim is diversity in public policies to allow for local preferences where different populations vote accordingly. This diversity, in a modern welfare state, is balanced by considerations of equity and the equal right of citizens to vial services.

The fourth is allocative efficiency in management of public services. There is a lot written in the federal literature about the optimal allocation of competences in order to achieve efficiency and how this determines governmental structures (Hooghe and Marks 2009; Alesina and Spoloare 2003). Yet in practice these proposals often rely on value judgments and priorities. During the heyday of the welfare state, people on the left often preferred centralization to share resources and enforce national standards. A strand of thinking on the right prefers decentralization so that governments will compete against each other and drive down costs, as practiced by the governments of Stephen Harper between 2006 and 2015. On the other hand, there are people on the left who want more power for Quebec or Scotland on the grounds that they are more likely than Canada or the UK to promote pro-welfare policies and expansion of public services. There is rarely a purely technical answer as balancing powers depends on what people want to do with those powers in a given context; this nearly always politically contested.

Plurinational Federalism

There is a strand in the literature that argues that federalism is appropriate only for mononational states, where there is a unitary people or demos and that it should be symmetrical (Tarlton 1965). Where there is more than one nationally self-conscious people, it is said, then limited self-government will lead inexorably to separation as that people assumes to itself full sovereign rights. This argument has played in different ways in the two countries. Unionists in the United Kingdom, dating back to the late nineteenth century, have rarely disputed that the UK consists of four nations and have been willing to accord them all manner of symbolic recognition. The state flag even incorporates their national crosses, although Wales, for historical reasons, is missing. It was, however, precisely because they recognized that these were nations that unionists, from A.V. Dicey (1886) to Margaret Thatcher (1993) refused their right even to limited self-government. The response of many English Canadian federalists to Quebec has been more like the reverse. Quebec does have internal self-government as a province of Canada, but has struggled to attain recognition as a nation. The doctrine of Canada as a union of two founding peoples has gained little traction outside Quebec; instead Canada is seen as a union of equal provinces and of individual citizens. The recognition of Quebec as a 'distinct society' was one of the provisions of the failed Meech Lake agreement that caused most problems in the rest of Canada in the late 1980s. Later on, the Canadian Parliament did recognize Quebec as a nation within Canada, but only once the term has been emptied of much of its meaning. The demand for aboriginal peoples also to be seen as a founding element has met with similar difficulties. The commemorations surrounding the 150th anniversary of the federal founding of Canada in 2017 is putting some of these symbolic and substantial issues back on the agenda.

These arguments, which often seem to revolve around mere symbols and semantics, reveal deep differences in both countries as to the nature of sovereignty. On the one side are the strict constitutionalists, who argue that sovereignty lies and is defined in one place, whether this be the Canadian constitution or (for the United Kingdom) the Monarch in Parliament. On the other are those who see the state as a union of self-determining peoples, which may be renegotiated and modified in each generation (Tully 1995). Understandings of federalism have also evolved and nowadays there is more support for the proposition that federalism

can be valuable as a means of managing national diversity and that it can be asymmetrical (Burgess 2006, 2012; Burgess and Gagnon 2010; Requejo 1999; Noël 2013).

At the limits, the principle of plurinationalism might imply that the state is a voluntary union in which each part has a right of secession. Neither Canada nor the United Kingdom makes constitutional provision for this but constitution doctrine has evolved so that the idea is in practice negotiable. The Supreme Court of Canada (1998) in its landmark ruling in the Quebec secession case, declared that if any province decided to secede by referendum, with a clear majority on a clear question, Canada would be obliged to negotiate. The federal parliament interpreted this in a very restrictive way, but the principle is nonetheless there. Successive British prime ministers (Thatcher 1993; Major 1993) have accepted that Scotland could secede, again if there was a large measure of support. In 2012 Conservative Prime Minister David Cameron, while denying that the Scottish Parliament had the power to hold an independence referendum, agreed to an order giving it a temporary authority to do so. Whatever Westminster insists, this has set a precedent. Neither state, however, has accepted the right of their component parts to negotiate for a settlement short of independence.

In consequence of these disagreements about the foundations of sovereignty, neither state has come to a definitive agreement on its constitution. As the parties seek to address on constitutional issue, other demands come onto the agenda, broadening the scope of negotiation and increasing the number of partners. So to the question of Quebec were added the demands of Aboriginal peoples, the Western provinces and non-territorial issues, putting a grand constitutional settlement beyond reach. The United Kingdom has been better able to address issues sequentially and to embrace asymmetrical devolution. The question of Northern Ireland is effectively divorced from politics in the rest of the UK and it was only by chance that devolution arrived there at the same time as it came to Scotland and Wales at the end of the twentieth century. Wales has tended to follow Scotland in successive phases of devolution. English grievances in relation to Scottish devolution do not concern the concession of power to Scotland which, unlike in similar cases elsewhere, does not provoke much opposition, but rather the implications for England itself. The two key issues are public finance and the ability of Scottish MPs at Westminster to vote on purely English issues when the corresponding matters are devolved to Scotland (the ‘West

Lothian Question'). The latter is unanswerable as long as devolution in the United Kingdom is so asymmetrical and there is no demand for an English parliament. A partial remedy was applied in 2015 when an additional stage was added to English legislation, involving only English MPs, but the problem was not resolved.

Hierarchy and Cooperation

While federalism establishes two levels of government, the normal idea is that there should be no hierarchy; hence the term 'orders' rather than tiers of government. Each has its powers, while recognizing the need for cooperation between them. Devolution is, in principle, more hierarchical, given that Parliament retains sovereignty and only 'lends' powers to the local level and can in principle, revoke them and invade devolved competences.

One again, the distinction is less clear in practice. At the time of the federal founding of Canada in 1867, many of the key political actors in the British colonies believed in the existence of a three-tiered hierarchy between levels of government, with new provincial governments remaining subordinate to the federal government in Ottawa in some key matters, and with Ottawa in a similar position of subordination vis-à-vis the imperial Parliament in Westminster, at least on external or 'imperial' matters. The legal basis for this consisted in the powers of reservation and disallowance, which allowed the superior level of government to suspend and ultimately to reject a legal statute approved by the lower level. Although these powers are now considered dormant by legal experts, this idea of hierarchy continues to play out in the political culture of Canada, thus affecting the relationships between the federal and provincial governments. As Papillon and Simeon (2004), among others, have observed, this culture of hierarchy continues to be present in the way intergovernmental relations are conducted in Canada, as will be more developed further on in this book (Papillon and Simeon 2004).

In the United Kingdom, the Sewel Convention has held and London-based departments have little incentive to encroach on devolved competences, since their remit is mostly limited to England. Unlike in other European states that have devolved power (like Spain or Italy) there is a rather clear distinction between the tasks of the two levels of government. This is largely due to the fact that devolved powers are based on the competences of the pre-devolution Scottish and Welsh Offices.

In Northern Ireland it was the old Stormont Parliament that provided the template, which has caused serious conflict over welfare reform as this was long a devolved function but in practice funded by Westminster in exchange for parity of provision. The UK also lacks framework laws, as in Germany, Spain and Italy, to constrain the devolved legislatures. On the other hand, the role of the devolved governments in UK policy-making is very weak and London-based departments still operate according to hierarchical assumptions.

There are, moreover, in both countries, concurrent functions, in which both levels are competent and, as the role and reach of government change, these are redefined. The development of the welfare state after the Second World War called into question the divisions of competences in several federal systems, as central government extended its reach into matters historically handled at the lower level. There have also been movements in the other direction. Canadian provincial governments expanded their role after the Second World War and have the major role in service provision. The competences of the Scottish Parliament were extended in the Scotland Act (2016) to include aspects of social welfare.

These interdependencies have called into being an elaborate system of intergovernmental relations (IGR) to manage common problems and resolve disputes. George Anderson and Jim Gallagher (Chap. 2) examine this issue, noting the relative informality and lack of institutionalization of IGR in both cases, in spite of repeated attempts. Instead, IGR is dealt with at a high level by political negotiation and on a day-to-day level by officials dealing with practical and technical matters. IGR is predominantly an executive matter, with little role for the legislative assemblies.

Yet there are key differences between the two cases, resulting from the distinct history of each and the essential asymmetry of the UK arrangements. Devolution is a side issue most of the time in London and there has been little expectation that granting more powers to Scotland will lead to wider demands for devolution, although there has been some tendency for Wales to play catch-up with Scotland. Federal-provincial relations, on the other hand, are at the heart of Canadian policy making in important fields. The other provinces object to the idea of Quebec having a distinct status such as Scotland has in the UK. This makes it easier for the UK to concede, incrementally, more powers to Scotland. Asymmetry and the distinct politics of each of the devolved territories has also make British IGR largely bilateral. This even includes constitutional negotiations.

Where intergovernmental negotiation fails, it falls to the legal system to resolve disputes between orders of government. The courts also have a role in setting the parameters of the constitutional settlement by case law and so shaping the institutions. Eugénie Brouillet and Tom Mullen (Chap. 3) explore the different roles of the courts in policing Canadian federalism and Scottish devolution. In Canada, the division of competences is entrenched, limiting the powers of both levels. The constitution is difficult to amend. This has led the courts, initially headed by the Judicial Committee of the Privy Council and then the Supreme Court of Canada, to reinterpret the constitution in order to adapt to changing political, economic and social circumstances. From 1970 the Supreme Court explicitly adopted a progressive interpretation, according to which the constitution can evolve over time. This, according to Brouillet and Mullen, has led to an expansion of federal power. The Canadian Supreme Court has also taken account of constitutional conventions, although refusing to accept as a binding convention the need for Quebec to agree to major constitutional moves such as the patriation of the constitution in 1982.

By contrast, the courts have taken a restrictive view on the interpretation of the Scotland Act and the UK Supreme Court has explicitly rejected the idea that conventions can be legally enforced. This judicial restraint is helped by the fact that the division of competences between the two levels is reasonably clear and the lack of challenges from the UK Government. While the UK Government insists that it still has the power to legislate in devolved fields, it has generally accepted the convention that it will not do so. Such challenges as there have been have come mostly from private parties and often based on European Union law and the European Convention on Human Rights, which are directly applicable in Scotland in relation to devolved matters. There is also a general reluctance in British political culture to take matters to the courts, rather than resolving them through political channels. Even the contentious matter of whether the Scottish Parliament could authorize a vote on independence was by-passed in an agreement between the UK and Scottish governments to transfer the power on a temporary basis, on condition that a clear question was asked. The legality and modalities of a future independence referendum remain an open issue in Quebec, which would return were a future Quebec government to make a third bid.

Competitive Federalism

Theories of fiscal federalism have often argued that matters of macroeconomic policy, together with redistributive services, should be located at the higher, federal level (Oates 1999). The federal level can mobilize greater resources for redistribution and it can deal with asymmetrical economic shocks (affecting one part of the state more than others). If social welfare is decentralized, there is a danger of 'welfare migration' as the poor move to areas offering higher levels of support, while the wealthy move to areas with lower taxation. This can generate a 'race to the bottom', in which federated or devolved units seek to attract wealthy individuals and businesses in order to boost their economic and tax base, by cutting back taxes and curtailing expensive social provision. The evidence for such a race to the bottom is mixed, as decisions on migration and investment respond to many factors other than levels of taxation and expenditure.

Spatial rescaling has affected this as the process of economic change is simultaneously internationalized and localized (Keating 2013). There is now a large literature on the importance of territory to economic development, going beyond traditional theories on factor endowment to examine the institutional and social structure of territories and even into culture to understand why some places are more dynamic than others. Some versions of this 'new regionalism' present territories not merely as locations of production but as production systems, with their own internal coherence and interdependencies. These production systems are in turn seen as being in competition with each other for investment and technology as Ricardian comparative advantage, in which each region has its place in the spatial division of labour, gives way to absolute or competitive advantage. While economists do not all agree on whether places, as opposed to firms, really do compete, the idea has become a major issue in the politics of federal and devolved units. It is a theme that allows politicians to expand their support base and promise measures benefitting everyone in the community, even if in practice any given development strategy always produces winners and losers.

The new thinking about development has also influenced higher level governments, who have moved away from diversionary policies aimed at promoting balanced development across the state. Instead, the focus has moved towards endogenous development, based on local capacities,

and towards competition. This opens the way for a third variant of federalism, competitive federalism. Federal and devolved units compete to attract development in what is often seen as a zero-sum game. That in turn may reinforce the tendency to a race to the bottom, as the interests of investors are given priority. They also compete to impress their own electors through policy innovation and service development; this favour innovation and a race to the top.

Competitive federalism has raised the salience of territorial transfers and equalization. Citizens of wealthy territories are less willing to see their taxes redistributed as this might advantage their competitors. The opening of international markets means that transfers do not necessarily come back to the donor regions in the form or purchases of their products. Devolution and federalism serve to make inter-territorial transfers more transparent and politicians have an incentive to draw attention to them. In this context, getting agreement on a formula for transfers becomes more difficult and has eluded most federal systems. Where the aim is to give all territories the opportunity to sustain the same level of services irrespective of their wealth, this is called fiscal equalization. Equalization is a notoriously difficult concept, as governments may choose to equalize according to the resources at the disposal of each region, according to needs, or a combination of the two. Equalization may be full or partial and there may be more or less restrictions on the use of the resources that are transferred.

David Bell and François Vaillancourt (Chap. 4) trace the evolution of taxation powers and intergovernmental transfers in Canada and the United Kingdom. Canadian provinces have always had tax-raising powers although these were surrendered for some years during and after the Second World War. Devolution in the United Kingdom did not initially include substantive taxation powers; rather there was a block grant from the centre. Tax powers have since been given to Scotland, with Wales due to follow; the main elements are income tax and an assigned share of Value Added Tax. Northern Ireland has been given control of corporation tax to allow it to compete with the low rates in the Republic of Ireland.

In both countries, taxes are complemented by transfers from the centre. In Canada, this is based on an equalization element intended to compensate poorer provinces, and supplemented by specifically dedicated health and social transfers. The aim is to combine federalism with a degree of equity and national standards. In the United Kingdom, the

transfer is based on the pre-devolution Barnett Formula, which takes historic spending as the base and allocates changes as a population-based share of changes in comparable services in England. This has in turn been modified to take account of devolved taxes. So the UK lacks any equalization formula whether based on needs or resources, a matter that has caused much grievance in England and Wales, where Scotland is seen to benefit. The settlement owes a great deal to political negotiation and calculation.

Competitive federalism and the expanding ambitions of federated and devolved governments have also raised questions about the distribution of competences and the range of powers available. After the phase of cooperative federalism in which it was common to decry efforts to demarcate competences precisely between the two levels, there has been more attention on the allocation of powers. While much of the literature on federalism and public policy concentrates on the intergovernmental domain, there is now more focus on what governments can do with their own powers and on getting the appropriate competences to achieve their aims.

Social Solidarity

Competitive federalism risks undermining social solidarity between territories, as they compete for development, and within territories because of the race to the bottom. Fears have also been expressed that a weakening of common national identity in the face of plurinationalism could threaten the affective solidarity that underpins welfare states. On the other hand, new forms of solidarity may develop around plant closures and threats to locally-dominant economic sectors, which often become expressed as territorial as well as sectoral. The old idea that redistributive services can be kept at the highest level may have worked as long as these could be defined narrowly. It is increasingly apparent, however, that almost all public services can be redistributive, depending on how they are financed and who are the beneficiaries. Spending on pensions benefits the elderly, while spending on education benefits the young and families, even if, across the life-cycle we all draw on both. Economic development may in principle generate a surplus to be shared by all but any given strategy will benefit some and may affect others adversely. This is all the more true as the older, stable economic and social structures break down and new social risks emerge, linked to

gender, age and location as well as employment status. New approaches to welfare have moved away from passive support towards activation policies focused on the labour market and aimed at getting people into work. These approaches are often based on local and regional labour markets and linked to social, infrastructural and education and training policies handled by territorial governments.

The assumption that welfare and solidarity are based on the nation is called into question when there is more than one national community in contention. Just as welfare and nation-building have historically been associated in the consolidation of welfare states, to they can be in the case of stateless nations (McEwen and Moreno 2005; Béland and Lecours 2008). Both Scottish and Quebec nation-building in recent years have focused on strengthening the sub-state nation as a locus of solidarity and defending welfare settlements seen as being under threat. It may therefore be that decentralization, rather than undermining welfare, may strengthen it where the decentralized unit is more solidaristic. At least it may be the case that distinct welfare regimes emerge, with different priorities and favoured beneficiaries.

These issues are explored by Keith Banting and Nicola McEwen. They show that welfare state expansion in Canada was accompanied by centralization and a stronger federal role. Retrenchment since the 1990s was led by the federal government, offloading austerity to the provinces by cutting transfers. The consequent cuts were reinforced by provincial government decisions, except in Quebec, which undertook a re-design of welfare policy and consequently resisted the trend to growing social inequality elsewhere in Canada. The United Kingdom welfare state has historically been centralized and, from the 1980s, inequality has grew, especially under the neoliberal policies of Margaret Thatcher. Opposition to welfare retrenchment was a factor in driving support for devolution in Scotland and Wales although the devolved authorities initially had few welfare responsibilities. There is evidence that since devolution Scotland has made some progress in addressing inequality, although it is hard to prove a link to government policy. Since 2016 the Scottish Parliament has expanded welfare and tax powers and a broad commitment to tackling inequality but so far policy has been rather cautious. We can, however, say that responses to inequality have differed across territories within both states. Where the politics of inequality intersects with that of identity, as in Scotland and Quebec, there is scope for a differentiated response, with pressures from the centre being mitigated as the periphery.

Reforming Federalism and Devolution

Neither federalism nor devolution represent fixed points. They are, rather, undergoing constant change, accelerated by the current phase of spatial rescaling. Some of the debates about reform of federalism and devolution focus on arguments about the optimal allocation of competences and functional efficiency. These are certainly relevant, but the definition of optimal can depend on the values and aims of whoever is making the judgement. For some, the aim is preserving the federation or union as a value in itself, while others see the federated or devolved level as the locus of the *demos* and the starting point. Some favour extensive territorial and interpersonal redistribution and a large welfare state, while others are more inclined to the market economy and competition. In the United States, those in favour of a larger state and extensive social provision usually prefer a strong federal government. Those looking to a smaller state and reduced welfare, are for states rights. In the United Kingdom and Canada, matters are complicated, with centralizers and decentralizers on both left and right.

Procedures for constitutional reform differ across federal and devolved systems but both Canada and the United Kingdom now involve the federated units themselves in the process, Canada by constitutional law and the UK by convention. As more actors are drawn into the constitutional game, veto points multiply and comprehensive agreements become more difficult to reach. This is particularly so in plurinational states, where nationalists both at the state and the federated level start from different premises and neither is ready to resolve issues definitively when there is a possibility of making progress in later rounds. The intergovernmental nature of constitutional negotiations and their protracted character can marginalize citizens and create disenchantment. Hence there has been a search for ways to re-engage citizens and to give them the last say in constitutional matters. Yet this in turn creates difficulties in creating a deliberative framework for shaping the options. Resolving the issues by referendum appears to be the ultimate democratic sanction but risks division and creating artificial choices where matters are more complex.

Ailsa Henderson and Stephen Tierney (Chap. 7) show how both Canada and the United Kingdom have used referendums, albeit sparingly, to resolve constitutional issues, including proposals for the independence of Quebec (1980 and 1995) and Scotland (2014). The procedure was different in each case. In Scotland, the legality and

procedure for the referendum was agreed by both the UK and Scottish governments and the question evaluated by an independent body and then accepted by both sides, who also promised to respect the result. This was not the case in Quebec. In the UK the principle that a simple majority was sufficient was accepted, which it was not in the Quebec case, partly because Quebec contains national minorities who fear that they could be marginalized. In the case of the Aboriginal people, they claim their own rights of self-government. In both cases, the question put was whether or not to accept the proposition (independence in Scotland and 'sovereignty' in Quebec, when opinion polls showed strong support for an intermediate position. The advantage of the Scottish option, of an agreed question, is that attention during the campaign was focused on the merits of the issue, rather than the meaning of the question; but this did not stop arguments about the full implications of the two options (Keating and McEwen 2017).

Centrifugal and Centripetal Forces

Federal and devolved systems are rarely in a stable equilibrium but are caught between centrifugal and centripetal forces. Economic change and shifts in economic dynamism can change the balance of forces among parts of the state and between the levels. In some phases, the federal level has a surplus of revenues and can transfer to the federated units, with a consequent enhancement of its power; at other times, the units are better off. Changing patterns of welfare provision and spending can lead to more centralization or decentralization. Political identities are not fixed but can fluctuate and change over time, with the balance between state and sub-state allegiances shifting. States and sub-state nations are the site of competing nation-building and state-building projects, as we have seen in the cases of Quebec and Scotland, with varying fortunes.

Federalism and devolution also have their own institutional dynamics. When territories are endowed with their own self-governing institutions, these may have an interest in their own expansion, demanding ever more powers. Political movements in other territories may demand equivalent status, leading to a decentralist dynamic. Federal governments may respond by spreading devolution across the territory in an order to secure symmetry in what the Spanish call *café para todos* (coffee all round). This is not, however, inevitable. Some Spanish regional governments, struggling with the burden of fulfilling their commitments at a time of austerity,

have sought to give powers back to the centre. English regions, invited to adopt regional government as a counterpart to devolution in Scotland and Wales, showed scant interest. While there is strong resentment in the rest of Canada at anything that looks like special status of powers for Quebec, voters in England have been remarkably relaxed about Scottish and Welsh devolution. They have reserved their resentment for the role of Scottish MPs at the centre and for questions of territorial finance.

An important role here is played by party politics. They must operate in electoral arenas at two levels and across distinct territories, which can serve an integrative or a disintegrative purpose. In some cases, a statewide party system dominates, with elections at the lower level becoming 'second order' elections, decided on the popularity of the incumbent central government. Lori Thorlakson and Michael Keating (Chap. 6) show that this is not the case in Canada or the United Kingdom, where political competition in the constituent parts takes distinct forms. Historically, Canada has had different party systems at the two levels, even where the parties carry the same names. Federal governments, although always formed by a single party, are often effectively coalitions of different territorial interests, living together in greater or lesser harmony. In Great Britain (but not Northern Ireland), the same parties have competed across the state. They must then adapt to different electoral environments while maintaining the capacity to come together at the centre. For most of the twentieth century, they were able to play an integrative role, with substantial (if uneven) support in England, Scotland and Wales. In recent years, this challenge has become much more difficult, with the emergence of new cleavages both on territory and on Europe. Scotland has become a distinct electoral arena, while Wales has tended to vote more like England. In both Canada and the United Kingdom, the integrative role of parties has become more difficult in the face of weakening support for parties, party fragmentation and electoral volatility.

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CHAPTER 2

Intergovernmental Relations in Canada and the United Kingdom

George Anderson and Jim Gallagher

Introduction

While the Canadian and British experiences of intergovernmental relations (IGR) have one major point in common—they both have parliamentary regimes in which IGR is dominated by relations between the executive branches of the respective governments and are conducted largely in a pragmatic and informal manner, with no constitutional institutions—they differ in myriad and fundamental ways. Canada has evolved over 150 years to become a highly devolved but still essentially symmetrical federation, while the UK, long marked by hyper-centralism, has launched into a highly asymmetric regime that is still young and unsettled in many ways. This chapter sets out the story of each and then elaborates on some similarities and contrasts.

G. Anderson
Queen's University, Kingston, ON, Canada

J. Gallagher (✉)
Nuffield College, Oxford, UK
e-mail: jim.gallagher@nuffield.ox.ac.uk

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IGR in Canada

The drafters of the British North America Act in 1867, cautioned by the bloody 'war amongst the states' to the south, envisaged a centralized federation with a classic, dualist structure with limited overlap in jurisdictions. In practice, the regional diversity of the country—and especially the unique place of Quebec—have produced a highly decentralized federation in which the federal and provincial governments have been deeply intertwined, with heavy intergovernmental engagement. The depth and range of IGR have varied enormously over time. While the federal government has largely determined the agenda, the provinces (and three territories) have increasingly tried to develop common stands in relation to the federal government—their success depending greatly on the subject and their degree of common interest. Canada's constitution makes only implicit provisions for IGR, so the dense institutional arrangements have developed in an ad hoc, informal and pragmatic matter and are more an effect of the political environment than an independent cause. Form follows function.

Canadian federalism reflects the constitution, but also the deeply federal nature of Canadian society. The country is bi-national: Quebec is a distinct, French-speaking society, while other nine provinces and three territories are essentially English-speaking. But 'English Canada' is divided in its ethnic composition, regional history and economic interests. While the central political debate of the last 50 years on the place of Quebec has cooled, other tensions have built up, notably between the strong resource-based provinces and the others. Ontario voters, with almost 40% of the population, are always key in deciding the form of federal governments, while other provinces have had periods with little representation in the governing party's coalition. Ontario, Manitoba, and the maritime provinces tend to more centralist views on the federation, while Quebec, the three Western provinces, and Newfoundland and Labrador (Canada's other distinct society) are more assertive of provincial autonomy.[1] Federal political parties are now separate from their provincial counterparts (see Chap. 6). While there are some constants in how provinces approach federal questions—Quebec's defence of its autonomy and Alberta's of its resources—within each province parties often have substantially different positions—the federalist Liberals versus the separatist Parti Quebecois in Quebec being the most dramatic example—so a province's approach to IGR can shift significantly with a change in government.

Until the 1930s the two orders of government operated quite separately, with limited overlap. However, the depression, the Second World War and then postwar reconstruction all put governments under strain, with the federal government playing the dominant role as interrelations increased, particularly around the creation of the modern welfare state. However, with time the federation has become very decentralized, with federal spending after transfers representing only 30% of all government spending. Federal leadership has declined as provincial (and municipal) governments have become large, and more coordinated in dealing with the federal government.

Construction of the modern Canadian state developed through different phases. The federal government introduced child benefit payments in 1945 and support for a trans-Canada highway in 1949. The constitution was amended to make pensions a concurrent jurisdiction in 1951, leading to old age pensions. Equalization payments to the poorer provinces and a hospital insurance programme both started in 1957. The federal government brought in a post-secondary student loan programme and an enhanced housing programme in 1964. The contributory Canada Pension Plan was started in 1965. Medicare, the universal publicly funded health insurance system, was introduced in 1966. The federal government developed its role in supporting post-secondary research through the National Research Council, and the creation of the Canada Council in 1957 (for humanities and social science) and the Medical Research Council in 1969. By the beginning of the 1970s, the federal government was engaged in most areas of the modern welfare state and economic management (primary and secondary education being the main exception) and provided extensive fiscal transfers to the provinces[2] (see Chap. 4). Since then the federal government has remained engaged in almost all of these areas, though its role has been subject to constant revision.

By far the most dramatic economic issue affecting IGR has related to natural resources, especially because changing petroleum production and prices can dramatically influence the balance of economic activity and fiscal capacity of different governments. The second oil price shock in 1979 led to the federal government's extremely contentious National Energy Programme, designed to shift petroleum activity and revenues away from Alberta. There were also bruising confrontations regarding control and benefits of petroleum offshore of the Atlantic provinces, given debates regarding their jurisdiction. The 1981 constitutional package somewhat strengthened provincial powers in relation to non-renewable resources,

while effectively precluding the possibility of federal export taxes on resource exports (Cairns et al. 1985).

Federal-provincial-territorial fiscal arrangements are a constant issue and no fiscal architecture ever lasts more than a few years. By 2016, over a quarter of federal spending went to transfers to the provinces and territories—up from just over 10% in 1966 (though federal spending as a percentage of GDP was about half that of the 1960s).[3] While the principle of equalization is embedded in the Constitution of 1982, its implementation has changed dramatically, as have other federal transfers to the provinces (and territories), in their purposes, degree of conditionality and allocation amongst governments. The dramatic rise in petroleum prices and production in the early 21st century destabilized the equalization regime as Ontario became a 'have-not' province.

From the 1960s to the 1990s the most fraught area of federal-provincial relations was the existential question of the Constitution, which was linked to rising separatist sentiment in Quebec. Serious but unsuccessful discussions started in the 1960s and Prime Minister Pierre Elliot Trudeau finally forced the issue in 1981, with a proposal that included an entrenched charter of rights. The Supreme Court found his attempt to proceed with the consent of only Ontario and New Brunswick contrary to established convention, which led to further negotiations and revisions that won the consent of all provincial governments except Quebec. Quebec's non-adherence led to the failed 'Quebec round' of constitutional discussions led by Prime Minister Brian Mulroney, and then another failed attempt in 1992—the 'Canada round'—when the public overwhelmingly rejected in a referendum the agreement made by First Ministers. After years of fraught constitutional negotiations and these two crushing failures, politicians spoke of 'constitutional fatigue' and avoided re-engaging with so little prospect of success, focusing instead on 'non-constitutional renewal' (Lazar 1998).

IGR are driven by politicians, who have their policy and partisan agendas, so they always are engaged in a two-level game (Putnam 1998).[4] While leaders can sometimes be cooperative working towards a deal, they always mindful of public opinion and there have been moments of major conflict and high drama—perhaps never more than the 'damn the torpedoes' approach of Prime Minister Trudeau in the constitutional debates in 1981, when 'perhaps nothing (else)… would have broken the log jam' (Simeon and Robinson 1990). Relations can degenerate into vituperative combat, more oriented to winning support with respective electorates than

to reaching an agreement. MPs in the federal government's party have sometimes become strong—and public—supporters of demands by their provincial government that the federal government has been resisting.[5]

While Liberal governments have normally had activist agendas with the provinces, Jean Chretien's Liberal government imposed brutal reductions in fiscal transfers as it addressed federal deficits; however, once fiscal health returned, Chretien and his Liberal successor Paul Martin undertook significant new initiatives with the provinces (child tax credit, support for university research, health care). By contrast, Prime Minister Stephen Harper favoured an agenda of smaller government and federal disengagement from many areas touching provincial responsibilities, while shrinking federal revenues to their lowest level since the 1950s. The new government of Justin Trudeau has large ambitions affecting the provinces. It achieved a major reform of the Canada Pension Plan within its first year and has launched a major infrastructure programme. Additional priorities include a new health accord, the legalization of marijuana, reducing interprovincial trade barriers, improving programmes for indigenous Canadians, social housing, as well as an aggressive climate change policy, including a national price on carbon—which many provinces will resist, having developed their own plans during the Harper government's inaction. The provinces have made little progress in their attempt to develop a national energy policy (Leuprecht 2015).

Political Institutions and Forums

The Canadian constitution says nothing about IGR. While representation in the Senate is based on regions, its members are appointed by the federal government, so it has limited legitimacy and no role in federal-provincial relations. All governments are parliamentary so IGR are dominated by elected governments—'executive federalism'—with only the most occasional and exceptional role for legislatures.

The apex institution of executive federalism is the First Ministers' meeting, which brings together the heads of the federal, provincial and territorial governments as well as representatives of aboriginal organizations for some purposes. Below these are sectoral ministerial meetings, complemented in turn by meetings of deputy ministers and other civil servants. In 2003 provincial and territorial leaders established the Council of the Federation, which formally institutionalized their regular

meetings, where they (and ministers and officials) discuss their positioning relative to the federal policies and develop their own (quite limited) multilateral projects. Provinces have little trouble agreeing on wanting more money from the federal government with fewer strings attached, but their interests do not converge on the allocation of federal transfers amongst them or on some major files, such as interprovincial trade and climate change. The provinces also have regional forums in the West and Atlantic region and can have active bilateral relations, especially with their neighbours.

With increasing intergovernmental meetings in the 1960s, the federal government created the Federal Provincial Relations Office within the Privy Council (Cabinet) Office. There has usually been a federal minister dedicated to federal-provincial relations, but there is none currently, and the size of the FPRO has ranged from well over 100 staff to less than 20, reflecting the agenda of the time. Most provinces have similar internal arrangements, though Premiers often act as their own minister for IGR. Quebec and Alberta have highly developed procedures for controlling IGR from the centre, which contrasts with some other provinces (and the federal government) that are more selective in the issues that are centrally controlled or monitored.

First Ministers in 1973 established the Canadian Intergovernmental Conference Secretariat to provide logistical, but not substantive, support for IGR meetings. The failed Charlottetown Accord of 1992 would have constitutionalized an obligation to have annual meetings of First Ministers. The frequency of First Ministers meetings has fluctuated greatly, peaking in 1985, when there were three, but in most years there is only one—and frequently none (Prime Minister Harper held only three in 10 years). Premiers meet more often, but also through conference calls. All in all, ministerial meetings have been typically in the range of 30–50 a year, but with a peak of 59 and a trough of eight since the mid 1970s.

The constitutional debates excited huge interest, so parts of the First Ministers meetings were open to the media; moreover, there was real bargaining at the table and in back corridors. However, these public events greatly raised the political stakes and sometimes pitted the federal prime minister against the rest; it was difficult to negotiate before the cameras. Prime Minister Chretien adopted a very low-key approach to First Ministers meetings—calling them once deals were ready to sign and limiting them to a private dinner and morning session, followed

by a press conference. Prime Minister Martin was more forthcoming and called a First Ministers meeting on health care before a deal was done, though he had to enrich his offer significantly during the meeting to claim success. Prime Minister Harper even kept one meeting to a non-substantive dinner (Papillon and Simeon 2004).

It is inevitable that First Ministers lead on major constitutional issues, but they rely more on line ministers and officials for normal business. When necessary to help move a sectoral file, First Ministers can meet bilaterally or talk on the phone. Prime Minister Chretien invited provincial leaders on his trade missions, which proved congenial and permitted discussions without pressure to announce deals. Prime Minister Justin Trudeau met the Premiers on climate change 4 months after assuming office and he promises regular meetings with them, which is consistent with his government's agenda. He had earlier invited Premiers, indigenous leaders and some mayors to join him at the opening session of the UN's climate change conference in Paris.

Making Policy

While one or more provinces can sometimes push the national agenda—the recent agreement on pension reform followed Ontario's threat to proceed with its own supplementary plan—in general the federal government leads in shaping the agenda of IGR. Its fiscal role, strong convoking power and centrality as a national newsmaker give it advantages no province, or even the provinces collectively, can have. However, it must consider how it might achieve an aim, whether by agreement, or an imposed arrangement; its choice may depend on its legal jurisdiction or the financial incentives at its disposal.

The original BNA Act envisaged that the federal government could intervene when necessary in areas of provincial jurisdiction, but the federal powers of 'peace, order and good government', to disallow a provincial law, and to declare a work to be of federal interest have fallen in desuetude, and there is nothing comparable in Canada to the supremacy, pre-emption, or commerce clause in the United States, which gives the US government almost limitless ability to intervene in state matters (Dymond and Moreau 2012). Thus the federal government has been very constrained in working with the provinces to reduce internal trade barriers. Furthermore, while the federal government can enter international treaties on its own, it does not have the power of the Australian

parliament to impose treaty provisions on provinces so the provinces increasingly join trade negotiations touching their jurisdictions.[6] Sometimes, to get an international deal, the federal government must consider a side payment to a province—for example, a possible $400 million to Newfoundland in exchange for its losing the right to require fish processing in the province in the Canada-Europe free trade agreement (Comprehensive Economic and Trade Agreement or CETA).

Unlike 'integrated' federations, Canada has few areas of concurrency (agriculture, immigration and pensions) and even where concurrency does apply federal laws are not administered by the provinces, unless by agreement. (Criminal law uniquely is a federal jurisdiction that is provincially administered.) Pensions has been a concurrent jurisdiction since 1951, but the provinces have paramountcy, which has led to a unique arrangement whereby changes to the Canada Pension Plan (and the parallel Quebec Pension Plan) require the approval of the federal government and two thirds of the provinces representing two thirds of the population (Little 2008). This formula effectively gives Ontario a veto, while Quebec retains control of its separate, but coordinated, plan.

As a practical matter federal and provincial jurisdictions can overlap when each has a head of power that permits legislating on the same subject. Thus environment is not mentioned in the constitution, but provinces can use several powers (natural resources, property and civil rights, municipalities) while the federal government can use of others (criminal law, fisheries, navigation, interprovincial and international transport) to legislate on the environment. Both orders of government also have taxing powers that can be used for environmental purposes and they can attach environmental conditions to their spending, all of which requires dialogue about coordinating policies and programmes. The federal government has delegated the administration of some environmental regulations to the provinces. However, when there is no agreement each order of government is free to pass its own laws—which in the case of the environment means that the more stringent regulations would apply.

Climate change is very contentious in current federal-provincial relations. The federal government has the authority to impose a national carbon price but will make every effort to build a coalition, if not unanimity, with the provinces before proceeding. Federal governments sometimes use their legal powers to impose an arrangement on the provinces (the previous Trudeau government's National Energy Plan was a controversial example), but they have also been frustrated in trying do

so by the courts, as when the Supreme Court found the Harper government's proposed federal securities regulatory regime to be unconstitutional. Even when its legal authority is clear (as in questions of inter-provincial water management (Saunders 2014)) the federal government can defer to the provinces—usually because politically it sees no advantage in engaging on a divisive issue.

Many significant federal-provincial initiatives relate to social programming. The federal government may act directly with individuals through grants, loans or tax benefits—loans to PSE students, the old family allowance, and the current Canada Child Benefit—but these can require discussion and possible coordination regarding their interaction with provincial programmes. More controversially, federal governments have extensively used the spending power to induce the provinces to create national programmes relating to health, post-secondary education, social services and social assistance—almost two-thirds of federal transfers to the provinces and territories have been in this area. The federal government typically offered quite generous initial cost-sharing arrangements along with detailed conditions for a provincial programme to qualify. Quebec traditionally objected that the spending power was illegitimate when used in areas of its legislative jurisdiction, but the better view seems to be that both orders of government can spend on any object.

