

The Royal Society of Edinburgh
Joint event with the Royal Society of Canada
Constitutional Change in Canada and the UK:
Challenges to Devolution and Federalism
Monday 14th and Tuesday 15th September 2015

Background

Federalism in Canada and devolution in the United Kingdom both face emerging challenges. Questions exist over the right level of social solidarity and welfare. There are disputes over fiscal decentralisation and transfers. Policy issues cut across levels of government calling for new forms of intergovernmental co-operation. Party politics is reconfiguring at different levels. The courts play an increasing role in settling disputes between levels of government. There are questions of national recognition, as well as the place of Scotland and Quebec. This conference brought together scholars from Canada and Scotland for a comparative analysis of these questions and to discover what each country could learn from the other.

Session 1: *Multilevel Party Systems*

Chair: Professor Guy LaForest FRSC

Dr Lori Thorlakson, European Union Centre of Excellence and University of Alberta *Multilevel Party Systems in Canada*

Dr Thorlakson identified three aspects of party competition through which a country's multilevel party system is shaped. These are the territorial concentration of party support; party organisational linkage; and party system congruence.

The first aspect tells us how the whole party system manages territorial differences; i.e. whether those differences are fed into the central system or whether conflict is dealt with at territorial level. The territorial concentration of party support can be measured by the Index of Cumulative Regional Inequality (Urwin 1985), which finds that Canada has one of the highest levels of concentration, historically driven in large part by concentration of party support on the right. This is reflected in the share of party support by vote, but also amplified by seat share; demonstrating how an electoral system can load conflict into the political sphere. Parties need a majority and therefore require diffuse support; this cannot be achieved by the concentration of support in small territories.

The second aspect, i.e. the vertical integration of parties, marks a distinct difference between Canada and the UK, and indeed most other countries. In the UK, the majority of parties compete both at central level (Westminster) and at territorial level (within the devolved nations), while in Canada parties represented at different levels frequently have only informal co-ordination, with entirely separate legal identities and organisational structures. Others have no equivalent at provincial level. The New Democratic Party (NDP) comes closest to an integrated structure: while it is not expected that most NDP members at the provincial level will also become members at the federal level, voters are not allowed to become members of the federal NDP if they are a member of another provincial party.

The degree of vertical integration can be considered an important feature of a multilevel party system, as some argue that such integration helps to ensure stability: building on shared goals, common purpose and interdependence, while the central party needs the 'foot soldiers' of the regional party, the regional party needs the brand and status of the central party. Vertical integration may also require some compromise in policy goals where the positions of the central party and the regional party differ.

Finally, Canada is also distinct in the high degree of dissimilarity in its party systems - among federal countries, only Switzerland has a greater degree of dissimilarity. This means that the competition dynamics between parties differ greatly from province to province. This results in inconsistent party identification, with voters supporting different parties at the provincial and federal levels.

Such separation and dissimilarity may allow parties to avoid internal conflict and respond to provincial demands but, the degree to which the political system is representative or responsive at each level is not clear. Further research is needed into the motivations of voters at each level: does split voting reflect a degree of sophistication, or is it a result of confusion?

Professor Michael Keating FRSE, University of Aberdeen and Centre on Constitutional Change
Multilevel Party Systems in the UK

Setting the context, Professor Keating highlighted two quotes from Blondel and Finer arguing that in the 1970s, a unified party system suggested a broad social homogeneity across the UK. Keating's 1975 Thesis provided a different interpretation: that society was differentiated across regions, but that the UK parties were, at the time, highly successful in brokering territorial politics and mitigating conflict at the centre.

MPs have always been faced with finding a difficult balance between aligning themselves closely with party politics while also positioning themselves as regional brokers. Territory and class are both important. It has become apparent that the perceived homogeneity of the early 1970s was merely one moment in time.

In Scotland Conservative support was stronger than in the rest of the UK in the 1940s and 50s, but has declined dramatically since. The disintegration of the broad coalition of the centre-right unionist parties and national liberals which formed the Conservative movement in Scotland (distinct from the UK party) in the 1940s and 1950s resulted in part from a loss of funding as the Scottish bourgeoisie disappeared, and as the movement focused too narrowly on appealing to its core voters.

The Labour vote held up in Scotland even through the 1980s, when it declined in the rest of UK. Support for the Scottish National Party (SNP) was historically relatively low, other than a peak in 1974, when 11 SNP MPs were elected to Westminster and, of course, has recently surged, breaking the bounds of the traditional two-party system.

Previous success in brokering territorial politics, for example through the Scottish Office, became more difficult to achieve following the recession of the 1970s, both in the UK and globally. Politics became significantly more territorialised, making it difficult for UK parties to appeal in all regions and nations. Following devolution, there was a trend towards differentiated politics, with people voting differently in devolved and UK elections. Recently that pattern has changed: in Scotland voting preferences in the UK elections now reflect those of Scottish elections, whereas in Wales the situation is reversed.

Following the 2014 Independence Referendum in Scotland and in the run up to the 2015 UK elections, the SNP clearly positioned itself as a centre-left, anti-austerity party, with ambitions not only to act as a territorial broker for Scotland but also to play a significant role in national politics. The unionist parties, conversely, appear to be manoeuvring out of the brokerage role, as exemplified by Ed Miliband's stated refusal, ahead of the 2015 Election, to work with the SNP in a progressive alliance against the Conservatives; and by the focus on 'English Votes for English Laws' immediately following the Referendum.

