Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

APPLICANT'S BOOK OF AUTHORITIES
(VOLUME II of II)

(in Response to Respondents' Motion to Strike Notice of Application)

Aniz Alani
[redacted]

Applicant

On his own behalf

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*March 14.
*April 24.

IN THE MATTER OF A REFERENCE AS TO THE MEANING OF THE WORD " PERSONS " IN SECTION 24 OF THE BRITISH NORTH AMERICA ACT, 1867.

Constitutional law—Statute—Senate—Eligibility of women—" Qualified persons "—Meaning—B.N.A. Act, 1867, ss. 23, 24.

Women are not " qualified persons " within the meaning of section 24 of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the Governor General to the Senate of Canada.

Per Anglin C.J.C. and Mignault, Lamont and Smith JJ.—The authority of *Chorlton* v. *Lings* (L.R. 4 C.P. 374) is conclusive alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of " qualified persons " within s. 24 of the B.N.A. Act by the terms in which s. 23 is couched, so that (if otherwise applicable) Lord Broughams' Act (which enacts that " words importing the masculine gender shall be deemed and taken to include females) cannot be invoked to extend the term " qualified persons " to bring " women " within its purview.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

Per Anglin C.J.C. and Lamont and Smith JJ.—The various provisions of the B.N.A. Act passed in the year 1867 bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were enacted. If the phrase "qualified persons" in section 24 includes women to-day, it has so included them since 1867. But it must be inferred that the Imperial Parliament, in enacting sections 23, 24, 25, 26 and 32 of the B.N.A. Act, when read in the light of other provisions of the statute and of relevant circumstances proper to be considered, did not give to women the power to exercise the public functions of a senator, at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House.

Per Duff J.—It seems to be a legitimate inference that the B.N.A. Act, in enacting the sections relating to the "Senate," contemplated a second Chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same, though, necessarily, in detail, not identical, with that of the Legislative Councils established by the earlier statutes of 1791 and 1840; and, under those statutes, it is hardly susceptible of dispute that women were not eligible for appointment.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act* of certain question for hearing and consideration as to the meaning of the word "persons" in section 24 of the British North America Act, 1867.

The Order in Council providing for the reference was dated 19th October, 1927 and reads as follows:

"The Committee of the Privy Council have had before "them a Report, dated 18th October, 1927, from the Min- "ister of Justice, submitting that he has had under con- "sideration a petition to Your Excellency in Council dated "the 27th August, 1927 (P.C. 1835), signed by Henrietta "Muir Edwards, Nellie L. McClung, Louise C. McKinney, "Emily F. Murphy and Irene Parlby, as persons interested "in the admission of women to the Senate of Canada, "whereby Your Excellency in Council is requested to refer "to the Supreme Court of Canada for hearing and consid- "eration certain questions touching the power of the Gov- "ernor General to summon female persons to the Senate of "Canada.

"The Minister observes that by section 24 of the British "North America Act, 1867, it is provided that:—

'The Governor General shall from Time to Time, 'in the Queen's Name, by Instrument under the Great

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'Seal of Canada, summon qualified Persons to the 'Senate; and, subject to the Provisions of this Act, 'every Person so summoned shall become and be a 'Member of the Senate and a Senator.'

"In the opinion of the Minister the question whether "the word 'Persons' in said section 24 includes female "persons is one of great public importance.

"The Minister states that the law officers of the Crown "who have considered this question on more than one oc- "casion have expressed the view that male persons only "may be summoned to the Senate under the provisions of "the British North America Act in that behalf.

"The Minister, however, while not disposed to question "that view, considers that it would be an Act of justice to "the women of Canada to obtain the opinion of the "Supreme Court of Canada upon the point.

"The Committee therefore, on the recommendation of "the Minister of Justice, advise that Your Excellency may "be pleased to refer to the Supreme Court of Canada for "hearing and consideration the following question:—

"Does the word 'Persons' in section 24 of the British "North America Act, 1867, include female persons?"

Pursuant to an order of the court, notification of the hearing of the reference was sent to the Attorneys General of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan and to the above petitioners. The Attorneys General of the provinces of Quebec and Alberta were represented by counsel at the hearing.

Hon. Lucien Cannon K.C., Solicitor-General, *Eug. Lafleur K.C.* and *C. P. Plaxton K.C.* for the Attorney General of Canada.

N. W. Rowell K.C. and *G. C. Lindsay* for the petitioners.

Chas. Lanctot K.C. for the Attorney General for Quebec.

N. W. Rowell K.C. for the Attorney General for Alberta.

ANGLIN C.J.C.—By Order of the 19th of October, 1927, made on a petition of five ladies, His Excellency the Governor in Council was pleased to refer to this court "for hearing and consideration" the question:

"Does the word 'Persons' in section 24 of the *British North America Act,* 1867, include female persons?"

Notice of this reference was published in the *Canada Gazette* and notice of the hearing was duly given to the petitioners and to each of the Attorneys General of the several provinces of Canada. Argument took place on the 14th of March last when counsel were heard representing the Attorney General of Canada, the Attorneys General of the provinces of Quebec and Alberta and the petitioners.

Section 24 is one of a group, or fasciculus of sections in the *British North America Act,* 1867, numbered 21 to 36, which provides for the constitution of the Senate of Canada. This group of sections (omitting three which are irrelevant to the question before us) reads as follows:

THE SENATE

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

* * * *

23. The Qualification of a Senator shall be as follows:

(2) He shall be of the full age of Thirty Years;

(2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Francalleu or in Roture, within the Province for which he is appointed, of the value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four Thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified

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Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

27. In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

28. The Number of Senators shall not at any Time exceed Seventy-eight.

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

31. The Place of a Senator shall become vacant in any of the following Cases:—

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate.

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

(4) If he is attainted of Treason or convicted of Felony or any Infamous Crime;

(5) If he ceases to be qualified in respect of Property or of Residence; provided that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by summons to a fit and qualified Person fill the Vacancy.

33. If any question arises respecting the qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

* * *

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

* * *

The *British North America Act*, 1867, does not contain provisions in regard to the Senate corresponding to its sections 41 and 52, which, respectively, empower the Parliament of Canada from time to time to alter the qualifications or disqualifications of persons to be elected to the House of Commons and to determine the number of members of which that House shall consist. Except in regard to the number of Senators required to constitute a quorum (s. 35), the provisions affecting the constitution of the Senate are subject to alteration only by the Imperial Parliament.

Section 33 which empowers the Senate to hear and determine any question that may arise respecting the qualification of a Senator, applies only after the person whose qualification is challenged has been appointed or summoned to the Senate. That section is probably no more than declaratory of a right inherent in every parliamentary body. (*Vide* clause 1 of the preamble to the B.N.A. Act and the quotation of Lord Lyndhurst's language made from MacQueen's Debates on The Life Peerage Question, at p. 300, by Viscount Haldane in Viscountess Rhondda's Claim (1).

It should be observed that, while the question now submitted by His Excellency to the court deals with the word "Persons," section 24 of the B.N.A. Act speaks only of "qualified Persons"; and the other sections empowering the Governor General to make appointments to the Senate (26 and 32) speak, respectively, of "qualified Persons" and of "fit and qualified Persons." The question which we have to consider, therefore, is whether "female persons" are qualified to be summoned to the Senate by the Governor General; or, in other words—Are women eligible for appointment to the Senate of Canada? That question it is the duty of the court to "answer" and to "certify to the Governor in Council for his information * * * its opinion * * * with the reasons for * * * such answer." *Supreme Court Act*, R.S.C. [1927] c. 35, s. 55, subs. 2.

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to

(1) [1922] 2 A.C. 339, at pp. 384-5.

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construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.

