

---

**Intergovernmental Relations in  
Canada: Lessons for the UK?**

by Alan Trench

---

October 2003



The Constitution Unit

---

ISBN: 1 903903 23 8

First Published October 2003

Copyright © The Constitution Unit

Published by The Constitution Unit  
School of Public Policy, UCL  
29–30 Tavistock Square  
London  
WC1H 9QU

Phone: 020 7679 4977

Fax: 020 7679 4978

[constitution@ucl.ac.uk](mailto:constitution@ucl.ac.uk)

[www.ucl.ac.uk/constitution-unit/](http://www.ucl.ac.uk/constitution-unit/)

This report is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, hired out or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

---

---

# *Contents*

|     |   |    |
|-----|---|----|
|     | Acknowledgements  | 4  |
|     | Executive Summary   | 5  |
|     | The working of the Canadian system  | 5  |
|     | Lessons for the United Kingdom  | 5  |
| 1   | Introduction: The Canadian constitutional background  | 7  |
| 1.1 | The development of the Canadian constitution: constitutional politics and intergovernmental relations | 7  |
| 1.2 | Party politics and party politicians in intergovernmental relations                                   | 9  |
| 2   | Finance and Canadian intergovernmental relations  | 11 |
| 2.1 | The financial framework of Canadian federalism  | 11 |
| 2.2 | Fiscal aspects of federalism  | 12 |
| 2.3 | Use of the federal spending power   | 13 |
| 2.4 | The impact of finance on intergovernmental relations  | 14 |
| 3   | Issues in intergovernmental relations   | 15 |
| 3.1 | Health  | 15 |
| 3.2 | International affairs   | 15 |
| 3.3 | The relationship between constitutional “mega-politics” and day-to-day intergovernmental relations    | 16 |
| 4   | Mechanics and processes   | 19 |
| 4.1 | Meetings and formality  | 19 |
| 4.2 | Intergovernmental agreements  | 20 |
| 4.3 | Dispute resolution and the courts   | 21 |
| 4.4 | Legislation   | 23 |
| 4.5 | Staffing and bureaucratic organisation  | 24 |
| 5   | Lessons for the UK?   | 27 |
| 5.1 | Generally: build trust, don’t destroy it  | 27 |
| 5.2 | Make sure that there is consistent advice—and follow it   | 28 |
| 5.3 | Legislative powers all round—including for Wales  | 29 |
| 5.4 | Sort out the finances   | 29 |
| 5.5 | Make the nuts and bolts work, but don’t fret over inessentials  | 30 |
| 5.6 | Think through the role of central institutions  | 30 |

---

## *Acknowledgements*

This report is part of a research project on 'Intergovernmental Relations in the devolved United Kingdom', based at the Constitution Unit and funded by the Leverhulme Trust as part of the programme of research on 'Nations and Regions: the dynamics of devolution' based at the Unit. I am most grateful to the Trust for its support.

The report is based on work on Canada over the last 12 months, which included a study visit to Canada in September 2002, when I interviewed officials of the Governments of Canada, Ontario and Quebec. It covers event up to July 2003. I am conscious that my choice of officials to interview means that this report is concerned far more with issues that concern central Canada than either the Atlantic or western Provinces. I hope to be able to rectify this in due course.

In his novel *The Life of Pi*, Yann Martell describes Canada as "a great country much too cold for good sense, inhabited by compassionate, intelligent people with bad hairdos" (Edinburgh: Canongate, 2003, p 6). I cannot agree about the hair but can about the compassion and intelligence; and would add that I encountered immense helpfulness and kindness too in all my dealings with Canadians, whether in academia, public service or on the train. My interviews with officials were conducted on the basis of anonymity, so I regret I cannot thank them by name. I am immensely grateful to them all and hope that this report represents fairly what they told me. On the organisational side, I would like to thank Bill Lawton of the Canadian High Commission in London, and Russ Mellett and Louis Guay of the Privy Council Office in Ottawa; Pierre Boyer of the Délégation-Générale du Québec in London and Patrick-Neko Likongo of the Ministère des Relations internationales in Quebec; and Justin Vaive and Janis Tomkinson of the Ministry of Intergovernmental Affairs in Toronto. I can thank the academics who were so generous with their time and advice: they are Keith Banting, Harvey Lazar, Peter Leslie and Ron Watts of Queen's University, Kingston; Richard Simeon, Grace Skogstad and Julie Simmons of the University of Toronto; Jean Leclair of the Université de Montreal, Alain-G. Gagnon of McGill University and Guy Lafleur of Université Laval, Quebec.

I am also grateful to my colleagues at the Constitution Unit for their help, particularly our administrators Helen Daines and Matthew Butt, and Robert Hazell, Scott Greer and (again) Ron Watts for their comments on a previous draft of this report. I am, of course, solely responsible for any errors that remain.

Alan Trench  
22 September 2003

---

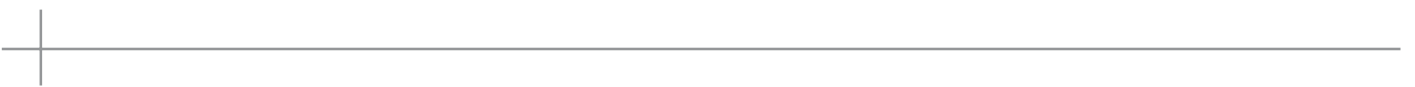
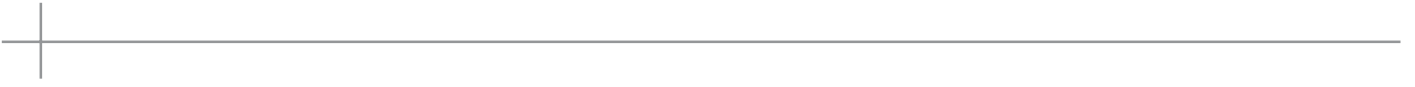
# *Executive Summary*

## *The working of the Canadian system*

- Canada now has a highly developed system of intergovernmental relations (IGR). IGR is accorded considerable importance by Federal and Provincial governments alike.
- IGR in Canada is dominated by the executive in each order of government, and within each order by the centre of each government—the Prime Minister or Premier, and his or her specialist advisors in the public service.
- Although Canada is a highly decentralised federation by many measures, the Federal government remains the dominant force in IGR. This is partly because of the greater material and financial resources available to the Federal government and partly because of easily-overlooked constitutional provisions that in practice confer a significant advantage to the Federal government.
- A notable example of this is in the area of finance: not only does the Federal government have more funds available to it than most Provinces, but it also has a legal power to spend money on exclusively-Provincial areas of competence. As a result, although matters such as health or education appear to be purely for the Provinces, in practice the Federal government has a major role to play.
- Nonetheless, the possession of separate taxing powers and tax bases underpins Provincial autonomy to a considerable degree.
- Administrative arrangements for IGR within the Federal government reflect concerns over national unity, and the threat to this that Quebec has posed for more than two decades. However, those arrangements are unlikely to change significantly even though that threat has now receded.
- Intergovernmental negotiations are highly intricate matters, conducted at various levels and taking up a considerable amount of officials' and Ministers' time. The most important issues fall to be resolved at the level of First Ministers, but that setting is used less now than in the 1980s.

## *Lessons for the United Kingdom*

- Canada may offer an insight into how the UK might work, after devolution has become fully bedded-in and if regional government in England increases the number of units and complexity of interests involved.
- Trust is a vital commodity in intergovernmental relations. It is also easily lost. All the governments involved need to bear in mind the need to act in a consistent and considered way, even when the demands are pressing. The onus is particularly on the UK Government, given the overwhelming dominance it still has in IGR in the UK.
- Trust requires respect for the boundaries of competence that do exist. The arrangements for Wales mean that devolution there has such an unclear boundary that this becomes very difficult.
- Financial autonomy also helps to maintain clear boundaries. While Canadian financial relations are highly complex, they ensure that Provinces are confident of their sources of funding, and not dependent on the Federal government.
- For the UK Government, Canadian experience suggests expertise in IGR needs to be concentrated in the heart of government, not fragmented across a number of offices concerned with particular territories.
- Detailed scrutiny of devolved legislation is unlikely to be a fruitful use of UK Government time or resources, as major issues will be identifiable without the routine line-by-line examination that presently happens.
- Canadian experience suggests that articulating territorial interests through the legislative upper chamber could be a useful way of reducing intergovernmental friction. This should not be overlooked when House of Lords reform returns to the political agenda.



---

# ***1 Introduction: The Canadian constitutional background***

The purpose of this briefing is twofold. First, it seeks to explain how intergovernmental relations work in Canada at the present time. Second, it tries to see what lessons the United Kingdom, with its relatively new experience of devolution, might draw from Canadian practice.

As far as its first purpose is concerned, the goal is explain to outsiders how the Canadian system works in its own terms. Given the rather closed nature of the world of intergovernmental relations, that means explaining a good deal that seems basic or obvious to those who study or work in the field, but which is distinctive or surprising to one looking from the outside. In doing so, it draws on elements of politics, law and public administration in a way common in intergovernmental relations. It is helped by the fact that Canada has a large literature on federalism generally and intergovernmental relations in particular. However, this briefing also draws on interviews conducted with a large number of officials working for the Federal government and a number of Provincial governments, conducted in September 2002. These interviews were carried out on terms of anonymity and I therefore cannot name my interviewees to express my thanks to them. I am, however, most grateful to them all for the time and help they gave me and for their candour in talking to me.

## ***1.1 The development of the Canadian constitution: constitutional politics and intergovernmental relations***

It is impossible to discuss the Canadian structure of intergovernmental relations without sketching the key features of Canadian federalism. The present arrangements originate in the British North America Act 1867, which established a federation of several of the British colonies in North America. Although enacted by a Westminster statute those arrangements were largely formulated by Canadian politicians, and

established a Federal Parliament and government responsible for a variety of functions and local legislatures and governments responsible for others, generally of a more local nature. The Federal Parliament's powers included a general grant of powers to legislate for the 'peace, order and good government' of the Dominion (as Canada was styled), as well a residual power to legislate for all matters not assigned to Provincial legislatures.<sup>1</sup> That Parliament included an appointed Senate as well as an elected House of Commons, but had no direct representation for the Provinces. The only formal point of liaison was in the Lieutenant-Governor of each Province, appointed by the Governor-General (an Imperial appointee) on the advice of the Government of Canada, whose powers include assenting to all legislation passed by the Provincial legislature.