Arguably now, there are clearly British parties, but there is no British party system, and this is placing considerable strain on the Union. There is an argument to be made that the Union needs to be saved from the Unionists.

Multi-Level party systems: Q & A session (key points)

Responding to a question on the issue of control of central parties over regional parties, Dr Thorlakson commented that the lack of vertical integration in the party system in Canada can, contrary to theory, be interpreted as a strength. Given the significant differences in policy interests, economic interests and political cultures across the country, parties would find it difficult to integrate. The current system allows them to build in flexibility and deal with tensions in an informal way.

Recognising the rise of regional politics, a question was posed on how unionist/central parties can effectively respond to rising nationalism. Speakers suggested that lessons to be learned from Canada included the crucial need to pay attention to issue salience, as well as recognising and

reacting quickly to changing economic conditions and left/right shifts. Parties must be nimble, constantly putting together and reshaping social and territorial coalitions as prominent issues dictate.

Asked whether it would be possible to project a multi-level party system which would be able to balance competing interests, Professor Keating noted that the territorial dimension is now refracting issues very differently: new forms of politics are emerging, such as inter-regional competition, and shared competence over key pillars of state such as welfare. EU states generally are struggling to amend or create constitutional arrangements which reflect this new reality. In the UK the electoral system has been established around a two-party state and distorts votes accordingly. Therefore, the entire electoral system, and the institutions within it, must be reconsidered.

Session 2: Welfare

Chair: Professor Alan Alexander OBE FRSE, General Secretary, Royal Society of Edinburgh

Professor Keith Banting FRSC, Queen's University

Inequality and Federalism in Canada

Canada has experienced two key trends over the past two decades: a marked shift towards decentralisation and a significant increase in inequality. The obvious question is whether these two trends are linked. Increasing federalisation moves decision making closer to citizens, but is inequality and a changing social contract across the country, the price to be paid?

Professor Banting posed two hypotheses:

1. Decentralisation > weaker distribution > greater inequality.
2. Greater inequality > decentralisation > weaker redistribution.

Providing some context, Professor Banting noted that a significant percentage of income growth in Canada in recent years has been captured by the top one per cent of earners. In terms of wealth held by the richest one per cent, Canada ranks second only to the USA. Prior to 1995 government transfers and taxes offset rising market income inequalities. Since then such transfers have merely tracked market inequalities. There has been retrenchment of the social envelope; social expenditure in Canada over the period 1990-2014 has remained stable at 17 per cent, while elsewhere spending has increased over that period. Countries such as the UK and the USA now outrank Canada on spend on social policy.

Overall, total federal expenditure has decreased greatly, while regional expenditure has increased. This, in part, reflects the on-going decentralisation of social policy, including powers to set the parameters of social programmes, to provincial level. Provinces have significant autonomy for both revenue raising and spending.

Hypothesis 1

Weakening redistribution may be driven by decreases in public finances, or by ideological shifts away from support for the welfare state. But could decentralisation be an additional driver? Some literature suggests yes, that institutions matter: as fiscal policy becomes more federalised and more fragmented, there is greater complexity in the system. This allows for blame shifting and blame avoidance. This was in evidence, for example, in the federal budget of 1995, when a higher proportion of spending cuts was transferred to provincial budgets than was incorporated into central spending.

Indeed, 1995 was a watershed moment for retrenchment of social assistance. Although federal cuts were somewhat offset by the expansion of other benefits, provincial cuts were not, reducing the overall redistributive effect. Additionally, although there is no simple relationship, where revenue is raised by central government and transferred to federal level, the centre is strengthened. Where revenue is raised at federal level, provinces are more constrained in their capacity; for example, due to tax competition.

Professor Banting noted that the case of Quebec should be considered as an outlier to broader trends. Other provinces have shifted politically to the right, while Quebec has moved left. It is a strongly organised society, influenced by powerful trade unions, women's and students'

movements, and a dense network of social and community organisations. Quebec has secured a level of fiscal freedom beyond that of any other province, allowing it to compensate for a decline in social assistance with policies such as universal childcare.

In concluding comments on Hypothesis 1, Professor Banting summed up that decentralisation has facilitated greater variation in redistribution across the provinces; for example, the level of redistribution in Quebec exceeded that of Alberta (the province with least redistribution) by 35 points between 2000 and 2007. The Canadian system is well able to cope with such major differences and asymmetry and the differences have, to date, remained stable; they do not illustrate a race to the bottom, but rather reflect the politics of each province.

Hypothesis 2

Has inequality across the regions contributed to the political pressures which have led to greater decentralisation? There are some interesting patterns; for example in rich regions, both the poor and rich prefer decentralisation, as it is seen to maximise income opportunities. Nevertheless, there is no clear evidence that inequality drove decentralisation in the 1980s and 90s, as the level remained relatively stable.

In the 2000s there is plausible causality, due to the resource boom that drove growing differences in inequality across the provinces. The Equalization Program, through which the Federal Government makes payments to less wealthy provinces, is an important ideological mechanism to address differences in inequality; but a recently-imposed cap on the total amount, combined with the impact of the resource boom, means that such differences continue to grow.

More research is needed on both hypotheses to determine their validity and the extent of their impact.

Professor Nicola McEwen, University of Edinburgh and Centre on Constitutional Change
Rescaling welfare? Assessing the prospects and implications of the devolution of UK social security

The Scotland Bill, currently undergoing scrutiny at Westminster, takes the devolution of welfare into new territory in the UK. Professor McEwen indicated that she would focus on three questions:

1. What welfare competences will be transferred?
2. What administrative, financial and constitutional constraints will condition welfare policy devolution and policy options?
3. What are the implications for the 'social union'?