Passed in the year 1867, the various provisions of the B.N.A. Act (as is the case with other statutes, *Bank of Toronto* v. *Lambe*) (1) bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.

In a passage from *Stradling* v. *Morgan* (2), often quoted, the Barons of the Exchequer pointed out that:

> The Sages of the Law heretofore have construed Statutes quite contrary to the Letter in some appearance, and those Statutes which comprehend all things in the Letter they have expounded to extend but to some Things, and those which generally prohibit all people from doing such an Act they have interpreted to permit some People to do it and those which include every Person in the Letter they have adjudged to reach to some Persons only, which Expositions have always been founded upon the Intent of the Legislature, which they have collected sometimes by considering the cause and Necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign Circumstances. So that they have been guided by the Intent of the Legislature, which they have always taken according to the Necessity of the Matter, and according to that which is consonant with Reason and good Discretion.

"In deciding the question before us", said Turner L. J., in *Hawkins* v. *Gathercole* (3),

> we have to construe not merely the words of the Act of Parliament but the intent of the Legislature as collected, from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject.

Two well-known rules in the construction of statutes are that, where a statute is susceptible of more than one meaning, in the absence of express language an intention to abrogate the ordinary rules of law is not to be imputed to Parliament (*Wear Commissioners* v. *Adamson* (4)); and,

> as they are framed for the guidance of the people, their language is to be considered in its ordinary and popular sense, per Byles J., in *Chorlton* v. *Lings* (5).

Two outstanding facts or circumstances of importance bearing upon the present reference appear to be

(1) [1887] 12 A.C. 575, at p. 579.
(2) 1 Plowd. 203, at p. 205.
(3) 6 DeG. M. & G., 1, at p. 21.
(4) (1876) 1 Q.B.D. 546 at p. 554.
(5) (1868) L.R. 4 C.P. 374, at p. 398.

(*a*) that the office of Senator was a *new* office first created by the B.N.A. Act.

It is an office, therefore, which no one apart from the enactments of the statute has an inherent or common law right of holding, and the right of any one to hold the office must be found within the four corners of the statute which creates the office, and enacts the conditions upon which it is to be held, and the persons who are entitled to hold it; (*Beresford-Hope* v. *Sandhurst* (1), per Lord Coleridge, C.J.);

(*b*) that by the common law of England (as also, speaking generally, by the civil and the canon law: *foeminae ab omnibus officiis civilibus vel publicis remotae sunt*) women were under a legal incapacity to hold public office, referable to the fact (as Willes J., said in *Chorlton* v. *Lings* (2), that in this country in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.

The same very learned judge had said, at p. 388:

Women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth. That would be quite inconsistent with one of the glories of our civilization, the respect and honour in which women are held. This is not a mere fancy of my own, but will be found in Selden, de Synedriis Veterum Ebraeorum, in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon motives of decorum, and was a privilege of the sex (*honestatis privilegium*): Selden's Works, vol. 1, pp. 1083-1085. Selden refers to many systems of law in which this exclusion prevailed, including the civil law and the canon law, which latter, as we know, excluded women from public functions in some remarkable instances. With respect to the civil law, I may add a reference to the learned and original work of Sir Patrick Colquhon (*sic*) on the Roman Law, vol. 1, c. 580, where he compares the Roman system with ours, and states that a woman "cannot vote for members of parliament, or sit in either the House of Lords or Commons."

As put by Lord Esher, M. R. (who, however, says he had "a stronger view than some of (his) brethern") in *Beresford-Hope* v. *Sandhurst* (3)

I take the first proposition to be that laid down by Willes J., in the case of *Chorlton* v. *Lings* (4). I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public functions. Willes J., stated so in that case, and a more learned judge never lived.

(1) (1889) 23 Q.B.D. 79, at p. 91.
(2) L.R. 4 C.P. 374, at p. 392.
(3) 23 Q.B.D. 79, at p. 95.
(4) L.R. 4 C.P. 374.

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While Willes, J., had spoken of "judicial and like public functions" at p. 388, the tenor of his judgment indicates unmistakably that it was his view that to the legal incapacity of women for public office there were few, if any, exceptions. See *De Sousa* v. *Cobden* (1).

The same idea is expressed by Viscount Birkenhead L.C., in rejecting The Viscountess Rhondda's Claim to a Writ of Summons to the House of Lords (2).

> By her sex she is not—except in a wholly loose and colloquial sense—disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which *ex vi termini* cannot include this right

Viscount Haldane, who dissented in the *Rhondda Case* (2), said, at p. 386:

> The reason why peeresses were not entitled to it (the writ of summons) was simply that as women they could not exercise the public function. That appears to have been the considered conclusion of James Shaw Willes J., one of the most learned and accurate exponents of the law of England who ever sat on the Bench. He says in *Chorlton* v. *Lings* (3) that the absence of all rights of this kind is referable to the fact that by the common law women have been excused from taking any part in public affairs.

Reference may also be had to *Brown* v. *Ingram* (4); *Hall* v. *Incorporated Society of Law Agents* (5); *Rex* v. *Crossthwaite* (6), and to the judgment of Gray C.J., in *Robinson's Case* (7), and also to Pollock & Maitland's History of English Law, vol. 1, pp. 465-8.

Prior to 1867 the common law legal incapacity of women to sit in Parliament had been fully recognized in the three provinces—Canada (Upper and Lower), Nova Scotia and New Brunswick, which were then confederated as the Dominion of Canada.

Moreover, paraphrasing an observation of Lord Coleridge C.J., in *Beresford-Hope* v. *Sandhurst* (7), it is not also perhaps to be entirely left out of sight, that in the sixty years which have run since 1867, the questions of the rights and privileges of women have not been, as in former times they were, asleep. On the contrary, we know as a matter of fact that the rights of women, and the privileges

(1) [1891] 1 Q.B. 687, at p. 691.
(2) [1922] 2 A.C. 389, at p. 362.
(3) L.R. 4 C.P. 374
(4) (1868) 7 Court of Sess. Cases, 3rd Series, 281.
(5) (1901) 38 Scottish Law Reporter, 776.
(6) (1864) 17 Ir. C.L.R. 157, 463, 479.
(7) (1881) 131 Mass., 371, at p. 379.
(8) 23 Q.B.D. 79, at pp. 91, 92.

of women, have been much discussed, and able and acute minds have been much exercised as to what privileges ought to be conceded to women. That has been going on, and surely it is a significant fact, that never from 1867 to the present time has any woman ever sat in the Senate of Canada, nor has any suggestion of women's eligibility for appointment to that House until quite recently been publicly made.

Has the Imperial Parliament, in sections 23, 24, 25, 26 and 32 of the B.N.A. Act, read in the light of other provisions of the statute and of relevant circumstances proper to be considered, given to women the capacity to exercise the public functions of a Senator? Has it made clear its intent to effect, so far as the personnel of the Senate of Canada is concerned, the striking constitutional departure from the common law for which the petitioners contend, which would have rendered women eligible for appointment to the Senate at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House? Has it not rather by clear implication, if not expressly, excluded them from membership in the Senate? Such an extraordinary privilege is not conferred furtively, nor is the purpose to grant it to be gathered from remote conjectures deduced from a skilful piecing together of expressions in a statute which are more or less precisely accurate. (*Nairn* v. *University of St. Andrews* (1). When Parliament contemplates such a decided innovation it is never at a loss for language to make its intention unmistakable. "A judgment", said Lord Robertson in the case last mentioned, at pp. 165-6

> is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

There can be no doubt that the word "persons" when standing alone *prima facie* includes women. (Per Loreburn L.C., *Nairn* v. *University of St. Andrews* (1)). It connotes human beings—the criminal and the insane equally with the good and the wise citizen, the minor as well as the adult. Hence the propriety of the restriction placed upon it by the immediately preceding word "qualified" in ss. 24 and 26 and the words "fit and qualified" in

(1) [1909] A.C. 147, at p. 161.

