Determining the Extent of Devolved Legislative Competence: A Comparative Analysis Between Scotland and Canada

Joseph Lavery*

Abstract—The validity of Acts of the Scottish Parliament is determined by whether the legislation relates to reserved matters, by reference to the purpose and effects of the provisions. This test is remarkably similar to the Canadian approach to determining legislative validity. However, the UK Supreme Court has rejected the use of Canadian authority in interpreting the Scotland Act. This paper contends that this proposition is mistaken, that the contextual similarities between the UK and Canada are such that comparisons can be made, and that reference to Canadian authority is beneficial in interpreting the scope of the Scottish Parliament's competence.

* Hertford College, Oxford. I would like to thank Adam Perry and the editorial team of the Oxford University Undergraduate Law Journal for their comments on earlier drafts. All errors remain my own.

Introduction

The UK Parliament has devolved legislative power to Scotland. While the courts have been tasked with defining the limits of devolved legislative competence through interpreting devolution legislation, such limits remain remarkably uncertain, as there is a lack of judicial authority. The judiciary have not addressed the meanings of certain provisions and there are even instances of conflicting authority. In spite of these issues, the Supreme Court has maintained that we should not use foreign jurisprudence to interpret devolution legislation.[1] This article contends that this proposition is mistaken. Given the importance of 'giving a consistent and predictable interpretation' to devolution legislation,[2] Canadian authority should be employed in order to provide a body of relevant authority and ensure that such a consistent and predictable interpretation is achieved. Canadian authority is a suitable source of comparative material due to the similarities between the constitutional contexts and the legal tests which each country applies. However, Canada has greater developed its approach to the delimitation of legislative competence, such that the UK would benefit from a comparative analysis.

In the UK, each devolution settlement has its own arrangements, but, as confirmed by Lord Hope, 'The essential nature of the legislatures that the devolution statutes have created in each case is the same'.[3] The following analysis will discuss Scotland, since the similarities are strongest between the approach taken to the Scottish devolution settlement and the system

[1] *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [13].
[2] *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [12].
[3] *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [81].

adopted in Canada. However, there is a strong argument that the analysis applies equally to Wales.[4]

To support this argument, two claims will be made. Firstly, that UK courts should not rule out using foreign jurisprudence. It will be demonstrated that the reasons supplied by the Supreme Court for the exclusion of foreign authority do not withstand scrutiny. Secondly, it would be beneficial for UK courts to use Canadian jurisprudence in order to shed light on the appropriate interpretation of certain provisions contained in devolution legislation. This would thereby increase the certainty with which the limits of devolved competence can be determined. In particular, the process of characterising impugned legislation and the severance doctrine will be discussed.

It is argued only that UK courts should *engage* with Canadian authority.[5] While Canadian authority should not be binding, it should be employed as a 'reflective tool'. The goal is simply 'to look for good persuasive ideas in other national jurisprudence, which would help solve similar constitutional problems through interpretation'.[6] It is always open for UK judges to decline to follow Canadian authority. But reflecting on

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[4] This proposition is supported by the fact that the language used to define legislative competence in Scotland and Wales; see Scotland Act 1998 s 29 and Government of Wales Act 2006, s 108A. The Welsh and Scottish formulations are identical, utilising the 'relates to reserved matters' test, meaning that conclusions drawn in respect of Scotland should be applicable in respect of Wales. Indeed, the fact that the Explanatory Notes of the Wales Act 2017 often make reference to the Scottish devolution settlement supports the conclusion that the Welsh model is intended to be the same as the Scottish model.

[5] For discussion of this approach see Vicki Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2010).

[6] Gábor Halmai, 'The Use of Foreign Law in Constitutional Interpretation' in Michael Rosenfield and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 1333.

Canadian authority is useful as a means of discussing the conceptual foundations of common legal principles, and determining the proper application of such principles.

Part 1 will set out the division of power structures present in the UK and Canada. Part 2 will refute the UK Supreme Court's reasons for excluding foreign authority, and adduce evidence pointing towards the prima facie value of a comparative inquiry. Parts 3 and 4 will support the prima facie case for comparison by explaining how Canadian authority can be used to develop the law surrounding the characterisation of legislation and the severance doctrine

1. Division of Legislative Power in the UK and Canada

To provide context, the relevant division of power structures and the law relating to the characterisation of impugned legislation and the severance doctrine – the two areas which will be discussed in greater detail – must be set out.

A. The UK

I. General

The UK is formally a unitary state, but since 1998 it has undergone a distinct decentralisation of political power to Scotland, Wales, and Northern Ireland. The Scotland Act 1998 establishes the existence and the general legislative competence of the Scottish Parliament. Acts passed by the Scottish Parliament

are treated as primary legislation,[7] but the exercise of jurisdiction by the Scottish Parliament does not affect the power of the UK Parliament to make laws for Scotland.[8] As such, the UK Parliament retains legislative sovereignty.

II. Delineation of Legislative Competence

S 29(1) of the Scotland Act states that an Act of the Scottish Parliament is not law *so far as* any provision is outside legislative competence. As such, the court is able to 'sever' an invalid part of a statute from the remaining valid portion. The Explanatory Notes explain that the provision 'does not render the whole Act invalid. It only provides that the Act is 'not law so far' as that invalid provision is concerned'.[9] This is known as the doctrine of severance. Section 29(2)(b) provides the test for determining whether Scottish legislation is outside legislative competence: whether the impugned provision relates to reserved matters. A provision is invalid if it relates to the reserved matters set out in Schedule 5.[10] The list of reserved matters is diverse; some are defined broadly whilst others are defined by reference to specific pieces of legislation. But there is a common theme – that 'matters

[7] *AXA General Insurance v Lord Advocate* [2011] CSIH 31 [87], 'Notwithstanding its [being Acts of the Scottish Parliament] classification for the purposes of the Human Rights Act 1998 as "subordinary legislation" (section 21(1)), it is "law" essentially of a primary nature'.

[8] Scotland Act 1998, s 28(7).