The intention may have been to establish a federation with a strong central authority, but that did not last more than twenty years. Disputes about the division of power under the 1867 Act went ultimately to the Judicial Committee of the Privy Council for resolution, which greatly strengthened the powers of the Provinces and limited those of the Federal order of government in doing so.<sup>2</sup> (A number of these cases and their implications are discussed below.) While the Privy Council heard its last Canadian appeal in 1948, those judgments had a lasting effect on Canadian federalism. Of course, Canada in effect became self-governing in 1931, when the Statute of Westminster ended the power of the UK Parliament to legislate for Canada without Canada's consent. Yet the problems of resolving other constitutional issues, notably a mechanism by which the constitution could be amended, meant that the basis of Canadian government remained a Westminster Act which no body in Canada could alter. While the constitution was 'patriated' in 1982 (becoming the Constitution Act 1867, and having a new Canadian Charter of Rights and

---

<sup>1</sup> See sections 91 and 92 of the Constitution Act 1867.

<sup>2</sup> There is a huge literature about the role of the Privy Council. See, for example, A.C. Cairns 'The Judicial Committee and its Critics' *Canadian Journal of Political Science* vol. 4 no. 3 (1971), reprinted in D.E. Williams (ed.) *Constitution, Government, and Society in Canada: Selected essays* by Alan C. Cairns (Toronto: McClelland & Stewart, 1988).

Liberties added to it) by the Constitution Act 1982, this change was itself highly contentious. There were sustained objections by both Aboriginal peoples (whose challenge in *Manuel v. Attorney-General* went to the England and Wales Court of Appeal) and by Quebec, which refused to acknowledge the legitimacy of the change or to sign the new constitution, because of concerns that its rights were not adequately protected under the new amending arrangements.<sup>3</sup> (These were not resolved even when the federal House of Commons undertook not to enact an amendment without Quebec's consent, in effect lending Quebec its own veto over change<sup>4</sup>). Quebec's objections to Canada's constitution derived from the development of Quebec nationalism during the 'Quiet Revolution' of the 1960s, as well as the immense growth in the number of English-speakers in Canada as a whole causing a sense of isolation on the part of Francophone Canadians concentrated in Quebec. The rejection of the 1982 Constitution by Quebec triggered a process through the 1980s of seeking to find a compromise between maintaining equality of the Provinces (a demand particularly from western Canada), while recognising Quebec's distinctiveness. This dominated the Prime Ministership of Brian Mulroney, resulting in two agreements between governments which failed to secure acceptance by all the Provinces (only 8 of the 10 endorsed it) or the population as a whole. These were known respectively as the Meech Lake and the Charlottetown Agreements.<sup>5</sup> The latter failed, at the last moment in 1993, to secure approval in a Canada-wide advisory referendum. It led to the second referendum in Quebec called by the governing Parti Québécois (PQ) to determine whether Quebec should remain part of the Canadian federation or have 'sovereignty-association' status. That referendum was held in October 1995 and resulted in very narrow defeat for the nationalist cause, but raised as many problems as its outcome solved, regarding the future of Canada, of Quebec within Canada, and

of the strategy each side should follow from now on.

However, one consequence was that constitutional politics changed in character and in the forum in which they took place. The Federal government referred the issue of whether Quebec could secede from Canada to the Supreme Court of Canada, which in its 1998 judgment determined that Quebec could not unilaterally secede but that a 'clear' majority vote in favour of independence in a referendum with a 'clear' question would require the Federal government and other Provinces to negotiate the terms of secession in good faith.<sup>6</sup> The Supreme Court's judgment was treated as at least a partial victory by many Quebecois nationalists, although the process of referring the issue to the court had caused considerable anger. It led to the Federal Parliament passing the 'Clarity Act' reiterating the Court's requirement of a clear question and a clear outcome to a referendum, passing the decisions about whether these were clear to the (federal) House of Commons and setting out some criteria to determine whether these requirements were fulfilled. There the issue has laid since, and with the election in April 2003 of an avowedly-federalist majority government in Quebec the questions of referendum and secession are unlikely to resurface at least for some years. That is not to say that relations are likely to be uncomplicated or straightforwardly harmonious, as safeguarding Quebec's place in Canada is likely to mean that Quebec forges more meaningful alliances with other Provinces and so strengthens the Provinces' hand against the Federal government, while increasing the need for the Federal government to reach agreements with a federalist Quebec.<sup>7</sup>

This thumbnail sketch of Canada's constitutional development is necessary to explain how Canada's intergovernmental relations now function. Canada lacks formal central institutions to deal with Federal-Provincial relations (no 'Council of the Federation', let alone a legislative chamber like the German *Bundesrat*). At the same time,

<sup>3</sup> *Manuel v. Attorney-General* [1983] Ch 77. Its lawfulness was also questioned in the 'Patriation' and 'Quebec veto' references: [1981] 1 SCR 753, [1982] 2 SCR 793

<sup>4</sup> See the Constitutional Amendments Act 1996.

<sup>5</sup> For an account covering events to the collapse of the Charlottetown Accord, see Peter H. Russell *Constitutional Odyssey* Second Edition (Toronto: University of Toronto Press, 1993).

<sup>6</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217.

<sup>7</sup> See for example Brian Tobin 'He's ready. Is Canada?' *Globe and Mail* 15 April 2003, or Norman Spector 'Not everyone is overjoyed at Jean Charest's election' *Globe and Mail* 21 April 2003



the complex structure of the constitution means that the two orders of government frequently interact, and that such interaction is vital to most areas of government, especially if the Federal government wishes to see Canada-wide arrangements for social welfare (most of the policy areas involved are within Provincial not Federal competence). The fact that the issues of constitutional reform and Quebec's position within Canada have ended in stalemate means that intergovernmental relations have turned to more mundane matters, although these are probably of more direct concern to most Canadians. The Federal government has sought to use the opportunity to engage in 'non-constitutional reform' of Federal-Provincial relations. Much of the heat has gone out of the issue, and the politicians generally avoid constitutional questions as much as they can. (Nonetheless, the Alberta government has recently repeated its desire for reform of the Senate, which if pursued will open debate about other constitutional issues.<sup>8</sup>)

Two key terms are widely used to describe the practice of intergovernmental relations. One is "executive federalism": IGR is something that takes place between executives, largely in private and with minimal accountability to the public or legislatures. It can be seen as part of the general trend for executives to dominate in Parliamentary systems, and has the effect of alienating the public and reducing participation in politics.<sup>9</sup> The second is "collaborative federalism": IGR is about finding ways of enabling the Federal and Provincial orders of government to work together in the interests of better governance and more effective policy-making, given the responsibilities allocated to each order by the constitution.

## ***1.2 Party politics and party politicians in intergovernmental relations***

One distinctive feature of the Canadian system is how party politics affects intergovernmental relations. Federal elections are dominated by

the Liberal party, which remains the only party to have support across the whole of Canada. The 1993 election saw the emergence in western Canada of a free-market populist challenge to the Progressive Conservatives, previously the main right-of-centre party; the PCs dropped to 2 seats in the Federal Parliament in that year's election. While they have recovered somewhat and are strong in parts of Atlantic Canada and Ontario, they still hold no Parliamentary seat west of Ontario. In the west, what is now the Canadian Alliance (and was formerly the Reform party) dominates. The split in the right-wing vote and the weakness of the social-democratic New Democrats mean that the Liberals appear to be unassailable in federal elections.

Not that this greatly affects intergovernmental relations. Canadian political parties do not act as a common thread uniting the two orders of government. Rather, two distinct party systems operate at Federal and Provincial level. Major differences of approach exist even within one party. The federal Liberals are a centrist (or marginally right-of-centre) party, with a strong commitment to social welfare; but in British Columbia they are a free-market, almost neo-conservative party, while in Quebec they are a nationalist party seeking to express Quebecois nationalism in a federalist rather than 'sovereignist' way, and seeking to reform public services in a less dirigiste fashion. (The party's leader was formerly a Progressive Conservative MP and briefly led the PCs federally.) Matters are further complicated by the habit of the Canadian electorate to vote for different parties to hold office in Federal and Provincial electorates.<sup>10</sup> In effect, Canada has 14 party systems—one for each of the ten Provinces and three Territories, and one for Federal purposes.

One consequence of this is that party politics play a minimal role in intergovernmental relations. Only very occasionally do politicians appear to let their behaviour be affected by party considerations. For the most part their concerns are governed by the order of government in

<sup>8</sup> See Government of Alberta News Release 'Resolution proposes constitutional amendment to create Triple E Senate' 14 May 2003 (available at [www.gov.ab.ca/acn/200305/14388.htm](http://www.gov.ab.ca/acn/200305/14388.htm))

<sup>9</sup> These criticisms were made by D.V. Smiley when he invented the term in 1979, and remain as valid today as then. For an updated discussion of the problem see R. Simeon and D.R. Cameron 'Intergovernmental Relations: An Oxymoron if Ever There Was One' in H. Bakvis and G. Skogstad (eds) *Canadian Federalism: Performance, Effectiveness and Legitimacy* (Toronto and Oxford: Oxford University Press, 2001).

<sup>10</sup> See C. Jeffery and D. Hough 'Elections in Multi-Level Systems: Lessons for the UK from Abroad' in R. Hazell (ed.) *The State of the Nations 2003* (Exeter: Imprint Academic, 2003).

which they hold office. Thus Quebec, which under both Parti Québécois and Liberal (PLQ) governments has followed broadly social-democratic policies, has found Alberta's right-wing governments to be its most consistent ally, as both seek to defend Provincial powers from Federal predations. The Federal government finds its most supportive partners in the Atlantic Provinces (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland), which may elect PC governments but which are also heavily reliant on federal funds.

The limited role of party is accentuated by the lack of engagement in intergovernmental relations on the part of the Federal Parliament or Provincial legislatures. The structure of intergovernmental relations and the issues that arise in them are of only very limited interest to elected back-bench politicians. There appears to be no regular or sustained scrutiny of them in any Canadian legislature. At Provincial level most questions asked by backbenchers are planted and friendly, apparently, and they generally concern specific policy matters like health or child care, not intergovernmental relations overall.

## 2 *Finance and Canadian intergovernmental relations*

The financial and fiscal arrangements of Canadian federalism are key to understanding how Canadian federalism actually works. The detail of the financial arrangements is complicated and highly technical (and beyond the scope of this paper). This section will seek to explain the basic financial structure of Canadian federalism, and to explore the relationship between the financial arrangements and intergovernmental relations more generally.<sup>11</sup>

### 2.1 *The financial framework of Canadian federalism*

In essence, Canadian Provinces have two sources of income: revenues they raise themselves, through taxes, and transfers from the Federal government. Both Federal and Provincial orders of government have access to a wide range of 'direct' taxes, including taxes on personal and corporate income and taxes on sales.<sup>12</sup> In total, Federal transfers account for 17.6% of total Provincial spending,<sup>13</sup> but that varies considerably from Province to Province in relation to the aggregate level of spending and the Province's ability to raise its own revenue (fiscal capacity). Ontario raises about 90% of its own spending, while a poorer Province like Manitoba or Newfoundland will raise only about 60%. The balance is accounted for by transfers from the Federal government, which take two main forms: CHST and Equalisation.<sup>14</sup> One is the Canada Health and Social Transfer (CHST), a block grant designed to support the provision of health care, education and other social services. It is largely unconditional (though Provincial compliance with the principles of the Canada Health Act is a requirement), and as a block grant it is not hypothecated or tied to particular policy areas. It is also paid to all

Provinces, with a formula to determine the share of each Province in relation to the whole amount provided by the Federal government. Budget cuts therefore reduce the amount of cash transferred to each Province, but not the proportion that Province receives compared to other Provinces.