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s. 32, which exclude the criminal and the lunatic or imbecile as well as the minor, who is explicitly disqualified by s. 23 (1). Does this requirement of qualification also exclude women?

Ex facie, and apart from their designation as "Senators" (s. 21), the terms in which the qualifications of members of the Senate are specified in s. 23 (and it is to those terms that reference is made by the word "qualified" in s. 24) import that men only are eligible for appointment. In every clause of s. 23 the Senator is referred to by the masculine pronoun—"he" and "his"; and the like observation applies to ss. 29 and 31. *Frost* v. *The King* (1). Moreover, clause 2 of section 23 includes only "natural-born" subjects and those "naturalized" under statutory authority and not those who become subjects by marriage—a provision which one would have looked for had it been intended to include women as eligible.

Counsel for the petitioners sought to overcome the difficulty thus presented in two ways:

(*a*) by a comparison of s. 24 with other sections in the B.N.A. Act, in which, he contended, the word "persons" is obviously used in its more general signification as including women as well as men, notably ss. 11, 14 and 41.

(*b*) by invoking the aid of the statutory interpretation provision in force in England in 1867—13-14 Vict., c. 21, s. 4, known as Lord Brougham's Act—which reads as follows:

> Be it enacted that in all Acts words importing the Masculine Gender shall be deemed and taken to include Females, and the Singular to include the Plural, and the Plural the Singular, unless the contrary as to Gender or Number is expressly provided.

(*a*) A short but conclusive answer to the argument based on a comparison of s. 24 with other sections of the B.N.A. Act in which the word "persons" appears is that in none of them is its connotation restricted, as it is in s. 24, by the adjective "qualified." "Persons" is a word of equivocal signification, sometimes synonymous with human beings, sometimes including only men.

> It is an ambiguous word, says Lord Ashbourne, and must be examined and construed in the light of surrounding circumstances and constitutional law *Nairn* v. *University of St. Andrews* (2).

(1) [1919] Ir. R. 1 Ch. 81, at p. 91. (2) [1909] A.C. 147, at p. 162.

In section 41 of the B.N.A. Act, which deals with the qualifications for membership of the House of Commons and of the voters at elections of such members, "persons" would seem to be used in its wider signification, since, while in both these matters the legislation affecting the former Provincial Houses of Assembly, or Legislative Assemblies, is thereby made applicable to the new House of Commons, it remains so only "until the Parliament of Canada otherwise provides." It seems reasonably clear that it was intended to confer on the Parliament of Canada an untrammelled discretion as to the personnel of the membership of the House of Commons and as to the conditions of and qualifications for the franchise of its electorate; and so the Canadian Parliament has assumed, as witness the *Dominion Elections Act,* R.S.C., 1927, c. 53, ss. 29 and 38. It would, therefore, seem necessary to give to the word "persons" in s. 41 of the B.N.A. Act the wider signification of which it is susceptible in the absence of adjectival restriction.

But, in s. 11, which provides for the constitution of the new Privy Council for Canada, the word "persons", though unqualified, is probably used in the more restricted sense of "male persons." For the public offices thereby created women were, by the common law, ineligible and it would be dangerous to assume that by the use of the ambiguous term "persons" the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women, as would be involved in making them eligible for selection as Privy Councillors. A similar comment may be made upon s. 14, which enables the Governor General to appoint a Deputy or Deputies.

As put by Lord Loreburn in *Nairn* v. *University of St. Andrews* (1):

> It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process.

With Lord Robertson (*ibid.* at pp. 165-6), to mere "verbal possibilities" we prefer "subject-matter and fundamental constitutional law as guides of construction." When Parliament intends to overcome a fundamental constitutional incapacity it does not employ such an equivocal expression as is the word " persons " when used in regard to eligibility

(1) [1909] A.C. 147, at p. 161.

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for a newly created public office. Neither from s. 11 or s. 14 nor from s. 41, therefore, can the petitioners derive support for their contention as to the construction of the phrase "qualified persons" in s. 24.

Section 63 of the B.N.A. Act, the only other section to which Mr. Rowell referred, deals with the constitution of the Executive Councils of the provinces of Ontario and Quebec. But, since, by s. 92 (1), each provincial legislature is empowered to amend the constitution of the province except as regards the office of Lieutenant-Governor, the presence of women as members of some provincial executive councils has no significance in regard to the scope of the phrase "qualified persons" in s. 24 of the B.N.A. Act.

(*b*) "Persons" is not a "word importing the masculine gender." Therefore, *ex facie,* Lord Brougham's Act has no application to it. It is urged, however, that that statute so affects the word "Senator" and the pronouns "he" and "his" in s. 23 that they must be "deemed and taken to include Females", "the contrary" not being "expressly provided."

The application and purview of Lord Brougham's Act came up for consideration in *Chorlton* v. *Lings* (1), where the Court of Common Pleas was required to construe a statute (passed, like the *British North America Act,* in 1867) which conferred the parliamentary franchise on "every man" possessing certain qualifications and registered as a voter. The chief question discussed was whether, by virtue of Lord Brougham's Act, "every man" included "women". Holding that "women" were "subject to a legal incapacity from voting at the election of members of Parliament", the court unanimously decided that the word "man" in the statute did not include a "woman". Having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, Bovill C.J., declined to accept the view that Parliament had made that change by using the term "man" and held that

this word was intentionally used expressly to designate the male sex; and that it amounts to an express enactment and provision that every man, as distinguished from women, possessing the qualification, is to have

(1) (1868) L.R. 4 C.P. 374.

the franchise. In that view, Lord Brougham's Act does not apply to the present case, and does not extend the meaning of the word "man" so as to include "women." (386-7).

Willes J., said, at p. 387:

I am of the same opinion. The application of the Act, 13-14 Vict., c. 21, (Lord Brougham's Act) contended for by the appellant is a strained one. It is not easy to conceive that the framer of the Act, when he used the word "expressly," meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies, is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammer and law, that general words are to be restrained to the subject-matter with which the speaker or writer is dealing.

Byles J., said, at p. 393:

The difficulty, if any, is created by the use of the word "*expressly.*" But that word does not necessarily mean "expressly excluded by words" . . . The word "expressly" often means no more than plainly, clearly, or the like; as will appear on reference to any English dictionary.

And he concluded:

I trust * * * our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance.

Keating J., said, at pp. 394-5:

Considering that there is no evidence of women ever having voted for members of parliament in cities or boroughs, and that they have been deemed for centuries to be legally incapable of so doing, one would have expected that the legislature, if desirous of making an alteration so important and extensive as to admit them to the franchise, would have said so plainly and distinctly: whereas, in the present case, they have used expressions never before supposed to include women when found in previous Acts of Parliament of a similar character. * * * But it is said that the word "man" in the present Act must be construed to include "woman" because by 13-14 Vict., c. 21, s. 4, it is enacted that "In all Acts, words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided." Now all that s. 4 of 13 and 14 Vict., c. 21 could have meant by the enactment referred to was, that, in future Acts, words importing the masculine gender should be taken to include females, where a contrary intention should not appear. To do more would be exceeding the competency of Parliament with reference to future legislation.

The later *Interpretation Act* of 1889 (52-53 Vict., c. 63), which (s. 41) repealed Lord Brougham's Act, substituted by s. 1, under the heading "Re-enactment of Existing Rules" for its words "unless the contrary as to Gender and Number is expressly provided" their equivalent, suggested by Mr. Justice Keating, "unless the contrary intention appears". *Frost* v. *The King* (1).

(1) [1919] Ir. R. 1 Ch. 81, at pp. 89, 95.