[9] Although in *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 it was stated that the Explanatory Notes should be given the same weight as any other post-enactment document at [33], in this case the Explanatory Notes confirm the natural reading of the Act.

[10] Examples of reserved matters include The Constitution, Foreign Affairs, Defence, and Financial and Economic matters, among others.

in which the United Kingdom as a whole has an interest should continue to be the responsibility of the UK Parliament'.[11]

To determine whether a provision relates to reserved matters, the court must 'identify the purpose of the provisions according to the test that s 29(3) lays down'.[12] Section 29(3) states that the question is to be determined 'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'. The essence of the test for reserved matters is therefore the purpose of the provision. *Imperial Tobacco* holds that for a provision to be outside legislative competence, the purpose which relates to reserved matters does not need to be the predominant purpose.[13] This test is not a mechanical, formalistic test, but requires the court to make value judgments concerning a broad range of evidence. For example, 'purpose' can be defined by reference to: the situation the enactment was designed to address; reports and papers issued by Ministers before the introduction of the Bill; Explanatory Notes; the policy memorandum which accompanied the legislation; and statements by Ministers during proceedings in Parliament.[14] It is implicit in the purpose inquiry that the court will search for the true rather than the stated purpose, because parliamentary statements of purpose are not dispositive. The 'true purpose' approach is also affirmed in the Explanatory Notes.[15] The Supreme Court has taken a pragmatic and limited approach to the admissibility of evidence as to the effects of legislation,[16] such that purpose can

[11] *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [29] (Lord Hope).
[12] *ibid* [18].
[13] *Imperial Tobacco v Lord Advocate* [2012] CSIH 9 [124] (Lord Reed).
[14] *Martin v Most* [2010] UKSC 10 [25] (Lord Hope).
[15] Explanatory Notes to the Scotland Act 1998, para 29.
[16] See *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill Reference* [2018] UKSC 64 [84]-[85]; *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [53]. Evidence as to the effects of legislation, in contrast to evidence as to its purpose, requires

properly be regarded as the primary determinant of validity. However, a principled general approach to the admissibility of effects evidence has not been undertaken, meaning that the present analysis can do no more than note instances in which effect evidence has been used.

Through s 29(4) a provision which does not relate to reserved matters but makes modifications of Scots law as it applies to reserved matters is treated as applying to reserved matters. This provision reflects the belief that if the Scottish Parliament enacts a provision which substantially affects a reserved matter, that effect must be the legislation's purpose. Once again, the essence of the question is 'purpose'.

B. Canada

I. General

Canada is a federal state consisting of ten provinces and three territories. The Constitution Act 1867[17] sets out the division of power between the provincial and federal levels. Under ss 91 and 92 of that act, legislative sovereignty is shared between the federal Parliament and provincial Legislatures – each is sovereign in its own sphere of competence. This is the primary difference between the UK and Canada. In the UK, Parliament is sovereign in all areas, including those over which devolved Parliaments have authority. By contrast, in Canada both federal and provincial institutions have limited sovereignty. Section 91 states that the federal Parliament shall be competent to make laws 'in relation to' matters not coming within provincial jurisdiction. For greater

an objective inquiry as to the real-world impact of the legislation so as to determine whether the purported *ultra vires* aspect is present.

[17] Originally known as the British North America Act, the Constitution Act 1867 was renamed by the Constitution Act 1982, s 53(2).

certainty, a number of these matters are enumerated, such as the military, currency and coinage, copyrights, and the criminal law. Section 92 states that provincial Legislatures are entitled to make laws 'in relation to' matters coming within an enumerated list, such as the management of public lands, property and civil rights in the province, and generally matters of a local nature.

II. Delineation of Legislative Competence

The allocation of powers is exclusive and exhaustive.[18] Therefore, a given subject matter is within the legislative competence of one level of government *or* the other; it is never within the competence of both levels. Under the Constitution Act 1982 s 52(1), any law that is inconsistent with the provisions of the Constitution, is *to the extent of the inconsistency,* of no force or effect. Therefore, where it is possible to say that only part of a statute is inconsistent with the Constitution, the statute will be 'severed', with the *ultra vires* part being invalid and the remainder remaining intact.

As the statutory test of 'in relation to' in ss 91 and 92 is brief, the process of defining legislative competence has been the subject of extensive judicial development. The courts have adopted the pith and substance[19] inquiry, whereby the court will examine 'the

[18] Peter W. Hogg, *Constitutional Law of Canada* (2017 Student Edition, Carswell), Chapter 15.9(b).

[19] A term first used in *Union Colliery Co v Bryden* [1899] AC 580, 587 (Lord Watson). Since pith and substance is a term which first originated in Canada and is used predominantly in connection with Canada, it will be presumed that references to pith and substance by UK actors refers to the Canadian concept. For a discussion of the origins of pith and substance see Tony Blackshield, 'Working the Metaphor: The Contrasting use of "Pith and Substance" in Indian and Australian Law' [2008] Journal of the Indian Law Institute 518.

purpose of the enacting body and the legal effect of the law'.[20] However, subsequent caselaw has made clear that the pith and substance test is predominantly a determination of the purpose of the provision. There are inevitable situations in which a piece of legislation affects matters outside the jurisdiction of the enacting body; therefore, the pith and substance approach concerns itself with the 'dominant purpose' and disregards extra-jurisdictional incidental effects.[21]

To assess the purpose, the court will rely on several sources, much like in the UK. These include Hansard, minutes of parliamentary debates,[22] related legislation, evidence of the 'mischief' at which the legislation is directed, and government publications.[23] But the court will keep in mind that such evidence is not dispositive of the purpose of the legislation, as evidence will often convey only the intention of a select few individuals rather than the legislature as a whole.[24] As in the UK, the court will seek to find the true purpose of the legislation rather than its stated purpose.[25] The effects of legislation are judged through 'considering how the law will operate and how it will affect Canadians'.[26] The Supreme Court has taken a limited approach to effects evidence, holding that 'only when the effects of the legislation … reflect some alternative or ulterior purpose do the effects themselves take on analytic significance'.[27] As such, effect is only relevant to the extent that the effects of a statute inform the statute's purpose.