To complicate matters, the funds comprised within the CHST mechanism can be calculated in two different ways: as an amount of cash, or as tax points. Tax points are a proportion of the tax raised from taxpayers in the Province to which the funds are paid—in other words, the Federal government hands over part of the tax take from taxpayers in a Province, according to the amount the Province levies. This creates a division of interest between the Provinces. Poorer Provinces prefer cash grants as the tax revenue they generate is small compared with the richer Provinces. But richer Provinces (such as Ontario or Alberta) prefer tax points, as their more prosperous tax base means that produces more revenue.

The other main type of grant are Equalisation funds. This is mandated by section 36 (2) of the Constitution Act 1982 which commits the Federal government and Parliament to providing the transfer of funds to the Provinces "to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation". Entitlement to Equalisation is designed to compensate the poorer Provinces for their lack of fiscal capacity, calculated on the basis of the standard tax yield in the median five Provinces of 33 separate taxes. As a result, eight Provinces are entitled to receive Equalisation funds (the four Atlantic Provinces, Quebec,

<sup>11</sup> For a general summary, see Douglas M. Brown 'Fiscal Federalism: the new equilibrium between equity and efficiency' in Bakvis and Skogstad op cit.

<sup>12</sup> In the Canadian context, a direct tax is one collected from the person who bears the cost of the tax. Thus, both sales taxes and income taxes are direct taxes, and as a result the tax bases of Federal and Provincial orders largely overlap. The chief difference between them is that the Federal government can raise excise taxes and customs duties, which are paid by a producer or importer but ultimately borne by the consumer of the goods and so are considered indirect taxes.

<sup>13</sup> Conference Board of Canada *Vertical Fiscal Imbalance July 2002: Fiscal Prospects for the Federal and Provincial/Territorial Governments* (Ottawa, 2002), Table 3, p. 27.

<sup>14</sup> CHST and Equalisation funds account for 89% of Federal transfers. The balance is made up of a number of small conditional grant schemes, and the Territorial Funding Formula for the three Territories.

Manitoba, Saskatchewan and now also British Columbia, but the latter has only recently slipped into entitlement and receives only a minimal amount.) Only Alberta and Ontario do not receive it; these are not only the most prosperous Provinces on a per capita GDP basis, but also together account for about half of Canada's population.

From a political point of view, the two forms of transfer raise quite different issues. For Ontario, for example, CHST is a relatively benign form of funding. Funds channelled through Equalisation will not reach the Province and effectively cost it money (as they may reduce the size of the pot from which CHST is paid). While the Province would generally prefer an outright transfer of tax points to Province, so that income tax payable to the Federal government was reduced and that payable to the Provincial government increased, the Federal government is rarely if ever willing to concede that. (It did so in 1977, but is regarded by the Provinces as having reclaimed that tax space since then.) For Quebec there is a mild preference to have funds transferred through CHST rather than Equalisation, but the Province's greater concern is with the overall 'fiscal imbalance' between Federal and Provincial governments. However, the problem for all Provinces is the use of 33 tax bases to calculate the amounts payable. This is not only opaque but can also cause swings from year to year in what constitutes normal fiscal capacity and therefore the amounts transferred.

Quebec's concern with fiscal imbalance is that the present arrangements have given the Federal government generous revenues in recent years compared with the services it provides, while limiting both the tax revenue and transfers to Provincial governments for the (generally more expensive) services they provide. The province has mounted a large-scale campaign to seek redress of this, involving a high-level Commission on Fiscal Imbalance chaired by Yves Séguin (who became PLQ Finance Minister after the April 2003 election), which reported in March 2002.<sup>15</sup> Its concerns are shared by a number of other Provinces (and have been the subject of

independent research, public debate and press advertisements), but Quebec's approach to the problem and the high profile it has given the issue have been distinctive.<sup>16</sup> So far English-speaking Provinces have allowed Quebec to make the running. Whether that will change with the new Quebec government remains to be seen.

## 2.2 *Fiscal aspects of federalism*

Fiscal imbalance and the allocation of 'tax points' are among the most important fiscal issues arising from Canada's federal structure, but are not the only ones. The receipt of revenue through a Province's own taxes means that Provinces have a substantial degree of accountability to their own electorates. It also means that they have a substantial degree of scope to develop their own economies, since they can tailor their tax systems to encourage or discourage certain sorts of activity. That depends on the Province having an economy able to generate meaningful revenues, however. The absence of such revenue leads to political as well as financial dependence on the federal government.<sup>17</sup>

The freedom of even affluent provinces is restricted by the Federal government's role in tax collection. Except for Quebec, all personal income taxes are collected by the Federal government and then remitted to the Provinces. So are corporate income taxes, except in Quebec, Ontario and Alberta. In total the Federal government collects some \$32 billion on behalf of the Provinces, and charges \$10 million for doing so. One consequence of this—and according to the Federal government a major reason for doing so—is that taxpayers have to complete only one tax return, not two, each year.

In addition, in three Atlantic provinces (New Brunswick, Nova Scotia and Newfoundland) a single Harmonised Sales Tax incorporates Federal GST and Provincial sales taxes, and is collected by the Federal government and distributed to the Provinces. Conversely, Quebec collects GST for the Federal government along with the Provincial sales tax.

<sup>15</sup> The report and its supporting documents (Commission on Fiscal Imbalance, *A New Division of Canada's Financial Resources* (Quebec: 2002)) can be found on the internet at [http://www.desequilibrefiscal.gouv.qc.ca/index\\_ang.htm](http://www.desequilibrefiscal.gouv.qc.ca/index_ang.htm)

<sup>16</sup> See Conference Board of Canada op cit. This report was commissioned by the Provincial and Territorial governments and concerns fiscal imbalance as it affects all the Provinces and Territories, not just Quebec.

<sup>17</sup> Recent discoveries of oil off the Atlantic coast may change that, however.

### ***Box 1: Losing revenue but not alienating provinces***

In January 2002 the Federal Department of Finance told Provincial governments of a problem it had identified in tax returns dealing with Capital Gains Tax. These contained a line for calculating gains that was coded to allocate funds to both Provincial and Federal governments. However, the corresponding line dealing with deductions was for the Federal tax only—so Provinces got the benefit of all the tax collected on gains without subtracting from that the deductions which should have been set against it. On enquiry it emerged that the problem went back to the establishment of CGT in 1972. Ironically, the problem only emerged when payments to the Provinces were delayed due to a change in computer system, and some Provinces questioned the amounts that were being transferred to them.

Four Provinces were overpaid as a direct result of the error. As a knock-on effect, seven (including these four) would have been paid extra amounts by way of Equalisation. The Federal government decided not to seek recovery of the Equalisation payments, and then calculated the benefit to those Provinces of that money—being \$62 per capita. (That benefit was wholly notional, since the amounts varied from Province to Province, and Equalisation is not calculated on a per capita basis in any case.) It then set that amount, multiplied by population, against the overpaid tax to the four Provinces directly overpaid. That eliminated any amount due from two of them, and left Saskatchewan and Ontario with appreciable repayments to make.

Resolving the problem involved negotiations at the whole range of levels, from First Ministers down to staff officials. The intellectual rationale for it remains dubious, involving allocating wholly notional benefits calculated on revenue no-one received, to avoid the Federal government being forced to recover money from the governments of poorer Provinces or being charged in public with acting capriciously. One Federal official involved described the process as “a painful experience—a hell of eight months sorting it out”. A Provincial official suspected that the Federal government had known about it for some months before it was communicated to the Provinces. The Ontario Minister of Finance denounced the settlement publicly when it was announced, but then went silent on the point. She may have considered that that Province had in fact done quite well, as a sizable part of the overpayment had been forgiven by the Federal government—but still had to be seen to criticise the arrangement reached to resolve it.

Those Provinces that collect their own taxes do so largely because they want the freedom to define their own tax base. One condition of collection by the Federal government is that the Province must accept the Federal government’s definition of tax bases (though not tax rates). Quebec is therefore able to encourage certain sorts of industries in the natural resources or high-tech sectors. However, collection is itself not automatic, and can lead to curious situation involving significant amounts of revenue.

### ***2.3 Use of the federal spending power***

Probably the most important lever of power for the Federal government in intergovernmental relations is its spending power. It is also one of the

most controversial tools used by the Federal government. Part of the reason is that the power lacks any explicit constitutional basis in the Constitution Acts, although it has been recognised in the jurisprudence of the Judicial Committee of the Privy Council and the Supreme Court of Canada, most notably in the *Reference regarding the Canada Assistance Plan*.<sup>18</sup> The power enables the Federal government to spend money on functions identified under the Constitution Act 1867 as exclusively Provincial ones, as well as on Federal ones. Such spending can be on direct services to citizens (although Provincial opposition to such programmes may prevent them working in practice), or on providing funding to Provincial governments for them to provide services. Such programmes may be funded wholly by the Federal government, but

<sup>18</sup> [1991] 2 SCR 525.



that is unusual. More often programmes have been funded by the Federal and Provincial governments on a shared-cost basis, and only for a limited time (although that has declined since the creation of Established Programmes Funding in 1977, for programmes now funded through CHST).

Shared-cost programmes spark much of the controversy. Funds may be made available to Provinces to pursue goals which are Federal policy but not a priority of some or all Provinces. When the programme is funded for only a limited period of time it puts the Provinces in a difficult position at the end. The Provinces have to decide whether to continue to fund a programme they would never have introduced in the first place, or to incur public displeasure by ending or scaling down a programme for which Federal support has ended.<sup>19</sup> By giving the Federal government such influence over Provincial decisions and being able to take the credit for introducing the programme while enabling it to avoid criticism for ending or reducing the programme, the spending power hands a powerful tool to the Federal government.

This is a tool which it is hard for Provinces to counter, even if they are affluent. Either they turn down money offered by the Federal government, which comes from taxpayers in the Province in the first place, or they lose their scope to direct policy in areas of Provincial jurisdiction as the Provincial government sees fit. Provincial responses vary, but most try to manoeuvre the Federal government to allow them to opt out of the Federal policy with full compensation if the Province provides a policy seeking to achieve similar objectives. This has been a long-standing position of Quebec, in particular, but rarely succeeds in practice. The Provinces are left having to agree to Federally-initiated programmes, knowing what will happen later on. The Social Union Framework Agreement was an attempt to deal with this issue, by regulating the Federal government's power to initiate or reduce social programmes (as discussed in Box 3, p. 16).