The development of the UK welfare state was considered an advanced stage of territorial integration, recognising equality of status for citizens across the nation and an equitable right to core services such as healthcare and education, helping to foster social solidarity.

The welfare state has been substantially expanded over a number of decades and has, to date, remained highly centralised. Along the journey of devolution, a distinction has been made between social security payments and social security services, with some of the latter being wholly or partly devolved (e.g., education, health, housing services). Today, therefore, a number of services available in Scotland are markedly distinct from those of the UK (for example, universal free prescriptions), while in others there are complicated inter-dependencies between levels (for example, housing benefits and housing provision). Some problems defy constitutional arrangements.

Recent debate on the reform and devolution of welfare, for example in the Scotland Act 2012, the UK Welfare Reform Act 2012 and in relation to the Scotland Bill, has been subsumed into the wider debate on the constitution and territorial politics. Both unionist and nationalist campaigns focused on social solidarity, the former promoting the UK as a 'union for social justice' and the latter heralding Scotland as a 'social nation'.

The effects of social security devolution will be potentially both negative and positive. The risks include the increasing number of veto points in the delivery of welfare between the centre and devolved institutions; increasing competition between regions and between the centre and regions,

which could lead to a race to the bottom; and that recognising territorial diversity could weaken inter-regional solidarity.

The potential positive impacts include greater solidarity within communities of devolved nations; the expansion of welfare as part of sub-state nation building; and opportunities for greater experimentation in progressive welfare policy on a smaller scale.

The current Scotland Bill proposes the devolution of welfare powers in the areas of disability and carers' allowances; executive power and flexibility over the administration of Universal Credit; the housing element of Universal Credit; the power to create new benefits in areas of devolved responsibility; top-up payments; and tax on earned income.

There are, nevertheless, a number of constraints which will limit the flexibility of the Scottish Government and Parliament to shape policy and implementation in these areas:

- Legislative constraints: the Scotland Bill proposes the devolution of welfare benefits, not the welfare powers which would allow the re-design of policies.
- Institutional constraints: the bureaucracy of welfare administration would be shared between devolved and reserved institutions, enhancing the inter-dependency across levels.
- Financial constraints: an ageing population will put growing strain on the welfare system but, with limited devolution of revenue-raising powers, financing will remain tied to UK macro policy and adjustments to the block grant.
- Public expectations: Scotland's welfare system will be measured against the rest of the UK; the Scottish public will only accept divergence from the UK system if it is perceived as better (e.g., greater scope and generosity) in Scotland.

Opportunities may include an enhanced ability to meet local need, flexible partnership working and policy innovation and experimentation.

Welfare: Q&A session (key points)

It was noted that in the case of both Canada and the UK, there is one 'key player' (Quebec and Scotland respectively) pressing for the further devolution of powers; other smaller provinces/nations may not want or have the capacity to handle extra responsibility.

Professor Banting commented that in Canada Quebec is the driver but most provinces are keen to assume additional responsibilities. There are two key areas – pensions and maternity/paternity benefits – where provinces can 'opt in'. Most have not done so; it is largely this which has led to significant asymmetry in the Canadian system, but the system can accommodate such asymmetry. Professor Banting went on to highlight that Quebec is the only province with control over its immigration policy; other provinces would like to negotiate similar deals, but these have not been offered by the Federal Government.

Professor McEwen noted that there are profound asymmetries within the UK (for example there is no self-government in England), but that the evolution of the political system in the UK has coped with such asymmetry. The UK largely sees itself as a union of nations and recognises the dynamics of separate and distinctive regions. Resentment tends to emerge around the issues of fiscal transfer and fiscal autonomy.

Responding to a question on the sharing of economic risk and the notion of a 'top-up' welfare state, Professor Banting commented that the real pressures on the welfare system in Canada in the near future will be around the provision of healthcare, which is the responsibility of the provinces. Therefore the questions arising include how the provinces will be able to bear this weight and whether they can join together to secure greater fiscal transfer for healthcare from the Federal Government.

With regard to top-up benefits, Professor McEwen noted that it would be preferable to have both the design tools to adapt welfare policy, as well as the spending tools, though in the absence of both, the design tools would be better. Again, there is an issue of offloading or blame shifting. If a reserved benefit is cut, pressure would come on the devolved nation to fill that gap, which is unlikely to be sustainable in the long term.

Session 3: Fiscal Federalism

Chair: Professor Nicola McEwen

Emeritus Professor François Vaillancourt FRSC, Université de Montréal

Fiscal Federalism – Canada

Professor Vaillancourt introduced his talk by explaining that he would refer to five factors which contribute to the changing Canadian Federation: geography; history; demographics; economics; and politics.

He also set out the allocation of responsibilities between the Canadian and provincial governments. Broadly this can be described as: federal responsibilities – foreign affairs, defence, money, banking, non-road transportation, communications unemployment insurance, old age security(pensions); provincial – health, education, roads, welfare, workers' compensation, municipal affairs; and shared – agriculture & immigration.

In Canada, the central government and provinces have full access to all tax fields (except customs, which is solely central government), with central government making equalisation transfers between provinces. Due to there being weak provincial rules on balanced budgets, the provinces can borrow and spend freely – there is no debt ceiling. With regard to health, the provinces face differences in their demographic composition and thus health spending. One also finds a universal coverage of prescription drugs in Québec (either private or public insurance) not found in other provinces.