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[20] *Reference Re Firearms Act* [2000] 1 SCR 783 [16].
[21] *Canadian Western Bank v Alberta* [2007] 2 SCR 3 [29] (Binnie and Lebel JJ).
[22] *ibid* [27].
[23] *R v Morgentaler* [1993] 3 SCR 463, 483-484 (Sopinka J).
[24] *ibid.*
[25] *Canadian Western Bank v Alberta* [2007] 2 SCR 3 [27].
[26] *Reference Re Firearms Act* [2000] 1 SCR 783 [18].
[27] *R v Big M Drug Mart* [1985] 1 SCR 295, 358 (Wilson J).

The combined effect of these rules is that the validity of Canadian legislation is determined primarily by reference to its purpose. Since Canada places such an emphasis on legislative purpose, similarly to the UK, comparisons between the two are instructive.

2. Is there a Case for Comparison?

The issue of defining legislative competence has been considered in depth in Canada. However, the UK Supreme Court has ruled out the use of comparative jurisprudence when defining devolved legislative competence. It will be argued that its reasons for doing so do not stand up to scrutiny. It is worth emphasising that this section does not attempt to argue that we *should* use Canadian authority, only that *there is nothing to say we should not* use such authority.

A. The UK Supreme Court's Approach

The Supreme Court has proposed three reasons to justify excluding foreign authority, none of which are persuasive.

I. The Legislative Intention Argument

In *Imperial Tobacco*, Lord Hope stated that 'the intention was that it was to the 1998 Act itself, not to decisions as to how the problem was handled in other jurisdictions, that one should look for guidance' as, 'How that issue is to be dealt with has been addressed and determined by the UK Parliament'.[28] There are two immediately apparent potential interpretations of this quote. It may mean that since Parliament intends the court to use the Scotland Act, and Parliament intends that other sources should

[28] *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [13].

not be used *by necessary implication*. Alternatively, it may mean that Parliament intends the court to use the Scotland Act and it *also* intends that other sources should not be used.

The first meaning is clearly untenable. If 'use X' necessarily means 'do not use Y', then there would be a presumption against the use of extra-statutory interpretative aids. It is clear that there is no such presumption in place. The judiciary regularly use extra-statutory aids. Examples include common law principles, equitable principles, and, indeed, comparative jurisprudence.[29] The fact that Parliament has not explicitly authorised the use of Canadian authority does not mean that it has been forbidden.[30]

The second meaning cannot be supported either. There is no positive evidence that Parliament intended that extra-statutory interpretative sources should not be used. There are several factors which point away from this conclusion.

Firstly, the Explanatory Notes – which are intended to inform the interpretation of the Scotland Act – use the phrase 'pith and substance'[31]. 'Pith and substance' is the method employed in Canada to resolve legislative competence issues. Although Explanatory Notes are not legally binding, they are

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[29] Examples include *A v Secretary of State for the Home Department* [2005] UKHL 71; *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22; *White v Jones* [1995] 2 AC 207.

[30] Support for this argument can be found through analogy with administrative law. Sir John Laws has argued, in the context of rebutting the Parliamentary intention-based *ultra vires* theory of judicial review, that there exists an 'undistributed middle' in cases where Parliament neither authorises nor prohibits a certain form of review; 'Illegality: The Problem of Jurisdiction' in Michael Supperstone and James Goudie (eds), *Judicial Review* (2nd edition, London 1997). Similarly, Parliament has not explicitly authorised the use of Canadian authority, but this does not necessarily mean that it is prohibited.

[31] Explanatory Notes to the Scotland Act 1998, para 29.

produced by the governmental department responsible for the legislation and therefore it is reasonable to use them as an interpretative aid and presume that they generally reflect the correct interpretation of the Act.[32] The Notes state that the s 29(3) test 'requires the court to determine … what the provision is about, what is its "true nature", its "pith and substance"'.[33] Since Parliament has referred to a Canadian concept as a tool to be used to characterise Scottish legislation, it is difficult to claim that Parliament has excluded the use of such concepts. Of course, we cannot dispositively claim that this reference is to the *Canadian* conception of pith and substance, but since the concept is most often associated with Canada this is a reasonable presumption to make. Secondly, Lord Sewel, the then Parliamentary Under-Secretary of State for Scotland and a leading proponent of the Scotland Act, contemplated the use of comparative jurisprudence. Speaking in the House of Lords he noted that courts should rely on 'the respection doctrine', as developed in

[32] See Daniel Greenberg, *Craies on Legislation* (Sweet & Maxwell 2017), 935: 'it is improbable, in the absence of strong indications in the Official Report of the debate on the Bill, that Parliament's intention in enacting it will be significantly different from the Government's in proposing it'. This proposition is reinforced by the extensive use of Explanatory Notes as an interpretative aid; see *R v Montalia* [2004] UKHL 50 [35] (Lord Hope), who states that it has become 'common practice' to use Explanatory Notes when issues are raised about the meaning of words.
[33] Although the Supreme Court has held that since the Explanatory Notes were published in 2004 they 'do not form any part of the contextual scene of the statute' and that it would be wrong to pay them any regard, per *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [33], a retrospective intention is an intention nonetheless. Further, the fact that Page cited the Explanatory Notes in his explanation of the legislative competence act supports the legitimacy of using the Notes as an interpretative aid. See Alan Page, *Constitutional Law of Scotland* (W Green 2015), Chapter 7.

Commonwealth Constitutions.[34] Lord Sewel also cited *Gallagher v Lynn*, in which Lord Atkin held that the subject-matter of challenged legislation under the Government of Ireland Act 1920 should be identified by the 'the pith and substance of the legislation'.[35] Lord Sewel argued that this approach applies to the Scotland Act, stating 'it is intended that any question as to whether a provision in an Act of the Scottish parliament "relates to" a reserved matter should be determined by reference to its "pith and substance"'.[36] As with the use of the term in the Explanatory Notes, it cannot be dispositively concluded that Lord Sewel was referring to the Canadian concept, but this is a reasonable interpretation. There was no Parliamentary opposition to Lord Sewel's approach, undermining Lord Hope's argument that Parliament intended to exclude the use of foreign authority.