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Keating J. concluded his judgment by saying (p. 396):

> Mr. Coleridge, who ably argued the case for the appellant, made an eloquent appeal as to the injustice of excluding females from the exercise of the franchise. This, however, is not a matter within our province. It is for the legislature to consider whether the existing incapacity ought to be removed. But, should Parliament in its wisdom determine to do so, doubtless it will be done by the use of language very different from anything that is to be found in the present Act of Parliament.

Similar views prevailed in *The Queen* v. *Harrald* (1), and *Bebb* v. *The Law Society* (2).

The decision in *Chorlton* v. *Lings* (3) is of the highest authority, as was recognized in the House of Lords by Earl Loreburn, L.C., in *Nairn* v. *University of St. Andrews* (4), and again by Viscount Birkenhead, L.C., in rejecting the claim of Viscountess Rhondda to sit in the House of Lords, with the concurrence of Viscount Cave, and Lords Atkinson, Phillimore, Buckmaster, Sumner and Carson, as well as by Viscount Haldane, who dissented (5).

In his speech, at p. 375, the Lord Chancellor said:—

> It is sufficient to say that the Legislature in dealing with this matter cannot be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House. And I am content to base my judgment on this alone.

In our opinion *Chorlton* v. *Lings* (3) is conclusive against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of "qualified persons" within s. 24 of the B.N.A. Act by the terms in which s. 23 is couched (*New South Wales Taxation Commissioners* v. *Palmer*) (6), so that Lord Brougham's Act cannot be invoked to extend those terms to bring "women" within their purview.

We are, for these reasons, of the opinion that women are not eligible for appointment by the Governor General to the Senate of Canada under Section 24 of the British North America Act, 1867, because they are not "qualified persons" within the meaning of that section. The question submitted, understood as above indicated, will, accordingly, be answered in the negative.

(1) (1872) L.R. 7 Q.B. 361.
(2) [1914] 1 Ch. 286.
(3) L.R. 4 C.P. 374.
(4) [1909] A.C. 147.
(5) [1922] 2 A.C. 339.
(6) [1907] A.C. 179, at p. 184.

DUFF J.—The interrogatory submitted is, in effect, this: Is the word "persons" in section 24 of the B.N.A. Act the equivalent of male persons? "Persons" in the ordinary sense of the word includes, of course, natural persons of both sexes. But the sense of words is often radically affected by the context in which they are found, as well as by the occasion on which they are used; and in construing a legislative enactment, considerations arising not only from the context, but from the nature of the subject matter and object of the legislation, may require us to ascribe to general words a scope more restricted than their usual import, in order loyally to effectuate the intention of the legislature. And for this purpose, it is sometimes the duty of a court of law to resort, not only to other provisions of the enactment itself, but to the state of the law at the time the enactment was passed, and to the history, especially the legislative history, of the subjects with which the enactment deals. The view advanced by the Crown is that following this mode of approach, and employing the legitimate aids to interpretation thus indicated, we are constrained in construing section 24, to read the word "persons" in the restricted sense above mentioned, and to construe the section as authorizing the summoning of male persons only.

The question for decision is whether this is the right interpretation of that section.

It is convenient first to recall the general character and purpose of the B.N.A. Act. The object of the Act was to create for British North America, a system of parliamentary government under the British Crown, the executive authority being vested in the Queen of the United Kingdom. While the system was to be a federal or quasi federal one, the constitution was, nevertheless, to be "similar in principle" to that of the United Kingdom; a canon involving the acceptance of the doctrine of parliamentary supremacy in two senses, first that Parliament and the Legislatures, unlike the legislatures and Congress in the U.S., were, subject to the limitations necessarily imposed by the division of powers between the local and central authorities, to possess, within their several spheres, full jurisdiction, free from control by the courts; and second, in the sense of parliamentary control over the executive, or

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executive responsibility to Parliament. In pursuance of this design, Parliament and the local legislatures were severally invested with legislative jurisdiction over defined subjects which, with limited exceptions, embrace the whole field of legislative activity.

More specifically, the legislative authority of Parliament extends over all matters concerning the peace, order and good government of Canada; and it may with confidence be affirmed that, excepting such matters as are assigned to the provinces, and such as are definitely dealt with by the Act itself, and subject, moreover, to an exception of undefined scope having relation to the sovereign, legislative authority throughout its whole range is committed to Parliament. As regards the executive, the declaration in the preamble already referred to, involves, as I have said, as a principle of the system, the responsibility of the executive to Parliament.

The argument advanced before us in favour of the limited construction is this: Women, it is said, at the time of the passing of the B.N.A. Act, were, under the common law, as well as under the civil law, relieved from the duties of public office or place, by a general rule of law, which affected them (except in certain ascertained or ascertainable cases) with a personal incapacity to accept or perform such duties; and, in particular, women were excluded by the law and practice of parliamentary institutions, both in England and in Canada, and indeed in the English speaking world, from holding a place in any legislative or deliberative body, and from voting for the election of a member of any such body. It must be assumed, it is said, that if the authors of the B.N.A. Act had intended, in the system established by the Act, to depart from this law or practice sanctioned by inveterate policy, the intention would have been expressed in unmistakeable and explicit words. The word "persons," it is said, when employed in a statute, dealing with the constitution of a legislative body, and with cognate matters, does not necessarily include female persons, and in an enactment on such a subject passed in the year 1867 *prima facie* excludes them.

In support of this view, a series of decisions and judgments, from 1868 to 1922, delivered by English judges

of the highest authority, are adduced, in which it was held that such general words were not in themselves adequate evidence of an intention to reverse the inveterate usage and policy in respect of the exclusion of women from the parliamentary franchise, from the legal professions, from a university Senate, from the House of Lords; and in particular, two judgments of Lord Loreburn and Lord Birkenhead, which, pronounced with convincing force, against reading a modern statute in such a manner as to effect momentous changes in the political constitution of the country, by, in the one case, admitting women to the parliamentary franchise, and in the other, to the House of Lords, in the absence of words plainly and explicitly declaring that such was the intention of Parliament.

Section 24, of course, in applying this principle, must not be treated as an independent enactment. The Senate is part of a parliamentary system; and, in order to test the contention, based upon this principle, that women are excluded from participating in working the Senate or any of the other institutions set up by the Act, one is bound to consider the Act as a whole, in its bearing on this subject of the exclusion of women from public office and place. Obviously, there are three general lines or policy which the authors of the statute might have pursued in relation to that subject. First, they might by a constitutional rule embodied in the statute, have perpetuated the legal rule affecting women with a personal incapacity for undertaking public duties, thus placing this subject among the limited number of subjects that are withdrawn from the authority of Parliament and the legislatures; second, they might, by a constitutional rule, in the opposite sense, embodied in the Act, have made women eligible for all public places or offices, or any of them, and thus, or to that extent, also, have withdrawn the subject from the legislative jurisdiction created by the act. They might, on the other hand, with respect to all public employments, or with respect to one or more of them, have recognized the existence of the legal incapacity, but left it to Parliament and the legislatures to remove that incapacity, or to perpetuate it as they might see fit. For example, they might have restricted the Governor in Council, in summoning persons to the Senate under section 24, by requiring him to address his sum-

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mons to persons only who are under no such legal incapacity, which would have made women ineligible, but only so long as such incapacity remained, and at the same time have left it within the power of the Parliament to obliterate the cause of the disability. The generality of the word "persons" in section 24 is, in point of law, susceptible of any qualification necessary to bring it into harmony with any of those three possible modes of treating the subject.

I have been unable to accept the argument in support of the limited construction, in so far as it rests upon the view that in construing the legislative and executive powers granted by the B.N.A. Act, we must proceed upon a general presumption against the eligibility of women for public office. I have come to the conclusion that there is a special ground, which I will state later, upon which the restricted construction of section 24 must be maintained but before stating that, I think it is right to explain why it is I think the general presumption contended for, has not been established.