Over time the provinces have become more chary about the federal use of its spending power because federal financial support often declined once programmes were established. This happened with a vengeance in 1995 when the federal government unilaterally made dramatic cuts in its three major social transfers, while abolishing some of the conditionality associated with them. This highlighted the issue of the spending power, so in 1999 the federal government concluded the Social Union Framework Agreement with nine provinces (excluding Quebec): this recognizes the spending power's importance in the creation of Canada's social union, but introduces new procedures of consultation on federal social spending initiatives, notably not to introduce new Canada-wide conditional transfers without the agreement of a majority of the provinces and to consult with the provinces for at least 1 year prior to major changes. Not yet tested, this procedure could be important if the federal government pursues a pharmacare programme. This and the voting procedure pensions are the unique cases of weighted majority voting in Canadian IGR—which is thus far less extensive than such voting in the European Union.

Implementing Arrangements

While the federal government may require the cooperation of the provinces for certain major initiatives, it has wide freedom to change fiscal arrangements without provincial consent. This was demonstrated by the Chretien government's cuts to transfers in 1995 and the unilateral decision of the Harper government on the new 5-year framework for major transfers in 2011. Agreements between governments are essentially political. In 1991 the Supreme Court found that the agreement on the Canada Assistance Plan was not legally enforceable (the federal government had unilaterally reduced payments it had agreed to) and most intergovernmental agreements not legally binding, in part because of the doctrine that parliament cannot bind its successors (Poirier 2003). The arrangements between the federal and provincial governments are captured in an estimated 1000–2000 documents. Quebec and Alberta have formal internal procedures for approving all such agreements, but this is not true in other provinces and there is no standard form or status for such agreements.

The Canadian constitution does not permit the delegation of legislative powers from one order of government to the other, but it does allow delegation of administration, which is extensively done. Most frequently this is from the federal government to the provinces, as in much environmental regulation, but it can also work in the other direction, as with taxation. Both orders of government have extensive and overlapping taxing powers, but most provinces have delegated much tax administration to the Canada Revenue Agency (which has a jointly appointed advisory board), partly because the federal government charges no fee for collecting the provincial taxes: this has permitted major savings to provincial governments and to taxpayers (facing lower compliance burdens) while providing for a more coherent tax regime, most recently in the creation of the harmonized sales tax (VAT) between the federal government and most provinces.

Very creative joint agency structures were developed for the administration of petroleum activities offshore Newfoundland and Nova Scotia. While technically under federal constitutional jurisdiction, the provinces have passed their own 'mirror legislation' and they play an equal role in naming the board members and have veto powers over certain major decisions (Plourde 2012).

While the provinces are typically jealous of their jurisdiction in the health area, they have joined the federal government in setting up a

cluster of agencies in areas of common interest: the Canadian Institute of Health Information (over 700 staff); the Canadian Agency for Drugs and Technology in Health (130); the Canadian Health Infoway (150); and, the Canadian Patient Safety Institute (38). The provinces have the majority on the boards of these agencies, while the federal government is the biggest payer. The provinces were angered by the Harper government's unilateral decision on fiscal arrangements in 2011, so they excluded the federal government (which administers health care for aboriginals and veterans) from the pan-Canadian drug procurement arrangement they developed, which has saved hundreds of millions of dollars annually; they finally admitted the federal government in 2016, after the Liberals were elected (Council of the Federation Secretariat 2013).

The federal government has been excluded from any role in primary and secondary education (except for aboriginals), but the provinces have long cooperated through the Council of Ministers of Education, which has over 60 staff. It has some research capacity and reports on education indicators and represents the provinces in international meetings relating to education. The federal government funded for a few years the Canadian Council on Learning, but the Harper government shut it down; its former chair argues that Canada's lack of intergovernmental coordination is undercutting its educational performance (Cappon 2014).

Quebec often stays out of arrangements between the federal government and the other provinces, though it may negotiate special deals. While there is no asymmetry in constitutional powers, the Canadian system is open to asymmetrical administrative arrangements. Thus Quebec has not delegated any tax collection to the federal government—and the federal government actually delegated to Quebec the collection of the federal goods and services tax to get an agreement on a VAT. Quebec is particularly punctilious in how it accepts funds from the federal government in areas that it deems to be its exclusive jurisdiction.

IGR IN THE UK

IGR came as a surprise to Britain. Long a notoriously centralised state, it embraced devolution to Scotland and Wales in 1999, but meaningful and effective IGR have taken longer to emerge. They remain a work in progress, because they relate only to 15% of the UK's population and

because 17 years later, the relative roles of the devolved administrations and central government remain in a state of flux.

The United Kingdom of Great Britain and Northern Ireland, of course, had more than one domestic government and legislature for much longer. From the partition of Ireland in 1923 until the imposition of direct rule in 1972, the Stormont Parliament and government in Belfast exercised unusually wide domestic powers. It was the child of the home rule debates for the island of Ireland which convulsed British politics for much of the 19th century, but was confined to the six counties of Northern Ireland after partition (Fanning 2013). The Stormont administration dealt with virtually all domestic matters (other than taxation) and left issues like defence and foreign affairs (described, to modern eyes quaintly, as 'Imperial') to Parliament at Westminster. Northern Ireland was represented there as well, but the number of MPs was discounted to take account of the extensive devolution. This was the plan Gladstone had finally settled on to remove the stranglehold Irish MPs had on parliamentary business: it was carried over unchanged for a much smaller number of members (Gallagher and McLean 2015).

These two UK Governments, however, had little in the way of intergovernmental interaction. Stormont was largely autonomous on domestic policy, albeit funded as today substantially by the UK Treasury. The mooted 'Imperial contribution' towards defence and foreign affairs was always in effect negative (Bogdanor 1998). Westminster and Whitehall were happy to forget about Northern Ireland, and leave it to march to its own drum. Its domestic politics were primarily about the maintenance of a Protestant hegemony in a mixed community. The consequences finally boiled over in the 1960s and 1970s, and the UK Government's concern since then has been the maintenance of peace and development of a functioning political system in Northern Ireland, rather than IGR on day-to-day matters. Relationships concerning the Northern Ireland peace process were bilateral before Scottish and Welsh devolution and have remained so since. Successive UK Governments, from Prime Minister Heath through to Prime Minister Cameron, have devoted enormous effort to creating, sustaining or restarting devolved government in Northern Ireland, which are not described here (Powell 2008). This chapter will ignore the various suspensions of devolved government, and deal only with Northern Ireland to the extent its government is a player in the UK's wider IGR.

Path Dependence: IGR and Devolution's Backstory

The new era for British IGR began in 1999 when Tony Blair's Labour government created a Scottish Parliament and Welsh Assembly, each with legislative and executive powers. Both however have political and administrative back-stories, which influence them profoundly. Scottish home rule, or independence, has its roots in the union of 1707. That union did not incorporate Scotland into the institutions of the English state wholeheartedly: although the parliaments of the two nations (England and Wales and Scotland at this point) were merged, Scotland retained cultural and institutional difference. Most notably it retained a national church, different in tone and doctrine from the Anglican Church, a distinctive educational system and an independent legal system. It was always differently administered—by an all-powerful Lord Advocate in the 18th-century, and a Secretary for Scotland from the 19th (Kidd 2008; Gibson 1985). By the end of the 20th century the Secretary of State for Scotland was responsible for the majority of Scottish domestic policy and public services (tax and welfare being the main exceptions). Devolution in 1999, therefore, was in a sense simply adding a directly elected Scottish legislature to an existing government machine, itself deeply embedded in the UK Government and civil service. Analogously in Wales, the Secretary of State for Wales and the Welsh Office grew up as an administrative recognition of Welsh identity, though later (1965) and with narrower powers, and became the core of the Welsh Assembly and its government. This administrative inheritance has deeply shaped IGR, for good and ill. They started from, and still have some of the feel of, departments of the same government talking to one another.

Path dependence is also seen, however, in the political back-story of devolution, notably in Scotland. Home rule was the Liberal Party's answer to demands for Irish self-government, though put into effect only in Northern Ireland. But it was also contemplated as 'home rule all round' for all the nations of the UK. This policy was shared by the Labour Party in the 1920s, but was pursued seriously by neither party until the 1970s. Indeed the Labour Party struggled to see how its historic commitment to home rule could be reconciled with its belief in social solidarity across the whole UK for working people. What changed things, of course, was the advent of Scottish nationalism. It grew from a fringe movement in the early 20th century to a major political force

in the 1970s, fuelled by offshore hydrocarbons, and the slogan 'it's Scotland's oil' (MacLean et al. 2014). Labour proposed devolution for Scotland and Wales in 1978, plans that were derailed after only half-hearted support in a referendum. But then after 15 years of Mrs's Thatcher's government, Tony Blair in 1997 accepted devolution as the 'settled will' of Scotland, as the substantial majority in the referendum then showed. Wales was pulled along in Scotland's devolutionary slipstream. But creating a Scottish Parliament did not as one Labour politician unwisely forecast kill nationalism 'stone dead': instead it gave nationalists a role in domestic politics, and an opportunity in due course to become a government. As a result, for Scotland, IGR have been dominated by the independence question, and this affects the whole system.

One further background factor substantially conditioning UK IGR in is the nature of the UK constitution. It is neither codified, nor federal, although much of it is written down and it shares many characteristics with federal states. Legislation allocates powers to the devolved legislatures, but it does not (as a federal constitution would) constrain the legislative powers of Parliament at Westminster. So there are substantial legislative overlaps between devolved legislative competence and Westminster, which retains the formal capability to legislate on any matter, whether devolved or not.[7] By contrast, UK ministers have lost any legal powers to act on devolved matters.[8] And because the constitution is not a federal one, devolution and hence IGR matter only to 15% of the UK population. Westminster and the UK Government may be like federal central institutions for the devolved nations, but they remain a unitary government for England, which has the overwhelming proportion of the UK population. This deep asymmetry has deep consequences. It is easy to see IGR as essentially peripheral to the core business of the UK Government. A final conditioning constitutional fact is that although the devolved administrations exercise broadly the same responsibilities, there are important differences of detail. The legal basis of the devolution of powers to the Scottish Parliament and the Welsh Assembly differs, as does the boundary of their responsibilities. Northern Ireland is different again; formally it has even wider powers, reflecting its inheritance from Gladstonian home rule. So the constitutional arrangements militate against wholly uniform IGR across the whole UK, and even for the three devolved nations. Add to this the different political backgrounds—the continuing issues of the Irish peace process, the apparently endless debates about Scottish independence, and the struggle to define

a sustainable model for Welsh devolution—and the scope for routine or systematic processes of IGR is understandably smaller.

Joint Ministerial Committees and Other Forums

Nevertheless in 1999 with devolution to Scotland and Wales it was recognised that a framework for IGR was needed. A formal 'Memorandum of Understanding' between the governments established joint ministerial committees, comprising UK and devolved Ministers from all three administrations. A plenary joint ministerial committee was to be chaired by the PM or his/her representative, and there was provision for subcommittees. Although these were new, they had the look and feel of the UK Cabinet subcommittees which in a sense they replaced. The committees were serviced by the UK Cabinet Office, with devolved support, met in some of the same rooms, with the same style of papers and discussion. (Indeed some Labour politicians initially saw them as simply a continuation of the Cabinet subcommittees that they then sat on; this idea was swiftly and properly sat upon.) This didn't last long. Politicians of the same political parties in government in London, Cardiff and Edinburgh preferred to deal with issues informally. Officials struggled to find meat for the committees to chew on, UK Ministers saw no point in them, and they fell into disuse between 2001 and 2007. The one committee that did continue to operate was the joint ministerial committee on Europe, which was the direct descendant of the Cabinet subcommittee on developing UK negotiating positions on issues in Brussels. It had a job, and continued to do it.[9]

Another notable piece of path dependence was the continuing relationship between the devolved administrations (especially Scotland) and the UK Government in the formulation of the UK legislative programme. Remarkably, this is still shared in advance, in confidence, so that any issues about the boundary between reserved and devolved matters can be sorted out. Often there will be good practical sense in allowing Westminster to legislate with agreement on a devolved matter, alongside parallel legislation affecting England, or in consequence of it. Sometimes these have been quite major pieces of legislation (for example an integrated approach to pursuing the proceeds of drug and other crimes in the Proceeds of Crime Act 2002) though on other occasions they concern relatively small consequential changes in devolved matters. This is exactly what happened before devolution inside government and contrasts with Canadian experience.

So for the first 8 years of devolution IGR were low key and effectively intra-party. This changed in 2007 with the election of an SNP administration in Edinburgh, so that Labour no longer governed in both Westminster and Edinburgh—and when the Northern Ireland Executive was once again in operation. Attempts were made to revive the joint ministerial committees, with a plenary session and a main subcommittee to deal with day-to-day business. This continues and the most recent indications are that these institutions still operate, albeit on an infrequent basis. In 2012–2013 for example, the plenary joint ministerial committee and the 'domestic' subcommittee both met once, while the European sub-committee met five times to discuss a range of day-to-day European issues. However, the plenary committee did not meet at all under the post-2015 UK Conservative government until after the European referendum. When they do meet, the committees provide an opportunity to discuss policy questions, but also to raise issues of concern or dispute. The dispute resolution procedure essentially consists of continued discussion: there is no authoritative referee on intergovernmental disputes (although the courts can resolve issues of competence on legislation or the exercise of devolved ministerial powers). The ministerial committees are supported by shadow official committees of civil servants from the different administrations. It might seem surprising that public business is not hampered by the absence of more frequent meetings. There are two reasons for this. First, there is a great deal of day-to-day official cooperation, usually bilateral, on relatively low salience issues, just as before devolution. And secondly, the boundaries of the devolution settlement were developed from the pre-existing administrative boundaries, which had evolved to minimise spillovers and clashes. The devolved administrations therefore inherited those good fences which are said to make good neighbours.

One very important area of intergovernmental working is not covered in the joint ministerial committees at all: finance. Her Majesty's Treasury operates a parallel arrangement under which the finance ministers of the devolved administrations and the chief secretary to the have regular meetings of what is described as a finance ministers' quadrilateral. This discusses a range of financial issues, but all of them in the context of the pre-existing devolved financial arrangements, so they are substantially path-dependent. The UK Government is the largest source of finance for the large programmes run by the devolved administrations (60% of public expenditure in Scotland is the responsibility of the Scottish Government),

and most of this is calculated by the well-known, but little understood, mechanism of the Barnett formula which operated from 1978 until devolution in 1999 (see Chap. 4). It was designed to allocate resources inside government, and was thought at the time to be a temporary measure. Instead it has become ingrained in the UK's territorial constitution.

Barnett is very simple. It operates on the assumption that the devolved governments, like government departments in the UK, have existing and forward budgets ('baselines') for their spending programmes. As each those budgets is reviewed for UK departments, similar population-based adjustments are made to the equivalent devolved budgets. So if the education budget in England is increased by, say, £1 billion. The Scottish budget Welsh budget and Northern Irish budget, each increased by a population share of that £1 billion. The devolved governments (like the territorial departments before them) have discretion how to spend the total thus arrived at (Gallagher 2012). This was a practical method of dealing with issues inside government, but it has no obvious relation to any measure of needs. It is arguably a rough and ready way of ensuring that when the UK Government allocates resources to spending programmes, it bears in mind Scotland, Wales and Northern Ireland as well as England. For political reasons the Barnett formula is very hard to change, largely because it has turned out to be advantageous to Scotland. Barnett may not be based on measures of spending need, but has real practical advantages of simplicity and predictability. It has given the devolved administrations complete spending freedom, which means that UK IGR have been spared the tensions in some federal systems over the earmarking of resources by central government. Conversely it means that central government has no say whatsoever over devolved spending, in contrast with Canada.

The main issues discussed in the finance ministers' quadrilateral have been the detailed calculation of the Barnett formula. There is surprisingly little scope for disagreement, although the Welsh Assembly government pursued a grievance for many years that public expenditure on the Olympic Games held in London should have been regarded as English expenditure—and thus produced consequentials for Wales—and not UK wide expenditure. Barnett is changing for Scotland at least (and possibly to a degree for Northern Ireland) as a result of the introduction of devolved tax powers. It is very striking that the Scottish Government fought very hard to keep every advantage of Barnett in the complex negotiations to implement income tax devolution for Scotland.

Bilateral Relations with the Devolved Governments

For each of Northern Ireland, Wales and Scotland, however, much intergovernmental business has been conducted bilaterally and in different ways. This is most obvious in the development of each devolution settlement. The Northern Ireland settlement is subject to internal challenge, as the peace process set up after the Good Friday agreement of 1998 works its way through domestic politics. Stumbles have included the suspension of the institutions before 2007, though major step forward, for example, was the devolution of justice and policing in 2012. A 'Fresh Start' on the devolution settlements was made in November 2015 but in January 2017 the power-sharing executive fell again, precipitating a new crisis. Understandably, such changes are not dealt with through multilateral IGR.

Devolution in Wales has gone through a number of iterations, none so far wholly satisfactory. The 1999 legislation was during its Parliamentary process altered from a model with an Assembly that was more like a local authority with collective corporate responsibility for running services to one with an executive within it. Further legislation in 2006 clarified that distinction, while creating a complex process for gradual extension of the Assembly's legislative powers—by means of Orders that had to be approved in both London and Cardiff. In practice this was like drawing teeth. The same legislation also provided for the possibility of more thoroughgoing legislative devolution after another referendum (Wales's third since 1997). This was approved and legislation brought into make the Welsh settlement more like Scotland's, under which matters are devolved unless explicitly reserved. This complex and messy process has been entirely bilateral, directly negotiated between the UK and Welsh governments (Wynn Jones and Scully 2012).

The further development of Scotland's devolution settlement has also been bilateral, partly a matter of IGR, and partly a matter of high politics. After the election of a minority SNP administration in 2007, the UK Government (and the majority pro-UK parties in the Holyrood parliament) created the Calman Commission on Scottish devolution (Calman 2008), which recommended tax powers for the Scottish parliament. These were based on Canadian experience, and involved sharing the Scottish income tax base between the UK and Scottish Governments. The intergovernmental processes in which this deal was done were partly bilateral negotiation, and partly political brinkmanship; eventually,

the tax powers were enacted in 2012 with the agreement of the Holyrood Parliament, and came into effect in 2016. Calman also recommended extensive improvements to IGR, but these were largely ignored. The election of a majority SNP administration in 2011 led to the Scottish independence referendum in which separation was rejected. This was followed by the Smith Commission, which considered yet further devolved powers, including the more or less complete devolution of income tax. The Smith Commission was a negotiation between the all the UK political parties (including the SNP), with administrative support provided by the UK Government. The detailed implementation was subject to bilateral negotiation between governments. The scrutiny and approval of this and earlier constitutional legislation is virtually the only area in which legislatures in the UK have been involved in intergovernmental negotiations.

Patterns and Prospects

It will be seen, overall, that the ideal of intergovernmental machinery in the UK is still finding its feet. It is heavily path-dependent, and very politically contingent. All three devolution settlements are, for different reasons, subject to change, and except in times of high politics can be peripheral to the UK Government's main interests. Nor is IGR well integrated. Each of the devolved administrations has very particular issues it wishes to pursue bilaterally. Finance is dealt with in quite a separate stream, largely because of the British Treasury's self-image as an independent power in government, still dealing with the devolved administrations in the much the same way it did when they were government departments.

One major change however is over the horizon. As the UK plans to leave the European Union, the machinery of IGR will inevitably change, both during the exit negotiations and subsequently. Powers will come from Brussels to London, but to Edinburgh, Belfast and Cardiff too. Areas such as agriculture, fishing and environmental protection are already devolved, and are uniform across the UK only by virtue of EU rules. While the government at Westminster might be tempted arrogate to itself the powers currently exercised by Brussels, this would breach the constitutional conventions regarding the devolution agreements. So Brexit is likely to mean that the devolved administrations existing powers over policies like agriculture, fisheries, environmental protection are

enhanced—potentially quite significantly. It will be necessary for the devolved administrations and the UK Government to work out arrangements, for example, over access and management of fishing grounds and environmental protection. This will require intergovernmental discussions in which the UK Government will have to bargain to get agreement.

Similarities and Contrasts

Similarities

Politics is politics in both Canada and the UK, so countries experience conflict and political competition along with quotidian cooperation. Political conflicts are inevitable: they must be dealt with by politicians, but politicians also need them. Some of the conflicts are structural—notably about fiscal matters, whether transfer arrangements or sharing petroleum revenues in Canada or the Barnett formula in the UK. Others are about deeper political and constitutional differences—the stories of Québec, or Scotland or indeed Northern Ireland. While still others are the daily meals of political competition as parties distinguish themselves nationally or regionally. The strength and nature of major conflicts varies over time as issues arise and are resolved. This is most obvious in Canada, with its much longer history. The central issues of IGR have changed dramatically according to such contextual factors as the depression, war or building of the welfare state, as well as the more regional issues of identity politics and provincial economic advantage that have played into the constitutional and fiscal debates. Changes in government can also be critical, most dramatically perhaps when separatist parties have governed in Quebec and Scotland, but more generally as well depending on the ideology, partisan alliances, and agendas of the governments. The sudden appearance of Brexit on the top of the UK's agenda is only the most recent example.

Whatever the state of high politics, much intergovernmental work happens below the radar, as officials in both jurisdictions work pragmatically on issues that may be routine and uncontroversial, or complex and technical in areas such as finance or law. Sometimes the technical swiftly turns into the political, as for example in the UK in the negotiations over the detailed fiscal framework for new Scottish tax powers.

Another, perhaps surprising, similarity is the absence of constitutional arrangements in which these issues are discussed. The frameworks of IGR in both jurisdictions are essentially ad hoc and informal. The significance of Canadian arrangements has waxed and waned over time, as the scale of federal resources devoted to them shows. The UK arrangements are the product of administrative deals (in a 'Memorandum of understanding') between the governments. In the absence of a legal mandate they too have gone through periods of disuse. In both jurisdictions, IGR are executive driven, and the scope for oversight by legislators is very limited. Provincial or devolved leaders may, for strategic or tactical reasons, announce publicly their aims—their 'ask'—in dealing the central government. This may increase pressure on the central government and, should the demand fail, permit the passing of blame. Negotiations will normally be dominated by the executives with the legislatures or public having almost no role unless the leaders of a government decide that it may suit their purpose to involve the public or legislature in some way. This reflects the top–down functioning of parliamentary regimes (quite different from congressional ones). Very occasionally, however, legislators in Canada have made a difference as champions of a claim by their provincial government, for example over offshore rights or revenues, even going up against their own party when it is in government. This is seen today in the UK where Scottish MP's at Westminster are almost all nationalist members supporting the SNP government in Edinburgh.

Contrasts

The most profound contrasts are structural. Canada is a largely symmetrical federation, whereas the UK is deeply asymmetric. Canada has always been a federal country and the whole country is federal in that every Canadian functions as a citizen of both a provincial or territorial unit and of the country. The United Kingdom, by contrast, is not federal, and probably never will be; it is doubly asymmetric, with devolved arrangements for three parts of the country (but excluding the 85% of the UK citizens in England), and with the devolution arrangements varying for each of the three units.

These structural differences profoundly affect the political dynamics in the two countries. IGR are always important in Canadian political life from coast to coast and are a central concern of the federal government, while they are normally peripheral to the political life

of the United Kingdom, rearing their heads at time of crisis or change, and of interest to only a small minority of the population. Thus, thinking about the structure and functioning of the federation is a core interest of Canada's central government that must be factored into its other interests and objectives. Very often, Canada's federal government needs provincial cooperation—however obtained—in order to advance key policy and political objectives. For the UK Government, by contrast, IGR are not just a recent novelty, they are mostly an irrelevance, with little or no sense that they affect the political fortunes of the government, whose MPs are overwhelmingly English.

Thinking about the territorial constitution is a side issue for the British government; it is episodic, incremental, and driven by immediate crises. While there have been major constitutional reviews by the UK Government, such as the Kilbrandon Commission in the 1970s, in general it has tended to be reactive to pressures from the devolved regions and to deal with them with little regard for any larger systemic implications. Thus the model for Scottish devolution adopted by the Labour government in 1999 was largely conceived by through the Scottish Constitutional Convention, which was not concerned by the systemic issues for the UK. In Canada, by contrast, Quebec and other provinces have periodically developed elaborate proposals for redesigning the federation, but the federal government has always treated these as only one input in its thinking and it has always led on the broader processes of constitutional reform.

In substantive terms, the UK Government's default position has been to concede many demands for increased devolution—even though this means that it is becoming ever more marginal in the day-to-day governance north of the border. The Canadian federal government, by contrast, has largely resisted demands for increased constitutional devolution, which it views as risking its relevance to its voters across the country as well as its ability to manage major issues. Moreover, constitutional asymmetry has never found much favour in Canada: while it has been a favourite option of Quebec, Pierre Trudeau strongly resisted it as Prime Minister on the grounds that it risked making Quebec MPs marginal in Ottawa. The other provinces have traditionally been very chary of special powers or status for Quebec; Alberta, which is the second-most autonomy-minded province, has always advocated 'equality' amongst the provinces. So not only is Canada a symmetric federation, but it is characterized by active resistance to asymmetry.

In the UK the main allocation of powers was worked out during the period of administrative devolution and carried over into the new political set-up; it is remarkably clear, and British politicians—overwhelmingly English—have had little incentive or opportunity to influence or invade the jurisdictions of the devolved governments. In Canada, by contrast, the division of powers includes many overlaps and the federal government has made strategic use of its spending power to influence provinces, so the Canadian system involves much more interaction across a wide range of issues than happens in the UK. Canadian federal parties have often campaigned with the promise of major initiatives that require provincial cooperation or tranche on their jurisdictions in health, social policy, environment, local infrastructure and post-secondary education. In doing so, they are responding to the concerns of voters who tend to show little appreciation for the allocation of powers. At a technical level, the strict separation of legislative powers but the effective sharing of some administrative powers in Canada contrasts with the UK, where law-making competence can be shared, but executive powers are strictly separated.

Constitutional issues have been important in both Canada and the UK. The long story of Québec and its aspirations was the most significant intergovernmental issue in Canada for at least a generation, though on occasion it had to share pride of place with disputes over natural resources, notably with Alberta and the east coast provinces claiming the offshore. However, even when they were at their peak, Canada's constitutional debates shared the stage with other intergovernmental issues because of the overlaps between the federal and provincial governments in so many programme areas. In the UK, constitutional issues have been much more dominant as the focus of IGR. Northern Ireland has only ever raised a constitutional issue, though for much of recent decades, it was not intergovernmental as devolved government was suspended. The UK's main objective has been to reinstate and sustain devolved government, which has necessitated elaborate constitutional arrangements. Scotland's debate has been dominated by independence, and continues to be after the Brexit vote. Even in Wales, where secession is not a real issue, a series of incremental constitutional changes has been the main content of discussions between the Welsh administration and the UK Government. In all these cases, the British focus on constitutional matters reflects the clean division of powers and the preparedness of the UK Government to cede more or less completely a role on major issues of public policy in the devolved areas.

The horizontal asymmetry in devolution arrangements amongst the three devolved governments in the UK has led to the dominance of bilateral deals, which is a further contrast to Canada. Most major IGR issues in Canada are dealt with multilaterally, though there can be considerable flexibility in precise arrangements amongst the provinces. In general, there has been resistance to asymmetric arrangements, especially concerning the constitution, and provinces tend to complain jealously if one is getting a special deal. In contrast to the Privy Council Office in Canada, each of the three UK devolved administrations has its own (tiny) sponsoring department in the UK Government, and each has its own very particular issues. Northern Ireland's story is always dealt with separately, for understandable reasons. At times of crisis, Northern Ireland expects and gets immediate and sustained access to the top of the UK Government (Powell 2008). Scotland pursues a furrow driven over the past 10 years by nationalist aspirations, whereas Wales spent has spent over 10 years coming to grips with the reality of devolution, and seeking to fashion a well-functioning settlement (Wynn Jones and Scully 2012). In Canada, Québec has certainly presented a unique challenge, but most issues affect all provinces to some degree or another, and can be dealt with successfully multilaterally. However, there are exceptions where deals, such as those on the offshore with Newfoundland and Nova Scotia, are negotiated bilaterally and whose terms may include special arrangements in what are normally national programmes—which in these cases related to how offshore revenues would be treated in calculating equalization payments.

Naturally enough, most routine intergovernmental issues are about money. In both the UK and Canada the central government has more taxing capacity, but Canada's provinces raise an average of 83% of their revenues, which contrasts with UK past experience.[10] Despite this, federal transfers are important in Canada and so in both countries 'fiscal federalism' is a major preoccupation, though with many differences in form and process. Whereas in Canada the major transfers are system-wide (though with occasional tweaks, as in the offshore equalization arrangements), the UK has consistently made special arrangements for Scotland and Northern Ireland, and to a more limited degree for Wales.[11] A further difference in the fiscal arrangements is the ability of Canada's federal government to change the regime to meet changing circumstance. While the Barnett formula has become virtually untouchable, the formulas underlying Canada's equalization transfers and its health

and social transfers have changed dramatically over-time, with large shifts in the allocations by province. While the federal government consults the provinces on these arrangements, it has preserved the right to decide. Such transfers account for about 25% of federal programme spending, so the level of transfers are an important factor shaping the federal government's fiscal situation. Beyond this, shifting fortunes in the resource sector can have knock on effects on fiscal arrangements forcing design, as with the equalization programme. As much as the provinces care about such matters, the complexity of fiscal arrangements can make it difficult for provinces to mobilize public opinion in support of their positions. The fact that the UK central government is also effectively the 'provincial' government for England, establishes a measuring standard for what spending might be in the devolved areas, but there can be no comparable standard in Canada.

The UK's system of fiscal federalism is path-dependent, having evolved from the administrative arrangements inside the government. One result, perhaps surprisingly, is that the fiscal transfers from central to devolved government are utterly without hypothecation. It was not needed for transfers inside UK administration; and this practice was carried forward for intergovernmental transfers. There is one large, unconditional transfer for each government, which is free to spend it as it will. In Canada, the largest transfers are for health and social welfare and they were originally highly conditional, as the federal government used the offer of money as an incentive for the provinces to create new national programmes. However, over time the federal government backed off on conditionality—because of fiscal pressures, but also in recognition that once the programmes are established it should not try to manage them. However, even as it has backed off on most conditionality for the largest transfers it has tried to stay relevant to public concerns by creating new targeted obligations for the provinces, e.g. waiting times for certain surgical procedures, or smaller 'boutique' conditional transfers, such as for infrastructure, which have high visibility (guaranteed by ubiquitous signs). This concern of federal politicians to stay relevant to voters' concerns has often motivated federal initiatives affecting the provinces, but the same dynamic does not operate in the UK.

In conclusion, it is evident that context matters hugely. There are profound contrasts between Canada and the UK: symmetry versus asymmetry; overlap in jurisdictions versus largely 'water-tight' compartments; an active use of the spending power with conditional transfers

versus one big unconditional transfer; flexibility in fiscal arrangements versus rigidity; federal versus quasi federal. Arguably most of the lessons flow one-way, from a fully, formally, federal country with long experience of multilevel government, to a young special autonomy regime, which is still very much in evolution and facing significant management challenges.

Notes

1. See Rocher and Smith (2003). They suggest that there have been four competing visions of Canadian federalism: equal provinces; equality of national communities; a nationalizing, centralizing vision; and a rights-based vision (underlying the importance of the federal government for equality seeking groups). These streams certainly exist and often co-mingle. While Alberta and Quebec are both strong defenders of provincial autonomy, Quebec traditionally leans to 'two nations' while Alberta strong advocates 'equality of provinces'.
2. Richard Simeon's classic *Federal-Provincial Diplomacy: The making of recent policy in Canada* (Toronto: University of Toronto Press, 1972) traces the complex stories of pension reform, the federal fiscal arrangements and the constitutional debate in the 1960s.
3. For an overview of fiscal history, see Eisen et al. (2016).
4. Newfoundland has produced outstanding examples: see Rowe (2010).
5. Newfoundland has specialized in dramatic confrontations with Ottawa. See Rowe (2010), p. 142. Two Liberal MPs from Newfoundland voted in favour of a motion condemning their own Prime Minister for an alleged breach of the offshore agreement with the province.
6. At the explicit request of the European Union, the provinces were at the table in the free trade negotiations with it because of their importance in the EU's 'ask'; by contrast, the 'sovereign' member states of the EU were not at the table. However, India would not accept this for its states in the free trade negotiations with Canada and so the provinces were excluded to avoid an invidious comparison.
7. By convention (the 'Sewel' Convention, named after the Minister who first enunciated it) Westminster does not legislate on devolved matters without devolved consent. For Scotland, this was made the subject of a legislative declaration in the Scotland Act 2016.
8. Legislative delegation is unknown in Canada but has been possible in the UK—e.g. in the delegation of powers to the Scottish parliament to legislate for the 2014 independence referendum. Administrative delegation is common in Canada but virtually unknown in the UK although agency arrangments are in principle legally possible.

9. For a more detailed account of the operation of these committees see Gallagher (2012).
10. The UK has however taken explicit policy learning from Canada in changing its arrangements, to allow the Scottish parliament taxing powers. The Scotland Act 2012, extended in the Scotland Act 2014, was explicitly based on Canadian experience of sharing the income tax base between federal and provincial government, so that now around half of devolved spending is now supported by taxes which 'belong' to the devolved body. The system seems to work well in Canada; it is too early to say whether it works well in the UK.
11. There is an entirely separate fiscal regime for the three territories, which have small populations scattered across vast areas.

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CHAPTER 3

Constitutional Jurisprudence on Federalism and Devolution in UK and Canada

Eugénie Brouillet and Tom Mullen

Introduction

This chapter seeks to explain the role of the courts in Canada and UK in managing the territorial dimension of the respective constitutions. We explain the doctrines developed by the courts in both jurisdictions and try to set them in their political and social context, examining the constitutional frameworks; constitutional jurisprudence in Scotland and Canada; and future developments.

The Constitutional Frameworks

The two political systems accommodate regional diversity in rather different ways. One overarching difference is that Canada has a codified federal constitution but the UK's constitution is neither codified nor federal.

E. Brouillet
Laval University, Québec, Canada

T. Mullen (✉)
University of Glasgow, Glasgow, UK
e-mail: tom.mullen@glasgow.ac.uk

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The Canadian constitution places absolute and legally enforceable limits on government power and specifies the allocation of government powers between the institutions of national government and those of regional governments. Changes to the constitution, including the territorial allocation of power, may be made only by the process of constitutional amendment, which is more exacting than the process for enacting ordinary legislation.

Canada's patriation of full sovereignty from Great Britain was the end of a long process, but with no definitive break. Prior to the constitutional reform of 1982, there was no longer any doubt that Canada was a fully sovereign country both domestically and internationally, but the constituent power was still vested in Britain's Parliament. However, there had been an understanding for many years that the British Parliament would legislate on Canadian constitutional matters only in accordance with instructions from Canada.

The project to bring the constituent power back to Canada was frequently discussed by the federal government and the provinces between the 1930s and 1980, but the discussions failed because of a lack of agreement about the amendment procedure to be included in the constitutional text. In the early 1980s, the federal government launched a new project to patriate the constituent power, which would include the insertion of an amendment formula and a charter of human rights and freedoms into the Constitution. The project finally worked. The *Constitution Act, 1982* was thus adopted by the British Parliament.

Since 1982, amendments to the Canadian constitution generally require consent from the federal government and from the governments of seven provinces making up 50% of the Canadian population (the so-called general formula, applicable notably to modifications to the distribution of powers). In some cases explicitly mentioned, an amendment must be made by the unanimous consent of the federal government and all ten provinces.[1] Further non-constitutional constraints have been added since 1982, including the *Act Respecting Constitutional Amendments*,[2] which gives a veto to each of the five Canadian regions[3] over any constitutional amendment that formally requires only the application of the general formula. Several provinces have passed laws making consultative referendums necessary before the adoption of resolutions targeting an amendment to the Constitution.[4] It remains the case, however, that an amendment to the distribution of powers can be made without the consent of some provinces. No special provision is made for Quebec in the amending formula even though it forms one of the founding peoples of the federation.

By contrast, in the UK there were, at least according to the orthodox view of the constitution, and until recently, no absolute legal limits on parliamentary power. The unlimited sovereignty of Parliament meant not only that any change could be made to the laws or constitutional structure, but that even the most fundamental changes, including changes to the territorial allocation of power could be made by ordinary legislation. Changes to the arrangements for government of any of the nations that form the UK (England, Scotland, Wales and Northern Ireland) were assumed *not* to require the agreement of the people of that nation; all that was needed was that the UK Parliament enact the necessary legislation. It was expressly stated in the devolution statutes that they did not affect the power of the UK Parliament to legislate even on devolved matters.[5] So, whilst the federal character of government is constitutionally guaranteed in Canada, in the UK, although government is substantially decentralised, that decentralisation was not protected by fundamental law.