There was a peak of centralisation of revenues and expenditures around the time of the Second World War and, since then, there has been a trend towards greater decentralisation and autonomy for the provinces.

Asymmetry in powers has developed in Canada mainly as a result of Quebec seeking and obtaining powers when it can. Professor Vaillancourt referred to the current debate in Scotland on powers to top-up benefits above those set at a national level, and indicated that this arrangement seems to work well in Canada.

Professor David Bell FRSE, University of Stirling

Fiscal Federalism – Scotland

Professor Bell opened by describing the current situation in Scotland as being “lots of fiscal, but not much federalism”. He discussed the Scotland Bill proposals for income tax devolution to the Scottish Parliament, whereby the UK will continue to control tax base and allowance but the Scottish Parliament will have power over bands and rates. For VAT, the Scottish Parliament will be assigned the first ten percentage points (for EU regulatory reasons, VAT cannot be different in component nations of member states) and air passenger duty.

He described how benefits for carers, disabled people and those who are ill (in multiple different allowances) will be devolved, as will those comprising the Regulated Social Fund (winter fuel payments, etc.). The Barnett Formula is to be retained with the further transfer of powers proposed - the detail of the initial level of transfers between the UK and Scotland is currently the subject of negotiation between the governments. There is also an agreement that the principle of “no detriment” is to be adhered to.

He explained that borrowing powers were already part of the 2012 Scotland Act and that a new Scottish Rate of Income Tax was also established with the 2012 Act – 10p from Income Tax currently, raising approximately £4.7bn. With the 2012 Scotland Act, Scotland controls around £10bn of the revenue from its roughly £30bn of expenditure. After the new Scotland Bill is enacted, this total will be roughly £17.5bn.

Professor Bell set out how much tax revenue is generated from various income sectors of the population – the lowest-earning 60% of Scottish taxpayers contribute just 10% of total tax revenue, the lowest-earning 90% contribute 50%, while the top 1% contribute nearly 20% - thus 130,000 people contribute substantially to the Scottish tax base. Consequently, Scotland currently has a very unequal tax base – he suggested that any move to increase taxation on higher earners (thereby making the system more progressive) would further raise their contribution to Scotland's

taxation – increasing the risk of those people leaving the country. Professor Bell posed one more conundrum for the UK's constitutional process: Scottish surveys suggest that people would like to see the Scottish Parliament gain extensive powers over taxation, spending and welfare; yet the people on average would like to see spending higher and taxation lower.

Fiscal Federalism: Q & A session (key points)

A question was asked about the constraints on devolving taxation powers – EU regulations mean it is impossible to vary VAT within different parts of the UK; corporation tax devolution could be difficult; and excise duty couldn't be varied due to the Act of Union. The questioner also asked who had drafted the current proposals and whether the SNP accepted them.

Professor Bell agreed about the limitations available due to the constraints identified. He also observed that within the UK there has been a steady shift away from visible taxation such as income tax (the basic rate having fallen from 33% to 20% since 1979) while there have been substantial increases in invisible taxes such as insurance premium tax and VAT.

Also raised was the balance between the devolution of tax powers and the sharing of economic risk, and why Canada seems to be against the complete devolution of income tax.

Professor Vaillancourt replied that he believes that a reasonable way to pay for central services is the central government retaining a right to raise some of the income tax. He also observed that within 15 years of moving from provinces levying a surcharge on the federal personal income tax (thus using the brackets and rates of the federal taxes) to setting their own bands (brackets) and rates, the bands and rates in every province have become diversified. He also noted that the federal Canadian Government has no power over provinces to require them to follow central government austerity measures.

Session 4: Pluri-national Federalism and Constitutional Accommodation

Chair: Professor Ailsa Henderson, University of Edinburgh

Professor Guy Laforest Université Laval, Québec
Canada as a multi-pluri-national federation and Quebec

Professor Laforest expressed his view that Canada is in some ways federalised, in others centralised. He highlighted the late Richard Simeon's argument that Canada is a highly decentralised federation because of the significant capacities the provinces have and which are entrenched in the constitution – jurisdictional, fiscal and bureaucratic. Nevertheless Canada is also highly centralised in terms of co-ordination, management of intergovernmental relations and the structure of the judiciary. This is what makes it a complex case for study.

He said that in Michael Keating's conceptualisation of pluri-national democracy, national projects and post-sovereignty can be utilised to consider the Canadian federation. Canada's federation is very much organised along asymmetric lines particularly with regard to the powers provided to Quebec although such asymmetry is not recognised within the Constitution.

The Quebec Question

Professor Laforest explained that when considering the Quebec question, some in the rest of Canada summarise it as:

- What does Quebec want? It simply wants more – money, power, recognition.
- What does Quebec want to contribute to Canadian interdependence? Nothing.

Describing the history of Canada's constitutional evolution from 1867, before reflecting on the last few decades, he observed that 25 years after the failure of the Meech Lake accords of the mid-eighties, recent powers and constitutional developments desired by Quebec have been outlined and are similar to those recommended in the late 1980s. He observed that constitutional change happens slowly in Canada.

LaForest commented that constitutional reform is an unlikely priority in present day Canada; although management of intergovernmental relations would prove useful. Lessons from how this has been achieved in certain contexts in the British Isles (North–South Council, British–Irish Council) could be instructive.