And first, one must consider the provisions of the Act themselves, apart from the "extraneous circumstances", except for such references as may be necessary to make the enactments of the Act intelligible.

It would, I think, hardly be disputed that, as a general rule, the legislative authority of Parliament, and of legislatures enables them, each in their several fields, to deal fully with this subject of the incapacity of women. You could not hold otherwise without refusing effect to the language of secs. 91 and 92; and indeed, one feels constrained to say, without ignoring the fact that the authors of the Act were engaged in creating a system of representative government for the people of half a continent. Counsel did, in the course of argument, suggest the possibility that Parliament, in extending the Parliamentary franchise to women, had exceeded its powers, but I do not think that was seriously pressed.

There can be no doubt that the Act does, in two sections, recognize the authority of Parliament and of the legislatures, to deal with the disqualification of women to be elected, or sit or vote as members of the representative body, or to vote in an election of such members. These sections are 41 and 84.

I quote section 41 in full,

Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

To appreciate the purport of this section, it is necessary to note that in all the confederated provinces, women were disqualified as voters, that in one of the provinces, they were excluded, *co nomine,* from places in the Legislative Assembly, and that in another, they were expressly excluded, but referentially, by the disqualification of all persons not qualified to vote; the right to vote having been confined explicitly to males. The phrase therefore "disqualification of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the various provinces", denotes disqualifications, which include *inter alia* disqualifications of women, while at the same time, the section recognizes the authority of the Dominion to legislate upon that subject. Mr. Rowell seemed to suggest that the legislative authority of Parliament, on the subject of qualification of members and voters, is derived from this section. I do not think so. It is given, it seems to me, under the general language of section 91, which obviously in its terms embraces it; but that does not affect the substance of the argument founded upon the section, which recognizes in the clearest manner, and by express reference, the authority of Parliament to deal with the subject of the disqualification of women in those aspects, women being demonstrably comprehended under the *nomen generale* "persons". This section 41 is taken almost *verbatim* from section 26 of the Quebec Resolutions, upon which the B.N.A. Act was mainly founded. It is difficult

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to suppose that the members of the Conference, who agreed upon these Resolutions, were unaware that, in that section, they were dealing with the subject. Section 84 is expressed in the same terms, and there can, I think, be no warrant for attributing to the phrase quoted (or to the word "persons" which is part of it), diverse effects in the two sections. Indeed, there can be no doubt, that the province of Canada had enjoyed full authority under the Act of Union (and probably the Maritime provinces as well) to legislate upon the constitution of the Legislative Assembly, and the right to vote in the election of members to that body. Nor is it, I think, doubtful that, under section 1 of the *Union Act Amendment Act,* 1854, the legislature of Canada had full power to deal with the subject of qualifications of members of the Legislative Council, and to determine (subject it is true, to any bill upon the subject being reserved for Her Majesty's pleasure), whether or not women (here again comprehended in that section under the generic word "persons") should be eligible for places therein.

The subject of the qualification and disqualification of women as members of the House of Commons, being thus recognized as within the jurisdiction of Parliament, is it quite clear that the construction of the general words of section 11 dealing with the constitution of the Privy Council, is governed by the general presumption suggested? Inferentially, in laying down the "principle" of the British Constitution as the foundation of the new policy, the preamble recognizes, as stated above, the responsibility of the Executive to Parliament, or rather to the elective branch of the legislature, and the right of Parliament to insist that the advisers of the Crown shall be persons possessing its "confidence", as the phrase is.

The subject of "responsible government," as the phrase went, had been for many years the field of a bitter controversy, especially in the province of Canada. The Colonial office had encountered great difficulties in reconciling, in practice, the full adoption of this principle with proper recognization of the position of the Governor as the representative of the Imperial Government. It was only a few years before 1867 that Sir John Macdonald's suggestion had been accepted, by which "Governor-in-Council" in Commissions, Instructions and Statutes was read as the

Governor acting on the advice of his Council, which was thus enabled to transact business in the Governor's absence. There can be no doubt that this inter-relation between the executive and the representative branches of the government was, in the view of the framers of the Act, a most important element in the constitutional principles which they intended to be the foundation of the new structure.

It might be suggested, I cannot help thinking, with some plausibility, that there would be something incongruous in a parliamentary system professedly conceived and fashioned on this principle, if persons fully qualified to be members of the House of Commons were by an iron rule of the constitution, a rule beyond the reach of Parliament, excluded from the Cabinet or the Government; if a class of persons who might reach any position of political influence, power or leadership in the House of Commons, were permanently, by an organic rule, excluded from the Government. In view of the intimate relation between the House of Commons and the Cabinet, and the rights of initiation and control, which the Government possesses in relation to legislation and parliamentary business generally, and which, it cannot be doubted, the authors of the Act intended and expected would continue, that would not, I think, be a wholly baseless suggestion.

The word "persons" is employed in a number of sections of the Act (secs. 41, 83, 84 and 133) as designating members of the House of Commons, and though the word appears without an adjective, indubitably it is used in the unrestricted sense as embracing persons of both sexes; while in secs. 41 and 84, where males only are intended, that intention is expressed in appropriate specific words.

Such general inferences therefore as may arise from the language of the Act as a whole cannot be said to support a presumption in favour of the restricted interpretation.

Nor am I convinced that the reasoning based upon the "extraneous circumstances" we are asked to consider—the disabilities of women under the common law, and the law and practice of Parliament in respect of appointment to public place or office—establishes a rule of interpretation for the *British North America Act*, by which the construction of powers, legislative and executive, bestowed in gen-

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eral terms is controlled by a presumptive exclusion of women from participation in the working of the institutions set up by the Act.

When a statutory enactment expressed in general terms is relied upon as creating or sanctioning a fundamental legal or political change, the nature of the supposed change may, in itself, be such as to leave no doubt that it could have been effected, or authorized, if at all, only after full deliberation, and that the intention to do so would have been evidenced in apt or unmistakable enactments. In *Cox* v. *Hakes* (1), Lord Halsbury was content to rest his judgment on his conviction that, in a matter affecting vitally the legal securities for personal freedom, the "policy of centuries" would not be reversed by Parliament, by the use of a single general phrase; and in the decisions concerning the disabilities of women, from 1868 to 1922, a similar line of reasoning played no insignificant part, as we have seen. Such reasoning has also been considered to give support to the view that the prerogative of Her Majesty, in relation to appeals, was left untouched by the *British North America Act; Nadon* v. *The King* (2); and by the (Australian) *Commonwealth Constitution Act, Webb* v. *Outrim* (3); and was applied by the Supreme Court of the United States in reaching the conclusion that the 14th Amendment of the United States Constitution did not compel the States to admit women to the exercise of the legislative franchise. *Minor* v. *Happissett* (4).

But this mode of approach, though recognized by the courts as legitimate, must obviously be employed with caution. The "extraneous facts" upon which the underlying assumption is founded, must be demonstrative. It will not do to act upon the general resemblances between the questions presented here, and that presented in the cases cited. Those cases were concerned with the effect of statutes which might at any time be repealed or amended by a majority. They had nothing to do with the jurisdiction of Parliament or with that of His Majesty in Council executing the highest and constitutional functions under

(1) 15 App. Cas. 506.
(2) [1926] A.C. 482 at pp. 494, 495.
(3) [1907] A.C. 81 at pp. 91, 92.
(4) 22 L.C.P. 627 at p. 630.

his responsibility to Parliament; and were not intended to lay down binding rules, for an indefinite future, in the working of a Constitution. And, above all, they were not concerned with broad provisions establishing new parliamentary institutions, and defining the spheres and powers of legislatures and executives, in a system of representative government. Passages in the judgments, of seemingly general import, must be read *secundum subjectam materiam.*

Let me illustrate this by reference to the Canadian Privy Council and the Provincial Executives. In 1867, it would have been a revolutionary step to appoint a woman to the Privy Council or to an Executive Council in Canada —nobody would have thought of it. But it would also have been a radical departure to make women eligible for election to the House of Commons, or to confer the electoral franchise upon them; to make them eligible as members of a provincial legislature, or for appointment to a provincial legislative council. And yet it is quite plain that, with respect to all these last-mentioned matters, the fullest authority was given and given in general terms to Parliament and the legislatures within their several spheres; the "policy of centuries" being left in the keeping of the representative bodies, which with the consent of the people of Canada, were to exercise legislative authority over them.