In theory, this means that it should be harder to change the allocation of power between national and sub-national government in Canada than it is in the UK. In practice, however, the autonomy of devolved government is strongly protected by the non-legal principles of the constitution and political reality. The creation of devolved government was approved by a popular referendum in 1997 and it would be politically impossible to reverse devolution without another referendum. Alteration of specific powers of the devolved institutions, as opposed to outright abolition would not require a referendum, but this too requires Scottish consent under the Sewel convention, which stipulates that the UK Parliament will not normally legislate within a devolved policy area without the consent of the Scottish Parliament. The convention is also part of the devolution schemes for Wales and Northern Ireland. Thus far, consent has been sought for all instances of UK legislation within the devolved area. Importantly, for Scotland the convention has been extended so that consent is also required for any alteration to the legislative competence of the Parliament or the executive competence of the Scottish Ministers (Cabinet Office 2013), Consent was in fact sought for the changes to devolved competence made by the Scotland Acts 2012 and 2016.

Conventions are not, of course, enforceable by the Courts, but the status of this particular convention may have been enhanced by the change made by the Scotland Act 2016 which amends the Scotland Act 1998 to include the statement:

> … it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. (Scotland Act 1998, s. 28(8))

The same Act stipulated that, 'The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements' (Scotland Act 1998, s. 63A), that abolition of either should be authorised by a referendum. The precise legal effects of these provisions are unclear but at the very least they constitute a clear political declaration that (i) there will be no interference in devolved policy areas without consent, and (ii) devolution cannot be reversed without the consent of the people of Scotland.

In practice, therefore, the powers of the devolved institutions in Scotland are at least as firmly guaranteed as those of the Canadian provinces because the apparent legal freedom that the UK Parliament has cannot be exercised to its full extent without creating a constitutional crisis. Therefore, the Scottish veto over any encroachment by the centre on devolved power may not in practice be much less strong than the provincial power over federal encroachment in Canada. Arguably, in practice the powers of Scotland's devolved institutions may be more firmly entrenched because no one province in Canada has a veto either under the law or the constitution whereas Scotland does have an effective veto. On the other hand, where the UK Government and Parliament accept in principle, that further powers should be devolved, the flexible constitution makes the process of change easy, which is not the case in Canada where that kind of change would require the consent of seven provinces making up 50% of the Canadian population.

Role of the Courts: Canadian Federalism

In a federal system that includes judicial review of constitutionality, one of the principal roles of the courts is to enforce the allocation of power by resolving disputes about the exercise of power. They often play a dual role of both maintaining the constraints set out in the constitution and promoting its flexible evolution. The text does not always supply a clear answer as to whether some measure proposed by either level of government is within its powers. In part because of the prima facie rigidity of codified constitutions, courts may use the interpretive leeway that often exists in constitutions to allow them to adapt to changing circumstances

without going through a formal amendment process. In Canada, the courts have played such a dual role. Until 1949 the final court of appeal was the Judicial Committee of the (British) Privy Council; since then it has been the Supreme Court of Canada.

To appreciate the significance of jurisprudence, we need to look more closely at the Canadian constitution's express provisions on the allocation of power. The *Constitution Act, 1867* (RSC 1985, App. II, no. 5) distributes power in a particular way. Sections 91–95 allocate both legislative and executive authority over various subjects to each level. Unlike many other federations, such as the United States and Australia, in which a list of specific powers is allocated to one level of government and all remaining powers are held by the other, Canada's Constitution sets out two lists of matters, one coming within the exclusive competence of the federal government (ibid. s. 91) and the other coming within the exclusive competence of the provincial governments (ibid. ss. 92 and 93). There is also a short list of powers under shared jurisdiction (ibid. ss. 92A(3), 94A and 95).[6]

Given that the main objective of the federative union was to provide for the economic and military needs of the new federation, legislative authority over these matters was given to the federal Parliament. It was given exclusive jurisdiction over, amongst other things, currency, taxation, the regulation of trade and commerce, banking, navigation, patents and copyright militia, military service and defence, criminal law, marriage and divorce (ibid. s. 91). The federal Parliament also was given the power to create a general court of appeal for Canada (ibid. s. 101).

The provinces retained exclusive jurisdiction over borrowing and taxation for provincial purposes, the constitution of the province, municipal institutions, education, property and civil rights in the province, the solemnization of marriage, local works and undertakings, the administration of justice, and generally 'all matters of a merely local or private nature' (ibid. ss. 92 and 93). The residual power to legislate on any matters not within the classes assigned exclusively to the provinces was given to the federal Parliament (opening paragraph of ibid. s. 91).[7] The original division of powers has been modified by constitutional amendment, but, as described above, the procedure is complex. This goes a long way towards explaining why only one important constitutional reform has taken place since the birth of the federation in 1867, namely the repatriation to Canada of the constituent power in 1982.

The enormous difficulty of amending the Constitution has made constitutional jurisprudence the preferred way to modify the regime to adapt to new societal conditions, via the courts, and ultimately the Supreme Court. This gradual evolution, less easily perceptible and less spectacular than formal amendments, has had a significant influence on the development of Canadian Federalism.

Contrasting Perspectives on Federalism

In Canada, there are divergent views on what federalism actually is, based on different understandings of how the country's political system emerged originally. The first view is territorial and mono-national; the second takes a plurinational view of the country. In the first view, predominant among Canadians outside Quebec, Canada's federation is first and foremost the result of an imperial act of the British Crown. In the second view, predominant for Quebec Canadians, it stems from a pact between the four original territorial entities (Quebec, Ontario, New Brunswick and Nova Scotia) and between separate national communities, which was then ratified by the British authorities. Similarly, there is no consensus on the nature and purpose of the original constitutional regime. In general, Canadians outside Quebec perceive Canada to have a highly centralized federative system. By contrast, Quebecers see it as a genuinely federative regime that guarantees protection for the autonomy of each level of government. Furthermore, the English-Canadian literature generally assesses the evolution of the constitution from a pragmatic and functional viewpoint based on an analysis of the effectiveness of public policy, whereas authors in Quebec are more likely to adopt a normative approach and to measure compliance with the rules governing the allocation of powers in the light of a principle of provincial autonomy.[8]

This conflict of perspectives on more fundamental questions about the nature of the Canadian federalism reached the courts during the controversy over the repatriation of the constitution and the secession of Quebec. In the early 1980s, the federal Prime Minister, Pierre Trudeau, launched a new project to patriate the constituent power, which included the insertion into the Constitution of an amendment formula and a charter of human rights and freedoms. These changes would have a significant effect on the powers of the provinces, because on one hand, they would give the provinces a say in constitutional amendment decisions and, on the other hand, they would limit the powers of the provinces (and the federal government) by reference to the charter of rights.

The project was initially opposed by eight of the ten provinces and after the federal government had announced that it would still go ahead with the project by submitting a request to the British Parliament, three provinces (Quebec, Manitoba, and Newfoundland) asked their respective courts of appeal to rule on the constitutionality of the government's action, both from a strictly legal perspective and also in the light of constitutional conventions. The Supreme Court was required to make the final ruling. This was the first time in Canada's constitutional history that the court of final appeal was asked to make such a direct and fundamental decision concerning the actual basis of the constitutional structure of the Canadian state.

In a majority decision (*Re: Resolution to amend the Constitution* [1981]), the Supreme Court ruled that, as a matter of law, the federal government could request the patriation of the Constitution and thereby alter the powers of the provinces, despite the opposition of a majority of provinces. However, although the federal Parliament could act *legally* without consent from the provinces, to do so would be to violate a constitutional convention. On this aspect, the majority considered that there was in Canada a constitutional convention that required the federal Parliament to obtain 'a substantial degree of provincial consent' (ibid. 905) before asking the British Parliament to make a constitutional amendment that would affect the powers of the provinces. The Court stated, 'The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities,' and that to admit the contrary would be to allow them to obtain by simple resolution what they could not validly accomplish by statute (ibid. 905, 906 and 908). In this way, the Supreme Court recognized the principle of equal autonomy of the levels of government, but confined its effects to the conventional dimension of constitutional law.

Following the Supreme Court's decision, the federal government resumed its negotiations with the provinces and, thanks to some changes to the initial project, was able to obtain the consent of the nine provinces with an English-speaking majority, but not of Quebec. The federal government and the signatory provinces to the agreement began the process leading to the patriation and amendment of the Constitution. Meanwhile, the Quebec government referred to the Court of Appeal of Quebec the question whether there was a constitutional convention requiring consent from Quebec for amendments to the Constitution that would affect its powers or status within the federation. The Court

of Appeal answered the question in the negative, and the decision was upheld by the Supreme Court in *Re: Objection by Quebec to a Resolution to amend the Constitution* [1982] 8 months after the constitutional amendment came into force. According to the Supreme Court, although an analysis of the precedents showed that all the previous proposed federal changes affecting the rights of the provinces had failed because, in two instances, of opposition from a number of provinces including Quebec and, in two other instances, of opposition from Quebec alone, the Quebec government had failed to show that the political actors in those cases felt themselves bound by the need to obtain Quebec's consent. Therefore, no such convention existed.

This decision laid to rest the claim, continuously expressed by Quebec governments, that Quebec had a power of veto over amendments that affected its power or position within the federation. It also retired, at least on the legal level, the idea that the Canadian federation was based on an agreement between two equal founding peoples. As a result, although as a matter of law the *Constitution Act 1982* applies to Quebec just as it does to all the other provinces, it suffers from a major lack of political legitimacy in Quebec, one of the federation's founding provinces and the cradle of French culture in North America which has never consented to the Act.

In 1998, the Supreme Court was asked to rule on the fundamental question of whether a province could secede from the federation in *Reference re Secession of Quebec*, an issue not expressly covered in the constitution. The Court first stated that it would limit itself to clarifying the legal framework within which a democratic decision could be taken, and then answered the question of secession in two stages. It held that the secession of Quebec was possible within the framework of Canadian constitutional law, and that a clear majority vote in Quebec on a clear question in favour of sovereignty would create a constitutional obligation on Quebec and Canada to negotiate a constitutional amendment on secession and its possible terms. Second, it held that if the negotiations failed, unilateral secession would be possible outside the scope of the Constitution, supported by recognition from the international community. In other words, Quebec could achieve independence outside the scope of the Canadian Constitution under the aegis of the international community, provided it had previously attempted to negotiate its secession in good faith with Canada. This is not a specific right in either Canadian constitutional law or international law, but a possibility based on the principle of effectivity.

The Supreme Court identified four principles underlying the constitutional texts that, in its opinion, were relevant: federalism, democracy, constitutionalism (rule of law), and the protection of minorities. On the basis in particular of the principles of federalism and democracy, the Supreme Court attempted to reconcile the considerations of legality and legitimacy by creating a constitutional obligation to negotiate. It was held that Quebec could not invoke the democratic principle in order to secede from Canada unilaterally, and the federal government could not rely on the principles of federalism and constitutionalism to ignore a democratically expressed desire to secede.

General Statements

Aside from the Quebec question, the courts have made a number of general statements on the character of Canadian Federalism. That Canada's Constitution is genuinely federal rather than being intended to accumulate power at the centre, has been recognized many times by the courts, notably in this passage from a judgment of the Judicial Committee Privy Council[9] that has since become a classic:

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. (*Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* [1892] A.C. 437, 440–442)

More recently, the Supreme Court has expressed itself in similar fashion, in particular in *Reference re Secession of Quebec*, in which it stated that federalism is one of the constitutional principles underlying the written Constitution, and that 'there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution' (*Reference re Secession of Quebec* [1998] pp. 250–251). Therefore, the Court considers that the idea of federalism can be used not only to guide the courts in the interpretation and application of the provisions of the constitutional text, but also to fill any gaps.

The Supreme Court has stated several times that the autonomy of each level of government lies at the heart of the federative principle

(For example, ibid. par. 58). It also refers, in several places, to the need to preserve a balance between the respective powers of each order.[10] And, in addressing its own role, the Court has said that whilst it 'falls primarily to governments,' to preserve the balance, the Court should define and apply doctrines for the implementation of power-sharing that promote 'the legitimate interplay between federal and provincial powers' (*Canadian Western Bank* [2007] par. 24, 36). However, despite these general statements highlighting the normative implications of the principle of federalism, the jurisprudence of Canada's highest court has tended to favour expansion of the federal government's powers.

The Approach to Interpretation of the Text of the Constitution

We can see this first in its approach to the interpretation of the constitutional text. The Privy Council originally interpreted the *Constitution Act, 1867*, as an ordinary statute, applying the normal rules of statutory interpretation as if its constitutional character made no difference to the way it should be interpreted. The object was to identify the intention of the legislator based on the ordinary meaning of the words used in the statute (the literal approach to interpretation). It was recognised that the meaning of particular words and phrases was not always clear but the correct meaning could be identified by interpreting the words in dispute in a manner consistent with the statute as a whole. Although the Judicial Committee began to show more openness, beginning in the 1930s,[11] to an evolving or flexible interpretation of the Constitution, it did not, in general, question the application of the normal rules of statutory interpretation to the *Constitution Act, 1867*.

From 1970 onwards, the Supreme Court gradually moved away from literal interpretation to embrace the so-called progressive interpretation under which, rather than being fixed at its creation, the meaning of the constitution can evolve over time. Referring to the famous metaphor comparing the Canadian Constitution to 'a living tree capable of growth and expansion within its natural limits' first expressed by the Judicial Committee in *Edward v. A.-G. for Canada* [1930],[12] the Court stated that if there is a gap between the constitutional text and the societal conditions to which it is meant to apply, the courts are responsible to adapt its impact accordingly. Constitutional interpretation should, therefore, respond to the changing circumstances and needs of society.

In 2005, the Supreme Court reiterated its preference for the progressive approach in *Reference re Employment Insurance Act (Can.)* [2005] ss. 22 and 23. The Government of Quebec challenged the constitutional validity of the federal legislative provisions providing for payment of income replacement benefits during maternity leave and parental leave and asked the Court to decide whether they encroached upon the provincial legislative competence over property and civil rights and matters of a merely private or local nature (Constitution Act, 1867, ss. 92(13) and (16)), or if instead they came under the federal legislative competence over unemployment insurance (ibid. s. 91(2A)). A constitutional amendment in 1940 had transferred competence over unemployment insurance from the provincial legislatures to the federal Parliament. The Quebec Court of Appeal, which had used the original intent approach to interpretation, concluded that the evidence showed that the amendment was not intended to extend federal competence over social security and assistance measures, which remained with the provinces, and that if that had been the intention, the provinces would have refused to agree to the constitutional amendment (*Québec (Procureur général) c. Canada (Procureur général)* [2004] par. 73). The Quebec Court of Appeal thought that the principle of evolutionary interpretation could not be applied if that meant ignoring the intent of the constituent authority in 1940 (ibid. par. 92). Conversely, the Supreme Court used the living tree metaphor to identify the extent of federal competence over unemployment insurance and found that it could cover assistance measures.

In general, the use of the principle of progressive interpretation has led the court to sanction expansion of federal power. While the Judicial Committee tended to interpret in a restrictive way certain federal powers—which, if interpreted literally, might have emptied some provincial powers of much of their meaning—the Supreme Court has tended to broaden their scope.[13] Examples include the federal government's power to legislate in the fields of trade and commerce, unemployment insurance, and criminal law. The same has applied to the residual powers of the federal Parliament.

Concerning trade and commerce, (ibid. s. 91(2)), the Supreme Court has interpreted the exclusive federal competence as including not only the power to legislate in connection with international and interprovincial trade (*Citizens Insurance Co. v. Parsons* [1881]), but also the right to govern trade in general. On that basis, it has recognized the federal government's power to legislate with respect to competition and trademarks

(*General Motors of Canada Ltd. v. City National Leasing* [1989]; *Kirkbi AG v. Gestions Ritvik Inc.* [2005]). As noted above, in 2005 it broadened the scope of the federal power to legislate in the area of unemployment insurance beyond what the constituent power had specified, allowing it to legislate not only in connection with jobs lost for economic reasons but also for interruptions of employment for personal reasons, by recognizing a power to legislate with respect to maternity and parental leave (*Reference re Employment Insurance Act (Can.)* [2005] *ss. 22 and 23*). The same result was achieved with respect to federal competence over the criminal law, which now covers not only legislation pursuing a valid criminal law objective by imposing a prohibition (*Labatt Breweries of Canada Ltd. v. Attorney General of Canada* [1980]), but also regulatory schemes, provided they contribute to the achievement of the law's penal objective (*R. v. Hydro-Québec* [1997]; *RJR-MacDonald Inc. v. Canada* [1995]; *Reference re Assisted Human Reproduction Act* [2010]).

Specific Doctrines

Two further ways in which federal competence has been expanded have been through interpretation of the residual power and the doctrine of cooperative federalism. The constitution gives the federal Parliament the power to 'make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces' (Constitution Act, 1867, s. 91). Three categories of federal actions that, today, appear to be completely independent of one another have been recognised as coming under this general federal power: those based on residual power, those based on emergency power, and those based on the power to legislate on matters of national concern.

The residual power to legislate on any matter not included in any class of subjects assigned to the provinces has been limited by the courts to matters that were foreseeable in 1867, rather than extended to include all the new legislative fields that have appeared since then. This explains why it has seldom been used as the basis for federal legislation, despite the substantial development of governmental activities. The express powers have proved adequate to cover these. On the basis of the opening paragraph of section 91, however, the courts have consistently recognized the federal government's power to deal with emergencies. In case of emergency, the federal Parliament is allowed to legislate in all areas,

including those under the exclusive jurisdiction of the provinces, but only temporarily.

Separately, the courts recognized at an early date, on the basis of the opening paragraph of section 91, the federal Parliament's power to legislate on any matter of national importance or of interest for the federation as a whole. This so-called doctrine of national interest had, for more than a century, applied only to matters which were distinctive and indivisible matters (as opposed to legislative objectives which were aggregates of provincial and federal matters) (*Re: Anti-Inflation Act* [1976]). Since 1988, the doctrine now applies 'to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern' (*R. v. Crown Zellerbach Canada Ltd.* [1988]). That case concerned federal legislation which prohibited the dumping of any substance at sea except in accordance with the terms and conditions of a permit. The majority considered that the express power to legislate for 'the Sea Coast and Inland Fisheries' was not by itself a sufficient basis for the law. However the provision was deemed competent as it related to a matter falling within the national concern doctrine.

For a matter to qualify as a matter of national concern it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. In determining whether a matter has the requisite singleness, distinctiveness and indivisibility, it is relevant to consider what would be the effect on extraprovincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter. The control of marine pollution met that test. Marine pollution, because of its predominantly extraprovincial as well as international character and implications, was thought to be a matter of concern to Canada as a whole.

The tendency to favour federal competence over provincial competence is also apparent in the case law on conflicting statutes. Two different approaches to federalism can be identified in the Canadian jurisprudence: the dualist and the cooperative approaches. The dualist view is that the powers conferred by sections 91 and 92 of the Constitution Act, [1867] constitute 'watertight compartments' and that, as far as possible, the overlapping of federal and provincial powers must be avoided

or limited. As a result, the notion of exclusive legislative jurisdiction plays a key role. The constitutional text adopted in 1867, appears to lean towards the dualist model as most legislative powers were allocated exclusively to either the federal or the provincial governments, with only a few areas of shared competence. However, the courts have developing doctrines on power-sharing that reflect an alternative 'cooperative' approach to federalism under which, the principle of exclusive jurisdiction has far more restricted application, creating broad areas of concurrent jurisdiction. Overlapping of action between the two levels of government is considered not only normal but advisable.

The Privy Council generally took a dualist approach to interpretation of the constitutional text, seeking to limit overlaps in order to preserve the sphere of autonomy of each level of government and a balanced sharing of powers. However, from the second half of the twentieth century, the Supreme Court moved gradually away from this approach to embrace a cooperative or 'modern' vision of federalism. This has led to a multiplication of zones of de facto competition between the federation and the provinces. Even though, in principle, maximizing the number of areas in which each order of government can intervene might seem to give equal protection for their autonomy, the practical effect of the application of various doctrines on sharing of legislative powers has generally been that priority is given to federal legislation.

According to the doctrine of federal paramountcy, any conflict between a provincial and a federal statute, where both are valid, will see the provincial statute declared inoperative, while the federal statute will alone be applied. The effects of the provincial statute are suspended to the extent that they are incompatible with the federal statute, for as long as they remain incompatible. The doctrine is expressly set out in the constitution in connection with certain matters of concurrent jurisdiction, namely non-renewable resources (ibid. ss. 92A(3)), old age pensions (ibid. s. 94A) and agriculture and immigration (ibid. s. 95). In two of these cases, the federal statute prevails in the event of a conflict and in the other the provincial statute prevails (old age pensions). However, the application of the rule of federal paramountcy has been extended by the court's jurisprudence to all conflicts between equally valid statutes whatever the provisions under which they are made.

The practical effect of this doctrine on the balance of legislative power depends in part on the meaning given to 'conflict' by the courts. For many decades, Canadian courts required proof that it was impossible

to comply with both statutes in order to find that there was a conflict; that complying with one statute inevitably meant breaching the other (*Multiple Access Ltd. v. McCutcheon* [1982]). Under this approach, which was consistent with the power-sharing conception of the constitution, provincial statutes could continue to be enforced even where their effects overlapped with those of federal statutes.

However, more recently, the Court has expanded the zone of conflict by holding that a provincial statute is inoperative to the extent that it prevents a federal statute from achieving its object. This applies even where complying with one statute does not inevitably mean breaching the other (*Rothmans, Benson & Hedges Inc. v. Saskatchewan* [2005], par. 21; *Canadian Western Bank* [2007], par. 74).[14] This criterion makes the application of the rule of federal paramountcy conditional simply on the expressed intention of the federal legislator to block a valid provincial legislative intervention. However, in an attempt to limit the concern that the frustration of federal purpose criterion poses a threat to provincial autonomy, the Supreme Court has stated that, the paramountcy doctrine should be applied with restraint (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.* [2015], par. 23–27; *Bank of Montreal v. Marcotte* [2014], par. 72).

The jurisprudence of the Supreme Court is also at odds with the cooperative approach when it applies the doctrine of interjurisdictional immunity, under which a valid law cannot have an effect on a person, thing, or undertaking under the jurisdiction of the other order of government. The goal is essentially to prevent a valid law from having effects that significantly encroach on the core of a subject under the exclusive jurisdiction of the other order of government (Brun et al. 2014). As a result, the doctrine represents an exception to the modern approach to power sharing because it is designed to preserve an area of exclusive jurisdiction in certain circumstances. Until 2007, the courts required proof only of the existence of an effect, regardless of its importance, on an essential element under the jurisdiction of the other order of government in order to conclude that a provincial statute was inoperable. Since 2007, following a shift in the Supreme Court's jurisprudence, the doctrine applies only if there is an impairment of a vital or essential part of the other government's jurisdictional authority (*Canadian Western Bank* [2007]).

However, although the doctrine of interjurisdictional immunity may, in theory, be invoked to restrict the application of both provincial and

federal statutes, so far it has been used only against provincial laws. Its effect has been asymmetrical, a fact recognized explicitly by the Supreme Court (ibid. par. 45). In addition, even though the introduction of the impairment criterion was intended to re-establish a federative balance, subsequent Supreme Court decisions based on interjurisdictional immunity have not provided concrete examples of this potential rebalancing (*Quebec (Attorney General) v. Canadian Owners and Pilots Association* [2010]; *Quebec (Attorney General) v. Lacombe* [2010]; *Canada (Attorney General) v. PHS Community Services Society* [2011]; *Carter v. Canada (Attorney General)* [2015], par. 49–53). By contrast, although there have been many decisions extending federal legislative power, there is no major decision in which the Supreme Court has substantially extended the scope of provincial powers.

Summing up this material, we might say that the asymmetry in the judicial interpretation of the federal and provincial powers is, in large part, attributable to the omnipresence of the value of efficiency in federative jurisprudence, which favours the federal government to the detriment of regional diversity (Leclair 2003: 411–453). Efficiency is at the core of the scope given by the Supreme Court to the doctrine of national interest, the ancillary powers doctrine, and federal jurisdiction over trade in general. Moreover, the Supreme Court has stated that the cooperative approach to Canadian federalism goes hand in hand with the perceived need to promote efficacy over formalism (*Quebec (Attorney General) v. Canadian Owners and Pilots Association* [2010], par. 44). In all these cases and in contrast to the European notion of subsidiarity, efficiency has an ascending application only, generates permanent effects, and can apply to matters not placed under the competence of the federal Parliament by the text of the constitution (Brouillet 2011: 601–632).

The overall conclusion is that, as in a number of other federations, the jurisprudence has broadly aided the process of expansion of federal power at the expense of the powers of the federated units. Indeed, in Canada, judicial interpretation of the constitution has been the primary method of adjustment of the balance of legal power given the difficulty of the formal amendment process. This has been particularly important for Quebec as the Supreme Court's case law has effectively adopted the dominant anglophone interpretation of the constitution and rejected the alternative constitutional narrative of the constitution as a union of peoples, a union which cannot be altered without the consent of Quebec.

Role of the Courts: Scotland

The most obvious difference between Scotland and Canada is that that the courts have played a much smaller role in policing the allocation of powers between levels of government. This is partly due to basic differences in constitutional law and convention. As explained above, only the agreement of the UK Government and the Scottish institutions is required for changes to the allocation of power; the consent of the other constituent nations of the UK is not required. And once, political agreement between the UK Government and the Scottish institutions has been reached, that agreement is easy to deliver as all the necessary changes can be made by Act of Parliament.

It is also due to differences in the style of drafting and the level of detail in the legislation. Whereas the Canadian constitutional provisions allocating power between federal and provincial governments cover only a few pages and make use of broad open-ended phrases such as 'the regulation of trade and commerce,' the Scotland Act's specification of devolved competence (Sections 28–30 and Schedules 4 and 5) extends to around 23 pages of small print (in the Stationery Office version). By any standards, this is a detailed specification. This approach was designed to achieve as much clarity as possible concerning the allocation of power and leave as little scope as possible for dispute about which powers had been devolved. Drafting the legislation in this way was a complex and time-consuming process, but feasible because it was essentially a matter of tracing the existing allocation of functions to the Scottish Office at the time devolved government was set up.

So there was a deliberate attempt to eliminate doubts, which in turn limited the possibilities for litigation. A further factor reducing the likelihood of litigation was that, despite its very detailed expression, the basic model of allocation of powers is simpler. Scottish devolution follows the retaining model of devolution; the Scottish Parliament and Scottish Government have all legislative powers other than those expressly reserved to the UK Parliament and Government. There is only a single list of powers, not two as in Canada.

Technically, the powers of the two levels of government are not mutually exclusive because the UK Parliament retains full powers to legislate for Scotland and because some executive powers are explicitly shared. However, the responsibilities have tended to be mutually exclusive in practice because of the Sewel convention. Although the

convention has been used to authorise UK legislation on devolved matters on many occasions this has been done largely for convenience with the consent of the Scottish Parliament so that its policy-making autonomy has been respected. In summary, it has been fairly clear from the legislation what the Scottish Parliament and Scottish Government can do without trespassing on turf of the UK Government and the latter has not sought to exercise its legal power to trespass on the turf of the devolved institutions.

The powers originally reserved to the UK Government and Parliament by the Scotland Act included defence; foreign affairs, fiscal, economic and monetary policy; pensions and social security; nationality and immigration; and a wide range of regulatory functions and other matters important to the maintenance of a single market across the UK. The powers devolved included health; education; local government; planning and licensing; housing; social work and community care; civil law; criminal law and the justice system; police, and fire services; economic development; aspects of transport; the environment; agriculture, forestry and fishing; sport and the arts. Adjustments have been made by recent legislation as discussed below.

Where there is a clear parallel with Canada is that the courts have been given a role in policing the boundaries, although only in one direction as, although the Scottish Parliament's legislation may be challenged, that of the UK Parliament may not. The courts may be involved both before and after enactment. Pre-enactment checks include the possibility of referring to the Supreme Court the question whether a provision of a Bill is outside competence. If the Supreme Court decides that the provision is indeed outside competence, the Bill may not be submitted for royal assent in that form, leaving the promoters the option of withdrawing or amending it (UK Parliament 1998a, s. 33). There is also a limited ministerial veto (ibid. s. 35). The post-enactment check is that a person with a sufficient legal interest can seek judicial review of a provision of a Bill after enactment. If the court considers that a provision of a Bill is beyond competence, then the provision has no legal effect (ibid. s. 29).

The Cases

However, although the SA gives the courts power to receive challenges to the exercise of devolved powers, the courts have placed a far less significant role in determining the allocation of power in the UK than they

have in Canada. The challenges to the competence of devolved legislation made thus far have been based on three grounds:

- incompatibility with human rights (i.e. under the European Convention on Human Rights (ECHR));
- incompatibility with EU law; and
- the legislation relates to matters reserved to the UK Parliament.

In the first decade after devolution challenges to legislation and to executive action were based almost exclusively on human rights arguments rather than on the allocation of power between levels of government. Examples included a challenge to legislation which authorised preventive detention in a secure hospital of persons who were not suffering from mental illness but were a potential danger to the public[15] and a challenge to legislation banning the hunting of wild mammals with dogs which was aimed principally at fox hunting (*Adams v Scottish Ministers* [2004]). More recently, the competence of the Alcohol (Minimum Pricing) (Scotland) Act 2012 which set a minimum unit price for sale of alcohol with a view to discouraging problem drinking was challenged in *Scotch Whisky Association v Lord Advocate* [2014, 2016a, b] as being contrary to free trade principles of EU law.

However, it took a decade for challenges to the competence of an Act of the Scottish Parliament based on the territorial allocation of power in the Scotland Act to emerge. The first such challenge arose from a technical change to the sentencing powers of the criminal courts. The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 had enacted a general increase in the sentencing powers of the Scottish courts. As a result, the maximum sentence for certain road traffic offences was increased. Although Scottish criminal law was in general devolved, certain aspects of criminal law are reserved to the UK Parliament, including terrorism, misuse of drugs and road traffic offences. It was argued that the general increase in sentences in the 2007 Act whilst valid for most offences was beyond the power of the Scottish Parliament in relation to road traffic offences. This claim was rejected by the UK Supreme Court in *Martin v Most* [2010].

The next allocation of powers challenge was to the Tobacco and Primary Medical Services (Scotland) Act 2010 which had enacted a ban on advertising tobacco products at point of sale and on selling tobacco products from vending machines. This legislation was challenged in *Imperial Tobacco Ltd*

v Lord Advocate [2012] on several grounds including that the legislation related to reserved matters and was, therefore, outside competence. Again, the Supreme Court rejected the challenge. A third such challenge was made in *Joint Liquidators of the Scottish Coal Co Ltd, Noters* [2014] the argument in that case being that section 169(2) of the Insolvency Act 1986 which states that a liquidator in a winding up in Scotland has the same powers as a trustee in bankruptcy related to reserved matters. Once again, the Court of Session rejected the challenge to competence.

Reasons for Comparative Lack of Litigation

Therefore, there have been only three cases focussing on the allocation of powers to devolved government in Scotland, and a similarly modest number relating to devolution in Wales and Northern Ireland. A number of factors may have contributed to the low level of litigation including: (i) the very detailed specification of devolved competence in the Scotland Act 1998; (ii) the procedures for pre-enactment scrutiny (iii) continuity of government after devolution; (iv) the fact that the same parties were in power in both UK and Scottish Government for the first 8 years of devolution (1999–2007); and (v) public spending was buoyant and economic circumstances generally favourable over the same period.

The point regarding specification of devolved competence has already been covered. As for pre-enactment scrutiny, it is clear that there are extensive discussion between the two governments and between the government and the Parliament which have resulted in Bills being adjusted before being introduced.

As for continuity of government, it is significant that, although devolution was in some respects a major constitutional change, there was substantial continuity in executive government. The powers exercised after devolution were essentially the powers previously exercised by the Scottish Office under the system of 'administrative devolution' that prevailed from 1885 to 1999.[16] In effect the Scottish Office became the Scottish Executive (later renamed the Scottish Government). The same body of civil servants carried out the same functions before and after devolution and other executive institutions such as Scottish local authorities and quangos continued to operate as before. Thus, the pre-devolution institutions and networks of governance, including channels of communication between UK Government departments and the Scottish departments, were maintained.

For the first 8 years of devolution (1999–2007), the same parties were in power in Westminster and Holyrood; a majority Labour UK Government and a Labour/Liberal democrat coalition in Scotland (see Chap. 6 on party links). Since 2007, the SNP has formed the Scottish Government, facing successively a Labour UK Government, a Conservative/Liberal Democrat coalition and since 2015 a majority Conservative UK Government.

The rise to power of a nationalist party might have encouraged boundary disputes, but the fact that the first SNP government (2007–2011) was in a minority lessened the likelihood of legal challenge as the SNP did not promote any Bills which were not likely to get majority support. Their most legally controversial proposal—a new income tax to fund local government—was never presented as a Bill. After the SNP gained a majority (2011–2016) its most legally contentious proposal, the independence referendum, was resolved by an agreement between the Scottish and UK Governments and a UK order under section 30 of the Scotland Act temporarily conferring the competence on the Scottish Parliament.

Finally, the fact that devolution was introduced in broadly favourable economic circumstances played a role. Public expenditure in the UK and in Scotland rose significantly without the Scottish Parliament having to raise taxes. Instead it accrued rising revenues through the Barnett formula (see Chap. 4). Scottish politicians were able to focus on spending rather than raising revenue and were not faced with difficult decisions about cutting public services or exceeding their legislative competences to manage.

Some of these factors subsequently changed. We have had different parties in power in the UK and Scottish Parliaments since 2007, and economic circumstances have been far less favourable since the economic crisis of 20–2008. However, although there have been some cases, the courts have still not been called on frequently to resolve boundary disputes.

The Approach of the Courts to Interpretation of Devolved Powers

There has, nonetheless been at least some litigation over since 2007, not because of disputes between the Scottish and UK Governments but because of a change in the type of legislation the Scottish Parliament has been enacting. Some of this legislation adversely affects the interests

of powerful and well-resourced business groups, namely legislation on employers' liability to workers,[17] restriction on tobacco advertising and sales (*Imperial Tobacco Ltd v Lord Advocate* [2012]) and minimum retail pricing for alcohol (*Scotch Whisky Association v Lord Advocate* [2014]). Large sums were at stake, giving a strong economic incentive to oppose the legislation and the relevant business groups had ample funds to support a legal challenge. These cases were, therefore, attempts by private individuals and industry groups to advance their own interests by raising competence questions; in none of the cases was the legislation opposed by the UK Government. Few as they are, these cases are worth analysing, as they give a clear indication of how the courts view their role.

Two related questions that have arisen are (i) whether the courts are or should approach the interpretation of the provisions of the devolution statutes setting out devolved competence in a different way from other statutes because of their nature; and (ii) whether they are or should be influenced by the approach taken by courts in other jurisdictions, including Canada, to conflicts about the allocation of power between the two levels.

The possibility that the Scottish courts might learn from the experience of litigation under Commonwealth constitutions was recognised when the Scotland Bill was being considered by the House of Lords. Lord Sewel, the Minister in charge of the Scotland Bill, referred to the 'respection doctrine' developed in cases arising under those constitutions and the Government of Ireland Act 1920. He suggested that the question whether an Act of the Scottish Parliament related to a reserved matter (and was, therefore, beyond its powers) should be decided by reference to its pith and substance or to its purpose (Hansard 1998, vol. 592, col, 818).

Both questions were taken up in academic commentary. In an article published in the year power was devolved, Craig and Walters (1999) asked whether the Scotland Act 1998 (SA) and the Government of Wales Act 1998 (GOWA) should be interpreted according to the traditional canons of statutory interpretation, that is in a conservative manner, focused on literal interpretation of the text or whether instead they should be read in a manner more typical of constitutional interpretation, a liberal progressive manner which takes account not only of the text, but also of the social and political context. They suggest, referring to the Canadian experience that, whilst courts make use of both approaches,

the longer the statutory provisions in question survive, the more likely it is that the courts will take a broader approach to interpretation.

Clearly, adopting a freer approach to interpretation might affect the way that the boundary is drawn between reserved and devolved powers, but no particular direction of travel flows automatically. A freer approach might result in the Scottish Parliament having either greater or lesser powers than was intended when the SA was enacted. Some support for the view that the devolution legislation should be given a large and liberal interpretation can be found in the Privy Council's decision in *Robinson v Secretary of State for Northern Ireland* [2002] a case arising under the Northern Ireland Act 1998 (NIA) (UK Parliament 1998b). The NIA was designed to implement the scheme of devolution accepted by all parties to the Good Friday Agreement. Part of that was to ensure that governments had cross-community support, including representatives from both unionist and nationalist parties. Section 16(1) of the Act stated:

> Each Assembly shall, within a period of six weeks beginning with its first meeting elect from among its members, the First Minister and the deputy First Minister.

The NIA did not, however, state clearly what should happen if the 6 week period expired without the two ministers having been elected. Without going into all the details, the nationalist and unionist parties had found it difficult to agree to form a government, devolution had been suspended and restored three times and an election held on 2 November failed to achieve the level of cross community support required by section 16 but a further election held on 6 November (after the 6 week deadline) did. Peter Robinson, the leader of one of the unionist parties, argued that the Assembly had no power to elect a First Minister and the deputy First Minister outside the 6 week period, and that a fresh Assembly election was required. The court divided three to two with the majority treating the election of a First Minister and the deputy First Minister as valid.