Professor Michael Keating FBA FRSE, University of Aberdeen
Constitutional theory and the continuity of debate

Professor Keating opened by recognising that identities are part of the constitutional debate, but identities are constantly changing. In pluri-national states, this could vary in different nations or regions. In most of Canada there is one identity; in Quebec there are two. In Scotland there are two, and in England there has existed a conflation of England, Britain and UK. He noted that pluri-nationalism is a characteristic of many modern states. An argument had been made by Mill, Wilson, Dicey, and others, that federalism could only be achieved in mono-national states, but this has been somewhat superseded by modern federalism studies which embrace different types of federalism, different rationales for establishing it and the different ways of dividing powers. The UK has been very good at recognising symbolic diversity, such as football teams; the distinct image of the monarchy in different parts of the UK and recognition and respect for individual nationalities within the UK. But it has only recently matched this with substantive devolution of power.

He observed that history is constantly evolving – political authority is rooted in the past, and the importance of different aspects of history can be focused depending upon who is telling the story. What is Unionism? An Orange March in Ballymena and a Conservative tea party in Buckinghamshire have little in common with each other, but both represent Unionism. There is space for both, and no requirement for one or the other to be the “correct” version. There are even different doctrines of sovereignty. The dominant English doctrine is that of Westminster supremacy, as defended by Dicey. Neil MacCormick, among others, pointed to a different view within Scotland, where parliamentary sovereignty was never established. There is no necessity to resolve this issue definitively.

Professor Keating suggested that states with weak national identities often embark upon nation-building projects – for example Spain, Canada, the UK. They seek a need to express the national identity by attaching it to rights or welfare systems; this does not solve any of the constitutional questions facing central states. In the UK, there is now a clash between a Scottish national project and a UK national project; and this is a challenge also facing several other states across Europe.

Pluri-national Federalism and Constitutional Accommodation:

Q & A session (key points)

Among the subjects raised in the Q & A session were:

- whether the dual nationality/identity approach adequately covers aboriginal Canadians. It was suggested by an audience member that it is not clear that this is the case;
- a point was raised about the relationship between nations and identity – Professor Keating observed that nations come and go, that they are forms of human collectivity that last as long as there is a shared purpose;
- another audience member was dismissive of attempts to claim rights to either a Scottish or British polity, observing that many of these rights are based on values shared throughout the nations of the UK.

Session 5: Processes of Constitutional Reform – Referendums, Citizens’ Assemblies and Other Means

Chair: Professor Michael Keating

Professor Stephen Tierney, University of Edinburgh

Popular Constitutional Amendment: Referendums and Constitutional Change in Canada and the United Kingdom

Professor Tierney explained that his presentation was an abstract from a longer paper. Both the written constitution of Canada and the unwritten constitution of the UK are silent on the use of referendums, yet both countries have used them at national and sub-national levels. Referendums represent an existential challenge to the state and to the assumptions about how the process of constitutional change should occur. There is a genuine question as to whether referendums aid or supplant the constitution.

The Canadian Supreme Court maintains that there is no unilateral right to secession, although it stated that if there were a clear expression by a clear majority of the population of Quebec this

would have implications for the constitutional arrangement. The 2014 Scottish Independence Referendum addressed many of the key issues which plagued the 1995 Quebec Referendum through the Edinburgh Agreement and the Political Parties, Elections and Referendum Act. Both the Scottish Government and UK Government were content for the Electoral Commission to act as arbiter. This resulted in a simple and clear question being posed to the people of Scotland. The phrasing of the Quebec Referendum was far less clear. The people of Scotland, therefore, had much more confidence than those in Quebec that a 'Yes' vote would lead to independence. Although the general public was not engaged in the early stages of framing the Referendum in Scotland, the Edinburgh Agreement dispersed elite control and mitigated the deliberation deficit.

There was little direct participation in Scotland over the Referendum question. Electoral reform is widely considered an uninteresting topic and it is difficult to raise public interest. The Referendum on the Alternative Vote system is an example of such a failure. Both Ontario and British Columbia held citizens' assemblies examining electoral reform, with participants selected from the electoral register at random. Although those directly involved were more engaged, this did not extrapolate to the macro level. Those who were not involved felt no better about the process. Concerns were also raised over the process being captured by experts pushing their favoured positions. Furthermore, it was questioned as to whether excluding politicians from the process would lead to politically unworkable decisions being put forward which would be unlikely to succeed. Removing politicians from the process might also lead to a lack of ownership over the question.

The first step of a referendum is framing the issue, rather than setting the question. Referendums are proliferating, yet sovereignty issues remain under-studied. The Scottish Independence Referendum dealt with issues of elite control and, in future, we must also consider processes of deliberative democracy.

Professor Ailsa Henderson, University of Edinburgh

Referendums and Losers' Consent: Referendum Process and Voter Satisfaction in Canada and the United Kingdom

The health of any democracy is based on citizens having positive feelings about the system; this applies to both 'winners' and 'losers'. Losers' consent can be maximised under certain systems which benefit losers, such as proportional representation voting, more inclusive governments and frequent elections. Individuals are more likely to be satisfied if they have a strong sense of civic duty and efficacy. Losers' consent and satisfaction with the system can be eroded by factors such as cumulative loss and ideological distance from the victorious party. While this is the case for ordinary elections, we know very little about losers' consent following referendums. Referendums are often binary, highly emotive and final, and so present different challenges from other elections. Referendums often include features designed to maximise losers' consent, such as the requirement for a supermajority.

Theoretically, losers' consent is enhanced if there is high capacity for engagement, opportunities to learn and deliberate are present, there is a belief that the process is fair, and preference intensity is low. In the Scottish Independence Referendum, preference intensity was high and was set early. There was significant opportunity for engagement over what was a long campaign and both subjective and objective knowledge of voters improved over the course of the campaign. It was an emotive, binary issue, without a neutral government.