## 2.4 *The impact of finance on intergovernmental relations*

In many ways Canada is highly decentralised financially. The OECD thinks so, and so does the Federal government.<sup>20</sup> From a Provincial point of view it is not so clear. All Provinces are dependent to a considerable degree on the Federal government, even the well-off ones. The Federal government's control of money, and information about money, give it powerful ways to influence all Provinces. When the Provinces have a high degree of financial dependence on the Federal government that is increased considerably. Notwithstanding the formal constitutional equality of the Provinces, their different financial positions mean that in reality there is much inequality. As a consequence the Atlantic Provinces and Manitoba are viewed as 'friendly' by the Federal government, and as being nearly Federal dependencies by some other Provinces. Conversely, Alberta and Ontario's prosperity and consequent financial autonomy underpin their freedom of action. Finance therefore governs the structural aspects of intergovernmental relations

Finance also becomes the major source of tension and contention in intergovernmental relations. This contributes to the lack of public interest or engagement, as the issues involved are conceptually unclear to start with, and made more confusing by the many ways of looking at the data. For example, the Federal government claims to contribute about 40% of the cost of health care in Ontario. Ontario's public position is that the Federal government pays about 11%. While both can produce figures to support their position, there is no one—or even just five—answer to the question of how much the Federal government pays. This is made worse by the need for solutions to disputes (like the capital gains tax collection issue) to be presented in a way that everyone can claim to have won. The only way to do that is to structure the agreement in such a way no-one can really understand it. None of that contributes to better or more accountable governance.

<sup>19</sup> For criticisms of the use of the power, see A. Tremblay 'The Federal Spending Power' in *The Canadian Social Union without Quebec: Eight Critical Analyses* (Montreal: Institute for Research in Public Policy, 2000).

<sup>20</sup> Organisation for Economic Co-operation and Development *OECD Territorial Reviews: Canada* (Paris: OECD, 2002).

## 3 Issues in intergovernmental relations

### 3.1 Health

Health has become a key issue in Canada for a number of reasons. It is an area of great importance to the public, which is expensive to provide and which is largely within Provincial competence. The Canada Health Act, passed in 1984, provided for the Federal government to support Provincial health-care systems provided they satisfied the criteria of being publicly administered, comprehensive, universal, portable and accessible.<sup>21</sup> Public administration of healthcare in fact means operation by public, non-profit bodies and in effect creates a state legal monopoly of the provision of healthcare—a point which has caused friction with Alberta in the past.

The growing costs of healthcare have meant that reform has become a growing issue. It is also one of which the Federal government has taken charge, appointing Roy Romanow, a former Premier of Saskatchewan (where Canadian Medicare first began) to chair a Commission on the Future of Health Care in Canada to inquire how reform should take place.<sup>22</sup> His report was published in November 2002, and the First Ministers' Meeting in February 2003 adopted an 'Accord on Health Care Renewal', identifying a number of specific areas for reform including even performance indicators to measure how the system should work. But it only dealt with the vexed issue of health care funding in outline, providing for a Health Reform Fund to be established and the replacement of part of CHST with a Canada Health Transfer solely to fund healthcare.<sup>23</sup>

### 3.2 International affairs

Canadian federalism is rather unusual in how it treats international affairs. In principle defence and the conduct of foreign affairs are matters for the Federal Parliament and government.<sup>24</sup> However, thanks to a 1937 Privy Council decision, the implementation of international treaties concerning matters of Provincial competence falls to the Provinces not the Federal Parliament or government.<sup>25</sup> Consequently Provinces need to be involved in the formulation of policy regarding such treaties, as otherwise the treaty may fail to be implemented. A recent and notable example has been the Kyoto accord on climate change (see box 2, p. 16).

A second characteristic feature of Canadian federalism is the position taken by Quebec. Citing what is known as the Gerin-Lajoie doctrine, Quebec claims competence over all aspects of foreign relations concerning exclusively Provincial matters such as education, the environment or health.<sup>26</sup> It therefore denies that the Federal government or Parliament have competence in such matters, and has entered into over 500 *ententes* with other governments (some sovereign states, some component units of other federal or quasi-federal states) since 1965. To a large degree this has created space for debate rather than actual disputes with the Federal order, as the Federal government has often pre-empted agreements entered into by Quebec with sovereign states by entering into one concerning similar subject-matter itself, creating the scope for Provinces to establish a bilateral agreement under the umbrella of that treaty. There have, however, been cases where the Federal government has advised sovereign

<sup>21</sup> Canada Health Act, sections 7–12.

<sup>22</sup> The Commission's interim report, *Shape the Future of Health Care*, was published in February 2002. The final report *Building on Values: The Future of Health Care in Canada* was published in November 2002. Both are available from the Commission's website at <http://www.healthcarecommission.ca>

<sup>23</sup> For a more detailed discussion of health and intergovernmental relations in Canada, see S. Greer *Intergovernmental relations, public policy, and the welfare state in Canada* (forthcoming: Constitution Unit, London).

<sup>24</sup> Sections 91.7 and 132 of the Constitution Act 1867 and section 3 of the Statute of Westminster.

<sup>25</sup> *A-G for Canada v. A-G for Ontario* (the 'Labour Convention Case') [1937] AC 327, PC

<sup>26</sup> The Gerin-Lajoie doctrine has hardly been uncontroversial. Its clearest academic statement is by J-Y. Morin; see his 'Comment' (1967) 45 *Can. Bar Rev.* 160–173. A riposte is that of G.L. Morris; 'The Treaty-making Power: a Canadian Dilemma' (1967) 45 *Can. Bar Rev.* 478–512. See also the contributions by Laskin, Delisle and McWhinney in Ontario Advisory Committee on Confederation *Background Papers and Reports* (Toronto: Queen's Printer of Ontario, 1967).

## ***Box 2: The Kyoto Accord***

The Federal government committed itself to the Kyoto Protocol on climate change at the Kyoto summit in December 1997. However, the agreement affects a variety of environmental matters reserved to the Provinces. While most Provinces are happy to accept the obligations arising under the accord, a number are not, most notably Alberta—partly because of the Alberta government's free-market approach but mostly because of the implications for Alberta's reliance on oil.

Alberta's response has been to say that it would not implement the accord, forcing a confrontation with the Federal government. That has involved much public grand-standing and threats of both court action if the Federal government sought to interfere with Provincial competences to implement the treaty, and an attempt to forge an alliance with other Provinces—notably Ontario; but British Columbia and Newfoundland are also opposed—to block the treaty. Quebec, by contrast, is an enthusiastic supporter of the Accord. None of this stopped the House of Commons from approving the Protocol's ratification on 10 December 2002 (and the Federal government ratifying it a week later), but it does raise the question of what the Federal government will do if Alberta and the other Provinces opposed to Kyoto's implications continue to decline to help implement Canada's obligations. By committing itself to do something beyond its power the Federal government put itself in a difficult position. It compounded that by ratifying the Protocol—and to succeed on an issue that profoundly affects several Provinces, it may have to make significant compromises in other areas.

states that in its view Quebec lacked the authority to enter into an agreement, with the result that the agreement has not been signed.

The lack of open confrontation over the Gerin-Lajoie doctrine appeared to increase with the Act respecting the Ministry of International Relations, passed by Quebec's National Assembly in June 2002. The Act provides for the Quebec government to assent to all treaties affecting such Provincial matters, and for all important treaties to be submitted by the Quebec government to the National Assembly for approval.<sup>27</sup> Thus, while the Act only alters the procedures affecting treaties, its effect is for Quebec to claim a veto over much treaty-making by the Federal government and to create the basis for open and possibly legal confrontation between the two governments in the future. However, the election of a Liberal government in Quebec in April 2003 makes the prospect of such confrontation recede considerably.

### ***3.3 The relationship between constitutional “mega-politics” and day-to-day intergovernmental relations***

As noted above, since about 1993 Canadian intergovernmental relations has been dominated by issues of practical policy rather than high-level debate about the nature of Canadian federalism and the future of the federation which had taken centre stage during the 1980s and 1990s. The fact that “constitutional mega-politics” (to use Peter Russell's phrase) is no longer the main focus of attention does not mean that it has lost all importance. In practice, constitutional and more pragmatic concerns interact constantly.

While this manifests itself most conspicuously in relation to Quebec, it affects all intergovernmental relations to a certain extent. All the officials involved exploit the advantages their government enjoys under the Constitution so far as possible. It is always possible for a mundane issue to turn into a major political flashpoint, and even if that does not happen the issue may fuel intergovernmental tensions for some time into

<sup>27</sup> An Act to amend the Act respecting the Ministère des Relations internationales and other legislative provisions; assented to on 8 June 2002.



### ***Box 3: The negotiation of the Social Union Framework Agreement***

The initiative for an intergovernmental agreement in this area came from the (English-speaking) Provinces, and they produced a common negotiating position at Saskatoon in August 1998. In January 1999 a revised position was agreed at Victoria, with which Quebec agreed and to which it committed itself. However, a number of these points were abandoned during the final discussions, and Quebec considered that the final agreement, signed in February 1999, was so flawed (for example, in failing to establish binding limits on the Federal government's use of the spending power) that it could not sign it. As a consequence Quebec sees itself as abandoned if not betrayed by the other Provinces, which—when it came to the crunch—preferred to cave in before the Federal government rather than maintain solidarity and the common position that had been agreed.<sup>28</sup>

From the point of view of English-speaking Provinces, SUFA is a real advance. It creates a much clearer process for dealing with Federal involvement in social policy matters—which may constitutionally be exclusively Provincial matters but which in practice need Federal funding if nothing more. By putting an end to unilateral Federal initiatives, it removes a major source of tension in Federal-Provincial relations. And SUFA also creates a way of managing future disputes, which has been lacking hitherto

For the Federal government, Quebec's self-exclusion from SUFA is a consequence of Quebec's already-high level of social provision. As it stands the agreement enables the Federal government to improve social policy and policy-making without compromising its own freedom of manoeuvre (for example, by keeping any disputes away from the courts).

the future. The cuts imposed by the Federal government as part of its 1995 budget (which significantly reduced Federal transfers to the Provinces to pay for health and social care, while leaving the Provinces with continuing responsibility for delivering these services) has caused long-standing resentment and meant that any Federally-funded scheme is treated with great scepticism. Even the attempt by a Province to follow a different ideological approach can fuel tensions. Federal officials regard Alberta and Ontario (notably under the former Conservative Premier, Mike Harris) as being almost as difficult to deal with as Quebec. For Ontario, an issue like criminal justice remains very difficult; the Province (which has responsibility for criminal procedure and policing) takes a much more hard-line approach to law and order issues than the Federal government, which has responsibility for the substantive criminal law. Each party therefore tries to implement policies reflecting its own view, but with disagreements so fundamental the result is often stalemate.