One may object that Lord Sewel's comments are not indicative of the intention of Parliament. However, his interpretation has been given substantial weight by governmental officials and should be duly considered. It has been recognised in the Explanatory Notes,[37] which cited the above *Gallagher v Lynn* approach in respect of s 29, and through the enactment of the Sewel Convention in the Scotland Act itself. Thus, the fact that he contemplated the use of comparative jurisprudence is a strong indicator that Parliament did not exclude the use of such jurisprudence.

There are significant indications from leading proponents of the Scotland Act that the use of foreign authority

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[34] HL Deb 21 July 1998, vol 592, col 818. 'The respection doctrine' is simply another name for pith and substance. The Explanatory Notes state that the definition of the doctrine is provided by Lord Atkin in *Gallagher v Lynn*, in which he referred to pith and substance.
[35] [1937] AC 863, 870.
[36] HL Deb 21 July 1998, vol 592, col 818-819.
[37] Explanatory Notes to the Scotland Act 1998, paras 28, 29, 58.

is acceptable. Therefore, it would be hasty to conclude that Parliament intended that the courts should not refer to extra-statutory interpretative sources.

II. The Textual Argument

In *Martin v Most* Lord Hope rejected the use of pith and substance in relation to the Scotland Act on the basis that the phrase 'does not appear in any of' the provisions of the Act.[38] This argument does not stand for two main reasons. Firstly, as above, this fact does not show that Parliament intended to exclude the use of pith and substance. Indeed, the Constitution Act 1867 does not use the phrase 'pith and substance', but Canadian judges use that approach. Parliament does not need to enact the phrase for the courts to use the approach. Secondly, even if Parliament were taken to have excluded the explicit use of the pith and substance doctrine, this would not exclude the use of Canadian authority altogether. It will be argued in Part 2.B that the UK approach to defining legislative competence bears striking similarities to the pith and substance approach, such that comparisons between the two may properly be made. But the pith and substance doctrine is only one of the 'tools' used to determine legislative competence. Even if Lord Hope is correct in excluding the pith and substance doctrine from comparison, his argument does not bear on the potential comparison with other doctrines employed in both the UK and Canada, such as severance.

III. The Constitutional Structure Argument

Lord Walker asserted in *Martin v Most* that the task of defining legislative competence of the Scottish Parliament 'is different from defining the division of legislative power between one

[38] *Martin v Most* [2010] UKSC 10 [15]. This point was later affirmed in *Christian Institute v Lord Advocate* [2016] UKSC 51 [32].

federal legislature and several provincial or state legislatures', and 'The doctrine of "pith and substance" mentioned by Lord Hope in his judgment is probably more apt to apply to the construction of constitutions of that type'.[39] The question is whether pith and substance is only suitable in countries which utilise constitutional structures in which sovereignty is divided, such as Canada.

Lord Walker believes that the difference between the Canadian division of powers and the UK delegation of powers is relevant. This difference does indeed render some comparisons between the countries inapt.[40] However, it does not affect the potential comparison of pith and substance. That approach is merely a way to construe the meaning of legislation. The only way in which sovereignty may be relevant in construing devolved legislation is that there is a presumption that Scotland will not legislate outside its competence. But this presumption applies equally when interpreting Canadian legislation, since there is a presumption that each federal and provincial institution will not encroach on the other's competence. Since sovereignty is equally relevant in both countries, the pith and substance doctrine is equally suitable in each.

Lord Walker may argue that the different system of enumerating powers renders the judicial function different and comparisons inapt. The UK uses a single enumeration model, in which there is only one subject-matter list – powers are allocated only to devolved legislatures. Canada adopts a double enumeration model, in which there are two subject-matters lists – powers are allocated to both federal and provincial legislatures. In *R (Hume) v Londonderry Justices*, the court stated that it was unnecessary to use the pith and substance approach to solve the legislative lacuna problem since Northern Ireland operated on a

[39] *ibid* [44].

[40] For instance, comparison of the principles guiding interpretation of the Constitution Act and the Scotland Act.

single enumeration model.[41] If this proposition is correct, then pith and substance is unnecessary in the Scottish context, since Scotland also adopts a single enumeration model. The court cited Calvert, who stated that pith and substance was appropriate in Canada 'Since provincial legislatures cannot legislate in relation to matters on the Dominion Parliament list and vice versa, a strict interpretation might have resulted in there being no body competence to enact many items of legislation. In these circumstances, it would be not only reasonable but necessary to resort to some test of characterisation of predominance'.[42]

Craig and Walters rightly doubt the strength of this argument, writing that 'there is no reason to conclude that the choice of approach is determined by whether a single or double enumeration model is used'.[43] Calvert believes that pith and substance is required to ensure that *an* institution is capable of enacting a particular piece of legislation. However, in the context of the UK devolution settlement, the true issue is ensuring that the *right* institution is capable of enacting a particular piece of legislation. The pith and substance doctrine means that the right institution is able to enact legislation, as the most appropriate institution for each matter will be competent to legislate over that matter. As such, the different enumeration models does not make the judicial task different. The goal is still to discern the meaning of the impugned provisions.

Lord Walker may further argue that recourse to Canadian authority is unnecessary because the Canadian approach is designed to avoid legislative lacunae – the risk that neither institution will be able to enact a particular piece of legislation –

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[41] [1972] NI 91, 110-111.

[42] Harry Calvert, *Constitutional Law in Northern Ireland* (Stevens & Sons Ltd 1968) 194.

[43] Paul Craig and Mark Walters, 'The Courts, Devolution and Judicial Review' [1999] PL 274, 294.

while this is not an issue since the UK Parliament retains legislative sovereignty. The Canadian approach allows legislatures to 'cover the field' of legislative subject-matters, since the Parliament may legislate 'in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces'.[44] By contrast, in the UK the retention of parliamentary sovereignty by the UK Parliament means the field is already covered – lacunae in competence are impossible. Thus, pith and substance supposedly has no benefits.