When compared to Northern Ireland and Quebec, post-Referendum losers in Scotland were less happy. Yet when asked about their level of satisfaction with how democracy works in Scotland after the Referendum, those on the losing side expressed a higher level of satisfaction than the winners. The happier you were that the 'No' side won, the less happy you were with the state of democracy in Scotland. Those voting 'Yes' were more likely to think that institutions would continue in an independent Scotland; whereas 'No' voters were more inclined to think ties would be cut. Similarly, 'Yes' voters were more likely to believe that Scotland and/or themselves had profoundly changed; with 'No' voters not believing this to be the case. The higher satisfaction of the losers can partly be explained by the different beliefs in what constitutional change would occur following the vote, what mattered during the campaign and what changes had and would occur in Scottish society.

Processes of Constitutional Reform – Referendums, Citizens’ Assemblies and Other Means: Q&A Session (key points)

Responding to a question on the difference between parliamentary sovereignty in England and Scotland, Professor Tierney noted that it is generally accepted that the UK Parliament remains the supreme power. There has always been a complex relationship between sovereignty and the law. The draft clauses in the Scotland Bill addressing the permanency of the Scottish Parliament could be overruled, but there is a plausible argument that this almost constitutes a constitutional provision.

Answering a question on the ‘neverendum’ situation in Quebec, Professor Tierney argued that he did not believe the 1995 Referendum was inevitable. Change was promised in the previous referendum in the event of a ‘No’ vote, but no such change was forthcoming following the result. This made the public unhappy and ultimately fuelled the 1995 referendum. Process handling was the problem.

Addressing the issue of a precedent being set on the Scottish Government being granted a referendum, Professor Henderson pointed out that the more polarised a debate becomes, the more people believe important issues have been discussed. The Scottish Independence Referendum had a long campaign, but did not focus heavily on further powers. Those who voted ‘No’ were not given a say on which powers, if any, they wanted in case of a ‘No’ victory. Professor Tierney noted that the drama of the event resonated with ‘Yes’ voters. In signing the Edinburgh Agreement, the Scottish Government implicitly conceded that it required the consent of the UK Government to hold a Referendum on Independence. In turn, the UK Government conceded that a manifesto commitment from a Scottish party which goes on to win a majority at Holyrood creates a political imperative. It is difficult to envisage a situation where this would not be the case.

Session 6: Intergovernmental Relations

Chair: Professor Michael Keating

George Anderson, Queen’s University, Ontario
Intergovernmental Relations in Canada

Canadian federalism is strongly dualist. Only the areas of agriculture, immigration and pensions are completely reserved. Spending power is the main lever of Government to influence regional policy. There is a political culture of provincial autonomy, particularly in Quebec and Alberta, with provinces extremely reluctant to give up sovereignty. In terms of vertical federalism, there is dominance by federal and provincial executives, with a very limited role for the legislature. This has led to a culture of numerous ministerial meetings albeit that these have declined significantly in number from 50 to around 25 per year. First Ministers’ meetings have similarly become less frequent, falling from five meetings annually in the 1960s, 70s and 80s to just two meetings under the leadership of the current Prime Minister, Stephen Harper.

Regarding horizontal federalism, there has been a significant increase in horizontal co-operation at the national level. The Council of Federations was formed in 2003 to facilitate a greater number of meetings although there are often widely differing views on issues such as fiscal policy and energy, and little is achieved in the way of concrete agreements. As a result, the Council of Federations can be considered a pale shadow of comparable bodies, such as the Council of Australian Governments. Bilateral agreements between provinces are common.

Intergovernmental relations (IGR) in Canada have seen an increase in First Nations representation. They have played a major role in constitutional meetings since 1982. First Nations’ representatives are invited to join First Ministers and Ministers when programmes directly relating to them are on the agenda. Exclusion of municipal representatives does not occur in Canada. The issue of provincial sovereignty remains, even over areas such as major infrastructure projects. The public is largely excluded from the process; some vertical IGR sessions have been publicly broadcast in the past, but this is no longer the case. There is an extremely rigid constitutional amendment formula, under which individual regions have the power of veto. Consensus is the general rule if provincial co-operation is required. This can lead to multilateral and bilateral provincial deals being made.

There are varying visions of federalisation, including founding peoples, equal provinces and national citizen-centric. The Federal Government has had little consistency regarding the management of federalism. Liberal governments have historically acted as activists in promoting national programmes, whereas the administration of Stephen Harper has been more dualist. Quebec and Alberta have proven to be the most consistent protectors of provincial rights, and Ontario, along with the less prosperous provinces, has acted more pragmatically. All provincial governments have intergovernmental affairs offices, including international affairs offices. The strongest central control can be found in Quebec and Alberta. The Federal Government prefers to work with provincial departments directly and often bypasses the intergovernmental organisations.