So far as Quebec is concerned, Parti Québécois governments and their officials have tended to

interpret every action of the Federal government, and often those of the English-speaking Provinces, as being directed first and foremost toward Quebec. Even if such actions are not seen as deliberately directed against Quebec, they are regarded as showing disregard for Quebec's concerns or insensitivity toward those concerns. The Millennium Scholarships are one example (see box on page 24). Another is the way the Social Union Framework Agreement (SUFA) was negotiated.

This has reinforced Quebec's determination (at least under PQ governments) to protect its rights and privileges under the 1867 Constitution, and means that Quebec's position in any Federal-Provincial discussion has been governed by Quebec's larger and long-standing constitutional concerns. It made Quebec sceptical about forming any alliance with other Provinces even for limited or tactical goals (although the new PLQ government has indicated this will be a key part of its approach), and has also made Quebec doubtful about the value of participation in Canada-wide schemes or activities. That in turn has often become a self-fulfilling prophecy, how-

<sup>28</sup> This is a somewhat crude summary of the views expressed in *Social Union without Quebec: Eight Critical Analyses* (Montreal: Institute for Research in Public Policy, 2000).

---

ever. Quebec may have mistrusted the other Provinces but could be counted on to take a maximalist position as regards the Provinces' power. The English-speaking Provinces could use Quebec's intransigence to obtain a better deal from the Federal government, knowing that they lose little from breaking a position agreed with Quebec because Quebec never really trusted them in the first place.

With a new Quebec government committed to active engagement with other Provinces, this is likely to change. The question will be how successful that new approach is in practice.

---

## 4 *Mechanics and processes*

### 4.1 *Meetings and formality*

Canadian intergovernmental relations appear to be highly formal and formalised, at least compared with the UK. Its institutional framework involves a large number of meetings at a variety of levels; this constitutes the main mechanism for collaborative federalism. The main meetings are:

- Annual Premiers' Conferences of Provincial and Territorial Premiers. These meetings usually take place in August and will be timed to precede a First Ministers' Meeting (if one is taking place that year).
- Regional Premiers' Conferences, again taking place annually and involving the Premiers from a particular region of the country. The Western Premiers' Conference is particularly important.
- The First Ministers' Meeting, comprising the Federal Prime Minister and the Premiers of the Provinces and Territories. There is no fixed schedule for such meetings, but they normally appear to take place every 18 months or two years. These are the place for discussing issues of the highest political importance—they were common during the late 1980s and early 1990s, when constitutional megapolitics was in train. (Their use also reflects the personal approach of the Prime Minister; Jean Chrétien has been reluctant to use them as he would have been facing a chorus of unanimous opposition.) They have been much less common since 1993; none was held between September 2000 and February 2003 for example. The February 2003 meeting was concerned with reform of the Canadian health system, following publication of the Romanow report.
- Ministerial Conferences in particular sectoral policy areas. These take two forms: the Provincial-Territorial ('P-T' for short), and the Federal-Provincial-Territorial ('F-P-T' for short). These usually take place between once a year and once a quarter, but depending on the area of policy involved and the issues that are

current. Such meetings normally last two or three days, with a P-T Meeting often preceding the F-P-T meeting (there were about 15 P-T meetings annually between 1998 and 2001, and 30–34 F-P-T ones). P-T meetings are a forum for discussion of areas of common interest but also serve to agree a P-T line for the following F-P-T meeting, at which the host Province's Minister normally speaks for the Provinces and Territories as a whole. Communiqués are issued routinely after such meetings, which are usually reported in the better newspapers, if only in a couple of lines.

- Meetings of Deputy Ministers<sup>29</sup>, which also take place in P-T and F-P-T forms in much the same way as Ministerial meetings. These largely prepare Ministerial meetings or conferences (and are roughly as numerous), with the chief difference that such meetings are wholly private, and no communiqué is issued afterward.
- Meetings of other officials take place with greater frequency. These can be at a variety of levels. Most appear to be at Assistant Deputy Minister or Director level (the equivalent of Grade 2 or Grade 3 in Britain), but they may involve more junior desk officials too. In a complicated and important area like finance, there are three separate committees at that level, operating at F-P-T level, and a separate P-T meeting dealing with transfers. Such meetings are largely preparing the ground for Ministerial-level meetings.

Below all this there is a good deal of informal contact, particularly between officials from line departments (rather than intergovernmental affairs specialists). The number of parties involved mean that there is a limit to what such informal contacts can achieve, at least when they are between Provinces, and the main purpose of such contacts appears to be trying to agree a line to pursue at P-T meetings and thereafter at F-P-T ones. Contacts between particular Provinces and the Federal government are much more common, and are treated as a major part of a Federal official's job. Thus, for Provincial finance

---

<sup>29</sup> The Deputy Minister is the most senior permanent official in a Ministry or Department—in other words, the equivalent of a Permanent Secretary in the British system.

officials keeping abreast of what will be in the Federal budget requires good contacts with the Federal Department of Finance, done largely informally and bilaterally.

At meetings between the Federal government and the Provinces, the Federal Minister and the Provincial Minister from the host Province act as co-chairs. However, they are not responsible for administrative arrangements for these meetings. With the exception of meetings of Finance Ministers and Deputy Ministers, the secretariat for P-T and F-P-T meetings is provided by the Canadian Intergovernmental Conference Secretariat. This is an independent body which exists to ensure that all parties have confidence in the impartiality of the arrangements for the meetings. It is based in Ottawa and staffed by officials from both Federal and Provincial governments on secondment, for administrative purposes only forming part of the Federal government.<sup>30</sup> Its brief is largely logistical and practical, and its representatives at a meeting do not provide advice to the chairs or co-chairs about procedural matters, and they do not draft the minutes or notes of meetings (that is left to the co-chairs and their staffs). Even so, there is a considerable volume of work; each meeting needs a team of 4 people per meeting (more for First Ministers' Meetings), and it usually has 4 such teams working on a sequence of meetings at any time.

This process of using many formal, inter-provincial meetings is itself contentious. Under the PQ, Quebec (with its strategy of limiting its engagement in Canadian intergovernmental relations) has been rather sceptical about the process, especially when it comes to meetings of more junior officials (at Director or working level), and in areas of exclusively Provincial competence such as health or social care. When they reviewed Quebec's involvement in such groups, officials in the *Secrétariat aux Affaires intergouvernementales canadiennes* (SAIC) identified over 700 groups in all, with 93 concerned with health. When undertaken on such a scale, and given the size of Canada, meetings like these are very time-consuming—those attending may have to spend a day travelling in each direction to a meeting, as well as the time of the meeting itself and the preparation it requires.

The travel costs involved if many officials are engaged in such meetings is also considerable. (A further concern from Quebec's point of view was that staff may develop a greater sense of fellowship with their colleagues from other governments working in the same professional area than they have with their colleagues within the Quebec government.) As a result, Quebec reviewed the number of such meetings its staff attend and announced its intention only to attend essential ones and to decline to take part in new groups. Again, this may well change following the PLQ's election victory.

This system will be familiar to many in the UK, as it closely resembles the sort of sherpa-ing and multi-lateral summitry used in European Union meetings. It is far more elaborate than the arrangements for relations between the UK Government and the devolved administrations. There are major differences, however. Few if any provinces have standing representation in Ottawa, in the way EU member states have in their Permanent Representations in Brussels. Provinces work much harder to co-ordinate their positions multi-laterally, rather than in the informal and usually bilateral way it is done in the EU. The Provinces and Territories therefore present a single negotiating position to the Federal government. Only the largest and most concerned Provinces make a serious and sustained effort to ensure they are aware of developments elsewhere and to use that information to build alliances with other Provinces. Unlike the EU, the fundamental inequality of the poorer Provinces means that they are vulnerable to overtures from the Federal government, perhaps to support a Federal line or possibly just to supply information to the Federal government about the attitudes of other Provinces.

## ***4.2 Intergovernmental agreements***

Intergovernmental agreements have proliferated as an instrument of Canadian collaborative federalism. They take two main forms: bilateral and multi-lateral (involving the Federal government and all or most Provinces). The differences between them are more substantial than simply the number of formal parties.

<sup>30</sup> The Secretariat's website is at <http://www.scics.gc.ca/>. It is frequently updated with details of the latest meetings.

Bilateral agreements have a long pedigree and are simpler to understand. They are often drafted by lawyers and in form resemble any other legal agreement, although it is not clear what their legal status is.<sup>31</sup> Such agreements are vital to making collaborative federalism work, by defining what each party will do for the other or setting out the terms of a policy to be followed by a Province using Federal funding provided under the spending power. Examples of the former are the tax collection agreements by which the Federal government collects provincial personal income tax for all Provinces save Quebec. Examples of the latter are agreements for provision of legal aid services by the Provinces. The complicated nature of such agreements and the fact that they reflect administrative practices which develop and change over time means that such agreements often require amendment and revision. In the case of the tax collection agreements, this has been accomplished by exchanges of letters over the years. However, a more fundamental change in the nature of tax collection procedures (the move from ‘tax on tax’ to ‘tax on income’) has led to a need to re-write the agreements altogether. Such agreements exist with nine Provinces, each of which has its own agreement reflecting a different set of arrangements in each case, and is likely to take the whole time of the Director in charge of the matter for over a year. While the clarity and legal certainty that comes from such a large investment of time is considerable, that time is also not a commitment to be undertaken lightly.

Multi-lateral agreements are rather different. These have developed in the years following the collapse of the Charlottetown Accord as a means of improving collaboration between governments to demonstrate the value of the existing constitutional arrangements of the federation. Examples include:

- The 1995 Agreement on Internal Trade (signed by all 10 Provinces)
- The 1998 Canada-Wide Accord on Environmental Harmonization and Sub-agreements on Canada-Wide Standards, Inspections and Environmental Assessment (signed by 9 Provinces, Quebec declining to sign until the agreement’s

provisions were incorporated into Federal law)

- The 1999 Social Union Framework Agreement, often called SUFA (signed by 9 Provinces, Quebec refusing to participate)
- The 2003 Accord on Health Care Reform, supplementing SUFA.

These agreements are vaguer and broader in form than bilateral agreements. As a result it is hard to see that their provisions could be subject to litigation, as they seldom (if ever) create clear and unambiguous provisions on which a court could pronounce (as well as the problems noted above regarding bilateral agreements.) In some cases—such as the provisions for dispute resolution in SUFA—the clauses were simply left out of the agreement, to be dealt with subsequently. And while these were reportedly agreed in the autumn of 2002, the terms of that agreement are confidential to the governments involved and have not been made public at the time of writing.

The use of this sort of agreement as a key tool of executive federalism suggests a limit to their value as a tool for renewing the federation. While they may enable better policy outcomes, and so show the public at large that ‘federalism works’, they will not open up the processes of intergovernmental relations or enhance democratic accountability. Their legally-doubtful status means that it is hard for the parties to rely on the courts enforcing such an agreement, should the need ever arise.