The decision itself had great political impact in the context of the Northern Ireland peace process, but what is of interest here is the approach to statutory interpretation taken by the court. Rather than following the literal meaning of the words which seemed to suggest that the election must take place within 6 weeks, the Privy Council took a

highly purposive approach which was sensitive to the political context. Lord Bingham, for example, said that the NIA 'was in effect a constitution' whose provisions:

> … should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. (*Robinson v Secretary of State for Northern Ireland* [2002] 11)

The values concerned were those underlying the Belfast Agreement including the desire to end decades of bloodshed and centuries of antagonism by ensuring participation by both unionist and nationalist communities in shared political institutions.'[18] Unsurprisingly, the argument that constitutional provisions of statutes might legitimately be given a more liberal interpretation than provisions of ordinary statutes was then deployed in disputes over the powers of the Scottish Parliament.

In *Imperial Tobacco, Petitioner*, Lord Hope, giving judgement for the whole court, laid down three principles to be followed when deciding whether a provision of an Act of the Scottish Parliament is outside competence. The first was that the question should be decided according to the rules set out in section 29 of, and Schedules 4 and 5 to the SA. Whilst the language of those provisions had been 'informed by principles that were applied to resolve questions that had arisen in federal systems … the intention was that it was to the 1998 Act itself, not to decisions as to how the problem was handled in other jurisdictions, that one should look for guidance' *Imperial Tobacco Ltd v Lord Advocate* [2013] [13]. In other words, although the SA drew on the Commonwealth experience, it was not appropriate to look at the decisions of courts concerning the powers of Commonwealth legislatures in deciding what the Act meant.

The second was that the competence rules in the SA must be interpreted in the same way as any other rules that are found in a UK statute. Whilst it should be assumed that those rules were intended to create a coherent, stable and workable system for the exercise of legislative power by the Scottish Parliament, the best way to do that was an approach to the meaning of a statute that was constant and predictable. This would be achieved if the legislation were construed according to the ordinary meaning of the words used (ibid. [14]).

The third was that description of the Act as a constitutional statute did not imply a different approach to interpretation; '[t]he statute must

be interpreted like any other statute' (ibid. [15]). However, he did go on to say that one of the purposes of the 1998 Act was 'to enable the Parliament to make such laws within the powers given to it by section 28 as it thought fit. It was intended, within carefully defined limits, to be a generous settlement of legislative authority.'

Lord Hope made comments to similar effect in a Welsh devolution case, *Attorney General v National Assembly for Wales Commission* ([2012], [2013]) in which the question for the court was whether proposed legislation (National Assembly for Wales 2012, ss. 6 and 9) on byelaws would be within the legislative competence of the National Assembly for Wales. The challenge to validity was repelled, and in a judgment supported by three of the other four judges, Lord Hope said that whilst the Government of Wales Act 2006 (which conferred legislative power on the Assembly) was an Act of great constitutional significance, the description of it as a constitutional statute could not be taken as a guide to its interpretation. The 2006 Act should be interpreted like any other statute, albeit that the purpose of the Act might help to decide what the words meant (ibid. [80]).

Therefore, *Robinson* apart, judicial reasoning has followed the ordinary approach to statutory interpretation, placing strong emphasis on the specific statutory provisions in their context rather than on articulating high level principles. The freer approach to interpretation adopted in *Robinson* now seems an isolated and anomalous incident. The approach of the courts in the devolution cases has been cautious and traditional; the primary role of the courts is to give effect to the intentions of the legislature rather than to place constraints on the operation of politics. Constitutional development is achieved primarily by political means. The allocation of powers to Scotland remained essentially as designed by the drafters of the SA, until the recent changes made by the Scotland Acts 2012 and 2016 which were themselves the result of political agreement.

The Future and Conclusions

Canada

As in many other federations, the difficulty of amending the constitution has led to the Supreme Court of Canada playing a major role in the evolution of the constitution. It has had the delicate task of maintaining a balance between the powers of the federal and provincial levels of

government. However, this has created a problem of legitimacy. In contrast to most other federal states, all members of the Supreme Court of Canada, like all the judges of the provincial superior and appellate courts, are appointed unilaterally by the federal government.[19] This appointment process creates problems for the Court as the 'umpire of federalism' because it prevents the judges from being perceived to be independent from the federal government. A reform that would allow the provinces to formally participate would make the Court an institution much more consistent with Canada's federal nature.

Over the decades, the decisions of the Supreme Court on the distribution of powers have created an asymmetric degree of protection for the autonomy of each order of government. While the cooperative approach to federalism has allowed the federal government to maximize, and even extend, its legislative domain, the same cannot be said of the provinces. At a time when state intervention is becoming more widespread and more complex, it is clearly impossible to avoid all overlapping of powers between the two orders of government. However, federalism cannot survive over the long term if legislative powers are completely de-compartmentalized.

The trend towards centralization that is generally apparent in the Court's constitutional jurisprudence is, perhaps, a reflection of the natural propensity of all democratic societies to strengthen their centre. However, it constitutes a problem in a multinational federative context. The coexistence of two forms of nationalism, for Canada and for Quebec, makes it especially important that the balance of power between the federal and provincial governments be preserved. The federative principle and its essential corollary, autonomy for each order of government in the exercise of its legislative powers, is seen in Quebec as more than just a technique for governance; it also is the guarantee that Quebec will be able to take its rightful place as a national group within the Canadian federation.

Scotland

The immediate future of devolved government is affected by three major actual or potential constitutional developments, the possibility of a second independence referendum, expansion of devolved competence and the UK's departure from the EU following the referendum held on 23 June 2016 ('Brexit'). Could these developments lead to more

constitutional conflict and a more significant role for the courts? Given constraints of space, we will deal only with Brexit and the Sewel convention and with those only briefly.

In the referendum on 23 June 2016, a small majority of the UK population voted for the UK to leave the EU, but a substantial majority of voters in Scotland voted to remain. This has raised tensions within the union and the Scottish Government has argued that it reinforces the case for independence. There are several devolved policy areas, of which the most important are agriculture, fisheries and the environment, in which the freedom to develop policy and enact laws has been restricted by membership of the EU. Unless agreement is made to the contrary, when the UK leaves the EU, these restrictions will no longer apply to the UK and the Scottish Parliament will suddenly have a level of policy freedom that they do not now possess. The logic of devolution is that the UK Government should simply let this happen—these are already devolved areas. However, once we leave, the EU policy-making in these areas becomes a different ball game and the decisions made by the devolved institutions may have real consequences for the rest of the UK.

We have little idea what will happen and whether or not the UK and devolved governments will take a cooperative approach to these policy areas post-Brexit. If there is friction, and the UK Government is tempted to legislate in any of these areas without the agreement of the devolved institutions, that will be perceived by many in Scotland as constitutionally illegitimate. As explained above, the Sewel convention is an essential part of the devolution settlement and its existence is now recognised in statute. The fact of its being mentioned in statute provided some basis for a legal argument that the courts were now empowered to rule on whether it has been breached. However, the Supreme Court, in R (Miller) v Secretary of State for Exiting the European Union [2017] 2 WLR 583, rejected this argument, holding that the policing of the convention's scope and the manner of its operation did not lie within the constitutional remit of the judiciary. The remedies for any supposed breach of the convention by the UK Government will continue to be political rather than legal.[20]

So, there are risks of heightened conflict arising from current constitutional changes and these may translate into more litigation on questions of allocation of powers. However, if that does happen, there is unlikely to be a change of approach by the courts. Their performance thus far suggests that they will approach any litigation cautiously. They will continue to take the normal approach to statutory interpretation rather than

refer to high-level constitutional values. They will wish to encourage the idea that these are political questions which are to be resolved through political processes and not through the courts.

Conclusions

Although in both Canada and the UK, the courts are empowered to rule on whether the constitutional limits on powers have been observed, the courts in Canada have played a much larger role than those in the UK in developing and updating the allocation of powers between levels of government. This can be traced to differences in constitutional structure, legal technique and judicial attitudes. In Canada, the difficulty of amending the text of the constitution has created a role for the courts in updating the allocation of power to meet changing requirements. In the UK, the constitution is much more flexible in legal terms and although the conventions of the constitution add some constraints it has been easier to get the necessary political agreement to changing the allocation of powers. The UK has also been able to set out the allocation of power in much more detail in ordinary legislation, thus reducing the scope for legal disputes about competence. Finally, the courts themselves have displayed different attitudes. The Canadian Supreme Court has taken the view in recent decades that in constitutional adjudication a liberal approach to the interpretation of legal texts is justified, whereas the UK courts have preferred to take a more cautious text-bound approach to interpretation. The effect in Canada has been to augment the powers of the federal government at the expense of the power of the provinces. The effect in the UK has been to maintain the detailed allocation of powers fixed by the legislature.

Notes

1. *Constitution Act, 1982*, R.S.C. (1985), App. II, no. 44, Sections 38–45.
2. S.C. 1996, c. 1.
3. Namely Quebec, Ontario, British Columbia, two or more of the Atlantic provinces (having combined populations of at least 50% of the population of all the Atlantic provinces), and two or more of the Prairie provinces (having combined populations of at least 50% of the population of all the Prairie provinces).

4. This is the case in British Columbia and Alberta. Several other provinces have decided to follow this lead by making such referenda possible (but not compulsory); the process has been in place in Quebec since 1978.
5. See Scotland Act, s. 28(7), Northern Ireland Act, s. 5(6) and Government of Wales Act 2006, s. 107(5).
6. They concern only agriculture and immigration (ibid. s. 95), old age pensions and supplementary benefits (ibid. s. 94A), interprovincial trade in natural resources (ibid. s. 92A(3)).
7. The opening paragraph of section 91 (ibid.) states that the federal Parliament may 'make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.'
8. On these differences, see François Rocher, 'La dynamique Québec-Canada ou le refus de l'idéal fédéral,' in Gagnon (2009), pp. 93–146.
9. The Judicial Committee of the Privy Council operated as the final court of appeal for Canada for many years after it achieve Dominion status. Appeals to the Judicial Committee were finally abolished in 1949.
10. To list only some decisions: *Reference re* Securities Act, [2011] par. 7; *Reference re Assisted Human Reproduction Act*, [2010] par. 43, 74; *Canadian Western Bank c. Alberta*, [2007] par. 24.
11. See, for example, *Edward v. A.-G. for Canada*, [1930].
12. On constitutional interpretation, see Huscroft and Miller (2011) and Kavanagh (2003), pp. 55–89.
13. As Peter W. Hogg wrote, 'Judicial interpretation since the abolition of appeals has permitted some growth of federal power, and this may well continue': Hogg (2007).
14. For a criticism of this doctrine, see Hogg (2006), pp. 335–344.
15. See *A v Scottish Ministers*, [2001], upheld on appeal to the Privy Council [2003].
16. See Mitchell (2015).
17. The Damages (Asbestos-related Conditions) (Scotland) Act 2009, considered in *AXA General Insurance Ltd and others v Lord Advocate* [2012].
18. See also Lord Hoffman (ibid. [30]).
19. In most federations, the federal entities are associated to varying degrees with the designation process of the constitutional judges or the members of the Supreme Court, in particular by means of the role recognized by the upper house (or federal chamber). Exceptions are federations whose constitutional law is of British inspiration, such as Canada, India, and Australia, where the federal government has exclusive power to appoint the judges.

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CHAPTER 4

Canadian and Scottish Fiscal Federal Arrangements: Taxation and Welfare Spending

David Bell and François Vaillancourt

Introduction

A central theme in federal and devolved systems concerns the balance of taxation and spending. Self-government and autonomy require that the lower level have discretion over taxes and expenditure. Equity and the need to cope with asymmetrical shocks (economic downturns hitting one part of the country more than others) point to the sharing of revenues and compensation according to the needs and resources of each territory. Canada and the United Kingdom are advanced welfare states, which poses the question of social citizenship and equal access to services and support. They have addressed this dilemma in different ways. Canada from the start has shared taxation between the two levels while

D. Bell (✉)
University of Stirling, Stirling, Scotland, UK
e-mail: d.n.f.bell@stir.ac.uk

F. Vaillancourt
University of Montreal, Montreal, Canada

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the UK has been more cautious. The Scottish Parliament was given only modest tax powers (never used) at the outset and the Welsh and Northern Ireland assemblies none. Since then, tax powers have been boosted by the Scotland Acts of 2012 and 2016 and proposals for Wales and Northern Ireland. This chapter examines similarities and differences in three areas of intergovernmental fiscal arrangements in Canada and Scotland: (a) the taxation of personal income; (b) sharing of VAT and (c) sharing responsibility for welfare spending.

Inter-Governmental Fiscal Arrangements in Canada and the UK

Canada

The drafters of the Canadian Constitution (the British North America Act) intended to create a strong central government (Bird and Vaillancourt 2006). The federal government was given sole access to the key revenue source at that time, customs duties, and made responsible for economic development including banking and railways; provinces were left to handle such local matters as education, health and social services which were not very important in the nineteenth century. The pre-eminence of the federal government changed after the First World War when decisions of the Judicial Committee of the Privy Council in London, which was Canada's final court of appeal until 1949, stated that transfers to individuals (workers compensation, welfare, unemployment insurance, old age pensions) were provincial responsibilities. This was reversed in part by constitutional amendments to allow for the federal programs of unemployment insurance (in 1940) and old age pensions (in 1951). The Second World War raised fiscal centralization to its historical maximum. This, and push-back by the provinces after the war, yielded the federal financial arrangement now in place. In the 1950s and 1960s, the federal government used its fiscal resources to intervene in constitutionally provincial fields such as welfare, health (mainly privately provided until 1957), and post-secondary education. Using what is called its 'spending power' the federal government offered major financial inducements to the provinces to modify their behaviour in these and other areas that were constitutionally within their jurisdictions.

Canada is marked by considerable diversity among the provinces. They are very different in area and population. There are marked

economic differences, including in the importance of the oil and gas sector. Provinces have similar patterns of health and social spending but differ greatly in their dependence on federal transfers to meet these (Tables 4.1 and 4.2).

There are three major federal transfer programs to provinces. The first of these is equalization introduced in 1957 and constitutionally protected in 1982. It provides for equalization of revenues by paying more to provinces with lower tax bases.

$$\text{Amount}(\$) = \sum^{\text{All Sources}} \text{Average effective tax rate per source}^{*}$$

$$(\text{per capita tax base } \textit{standard} \text{ -per capita tax base province}_i)^{*} \text{ population}_i$$

$$= 0 \text{ if per capita tax base standard} < \text{per capita tax base province}_i$$

Equalization[1] is funded from the general revenues of the federal government. Such revenues do not include natural resource rents since they are provincial revenues. It does not involve horizontal equalisation (transfer between provinces) or needs or cost equalisation for provinces. The formula is not set in the Canadian Constitution; it is a political outcome and there is no formal advisory body to review its structure. Payments are set using a 3-year moving average (25/25/50) lagged 2 years thus ensuring predictability and some stability but a weak response to current economic shocks.

The two other major transfers comprise the Canada Health Transfers (CHT) and the Canada Social Transfers (CST), previously known as the joint Canada Health and Social Transfer (CHST). These transfer programs have their origins in several open-ended conditional grants (Bird and Vaillancourt 2006). In 2015–2016,[2] the CHT was a per capita cash transfer (before 2014–2015 both cash and tax point transfers). It grew 6% per year from 2004–2005 (10 year Health Accord) but from 2017–2018, total CHT cash is expected to grow in line with a 3-year moving average of nominal Gross Domestic Product, with funding guaranteed to increase by at least 3% per year.[3] The CST is also a per capita cash transfer that grows annually at 3%. The total envelopes for both programs are linked to programs that they replaced.

Figure 4.1 presents the information on these payments for recent years.

Table 4.1 Key demographic, economic and geographic features of Canada's Provinces and Territories, 2011

	Area (Km^2) (1)	*Population ('000) (2)*	*Population density (3) 2/1*	*GDP ($000 000) (4)*	*GDP per capita (5) 4/2*	*per cent oil gas in GDP*	*per cent Area (7)*	*per cent Population (8)*	*per cent GDP(9)*
Canada	9,970,610	34,342,780	3	1,769,921	51,537	5%	100.00	100.00	100.00
NFD	405,720	525,037	1	33,539	63,879	x	4.1%	1.5%	1.9%
PEI	5660	144,038	25	5424	37,657	0%	0.1%	0.4%	0.3%
NS	55,490	944,469	17	37,652	39,866	x	0.6%	2.8%	2.1%
NB	73,440	755,530	10	31,500	41,693	x	0.7%	2.2%	1.8%
QUÉ	1,540,680	8,007,656	5	344,735	43,051	0%	15.5%	23.3%	19.5%
ONT	1,068,580	13,263,544	12	659,743	49,741	0%	10.7%	38.6%	37.3%
MAN	649,950	1,233,728	2	56,197	45,551	2%	6.5%	3.6%	3.2%
SASK	652,330	1,066,349	2	74,821	70,166	15%	6.5%	3.1%	4.2%
ALTA	661,190	3,790,191	6	299,521	79,025	20%	6.6%	11.0%	16.9%
BC	947,800	4,499,139	5	216,786	48,184	2%	9.5%	13.1%	12.2%
YU	483,450	35,402	0	2492	70,392	0%	19.0%	0.1%	0.1%
NWT	1,479,000	43,501	0	4730	108,733	7%	4.8%	0.1%	0.3%
NU	1,900,000	34,196	0	2034	59,481	0%	14.8%	0.1%	0.1%

Sources columns (1) and (7) Bird and Vaillancourt (2006), Table 1; column (2) and (8): CANSIM 051-0001; column (4) and (9); CANSIM: 384-0038; column (6): CANSIM 379-0030

Notes NFD: Newfoundland; PEI: Prince Edward Island; NS: Nova Scotia; QUÉ: Québec; ONT: Ontario; MAN: Manitoba; SASK: Saskatchewan; ALTA: Alberta; BC: British Columbia

An x in the per cent share of energy does not indicate zero; it indicates a confidential estimate given the small number of producers in that province. The energy sector (which includes electricity etc.) accounts for 32.1% of GDP in Newfoundland, 3.6% in Nova Scotia and 5.2% in New Brunswick

Table 4.2 Provincial and territorial governments, revenues and expenditures, Canada, 2011

	Total revenues $m (1)	*per cent revenues from own tax sources (2) (%)*	*per cent transfers (3) (%)*	*Total revenues per cent of GDP(4) 1/ (4 in T1) (%)*	*Own Revenues per cent of GDP(5) 2/ (4 in T1) (%)*	*Total spending $000, 000(6)*	*Deficit/ surplus (7) $000000*	*per cent health spending in total spending (8) (%)*	*per cent social services spending in total spending (9) (%)*
NFD	8,429	37.1	30.4	25.1	9.3	7913	516	36.8	7.1
PEI	1584	52.1	38.8	29.2	15.2	1753	−169	29.7	10.0
NS	9368	55.4	32.5	24.9	13.8	10,093	−725	40.6	10.7
NB	7971	50.6	35.8	25.3	12.8	8837	−866	39.2	10.3
QUÉ	95,821	61.1	20.8	27.8	17.0	95,796	25	32.4	16.3
ONT	107,045	72.1	18.7	16.2	11.7	127,996	−20951	40.3	18.2
MAN	13,208	54.1	32.5	23.5	12.7	14,381	−1173	38.4	13.3
SASK	13,769	52.2	15.9	18.4	9.6	14,151	−382	32.4	18.7
ALTA	42,331	45.4	10.7	14.1	6.4	43,436	−1104	36.7	13.0
BC	38,658	65.8	17.0	17.8	11.7	43,295	−4636	41.1	14.3
YU	1083	12.4	79.1	43.5	5.4	1084	−1	19.4	12.5
NWT	1631	15.8	74.0	34.5	5.4	1729	−98	23.7	14.2
NU	1756	5.4	80.1	86.3	4.6	1738	18	17.8	12.4

Source columns 1, 2, 3, 6 and 7: CANSIM 385-0034; columns (8) and (9): 385-0041
Note revenues is for provincial governments; Spending is for provincial/territorial and local governments aggregated. Columns (2) and (3) do not add to 100% as other revenues are not included

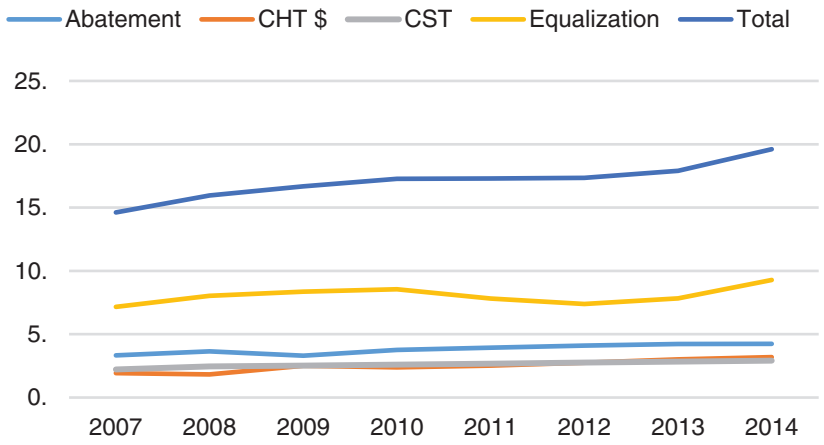

Fig. 4.1 Major Federal transfers to Provinces, Canada, 2007/2008 to 2014/2015 ($bn)

The United Kingdom

Federal fiscal structures, as commonly understood, hardly exist in the United Kingdom. Those that do relate to the devolved territories—Scotland, Wales and Northern Ireland—and are relatively weak and highly asymmetrical. They derive not from a written constitution, but from the ad hoc bilateral arrangements which derive from the history of the formation of the UK and from funding arrangements that have no legal basis, but instead are the product of political expediency. Before the 1970s, Scottish, Welsh and Northern Ireland expenditure was determined on the basis of historic levels and political negotiation. As the issue became politicized in the 1970s in anticipation of the planned (but not implemented) devolution measures the Barnett Formula, named for Joel Barnett, First Secretary to the Treasury, was introduced. It was then rolled over to the devolved arrangements after 1999.

There have long been proposals for a needs-based formula for the UK but they have come to nought (McCrone 1999). A Treasury 'needs assessment' exercise conducted in 1978 concluded it was justifiable to set Scottish public expenditure per head 16% higher than in England (less than prevailed at the time). This was politically explosive and the Barnett Formula did not take account of these findings. Instead, taking

the initial allocation of spending to the devolved authorities as given, it focused on year-to-year *changes* in this allocation. Specifically, it adds to (or subtracts from) the budget of each devolved authority its *population share* of any planned increase (or decrease) in 'comparable' public spending in England. The amount transferred by the UK Government to the devolved nations, following the application of the Barnett formula, is known as the 'block grant'.

Thus, in each expenditure round, HM Treasury sets spending limits for each ministry. Some of these ministries, such as health, only operate in England. Where there is 'comparable' spending in Scotland, Wales or Northern Ireland, their budgets are increased (or decreased) by their population share of whatever change in allocation is set for the Westminster ministry. For example since health spending in Scotland is administered by the Scottish Government, a budget increase of £1 billion in health spending in England will automatically increase Scotland's health transfer by £98 m (Scotland's population is 9.8% of that in England). However, the devolved administrations are under no obligation to allocate this additional funding in the same way as England. The Scottish Government could spend the additional resource on national parks if it so desired. Of course, there is continuous benchmarking of the performance of public services across the UK and there may be a political cost to deviating substantially from the distribution of spending increases set out by the UK Government for England.

The Barnett Formula has several noteworthy properties:

1. Since budget increases in the devolved territories are determined by decisions relating to ministries that spend in England, the Barnett formula takes no account of the current *needs* of the devolved authorities;
2. The devolved authorities' budgets depend on the *history* of changes in spending in England. Each year a new baseline is set. Increments to this baseline are determined by spending decisions made by HM Treasury in the annual budget;
3. The Barnett formula is not based on legal agreements between the UK Government and the relevant authorities in Scotland, Wales and Northern Ireland. It has not, until recently, had any statutory basis and therefore could be amended at will by HM Treasury, acting as judge and jury over what forms of spending can be classed as 'comparable'. For example, although much of the budget was

> used to regenerate London's East End, expenditure on the 2012 Olympics was classed as UK, rather than English, spending thus avoiding Barnett 'consequentials', which would have increased the budgets of Scotland, Wales and Northern Ireland.

However, though the Barnett Formula has been retained and continues to determine more than 50% of the budget in Scotland, Wales and Northern Ireland, pressure for increased local political autonomy has led to significant change in the fiscal arrangements within the UK, particularly following Scotland's independence referendum in 2014. Thus, the Scottish Government has gained several new tax powers. We discuss these subsequently, but the obvious corollary of the increased tax revenue coming to Scotland (and therefore the reduction in revenues for the UK Government) is that there should be a reduction in the Barnett-determined block grant from the UK Government to Scotland. This reduction, known as the block grant adjustment (BGA) was one of the most contentious aspects of the negotiation of the so-called 'fiscal framework' between the UK and Scottish Governments during the passage of the Scotland Act 2016. The BGA (at least until 2021) will be given by:

(a) In the first year, the block grant will be reduced by the value of the tax revenues collected. This ensures 'no detriment' to both the UK and Scottish Governments as the new tax is introduced.
(b) In subsequent years, the change in the adjustment will be given by the change in 'equivalent' UK tax revenues *times* 'the comparability factor' *times* Scotland's population share.

For example, in relation to income tax, in the first year, Scotland's block grant will be reduced by the amount of tax raised, leaving its budget unchanged. Subsequently this adjustment will be increased by Scotland's population share of the increase in income tax revenue in the rest of the UK attenuated by the 'comparability factor'. This latter adjustment is intended to take account of Scotland' 'tax capacity'—the ratio of mean income tax per taxpayer in Scotland relative to mean income tax per taxpayer in the rest of the UK.[4]

This complex formula determines the risks and potential rewards to the Scottish budget from the new tax powers. Firstly, other things being equal, the budget will increase if Scottish tax revenues per head grow more quickly that the growth in comparable tax revenues in the rest of

Table 4.3 Key statistics for the UK and its constituent nations, 2014

	England	*Scotland*	*Wales*	*Northern Ireland*	*United Kingdom*
Population (millions)	54.8	5.4	3.1	1.9	65.2
Population Share (%)	84.0	8.3	4.8	2.9	100.0
Area (000 sq km)	130.4	78.8	20.8	13.8	243.8
Population density (per km^2)	406	67	147	130	259
GVA (£bn)	1378	124	54	34	1590
Share of GVA (%)	86.7	7.8	3.4	2.2	100.0
GVA Per Head (£)	25,367	23,102	17,573	18,682	24,616
GVA Per Head (UK = 100)	103.1	93.8	71.4	75.9	100.0

Source office for national statistics

the UK because the BGA will be more than offset by these increased revenues. Secondly, slower or faster population growth in Scotland compared to the rest of the UK will not affect the budget because the BGA reflects any changes in Scotland's population share. Thirdly, the 'comparability factor' means that Scotland's lower per capita tax revenues do not require it to make a greater 'tax effort' than the rest of the UK to hold its budget constant. Note that the same approach to determining the BGA will be followed in Wales once the Welsh Assembly gains control over stamp duty, land tax (from 2018–2019), landfill tax (from 2018–2019) and income tax (from 2019 to 2020) (UK Government 2016).

We return to these issues subsequently, but first provide some contextual information which will form a backdrop to the discussions that follow. Table 4.3 shows key statistics for the population of the nations that comprise the UK in 2014.

England accounts for 84% of the total population of the UK while Northern Ireland accounts for less than 3%. The internal borders of the UK are based on history and identity rather than from a desire to equalize the population of its spatial units. Population density is 6 times greater in England than in Scotland. It has the highest population density among the constituent nations, while Scotland has the lowest. As in Canada, such large variations in population density lead to substantial differences in the costs of providing public services, which in turn have implications for fiscal transfers.

UK annual Gross Value Added[5] (GVA) was around £1.6 trillion in 2014–2015. Almost 87% of UK GVA was produced in England,

somewhat above its population share. On average, productivity levels are higher in England. This is certainly true in comparisons with Wales and Northern Ireland whose GVA per head are respectively 28% and 24% below the UK average. The comparison with Scotland is more difficult because the Office for National Statistics (ONS) does not include North Sea oil production in its national GVA calculations. Thus, in 2014, UK GVA was £22 billion greater than shown in Table 4.3 due to wages paid and profits accrued in oil and gas production. In the UK national accounts, this production is allocated to an area known as 'Extra-Regio', thus avoiding possible political difficulties for the Westminster Government of allocating this production to Scotland, within whose territorial waters around 95% of this production occurs. However, nationalist parties interpret this arrangement as a statistical device that was invented to deflect the political argument that North Sea oil revenues should be allocated to Scotland's public finances rather than to the UK Government's.

Thus, the background against which public finance is distributed to the devolved nations is one where England is dominant in economic, demographic and political terms. This means that it will tend to prevail in setting policy agendas including the UK's overall macroeconomic stance. On the other hand, it is relatively cheap to make financial concessions to the devolved nations due to their much smaller scale. Asymmetry in the size of the constituent nations has a pervasive effect on intergovernmental relationships within the UK.

Intergovernmental Tax Issues in Canada and the UK

Canada

The tax powers of both levels of government are set out respectively in item 3 of Sect. 91 of the BNA Act that specifies that the federal government can carry out *'The raising of Money by any Mode or System of Taxation'* and in item 2 of Sect. 92 that specifies that provinces can use *'Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes'*. Various judicial decisions mean that in practice both the federal and provincial governments can levy personal income taxes (PIT), corporate income taxes (CIT), general consumption/sales taxes, excises (alcohol, fuel, tobacco), payroll taxes. We focus on the PIT and on general consumption taxes, that is three VAT type taxes—the

federal Goods and Services Tax (GST), the joint federal-provincial Harmonized Sales Tax (HST[6]) and the Québec Sales Tax (QST)—and the Provincial Sales Taxes (PST) which are retail sales taxes.

Personal Income Tax

During the Second World War, under the Wartime Tax ('tax rental') Agreements the provinces surrendered ('rented') all rights to impose income taxes to the federal government in exchange for fixed annual payments. They were in place over the 1942–1947 period and implemented through centralized tax collection. Similar arrangements persisted until 1954 when Québec reintroduced a PIT that it collected. From 1957 all provinces could re-introduce the three rented-out taxes (personal and corporate income taxes and succession duties. There was an equalization scheme by which provinces with low yielding tax points would be compensated up to the level of the two provinces with the highest per capita yield.

The federal government agreed to collect provincial PIT at no cost provided that the base was identical to the federal base and that levels of exemptions and deductions and the rate structure set by Ottawa were used. They could set their own rate using a tax on tax approach. Only Québec was free to set its own exemptions and rates.[7] Finally 'opting-out' (also referred to as 'contracting-out') was introduced. This meant that provinces that wished to do so could replace a reduced federal PIT and lower transfers by a higher provincial PIT, provided they agreed to maintain the same programs as those financed by transfers. Only Québec opted-out with the result that the federal income tax imposed in that province has for many years been lower than that imposed in the 'rest of Canada' (ROC). This does not increase or decrease the revenues of Québec since federal transfers are reduced by an equivalent amount. It does however, allow Québec to reflect its own preferences in tax matters over a greater share of personal income than other provinces. The federal government ceded 16.5% of the federal PIT field to Québec which means that Québec federal PIT taxpayers calculate their federal PIT and then reduce it by 16.5%. The total value of these reductions is known as the Québec abatement.[8]

Finally, in 1999, when the federal government replaced Revenue Canada by the Canadian Customs and Revenue Agency (CCRA), it agreed to collect provincial PITs using a tax table (number of bands,

Fig. 4.2 Coefficients of variation in highest and lowest statutory rates, nine CRA provinces, Canada, five years, 2000–2016. *Source* our calculations

floor and ceiling of bands, rate for each band) selected by the provinces so long as they used federal taxable income as a base. The previous 'tax-on-tax' (ToT) approach was thus replaced by a 'tax-on-income' (ToI) approach, allowing provinces for the first time to determine the progressivity of their own PIT rather than accepting the one set by the federal tax schedule. Alberta implemented a very distinct provincial PIT by introducing a 10% flat tax in 2000 that was replaced by a progressive schedule in 2016. The other provinces have varied the degree of progressivity of their PITs.

The most common and earliest introduced measures are tax surtaxes (Ruiz Almendral and Vaillancourt 1996). These are calculated as a share of the provincial PIT; these vary both across provinces at a point in time and for a province over time. The second most common measures are investment tax credits for various types of investments; these are usually for investments in shares of businesses (equity or stock savings plans) active in the relevant province but can be for specialized types of activities such as livestock (Saskatchewan). The third most frequently used measures are tax credits for older individuals (those aged 65+). These aim to reduce PIT paid by poor older individuals. Figure 4.2 shows how the statutory tax rates have varied over time. The key point is that the lowest rate shows greater variability than the highest one, most likely because of the higher potential mobility of high income individuals; the sharp drop in the Coefficient of Variation for the highest rate in 2016

Table 4.4 Characteristics of provincial PITs, Canada, 2016

		Lowest band (non zero rate)		*Highest band*	
	No. of bands	*Floor $*	*Rate per cent (%)*	*Floor $*	*Rate per cent (%)*
Newfoundland & Labrador	5	8802	7.7	175,700	15.3
Prince Edward Island	4	7708	9.8	98,143	18.4
Nova Scotia	5	8481	8.8	150,000	21.0
New Brunswick	5	9758	9.7	150,000	20.3
Ontario	7	10,011	5.1	220,000	20.5
Manitoba	3	9134	10.8	67,000	17.4
Saskatchewan	3	15,843	11.0	127,430	15.0
Alberta	5	18,451	10.0	300,000	15.0
British Columbia	5	10,027	5.1	106,543	14.7
Average of nine CRA provinces	4.7	10,913	16.9	154,979,556	17.5
CV (Coefficient of Variation)	0.26	0.34	0.26	0.46	15.0
Federal	5	11,474	15	200,000	33.0
Québec	4	11,550	16	103,150	25.8

Source Tables 4.4, A-1 and A-2 Vaillancourt et al. (2016)

is due to the increase in that rate in some provinces such as Alberta. Table 4.4 present the characteristics of the PIT for the CRA provinces, the federal government and Québec for 2016. It shows the variability of these arrangements.

The federal government introduced a manufacturer's sales tax (MST) in 1920 while some municipalities, school boards and provinces introduced retail sales taxes in the 1930–1960 period with provinces taking over the field exclusively by 1970. From 1970 to 1991, one thus had a federal tax at the factory gate (however defined) and provincial (except in Alberta) retail sales taxes. In 1991 the federal government replaced the MST by a VAT, the GST. Provinces complained about this 'intrusion' but through various processes one finds in 2016 the arrangements presented in Table 4.5.

Of interest in this case is the behaviour of HST provinces; they have more freedom to set their own rate than subnational units in European Union countries. They can also vary their base by exempting up to 5% of GST taxable sales. For example, Ontario exempts the following items: Books, Children's Car Seats/Car Booster Seats, Children's Clothing,

Table 4.5 Characteristics of general consumption taxes, Canada, 2016

	HST or PST	*HST rate/sum of PST and GST (5%)*	*Provincial tax/HST share*
Nfld. & Lab	HST	13	8
PEI	HST	14	9
Nova Scotia	HST	15	10
New Brunswick	HST	13	8
Quebec	PST (QST)	14.975	9.975
Ontario	HST	13	8
Manitoba	PST	13	8
Saskatchewan	PST	10	5
Alberta	none	5	0
British Columbia	PST	12	7

Source http://www.calculconversion.com/sales-tax-calculator-hst-gst.html
Note on July 1st 2016, the HST in New Brunswick rises to 15% with a 10% provincial rate

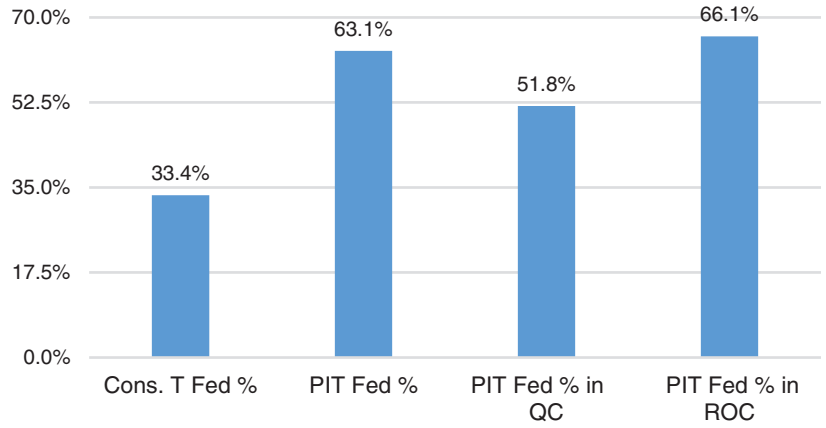

Fig. 4.3 Federal share of selected tax revenues, Canada, 2012 *Source* own calculations with Department of Finance of Canada data

Children's Diapers, Children's Footwear, Prepared Foods and Beverages ($4 or less), Print Newspapers (Ministry of Finance 2015).

Figure 4.3 presents the occupancy of the PIT and VAT tax fields by the federal government.