Dr Bettina Petersohn, University of Edinburgh/Swansea University
Intergovernmental Relations in the UK

Devolution and the existence of intergovernmental relations are relatively new developments in the UK, affected significantly by political circumstances and specific issues, and undergoing constant change. Intergovernmental relations in the UK are bilateral and asymmetric in nature, which leads to a complex system. As is the case in Canada, intergovernmental relations in the UK are dominated by the executive which makes it more difficult for parliaments to perform a scrutiny function. Scrutiny is one of parliament's main functions and occurs in several ways; including influencing the policy of government, holding the government to account and raising public awareness. Opportunities for such scrutiny are affected by four factors:

1. **Timing:** the relationship between a decision being taken and scrutiny taking place. Can parliament scrutinise prior to the meeting and how much time is available to scrutinise afterwards? The longer parliament has to scrutinise, the easier it is to co-operate with others and become more informed. Timings are also relevant, with more frequent meetings; for example, quarterly, allowing parliament to know in advance what is to occur.
2. **Access to information:** is parliament informed of the position of government prior to the meeting? Publishing agendas in advance aids parliament in carrying out its role.
3. **Processes:** how does parliamentary scrutiny occur? The type of committee, whether a standing committee or specially constituted committee, affects opportunity.
4. **Transparency and publicity:** is the process open to and visible by the general public?

In the UK, there is a dualist allocation of power. There is a clear distinction as to which powers are reserved and which are devolved. The two levels of government coordinate on some areas, such as EU policy, where the devolved administration would be involved in the implementation of the policy. Although it is not constitutionally entrenched, a memorandum of understanding exists between the governments on principles and forums.

The Joint Ministerial Committee includes members of the UK, Scottish, Welsh and Northern Irish executives. Its use was initially limited at the outset of devolution, but was resurrected in 2007 following the elections of significantly different governments in the different devolved regions of the UK. There is a considerable amount of informal co-operation between officials working in different governments on similar policy issues, which is difficult to monitor. As a result intergovernmental relations are often based on personal relationships between individuals. Resolutions reached by Joint Ministerial Committees tend to be non-binding and there is no obligation for these to be published.

Constitutional matters are reserved and by convention, any alteration to the powers of the devolved administrations requires the consent of the devolved legislatures. For example, the Scottish Parliament recommended several amendments to the Scotland Act 2012. The Scotland Act 2015 is expected to follow a similar path. In situations where the devolved administrations believe UK-wide legislation would be beneficial, they may permit the UK Government to implement change via a legislative consent motion (LCM). Although this is currently by convention, it is intended that LCMs will get statutory status in the Scotland Act 2015.

Legislative consent motions occur after the legislation has been passed or is well underway, and thus do not hold the Government to account. The majority of LCMs pass without controversy, and sometimes even without debate. This is an indicator of the interdependency which exists between governments. Following the devolution of further powers, it is expected that considerably more

LCMs will be needed. In order to manage interdependency, the Smith Commission recommended significant upscaling of intergovernmental machinery.

Intergovernmental Relations: Q&A Session (key points)

In response to a question on the use of multiple languages in communiqués, Professor Petersohn noted that all documents from the Welsh Assembly are available in both English and Welsh. George Anderson stated that both English and French are used in various Canadian provinces. As a matter of practice, all communications between the Federal Government and the Government of Quebec are in French. Interpretation facilities are available in Canada and all documents are published in both languages. Obviously direct communications depend on officials' grasp of languages.

When questioned on whether there is currently greater emphasis on dualist federalism than has been the case in the past, Professor Petersohn noted that there are no legislative consent motions in Canada. In the UK, these serve to maintain the sovereignty of the UK Parliament. George Anderson pointed out that in Canada, most significant policy involves both levels of government. He gave his opinion that the Canadian Government is too deferential to the provinces. Canada has suboptimal outcomes in both health and education, which could be improved by greater co-operation.

George Anderson answered a question regarding the adequacy of intergovernmental machinery for signing up to international agreements, by stating that Canada can only enter trade agreements by Royal Prerogative. This binds Canada, but not the individual provinces. Thus, the individual consent of the provinces is needed, and they are essentially afforded a seat at the table. In the situation of the EU–Canada Trade Agreement, the Canadian Government and all of the provinces were represented, compared to a single government representing all of the sovereign states of the European Union.

Session 7: Legal Issues and Constitutional Jurisprudence

Chair: Professor Stephen Tierney

Professeure Eugénie Brouillet, Université Laval, Québec

The Federative Balance and Co-operative Federalism in Canada: What Does Co-operation Mean?

Historically, the Canadian courts did not enter into debates about the Canadian federal state, but more recently this position has changed. The courts have attempted to maintain a balance between unity and diversity – the essence of federation. In 1998, in considering the question of whether Québec could make a unilateral Declaration of Independence, the Supreme Court of Canada stated that federalism is one of the underlying principles of the written constitution.

The principle of federalism can therefore be used by the courts to guide their interpretation of the provisions of the constitution. The principle has also been invoked by the courts to fill omissions in the Canadian constitutional text. The Supreme Court's reasoning in decisions involving the distribution of powers is increasingly founded on considerations which promote efficiency over diversity.

Two theories of federalism were identified:

- *Dualist federalism*: whereby powers occupy clear compartments, thus minimising the overlap of powers. Exclusivity of powers is an important consideration.
- *Co-operative federalism*: The overlap of powers between the two levels of government is promoted.

Traditionally, the dualist approach has been the main method for the distribution of powers in Canada. That has not prevented the courts from applying the co-operative approach to federalism, and this has become more apparent in the last ten years. The creation of zones of overlapping powers has provided fertile ground for the discreet, but increasingly apparent, emergence of a constitutional principle of subsidiarity in Canada.

Despite it not being a part of the federation's formal constitutional structure, the principle of subsidiarity has been stated with increasing explicitness in the jurisprudence of Canada's Supreme Court. In contrast to the European notion of subsidiarity, in Canada it operates only upwards,

creates permanent effects, and can apply to matters that are not attributed to the federal parliament.