### ***4.3 Dispute resolution and the courts***

The courts have played a very important part in the historical development of Canadian federalism. The Judicial Committee of the Privy Council, sitting in London, was the final court of appeal for division-of-powers cases from Canada until the middle of the twentieth century, with civil appeals finally ended in 1948 (although the last case was not decided until 1959).<sup>32</sup> The Privy Council was widely criticised (at least in English-speaking Canada) for its many judgments enhancing Provincial powers and limiting Federal ones. One effect of this, for example, was to narrow to practically nothing the scope of

<sup>31</sup> The key issues are contractual intent or its absence, and public-policy issues (the Canadian term for what UK lawyers call the fettering of discretion). See A. Heard *Canadian Constitutional Conventions: the marriage of law and politics* (Toronto: Oxford University Press, 1991), pp. 112–116.

<sup>32</sup> *A-G of Ontario v. A-G of Canada* (References re Abolition of Privy Council Appeals) [1947] AC 128, PC.



#### ***Box 4: A recent division of powers case: Hydro-Québec<sup>35</sup>***

The (Federal) Canadian Environmental Protection Act allowed an administrative agency to impose limits on emissions from power stations, backed up by criminal sanctions for breach. Hydro-Québec (an electricity generator) breached those limits and was prosecuted. It appealed, on the ground that the legislation imposing limits was unlawful as the Federal Parliament had no power to legislate on the exclusively provincial matter of the environment.

The Supreme Court of Canada held, by a majority, that the legislation was properly made under the criminal law power (s. 91.27) of the Constitution Act 1867, on the basis that the legislation constituted a limited prohibition applying to a limited number of substances, and the use of an administrative agency to set those limits a way of tailoring the prohibitions to suit the substances and circumstances involved. Consequently, there was a valid and appropriate public purpose (as well as the criminal prohibition and penalty) required to make the prohibition a valid use of the criminal law power—rather than a use of the criminal law power to enable the Federal government to regulate a matter that otherwise was beyond its competence.

This judgment has been widely criticised, particularly but not only in Quebec. Its effect is to broaden considerably the scope within which the Federal criminal law power can be used. It enables the power to be used to regulate a wide range of activities that otherwise fall within Provincial jurisdiction. The vague terms in which the judgment was couched—using the criminal law to “underline and protect fundamental values”—attracts controversy by begging the question of what values they are and by whom they are held.

the Federal Parliament’s power to regulate trade and commerce, and enhance instead the scope of the Provinces’ powers regarding ‘property and civil rights’.<sup>33</sup> Since 1948 the Supreme Court of Canada has taken a rather different approach, more often upholding the powers of the Federal order at the expense of the Provinces. It is often viewed by Quebecois scholars as showing a pro-federal bias, even if its record is more balanced. (In a number of notable cases, it has decided in favour of the Provinces: for example, in the *Patriation* reference or the *Reference re the Secession of Quebec*.<sup>34</sup>) The Federal government is therefore able to approach constitutional litigation regarding federalism issues with a degree of equanimity. However, division-of-power cases have become much less common over the last twenty years, with a torrent of litigation relating to rights arising under the Canadian Charter of Rights and Freedoms established by the Constitution Act 1982. In these cases, the interests of Federal and Provincial governments are likely to be similar, as governments affected by the rights of individual citizens.

Litigation is a less attractive prospect for the Provinces than for the Federal government. They go to court with limited expectation of success, regarding the Supreme Court of Canada (and many Provincial supreme courts, whose judges are appointed by the Federal government) as having a centralist bias. The procedures by which they raise such issues are more cumbersome than they are for the Federal government (a Province can only refer an issue to its Provincial court of appeal and then take it on appeal to the Supreme Court, but the Federal government can refer a matter directly to the Supreme Court of Canada).<sup>36</sup> Provinces therefore look to other ways of resolving an issue, notably some sort of intergovernmental agreement. Even for the Federal government, however, litigation is far from risk-free and a recent string of notable successes does not breed a high level of confidence about litigation. Most division-of-powers cases have tended to reach the court as a consequence of litigation between other parties, in which Federal and Provincial governments can choose to intervene. (The

<sup>33</sup> Constitution Act 1867, s. 91.2 and s. 92.13 respectively.

<sup>34</sup> [1981] 1 SCR 753; [1998] 2 SCR 217.

<sup>35</sup> *R. v. Hydro-Québec* [1997] SCR 213

<sup>36</sup> Supreme Court Act, 1953. See also P. Hogg *Constitutional Law of Canada 3rd edition* (Toronto: Carswell, 1992), pp. 214–219.

Federal Government's Department of Justice receives many calls to intervene in such cases, but usually declines.) When it does involve itself in a case, it does so at a late stage, allowing the earlier litigation to proceed between the parties in the lower courts and intervening either in the Provincial supreme court or in the Supreme Court of Canada.

One key feature of such cases is how the political and the legal aspects of the case become intimately intertwined. Court hearings become a setting for rhetorical statements about the parties' cases, with lawyers giving interviews on the court steps and becoming involved in the political and public relations aspects of the case. Equally, the litigation becomes both a focus or occasion for lobbying as well as an attempt to secure a legal resolution.

#### 4.4 *Legislation*

The control of Provincial legislation by the Federal level (by the government, the Lieutenant-Governors in the Provinces and the Governor-General) loom large in the original framework of the Constitution Act 1867. The Federal order, in particular, had extensive powers to prevent the enactment of legislation which was beyond a Province's powers. The Governor-General, on the advice of the Federal government, could 'disallow' Provincial legislation even if it had received assent from the Lieutenant-Governor, in effect repealing it within a year of it receiving assent.<sup>37</sup> The Lieutenant-Governor could 'reserve' legislation for a year, withholding his assent and placing the matter in the hands of the Governor-General.<sup>38</sup> These measures were available whether or not the legislation exceeded the powers of the legislature which enacted it; they could be used to curb an exercise of powers that was inappropriate even though lawful, as well as measures which were unlawful because they exceeded Provincial competence. Similarly, the Governor-General could withhold assent from Acts of the (Federal) Parliament if these intruded into Provincial competences. And the option of a reference to the Supreme Court of Canada (and thence to the Judicial Committee of the Privy Council) was also available.

In practice these measures work rather differently. Both reservation and disallowance have fallen into disuse (the last case of disallowance was in 1947 and that of reservation in 1961) and many authorities now regard them as being unusable by constitutional convention.<sup>39</sup> The reference to the Supreme Court of Canada is available, but that is a prerogative of the Federal government not the Provinces, and (as noted above) litigation is a remedy which the Provinces are reluctant to use anyway. In reality, the Federal government appears to take a relaxed view of Provincial legislation, which it makes only limited efforts to scrutinise as a matter of routine. The volume of Provincial legislation and the Federal government's own limited resources are compelling reasons for this, and instead the Federal government relies on major instances becoming conspicuous by virtue of being controversial enough to come to its attention. It does respond in cases where there is a clear interference with Federal functions, but reactively rather than actively.

For Provinces Federal legislation affecting Provincial matters is a much more routine hazard. Part of SAIC's remit in Quebec is to examine all Federal legislation to see whether and in what ways it affects Provincial matters. The Federal government accepts that it often does so, partly to see how far it can go in extending its competences. From Quebec's point of view this a significant problem, although it appears to be a matter of greater sensitivity for Quebec than for English-speaking Provinces. Yet even when intrusions into Provincial competence are found, there is little Provincial authorities can do. Their options are to try to find a way of litigating the matter, which (as they lack the power to refer the matter directly to the Supreme Court) may be difficult; or to raise the matter with the Federal government and remonstrate with it, in which case the Federal government alone can decide whether to amend the legislation. It may help that the Federal government will not want to add to Quebec's stock of grievances against the Federal order, but that is a political rather than constitutional safeguard.

<sup>37</sup> S. 56 and s. 90 Constitution Act 1867.

<sup>38</sup> S. 55, s. 57 and s. 90 Constitution Act 1867.

<sup>39</sup> See Heard *op cit*, pp. 102–105; Hogg *op cit*, pp. 112–113.

## ***4.5 Staffing and bureaucratic organisation***

In any Canadian government, a significant number of staff are concerned wholly or largely with intergovernmental relations. Each government (even the smallest Province) has some sort of central unit dealing with the subject. This may be a free-standing Ministry or Department (as in Ontario), or be linked with other 'intergovernmental' issues such as international issues (as in Alberta or New Brunswick), or be part of a larger central Ministry (as in Quebec or the Federal government). As well as these staff (whose role is discussed below), there are sections in most if not all Ministries with service functions specialising in intergovernmental issues affecting that Department. In an area such as finance this will involve a number of senior officials. In others such as child-care, it may be only a single fairly junior person. Those involved deny that this is duplication—they say that the central intergovernmental affairs unit is intended to ensure co-ordination and provide an overview of intergovernmental relations generally, while departmental specialists have expertise in that area of policy which line officials lack. Such claims need to be treated with a measure of doubt and there does appear to be a degree of duplication—arising largely because service de-

partments want their own specialists as they are not sure of the central unit's understanding of their policy area, or of its desire to secure their department's objectives at the expense of other departments' goals.

At the political level, there is a similar pattern of variation. Some governments such as the Federal government or Alberta have a Minister for Intergovernmental Relations. While the Federal Minister, Stéphane Dion, has a high profile, he appears to have a comparatively light workload. In other governments, like Ontario, the Minister is the Premier. In practice this seems to mean relatively limited interest from politicians in the area, although it would enable direction to be given at the highest level if that were called for. A third option (as in Quebec) is for the Minister to have a range of central responsibilities. While the Federal government also has Ministers (with other portfolios) responsible for particular Provinces, their role is much more one of political liaison and representation, primarily with the Liberal party in that Province. So far as the management of intergovernmental relations is concerned, those Ministers are irrelevant; the key actors are the Minister for Intergovernmental Relations, the Prime Minister or Premier, and the Minister for the portfolio involved.

### ***Box 5: The Millennium Scholarships Endowment Fund***

By section 93 of the Constitution Act 1867, education (including support for students in higher education) is an exclusively Provincial matter. Some Provinces, such as Quebec and to a lesser degree Ontario, provide direct support for students from that Province. Others operate systems of support through loans along the lines of the United States.

In June 1997 the Prime Minister, Jean Chrétien, announced the establishment of Millennium Scholarships to support students from low and moderate-income families at university. The cost of the scheme was some \$2.5 billion. The announcement was made without consulting the Cabinet, the Federal-Provincial Relations Office or even departments such as Human Resources or Canadian Heritage that would have been directly affected. It also appears to have been taken without advice from the Attorney-General or the Department of Justice who—like the FPRO—would have had to advise that this was a matter of Provincial competence. The only people outside the Prime Minister's office who appear to have been consulted were the Finance Minister and his Deputy Minister.

While the scheme is now up and running, it has had a lasting effect on Federal-Provincial relations. For Provinces like Ontario, where it duplicates an already-existing scheme, it is simply bad policy design. To Quebec it is not just an intrusion into Provincial competences but effectively a waste of money, duplicating an existing Provincial programme. However, both Provinces' pragmatic response has been to reduce the amount they themselves spend in this area, effectively allowing the Federal government into the field while they direct their resources elsewhere.