The UK

Until recently, there would have been little to say about devolved taxes within the UK. Until 1998, the only taxes devolved below central government at Westminster were property taxes levied by local (municipal) authorities both on households and businesses. These are linked to property values. Historically, these taxes were known as 'rates' and were adjusted regularly to reflect current market property valuations. Local authorities had to set the 'poundage rate' annually, which determined the proportion of the property's value payable to the local authority in the following financial year. Both council tax and business rates are paid to, and administered by, local authorities. Responding to their unpopularity and what were seen to be unacceptable increases in domestic rates, the Conservative Government redesigned property taxes in England, Scotland and Wales during the 1990s. Following a first experiment with the hugely unpopular 'poll tax' (a per capita levy on adults), it introduced the 'council tax' in 1993 to replace the residential element of rates. Council tax is a hybrid tax which includes elements of a per capita levy (single adult households receive a 25% rebate compared with households comprising two or more adults) and a tax based on property value (dwellings are allocated to a number of valuation bands as assessed in 1992). Various attempts to radically reform this tax have failed while local authority control over its level has gradually been weakened due to interference by higher levels of government.

Under devolution, the Scottish Parliament and Government have legislative and administrative responsibility for local government taxation and in 2007 the Scottish Government 'froze' the council tax while claiming to have compensated local government by increasing their annual grant. The UK Government also froze the council tax (in England) from 2011 onwards. Both governments argued that these freezes were necessary to prevent local authorities from introducing 'excessive' increases in their council tax. Nevertheless, such interference clearly reduces the scope for decentralised fiscal policy. Figure 4.4 shows how revenue from council tax in Scotland from 2007, and more recently in England, has grown less quickly than in Wales, where council tax was not frozen, between 2001–2002 and 2015–2016.

Business property taxation was centralised in 1990. The rate poundage, now known as the Uniform Business Rate, is set by the UK

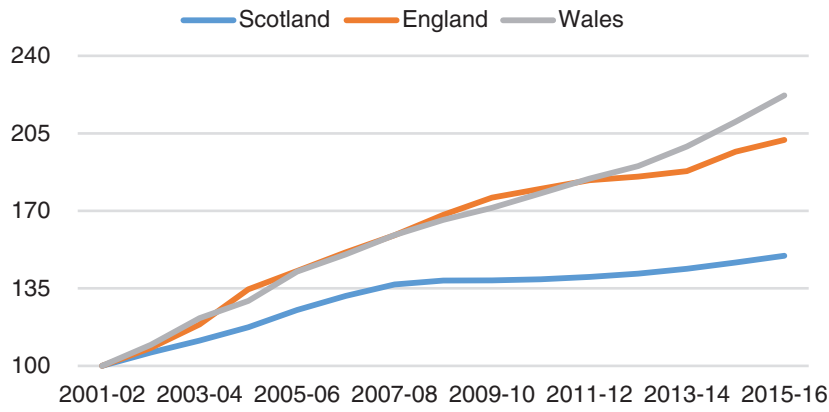

Fig. 4.4 Index of council tax revenue 2001–2002 to 2015–2016 in Scotland, England and Wales (2001–2002 = 100). *Source* Scottish Government (2016) local government financial statistics

Government for England and Wales. In Northern Ireland, the poundage rate comprises both a district element set by these entities and one that is applied to the whole of Northern Ireland. In Scotland, there is a single poundage rate set by the Scottish Government. Each of the nations offers reliefs from non-domestic rates, particularly to small businesses. The Scottish Government collects non-domestic rates income (NDRI) and redistributes it to local authorities based on population, thus redistributing income from local authorities with high value businesses to those with high population.

The first significant extension to devolved fiscal powers came with the Scotland Act 1998. It allowed the Scottish Parliament (a) to decide the local tax regime and (b) to vary the 'basic' rate of income tax by 3p, upwards or downwards. This required the Act to define a 'Scottish taxpayer' for the first time, since the revenue collecting authority would have to be able to identify individual tax liabilities correctly. Yet this power was never used. An increase of 1p was proposed in 2002 by the SNP leader, John Swinney, but was quickly dropped due to perceived electoral unpopularity.

Nevertheless, pressures for further increases in fiscal powers continued to grow and in 2012, partly in response to the SNP gaining an overall majority in the Scottish Parliament, the main UK parties jointly proposed

a further extension to Scotland's fiscal powers following the recommendations of the Calman Commission. This included the transfer of two small taxes—Land and Buildings Transaction Tax (LBTT) and Landfill Tax. But the main change was the introduction of the 'Scottish Rate of Income Tax' (SRIT). SRIT was essentially a 'slab' tax, set at a fixed rate across all income tax bands. Initially, this slab was set at 10p (per cent). Current rates of income tax are basic rate—20p, higher rate—40p and additional rate—45p. With SRIT, the Scottish Government receives 50% of all basic rate income tax, 25% of all higher rate income tax and 22% of all additional rate income tax. Each year, the Scottish Finance Secretary has to decide the value of SRIT, increasing it or decreasing it relative to its 10p baseline.

However, the Scotland Act 2012 was swiftly replaced and a further increase in devolved tax powers agreed by the Scottish and UK Parliaments. This followed the so called 'vow' made by the UK party leaders on the brink of the 2014 independence referendum, in which they committed to a substantial extension of Scotland's fiscal powers. Proposals were put forward by the hastily-established Smith Commission and agreed by both governments. The resulting Scotland Act 2016 granted the Scottish Government control over the bands and rates of non-savings and dividends income tax. Powers to define the income tax base and set the value of the personal allowance were retained by the UK Parliament. The Act also assigned 10p of the standard rate of VAT and 2.5p of the reduced rate of VAT to the Scottish Parliament. Two further small taxes—air passenger duty and the aggregates levy were also devolved to the Scottish Parliament.

The Wales Act 2014 provided for the Welsh Government to set the basic, higher and additional rates of income tax if this is approved by a referendum on the use of these powers. The Wales Bill 2016 proposes to remove the requirement to hold a referendum. Rather than focusing on income tax, the Northern Ireland Assembly has pressed for control over corporation tax. Its argument was that such control would allow it to compete with the Republic of Ireland which has had a long history of attracting foreign direct investment partly through its low corporate tax rates. The Corporation Tax (Northern Ireland) Act 2015 allows the assembly to set the Northern Ireland Rate of Corporation Tax and defines the relevant trading profits and reliefs to which this legislation will apply.

Table 4.6 Total revenue by tax and nation excluding local taxes, UK, 2014–2015 (£m)

	England	*Wales*	*Scotland*	*Northern Ireland*	*UK*
Total tax revenue	445,162	17,449	41,833	10,901	515,348
Income tax	143,536	4877	11,972	2724	163,109
VAT	94,699	4445	9134	3084	111,363
Corporation tax	36,388	1023	2988	532	40,932
Stamp duty land tax	10,040	172	478	48	10,738
Air passenger duty	2763	10	305	98	3175
Landfill tax	965	50	102	28	1144
Aggregates levy	222	29	50	40	342
Other taxes	156,548	6843	16,804	4347	184,545

Source HMRC

The obvious conclusion from these recent changes in tax powers within the UK is that they are highly asymmetric and driven by decisions by UK politicians to respond to pressures deriving from local politics in Scotland, Wales and Northern Ireland. They do not form part of any coherent plan, and are made possible by the lack of any overarching structure defining the rules and powers of different layers of government. Nor is it clear whether these relatively new fiscal arrangements will define a temporary or permanent equilibrium. Their longevity will inevitably reflect their perceived success at all levels of government. While it is clearly too early to make any judgement about the merits of this new configuration of tax affairs within the UK, it is possible to discuss their likely starting point, relating these to other sources of revenue.

How much revenue do these devolved taxes raise and how do they relate to public spending in the different parts of the UK? Table 4.6 below shows total tax revenue (£m) and revenues from each of the taxes that will be devolved partially or totally to at least one of the constituent nations of the UK for 2014–2015. Several points emerge. First, as with population, England dominates the generation of tax revenues in the UK accounting for 86.4% of UK tax revenues (excluding local taxes). Second, some of the taxes that have been selected for devolution raise relatively small amount of revenue. For example, landfill tax only raised £102m in Scotland in 2014–2015, while the aggregates levy raised only £50m. The question of whether to devolve such taxes may be determined by pragmatic judgements as to whether increases in revenues may be offset by increases in administrative costs. Third, Table 4.6 reveals the

Table 4.7 Tax revenues and public spending in the UK and its constituent nations, 2014

	England	*Scotland*	*Wales*	*Northern Ireland*	*UK*
Tax revenues per head (£000 s)	8.1	7.7	5.6	5.7	7.9
Higher rate taxpayers (# 000 s)	3980	144	366	77	4567
Higher rate taxpayers per 1000 population	72.6	67.8	46.5	40.5	70.0
Additional rate taxpayers (# 000 s)	308	18	5	3	334
Additional rate taxpayers per 1000 population	5.6	3.3	1.6	1.6	5.1
Identifiable public spending 2004–2015 (£bn)	469.2	55.5	30.6	20.4	575.7
Identifiable public spending per head	8.6	10.4	9.9	11.1	8.9
Identifiable public spending per head (UK = 100)	97	116	111	125	100
Social protection per head (UK = 100)	98	107	115	119	100

Source HM Treasury and HMRC

asymmetry in the devolved taxation arrangements, with Scotland gaining new powers that will give it control of around 40% of its total tax revenues. Fourth, income tax is the largest source of tax revenue for the UK as a whole and for Scotland and England. But in Wales, VAT revenue is close to that from income tax, while in Northern Ireland, VAT revenue exceeds that from income tax. Lower levels of personal income in Wales and |Northern Ireland result in lower income tax revenues.

Table 4.7 presents additional information on taxes in the nations of the UK as well as on public spending. It shows higher tax revenue per head in England, due in part to the fact that that higher income taxpayers are concentrated in England. It also shows that both identifiable and social protection public spending is higher in the Celtic nations than in England.

Consumption Taxes

Variations in Value Added Tax (VAT) within the European Union are allowed only within certain limits for states and not at all for sub-state governments. The Scotland Act (2016), instead assigns a share of VAT revenue raised in Scotland but with has no power to alter either the tax base or rates. Thus, for example, Scotland has no ability to change the treatment of food and children's clothing, both of which are exempt from VAT. However, once the UK leaves the EU, these arguments will no longer apply and one might expect the Scottish Government to press for greater control of consumption taxes, perhaps along the lines available to the Canadian provinces.

Individual Transfers and Welfare Benefits

In both Canada and the United Kingdom, central government administers a series of state-wide welfare programmes providing for benefits to individuals regardless of place of residents. These co-exist with programmes at the provincial and devolved level, to create complex mosaic of social entitlements (see also Chap. 5, by Banting and McEwen). In Canada, the federal government is responsible for Old Age Security (OAS) a universal pension scheme funded by general revenues and complemented by the Guaranteed Income Supplement (GIS) an income tested program for OAS recipients.[9] Provinces are free to offer programs targeting the 65+population and do so through the provision of additional free medical services, property tax rebates, income subsidies and so on.[10]

The Canada Pension Plan (CPP) is a capitalized pension scheme financed by payroll taxation except in Québec where the QPP is offered by the provincial government. It offers similar benefits but is financed with higher payroll taxes as the population of Québec is older than the population of Canada. Employment Insurance (EI) including parental leave is provided federally except in Québec where parental leave is provided by that province with a reduction in EI premiums concomittant with provincial premiums collected.

All provinces are responsible for welfare programs that are financed by general revenues and that vary between provinces in eligibility and generosity; there are no national/federal (nominal or real) standards. Workers Accident Insurance (Workers Compensation) that are financed by employer paid payroll taxes is provincial and varies in generosity with no national/federal standards. Québec is the sole province that offers

a preventive withdrawal program to pregnant women. Public health insurance programs vary slightly between provinces in coverage and are guided by the principles of the federal Canada Health Act (universality, public provision, portability, no user fee). Provinces can introduce any other programme they wish to implement such as Québec's public Prescription drugs insurance, which must be taken up by those individuals not privately insured.

Scotland

Since the passage of the National Insurance Act in 2011, UK social insurance has been highly centralised and controlled directly by the UK Government. However, the Scotland Act 2016 broke new ground in devolving some of this centralised welfare system to the Scottish Parliament. Certain benefits, particularly those associated with disability, are to be transferred from the Department for Work and Pensions to a new Scottish Social Security Administration. The value of the benefits being transferred is £2.8 billion. Two benefits, which account for almost 80% of this total, are Disability Living Allowance (which is being transformed into Personal Independence Payments for the UK as a whole) and Attendance Allowance. Both are payable to individuals suffering from serious disabilities.

The Scottish Government has also been given powers to create new benefits and to top up existing benefits being paid by the UK Government. The power to create new benefits is limited to areas that are not covered by existing benefits which remain reserved to the UK. Thus, it will not be possible for the Scottish Government to create a new benefit to offset reduction in UK benefits. No additional funding will be available for these new welfare powers and therefore reductions will have to be made elsewhere in the Scottish Government budget if new benefits or increases in existing benefits are introduced.

Finally, the Scottish Government has been given powers to vary the conditions under which some UK benefits are paid. Thus, for example, the Scottish Government has decided that the main benefit available to working age individuals, Universal Credit, can be paid more frequently in Scotland and that its housing element can be paid direct to landlords. Such measures indicate a more empathetic treatment of benefit claimants by the Scottish Government than the UK Government.

Conclusion

Let us examine anew the three topics addressed above: intergovernmental financial relations, taxation of personal income and value added and welfare type transfers to individuals.

With respect to the overall intergovernmental financial arrangements, both the British and Canadian systems of fiscal federalism have evolved in response to political pressures. However, the Canadian provinces have more direct influence over the design of taxes and transfers, largely as a result of their constitutionally assigned powers. Devolution of the UK tax and benefit systems would not have occurred had there not been an upsurge of nationalist sentiment among the Celtic nations while greater autonomy for Canadian provinces, exercised or potential, is the result in good part of the nationalist sentiment in Québec.

The Barnett formula remains the principal mechanism for fiscal transfers to the Celtic nations in the UK. Like its Canadian equivalent, its value is not based on a measure of need. These grants determine a significant share of each province's (in the case of Canada) or nation's (in the case of the UK) annual budget. Their calculation is extremely complex and open to political rent seeking. The Barnett formula has been given a firmer legal basis to transfers following the passage of the Scotland Act 2016, which mentioned its use in the calculation of the block grant adjustment. This puts it on a status similar to the Canada Health and Social transfers but it is not a form of equalisation and has no constitutional protection.

To what extent do the fiscal and welfare powers provide insurance against asymmetric shocks? Clearly Scotland is now exposed to greater risk in respect of significant falls in employment or in earnings (particularly among the higher paid given the progressive nature of income tax). It is also exposed to changes in the prevalence of disability which will impact on its welfare payments. In the case of Canada, this risk is explicitly mitigated by the equalisation system.

Turning to taxation, personal income tax is one of the major fiscal levers that has been devolved to Scotland (and potentially Wales) in the UK. Whereas Canadian provinces share personal income tax revenues with the federal government, the intention is for Scotland and Wales to control all of income tax revenues, other than the relatively small amount raised from savings and investment. Given that income tax is the main source of tax revenue to the UK as a whole and therefore an important

element of macroeconomic management, the almost complete assignment of control over personal income tax to the Scottish Government and Welsh assembly is only possible because of their relatively small size.

After the passage of the Scotland Act 2016 and the Wales Act, the Scottish Parliament and National Assembly for Wales will have much greater control over their fiscal affairs compared with the regions of England, many of which are larger than either Scotland or Wales. Plans for tax devolution to the regions of England—such as the North and London—have thus far been limited to property taxes. The asymmetry in the extent of fiscal powers between the nations that make up the UK is much greater than that in Canada between Québec and the other nine provinces.

The control that the Scottish Government is able to exercise over consumption taxes is minimal compared with Canada. Essentially VAT revenues are assigned: the Scottish parliament does not have the ability to affect either the tax base or VAT rates. This is dictated by EU various rulings on the use of consumption taxes as a form of state aid. Whether these rulings will continue to be applicable once the UK has left the EU will depend on the nature of the 'divorce' agreement between the UK and the EU.

Finally, the transfer of some welfare measures from the UK to Scotland is not of the same scale as the inter-provincial diversification found in Canada. Indeed, there is a lack of inter-relation between the devolution of taxation and spending powers in the UK that is not observed in Canada where more provincial freedom in taxation is accompanied by more freedom in how to spend said revenue.

Inter country comparisons of intergovernmental financial arrangements are always fraught with difficulties given differences in historical development and in the political environments. Nonetheless we hope that this comparative paper will be of some help to UK and Celtic policy makers as they progress along the road to devolution.

Notes

1. In the formula, the *standard* is the 10 provinces average and the revenue sources: there are five broad sources of which four are fully (100%) included while only 50% of resource revenues are equalised. The following three steps are then used to determine the final amount paid: (1) initial entitlements as above are calculated using a metric-based formula; (2)

the Fiscal Capacity Cap (FCC) is applied so that an equalization-receiving province is not better off, after equalization than a non-receiving province; (3) since 2009 a per capita reduction is applied when necessary to ensure that growth in the overall envelope does not exceed nominal GDP growth.

2. In Canada, the fiscal year is April 1st of year T to March 31st of year T + 1.
3. At the time of writing (December 2016), there are ongoing negotiations between the provinces and the federal government; this is the default should these negotiations not yield a different formula.
4. See Annex C: Operation and Governance of the Scottish Government's Fiscal Framework (2016) for details. The comparability factor is defined as: *Scotland's revenues per head as a share of the average revenues per head in the rest of the UK in the year immediately prior to devolution*.
5. The UK Office of National Statistics only publishes estimates of gross value added (GVA) for the constituent parts of the UK. GVA is closely linked to GDP. Specifically, GVA plus taxes on goods and services less subsidies on goods and services equals GDP.
6. The Québec Sales Tax is de facto harmonized but not an HST.
7. Lachance and Vaillancourt (2001) describe how the Québec PIT has evolved over time.
8. See http://www.fin.gc.ca/fedprov/altpay-eng.asp.
9. That can be complemented by a transitory allowance for a member of a couple aged 60–64 and thus not yet eligible for OAS-GIS.
10. One can find information by province at http://www.canadabenefits.gc.ca/f.1.2cw.3zardq.5esti.4ns@.jsp.

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CHAPTER 5

Inequality, Redistribution and Decentralization in Canada and the United Kingdom

Keith Banting and Nicola McEwen

Introduction

The last two decades have been marked by two powerful transitions throughout the OECD world. The first has been the growth of economic inequality and the weakening of the redistributive role of the state. This trend has occurred not only in countries with historically weak redistributive systems but also in some countries with robust welfare states such as Sweden. The second transition has been a growing decentralization or devolution of responsibility for social programmes, not just in federations such as Canada but also in states that were traditionally highly centralized, such as the United Kingdom. The obvious question is whether these two big transitions are related to each other. Does growing

K. Banting
Queen's University, Kingston, Canada

N. McEwen (✉)
University of Edinburgh, Edinburgh, UK
e-mail: n.mcewen@ed.ac.uk

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inequality and/or a political desire to reduce redistribution trigger decentralization? Or does greater decentralization/devolution weaken the redistributive capacities of the state, contributing to growing inequality? Or are both patterns important?

This chapter examines the relationships between inequality, redistribution and decentralization in Canada and the United Kingdom. Both countries have witnessed significant growth in inequality, and have experienced periods in which the redistributive role of the state contracted significantly. In addition, both have embraced significant decentralization. Canada was already a decentralised federation, but in the 1990s the federal government abandoned some of its traditional leverage over provincial social programmes and, in the 2000s, and reduced social policy activism within its own jurisdiction. In 1999, the United Kingdom partially departed from its historically centralised political system by introducing devolution to Scotland, Wales and Northern Ireland, entailing substantial decentralisation of social programmes, even if devolution of social insurance and redistributive welfare remained tightly constrained. More recently, decentralisation has deepened, especially in Scotland, with a substantial increase in the Scottish Parliament's fiscal autonomy and social security responsibilities.

We explore the relationships between economic inequality, redistribution and decentralization in these countries by asking two questions. First, did growing inequality and/or a political struggle over redistribution contribute to the decentralising trend in Canada and the UK? Second, did decentralization accelerate or mitigate the weakening of the redistributive state? That is, did regional governments also reduce their social commitments, multiplying the impact of retrenchment at the central level? Or did they utilize their enhanced autonomy to expand social programmes, compensating for the fading of redistribution at the centre. Since there is considerable variation in the response of sub-state governments within and across these cases, we also explore the factors that shaped regional responses. Comparing across the cases allows us to consider the effects of the different depths of autonomy at the regional scale. Our focus of comparison is the provinces and the devolved territories. Power remains highly centralised in England, and we mainly set that nation aside in the discussion.

Our argument can be summarized briefly. Growing economic inequality in the late twentieth and early twenty-first centuries did matter to both the level of decentralization and the impact of decentralization. To be sure, inequality mattered in quite different ways in the two cases,

and in neither case does inequality offer a complete explanation for either the level or impact of decentralization. Rather economic inequality reinforced other decentralist pressures, becoming entwined with other forces at work.

This argument unfolds in four sections. The first section sets our analysis in the context of the larger debates in the literature about decentralization, examining prevailing interpretations of the factors driving decentralist trends and the impact of decentralization on redistribution. The second and third sections then turn to our two case studies, examining the growth in inequality in each country, the factors that triggered decentralization in social policy, and the responses of regional governments to their expanded autonomy. The final section pulls the conclusions together.

Inequality, Redistribution and Decentralization: The Debates

There is now a substantial body of literature analyzing the factors driving the widespread trend to decentralization within democratic societies, and a related literature analyzing the relationship between centralization/decentralization and redistribution. We start with the drivers of decentralization.

The Drivers of Decentralization

Traditional interpretations of the causes of decentralization have not paid much attention to economic inequality, emphasizing the role of other factors instead. One approach—which we label the functionalist approach—argues that decentralization has been driven by pressures for greater efficiency, flexibility, responsiveness and accountability in public services. Public services provided by the central government tend to be uniform across the country, remaining insensitive to the distinctive needs of different regions. They can also be difficult to reform, as innovation must await the emergence of a country-wide consensus. Sub-state governments, in contrast, are freer to innovate and tailor programmes to the preferences of local residents; and, in the view of many, such governments can be held to account more effectively by voters. A second, more sociological approach—which we label the identity approach—argues

that in many countries, decentralization is a response to territorially-based cultural diversity. Over a half-century ago, Livingstone (1956, p. 84) argued that 'federal government is a device by which the federal qualities of the society are articulated and protected.' From this perspective, serious decentralization tends to be driven by regional differences in culture, language, and identity. The functionalist and identity approaches are not mutually exclusive. Distinctive territorial communities are inclined to assert that they are better equipped to recognise and be responsive to needs and priorities within their own political communities. They may also have greater capacity to appeal to the solidarity that underpins redistributive welfare.

An emerging literature sees a third approach, arguing that struggles over the distribution of income and wealth as a critical determinant of the design of political institutions. Some authors argue that inequality and redistributive politics help explain regime transitions, including the extension and consolidation of democracies (Boix 2003; Aceoglu and Robinson 2006). The design of the US constitution, with its checks and balances, is thought to reflect a desire to constrain redistributive politics. More recently, inequality and redistributive politics have been seen as shaping the design of electoral systems (Cusak et al. 2007). Does a similar logic underpin centralization or decentralization in states? Clearly, the brute facts of inequality alone cannot change political institutions. Political agency is also needed, and in this approach it is the political struggle over redistribution that constitutes the link between inequality and decentralization.

The most obvious possibility is that high levels of *territorial* inequality trigger decentralist pressures. For Boix (2003), the adoption of federal institutions is driven by a desire in rich regions to minimize redistribution to poor regions. From this perspective, federalism and decentralization are instruments to manage tensions inherent in interregional inequality; at the extreme, federalism helps ensure the very survival of democracies with high levels of interregional income inequality. We extend this logic to ask whether changes in the level of territorial inequality contributed to recent decentralist trends in Canada and the United Kingdom.[1]

More broadly, the politics of inequality between income classes is potentially critical. Two possibilities are worth investigation. In the first scenario, conservative political interests at the central level try to forestall redistribution by decentralizing power over social programmes to the regional level, on the assumption that economic and fiscal constraints

on regional governments would doom redistributive agendas. A second scenario envisions more bottom-up pressure. In this scenario, conservative retrenchment in redistribution at the central level energizes local demands for decentralization in regions where progressive political forces are strong and convinced they can build a more redistributive state within the region.

This second scenario can take on added complexity in multinational states divided along identity lines. In territorially diverse states, the capacity and willingness of the central or federal governments to meet the social and economic security of its citizens directly, or to promote equality across regions through equalization programmes, can help to reinforce citizen and regional attachments to existing state structures (Banting 1995). State social protection may also help stave off nationalist and secessionist demands, by heightening the risks and potential losses national minorities might incur as a result of major constitutional change. In reducing the redistributive policies of the central state, conservative political forces risk undermining the social contract that helps bind not just citizens but communities to the state, and thereby reduce the risks faced by national minorities demanding decentralization. In this way, political struggles over the redistribution of wealth can weaken the ties that bind, and energize the politics of secession (McEwen 2006).

Such political dynamics are not necessarily triggered by a dramatic increase in actual economic inequality. They could emerge as a result of independent ideological shifts at the centre or in the regions of a country. But the effects are presumably stronger when growing inequality and redistributive political struggles reinforce each other. We therefore ask whether the politics of redistribution contributed to decentralization in Canada and the United Kingdom.

The Redistributive Consequences of Decentralization

Debates over the redistributive consequences of centralization/decentralization have crystalized into a long-standing and somewhat ritualized debate. On one side, a traditional argument holds that redistributive functions are best allocated to the central government. A regional government that launches a vigorous effort to redistribute income runs the risk of attracting poor people from elsewhere and driving away high-income individuals and new investment, undermining the additional tax revenues necessary to support redistribution (Huber et al. 1993;

Swank 2002; Rodden 2003). On the other side, defenders of decentralization have long insisted that regions can rely upon greater solidarity and institutional thickness between class groups and social actors, making it easier to agree the social and economic compromises necessary to reduce inequality (Moreno 2003; Keating 2009). Regions in which the conditions are most favourable can also foster policy innovation and establish new progressive benchmarks which in time can spread across the country (Gallego and Subirats 2012). There is some empirical evidence that regional governments can compensate for actions at the central level. For example, in the US, the fading of redistribution at the federal level in recent decades was partially offset by state policies in regions where the political left was strong (Kelly and Witko 2012). But variations in the fiscal capacity of regional governments are also likely to shape the extent to which they can pursue equality-inducing policies. This may be exacerbated by a further common consequence of decentralization: decreased support for fiscal transfers between richer and poorer regions. As well as generating territorially-based grievances, reduced inter-regional redistribution limits the capacity of poorer regions to redistribute.

We investigate whether decentralization in Canada and the United Kingdom was driven in part by growing economic inequality and a fading political commitment to redistributive politics. We also ask whether political decentralization weakened redistribution and contributed to growing inequality. In effect, we ask, with Beramendi, whether the traditional causal logic underpinning the links between decentralization, redistribution, and inequality might be very well reversed. It is not that decentralization causes inequality, but rather 'pre-existing economic inequalities that drive decentralization of the welfare state, which in turn reproduces the pre-existing pattern of inequality' (Beramendi 2007, p. 786).

Inequality and Decentralisation in Canada

Throughout the 1980s, 1990s and 2000s, Canada witnessed the growth of economic inequality and the fading of the redistributive state. During the 1980s and 2000s, inequality in market incomes grew significantly, as the top line in Fig. 5.1 indicates.[2] The fading of the redistributive state is tracked by the bottom line in Fig. 5.1, which tracks change in the GINI coefficient in post-tax/transfer income. Until the mid-1990s, the tax-transfer system offset the growth in inequality in market incomes,

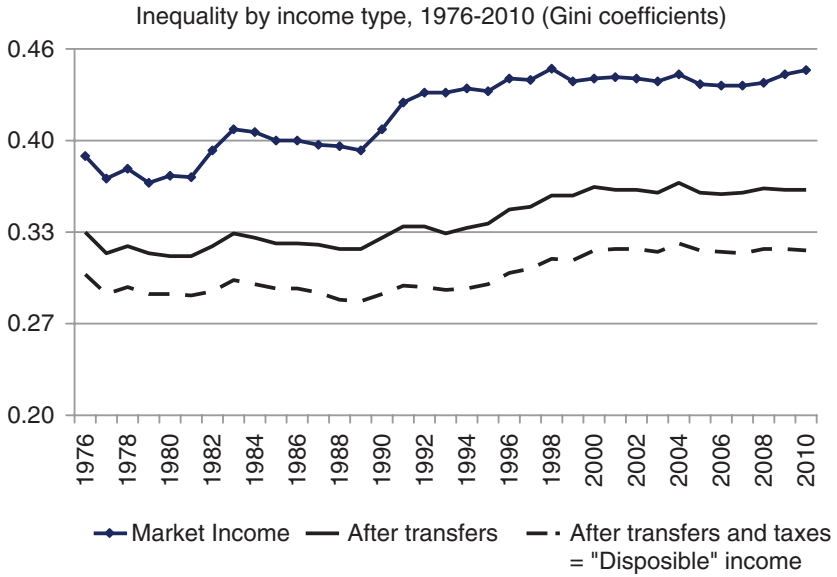

Fig. 5.1 Growth of Income Inequality in Canada. *Source* Banting and Myles (2016)

but following the deep retrenchment in social benefits and growing emphasis on tax cuts, it could no longer do so. The Canadian transition was striking in comparative terms. A major OECD study found that between 1985 and 1995, the redistributive impact of the tax-transfer system was strongest in Canada, Denmark, Finland and Sweden. But between the mid-1990s and the mid-2000s, Canada joined Switzerland and the US as the countries with the smallest redistributive impact (OECD 2011, p. 271).[3]

During this same period, the Canadian federation became more decentralized. The postwar construction of the Canadian welfare state had been led by the federal government, but as provincial programmes expanded, the intergovernmental balance shifted. Figure 5.2 provides one view of this transition. Between the 1950 and the 1970s, the federation shifted to a new balance, with the federal share of direct programme spending declining to about 40%, a pattern that remained relatively stable for several decades. But suddenly in the mid-1990s, precisely the years when redistribution was weakened, the provincial/local role expanded further.

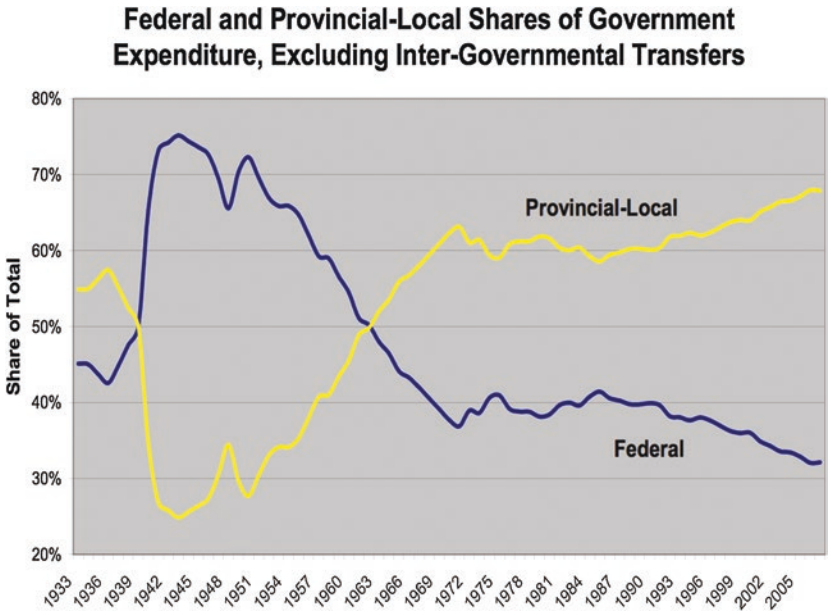

Fig. 5.2 Decentralization in Canada. *Source* Data supplied by the Department of Finance

Figure 5.2 does not include intergovernmental transfers and undoubtedly understates the federal role. But the federal influence implicit in transfers to provinces was also in decline. Beginning in 1978, the federal government shifted from shared-cost programmes to block grants, reducing federal capacity to shape provincial programmes. That process culminated in the 1995 budget, which eliminated the Canada Assistance Plan, the last big shared-cost programme, and cut the financial transfer to provinces significantly. Further decentralization in the field of labour market training followed later in the decade. In law, the federal transfers in the health sector still require provincial compliance with general principles set out in the Canada Health Act. But, in practice, those principles became increasingly hard to enforce as the federal transfer declined as a proportion of provincial health spending.

By the 1990s, Canada had one of the most decentralized welfare states among western democracies. Federal legislative authority over social protection was more limited than in any other federation in the OECD (Banting 2006; Obinger et al. 2005). In addition, federal

transfers represented a comparatively small portion of provincial revenues, precisely the pattern that comparative evidence suggests most dampens social spending (Rodden 2003).

The pattern is clear. Growing inequality, fading redistribution, and decentralization in the federation went hand-in-hand in the 1990s and 2000s. To explore whether these trends were related, we turn to the drivers of decentralization and then to its consequences.

Did Inequality Drive Demands for Decentralization?

Traditionally, students of Canadian federalism have interpreted decentralization largely in terms of identity politics and functionalist imperatives. The distinctive role of Quebec in the federation has been key to decentralist pressures. Quebec never accepted the semi-centralization of the postwar years, arguing that control of social programmes was integral to its capacity to preserve and promote a distinctive Quebec culture. During the protracted constitutional struggles that defined Canadian politics from the 1960s through the 1990s, the province successively pressed for greater decentralization, carving out a distinctive—and de facto asymmetric—role in pensions, immigration, maternity/paternity benefits, and intergovernmental transfers. Over time, the other provinces added their weight to the decentralist cause. They were less animated by identity politics, and advanced their claims primarily in functionalist terms, arguing for greater provincial autonomy in the language of efficiency, innovation, responsiveness to local needs, and accountability to voters. Beginning in the late 1970s, the federal government itself began to see some advantages in a degree of decentralization, accepting less influence over provincial programmes in return for better control over its own budget. This desire to shed responsibility grew exponentially as the federal budgetary position deteriorated. By the 1990s, Canada was among the most indebted of the G7 countries, and approximately 35% of all federal revenue was pre-empted by interest payments on its debt. In this context, the federal government sought to off-load social policy responsibilities, a process which culminated in the 1995 budget.

The history of decentralization has been told in these terms many times. But does this story ignore the role of inequality and the politics of redistribution? While identity and functionalist logics were clearly important, were they reinforced by the politics of inequality? We start with the general political struggle over redistribution and then turn interregional inequality.

Political struggles over redistribution in Canada have been transformed by greater polarization in the party system. The 1993 election witnessed a dramatic fragmentation of the historic party system, and the following decade saw the restructuring of conservative political forces. In the process, the traditional centre-dominated party system, with its ideologically flexible brokerage parties, was replaced by one more polarized on a left-right basis. This ideological realignment among the parties has triggered an ideological 'sorting' at the level of voters. Strikingly, in the 1988 election, voters for the three main parties differed little in their attitudes toward income redistribution; indeed, Progressive Conservative voters were, if anything, a little to the left of Liberal voters. By the mid-2000s, in contrast, Conservative voters were clearly to the right of the other parties on redistributive issues, New Democratic Party (NDP) voters were on the left and Liberal voters were in the middle. Canada still had not moved to class politics, but it did shift to a more ideologically polarized party politics (Johnston 2015; Banting and Myles 2016).

These political shifts mattered both for redistribution and decentralization. The Liberal governments led by Jean Chrétien and Paul Martin remained ideologically centrist. They did make deep cuts in unemployment benefits and transfers to the provinces during the budgetary crisis of the mid-1990s. They also devolved labour market training to the provinces generally and maternity/paternity benefits to Quebec specifically, steps that reflected the aftermath of the Quebec referendum on sovereignty which failed by the slimmest of margins. But when federal finances recovered later in the decade, the Liberals reversed course, reinvesting in redistributive programmes and once again attempting to shape provincial health programmes. All of this stopped after the 2006 federal election, won by the Conservative Party led by Stephen Harper. The restructured Conservative Party was ideologically more neoliberal than its conservative predecessor, and was culturally rooted in western Canada, especially Alberta. The Conservatives were generally unsympathetic to redistributive agendas, especially ones with powerful interregional effects. The result was another round of cuts to unemployment benefits, with greatest impact in eastern Canada. The government also opposed an expansion of the Canada Pension Plan, despite considerable provincial pressure in favour. Harper had long seen the CPP as bleeding the younger population of the west to support the ageing societies to the east. Overall, the Conservatives emphasized the reduction of taxes and federal spending, leaving little room for social policy innovation.

Table 5.1 Interprovincial variation in family income, 1976–1995. Provincial average family income as a per cent of national average income

Date	*Nfld*	*PEI*	*NS*	*NB*	*Que*	*Ont*	*Man*	*Sask*	*Alta*	*BC*
1976	0.81	0.73	0.80	0.88	0.97	1.07	0.84	0.88	1.03	1.08
1980	0.78	0.79	0.83	0.83	0.94	1.08	0.87	0.93	1.08	1.09
1985	0.82	0.80	0.86	0.86	0.94	1.11	0.92	0.90	1.06	0.94
1990	0.93	0.84	0.88	0.88	0.87	1.16	0.91	0.84	1.03	0.99
1995	0.87	0.92	0.86	0.89	0.89	1.11	0.93	0.89	1.04	1.03

Source Statistics Canada, CANSIM

This ideological conservatism aligned closely with a decentralist conception of the federation. Introduced in the 2006 election campaign as 'open federalism', the Harper government adopted a narrow conception of the powers of the federal government, taking the position that social policy was predominantly a provincial responsibility. The government promised to minimize federal interventions in provincial jurisdiction; and in office, they avoided joint federal-provincial initiatives and decision-making. One of their first acts was to cancel a series of federal-provincial agreements designed to expand childcare, which the previous Liberal government had negotiated late in its life. In another contrast with the Liberals, the Harper government did not seek to attach additional programmatic 'goals' to the federal transfer for health care. The Conservatives did not seek to change the formal division of authority between governments but they significantly narrowed the role of the central government in redistributive politics.