However, this argument is deficient – it focuses on the practical benefits of the Canadian approach and ignores its normative merits. Practically, the fact that any piece of legislation is held to relate to either federal or provincial competence ensures that an institution *can* enact a piece of legislation. But normatively, this approach can be used to determine whether an institution *should* be able to enact that legislation. This point will be further developed in Part 3. In short, recourse to the Canadian predominant purpose approach can be used to argue whether the Scottish Parliament should be competent in certain areas. The UK Parliament's sovereignty renders the benefit of avoiding legislative lacunae irrelevant, but the normative benefits of the Canadian approach are still relevant.

As such, the UK Supreme Court's reasons for the exclusion of foreign authority do not in fact hold up. It is open for the Court to consider Canadian authority, even though Parliament has not explicitly endorsed this.

[44] Constitution Act 1867, s 91.

B. The Case for Comparison

The Supreme Court's reasons for excluding the use of Canadian jurisprudence in interpreting Scottish devolution legislation are not persuasive, but this alone does not establish that comparisons can be made. There are several factors supporting engagement with Canadian authority in this context: 1) the similarity of the constitutional context, 2) the absence of domestic jurisprudence, and 3) Canadian judicial competence in the area of law.[45] The first point argues that comparisons *can* be made, and the latter two argues that comparisons *should* be made.

I. Why Comparisons Can be Made

Although comparative constitutional analysis is a tool which is increasingly used by judges in a variety of contexts,[46] it has been met with criticism. These criticisms often surround the failure to appreciate the legal context of the foreign area of law being compared or, more commonly, the failure to appreciate the broader social and political context of the foreign constitution.[47] This risk is particularly prevalent when comparing federalism issues, due to the historically contingent federal bargains which create such systems.[48] Therefore, the present goal is to show that

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[45] For detailed discussion of factors supporting a comparative inquiry see Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', (2000) 20 OJLS 449, 516-527.

[46] Gábor Halmai, 'The Use of Foreign Law in Constitutional Interpretation' in Michael Rosenfield and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 1330.

[47] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2016), 152.

[48] Vicki Jackson, *Constitutional Engagement in a Transnational Era*, (OUP 2010), 227-230.

the broader constitutional context – which includes the legal context and political context – is sufficiently similar.

Firstly, the UK and Canada share a legal heritage. Canada received its legal systems through the process of 'reception' – being the process by which British settlers were deemed to have imported English common law with them.[49] The result of reception is that Canadian law utilises the same common law structure as English law and that the overarching legal principles present in English law are equally present in Canada.[50] This similarity has been sustained by the 'reciprocal' relationship between the UK and Canada in the context of legal developments.[51] Indeed, this similarity extends to the constitutional context of the two countries. The preamble to the Constitution Act 1867 states that Canada shall have 'a Constitution similar in Principle to that of the United Kingdom'. There are a great many similarities between the political structures

[49] For more detail see Peter W. Hogg, *Constitutional Law of Canada* (2017 Student Edition, Carswell), Chapter 2.

[50] For example, the similarity between the UK and Canadian treatment of constitutional conventions is sufficiently similar that the UK Supreme Court cited *Re Resolution to Amend the Constitution* [1981] 1 SCR 753 in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [141]. Further, Canada utilises a principle of parliamentary sovereignty (see *Reference Re Canada Assistance Plan* [1991] 2 SCR 525) and a series of prerogative powers (see Craig Forcese, 'The Executive, the Royal Prerogative, and the Constitution' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017).

[51] Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, 'Introduction' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017). A pertinent example is the fact that the ECHR influenced the Canadian Charter or Rights and Freedoms, which was later used in the development of the UK Human Rights Act (see the Constitution Unit's *The Impact of the Human Rights Act: Lessons from Canada and New Zealand*, 1999).

present in the Canadian and UK constitutions.[52] Indeed, UK judges make reference to Canadian authority in several cases,[53] including constitutional cases.[54] This further affirms the suitability of comparison.

Further, the conditions and goals surrounding the division of legislative powers are similar, meaning that comparisons between the two are suitable. Each country is composed of a number of diverse regions. Notably, Scotland and Quebec enjoy markedly different cultures from the rest of the UK and Canada respectively. Each have been granted a substantial degree of autonomy. Each country utilises a similar method of decentralisation, being that legislatures are only competent to make laws 'in relation to' matters deemed within their competence.[55] Since each arrangement places emphasis on the ability of regional units to govern themselves, the pertinent question is which level of government *should* legislate over a given subject matter. As noted above, the pith and substance inquiry is a valuable tool for answering this question, even though the UK Parliament retains legal sovereignty to legislative over any subject matter. The suitability of comparisons is strengthened by the fact

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[52] For example, each country utilises a parliamentary system of government through the medium of a bicameral Parliament controlled by a powerful executive. The executive is composed of a Prime Minister, being the leader of the party with a majority in Parliament, and a number of Ministers. Each country utilises a first-past-the-post electoral system, with the result that power is concentrated between a small number of powerful parties. For further discussion of the similarities between the two countries, see R. A. W. Rhodes, John Wanna, and Patrick Weller, *Comparing Westminster* (OUP 2009).

[53] Examples include: *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 [11], [13], [27] (and elsewhere); *White v Jones* [1995] 2 AC 207, 255.

[54] Examples include: *A v Secretary of State for the Home Department* [2005] UKHL 71 [17], [37]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [141].

[55] Constitution Act 1867, s 92.

that comparisons have already been made in the judicial[56] and academic[57] contexts.