In the Federal government, matters are further complicated by the extent to which power is centralised in the hands of the Prime Minister and his (or her) office.<sup>40</sup> As a consequence the Prime Minister is able to take decisions (often far-reaching ones) and then announce them publicly without consulting the Cabinet, Federal government departments or even on occasion the Privy Council Office. The same applies in many Provinces too. While this may permit a strong political direction to be given to the management of Federal-Provincial relations, it has many shortcomings. It means the policy advice to the Prime Minister (or Premier) is likely to be very limited, and to omit key considerations such as legal issues or the wider ramifications of a step taken to deal with a particular problem.

Staffing is an area in which the Federal government has a clear advantage over the Provinces. The Intergovernmental Affairs Office is now part of the Privy Council Office (the Canadian equivalent of the Cabinet Office), although it has in the past been a separate office. It has its own Minister and Deputy Minister, as well as the close attention of the Prime Minister and direct access to him or her when critical issues arise.<sup>41</sup> It also has about 300 staff, split into 'Policy' and 'Operations' branches, and comprising a mix of people specialising in intergovernmental aspects of particular policy areas and those concentrating on matters affecting particular regions or Provinces. As part of the centre of the Federal government it has a powerful position. Yet even so it is struggling to co-ordinate the position of the Federal government's various departments, which may keep it in the dark or seek to evade its influence.<sup>42</sup> In practice, its control depends on the Prime Minister taking a direct interest in a matter and ensuring that his involvement is communicated through IGAO. In the case of the Millennium Scholarships, this was clearly not the case.

It is worth asking why the Federal government employs so many people to work on intergovernmental relations at the centre of government, as well as having many IGR specialists in other de-

partments. The first part of the answer is that federalism is an integral part of Canadian government, and that it requires specialists to deal with its administrative implications. That helps to explain its importance for line departments if not at the centre. For the centre, the issue is political not administrative. Here, the answer appears to start with Quebec, not in the sense that Quebec needs many officials to help 'manage' it but because of the concern that separatist demands have fuelled for a government wishing to preserve the unity of Canada as a state. While many of IGAO's officials are concerned largely with matters relating to Quebec it is not their sole concern. Once close attention is paid to Quebec, attention also needs to be paid to the other parts of Canada, in case a measure intended to have a particular effect in relation to one Province or region has a different effect elsewhere. If the threat to national unity were to decline, one would therefore expect the need for central co-ordination through IGAO to decline too. However, that is unlikely to happen in the short term (and even with a PLQ government in Quebec), because the new government will engage with other Provinces in a way that increases the complexity of Federal-Provincial relations even as it reduces the stakes.

The contrast with even the best-resourced Provinces is dramatic. The smaller Provinces such as the Maritimes may have only 3 or 4 people dealing with intergovernmental affairs as a whole. Ontario does better and has about 33 people in its intergovernmental section, mostly concerned with sectoral matters and with only limited capacity to monitor developments in other Provinces. Alberta similarly has a large and experienced group of officials in the Ministry of International and Intergovernmental Relations.<sup>43</sup> The best-resourced Province is Quebec, whose intergovernmental staff form part of the *Secrétariat aux Affaires intergouvernementales canadiennes* (SAIC) within the Ministry of the Executive Council.<sup>44</sup> SAIC has a total of 70 or so staff, but that includes staff who deal with relations with other Francophone communities in Canada as well as those dealing with functional

<sup>40</sup> For a detailed discussion, see Donald J. Savoie *Governing from the Centre: the concentration of power in Canadian politics* (Toronto: University of Toronto Press, 1999), especially chaps. 2–4.

<sup>41</sup> The Intergovernmental Affairs Office has a useful web-site at <http://www.pco-bcp.gc.ca/aia>

<sup>42</sup> See also Savoie *op cit* at pp. 148–153.

<sup>43</sup> See R. Gibbins 'Alberta's intergovernmental relations experience' in H. Lazar (ed.) *Canada: the State of the Federation 1997: Non-constitutional renewal* (Kingston, Ont: Institute of Intergovernmental Relations, Queen's University, 1998). The Alberta Ministry's website is at <http://www.iir.gov.ab.ca>

policy areas and those dealing with constitutional and institutional matters. SAIC conceives of its role much more broadly than its counterparts in other Provinces. Its mandate includes not only overseeing relations with the Federal government or other Provinces, but also approving all intergovernmental agreements and the systematic examination of Federal legislation to see whether and how that intrudes into Provincial competences. It also has offices in other important Canadian cities such as Toronto, to monitor local developments and maintain local contacts. No other Province appears to do that, and (unusually for a Canadian Province) the task is undertaken by lawyers working within SAIC rather than within the Ministry of Justice.<sup>45</sup>

What all these administrative units have in common is the nature of their remit. All are supposed to co-ordinate their governments' approach to intergovernmental relations, to prepare meetings and support the Ministers (including the Premier) attending them. This should enable each province to develop and implement a coherent intergovernmental strategy across government. In reality these sections' job appears to be largely one of co-ordinating co-ordinators, and when (as at present) the political stakes are low so is Ministerial interest. This exacerbates the natural tendency of individual Ministries or Departments to pursue their own approach without regard to their government's broader interest (a contrast to how the UK, at least, deals with EU matters). The greater resources of the Federal government enable it to undertake this with greater effectiveness than other governments as far as routine matters are concerned. However, the highly centralised nature of the Federal government and the power enjoyed by the Prime Minister and his office mean that an uncontrollable element will always exist. The Millennium Scholarships demonstrate that vividly. While the legal powers of SAIC in Quebec give it greater weight than its counterparts in other Provinces, it still appears to be struggling with centrifugal tendencies in other parts of the Quebec government.

<sup>44</sup> SAIC's English-language website is at <http://www.mce.gouv.qc.ca/v/html/v0368002.html>

<sup>45</sup> Most Canadian governments, including the Federal government and the Ontario government, provide that all legal advice is to be provided by the Attorney-General and his or her officials. The monopoly of legal advice is key to ensuring that the Department or Ministry of Justice is aware of all constitutional developments and able to intervene if it has concerns about their legality. However, the Federal Prime Minister and his office are able to operate outside the scope of that monopoly in practice.

## 5 *Lessons for the UK?*

### 5.1 *Generally: build trust, don't destroy it*

Drawing lessons from Canada for the UK is not straightforward. There are many differences between the two systems, and these are not always the obvious ones. Canada is obviously a federal system, while the UK has only a limited measure of devolution which in its most advanced form (in Scotland and Northern Ireland) affects little more than 10% of the population. The asymmetry of the UK—the different arrangements for Wales and the lack of them for England — is a greater difference than the issue of federalism. Canada also has many more units to deal with than the UK—ten Provinces and three Territories—as well as a much larger landmass and smaller population.

But Canada took many years to reach the present state of affairs. During the early years after Confederation, intergovernmental relations were much quieter. The federation was much smaller as only four Provinces—Ontario, Quebec, Nova Scotia and New Brunswick—joined in 1867. Manitoba, British Columbia and Prince Edward Island joined within a few years, but the first two had insignificant populations until the twentieth century. Federal-Provincial relations were dominated by arguments about legislation, and the use of the powers of disallowance and (to a lesser degree) reservation. Finance figured large too—whether in arguments about the amounts of Federal grants to the Provinces, or about interest on debt assumed by the Federal government from the Provinces at Confederation, or about other forms of Federal support such as for infrastructure projects (notably railways). Contact was often informal, relied heavily on personal acquaintance itself frequently predating Confederation, and was greatly affected by whether the party in office was the same as (and therefore friendly to) the Federal government, or different to it and hostile.

The politics of intergovernmental relations was very different. The 'awkward partners' were Nova Scotia and Ontario. Nova Scotia had entered Confederation reluctantly in the first place and threatened to secede on several occasions, while Ontario (with a Liberal government facing the Conservative one in Ottawa) enjoyed its prosperity and regularly confronted the Federal government over Provincial powers. Quebec was an enthusiastic part of the new arrangements, and was concerned chiefly with getting extra money from the Federal government. As its large bloc of Conservative voters provided a key element in the Federal government's Parliamentary majority it was in a relatively strong position. Meanwhile, much of the territory of Canada fell under the direct control of the Federal government, including what is now the Provinces of Saskatchewan and Alberta, and also what is now northern Ontario and northern Quebec.<sup>46</sup>

To a large extent, this is a familiar picture to any observer of intergovernmental relations in the UK now—especially in the asymmetry, the importance of the financial power of the Federal government as well as control over legislation, and the reliance on personal contacts to oil the wheels of the machine.<sup>47</sup> To that extent, Canada may offer a vision of how intergovernmental relations in the UK might develop, especially if the establishment of regional government in England increases the number of units and complexity of interests involved.

Apart from some institutional differences (such as the role of the office of Lieutenant-Governor) there are three major differences between Canada in the 1870s and the UK in the early years of the twenty-first century. First, in Canada the creation of a modern state, with its many activities in managing the economy and promoting social welfare, has taken place in the context of an established federal system, while in the UK these developments have already taken place and one of the major difficulties of devolution is to maintain that framework while transferring

<sup>46</sup> See G. Stevenson *Ex Uno Plures: Federal-Provincial Relations in Canada 1867–1896* (Montreal and Kingston: McGill-Queen's University Press, 1997).

<sup>47</sup> Perhaps the best single account is in House of Lords Select Committee on the Constitution Session 2002–03 2nd Report *Devolution: Inter-institutional relation in the United Kingdom* HL Paper 28 (London: The Stationery Office, 2002).

control of part of it to the devolved institutions. Second, devolution in the UK exists in the context of a rapidly-changing world in which globalisation and the international mobility of capital are key forces. Third, the European Union is a key force for all governments in the UK, and access to EU institutions and the controls exercised by EU law are vital issues for the devolved administrations and their legislatures and assemblies. Yet for Canada there was something similar in the nineteenth century—the role of the UK as colonial power, and the supreme position (until 1931 and the Statute of Westminster) of the Imperial Parliament. Confederation meant that the Provinces no longer had a direct right of access to the Crown or Imperial institutions but had to operate through the Federal government (a shock for the Maritime Provinces in particular, as they had been self-governing colonies prior to Confederation), but London still loomed large in the Canadian consciousness. It is little wonder that most Provinces quickly established representative offices in London even when they had none in Ottawa.