The increasingly prominent role given to the principle of subsidiarity has opened up a number of important considerations. Its effects on the balance of powers are difficult to anticipate; its actual form is still largely undetermined and depends on the choices made in the course of adjudication by the courts.

Professor Tom Mullen, University of Glasgow
Legal Issues in Scottish Devolution Since 1999

Professor Mullen outlined the competence framework for devolved government in Scotland and the role of the courts and commented on possible future developments.

The courts have played a limited, but significant, role in Scottish devolution since 1999. The Scotland Act 1998 followed a retaining model of devolution – it detailed the powers reserved to Westminster, with the presumption that all the powers not specifically named would be within the competence of the Scottish Parliament. The UK Parliament retains legal authority to legislate for Scotland on any matter. The sovereignty of the UK Parliament, in this respect, remains uninhibited by devolution, but the Sewel Convention has meant that it has not done so without the permission of the Scottish Parliament. Equally, although the Scotland Act functions in some senses as a “constitution” for the Scottish Parliament, its status as an Act of the UK Parliament means it does not carry with it the same legal guarantees that a traditional constitution would deliver.

The courts have predominantly been involved in challenges with regard to human rights issues and Professor Mullen cited two: the first Act passed by the Scottish Parliament, on detention of persons on the basis of mental health issues; and the fox-hunting ban; both of which were found in favour of the Scottish Executive. More recently, other issues, such as minimum pricing for alcohol, have been challenged on the basis of their compliance with European Law (a decision on this particular issue is still pending). Equally, there are several issues which have arisen with regard to the allocation of powers between Scotland and the UK. Two cases were cited:

Martin v Most [2010] UKSC 10; 2010 SC (UKSC) 40

This case centred on the competence of the Scottish Parliament to use *the Criminal Proceedings etc. (Reform) (Scotland) Act 2007* to increase sentencing powers applicable to road traffic offences in Scotland. The Scotland Act specifies road transport being a reserved matter. The majority decision of the Supreme Court ruled (in a finely balanced judgement, with two of the five judges dissenting) that the Scottish Parliament does have the requisite competence.

Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61; 2013 SC (UKSC) 153

The tobacco industry argued that since the *Tobacco and Primary Medical Services (Scotland) Act 2010* applies to the display, sale and purchase of tobacco products in Scotland, it is a consumer protection issue and therefore a reserved matter. The Supreme Court ruled that it is a public health matter and, therefore, it is within the competence of the Scottish Parliament to introduce new provisions for the display of tobacco products in Scotland.

These cases serve to demonstrate that there can be crossover between reserved and devolved matters, and it is not straightforward to compartmentalise them.

Professor Mullen indicated that the limited role of the courts in adjudicating on issues of competence was due to:

- the Scotland Act 1998, providing detailed specification of reserved matters, thereby minimising legal doubt;
- continuity of government, whereby the Scotland Act built upon the existing framework and structures of governance in Scotland;
- UK Government preference for informal methods of dispute resolution;
- congruence of political parties in government at UK and Scottish levels 1999–2007; and
- generally buoyant public spending and favourable economic circumstances 1999–2007.

In contrast to Canada, there is no equivalent constitutional jurisprudence in Scotland for interpreting competence. Instead, strict adherence to the Scotland Act 1998 has persisted.

Reference was made to *Thoburn v Sunderland City Council* [2002] All ER (D) 223 (also known as the Metric Martyrs case) in which Lord Justice Laws suggested that there is a hierarchy of “constitutional statutes” that only the UK Parliament could expressly repeal. That approach has not been followed in the cases on devolved powers which have stated that the ‘constitutional’ character of the provisions of the Scotland Act does not require a different approach to statutory interpretation from that applied to statutes generally.

Legal Issues and Constitutional Jurisprudence: Q&A Session (key points)

A question was asked in relation to the significance of the UK Supreme Court. Professor Mullen responded by saying that the replacement of the House of Lords as the final – and highest – appeal court in the UK by the Supreme Court has not impacted greatly on constitutional considerations, as its structure is similar to that of the House of Lords, as was. The Supreme Court has retained the convention that two of its Justices are Scottish. It is worth noting that the Supreme Court is more interventionist than the House of Lords, particularly in relation to human rights issues and, to some extent, European Union law.

A question was asked relating to how the Canadian courts have interpreted co-operative federalism in the last 10–15 years. Professor Brouillet responded by saying that there has been a noticeable change, whereby the Supreme Court has sought to rebalance centralisation in favour of the provinces. There was also discussion as to whether one of the federal partners can change the central institutions, including the Supreme Court and the Canadian Senate. Professor Brouillet replied that in recent case law, the Supreme Court has made it clear that as the Senate is one of the political foundations of the Canadian federation, any change to its powers would be regarded as a constitutional change and could not be made unilaterally by the Federal Government.

In the context of the principle of subsidiarity, it was asked whether, in future, a Scottish administration could take cases directly to the European Court of Justice. In response, Professor Brouillet referred to the distinction between the political and legal interpretation of the principle of subsidiarity and that there is a need to be prudent. In addition, Professor Mullen remarked that it would be difficult for Scotland, as a sub-state, to justify that it has the jurisdictional competence to take a legal action to the European Court of Justice. As the member state, the UK would need to take up the case on behalf of the Scottish Government.

**Opinions expressed here do not necessarily represent the views of the RSE,
nor of its Fellows**

**The Royal Society of Edinburgh, Scotland’s National Academy,
is Scottish Charity No. SC000470**