In view of this, I do not think the "extraneous facts" relied upon are really of decisive importance, especially when the phraseology of the particular sections already mentioned is considered; and their value becomes inconsiderable when compared with reasons deriving their force from the presumption that the Constitution in its executive branch was intended to be capable of adaptation to whatever changes (permissible under the Act) in the law and practice relating to the election branch might be progressively required by changes in public opinion.

Then, assuming that the considerations relied upon are potent enough to enforce some degree of restrictive qualification, what should be the extent of that qualification? Should it go farther than limiting the classes of persons to be appointed, or summoned, to those not affected for the time being by a personal incapacity under some general rule

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of law, leaving it to Parliament or the legislatures to deal with the rule or rules entailing such disabilities?

For these reasons I cannot say that I am convinced of the existence of any such general resumption as that contended for. On the other hand, there are considerations which I think specially affect, and very profoundly affect, the question of the construction of sec. 24. It should be observed, in the first place, that in the economy of the *British North America Act,* the Senate bears no such intimate relation to the House of Commons, or to the Executive, as each of these bears to the other. There is no consideration, as touching the policy of the Act in relation to the Senate, having the force of that already discussed, arising from the control vested in Parliament in respect of the Constitution of the House of Commons, and affecting the question of the Constitution of the Privy Council. On the other hand, there is much to point to an intention that the constitution of the Senate should follow the lines of the Constitution of the old Legislative Councils under the Acts of 1791 and 1840.

In 1854, in response to an agitation in the province of Canada, the Imperial Parliament passed an Act amending the Act of Union, (17 and 18 Vic., Cap. 118 already mentioned) which fundamentally altered the status of the Legislative Council. Before the enactment of this Act, the Constitution of the Legislative Council had been fixed (by secs. 4 to 10 of the Act of Union) beyond the power of the legislature of Canada to modify it. By the Statute of 1854, that constitution was placed within the category of matters with which the Canadian Legislature had plenary authority to deal. Now, when the *British North America Act* was framed, this feature of the parliamentary constitution of the province of Canada, the power of the legislature of the province to determine the constitution of the second Chamber, was entirely abandoned. The authors of the Confederation scheme, in the Quebec Resolutions, reverted in this matter (the Constitution of the Legislative Council, as it was therein called) to the plan of the Acts of 1791 (save in one respect not presently relevant) and of 1840. And the clauses in these resolutions on the subject of the Council, follow generally in structure and phraseology the enactments of the earlier statutes.

It seems to me to be a legitimate inference, that the *British North America Act* contemplated a second Chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same, though, necessarily, in detail, not identical, with that of the second Chambers established by the earlier statutes. That under those statutes, women were not eligible for appointment, is hardly susceptible of controversy.

In this connection, the language of sections 23 and 31 of the *British North America Act* deserves some attention. I attach no importance (in view of the phraseology of secs. 83 and 128) to the use of the masculine personal pronoun in section 23, and, indeed, very little importance to the provision in section 23 with regard to nationality. But it is worthy of notice that subsection 3 of section 23 points to the exclusion of married women, and subsection 2 of section 31 would probably have been expressed in a different way if the presence of married women in the Senate had been contemplated; and the provisions dealing with the Senate are not easily susceptible of a construction proceeding upon a distinction between married and unmarried women in respect of eligibility for appointment to the Senate. These features of the provisions specially relating to the constitution of the Senate, in my opinion, lend support to the view that in this, as in other respects, the authors of the Act directed their attention to the Legislative Councils of the Acts of 1791 and 1840 for the model on which the Senate was to be formed.

I have not overlooked Mr. Rowell's point based upon section 33 of the *British North America Act*. Sec. 33 must be supplemented by sec. 1 of the *Confederation Act Amendment Act* of 1875, and by section 4 of c. 10, R.S.C., the combined effect of which is that the Senate enjoys the privileges and powers, which at the time of the passing of the *British North America Act* were enjoyed by the Commons House of Parliament of the United Kingdom. In particular, by virtue of these enactments, the Senate possesses sole and exclusive jurisdiction to pass upon the claims of any person to sit and vote as a member thereof, except in so far as that jurisdiction is affected by statute. That, I think, is clearly the result of sec. 33, combined with the

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Imperial Act of 1875, and the subsequent Canadian legislation. And the jurisdiction of the Senate is not confined to the right to pass upon questions arising as to qualification under sec. 33; it extends, I think, also to the question whether a person summoned is a person capable of being summoned under sec. 24. In other words, when the jurisdiction attaches, it embraces the construction of sec. 24, and if the Governor General were professing, under that section, to summon a woman to the Senate, the question whether the instrument was a valid instrument would fall within the scope of that jurisdiction. I do not think it can be assumed that the Senate, by assenting to the Statute, authorizing the submission of questions to this Court for advisory opinions, can be deemed thereby to have consented to any curtailment of its exclusive jurisdiction in respect of such questions. And therefore I have had some doubt whether such a question as that now submitted falls within the Statute by which we are governed. It is true that an affirmative answer to the question might give rise to a conflict between our opinion and a decision of the Senate in exercise of its jurisdiction; but strictly that is a matter affecting the advisability of submitting such questions, and therefore within the province of the Governor in Council. As yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion.

The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law.

MIGNAULT J.—The real question involved under this reference is whether, on the proper construction of the *British North America Act,* 1867, women may be summoned to the Senate. It is not apparent why we are asked merely if the word "persons" in section 24 of that Act includes "female persons". The expression "persons" does not stand alone in section 24, nor is that section the only one to be considered. It is "qualified persons" whom the Governor General shall from time to time summon to the Senate (sec. 24), and when a vacancy happens in the Sen-

ate, it is a "fit and qualified person" whom the Governor General shall summon to fill the vacancy (sec. 32). On the proper construction of these words depends the answer we have to give. It would be idle to enquire whether women are included within the meaning of an expression which, in the question as framed, is divorced from its context. The real controversy, however, is apparent from the statement in the Order in Council that the petitioners are "interested in the admission of women to the Senate of Canada," and that His Excellency in Council is requested to refer to this court "certain questions touching the power of the Governor General to summon female persons to the Senate of Canada." It is with that question that we have to deal.

The contentions which the petitoners advanced at the hearing are not new. They have been conclusively rejected several times, and by decisions by which we are bound. Much was said of the interpretation clause contained in Lord Brougham's Act, but the answer was given sixty years ago in *Chorlton* v. *Lings* (1). It appears hopeless to contend against the authority of these decisions.

The word "persons" is obviously a word of uncertain import. Sometimes it includes corporations as well as natural persons; sometimes it is restricted to the latter; and sometimes again it comprises merely certain natural persons determined by sex or otherwise. The grave constitutional change which is involved in the contention submitted on behalf of the petitioners is not to be brought about by inferences drawn from expressions of such doubtful import, but should rest upon an unequivocal statement of the intention of the Imperial Parliament, since that Parliament alone can change the provisions of the *British North America Act* in relation to the "qualified persons" who may be summoned to the Senate.