A similar dynamic was triggered by growing interregional inequality, which intensified political struggles in the 2000s. Once again, these pressures did not take the form of demands for greater decentralization of formal jurisdiction. Rather powerful voices increasingly challenged federal social programmes, especially ones that transfer resources to poor regions.

Traditionally, Canada has been marked by higher levels of inequality in regional incomes than most other federations in the OECD. Table 5.1 indicates that the pattern of regional economic inequality was reasonably stable during the years before the large decentralization of the mid-1990s. Table 5.2 documents significant growth in territorial inequality in the 2000s, as the surge in energy prices boosted the economies of

Table 5.2 Interprovincial variation in family income, 2000–2014

Date	*Nfld*	*PEI*	*NS*	*NB*	*Que*	*Ont*	*Man*	*Sask*	*Alta*	*BC*
2000	0.76	0.88	0.88	0.85	0.94	1.10	0.93	0.90	1.09	0.97
2005	0.79	0.88	0.89	0.84	0.94	1.06	0.93	0.93	1.17	0.97
2010	0.90	0.91	0.92	0.89	0.94	1.02	0.95	1.04	1.22	0.96
2014	0.98	0.92	0.92	0.88	0.94	1.00	0.95	1.08	1.28	0.07

Source Statistics Canada, CANSIM

resource-rich provinces. The gap in the average family income between the poorest province and the richest province grew by more than 60% between 2000 and 2014. Equally importantly, surging energy prices and changes in the global economy altered the historic order of rich and poor provinces. Newfoundland and Saskatchewan joined surging Alberta as 'have' provinces in the equalization system, while Ontario's manufacturing economy weakened noticeably, eventually reducing the province to 'have not' status.

The result was intense political struggles, with provincial governments leading the charge. Strikingly, Ontario, which historically had been a political bulwark of the federal role, increasingly joined rich western provinces in demanding retrenchment in interregional transfers. Provinces were unhappy with federal-provincial fiscal arrangements generally. In addition, the federal unemployment insurance programme, which is much more generous in Quebec and Atlantic Canada, was a target. But the most intense intergovernmental warfare centred on the equalization programme. Equalization is a federal programme, funded exclusively from federal revenues, which provides payments to provinces with below-average fiscal capacity. The programme, introduced in 1957 and entrenched in the constitution in 1982, has always been comparatively modest, narrowing differences in the fiscal capacity of provinces less than similar programmes in other federations (Blöchliger and Charbit 2008; see also Chap. 4). This has not, however, insulated the programme from recurrent political controversy, and in the 2000s, 'discontent over equalization morphed into a full-blown intergovernmental conflict' (Lecours and Béland 2009, p. 570; also Lecours and Béland 2013). The immediate flashpoint was the impact of higher resource prices on territorial inequality. On one side, previously 'have not' provinces such as Saskatchewan and Newfoundland found their surging revenues from energy royalties offset by reductions in their equalization

payments (Courchene 2004). When the problem was not resolved, the premier of Newfoundland, Danny Williams, a Conservative, urged Newfoundlanders to vote against the federal Conservatives in the next election and the premier of Saskatchewan announced they would sue the federal government over its 'betrayal'. On the other side, Ontario, previously a 'have' province, received equalization payments beginning in the 2009–2010 fiscal year. This shift generated even wider anger. Since the total size of the equalization pool was capped, Ontario's entry squeezed payments to other 'have not' provinces. But Ontario was not happy either. Since Ontario is a big province, its taxpayers provide a major share of federal revenues that finance the equalization grants. The Ontario premier, Dalton McGinty, joined the angry chorus, objecting that 'we would rescue ourselves with our own money. That's how perverse and nonsensical this financial arrangement is' (quoted in Lecours and Béland 2009, p. 579). In this context, the federal government implemented a compromise between rich and poor provinces. But the constrained programme could not keep up with the growth of interregional inequality. As Fig. 5.3 indicates, post-equalization disparity in the fiscal capacity of provincial governments was on the rise in the early 2000s.

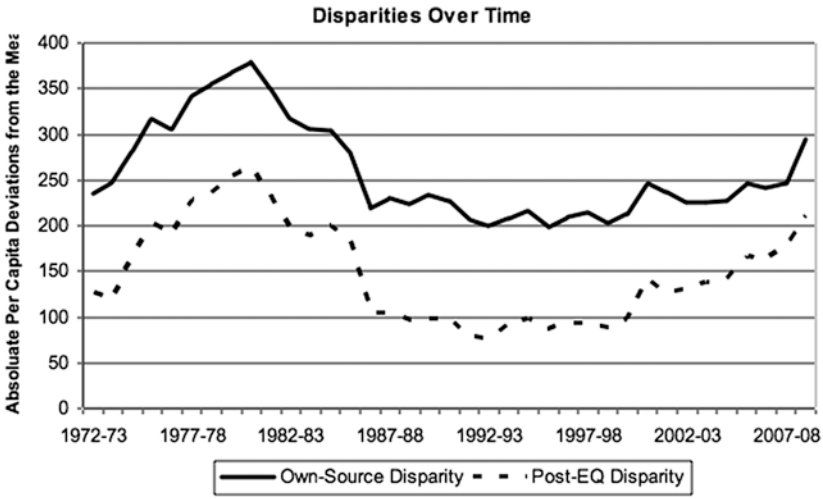

Fig. 5.3 Reduction in provincial fiscal disparities by equalization programme. *Source* Data supplied by the Department of Finance

What conclusions flow from this? It is difficult to attribute the decentralization in the 1990s to growing economic inequality. As we have seen, the Liberal government was driven primarily by fiscal pressures and anxiety about Quebec, and returned to social policy activism as soon as it could. In addition, territorial inequality was reasonably stable in the last decades of the twentieth century. But in the 2000s, the combination of more conservative politics at the federal level and a growing gap between rich and poor regions bore down on the redistributive role of the central state. These pressures did not change the formal division of power between levels of government, but they narrowed the social role of the federal government. Moreover, in Jane Jenson's words, federal passivity meant 'federalism without a leader' (Jenson 2013, p. 56). If social policy activism was to come, it would have to come from the provinces.

The Provincial Responses: Redistribution at the Regional Level

How did the provinces respond? Overall, provincial action in the 1990s reinforced rather than offset the decline in redistribution at the federal level. Indeed, redistribution declined more at the provincial than the federal level. In their detailed analysis, Frenette and his colleagues conclude that 'most of the 'action' in changes in the redistributive effect of tax and transfer systems over this period took place at the provincial level' (Frenette et al. 2009, p. 408). Cuts to social assistance, the elimination of surtaxes and the reduction of general tax rates paved the way. Retrenchment in social assistance was most important. The speed and intensity of cuts varied across the country, with the steepest reductions made in Ontario when the Conservative government cut benefits by 20% in 1996. Nevertheless, the direction of change was consistent across the country (Kneebone and White 2008). The real value of benefits fell by large amounts. Caseloads dropped dramatically, as eligibility conditions were tightened and beneficiaries came under increasing pressure to participate in employability programmes and move into employment.

Broadening the focus beyond social assistance, however, reveals greater variation across provinces. Quebec actually seized the opportunity to build a stronger model of social protection (Noël 2013; Béland and Lecours 2008). Although it also cut social assistance, the province introduced a family policy including universal childcare, stronger child benefits, active labour market policies, and a strategy against poverty and social exclusion. These changes offset the impact of social assistance

cuts, and helped Quebec defy the country-wide trend towards greater inequality (Fortin 2010; Banting and Myles 2013). The distinctive politics of Quebec lay behind the growing divide. In the middle of the 1990s, Quebec still had a strongly organized society, with powerful trade unions, a strong women's movement, and a dense network of social and community organizations (Noël 2013). As a result, the political dynamic resembled the politics of welfare state reform in many European countries, where governments seeking to reform their welfare states built coalitions among historic social partners (Häusermann 2010). In 1996 and 1997, the Quebec government and its social partners built such a reform coalition around innovations in public finance, employment, and family policies, including child care.

Other provincial responses also varied, and the gap between the most and least redistributive provinces grew even larger. The different responses reflected differences in their politics. The redistributive impact of taxes and transfers has been higher in provinces with greater union density and more left-party governments since the early 1990s. Provinces dominated by conservative parties have moved in the opposite direction (Haddow 2013, 2014). An analysis of levels of public support for redistribution within provinces during the 2000s comes to similar conclusions (Sealey and Andersen 2015, p. 58).

Table 5.3 provides a measure of the trends between 1993 and 2007. The overall pattern across all provinces was a weakening of

Table 5.3 Redistribution by provinces, 1993–2007. Reduction in provincial GINI from provincial transfers and income taxes

Province	*1993*	*2000*	*2007*
Quebec	0.56	0.50	0.47
Ontario	0.44	0.28	0.28
Newfoundland	0.32	0.51	0.37
PEI	0.15	0.22	0.19
Noiva Scotia	0.34	0.27	0.24
New Brunswick	0.31	0.29	0.30
Manitoba	0.38	0.27	0.23
Saskatchewan	0.31	0.32	0.22
Alberta	0.29	0.16	0.11
British Columbia	0.25	0.31	0.14
Mean	0.34	0.31	0.26

Source Data from Haddow (2013), Appendix Table 16B, column 5

redistribution, except in tiny Prince Edward Island but the steepness of the decline and the redistributive impact varied enormously. Redistribution in Quebec was over four times that in Alberta.

What conclusions can be drawn about the impact of decentralization on redistribution in this era? At one level, both of the traditional arguments find some vindication. Provinces did vary significantly in their responses, reflecting differences in their internal politics. Yet overall, the provincial action in the wake of decentralization reinforced rather than reduced the fading of the redistributive state.

Inequality and Decentralization in United Kingdom

The United Kingdom is one of the most unequal countries in Europe, behind only Estonia among EU member states in the OECD. The level of income inequality has been well above the OECD average for the last three decades, and remains well above that in Canada (OECD 2015). As Fig. 5.4 reveals, the UK witnessed a sharp rise in income inequality from 1979 to around 1990, with the Gini coefficient rising from around 0.24 to 0.34 during this period. The relative stability since then masks a sharp divergence in the incomes of the very rich and the rest. During

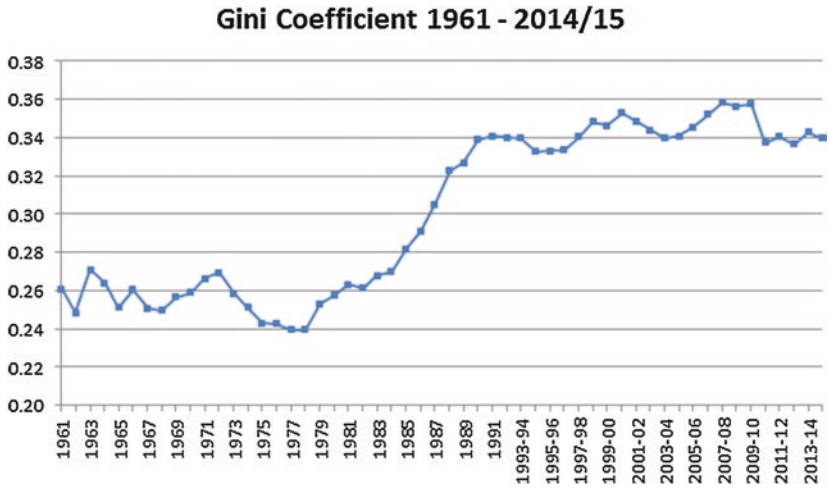

Fig. 5.4 Income inequality in the UK. *Source* Belfield et al. (2016)

the 1980s, the incomes of both the top 10% and the top 1% rose significantly, but since 1990, it is the top 1% who have seen their incomes rise sharply (Belfield et al. 2016).

These trends are the result of several drivers. In the UK, as elsewhere, inequality has been affected by changes beyond the control of national governments, such as globalization, capital mobility, the accumulation of wealth and the impact of new technologies on the labour market. However, policy interventions are a contributory factor. The sharp rise in inequality in the 1980s coincided with the period of radical neoliberal government under Margaret Thatcher. Her government curtailed trade union rights and social security entitlements, affecting the incomes of the lowest earners. At the same time, high earners benefited from substantial reductions in the top rate of income tax, in the first instance from 83 to 60%, then to 40% in 1988. Policy interventions of the Labour Government in office from 1997 to 2010 helped to mitigate and contain further rises in inequality. These included the introduction of the National Minimum Wage, working tax credits for low earners, increases in state pensions and other pensioner benefits, and an additional rate of taxation for the highest earners. Headline figures, however, mask increasing inter-generational inequality such that, by 2015, pensioner incomes (after housing costs) had surpassed those of non-pensioner households for the first time (Belfield et al. 2016; Bell et al. 2017). Since the Conservatives re-election in 2010 (in coalition with the Liberal Democrats from 2010–2015, then with a single party majority), the UK Government has implemented a series of welfare reforms, with cuts in social security entitlements especially for working-age adults, a stronger sanctions regime facing benefit claimants, alongside reduction in taxes, including by expanding the personal allowance (a cut for all but the very wealthy) and reducing the additional rate imposed on the highest earners.

The introduction of devolution within this period provides an opportunity to test the question of whether decentralization is a result of rising inequality or whether it exacerbates the problems of inequality. Until 1999, the UK was one of the most centralized states in Europe, with power and authority concentrated in Westminster and Whitehall. There had been pressure for devolution from Scotland and (in a weaker form) from Wales periodically since the late 1960s, eventually leading to the establishment of the Scottish Parliament and the National Assembly for Wales in 1999. Northern Ireland was the only part of the UK to have

hitherto experienced devolution following the partition of the island of Ireland in 1921, but this was abandoned amid sectarian conflict in 1972. The reintroduction to Northern Ireland of a very different kind of legislative assembly, with power-sharing at its heart, was a response to the drive for peace and conflict resolution. But the historical precedent shaped the distinctive nature of devolution in Northern Ireland. It remains the only sub-state territory within the UK where social security is wholly devolved. However, social security devolution has been heavily constrained in practice, as a result of the commitment of successive UK Governments to ensure citizens in Northern Ireland receive benefits on a par with other UK citizens on the understanding that its social security policy would remain in step with UK policy. In Scotland and Wales, by contrast, social security remained wholly reserved in the original devolution settlement. Almost every other area of the welfare state fell under the jurisdiction of the Scottish Parliament and the National Assembly for Wales, although the latter's capacity for developing new policies has been constrained by weaker legislative devolution and policy capacity. Given the strict limitations on fiscal autonomy across the devolved territories, their social spending has been heavily dependent on fiscal transfers (the Block Grant) from the UK Treasury (Chap. 4).

As in any large state, there are significant geographic disparities in income and wealth. Yet, the UK is comparatively unusual in lacking a system of equalization to spread income across sub-state governments. Fiscal transfers are instead based on historical departmental allocations, with population-based increments allocated according to a formula (the Barnett formula) which calculates devolved government allocations as a proportion of comparable spending in England (Chap. 4). Although this formula ought gradually to even out geographic disparities in per capita spend, there remains considerable variations in per capita spending depending on where in the UK one lives. Notwithstanding the health warning economists and even the Treasury's own statisticians place on interpreting the data, Table 5.4 provides some insight into these variations and their persistence over time. With respect to overall identifiable public expenditure (which includes health, education, social care, housing and social protection), Northern Ireland, Scotland and Wales receive more per head than England. This is especially the case in Northern Ireland and Scotland (though not Wales) once we exclude transfers to individuals for social protection (Heald and McLeod 2002). The two time points suggest that devolution has made little difference to these

Table 5.4 Identifiable public spending per head by region and country, indexed (UK = 100) 1999/2000 and 2015/2016

	1999/2000	*2015/2016*
Scotland	118	116
Wales	113	110
Northern Ireland	133	121
England	96	97
English regions:		
North East	*109*	*104*
North West	*104*	*103*
Yorkshire & the Humber	*95*	*97*
East Midlands	*90*	*91*
West Midlands	*94*	*96*
East	*88*	*90*
London	*113*	*112*
South East	*84*	*88*
South West	*92*	*92*
UK spending	100	100

Source HM Treasury (2001), Table 8.6b; 2016, Table A.2

overall spending disparities. Table 5.4 also reveals considerable variation within England, with London benefiting more than relatively poorer regions in the north.

Did Inequality Drive Demands for Decentralization?

The increased demand for decentralization in the 1980s had a number of drivers, chief among these being the divergent political preferences between Scotland and Wales on the one hand, and England on the other. Coupled with the anomalies of the electoral system, the Conservatives enjoyed successive landslide election victories despite their falling support in Scotland and Wales, giving rise to perceptions of a 'democratic deficit' in the political system. Demands for devolution in Wales were weaker than in Scotland, but antipathy to the UK political system and its lack of democratic accountability was nonetheless keenly felt. Devolution demands were weaker still in the north of England, which was similarly adversely affected by changing economic and political priorities, and similarly lacking democratic voice within government. In Scotland, a resurgent nationalism as evidenced in growing support for the Scottish National Party helped to reinforce the Labour Party's commitment to devolution.

Rising inequality within the UK may have contributed to the declining popularity of the Conservatives. It certainly changed the nature of the home rule debate, especially within Scotland. A Scottish Parliament came to be regarded as a necessary means of resisting neoliberalism, preserving the institutions and services of the welfare state, and promoting progressive social and economic change within Scotland. A leading trade unionist at the time recalled that the UK Government in the 1980s was 'so out of touch, fiercely unionist and hostile to Scotland that opposition to its social and economic policies became linked with the constitutional question', broadening the coalition of support in favour of some form of home rule for Scotland (cited in McEwen 2006). Among the wider electorate, too, support for devolution went hand-in-hand with support for social democracy, antipathy towards the Conservative Party and feelings of Scottishness (ibid.; Mitchell and Bennie 1996).

A similar intermeshing of support for home rule and the defence of the welfare state was evident in the 2014 Scottish independence referendum. Although there is, at best, very limited evidence to suggest that UK welfare cuts and the promise of a progressive welfare state after independence increased support for independence in the referendum itself (Liñeira et al. 2017), it became a central feature of the pro-independence campaign. The then Deputy First Minister, Nicola Sturgeon, frequently exploited the political opportunity created by UK welfare reforms to promote independence as the only means by which the social and economic needs and priorities of Scots could be met, while the broader yes movement also posited independence as a path towards social justice (McEwen 2017a). There was an innate (small 'c') conservatism to the arguments made by yes campaigners, at least those within government; what they sought was the preservation of once-cherished British institutions rather than to embark on radical reform. In a speech in the months prior to the referendum, Sturgeon underlined 'the need to protect the post-war welfare state' as a core ambition of Scottish independence, arguing that 'far from pooling risk and sharing resources, the current Westminster government is intent on nothing less than the dismantling of the social security system'. Of course, such claims were countered by opponents of independence, most cogently by the former Labour Prime Minister Gordon Brown, who presented the UK as a 'social union' and a 'union of social justice', united by solidarity and mutual belonging which allowed for the pooling and sharing of risks and resources across territorial boundaries (cited in McEwen 2017a).

Devolution, Inequality and Social Welfare

Devolution appears to have had little obvious impact on reducing overall inequality. As Fig. 5.5 portrays, levels of income inequality as measured by the Gini coefficient have remained high across the UK. The higher levels of inequality in England and, to a lesser extent, in Scotland compared to Wales and Northern Ireland are not a result of policy interventions; the relative lack of high earners in Wales and Northern Ireland dampens the effects on regional inequality of the sharp rises in the incomes of this group seen in the UK as a whole. Wales and Northern Ireland also have the highest levels of poverty of the UK's constituent units. During the period of devolution, the proportion of households living below 60% of median household income has declined most in Scotland—from 24% in 1999 to 18% in 2014/2015. A smaller decline could also be seen in England, though this masks considerable regional variation (DWP 2016). On a range of other indicators, however, there are some signs of social progress across the devolved territories. For example, one study noted that, following a decade of devolution, Scotland had achieved most progress on six indicators, including in reducing child and pensioner poverty, while Northern Ireland and Wales presented a more mixed picture (McCormick and Harrop 2010).

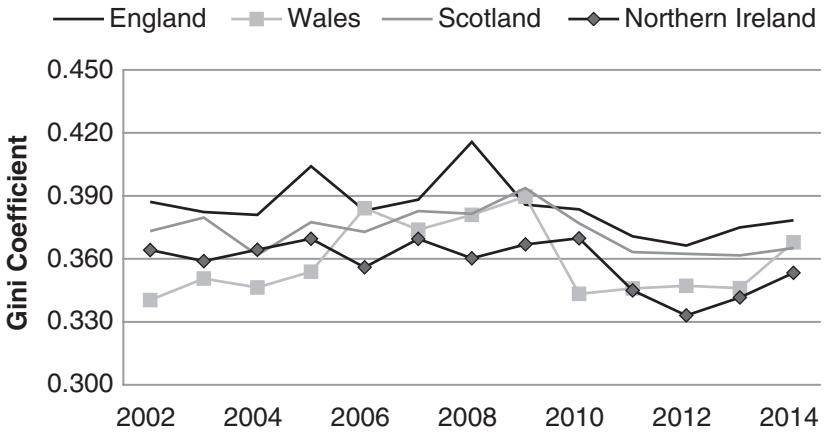

Fig. 5.5 Income inequality after devolution (net income—Gini coefficient). *Source* DWP (2016)

It is difficult to identify a causal relationship between public policy, decentralization and levels of inequality, and McCormick and Harrop do not claim one. As already discussed, the drivers of inequality are multiple. Moreover, despite successive governments in Scotland and Wales being ideologically more predisposed towards reducing inequality and expanding the welfare state, redistributive competence has been minimal. The Welsh Assembly Government was originally given responsibility only for local taxes, though the latest devolution reforms will lead to a modest increase in fiscal autonomy, including the introduction of a Welsh rate of income tax to be applied across all tax bands in 2019. The Scottish Government had powers (never used) to vary income tax from the outset, but only at the basic rate; until 2017, it could not increase the tax take from higher earners nor reduce the tax burden on those with lower incomes. Scotland has recently been the subject of a significant increase in fiscal autonomy, giving the Scottish Government responsibility for raising 100% of income tax on employment-related earnings of all Scottish residents.[4] It will also have significant social security responsibilities for the first time, when it takes charge of a series of existing benefits equating to around 14% of current social security spending in Scotland, as well as competence to introduce new benefits from its own budget, and to 'top up' UK benefits. The Scottish Government has already used its limited competences to offset some of the UK cuts, including through establishing a Scottish Welfare Fund to provide short-term crisis funding, and discretionary housing payments to offset the UK Government's reduction in housing benefit for those deemed to have surplus rooms (dubbed as the 'bedroom tax' by critics) (McEwen 2017b). Resistance to UK welfare reforms among nationalist parties also brought devolution in Northern Ireland to the brink of collapse and exposed the impotency of its political authority in the face of continued fiscal dependence on the UK Government.

Notwithstanding their limited competence over redistribution, the devolved governments have had considerable distributive powers, with few constraints on how they should allocate fiscal transfers (block grants) from the UK Treasury. The first decade of devolution presented a benign fiscal climate, which saw a doubling of the block grants allocated to each of the devolved institutions. This helped support substantial increases in health and education across the devolved territories, and supported their preference for universal public service provision, such as free university tuition (Scotland), free prescriptions (Wales, Northern Ireland and Scotland), and free personal care for the elderly (Scotland). Policy experimentation has been more limited, but there are notable examples, such as Wales' Children's

Commissioner, a policy which was subsequently emulated by the three other governments in the UK. The Welsh Assembly Government also established the world's first independent Older People's Commissioner. Northern Ireland pioneered the integration of health and social care in the UK, a policy now being implemented in Scotland. The Scottish Government led the way in tackling homelessness, with stronger statutory rights to rehousing for the homeless (Birrell 2009; Scott and Wright 2012; Lodge and Schmuecker 2010). The current Scottish Government is also pursuing an ambitious education policy designed to reduce inequalities in educational outcomes by providing targeted investment to address the 'attainment gap' between children from lower and higher income households.

The financial crisis and the austerity agenda of the UK coalition government limited further rises in fiscal transfers and, in some instances, brought decreases in real terms, creating tensions in intergovernmental relations. For Wales, in particular, where spending per head has been lower than in Scotland and Northern Ireland, budget restraint and its particularly detrimental impact on the Welsh budget provoked re-examinations of the system of UK territorial finance. As Wales expands its fiscal autonomy in the coming years, a new fiscal framework has promised a needs-based element to territorial finance specifically for Wales. This is expected to 'more than outweigh' income tax revenue losses resulting from Wales' slower population growth relative to England (Poole et al. 2017).

It remains an open question as to whether new constitutional capacities in tax and welfare will generate greater equality-inducing policies, especially in Scotland where there is now some constitutional capacity to promote redistribution. Thus far, the Scottish Government has demonstrated a cautious approach, deviating from UK income tax rates only by *not* adopting a UK policy change which increases the threshold at which higher rate taxation is levied. This caution may reflect concerns about the risk of middle class flight or, more likely, middle class accountancy. The continued limits on fiscal autonomy carry the risk that tax increases for high earners would be offset by a greater proportion of their income shifted into savings, dividends or tax avoidance schemes, which all fall under the jurisdiction of the UK Government. Demographic pressures also constrain capacity to use new social security powers to expand provision significantly. The new social security responsibilities are primarily to support older people and those unable to participate in the labor market. Yet, Scotland's population is ageing more rapidly than in the UK as a whole, with a less favourable dependency ratio, leaving fewer workers to support more progressive and expansive programmes.

Conclusions

We began by asking whether growing inequality and the political competition over redistribution contributed to the drive for decentralization in Canada and the UK, or whether decentralization contributed to undermining the welfare state and its capacity to reduce poverty and redistribute income and wealth across regions. These are sequential questions, and are not mutually exclusive. It is entirely possible to answer both in the positive.

The answer to the two questions differ in our two countries. Canada entered the era of rising inequality as an established and comparatively decentralized federation. The United Kingdom confronted inequality as a highly centralized state. These differences mattered to the interaction between inequality and decentralization. The politics of inequality mattered more to decentralization in the United Kingdom than in Canada; but the response of sub-state governments to the decline of redistribution at the centre mattered more in Canada than in the United Kingdom.

In Canada, rising inequality and political struggles over redistribution add little to our understanding of the causes of formal decentralization. The decentralist steps of the mid-1990s were driven more by functionalist and identity politics, especially intense budgetary pressures and the near-death experience of the 1995 referendum in Quebec. The politics of inequality were more important in the 2000s. The combination of ideological conservatism at the federal level and anger over interregional inequality at the provincial level bore down on federal programmes, especially those that redistribute between regions. There was no change in the formal division of power. But federal inaction masterfully diverted the social pressures to the regional level. Provincial responses did matter. Overall, the provincial action reinforced rather than reduced the fading of the redistributive state at the federal level. But provinces varied significantly in their responses, with Quebec in particular exercising its enhanced autonomy to strengthen social solidarity.

In the United Kingdom, the pattern was the reverse. The politics of inequality permeated and reinforced decentralist pressures rooted primarily in identity politics. The growth of inequality and the retreat from the redistributive welfare state on the part of central government shaped the debate on—and to a more limited extent the level of support for—enhanced self-government. This was most notable in Scotland, both in the 1997 referendum on devolution and the 2014 referendum on Scottish independence. A Canadian-style conflict over inter-regional

equalization did not occur, as there is no regionally-based redistribution in the UK; recent concessions to Wales notwithstanding, the disparities that remain in spending per head are a result of historic spending patterns rather than any assessment of fiscal capacity. Nevertheless, the wider struggle over redistribution mattered to decentralization more broadly than in Canada. Having said that, it is too soon to know whether the policy decisions of the devolved authorities will eventually have a significant impact on the levels of inequality, but the constraints on charting a different social future in Scotland, Wales and Northern Ireland are real.

Thus, inequality mattered to decentralization in different ways in the two countries. Yet in neither case does inequality offer an alternative causal explanation for increased decentralization. Indeed, the fact that persistent inequality in income and spending across the regions within England has not led to stronger demands for decentralization suggests that no direct causal link can be made. More interesting is the way in which inequality interacts with identity politics and functional imperatives. Governments intent on reducing their spending can offload social burdens to other jurisdictions, strengthening both the latter's policy-making capacity and their policy responsibilities in the process. At the same time, however, retrenchment at the federal or central level undermines the principles of social citizenship and social commitments made to all citizens within a state. In both Canada and the UK, we have seen how, in regions where identity politics are already salient, retrenchment enabled pro-decentralization forces to posit regional government as the guarantor of social rights, redrawing the boundaries of social solidarity at the regional scale.

Notes

1. A more subtle argument is that differences in the level of inequality *within* regions is critical to changes in the level of centralization/decentralization in a federation. Beramendi (2007, 2012) argues that the level of inequality and economic specialization within regions shape the preferences of both rich and poor individuals towards centralization/decentralization. However, differences in within-region inequality were stable in our two cases in the relevant period, and we do not pursue this hypothesis in explaining recent decentralization.
2. During the 2000s, the growth of inequality was more noticeable in the spectacular rise in the proportion of income captured by the top 1% of income earners (OECD 2014).

3. For a fuller discussion, see Banting and Myles (2013) and Green et al. (2016).
4. In the UK, 'income tax' is separated from 'national insurance', though they are both effectively a tax on wages and used for general public expenditure. National insurance remains reserved.

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CHAPTER 6

Party Systems and Party Competition

Lori Thorlakson and Michael Keating

Introduction

Parties and party systems play a key role in managing territorial politics in most states and especially in federal or devolved countries, where they must compete in different electoral arenas. State-wide parties may serve a centripetal role, bringing the federation together while territorial parties are centrifugal. One school of thought has long argued that party competition will tend to even out across states (Lipset and Rokkan 1967; Caramani 2004). This may be because they reflect underlying sociological factors serving to integrate territory. Alternatively, parties may learn to manage territorial diversity, making different appeals in different parts of the state and acting as territorial brokers. In majoritarian electoral systems parties need to gain support across the country in order to govern. Canada and the UK combine first-past-the-post in state-wide elections with an aversion to coalitions. In some cases, however, political development does not follow this nationalizing path and territory re-emerges to leave its

L. Thorlakson
University of Alberta, Edmonton, Canada

M. Keating (✉)
University of Aberdeen, Aberdeen, UK
e-mail: m.keating@abdn.ac.uk

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mark on party systems at the regional or state-wide level. The complexity of the multi-dimensional nature of competition that results from both territorial and left-right conflict presents parties with strategic challenges.

These issues play out differently in Canada and the UK. In Canada, state-wide and provincial party systems have a high degree of dissimilarity, and parties have generally responded organisationally by developing separate organizations at the provincial and federal levels, a strategy that has given the parties room to respond to differing regional political dynamics. In the UK, state-wide parties compete at both levels everywhere except in Northern Ireland. In practice, however, despite the disconnect between political competition at the federal and provincial level in Canada, connections between federal and provincial politics in Canada persist. In the UK since devolution, despite the similarity of parties and party systems in statewide and regional contests, dual voting has emerged and, in Scotland, the UK party system is in crisis at both levels. In both cases, the need to compete in distinct arenas and produce tensions within parties as well as between them.

The chapter will examine patterns of party competition and voting at the two levels in the two cases, the territorial dispersion of the vote and the territorial strategies of the main parties. We argue that there is a common problematic in the two cases but that the structure of the party system and the organisational strategies of parties have meant that it is worked out differently in Canada and the UK.

Patterns of Party Competition and Voting in the UK and Canada

Parties and Voter Behaviour: Integrative Dynamics in Multi-level Systems

Parties in multi-level settings are competing in complex environments. This is especially true in systems where territorial cleavages are present. Differences in the cleavage basis and party systems, party organization and voter behaviour can affect integrative dynamics in multi-level settings and the management of territorial conflict. First, the similarity of the party systems and cleavage basis affects the potential for territorial conflict and shapes the incentives and strategies available to parties and voters. The similarity of party systems and their connectedness through party organization and electoral behaviour can also affect how

party system change in one arena can spill over into others. Party system dissimilarity can take different forms. The cleavages that structure the party systems can differ across electoral arenas and their relative salience can vary over time. This can in turn lead to dissimilarity in the party systems: in the parties that compete, their relative electoral strength and patterns of opposition (Thorlakson 2007; Schakel 2013).

The organizational strategies of parties affect whether they are able and incentivised to horizontally or vertically coordinate interests within the party. State-wide parties, which organize and compete across all regions, must coordinate horizontally, internally brokering regional interests across the country in order to maintain a unified party. Competing state-wide gives parties a chance to secure seats across the country and aspire to majorities in parliament, but at the price of limiting their responsiveness to the preferences of particular regions. Regional or non-statewide parties, that compete on a territorial dimension, limit their office potential in state-wide elections to possibly serving as a pivotal party in a minority government or as a coalition partner, but maintain maximum responsiveness to regional preferences. This can strengthen these parties in regional contests.

Parties also face the choice of coordinating vertically, by maintaining integrated organizations with the party that competes in the regional or sub-state electoral arena. This can pose a strategic dilemma for parties because they have to balance responsiveness to electorates at two levels and sometimes the voter preferences and priorities of these arenas conflict. Some theorists argue that vertically integrated parties are key to maintaining stability in federations because it creates a mutual interdependence that regulates the federal bargain: the central party needs the regional level for its electoral success because its state-wide vote is secured through local campaigning by strong local organizations (Filippov et al. 2004).

For some parties, the price of vertical coordination is too high and they choose to operate as separate organizational entities—truncated parties—at the two levels (Dyck 1991). This strategy of maintaining weak (or no) organizational links with the party at the federal or state-wide level may give parties at the regional level valuable flexibility that they need for regional responsiveness, especially when the provincial and federal arenas are very different. It also allows for sub-state parties to distance themselves from unpopular policies (or politicians) at the state-wide level. Strategies of truncation can be found in both state-wide and regional parties, although the latter form is rare.

Finally, the dynamics of territorial conflict can also be affected by voter behaviour. Voter behaviour in a multi-level system can be linked, either due to voters holding consistent party identification across electoral arenas, or using sub-state elections as opportunities to protest against the nationally incumbent party. Alternatively, we may find patterns of dual voting emerging, where voters hold independent and sometimes inconsistent party identifications at different levels.

Cleavage Structure and Party System Patterns in Canada at the Provincial and Federal Level

Party competition in Canada is characterized by separate and often quite different party systems across the provincial and federal party systems. While the usage of single member plurality electoral systems in all of these arenas generates a tendency for two party competition, dissimilarities remain in the parties that compete and the relative electoral strength of the parties. Generally, the federal party system has primarily been structured by the left-right cleavage, with the territorial cleavage playing a more limited role.

The Liberals and Conservatives dominated federal politics following confederation, with both parties seeking to accommodate linguistic and religious cleavages that divided the founding provinces. This pattern continued until the end of the First World War, when voters in Quebec turned against the Conservatives over the conscription crisis and new populist movements emerged in the new western provinces of Saskatchewan and Alberta. While the single member plurality electoral system meant that the national electoral strength of these parties remained limited, these new parties channelled regional grievances. In response, the Conservative and Liberal parties became effective at brokering regional interests in order to maintain support across the country (Carty et al. 2000). This brokerage role was supplanted by an increasing focus on the national agendas of parties from the 1960s onward, as party members demanded greater control over the parties at the expense of the regional elites (Carty et al. 2000).

The pattern of Liberals and Conservatives alternating in government, with the New Democrats as the third party, was disrupted in the late 1980s and the 1990s with the mobilization of the nationalist cleavages and subsequent rise of the rise of the Bloc Québécois, and

the fragmentation of the right through the rise of the Reform Party, which channelled western regional interests. The federal election of 2011 returned the federal party system to its traditional pattern of two-and-a-half party competition.

At the provincial level, we find dissimilarity among party systems. Ontario most closely mirrors patterns of federal competition between Liberals and Conservatives with the NDP as the third party. In the Atlantic provinces, competition occurs between the Liberals and Conservatives. In the west, the NDP have traditionally alternated in power with the right in Manitoba (Conservatives), Saskatchewan (Conservatives, Saskatchewan Party) and British Columbia (Social Credit, then BC Liberals), and in 2015 Alberta broke from its decades long pattern of Conservative party dominance by electing an NDP majority government.

Quebec is the most distinct provincial party system in Canada. While the left-right dimension generally structures party competition elsewhere in Canada, a federalist-separatist cleavage structures party competition in Quebec (Carty et al. 2000, p. 75). Since the 1970s, its party system has featured two party competition with an alternation in power between the federalist Parti Libéral du Québec and the separatist Parti Québécois, fragmenting into three-party competition since the 2000s. Since the Quiet Revolution triggered the mobilization of the territorial cleavage provincially in Quebec in the 1960s, territorial cleavages have been chiefly expressed through—and contained within—the provincial party system in Quebec. This changed in 1993 when the territorial cleavage left a distinct imprint on the federal party system with the emergence of the Bloc Québécois. The party was formed in the early 1990s following the failure of constitutional reform efforts in Canada. Most recently, while the strength of mobilized regionalism is on the rise in party systems in the UK, it is in decline in Canada. In 2011, the Bloc's seat share collapsed from 49 to 4 seats due to an electoral surge of the New Democratic Party. The BQ was a victim of the low salience of the territorial cleavage in the 2011 federal election in Quebec as well as a downward trend in voters' support for sovereignty (Bélanger and Nadeau 2011, pp. 111–112). The party has only experienced modest gains since then, with 19% of the vote and ten seats in Québec in 2015.