II. Why Comparisons Should be Made

Due to the absence of UK case law in this area, it can be argued that the UK could benefit from employing Canadian authority. There are many provisions of the Scotland Act that the judiciary have not had the opportunity to address. Even where provisions are applied, they are often applied without detailed discussion.[58] Such a dearth of authority means that the law surrounding legislative competence issues is both uncertain and unstable. One may argue that the UK's dearth of case law indicates that interpretation of the Scotland Act is not an issue, but this conflates the existence of litigation with the existence of a problem. The present aim is not to shed light on the ways devolved acts can be made litigation proof: it is to shed light on the limits of devolved legislative competence. There is a political issue, and the *potential* for a legal issue, due to the lack of authority. Recourse to foreign authority is an effective way to remedy this issue. Of course, conclusive pronouncement on the interpretation of the Scotland Act by the courts is an ideal remedy, but, in the interim, recourse to Canadian authority can provide a suitable substitute.

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[56] *Imperial Tobacco v Lord Advocate* [2012] CSIH 9 [104], [120], [121], [124]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [141].

[57] Alan Page, *Constitutional Law of Scotland* (W Green 2015), 7-32, 7-35, 7-39.

[58] A prominent example is *Christian Institution v Lord Advocate* [2016] UKSC 51. In that case, the appellants challenged the validity of Part 4 of the Children and Young People (Scotland) Act 2014. They claimed that Part 4 should be severed from the rest of the Act. However, Lady Hale assumed that Part 4 could indeed be severed without establishing this by reference to s 29(1) of the Scotland Act 1998.

The argument for comparison is further strengthened by Canadian competence in this area. Canada enjoys the benefit of over 150 years of jurisprudence concerning allocation of powers. Due to the brevity of the statutory test, the allocation of powers in Canada has been the subject of a wealth of judicial and academic consideration.[59] Although the UK has experience in the delegation of governmental functions throughout its history, this experience is different from the process of allocating powers between democratically legitimated legislatures, such that it is not particularly helpful in determining the legislative competence of the Scottish Parliament. In light of the absence of authority in the UK, there is a strong prima facie argument that Canadian authority will be valuable.

III. Interim Conclusion

Thus far, it has been established that the Supreme Court's reasons for the exclusion of Canadian authority are not compelling, and that the similarity between the two contexts is sufficient to think that comparison may be fruitful. To prove that comparison is valuable, a more detailed analysis of Canadian jurisprudence and its relation to the Scotland Act will be undertaken.

[59] Examples include Peter W. Hogg, *Constitutional Law of Canada* (2017 Student Edition, Carswell), Chapters 15-33; Bora Laskin, *Canadian Constitutional Law* (Carswell 1975), Chapter 1; Louis Davis, *Canadian Constitutional Law Handbook* (Canada Law Book Inc. 1985), Chapters 20-55, 76-88; William Lederman, *Continuing Canadian Constitutional Dilemmas* (1981 Butterworths), Chapters 12-23.

3. 'Purpose' and the Characterisation of Impugned Legislation

To determine whether a provision is within legislative competence a court must determine what the provision means. The approaches of the UK and Canada will be discussed to establish that reflection on Canadian authority can help elucidate the proper approach to issues in UK law. In particular, the UK has not elucidated the appropriate use of precedent, nor the appropriate use of evidence as to legislative effects. Through reflection on the normative underpinnings of the purpose inquiry and the approach taken in Canadian courts, these questions can be answered.

The present issue is one of classification: legislation must be placed into the category of 'within' or 'outside' devolved legislative competence. For achieving this goal, the 'purpose' criterion emerges as an ideal classificatory tool. Classification is an inherently reductive process, because 'No definition ever states the sum total of the qualities that seem to go to the being of a thing; it always involves a selection from those qualities'.[60] There are as many possible classifications of a rule as that rule has distinct characteristics which may be isolated as criteria of classification[61]. The issue is determining which characteristics of a piece of legislation are relevant to the goal of classifying that legislation as valid or invalid.

Lederman argues that 'a rule of law for purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one'.[62]

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[60] Glanville Williams, 'Language and the Law – IV' (1945) 61 LQR 889.
[61] William Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths 1981) 238.
[62] *ibid* 241.

Legislative purpose stands out as a way of focusing attention on the most important feature. After all, the most important feature of a thing is, usually, its raison d'être. Taking purpose as the primary classificatory tool, the proper use of different types of evidence becomes clear. Although there are many similarities between the UK and Canadian approaches to evidence, Canadian authority is useful for reflecting on the reasons underlying the use of different types of evidence to determine the purpose of a provision.

For instance, Canadian authority establishes that an approach based on purpose means that undue weight should not be placed on previous authority. The UK has not discussed the appropriate use of previous authority, but the courts have cited previous case law without establishing whether doing so is justified. Since no two statutes are the same, it is likely that the purpose of each impugned statute will have be to be considered in its own right.[63] Even where statutes share a 'form', this form is not conclusive of the substance of the statute. For example, in *Bank of Toronto v Lambe,*[64] a provincial law imposing a tax on banks was held to be intra vires as its purpose was raising revenue in the provinces. By contrast, in *Alberta Bank Taxation Reference,*[65] a similar tax was held to be ultra vires as the purpose of the law related to banking. The distinguishing factor was that in the former case the tax was not directed at banks in particular, but at a range of companies.[66] The fact remains that both cases concerned a provincial tax on banks, but the broader purpose of the legislation affected its validity. It may be possible to say that, generally, a certain 'type' of statute is valid or invalid, but frequently there will be new laws which the precedents on

[63] F. E. LaBrie, 'Constitutional Interpretation and Legislative Review' (1950) 8 U Toronto LR 298, 342.
[64] (1887) 12 App Cas 575.
[65] [1939] AC 117.
[66] *ibid* 134.

classification 'will not touch decisively or concerning which indeed there may be conflicting analogies'.[67] For this reason, Lederman writes that the degree of certainty which precedent provides 'is often much overstated'.[68]

Further, a purpose-based approach means that evidence as to effects must be admissible to some extent, but a limited extent. In the UK, the Supreme Court has taken a pragmatic approach to determining the effects of challenged provisions.[69] However, it has not embarked on a principled analysis of the types of effect evidence which can be taken into account. By contrast, Canada has undertaken a far more rigorous analysis of the admissibility of effects evidence.[70]

Lederman notes that purpose alone is an insufficient criterion for the purpose of classification. This is so because 'A rule of law expresses what should be human action or conduct *in a given factual situation*'.[71] We assume that a rule will be observed, so we judge the rule's meaning in terms of the consequences of that action called for. It is the effects of observance of the rule that, in part, constitute its purpose.[72] Therefore, the classification

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[67]William Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths 1981) 243.