While concurring generally in the reasoning of my Lord the Chief Justice, I have ventured to state the grounds on which I base my reply to the question submitted, as I construe it. This question should be answered in the negative.

LAMONT J.—I concur with the Chief Justice.

(1) (1868) L.R. 4 C.P. 374.

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SMITH J.—I concur with the Chief Justice.

The formal judgment of the court was as follows:—

"Understood to mean 'Are women eligible for appointment to the Senate of Canada,' the question is answered in the negative."

Rex ex rel. Tolfree v. Clark et al

[1943] O.R. 501-525.

ONTARIO
[COURT OF APPEAL]
RIDDELL, FISHER, HENDERSON, GILLANDERS and LAIDLAW JJ.A.
11th JUNE 1943.

Quo Warranto -- When Available -- Usurpation of "Office or Franchise" -- Membership in Legislative Assembly -- Necessary Preliminaries -- Leave of Court -- Recognizance -- The Judicature Act, R.S.O. 1937, c. 100, s. 141.

S. 141 of The Judicature Act, R.S.O. 1937, c. 100, is procedural only, and merely substitutes proceedings by originating notice of motion for the old writ of quo warranto or an information in the nature of quo warranto; such proceedings can still be taken only in the same cases, and subject to the same conditions, as the older remedies. The statute of 1692, 4 & 5 W. & M., c. 18, which is a part of the law of Ontario, requires a private individual, before taking proceedings in the nature of quo warranto, both to furnish security and to obtain the leave of the Court, and the necessity for leave before instituting such proceedings still remains. If proceedings are taken without leave, and it appears that leave should properly be given, the Court may stay proceedings pending an application for leave, but if the circumstances are such that leave should not be given, the proceedings will be struck out. Leave will not be given as of course, but only in the exercise of a sound discretion, upon the particular circumstances of the case.

Membership in a Legislative Assembly is not an "office or franchise", the right to which can be tested in quo warranto proceedings. A member of such an Assembly holds a "seat", and

may be appointed to some office in the body, but his position is not such as arises by virtue of charter or Act of Parliament, within the meaning and intention of the law. Rex v. Speyer; Rex v. Cassel, [1916] 1 K.B. 595, considered.

Courts -- Inherent Powers -- Preventing Abuse of Proceedings -- Rule 124.

There can be no doubt that the Court has ample jurisdiction to make an order striking out proceedings as frivolous and vexatious, and disclosing no reasonable cause of action. The power should be exercised with great care, and only in cases where it is clear that a continuation of the proceedings would be an abuse of procedure; if, however, the necessary conditions are present, it would be improper to permit the proceedings to be maintained. They should be struck out if relief is sought which the Court is powerless to grant, or if the applicant lacks the status or authority necessary to pursue the remedy. This result should follow equally where the proceedings are instituted by an originating notice of motion as where they are commenced by writ of summons.

Constitutional Law -- Powers of Provincial Legislature -- Amendment of Sonstitution -- Extension of Term of Existing Legislature -- The British North America Act, ss. 85, 92(1) -- The Legislative Assembly Act, R.S.O. 1937, c. 12, s. 3 -- The Legislative Assembly Extension Act, 1942 (Ont.), c. 24.

Per Riddell, J.A.: The Legislative Assembly Extension Act, 1942 (Ont.), c. 24, is intra vires, notwithstanding s. 85 of The British North America Act. It is within s. 92(1) of that Act, as an amendment of the constitution of the Province, which in no way affects the office of Lieutenant-Governor. (Henderson J.A. inclined toward this view; the other members of the Court refrained from expressing any opinion on this question).

AN appeal by the relator from the order of Hope J., [1943] O.R. 319, [1943] 2 D.L.R. 554, dismissing the proceedings (by originating notice in the nature of quo warranto) as frivolous and vexatious and disclosing no reasonable cause of action.

The facts are fully stated in the report of the proceedings below, and in the judgment of LAIDLAW J.A.

13th and 14th May 1943. The appeal was heard by Riddell, Fisher, Henderson, Gillanders and Laidlaw JJ.A.

V. Evan Gray, K.C. (W.A. Toogood with him), for the relator, appellant: Four questions are in issue in this appeal, as follows:

A. Has the Ontario Legislature power to extend the duration of the Assembly beyond the four years fixed by s. 85 of The British North America Act, or the five years fixed by s. 3 of The Legislative Assembly Act, R.S.O. 1937, c. 12?

B. Is the present proceeding in the nature of quo warranto competent to test the legality of the existence of a de facto Legislative Assembly?

C. Was the learned judge below right in assuming jurisdiction to stay proceedings brought by originating notice before the return of the motion?

D. Was the judge below right in setting aside the subpoena issued to the Clerk of the Assembly and Chief Election Officer?

A. and B. These questions must be argued together, because they are interlocking, and B can only be determined when A is fully understood.

The duration of the 20th Legislative Assembly expired in October 1941 if effect is given to s. 85 of The British North America Act, or in October 1942 under the Legislative Assembly Act. Nevertheless, a de facto session of the same Assembly has been held in 1943, in which the respondents participated as if their term of office had not expired. The respondents are respectively the Speaker of the Assembly and the leaders of the

government and of the opposition. They claim that their acts as Assemblymen are rendered lawful by The Legislative Assembly Extension Act, 1942 (Ont.), c. 24, which extended the life of the Assembly. The relator, on behalf of his Majesty, seeks a determination by this Court of the validity of that enactment. This proceeding, in the nature of quo warranto, is brought pursuant to s. 141 of The Judicature Act, R.S.O. 1937, c. 100, and is the appropriate and only available means of determining the question. No other form of action is available to the relator, because his interest is merely the common interest of all citizens.

S. 85 of The British North America Act is unrepealed and unamended. The 1942 Act contradicts, but does not amend, it. S. 92(1) does not include, either by express words or by nexessary intendment, a power to change s. 85. The meaning and scope of the words "The Amendment ... of the Constitution of the Province" must be gathered from the Act itself. I refer particularly to ss. 3, 5, 6, 9, 12, 15, 20, 38, 50, 55, 56, 57, 58, 59, 60, 61, 63, 65, 66, 69, 80, 81, 82, 85, 86, 89, 91, 92, 128, 129. It is plain that the words must be given a restricted interpretation, which cannot include the subject-matter of s. 85: Rex ex rel. Brooks v. Ulmer, 19 Alta. L.R. 12, [1923] 1 D.L.R. 304, 38 C.C.C. 207, [1923] 1 W.W.R. 1; In re The Initiative and Referendum Act, [1919] A.C. 935, 48 D.L.R. 18, [1919] 3 W.W.R. 1. This view is supported by the history of s. 85, which was derived from The Constitutional Act, 1791, and The Act of Union, 1840, and by The Colonial Laws Validity Act, 1865.

The duration of the Assembly involves prerogative or Crown rights existing in Canada before Confederation, and cannot be amended under s. 92(1) because of s. 65. Ss. 80, 91, 92 and 129 illustrate necessary restrictions on the meaning and scope of the power of amendment under s. 92(1). This power can be no wider than that conferred by s. 5 of The Colonial Laws Validity Act, which the Dominion Parliament shares with all other legislatures. If the Province can amend or alter s. 85, then the Dominion can amend or alter s. 50, but the extension of the life of the House of Commons by an amendment to The British North America Act in 1916 is strong evidence that the Dominion

claims no such authority. The power of the Province in this respect can be no greater than that of the Dominion: Smiles v. Belford (1877), 1 O.A.R. 436, 1 Cart. 576, 2 Can. Com. R. 216.