Cleavage Structure and Party System Patterns in the UK

UK elections have always been conducted by first-past-the post voting, which penalizes small parties heavily and favours a two-party system with parties competing across the territory. As the franchise was expanded during the nineteenth century, the Conservative and Liberal parties came to dominate elections, drawing on both religious and class cleavages. Starting off as parliamentary factions, these two parties adapted to franchise reform by establishing extra-parliamentary wings in order to mobilize and discipline their electorates. From the early twentieth century, they were joined by the Labour Party, with its origins outside Parliament but adapting quickly to the conventions of the parliamentary constitution (Jones and Keating 1985). As class displaced religion as the main cleavage (Wald 1983), Labour replaced the Liberals, maintaining the logic of the two-party system and of alternation in government. Two-party dominance looked complete after the Second World War so that Pulzer (1972) declared that class was the essence of party competition while Blondel (1974) and Finer (1974) could pronounce that Britain was the most homogeneous of European democracies, with nationality questions a thing of the past.

Yet territory was never completely absent from UK party politics. From the 1870s, Ireland developed its own party system, focused on the national question and the religious cleavage. The Liberals were displaced by the Irish home rule party, which had an on-off relationship with the Liberals after the latter's conversion to home rule. The Conservatives took the form of Irish Unionists. Labour made an effort to get into Irish politics, even holding its conference in Belfast in 1905 but the class issue was largely displaced by the national one and Labour failed to contest the critical election of 1918, the first under almost universal franchise. After the partition of the island in 1922 Northern Ireland developed its own party system, although the Unionists retained a link with the British Conservatives until 1974, sitting with the Conservatives in the UK Parliament. Northern Ireland had its own devolved parliament between 1922 and 1972, with the province sending only twelve MPs to Westminster, so effectively it was marginalized in British politics. Northern Ireland has always had its own party system, reflecting the dominant communitarian cleavage between nationalists (mainly Catholic) and unionists (mainly Protestant) although at times of reduced sectarian tension the Northern Ireland Labour Party made some progress in mobilizing class-based support.

In Scotland, Conservatism was weak for much of the nineteenth century and became competitive only when a wing of the Liberal Party broke with the party over Irish home rule, later merging with the Conservatives. In Scotland, unlike England, the Liberal Unionists were the more numerous and the merged party was called the Scottish Unionist Party, in alliance with the British Conservatives. Scottish Conservatism had a distinct social base, drawing on Protestant urban working class support derived from sectarian divisions linked to those in Northern Ireland. Most Conservatives stood as Scottish Unionists but others would stand as National Liberals or Liberal and Conservative. The Scottish Unionists never stood in local government, preferring to present themselves as independents or Moderates. There was also a rural deference vote in some parts of the country. In this way, the support base for Conservatism was widened and until the late 1950s they performed better in Scotland than in England. These foundations were then eroded and Scottish Conservatism entered a long decline. Although there was a small historic home rule section within Scottish Conservatism and Conservative Leader Edward Heath (1965–1975) tried to push a rather limited programme of devolution, the party mainstream was against it. Under Margaret Thatcher, resistance to devolution demands combined with a loss of understanding of, or empathy with, Scotland (Torrance 2012) to give the Conservatives the image of an 'English' party. So from winning a majority of Scottish seats at the General Election of 1955, they went to winning none at all in 1997.

The Labour Party in Scotland had distinctive roots and played with Scottish home rule politics before the First World War but opted decisively for the UK frame from 1922 (Keating and Bleiman 1979). Thereafter, it resisted periodic campaigns for a return to its older home rule traditions with the argument that power at the centre was what mattered. Labour mixed class and ideological with territorial appeals as the party that stands up for Scotland, winning a plurality of votes and majority of seats at every General Election between 1964 and 2010. During the 1970s Labour fought off a strong challenge from the SNP by reverting to their historic policy of Scottish devolution within the United Kingdom, although they failed to deliver this for 20 years.

In Wales the non-conformist Radical tradition gave a distinct flavour to Liberal politics, while disadvantaging the Conservatives. Labour inherited much of this tradition after the inter-war demise of the Liberal and the industrial and mining culture of south Wales

sustained a hegemonic Labour Party until later in the twentieth century. Conservatism in Wales, by contrast with Scotland, however, advanced from the 1980s, albeit from a very low base, so that Welsh results began to converge on those in England.

The Liberal and later Liberal Democrats were long a territorially-based party, strong in rural Wales, south-west England, the Pennine valleys, the Scottish Borders and North-East Scotland. As their fortunes revived during the 1980s and 1990s, they spread their geographical basis of support but their vote in Scotland was so well concentrated that they actually benefited from first-past-the-post.

Territorial politics re-emerged more explicitly from the 1960s. The Scottish National Party, after scoring some by-election successes, made a breakthrough in the two general elections of 1974, winning over 30% of the Scottish vote and 11 seats. The Welsh nationalists of Plaid Cymru never reached this level of support but have been in parliament continuously since 1974. Direct elections to the European Parliament from 1979 gave territorial parties another platform, especially after the introduction of proportional representation (PR) in 1999.

The establishment of the Scottish Parliament and National Assembly for Wales elected by PR in 1999 and the restoration of devolution to Northern Ireland gave further opportunities for territorial parties so that nationalist parties have served in government alone or in coalition in all three non-English territories. Direct election of a mayor in London and some other towns in England also provided opportunities for candidates not from the main parties.

Voter Behaviour in Canada: The Breakdown of the Second Order Model?

Voter behaviour in Canada facilitates and reinforces the multi-level flexibility of parties that comes from split organizational structures and dissimilar party systems. Partisanship in Canada is flexible and inconsistent between provincial and federal electoral arenas (Stewart and Clarke 1998; Martinez 1990; Blake 1982; Uslaner 1990; Clarke et al. 2011, p. 281). In addition, provincial party identifications tend to be stronger than federal ones, and especially so in British Columbia and Quebec, two provinces with party systems that are highly dissimilar to the federal party system (Kornberg and Clarke 1992, p. 159). Such dual voting is reinforced by dissimilar party systems: in many provinces, voters do not find the same parties on the ballot at each level.

These patterns of voter behaviour in Canada are not consistent with expectations of typical 'second order' behaviour in a multi-level system, in which consistent partisanship is generally assumed, yet voting is also expected to be shaped by a tendency by voters to punish federally incumbent parties and reward small parties in sub-state elections in barometer or second order voting effects (Reif and Schmidt 1980).

Canada: Territorial Strategy

Federal parties compete on left-right dimension of competition and are wary of unleashing the politics of the national question in Quebec or of regional economic resentment. Unlike the left-right dimension, the territorial dimension is difficult for parties to handle because it is internally divisive. Differences in regional preferences along the left-right dimension can also be accommodated by federalism, which leaves many aspects of social policy to the provinces. While the positions of party supporters from both Quebec and the Rest of Canada (ROC) are quite cohesive on the left-right dimension, their positions on the national question leave the parties deeply internally divided (Johnston 2008, p. 822).

The Liberal party, whose supporters hold the most centrist positions on both the left-right and national dimensions, compared to the supporters of other parties, faces the easiest task of maintaining cohesion. It is not immune to the pressures of accommodating the territorial cleavage. Historically, it has faced difficulties due to its policy stance on the national question. The Liberal government's role in the 1982 repatriation of the constitution caused its electoral support to plummet in the 1984 federal election. The ongoing attempts at constitutional reform led to the rise of the BQ federally in the 1994 election.

The Conservative party, meanwhile, faces the biggest strain on the federalist-nationalist issue dimension. The party, whose supporters in the Rest of Canada are the least pro-nationalist of the supporters for all major parties, relies on supporters from Quebec who are more pro-nationalist than Liberal party supporters (Johnston 2008, p. 822). This creates a difficult challenge for party unity for the Conservatives. While the Conservatives were able to secure a majority in Quebec with the help of the provincial Liberals in the 1988 federal election (Carty et al. 2000, p. 71), the party's subsequent support for the Charlottetown Accord led to backlash from Quebec nationalists (and the rise of the BQ) as well as drawing a backlash from the party's Western supporters, who saw

the constitutional reform attempts as an elite project (Carty et al. 2000, p. 72). Since reuniting the right under the Conservative Party of Canada in 2003, the party has sought to hold together the three factions of the party that are rooted in different geographic centres: the western populists, the traditional progressive conservatives and the Québécois.

Mobilized regionalism in Canada has also developed on the basis of centre-periphery conflict in the form of both regional economic interests and anti-elitism. Western opposition to constitutional reform attempts in the 1990s took the form of an anti-elite backlash and support for the grassroots democracy ideals of western populism. This split the right in the West, resulting in increased territorial concentration of the Canadian federal party system in the 1990s, especially on the right. The federal Liberal party has learned of the perils of economic policies that harm regional interests. The National Energy Program, implemented in 1980 by the federal Liberal government and which disadvantaged western oil producers, led to the collapse of the Liberal party's western vote. The party had difficulty winning votes west of Ontario until 2015. A dispute over offshore oil and gas revenues led to political conflict with Newfoundland led by the provincial Conservative government of Brian Williams. This led to Williams campaigning against the federal Conservatives in the 2008 federal election, with his 'ABC' slogan, which stood for 'Anything But Conservative'. The weak integrative organizational linkages between federal and provincial parties in Canada can be seen as an organizational response of parties to the difficulty of accommodating regional interests.

Even within a single electoral arena, the multi-dimensional space created by the territorial cleavage still creates a strategic challenge for parties. Emanuele Massetti predicts that in multi-dimensional space in which the party system is not permeable due to electoral rules that generate two-party competition, parties will seek to be centrist on one dimension in order to capture votes on the other (Massetti 2009, p. 514). We see this in Canada where federally, the Bloc Québécois position themselves as moderate in left-right terms but radical on the national dimension. Successful state-wide parties have sought to co-opt nationalist positions in Quebec to secure support in Quebec (especially the Conservatives in 1984 and 1988) (Bickerton et al. 1999, p. 165). In 2006, the Conservative Party sought to capture nationalist votes through a strategy of 'open federalism', holding out the promise of greater accommodation for Quebec's interests (Bélanger and Nadeau 2009, p. 138).

At the provincial level, parties that are pro-autonomy differentiate themselves on the L-R dimension and we find autonomist parties of the left and right. Most Quebec nationalist parties are of the centre left, although the Ralliement des Creditistes, positioned on the right, is an exception (Bickerton et al. 1999, p. 165).

Voter Behaviour in the UK: The Emergence of Dual Voting

Devolution after 1999 created a new electoral arena. Contrary to some expectations, devolved elections did not become 'second order'. The nationalist parties did consistently better at devolved than at state-wide elections in the early years. After 2007, there was some convergence between party performance at the two levels but in different ways. In Scotland, devolved elections were dominated by Labour and the SNP, which alternated in power but the SNP massively improved its performance in the UK General Election of 2015, winning half the vote (equalling the Conservatives in 1955 and Labour in 1966) and 56 out of the 59 seats. In Wales, devolved elections converged somewhat with the UK pattern, as the Conservatives revived and Plaid Cymru failed to make the same breakthrough as its Scottish counterpart.

Devolved politics has forced the state-wide parties to compete explicitly on the territorial as well as the class and ideological cleavages. Labour long played the class card against the Scottish nationalists, arguing for the unity of working people across the UK. Polls during the 1970s showed a majority of Scots felt more in common with an English person of the same class than with a Scot of another class. By the 2000s, this had reversed. At the same time the SNP had moved to the social democratic left and started to make inroads into Labour's working class urban vote. During the 2000s, both parties, now the main parties in Scotland, pursued almost indistinguishable social democratic policies on the social and economic dimension, differing only on the territorial dimension. Labour had taken ownership of the self-government issue in the 1990s, with its proposals for devolution within the UK but after 1999 were continually outflanked by the SNP, which argued for an attenuated form of independence resembling the Quebec concept of sovereignty-association. The independence referendum of 2014 marked a decisive change as Labour allied itself with the Conservatives on the No side, losing a large part of their working class vote. In the subsequent 2015 General Election they lost all but one of their Scottish seats.

Scottish Conservatives, having opposed devolution, came to accept it after 1999 but were divided on how far to go. Some advocated a policy of outflanking Labour on the territorial dimension by going for 'devolution-max', linked to a programme of tax cuts and slimmed-down state, going directly against the mainstream social democratic assumptions in Scotland. The party never accepted this line and instead after 2011 began to move to the political centre, garnering disillusioned nationalist and Liberal Democrat voters. This was in many ways a return to the traditional Scottish Conservatism of the 1950s and a subtle dissociation from neoliberalism and it saw a modest revival of the party's fortunes which, combined with the collapse of Labour, gained it second place at the Scottish Parliamentary elections of 2016, something that they had not managed in the UK General Election of the previous year.

The European issue has also played out differently across the UK. The SNP, Plaid Cymru and the (moderate nationalist) Social Democratic and Labour Party (SDLP) in Northern Ireland, have long linked Europe with their domestic aspirations, seeing it as a framework for self-determination. The Labour Party in Scotland and Wales is also largely pro-European while Scottish Conservatives are not notably Eurosceptic. Ulster Unionists are historically Eurosceptic, especially the Democratic Unionists. The radical nationalists of Sinn Féin are historically Eurosceptic but came out in favour of remaining in the EU at the referendum of 2016 on the grounds the UK exit would 'repartition Ireland'. The UK Independence Party (UKIP) is an insignificant force in Scotland but has made inroads in Wales. This has allowed a cross-party consensus for Europe in Scotland, which delivered a decisive vote to remain in the 2016 referendum. In Wales, on the other hand, UKIP is a presence and Wales, like England, voted to leave the EU. In Northern Ireland, with the parties in disagreement, there was a majority to remain but concentrated among nationalist voters.

Devolved elections have thus provided distinct electoral arenas, with different patterns of party competition in the four nations. In Scotland and Wales, the left-right and unionist-nationalist dimensions cross-cut but one part of the resulting quadrant—the right-nationalist one—is missing. Party politics in Scotland has thus been dominated by competition over the national question and within the social democratic space. In Wales, there is a similar pattern, but with the addition of a right-wing Eurosceptic option. Northern Ireland politics remains dominated by

the communitarian division, to which other cleavages are subordinate. Only the Labour Party has been competitive across Great Britain (that is England, Scotland and Wales) as a whole and between 1997 and 2010 formed governments with a plurality of votes and majority of seats in all three nations. Its collapse in Scotland in 2015 calls this integrative role into question. The SNP's status as the third largest party in Westminster puts a territorial party in a key brokerage role at the centre for the first time since the Irish Party in the late nineteenth and early twentieth centuries.

Territorial Dispersion of the Vote in the UK and Canada

Territorial Dispersion of the Vote: Meaning and Measure

The territorial concentration of electoral support is an important 'vital statistic' of party systems in a federation. It measures the extent to which the federal or national parliamentary arena is nationally integrating, diffusing regionalist conflict by requiring parties to mediate conflict internally, or whether parties become channels for representing—and perhaps amplifying—these territorial conflicts in the parliament. The extent to which parties gain representation across a broad range of regions in the state or are limited to a single region, what Deschouwer (2006, p. 292) refers to as the 'territorial pervasiveness' of parties, can be a product of strategy, a deliberate choice, usually taken by autonomist parties, to compete in a single region and focus their appeal on the nationalist aspirations of the regions, or it can result from a party's failure to secure a geographically broad range of seats. Party systems with a high degree of territorial concentration can load territorial conflict into the legislative arena, while those with a low territorial concentration broker territorial conflict within parties.

One way of measuring the territorial dispersion of the vote is through the Index of Cumulative Regional Inequality (Urwin 1983). This is a type of Gini coefficient for party systems. The type of inequality that it measures is the territorial or spatial coverage of party systems. It compares the proportion of a party's vote (or seat share) that it receives in each unit of the federation to that it would draw in each unit of the federation if its support were distributed perfectly proportionately with the

population of each province. The CRI index measures the variance of the actual vote distribution from this central measure. The value of the statistic ranges from zero (perfect territorial diffusion) to a theoretical maximum approaching 1.00 (perfect territorial concentration).

The index of Cumulative Regional Inequality can be expressed as:

$$CRI_A = \frac{\sum_i |q_i - v_{Ai}|}{2}$$

where q_i represents the proportion of the population found in unit i and v_{Ai} is the proportion of the vote for party a found in unit i. The CRI is calculated by party. A system-wide CRI measure can be calculated by taking the weighted average of the party CRI scores.

We can calculate the CRI for either vote or seat shares. These tell us different stories. The CRI of the vote gives some impression of the territorial concentration of electoral support for the parties, which in turn can indicate the territorial structure of cleavages. Comparing this to the CRI of seat shares, we can see the role that a majoritarian electoral system plays in amplifying the territorial concentration of the system as it translates votes into seats. Here, we calculate the CRI for parties that compete at the federal level in Canada. For the UK, we calculate the CRI for statewide parties (Conservatives, Labour and Liberal Democrats) in England, Scotland and Wales.

In Canada, we can trace the rise and fall of regional concentration of the party system by vote share (Fig. 6.1) and seat share (Fig. 6.2).

Over the period of 1945 to 2015, we see that system CRI peaks in 1993 after the electoral collapse of the traditional party of the right (the Progressive Conservatives) and its replacement by a series of parties on the right which for nearly a decade had difficulty moving beyond its Western Canadian base. Corresponding to this, the Bloc Québécois, a regionalist party that competes only in Quebec, emerged in compete in the 1993 federal election. Changes in regionalisation of the party system, as indicated by the system CRI, are due not only to the rise of the Bloc Québécois in Quebec through the 1990s, but also due to the susceptibility of the right to territorial concentration of its electoral support. The Liberals have managed to maintain broad territorial coverage and the lowest average territorial concentration scores during the time period. The mean score for the NDP is much higher (0.257 measured by vote share and 0.547 measured by seat share) because its electoral strength

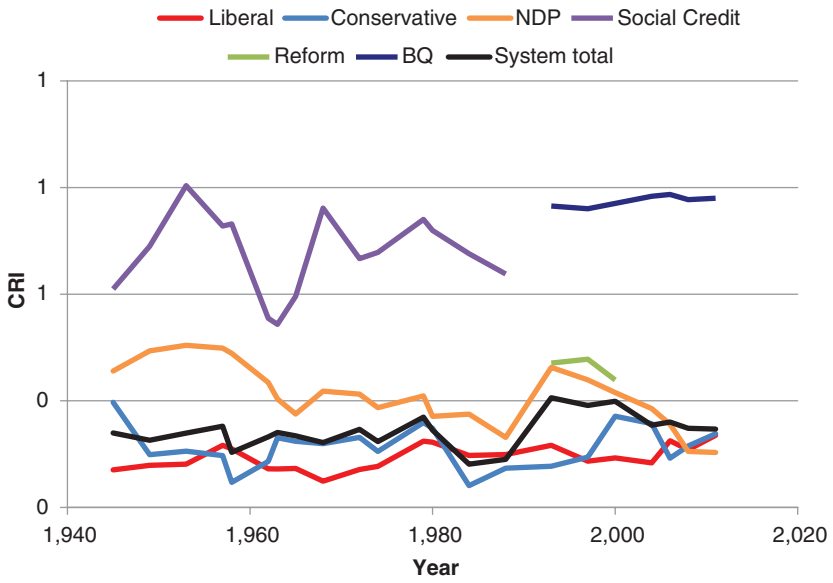

Fig. 6.1 Cumulative regional inequality of electoral support for Canadian federal parties, by vote share, 1945–2011

tends to be concentred in certain provinces (Quebec, Ontario, British Columbia).

Turning to the territorial concentration of seat shares, we can see that in Canada, the electoral system amplifies the effect of territorial concentration of electoral support. As Fig. 6.2 demonstrates, we see a sharp increase in the territorial concentration of the party system, measured by seat shares, in the early 1990s. At a system level, the CRI nears 0.5 in 1993.

This increase in territorial concentration created an opportunity for the Bloc Québécois in 1993. It left with the second largest share of seats in parliament and they formed the official opposition. The territorially concentrated right learned that it had to build a national base to return to power.

In contrast, the state-wide parties in the UK long maintained very low levels of territorial concentration of both seat and vote shares compared to the parties in Canada's federal party system (Figs. 6.3 and 6.4). The average CRI vote scores since 1945 are 0.03 for the Conservatives

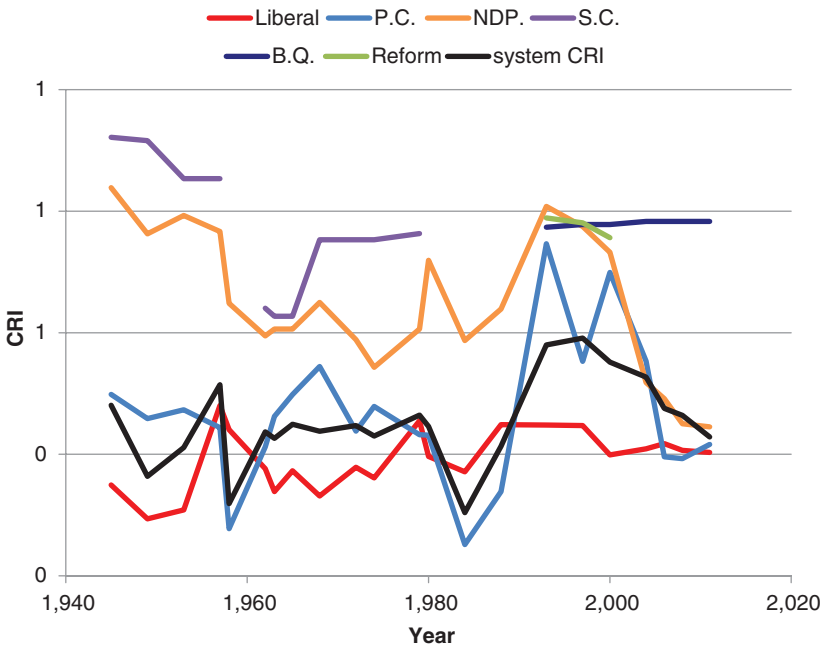

Fig. 6.2 Cumulative regional inequality of electoral support for Canadian federal parties, by seat share, 1945–2011

and Labour and 0.04 for the Liberal Democrats in the UK, compared to average scores of 0.12 for the Liberals, 0.14 for the Conservatives and 0.26 for the NDP—the three parties that compete in all provinces in Canada. The electoral system increases the territorial concentration of seat shares but the scores remained well below the levels reached by their Canadian counterparts. For Labour and the Conservatives, increases in the territorial concentration of their seat shares correspond to poor electoral performance. It should be noted, however, that these figures are affected by the preponderance of England, with 85% of the population. If one takes variation in England into account, there is evidence that territorial voting patterns have been diverging since their mid-century peak of convergence; in some ways reverting to pre-1914 patterns (Bogdanor and Field 1993). Also, in 2015 Scottish voting behaviour broke radically with the UK pattern.

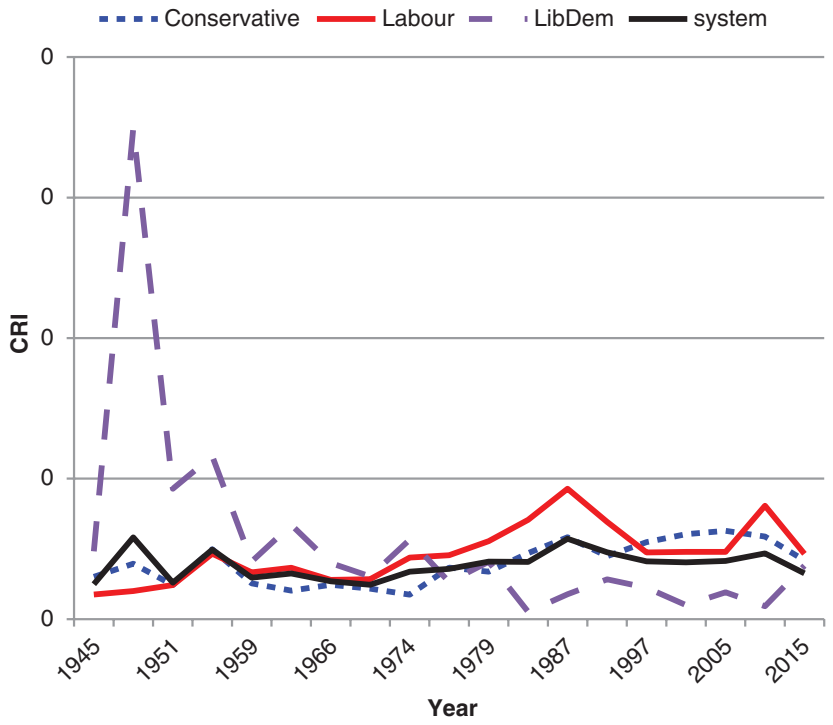

Fig. 6.3 Cumulative regional inequality of electoral support for statewide parties in Westminster elections, by vote share, 1945–2015

Party Organizational Strategies

Canada

Territorial conflict has often been managed in the Canadian party systems through containment of conflict within the provincial party system. This has been made possible through the organisational separation of provincial and federal parties and by voter behaviour that supports this flexibility. The Canadian party system is characterized by (mostly) statewide parties at the federal level with often-weak integrative linkages to provincial parties. This federal party structure internally accommodates pressure for regional representation. The desire of federal parties

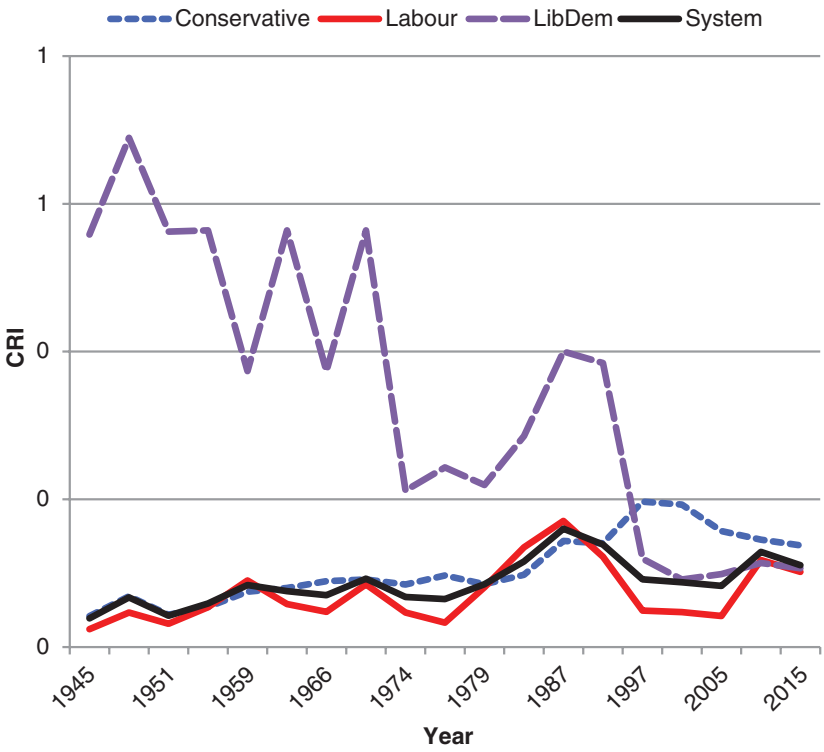

Fig. 6.4 Cumulative regional inequality of electoral support for statewide parties in Westminster elections, by seat share, 1945–2015

to seek and secure seats in all provinces means that federal parties seek to quell potentially divisive regional issues, limiting the possibility for these issues to be mobilized and intensify conflict in the federal legislature. At the same time, the federal parties maintain only very loose organizational linkages with their provincial counterparts (Dyck 1991; Thorlakson 2009).

The Liberal parties in most provinces are legally separate entities from the federal Liberal party. The constitution of the Conservative Party of Canada specifically forbids provincial parties. The NDP are the most vertically integrated political parties in Canada. While the party constitution grants provincial parties autonomy so long as they don't

conflict with the statutes of the federal party, it also prohibits individual membership of the party where that person is a member of another political party—except in the case of Quebec, where the autonomy of the provincial party is enhanced and membership of the federal party does not require provincial NDP membership. It is telling that the NDP, the most integrated party in Canada, does not attempt this integration in Quebec, where the provincial wing, the NPDQ, voted to split from the federal party in 1989 due to differences over the national question. The NDP no longer operates provincially in Quebec.

Even regional parties that compete only in Quebec resist vertical integration between the federal and provincial levels. In Quebec, the BQ and PQ are organizationally separate parties. The PQ formed in 1968. The BQ formed at the federal level in 1991 as a result of regionalism mobilized through constitutional reform efforts. The parties are organizationally separate although they have an overlap of membership and a high degree of cooperation between party elites and leaders at both levels. This organizational separation reinforces the notion that politics at the provincial and federal levels occupies separate worlds.

UK

The most decentralized political movement in the UK is the Greens, who, since 1990, have separate parties for England and Wales, Scotland and Northern Ireland. The Scottish Greens, who have consistently had a presence in the Scottish Parliament, support independence. The second most decentralized movement is the Liberal Democrats, who have a federal structure in Great Britain to mirror their ambitions for the constitution of the UK. The parties in England, Scotland and Wales have complete autonomy on devolved matters, although this did not prevent the Scottish Liberal Democrats from suffering a devastating defeat at the Scottish elections after their UK counterparts went into coalition with the Conservatives after the 2010 UK General Election. Liberal Democrats do not have their own structure or contest elections in Northern Ireland but are closely associated with the Northern Ireland Alliance Party.

The Scottish Unionist Party long represented the Conservative interest in Scotland, although their MPs were fully part of the parliamentary Conservative Party and subject to its policy line and discipline. Following their decline from the late 1950s, there was a reorganization in 1965 and

they were renamed the Scottish Conservatives. In 1968 Conservative leader Edward Heath even announced a move towards Scottish devolution without the agreement of the Scottish Party although he later backtracked faced with their opposition. Unable to sustain an independent operation or fund themselves, the Scottish Conservative structures were merged with those of England and Wales in the late 1970s. Since devolution there has been an intermittent debate about whether to return to a separate Scottish Party, even a new name, to establish a distinct Scottish presence, but such moves have always failed given the reluctance to bow to Scottish nationalism and the weak financial base for such a party. In Northern Ireland, there was such a party in the shape of the Ulster Unionist Party, whose MPs took the Conservative whip until 1974. At the General Election of 2010 there was an effort to reconstitute the alliance but all the candidates running on the joint ticket were defeated while a sitting Ulster Unionist who had refused the deal was elected as an independent.

The most centralized party has historically been Labour, which only reluctantly conceded a Scottish Advisory Committee in 1918, with no distinct structure for Wales until 1947. Labour has not contested elections in Northern Ireland since the partition of Ireland, leaving the field to the Northern Irish Labour Party and maintaining some informal links with the Social Democratic and Labour Party. Since devolution there has been a constant debate about allowing Scottish and Welsh Labour more autonomy but with little progress. In 1999 in Wales, the UK Labour leadership intervened to ensure the victory of its own candidate to lead the party into the devolved elections. The move backfired and Labour unexpectedly failed to secure a majority. The centre's candidate had to resign after a few months in office and Rhodri Morgan, elected unopposed, found his position in relation to London strengthened. In Scotland, the party gained policy autonomy over devolved matters in 1999 and, under threat from the SNP, was renamed Scottish Labour Party with its own leader, in 2007. In reality, it remained a part of the British Labour Party. Scottish leader Johann Lamont, resigning after Labour's devastating defeat in the UK General Election of 2015, accused London of treating it like a branch office; at one point the general secretary of the party in Scotland had been fired with her being informed in advance. Labour encountered similar difficulties in London in 1999 when the leadership under Tony Blair manipulated the complex rules to prevent Ken Livingstone becoming their first candidate for mayor. Livingstone ran as an independent, won and was subsequently re-admitted to the party.

In office, Labour administrations in Scotland and Wales have pursued a distinct line on public services, less geared to private provision and competition. Rhodri Morgan made this a point of pride, talking of 'clear red water' between Wales and England, but Scottish Labour played down the differences in public. This left Scottish Labour's home rule flank exposed, which played a role in its electoral slump from 2015. The Conservatives in Scotland and Wales have been too small in number to be a significant force but in 2016 the Scottish Conservatives made something of a recovery by adopting a more centrist line than their English counterparts, while pledging full loyalty to the party leadership.

Conclusion

In Canada and the United Kingdom, territorial politics has created strategic dilemmas for parties. At the same time, party organizational strategies and party systems have provided these multi-level systems with tools for managing territorial or national cleavages. The institutional context has created strong pressures to manage these cleavages. In both Canada and the UK, a single member plurality electoral system has meant that parties seeking majorities in parliament in Ottawa or Westminster have needed to secure a support base as geographically broad as possible, or else maintain enduring partnerships with supportive parties in regions where they do not compete. The UK stands out for its nationalized party system dominated by statewide parties while Canada's federal party system, while also dominated by statewide parties, has undergone periods of regionalization when the rise of constitutional issues or regional grievances have undercut support for statewide parties (such as Conservative losses in Quebec) or have led to the rise of territorially concentrated new parties (such as the BQ or Reform Party). When the party system has readjusted from periods of territorial concentration, the parties have sought strategies of broad accommodation across Canada and to avoid mobilization of the nationalist cleavage.

Generally, Canadian parties have adapted to the combination of a multi-level system and distinct regional interests by adopting a loose organizational structure for parties that affords maximal autonomy to provincial parties and has allowed quite distinct party systems to emerge at the provincial level. This provincial distinctiveness has supported the maintenance of relatively high levels of split party identification at the federal and provincial levels.

While activation of nationalist and regionalist cleavages has affected Canadian party competition intermittently, delivering regionalist 'shocks' to the party system from which the system slowly recovers, the UK reflects an active and ongoing impact of devolution. In the UK, the national question has complicated multi-level competition for parties in the lead up to and after devolution, triggering some organizational struggle over the optimal balance of regional autonomy and integration with the broader UK party. Parties competing in the Scottish Parliament and the Welsh Assembly have sometimes sought policy distance on economic issues, for instance creating leftward pressure on the Labour Party in Scotland and Wales. At times the central party's stance on devolution has caused some friction. Parties have had to negotiate policy distance and regional organizational autonomy to optimize their competitiveness in both arenas. For UK parties, this organizational adjustment to the pressures of multi-level competition is relatively recent, while Canadian parties have for decades maintained highly autonomous provincial parties. Ultimately, the Canadian party system has managed to reach (and regain) its equilibrium in the face of territorial and regional pressures, and the organizational flexibility of its parties has been an important element of this. The UK statewide parties are facing adjustment pressures of their own, but the outcome is uncertain, not least due to ongoing pressures for constitutional change due to Brexit and pressure for Scottish independence.

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CHAPTER 7

Can Referendums Foster Citizen Deliberation? The Experience of Canada and the United Kingdom

Ailsa Henderson and Stephen Tierney

Introduction

Despite their recent proliferation, referendums, addressed in the longue durée, are something of a rarity in both Canada and United Kingdom. At the national level only three have been held in the UK (in 1975, 2011 and 2016: Table 7.1), while in Canada the referendum on the 1992 draft Charlottetown Accord is the only recent example (Table 7.2). Referendums are in fact more common at the provincial/sub-state level where the issue of secession has been bound up with direct democracy in each country. There have also been referendums on electoral reform at the sub-state level in Canada and on the Alternative vote (AV) at state-wide level in the UK. This chapter compares the 'sovereignty' referendums held in Quebec, particularly that in 1995, with the Scottish 'independence' referendum of 2014.