[68] *ibid.*

[69] For instance, it has taken into account facts such as the date on which certain provisions will come into force (see *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill Reference* [2018] UKSC 64 [84]-[85]) and the likelihood of ministerial powers ever being exercised (see *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [53]).

[70] As built up through a corpus of caselaw including: *AG for Alberta v AG for Canada* [1939] AC 117; *Samur v Quebec* [1953] 2 SCR 299; *Re Anti-Inflation Act* [1976] 2 SCR 373; *Big M Drug Mart* [1985] 1 SCR 295; *R v Morgentaler* [1993] 3 SCR 463; *Reference Re Firearms Act* [2000] 1 SCR 783.

[71] William Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths 1981), 239 (own emphasis added).

[72] *ibid.*

question must be determined by reference to the legislation's purpose and effect. But the importance of legislative effect in determining purpose is context dependent. Lederman demonstrates this proposition though discussing a federal tax on alcohol consumption.[73] The effects of the law are to reduce consumption of alcohol, and to free up alcohol supplies. Normally, the effects of reducing alcohol consumption would reflect a primary purpose of regulating alcohol consumption. This legislation would not be within federal legislative competence, as it relates to Property and Civil Rights in the Provinces. However, during wartime the effect of freeing alcohol supplies, which could then be used to manufacture explosives, would reflect a primary purpose of national defence. This legislation would be within federal legislative competence. Since effect will often only confirm the apparent purpose of the legislation it is clear that an analysis of purpose should be the first question asked, but an analysis of effect is a valuable fallback in cases where the legislation's true purpose differs from its apparent purpose.

The conclusion that a restrained approach should be taken to effects evidence is reinforced by the fact that judging the effects of legislation risk encroaching on Parliament's competence. Effects determinations require the court to make judgments about how the legislation will operate in relation to its intended purpose, so there is a risk that that court may make determinations of the efficacy of the legislation. Such determinations should be avoided, as 'Parliament is the judge of whether a measure is likely to achieve its intended purposes'.[74] Thus, a restrained approach to the admissibility of evidence on effect has been taken.

The conclusion which can be drawn from this discussion is that purpose should be the criterion adopted to determine

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[73] *ibid.*

[74] *Reference Re Firearms Act* [2000] 1 SCR 783 [18].

whether legislation is within legislative competence, and that other types of evidence should only be relevant to the extent that they inform the legislative purpose. The Canadian Supreme Court has held that there is 'no general principle of admissibility or inadmissibility'[75] and that 'only when the effects of the legislation … reflect some alternative or ulterior purpose do the effects themselves take on analytic significance'.[76] As such, effect is only relevant to the extent that the effects of a statute inform the statute's purpose. Canadian authority provides useful examples of situations in which legislative effect will reflect ulterior purposes. For instance, the economic effects of legislation may reveal a purpose which is not apparent from the statutory wording. In *Alberta Bank* the challenged legislation was classified as relating to banking because it resulted in a 'gigantic increase' in the taxation of banks which was not apparent from the legislation alone.[77] The manner in which a statute is actually enforced may reveal an ulterior purpose. In *Saumur*[78] it was held that legislation which purported to control the distribution of literature in the street was actually used as a vehicle for censorship and was thus ultra vires.

As such, reflection on Canadian jurisprudence can make clear the utility of the 'purpose' criterion, and the appropriate use of evidence as a means of discerning purpose. Through employing Canadian authority as a reflective tool, a more principled approach to the interpretation of legislative purpose through the use of certain types of evidence can be utilised.

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[75] *Re Anti-Inflation Act* [1976] 2 SCR 373, 389 (Laskin CJ).
[76] *R v Big M Drug Mart* [1985] 1 SCR 295, 358 (Wilson J).
[77] *Alberta Bank Taxation Reference* [1939] AC 117, 131.
[78] *Saumur v Quebec* [1953] 2 SCR 299.

4. Purpose and Severance

The democratic legitimacy of legislation demands that the judiciary should uphold its validity when possible. For this reason, judges in the UK and Canada have expressed a desire to uphold the validity of legislation[79] and have developed tools to give themselves opportunities to hold legislation *intra vires*. Severance is one of the methods used to fulfil this goal.

In the UK, neither the reasons behind severance nor the appropriate limits of severance have been explained. But there has been little exposition surrounding the application of this section. In the *Christian Institute*[80] case the Supreme Court held that only certain provisions of the challenged Act were invalid, but there was no discussion surrounding the feasibility of separating those provisions from the rest of the Act.[81] Reflection on Canadian law will be used to elaborate on the reasons why legislative purpose and severance share a close relationship, and how the concept of purpose may be used to define the appropriate limits of severance.[82]

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[79] For examples see *AXA General Insurance v Lord Advocate* [2011] UKSC 45 [46], [49], and *Canadian Western Bank v Alberta* [2007] 2 SCR 3 [48].

[80] *Christian Institute v Lord Advocate* [2016] UKSC 51.

[81] Admittedly, the challenged legislation was not in force at the time, meaning that the question of whether the remainder of the Act could stand without the challenged provisions was purely academic. However, discussion of the principles surrounding the UK severance doctrine would still be welcome.