Offering Canada as a vision of the future is likely to horrify many in the UK, pleased as they are with the largely uncontentious and consensual intergovernmental relations that exist at present. The large amount of politicians' attention, the larger amount of officials' time and the formality of the Canadian arrangements can easily cause alarm. However, looked at in the light of how Federal-Provincial relations have developed one can perhaps draw a large lesson for the UK from Canada, and one that is more for the UK Government than the devolved institutions. That is the importance of trust. This is a notably scarce commodity in Canada. Each government is sure that the other governments are trying to exploit their own positions and powers, probably at its expense. Each has shown considerable resourcefulness in maximising the resources available to it, whether those be financial, access to the courts or the framing of legislation. Yet this resourcefulness and 'utility-maximisation' serve to undermine even further the level of confidence any government has in the others, making the process self-perpetuating. In the UK context, the dominance that the UK Government enjoys under the devolution arrangements gives it a degree of control that the Canadian Federal government would envy. If it wishes to avoid the sorts of formalised and confrontational relations to be seen in Canada, it will have to exercise that power with great discre-

tion. Repeated intrusions into or interferences with devolved matters—as exemplified by some of the provisions in the Anti-terrorism, Crime and Security Act 2001—are likely to lead to the levels of mistrust that will result in the UK resembling Canada sooner rather than later.

## ***5.2 Make sure that there is consistent advice—and follow it***

It is telling how much the centralisation of power within the Federal government has contributed to harming intergovernmental relations in Canada. The Prime Minister's concerns with ensuring Quebec remains part of Canada while maintaining his popularity in English-speaking Canada and (more recently) with safeguarding his own legacy have not been effectively restrained by advice about the implications of his actions for Federal-Provincial relations. That is not for want of skill or effort on the part of the Privy Council Office, but rather because PCO's intergovernmental affairs section has not been consulted or involved. The consequences of this have been serious: matters like the Millennium Scholarships have seriously undermined trust, and made it harder to reach agreement on other matters like health-care funding or implementation of the Kyoto accord. Avoiding this sort of episode means having in-house experts and always consulting them—not just doing so when it is convenient or expedient. The UK's practice in this area so far has been good—and is greatly helped by the emphasis placed in the Memorandum of Understanding on good communication and careful consultation. The time will come when the political stakes involved will be high, in a way that they have not been up to now. As the UK Government still places much greater emphasis on officials' advice to the Prime Minister than the Canadian does, the signs are good. But that will be the key test—and if making the procedures work is obscured by a pressing crisis, the consequences may be serious too.

A further point is that ensuring consistent advice is given across government (any government) involves a great many people. The Canadian practice of having intergovernmental affairs specialists at the heart of government, complemented by IGR specialists in line departments and line officials who deal with intergovernmental issues in the course of making or implementing policy, appears to create a great deal of duplication. To an extent that is true, but the amount of duplication is more ap-



parent than real. Each set of officials brings something different to the table—a different set of skills, and a different perspective on what is important. The real question that needs to be asked is the extent to which those skills and perspectives are needed.

In the UK, that question has received the answer of ‘not much’. While most line departments had a small team dealing with devolution or constitutional matters in the first few years after the 1997 election, most of those have now been dissolved (though a network of legal contacts remains). While there are a good number of specialists dealing with matters relating to Scotland in the Scotland Office, the Wales Office has many fewer even given the difference in size between the territories; and the small team in the Office of the Deputy Prime Minister lacks the staff to do any thorough-going job of co-ordination.<sup>48</sup> The combining of all three groups as part of the new Department of Constitutional Affairs in June 2003 may help improve internal co-ordination, but not if each remains a separate unit within the Department as appears to be the intention. If devolution is to play a major role in the governance of the United Kingdom, the Canadian experience suggests the number of officials directly involved will increase.

### 5.3 *Legislative powers all round—including for Wales*

One practical lesson does emerge from Canada, however; the need for clear dividing lines between governments for them to be able to have a sustained relationship in which trust can exist. While perfect separation of powers in a federal system in the classical formulation is long gone in Canada, the fact that parties have a clear sense of what is and is not their responsibility underlies their relations and helps to make them work. That is particularly important when looking at Wales. The form of executive or quasi-legislative devolution adopted there is already becoming highly cumbersome for administrators as well as being inherently constitutionally un-

stable. The closest Canadian parallel to the Welsh arrangements would be with the three Territories (the Yukon Territory, the North-west Territory and Nunavut). But these have a legislature and a separate government accountable to that legislature, and differ from Provinces chiefly in the ability of the Federal government to overrule their legislatures or executives for any reason if it sees fit, not only when they exceed their constitutional authority. (Another practical but not constitutional difference is that all three govern large, sparsely-populated areas.)

The many problems posed by the Welsh arrangements have been widely discussed and criticised, by the Constitution Unit and others. They are presently being considered by the Richard Commission which is due to report later in 2003. The sooner the UK Government bites on the bullet of sorting out the unsatisfactory compromise established in 1998, the quicker it avoids the danger of those arrangements becoming unworkable.

### 5.4 *Sort out the finances*

Even with good overall relations, the thorny issue of finance will be very difficult to deal with. The parallel with Canada here is much less exact. In 1880 Federal grants accounted for about 47% of total Provincial spending. In 1890 they accounted for some 35% (and now for 17.6%).<sup>49</sup> That is a far cry from the situation in the UK, where the block grants from HM Treasury account for practically all the revenue of the devolved institutions. Even though the Provinces were raising a large proportion of their own revenue, they remained heavily dependent on Federal funds, especially as the Federal government had more scope to increase its revenue (more elasticity) than the Provinces did. Canadian history is littered with rows over fiscal federalism—for example, the attempts by the Provinces after World War 2 to secure the return of income tax revenues they had ‘rented’ to the Federal government during the war, which did not succeed until 1957 (to be replaced by the tax

<sup>48</sup> For other objections to the continuing role of the Secretaries of State, see House of Lords Select Committee on the Constitution op cit, chap. 2.

<sup>49</sup> The figures (in thousands of Canadian dollars) are

|                             | 1880  | 1890   | 2000–01     |
|-----------------------------|-------|--------|-------------|
| Federal grants to Provinces | 3,431 | 3,905  | 29,275,000  |
| Total Provincial spending   | 7,366 | 11,132 | 166,595,000 |

Sources: Stevenson op cit, Table 2.5, p. 46 (for 1880 and 1890); Conference Board of Canada op cit, Table 3, p. 27 (for 2000–01).

collection arrangements that remain largely in place today).

The existence of separate fiscal bases gives the Provincial governments a substantial degree of autonomy and so limits the scope for dispute about financial matters. (That scope would be almost unrestricted if the Provinces were more dependent on the Federal government than they presently are.) If the Provinces were compelled to rely on the Federal government even more than they do they would be disputing every penny they did not receive. While there might be little they could do about their lack of revenue, their objections would be voiced loudly and often, and would prevent intergovernmental co-operation on other matters. Even formula-based financial arrangements will only work if the formula is demonstrably fair given the obligations of the governments involved and the resources they have. (This is of course been a notable current problem in Germany, as richer *Länder* in the west object to the extent of transfers to poorer ones in the east now mandated by the formula used. The Federal Constitutional Court upheld their objections in 1999, and the present solution is unlikely to last long.)

A further lesson from Canada would therefore appear to be that the financial arrangements for devolution need to be on a firmer footing than the UK's present ones presently allow, and that this would be better done sooner than later. Otherwise, the issue will come to take over all other matters, inhibit co-operation generally and lead to precisely the sort of formality and confrontation that the UK Government is trying to avoid. One way of doing so is to look to the Australian model of an independent commission charged with the allocation of finance, rather than leaving this to the parties themselves. In the hands of the parties (and especially in the absence of much trust), finance quickly becomes disputatious and heated; an impartial body is the only way to take that heat out of the issue.

### ***5.5 Make the nuts and bolts work, but don't fret over inessentials***

Likewise, it seems axiomatic in Canada that each government should have its own officials, forming a separate and independent service. The idea that there should be a single civil service embracing both Federal and Provincial governments would confound expectations that officials should have a clear and undivided loy-

alty to the government for which they work. The UK Government's reluctance to contemplate separate civil services for Scotland or Wales would seem incomprehensible in a Canadian context (although some other federal systems such as India have a single service for officials). Officials there have little difficulty in identifying each other as belonging to the same 'breed', even if they work for different governments in different services (as, of course, happens in Northern Ireland already).

Part of the process of building and maintaining trust is allowing governments to get on with what is properly in their domain, and not being subject to the tutelage of another government in doing so. The disuse of the controls over legislation (the powers of reservation and disallowance) is an example of that. There is a marked contrast here, on the administrative level, with practice in the UK. While the UK Government has taken no action regarding any legislation before the Scottish Parliament under sections 31–33 of the Scotland Act 1998, it continues to scrutinise every bill and Act, several times and in great detail. The Canadian experience is that this sort of scrutiny is unnecessary, at least for the Federal government. If Provincial legislation were to be beyond Provincial powers, the fact would emerge quite quickly and probably result in a third-party challenge. The UK Government's practice of detailed scrutiny seems inappropriate and excessive in the light of such an approach.

### ***5.6 Think through the role of central institutions***

Canadian federalism seems highly formalised, operating through a variety of Ministers' meetings and conferences and a large supporting network of officials. However, it is easy to overlook why this system comes about—the absence of any formal institution to represent Provincial interests within the Federal political institutions. In this respect Canada is at the opposite end of a continuum with Germany at the other end; the German *Bundesrat* is the upper chamber of the legislature and is composed of representatives of *Land* governments, with votes roughly weighted according to size. (It also departs from the US model of a Senate with elected representatives chosen equally from each State.) The Canadian Senate, by contrast, is an entirely appointed chamber. Although seats are allocated proportionately to four regions (Atlantic Canada, Quebec, Ontario and Western

---

Canada) the power of appointment is a matter for the Federal government (by advising the Governor-General), and there is no requirement to make appointments when vacancies arise. The lack of a central voice for the Provinces within the Federal institutions leads to the use of frequent Ministerial meetings to compensate. It is telling that the most significant demand of the new Liberal Premier of Quebec, Jean Charest, is for the establishment of a 'Council of the Federation' to give a voice to the Provinces in Federal matters. That is a role that could have been played (alongside its legislative role) by the Canadian Senate—or in the UK, by the House of Lords.

The idea that a reformed House of Lords might also represent the interests of the devolved territories was recommended by the Wakeham Report.<sup>50</sup> It subsequently disappeared from public attention, overshadowed by the debate about the extent to which a reformed House should be elected. The collapse of any sustained effort at reform after the votes in February 2003 may have killed off the issue altogether, but the value of representing territorial interests through the upper house should not be neglected. Its lack is clearly felt in Canada. It would enable the devolved territories to feel more confident that their interests could not be ignored at UK level. There are of course many problems with such an approach, not least how representatives of devolved territories might be selected and their relationships with the assembly or legislature for their territory and its administration, but tackling such a concern would avoid the problems seen in Canada with a remote, ill-respected and largely illegitimate Senate.

---

<sup>50</sup> See Royal Commission on the Reform of the House of Lords *A House for the Future* Cm 4534 (London: The Stationery Office, 2000), chap. 6.