A. Henderson · S. Tierney (✉)
University of Edinburgh, Edinburgh, Scotland
e-mail: stephen.tierney@ed.ac.uk

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Table 7.1 Referendums in the United Kingdom

Place	*Date*	*Issue*	*Result*
Northern Ireland	8 March 1973	Remain part of the UK	Approved: 98.9
Northern Ireland	22 May 1998	Belfast Agreement	Approved: 71.1
Scotland	1 March 1979	Creation of a Scottish Assembly	Approved: 52 (did not meet threshold)
Wales	1 March 1979	Creation of a Welsh Assembly	Not approved: 79.7
Scotland	11 September 1997	1. Creation of a Scottish Parliament. 2. Devolution of limited tax-varying powers	1. Approved: 74.3 2. Approved: 63.5
Wales	18 September 1997	Creation of a National Assembly	Approved: 50.3
England (London)	7 May 1998	GLA and Mayor	Approved: 72
England (North East)	4 November 2004	North East England regional assembly	Not approved: 78
Wales	3 March 2011	Devolution of further powers to the National Assembly	Approved: 63.5
Scotland	18 September 2014	Independence	Not approved: 55.3
United Kingdom	5 June 1975	Continued EC membership	Approved: 67.2
United Kingdom	5 May 2011	Electoral System: Alternative Vote	Not approved: 67.9
United Kingdom	23 June 2016	Remain in or Leave the European Union	Leave 52

Reviewing the processes of each of these referendums, we address the issue of citizen deliberation in theory and practice. The theoretical problem posed is how to integrate participation and deliberation within referendum processes. Referendums tend to carry a negative connotation within political and constitutional theory. The charge is that they are open to manipulation by political elites and are therefore not capable of facilitating the meaningful deliberation of citizens. Far from being an asset to democratic decision-making, referendums are seen as a risk to an otherwise healthy constitutional system (Haskell 2001). The democratic deficiencies associated with referendums are in large part issues of practice rather than principle and these can be surmounted by way of carefully-tailored regulation of the referendum process (Tierney 2012). To this end the

Table 7.2 Referendums in Canada[1]

Place	*Date*	*Issue*	*Result*
Canada	29 September 1898	Prohibition of alcohol	Approved: 51.2
Canada	27 April 1942	Conscription	Approved: 64.5
Canada	26 October 1992	Constitutional renewal (Charlottetown Accord)	Not approved: 54.3
Quebec	April 10 1919	Legalization of sale of alcohol	Approved: 78.62
Quebec	20 May 1980	Sovereignty Association	Not approved: 59.6
Quebec	30 October 1995	Sovereignty and Partnership	Not approved: 50.6
Ontario	23 October 1924	Continuation of prohibition statute Limited sale of alcohol	Approved: 51.5 Not approved: 51.5
Ontario	10 October 2007	Electoral Reform	Not approved: 63
Newfoundland	3 June 1948	Constitutional Status	Inconclusive: 44.6% for restoration of dominion status, 41.1% for confederation with Canada, 14.3% for continuing the Commission of Government
Newfoundland	22 July 1948	Confederation	Approved: 52.3
Newfoundland and Labrador	5 September 1995	Non-Denominational School System	Approved: 54.4
Newfoundland and Labrador	2 September 1997	Non-Denominational Schools	Approved: 73
New Brunswick	14 May 2001	Retain Video Lottery Terminals	Approved: 53.1
Nova Scotia	October 16 2004	Allow Sunday shopping	Not approved: 54.9
British Columbia	August 30, 1972	Time settings	Not Approved: 63.4
British Columbia	October 17, 1991	Recall of elected officials Introduction of Initiative Referendum	Recall approved 80.9 Initiative approved 83
British Columbia (postal referendum)	15 May 2002	First Nations Treaty Rights	Over 80% approval on the eight principles asked about
British Columbia	17 May 2005	Electoral Reform	Not approved: support of 57% of voters but failed to meet 'supermajority' threshold of 60%
British Columbia	12 May 2009	Electoral Reform	Not approved: 60.9%

(continued)

Table 7.2 (continued)

Place	*Date*	*Issue*	*Result*
British Columbia	13 June–5 August 2011 (postal referendum)	Sales Tax discontinuation	Approved: 55
Prince Edward Island	January 18, 1988	Confederation Bridge	Approved: 59.4 in favour of the fixed link
Prince Edward Island	28 November 2005	Electoral Reform	Not approved: 64
Northwest Territories	April 14, 1982	division plebiscite	Approved: 56.48%
Northwest Territories	4 May 1992	Jurisdictional boundaries	Approved: 54
Alberta	August 17, 1948	Electrification plebiscite The ballot offered two options on electricity regulation, asking if the province should create a Crown corporation to manage electricity, or leave the electricity industry in the hands of the companies currently in the business	Option A: Approved 50.03% Option B: Not approved 49.97%
Alberta	May 23, 1967	Daylight Saving Time plebiscite	Not approved: 51.25
Alberta	August 30, 1971	Daylight Saving Time	Approved: 61.5
Nunavut	11 December 1995	Nunavut capital	Approved: 60
Nunavut	26 May 1997	Equal representation	Not approved: 57.4

[1]There have been many provincial referendums since 1892 on the prohibition of alcohol. For reasons of space we have not listed these, but see Donovan (2014), pp. 132-5

recent turn in political theory and democratic practice towards deliberative democracy is an aid to process construction; it offers insights as to how theory and practice can come together to inform rule-making through which a referendum can be shaped to help engage citizens, and thereby produce a meaningful act of republican deliberation (Tierney 2009).

First we lay out the theoretical framework, before turning to an empirical account of the practice of Quebec and Scottish referendums. This will begin with a discussion of how the referendums in each country were designed, assessing which elements of each served either to

promote or frustrate effective citizen deliberation before the referendum, as well as satisfaction with the process afterwards.

Then we address a second empirical dimension. It is one thing to design a process which, prima facie, appears to offer the opportunity for good deliberation, it is quite another for this to take place within the actual lived experience of the referendum campaign. It is here that we turn to political science with which we can test how effective this design was in terms of nurturing citizen satisfaction with democracy.

Losers' consent may in the end be unattainable; this is politics after all, and politics is about conflict (Crick 1962). But losers' *assent* may be achievable: a preparedness by losers to agree *to* if not *with* the result of a referendum. We will explore what evidence exists in relation to each of our case studies.

Designing the Referendum Process

Can referendums be deliberative? Referendums may seem to represent an ideal model of participatory democracy. The voters are engaged directly in constitutional decision-making, speaking together as one unified people, with the power to determine the issue at stake. What, within the classical ideal of popular government, could be more democratic? In this vignette the republican promise of democracy is seemingly fulfilled; political equality, expressed in a way unmediated by politicians, gives effect to a collective expression of popular sovereignty (Bogdanor 1981, p. 93). But for others the referendum is in fact a threat to democracy. This can only be safeguarded by way of professional politicians, whose decision-making is both informed by expertise and carefully structured by way of constitutional design to prevent the triumph of populism and transient majorities; the task of democratic constitutionalism is to construct institutions which will contain and balance the popular will, rather than give effect to it in an unqualified way.

There are three main objections that inform scepticism of direct democracy: that referendums lend themselves, by definition, to elite control and hence to manipulation by the organisers of the referendum ('the elite control syndrome'); that there is an inherent a tendency of the referendum process merely to aggregate pre-formed opinions rather than to facilitate meaningful deliberation ('the deliberation deficit'); and that referendums consolidate and indeed promote simple majoritarian decision-making at the expense of minority and individual interests ('the majoritarian danger') (Tierney 2012).

The elite control syndrome is the most common criticism of referendums. The charge is that referendums promise popular power, including control by the people over elites, but are themselves so open to manipulation by elites as to belie that promise. In other words, even if popular influence on constitutional processes is a republican good, referendums fail to deliver by that marker. Supporting this critique is the presupposition that the executive is able to shape the referendum process in a way that suits its objectives. Among the tools that are frequently assumed to be at the disposal of elites are: the initial decision to stage the referendum, the power unilaterally to frame the question, and the capacity to determine the process rules by which the referendum will be conducted, rules which can then be shaped to play to the government's strengths, for example by manipulating funding and spending regulations or rules about thresholds for support. According to this criticism, the government is in effect able to produce its desired result. As the political scientist Arend Lijphart (1984, p. 203) famously put it, 'most referendums are both controlled and pro-hegemonic' (see also Qvortrup 2000).

The second objection flows from the first. It asserts that public reasoning is absent from referendum processes. Representative government is an infinitely preferable model of decision-making because it is designed in a way that causes elected politicians to cooperate with each other, allowing them only to arrive at decisions having offered convincing reasons for their views. By contrast, such informed reflection upon, and discussion of, the issues at stake are neither required nor facilitated in referendum processes, and are accordingly absent.

What we find undergirding these critiques, however, are a number of assumptions which are themselves often based upon stereotypes: referendums are often held quickly, based upon a short-term political calculation made by government; voters are faced with an issue which they have not had time to learn about or debate; voter confusion can be exacerbated by a deliberately obscure question which in many cases pushes responses in a particular direction; and citizens with busy lives lack the time and incentive to engage with the issue and even the ability to understand it. The overall picture is one in which turnout is often low, and those who do vote often do so without much information and with little reflection, deliberation or public discussion, largely following the cues set by those who have staged the referendum.

Despite the force of these criticisms it does seem that referendums are often held to a very different standard from that used to assess the

democratic efficacy of representative democracy, which can also be a crude device for promoting a plurality of interests (Tierney 2012, pp. 40–41). But the point we will focus upon is that these concerns with referendums can in large part be overcome by way of good process design, (Tierney 2012, pp. 285–303) which if well-constructed can help promote a range of positive outcomes.

Referendums can also be evaluated on the ways that citizens judge the process, and in particular the way that they engage those who are on the losing side. To function well, democratic systems must engender among participants positive attitudes to the democratic regime. This reserve of goodwill among citizens is characterised by feelings of trust, efficacy, satisfaction or confidence and is integral to the perceived legitimacy of the political system. We know that the presence or absence of such goodwill varies by state and can be affected by the structure of political system or the extent to which participation is facilitated. We know too that within political systems reserves of goodwill vary across the population. The challenge of any democratic system is to generate these reserves of goodwill not just within the electorate as a whole but among those who back losing options in democratic contests. Within elections, there are certain factors that can help to generate losers' consent. These include measures of proportional representation so that governments reflect the wishes of the electorate as a whole, regular elections (giving losers another chance to influence government formation) as well as governments acting in the interests of all not just their own supporters (Anderson et al. 2005; Anderson and Guillory 1997; Anderson and Lo Tempio 2002; Blais and Gélineau 2007; Henderson 2008; Esaiasson 2011).

Referendums, by their very nature, pose challenges to losers' consent. The issues on which referendums are held can be polity shaping (Clarke et al. 2004) and emotive, where the stakes are seen to be higher, the results more permanent than for elections. They are more often to be binary and potentially more divisive than elections, particularly in multi-party systems. Not all referendums are similar. Some are on well-known issues, where the electorate has clearly formed opinions. Others are on newer issues where attitudes are more malleable. The range of referendums offers different contexts in which voters can engage, learn about and evaluate options and have differing levels of attitudinal volatility (Leduc 2002). We would therefore expect referendums on binary issues to pose more challenges for losers' consent, just as referendums on older, more emotive issues to pose more challenges

than those on less salient issues. In such a contest, attitudes to the referendum process can exert a decisive role (Henderson 2012). This sets the context for an evaluation of referendums in Quebec and Scotland, in particular the 1995 referendum on sovereignty partnership and the 2014 referendum on independence. Both, arguably, offered referendums in which losers' consent was likely to be difficult to generate but with sufficient variation in process that we can determine what impact this had on satisfaction.

Evaluating the 1995 and 2014 Referendums

Who Controls the Process?

Canada, unlike the United Kingdom, lacks a national referendum law capable of forming the basis of an agreed process for referendums across the country. The United Kingdom, by contrast, has the highly detailed Political Parties, Elections and Referendums Act 2000 (PPERA), which sets out detailed rules on question-setting, funding and spending etc. and which also created an independent regulatory body, the Electoral Commission, to oversee referendum (and other electoral) processes.

One example of how much less fraught this made the Scottish than the Quebec process is over question-setting. This was a significant issue in both Canadian referendums. Both sovereignty referendums were run by the Directeur général des élections du Québec (DGE-Q). While the DGE-Q has authority to regulate spending, the framing of the question was solely a matter for the provincial government. The questions asked in both 1980 and 1995 were arguably convoluted. It is not unreasonable to think that they would have encouraged people to believe they were voting for an outcome, association[1] or partnership[2] with Canada, that would fall short of independent statehood. The questions were long, referring to other pieces of legislation, and sought to identify what sovereignty means. The 1980 question referred to the prospect of another referendum following negotiations. The 1995 question implied that sovereignty partnership, if not achieved, would result in independence. Although advocates of change argued that a Yes vote was clearly a vote for more power, in 1995 in particular it was not clear whether Yes voters expected sovereignty partnership or independence to be the likely result were they to win the referendum. By contrast, in the Scottish referendum, the referendum was preceded by an agreement between both levels

of government on the referendum process, buttressed by PPERA, which allows for independent oversight of referendum questions. Key too was the decision of the Scottish Government, to ask a short, clear question which would allow it to focus on the substantive content of the independence proposal.

In relation to the question itself, the Edinburgh Agreement provided:

> Both governments agree that the referendum question must be fair, easy to understand and capable of producing a result that is accepted and commands confidence.[3]

One duty of the Electoral Commission under PPERA is to assess and comment upon the 'intelligibility' of proposed referendum questions.[4] Notably the Electoral Commission goes about this task by convening focus groups to test the question empirically, assessing how well it is understood by people.[5] The initial question proposed by the Scottish Government was: 'Do you agree that Scotland should be an independent country? Yes/No'. The Electoral Commission took the view that

> based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase 'Do you agree …?' could lead people towards voting 'yes'.

It therefore recommended the following alternative question: 'Should Scotland be an independent country? Yes/No'.[6] This was accepted by the Scottish Government and this was the question included in the Scottish Independence Referendum Act,[7] and ultimately put to the voters.

The contrast with the two Quebec referendums is clear. The Edinburgh Agreement allowed for UK involvement in the referendum process, as well as oversight by a mutually acceptable independent national regulator who would have a role in reviewing the wording of the question. Notably the Scottish Government in 2012 suggested the establishment of a Scottish Referendum Commission to regulate the process, but this was dropped as part of the Edinburgh Agreement. In Quebec there was no involvement for the Canadian government in the process, nor did the DGE-Q have a role in regulating the question. It oversaw the fairness of the process more broadly, but not the question itself.

Deliberation Deficit

In Scotland therefore we saw that elite control was dispersed: both the UK and Scottish Governments were party to the Edinburgh Agreement and beyond this the process was subject to law and independent oversight. But it is one thing for elite control to be constrained, it is another to facilitate deliberation. Here again the Scottish process demonstrates prima facie strengths. For example, PPERA again set the benchmark for strict and fair funding and spending rules and regulation of advertising. which helped to create a level playing field. These were given specific guarantees in the Scottish Independence Referendum Act 2013.

In Quebec there were also efforts to ensure that voters were provided with balanced information. In 1980, for example, the DGE distributed a pamphlet with arguments for the Yes and No campaigns. The DGE also had responsibility for regulating spending. Following the 1995 referendum in particular it investigated several complaints about the practices of organisations such as Via Rail and post-secondary institutions for funding travel of Canadians outside Quebec to attend the Montreal unity rally shortly before the referendum.

However, another advantage of the Edinburgh Agreement process is that it also served to legitimise the referendum outcome. In the Scottish process the quid pro quo to the Scottish Government's acceptance of this regulatory model was a concession that the UK Government would accept the result of the referendum. The Agreement ended with this paragraph on cooperation:

> The United Kingdom and Scottish Governments are committed, through the Memorandum of Understanding between them and others, to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.[8]

This stage was never reached in Canada in either 1980 or in 1995, a point made clear by the circumstances surrounding the *Secession Reference* brought to the Supreme Court of Canada by the Canadian government, the very premise of which was the federal government's refusal to countenance Quebec's right to secede.

Of course, the difference in legal regimes did not exempt either from criticisms by different actors or organisations. In Scotland, the BBC was perceived by some Yes voters to be biased towards the Better Together campaign. The late intervention of the party leaders of the three largest UK political parties, committing to some form of unspecified institutional change in the event of a No vote, was also seen as confusing to voters. In Quebec, the DGE investigated not only funding irregularities, particularly around the unity rally, but also instances of voter fraud and the high proportion of rejected ballots in a limited number of constitutions.

In the end the independence referendum in Scotland passed off smoothly with no disputes over any of the key process issues, including the funding and spending rules which were also established by the Edinburgh Agreement.[9] This is particularly telling given the change to the franchise rules, extending the right to vote in the referendum for 16 and 17 year olds. The upshot was that both sides in the referendum campaign, and therefore citizens themselves, were able to focus upon the substantive issues at stake without being distracted by whether or not the referendum was lawful or whether the UK Government would accept the result of a majority Yes vote. This was fundamentally important to the process and a key condition which allowed the Scottish process to be seen as a genuine moment of citizen deliberation.

The Scottish referendum also enjoyed high participation levels. The turnout of 84.65% was the highest for any UK electoral event since the introduction of universal suffrage, and compares very well to the 65.1% who voted in the 2010 UK general election and the 50.6% who turned out for the 2011 Scottish parliamentary elections. Another feature of the referendum was that the Scottish Parliament extended the franchise to those aged 16 and 17.[10] This was a radical departure; never before have people under the age of 18 been entitled to vote in a major British election or referendum.[11] This makes the turnout even more remarkable when we consider the significant logistical task involved in registering new voters and in mobilising so many young people to engage with an electoral campaign for the first time.[12]

But turnout is only part of the picture. Evidence has emerged of the extent to which people sought out information about the issue at stake and engaged vociferously with one another at home, in the workplace and other public spaces, and, to an unprecedented degree in British politics, on social media.[13]

This leads us to a discussion of referendum features designed to facilitate losers' consent.

Majoritarian Danger

Interestingly, the issue of the size of majority required to validate a referendum vote for independence was never a topic of dispute in Scotland in 2014, the way it was in Quebec, particularly in 1995. The fact that it was not even mentioned in the Edinburgh Agreement illustrates the implicit acceptance that 50% plus one of those voting would decide the referendum. This had been the requirement in 1997 for devolution, although the 1979 devolution referendum had required a threshold of 40% of the electorate to secure success. The proposition gained majority consent but did not meet the threshold and was not put into effect.

To a Canadian audience it may well seem odd that the UK Government agreed to a process which could have, in effect, broken up the country by way of one simple majority vote. This was of course a concern for the Supreme Court of Canada in the *Secession Reference*, where one of the constitutional principles to which it referred was 'respect for minority rights'.[14] And in the Reference the court made clear that the interests of minorities would be very important to the constitutional permissibility of any secession process.[15] It also announced that the validity of any future referendum on secession would depend upon a 'clear majority', a term upon which it did not elaborate.

The contrast with the UK does not appear to be mainly one of constitutional principle, but rather a consequence of very different demographics. Quebec is a francophone province but one that is home to a long-established Anglophone minority and many indigenous peoples. It is in defending the interests of these people that the Secession Reference seems primarily to be concerned, rather than the more general minority of voters who might find themselves on the losing side. Scotland, by contrast, does not have territorial minorities in the same sense.

That said, there is also a divergence on the point of constitutional principle as to whether or not fundamental constitutional decisions should be made by way of simple majority. This is less of an issue in the UK where Parliament can change the constitution by way of ordinary legislation. But it is no surprise that a 'supermajority' argument emerged in relation to the Quebec referendum in a country where qualified majority (and in some cases unanimous) provincial consent is needed for constitutional change.

To conclude, it is clear that elite control was constrained in Scotland and that the organisational context in general was propitious for

fostering of healthy deliberation. Furthermore, the process was also not over-shadowed about arguments concerning the appropriate threshold for the result. But what evidence is there for actual voter engagement in both the Scottish and Quebec referendums?

Citizen Evaluations of the 1995 and 2014 Referendum Process

We can gauge the level of voter engagement with referendum arguments by examining levels of knowledge. Obviously, examining the extent to which voters were aware of the outcomes of independence or a No vote takes us into the realm of risk perception rather than knowledge. In other instances, we can evaluate knowledge of what the various Yes campaigns were advocating. Here we can see evaluations are variable across policy areas. We see also different trends across votes in Scotland and Quebec. In Quebec, No voters tended to perceive fewer links between an independent Quebec and Canada than Yes voters. In Scotland, the reverse is true for some questions (Table 7.3).

The questions are not always equivalent. The 1995 Yes campaign advocated a sovereign Quebec using the Canadian dollar, just as the 2014 Yes campaign advocated using the pound sterling. The question asks for knowledge of a campaign policy in Quebec, but asks about its likelihood in the case of Scotland. In both cases we see the greatest divergence between Yes and No voters on issues of currency and wider continental arrangements (NAFTA in the case of Quebec, EU membership in the case of Scotland).

Table 7.3 Knowledge and perception, Quebec 1995 and Scotland 2014, per cent agreeing

	Yes	*No*
Sovereign Quebec will send MPs to Ottawa	25	20
Independent Scotland would send MPs to Westminster	29	39
Sovereign Quebec will be protected by Canadian army	55	31
Independent Scotland would be protected by the UK army	20	30
Canadian government will not block Quebec access to NAFTA	79	50
Scotland would be able to retain membership of the EU on the same terms as the UK	63	8
Sovereign Quebec will use Canadian dollar	85	45
The UK government would allow Scotland to keep the pound	70	15

Table 7.4 Post-Referendum satisfaction with democracy in Quebec 1995 and Scotland 2014, per cent

	Quebec	*Scotland*
Winners	60.7	63.0
Losers	46.3	15.2

Another method by which we can evaluate a referendum is by the presence of losers' consent (or assent). In general, voters were satisfied with the process. Results from the Scottish Referendum Study, conducted before and after the 2014 referendum, as well as the Quebec Referendum Study, conducted after the 1995 vote, show a majority of referendum winners were satisfied with the way democracy was working. They show also that winners were more likely to be satisfied than losers.

Table 7.4 reports the percentage of winners and losers satisfied with the way democracy is working. A clear majority of winners are satisfied and a minority of losers are satisfied. While much of the evidence suggests that the regulation and conduct of the referendum in Scotland offered an example of best practice, losers were significantly less satisfied with the way democracy was working than they were in Quebec. There are three caveats to this.

First, the post-referendum satisfaction should be viewed in light of pre-referendum satisfaction. As the Quebec survey was only conducted after the referendum we have no way to evaluate the post-referendum satisfaction against a pre-referendum benchmark. In Scotland, however, we do. Here we find that 'only' 19.2% of eventual referendum losers (Yes voters) were satisfied with the way democracy was working. Second, in Scotland we have data from 1 year after the referendum to examine whether this sheds light on losers' consent. Here we find that satisfaction with UK democracy among losers had decreased to 14.1% but had also decreased among winners to 55.4%. Third, the satisfaction with democracy question is the standard indicator to gauge losers' consent, but the question itself can be tied to referendum preferences. One might reasonably expect someone advocating independence for Scotland to be dissatisfied with the way democracy works in the United Kingdom. The September 2015 figure could well be tapping dissatisfaction with the 2015 UK general election result. The gap is narrower (and overall levels are higher) when we

Table 7.5 Pre and post-referendum satisfaction with democracy in Scotland

	Yes voters	*No voters*
Pre-referendum	71.6	56.8
Post-referendum (Sept. 2014)	63.6	62.5
Post-referendum (Sept. 2015)	70.7	43.0

ask about satisfaction with democracy in Scotland. Indeed here we find the opposite of what we would expect, evidence of a possible issue with winners consent rather than losers' consent (Table 7.5).

Despite the degree of popular participation in the Scottish process, it is still notable that while citizens played a full role in the referendum campaign itself and voted in high numbers, their role prior to this was largely passive. The decision to hold a referendum was taken by the Scottish Government, while the Edinburgh Agreement determined that the referendum could be held only on the issue of independence and not on any other model of constitutional change.

This raises a serious democratic concern about the overall process. In the course of 2012 it became clear that a substantial majority of citizens in Scotland were in favour of constitutional change, but not of full independence. The Scottish Government tapped into this sentiment and revived an earlier suggestion of a third option on the ballot—some formulation of further devolution.[16] The United Kingdom government reacted strongly to this. Its key political goal in consenting to the Edinburgh Agreement was to ensure that the referendum would contain only two options—independence and the status quo—since it was confident that it could defeat the independence proposal. To that end the Agreement, while enabling the Scottish Parliament to legislate for a referendum, made clear that it could do so only 'with one question on independence'.[17] While the Edinburgh Agreement was a positive step in avoiding hostility between the two campaigns over the process, it was also an elite deal which constrained the options which were presented to voters. In short, it was a trade-off between the political goals of the SNP on the one hand—to acquire the legal authority to manage the process rules—and, on the other hand, a political calculation made by the UK Government that it could win a referendum on independence but would probably lose a referendum which promised more—and potentially open-ended—powers to the Scottish Parliament.

Conclusion

What was missing from the Scottish referendum design process, therefore, was a step which would ensure that citizens were in fact able to vote for the most popular constitutional option. This is not to single out the Scottish referendum as particularly deficient. The typical story of referendums is one in which elites are able to set the agenda. The process rules, the length of a campaign, and the question that is set are typically in the hands of the executive, albeit subject to parliamentary approval; constitutionally guaranteed opportunities for citizens or other deliberative bodies to influence the process are invariably lacking.

The Scottish referendum is in general an instance of good referendum design in which the process rules were agreed by both sides allowing the debate to focus upon issues of substance. This contrasts with the two Quebec referendums where so much of the debate was side-tracked by procedural matters. However, it is also clear that a good setting for popular deliberation is not in itself enough to bring that about. Much depends upon the appetite of the electorate to gain knowledge of the issues, whether the issues with which they are presented seem important to them and whether the political system and civil society are sufficiently healthy to help impart information in an objective way. A broader assessment may be that while a contested process can deeply damage the democratic engagement of citizens and their faith in the system as the Quebec experience shows, agreed formal processes are of themselves insufficient to engender deep citizen engagement.

Notes

1. The question posed in 1980 was:
   The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad— in other words, sovereignty—and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?
2. The question posed in 1995 was:

Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

The reference to two external documents was arguably confusing for voters.

3. *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, para 5.
4. Political Parties, Elections and Referendums Act 2000, c.41, s.104(2).
5. Electoral Commission, 'Referendum on the UK Parliamentary Voting System: Report of views of the Electoral Commission on the proposed referendum question', (The Electoral Commission 2010), http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf; Electoral Commission, Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question, (The Electoral Commission 2013) http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.
6. 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', (The Electoral Commission 2013) http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.
7. Scottish Independence Referendum Act 2013, s.1(2). See also, 'Scottish independence: SNP accepts call to change referendum question', BBC News, 30 January 2013. http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21245701.
8. *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, para 30.
9. *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, paras 24–28.
10. Scottish Independence Referendum (Franchise) Act 2013, s.2(1)(a).
11. Representation of the People Act 1983, c.2, s.1(d).
12. Scottish Independence Referendum (Franchise) Act 2013, s.9. Although the extension of the vote to younger voters can be seen as a strategic move by the SNP Government to enfranchise those who might prove to be independence supporters, it should also be noted that such a move has long been SNP policy and that the referendum was the first opportunity the SNP government had to make such a change. It now has the power to change the franchise for the 2016 Scottish parliamentary elections and is indeed seeking to extend the vote to young people for this process: Scottish Elections (Reduction of Voting Age) Bill, Scottish Parliament,

2 April 2015. It is also the case that the UK Government accepted the former franchise extension in the Edinburgh Agreement and has since then extended the Scottish Parliament the power to introduce a general extension for Scottish Parliament elections: Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015.

13. https://www.aqmen.ac.uk/project/socialmedia; and Ailsa Henderson, Liam Delaney and Robert Liñeira, 'Risk and Attitudes to Constitutional Change', ESRC Scottish Centre on Constitutional Change Risk and Constitutional Attitudes Survey, 16 August 2014.
14. *Reference Re Secession of Quebec,* para 49.
15. *Reference Re Secession of Quebec,* paras 77, 88, 81 and 90–93.
16. Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper, 2010.
17. *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, para 6.

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CHAPTER 8

The Future of Federalism and Devolution in Canada and the United Kingdom

Guy Laforest and Michael Keating

The United Kingdom (UK) and Canada have much in common. Both are constitutional monarchies and they share the same Queen at once separately and in the fraternity of the Commonwealth. Both countries are liberal democracies governed by the rule of law in a long constitutional tradition. Both states share a combination of a cabinet system of government and bicameral parliamentarianism. In both environments the English language is dominant, although in Canada it has to share official status with French, while Welsh, Gaelic and Irish enjoy various degrees of protection in the United Kingdom. Both states are plurinational in nature, with the UK dealing with the English-Scots-Irish-Welsh configuration while Canada is home to a territorially concentrated national minority in Québec, Acadian and other French-Canadians across the country, alongside hundreds of aboriginal First Nations. In addition, at a time of increasing migrations in the world, both countries aim at integration and social

G. Laforest
Laval University, Quebec, Canada

M. Keating (✉)
University of Aberdeen, Aberdeen, UK
e-mail: m.keating@abdn.ac.uk

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cohesion while accommodating substantial multicultural populations. Both states, as we hope to have shown in this book, must manage the tensions between centralization and decentralization, the search for balance that remains a permanent challenge in the world of federalism as in the world of devolution. At a time of complex upheavals in the history of humankind and of our common planet, it is worth mentioning that both countries and their populations are also united or at least significantly touched by shared memories of the two world wars of the twentieth century, while their systems of government and their external relations are intertwined in a web of alliances that include, beyond the Commonwealth, NATO, the OECD and the Five-Eyes intelligence security alliance with the United States, Australia and New Zealand. As Canada celebrates the 150th anniversary of its federal constitution in 2017, the preamble of the British North America Act of 1867 stands as a testimony of the historical and contemporary centrality of British heritage for the younger country: 'Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom…'.

Beyond these overarching aspects of commonality between Canada and the United Kingdom, the various chapters of this book have compared and contrasted the government, political institutions, public policies and political culture of both countries in a variety of dimensions. We have looked at the nature and evolution of intergovernmental relations (Anderson and Gallagher); the structure and contemporary challenges of political parties (Keating and Thorlakson); the role of courts in the quest for balance at the heart of both federalism and devolution (Brouillet and Mullen); the tensions, hard figures and power struggles involved in taxation powers and intergovernmental transfers (Bell and Vaillancourt); the normative, political and social aspects of redistributive affairs (Banting and McEwen); and the often dramatic and always fascinating deliberative challenges associated with constitutional referendums (Henderson and Tierney). These chapters, we hope, will have shed light on the commonalities but also with important differences in the experiences of both countries with regards to legal foundations, structures, institutions and processes. Historical continuities are important but so are changes. If the Canadian system of government was to be similar in principle to that of the UK, it is also true that the UK itself has evolved and in some respects become similar to Canada. A role is also played by of unpredictable events or rearticulated political leadership.

In the case of Canada, the arrival of Justin Trudeau, leader of the Liberal Party since 2013 and Prime Minister of a majority government since October 2015, could significantly touch or remould the nature of the state and the contours of federalism. As Anderson and Gallagher argue (Chap. 2), in coherence with the arguments further developed by Christopher Dunn (2016), the early tone and attitudes of Justin Trudeau in his relationships with partners in the federation (provinces, territories and aboriginal peoples) were in marked contrast with those of his predecessor, Stephen Harper. The latter had started well in 2006 with an approach designed as 'open federalism', but his decade-long government ended in an atmosphere of coldness and unilateralism. During the federal electoral campaign of 2015, responding to a letter by the Premier of Québec, Philippe Couillard, Trudeau wrote that if he were to be elected, he would govern in accordance with the federal spirit, working together with partners while respecting differences in the search towards the realization of common objectives (Trudeau 2015c).

From the early days of his majority Liberal government in November 2015, 'working together', 'dialogue', 'partnership' and 'collaboration' were the key words in the rhetoric of Prime Minister Trudeau concerning federalism (Dunn 2016). On the night of his electoral triumph, he went as far as saying that collaboration with provinces would be the first principle of the actions of his new government (Trudeau 2015b). By the time in early November 2015 when Trudeau and his new ministers were sworn in, this rhetoric had been slightly altered. The spirit and language of collaboration with provinces were still present, but were more precisely circumscribed, essentially touching climate changes and other environmental matters (Trudeau 2015a). In the first 15 months, Trudeau met three times formally with provincial and territorial leaders arriving at a comprehensive agreement in early December 2016. On the matter of health transfers, broached by Bell and Vaillancourt (Chap. 4) and by Banting and McEwen (Chap. 5) in their respective chapters, Trudeau reverted to a more confrontational 'divide and rule' approach, negotiating bilateral deals significantly below early comprehensive provincial expectations with all partners excepting (at the time of writing) Alberta, Ontario and Québec. At the normative and symbolical level the real innovation, in Trudeau's approach to federalism and in his understanding of the Canadian political community, was his promise to deliver a meaningful reconciliation with aboriginal peoples, in the wake of the report of a major commission of inquiry (Truth and Reconciliation Commission

of Canada 2015). Upon key political occasions, this was coherently repeated. In the Throne Speech delivered by the Governor General in December 2015, Trudeau stated that no relationship was more important in his eyes than the nation-to-nation dialogue between Canada and the aboriginal peoples (Trudeau 2016; Government of Canada 2015). The reinforcement of aboriginal self-government has been part of the Canadian political landscape ever since the constitutional reform of 1982; however, progress in this matter has since then mostly come from judicial pronouncements. Since October 2015, we have witnessed the creation of a commission of enquiry on missing and murdered aboriginal women, and new investments towards basic infrastructures and educational concerns devoted towards aboriginal peoples. On this matter, the rhetoric is undeniably noble, and the expectations unmistakably high.

In the United Kingdom, the transformation of the party system, and in particular the crisis of the Labour Party, has put into question one of the principal mechanisms of territorial management. With the SNP dominating electorally in Scotland both at UK and devolved elections, territorial politics can no longer be managed within the state-wide parties but are bargained among territorial parties, a pattern that has long marked Northern Ireland. These changes in the party-political framework have followed structural changes dating back to the end of the twentieth century. The devolution settlement was initially presented as a reform to the unitary state, which left the essential principles of parliamentary sovereignty intact and did not in any substantial way affect the centre.

Following the near-death experience of the union in the Scottish independence referendum of 2014 (in which Scotland voted by 55% to remain in the UK), the United Kingdom appeared set on a federal path, albeit without formally becoming a federation. The Scotland Act (2016) devolved additional tax and welfare powers to the Scottish Parliament and was followed by a new Wales Act (2017) intended to move Wales to the reserved powers model and enhance its fiscal capacity. The Legislative Consent (Sewel) convention, under which Westminster will not legislate in devolved matters was put in statutory form in both acts and there was a shared understanding that this extended to changing the powers of the devolved legislatures. There was broad cross-community support for keeping Northern Ireland in the United Kingdom but with a special relationship and an open border with the Republic of Ireland.

Much of this has been called into question by the referendum decision of the UK to leave the European Union (EU). To a greater

extent than was appreciated in London, common EU membership served to hold the British union together. European law is directly applicable (by any court) in the devolved territories and UK withdrawal (Brexit) will at least require the removal of this provision. EU membership, by providing a framework in key policy areas, including agriculture, environment and regional development support, allowed a more expansive devolution settlement than would otherwise be possible, without UK framework laws. As these fields are not reserved to Westminster, following Brexit they will revert to the devolved legislatures. It is likely that the UK Government will want some overall framework to regulate territorial competition and deal with externalities. This could entail further centralization, or else more elaborate intergovernmental mechanisms. More profoundly, Europe provided a discursive framework within which ideas of shared and divided sovereignty or 'post-sovereign' (MacCormick 1999; Keating 2001; Walker 2016) could thrive. Like the UK itself, the EU is a post-sovereign polity, a pluralist legal order that does not require a unitary people (*demos*) or shared long-term destiny (*demos*). These ideas have underpinned the sharing of sovereignty and multiple identities and the open border in Northern Ireland. They helped ensure that the independence debate in Scotland has been about different forms of interdependence and union rather than statehood in the traditional sense (Keating and McEwen 2017). Brexit was promoted in England as a way of bringing back sovereignty and ultimate authority to one place; it is not clear whether this was the UK Parliament or a putative sovereign UK people acting through referendum. In neither case is it able to cope with different outcomes in Scotland and Northern Ireland, where 62 and 55% respectively voted to remain. The UK constitution has proved remarkably flexible in dealing with plurinationalism (since 1999 if not before). It is not at all clear how it can cope with different aspirations with regard to Europe. A plurinational UK embedded within a plurinational Europe could work more coherently.

Brexit will introduce a new hard border between the two parts of Ireland, one within and the other outside the EU. It has deepened the division between the two communities, with the nationalist community having overwhelming voted to remain within the EU and the unionist community leaning to Leave. It has raised the prospects of another EU referendum in Scotland as Scots, having voted in 2014 and 2016 to remain within the UK and the EU now discover that they cannot be in both. Brexit has also exposed the limitations of the emerging federal interpretation of the UK constitution. The position of the UK initially

was that the executive, acting under the royal prerogative, could notify the EU of its intention to withdraw without parliamentary sanction, this being a matter of foreign affairs. The issue ended up in the Supreme Court, which ruled that Parliament did need to approve the matter. The Scottish Government (along with some forces in Ireland and Wales) argued that the relevant legislation would require a legislative consent motion in the devolved legislatures as it would touch on devolved competences and change their power. The Scottish Government accordingly joined the case in the Supreme Court. On this matter, the Court upheld the position of the UK Government. It could have done so on the narrow grounds that the matter is reserved and is not a 'normal' case. Instead, it chose to pronounce that the legislative consent convention was a purely 'political' convention with no binding force whatever.

As territorial pressures intensify, sections of the British political class (including the Scottish Labour Party) have fallen back on federalism as the answer but this runs up against two historic objections. For the system to be truly federal, it would have to include England (which accounts for 85% of the population) and there would have to be a constitutional limitation of the power of the centre; Brexit and the Supreme Court have revealed the absence of the latter. As a test of the constitution, Brexit exposes the very different conceptions of the UK union in its constituent parts. If the aim of Brexit is to re-establish a state (whether unitary or federal) predicated on a unitary people, the prospects are not good.

The cases of Canada and the United Kingdom thus allow us to explore wider patterns of state reconfiguration (King and Le Galès 2017) and rescaling (Keating 2013) in a changing world. There is no definitive outcome to this process and preconceived models never quite fit actual cases, but if we conceive of federalism as a principle rather than a precise prescription, it continues to be a vital concept for understanding the structure of political power, authority and legitimacy.

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