[82] One may argue that there is little to be gained from reference to the Canadian severance doctrine because the UK has a severance doctrine used in the context of subordinate legislation. This argument does not hold, as other UK authority on severance is of little relevance to severance in the context of devolved legislation. Most delegations of legislative power take the form 'Actor X may make Legislation Y for Purpose Z'. An example of this form is to be found in s 14(1) of the Military Lands Act 1892, which was the subject of *DPP v Hutchinson*

It is clear that there is some relationship between legislative purpose and severance. In the UK, devolved legislation is only invalid to the extent that its purpose relates to reserved matters. Severance can therefore be applied because the legislative purpose relates to reserved matters *only to a limited extent*. Thus, severance is applicable because a piece of devolved legislation has multiple purposes, and only one of those purposes relates to reserved matters. As Lederman puts it, when the provisions of a statute are 'all facets of a single plan or scheme' the statute will be held valid or invalid as a whole. But 'it may be that a single statute will fall into parts which can be taken as separate units for the purposes of determining which authority has power to enact them'.[83] In this case, severance is appropriate. Where a statute is conceptualised as a number of separate 'purpose units', then severance can be rationalised as an attempt to uphold legislative intent. This is so because 'it may be assumed that the legislative body would have enacted one [unit] even if it had been advised that it could not enact the other'.[84] On this basis severance shares a direct link with legislative purpose – severance is the tool used to mitigate the tensions caused when democratically legitimate legislation is subjected to validity review by the courts. The UK judiciary are able to uphold legislative purpose as far as possible. Through doing so, they can maximise democratic representation

[1990] 3 WLR 196. If the validity of Legislation Y is challenged by way of judicial review, the question is whether it goes beyond the scope of power designated by Purpose Z. This question does not take into account Actor X's *purpose* in enacting Legislation Y. When determining the severability of devolution legislation, the court must demarcate 'purpose units'. As such, UK severance authority will often be irrelevant in the context of devolution legislation since it will not address the determination of legislative purpose.

[83] William Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths 1981) 247.

[84] Peter W. Hogg, *Constitutional Law of Canada* (2017 Student Edition, Carswell) 15-24.

in government whilst allowing the judiciary to better maintain their proper constitutional role.

So, severance can, in principle, be applied where a piece of legislation is composed of distinct 'units', each with a separate legislative purpose. From this proposition, the Canadian test of severance may be derived: whether the intra vires part 'is so inextricably bound up with the part deemed invalid that what remains cannot independently survive'.[85] Severance will only be possible where intra vires and ultra vires parts may independently survive without the other. As noted by Lamer CJ, severance reflects the assumption 'that the legislature would have passed the constitutionally sound part of the scheme without the unsound part'.[86] This independence reflects the distinct legislative purpose in enacting each part. The legislative purposes must be wholly independent. But the difficult issue is determining what will constitute an independent purpose. It is clear that multiple purposes may exist within a piece of legislation. Indeed, in *Christian Institute*, Part 4 of Children and Young People (Scotland) Act 2014 was treated as a conceptually distinct unit, such that it could be severed. But could multiple purposes exist within a single Part, or within a legislative heading, or even within a single section? Analysis of Canadian law may shed light on this issue, and through doing so define the appropriate limits of severance.

Lederman argues that it is impossible to lay down any standard test for grouping legal rules for a single purpose,[87] and it appears that this is correct. The court has refused to apply severance in a great number of cases and held entire statutes to

[85] *Reference Re Alberta Bill of Rights Act* [1947] AC 503, 518.
[86] *Schachter v Canada* [1992] 2 SCR 679.
[87] William Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths 1981) 247.

be invalid.[88] However, severance has been used with respect to smaller units of legislation. For instance, *Toronto Corp v York Corp* stands for the proposition that legislative purpose can be differentiated on the basis of function – where a provision concerns two distinct purposes it is possible to sever that provision.[89] The case concerned judicial and administrative functions given to the Ontario Municipal board, allowing Lord Atkin to hold that the provisions governing judicial functions were severable from the remainder of the Township of York Act 1936. Further, *Roy v Plourde* shows that legislative purpose can be differentiated by reference to *creation* of legal rules and *limitation* of legal rules.[90] This seems correct. A legislature will have one purpose, supported by reasons, for the creation of a rule of law. The legislature will have other reasons, reflecting another purpose, for limiting that rule. A provision may be severed along these lines.

This discussion shows how Canadian authority can be used to examine the relationship between severance and the purpose inquiry in order to establish a principled limit to the severance doctrine and that individual Canadian cases may shed light on what the correct approach should be. Since the UK has not developed their concept of severance in a principled manner, Canadian authority provides an invaluable source of reflective material. Indeed, applying the 'purpose unit' approach to the Children and Young People (Scotland) Act 2014, we can say with confidence that the Named Person Service established under Part 4 (the severed part of the Act) reflects a distinct purpose from the remainder of the Act, which discusses various other distinct mechanisms aimed at promoting the welfare of children and

[88] Peter W. Hogg, *Constitutional Law of Canada* (2017 Student Edition, Carswell) 15-24.
[89] [1938] AC 415, 428.
[90] [1943] SCR 262, 264.

young people. Since the rest of the Act is not inextricably bound up with Part 4 and can survive independently (applying the *Alberta Bill of Rights Test*) it may be severed.

Conclusion

Contrary to the UK Supreme Court's current stand, it seems that there is something to be gained from reflecting on Canadian authority. The reasons explicitly given for the exclusion of foreign authority do not stand up to scrutiny, nor are there any implicit reasons supporting exclusion: in fact, the similar legal and political contexts of the UK and Canada point towards the feasibility of comparison. Indeed, it has been argued that comparisons are beneficial as a means of reflecting on the conceptual foundations of UK devolution legislation and defining the appropriate operation of these provisions. The democratic representation of devolved citizens is dependent on the effectiveness of their respective Parliaments. At present the limits of devolved legislative competence are uncertain. This uncertainty hampers the effectiveness of devolved institutions, as they cannot define their own competence. This ineffectiveness will compromise the enfranchisement of devolved citizens. As such, more certain competence limits are desirable as a way to maximise the effectiveness and, therefore, the democratic enfranchisement of devolved citizens. Canadian authority can provide this certainty. That is not to say that Canadian authority should be regarded as binding in the UK, but it would be a mistake to ignore such an extensive and well-reasoned body of legal material. For these reasons, courts should reflect upon Canadian authority when interpreting the extent of devolved legislative competence under the Scotland Act 1998.