Colonial legislatures have never had jurisdiction to affect constitutional rights of the Crown within the colony. These were subject only to Imperial authority, the Governor's commission and instructions: Musgrave v. Pulido (1879), 5 App. Cas. 102; Bonanza Creek Gold Mining Company Limited v. The King, [1916] 1 A.C. 566 at 578-587, 25 Que. K.B. 170, 26 D.L.R. 273, 10 W.W.R. 391, 34 W.L.R. 177.

These constitutional rights of the Crown are entirely different from prerogative rights in subject-matter of conferred legislative authority such as incorporation of companies with Provincial objects and other local matters. This interpretation of The British North America Act also applies to s. 5 of The Colonial Laws Validity Act: Taylor et al. v. The Attorney-General of Queensland et al. (1917), 23 C.L.R. 457 at 473, 474. S. 5 of the latter Act applies to and limits the exercise of authority under s. 92(1), preserving the supremacy of Imperial statutes, and imposing respect for "form and manner" of amendment of the constitution, as well as for substance: Attorney-General of New South Wales et al. v. Trethowan et al., [1932] A.C. 526, and in the court below, 44 C.L.R. 394 at 424-433.

The words "notwithstanding anything in this Act" confer no new jurisdiction not found elsewhere in the clause. They do not affect the application of s. 5 of The Colonial Laws Validity Act. Just as the word "Constitution" is restricted in meaning by its context, so these words cannot be given a wide or unlimited construction without upsetting the whole scheme as set out in ss. 91 and 92; they cannot override the express limitations of ss. 65, 80 and 129.

The words "except as regards the Office of Lieutenant-Governor" refer to the latter's funcitons, power and authority under s. 65, and include all powers and functions conferred on him by Imperial statute or Dominion law, of which the calling of a new Assembly is one, given before

Confederation and continued thereafter. This is illustrated by the Royal Proclamation of 7th October 1763, and other proclamations by the governors. For a description of the royal prerogative in summoning Parliament, exercised in Ontario by the Lieutenant-Governor, see 24 Halsbury, 2nd ed., p. 176, para. 295; 6 Halsbury, 2nd ed., p. 462, paras. 551-554; also Broom and Hadley, Commentaries, vol. 1, pp. 177, 220-222. The summoning of a new Assembly is a constitutional right of the Crown in Ontario, conferred by statute, and to be exercised according to law. It is not the same as, or dependent upon, the right to dissolve the Assembly, which latter is discretionary, to be performed only on the advice of the Ministers. Withdrawal or abolition of the statutory right and duty of the Governor to call a new Assembly is not compensated by retaining the discretionary right to dissolve an existing Assembly, on advice.

The 1942 Act is neither in form and manner nor in substance an amendment of the constitution, and in this respect it is distinguishable from the Quebec statute of 1881. In terms it contradicts itself, in ss. 1 and 2. By virtue of s. 11 of The Interpretation Act, R.S.O. 1937, c. 1, that conflict must be resolved in favour of s. 2.

The right to proceed by quo warranto in these circumstances is established by Darley v. Reg. (1845), 12 Cl. & F. 520, 8 E.R. 1513; Rex v. Speyer; Rex v. Cassel, [1916] 1 K.B. 595; Askew v. Manning et al. (1876), 38 U.C.Q.B. 345; Rex ex rel. The Township of Stamford v. McKeown et al., [1934] O.R. 662, [1934] 4 D.L.R. 644. Each respondent has assumed to occupy a public office, that of Assemblyman, to which his lawful title has expired. The function of this office is to advise His Majesty, represented by the Lieutenant-Governor, in matters of legislation. It is performed by each Assemblyman as a member of a corporate body known as the Legislative Assembly, which has the character of a corporation created by statute. The office is a "public" one because: (a) it is created by His Majesty, on the advice of the Imperial Parliament (The British North America Act); (b) the holder of the office is elected by the people; (c) he takes oaths of office and of allegiance to

the Crown; (d) he receives remuneration from the consolidated revenue fund; (e) his duties and privileges are defined by statute; and (f) his term of office is fixed by statute, and he does not hold office at will or at pleasure.

These proceedings are therefore appropriate to test the legal title to that office. They have been found appropriate in the case of such public officers as jusges, administrative and judicial officers, municipal officers, elected representatives of governmental bodies, and His Majesty's Imperial Privy Councillors. The office of Assemblyman has not been withdrawn from the scope of the common law remedy, as was done by The British North America Act in the case of legislative councillors (expressio unius est exclusio alterius), and in the absence of statutory restriction that remedy is universal in its application: Darley v. Reg., supra; Rex v. Speyer, supra. The statutes 4-5 W. & M., c. 18 and 9 Anne, c. 20, as well as ss. 141-143 of The Judicature Act, are procedural only -- the right invoked is one at common law. The Lower Canada statute of 1849, 12 Vict., c. 12, may be looked at to show the scope of the remedy as viewed by Canadian legislative draftsmen.

Assemblymen, like all other persons, must obey the law, and the law finds means of compelling obedience, as in Attorney-General v. Trethowan, supra, where an injunction was used to prevent the submission of a bill which had passed both houses of the legislature. The Ontario Legislative Assembly and its members have only such privileges and immunities as are given by statute or are necessarily incidental to the performance of their statutory duties: Kielley v. Carson et al. (1841-42), 4 Moo. P.C. 63 at 88, 92, 13 E.R. 225; Doyle et al. v. Falconer (1866), L.R. 1 P.C. 328, 4 Moo. P.C. (N.S.) 203, 16 E.R. 293. They have no inheritance of privileges or immunities from the previous Parliament of Canada, or from the Parliament of Great Britain. No specific privileges are conferred by The British North America Act, and all statutory privileges must be found in The Legislative Assembly Act, R.S.O. 1937, c. 12. These are not the same in scope or in origin as those of the House of Commons of Canada or of the Legislature of Nova Scotia, referred to in Fielding et al. v. Thomas, [1896] A.C.

600, C.R. [11] A.C. 278, 5 Cart. 398; and Landers et al. v. Woodworth (1878), 2 S.C.R. 158; see also Ontario statute, 1868, c. 3, disallowed by proclamation, 4th December 1869, and correspondence as to disallowance in Hodgins, Dominion and Provincial Legislation, pp. 48, 50, 54, 60, 62, 63.

No other legal remedy is available to test the legality of a de facto Assembly. It is not sufficient to wait until legislation of doubtful validity has been enacted, and then attack such legislation. The Court must interfere to restrain illegal usurpation of office: see recitals in 9 Anne, c. 251. Quo warranto is the ancient procedure for this very purpose: Darley v. Reg., supra, at p. 544; Rex ex rel. The Township of Stamford v. McKeown, supra. Controverted elections are definitely a privilege of Parliament, which have been dealt with by statutes, and as to which jurisdiction has been expressly given to the courts. The existence of that Act and its subject-matter do not affect the present question in any way.

C. The respondents' notice of motion was irregular, in that it was merely the negative of our motion, notice of which was served two weeks earlier, and had the effect of withdrawing the question from the jurisdiction of the judge before whom our originating notice was returnable. There is no authority under Rule 124, which has never heretofore been applied to an originating notice, and the case is not one for invoking the inherent jurisdiction of the Court to quash, before presentation of the motion. Having shown by his reasons for judgment that serious and important questions of law were involved, the judge of first instance should have left these questions for argument and determination after completion of the applicant's evidence and other material, and in the forum and by the judge before whom they were intended to be brought: Electrical Development Company of Ontario v. Attorney-General for Ontario et al., [1919] A.C. 687 at 689, 693-695, 47 D.L.R. 10; Dyson v. Attorney-General, [1911] 1 K.B. 410. Such questions as are here raised, of their nature, cannot be frivolous or vexatious.

D. No immunity or privilege attaches to the office or functions of the Clerk of the Legislative Assembly or of the Chief Election Officer, to excuse him from attending in court to give evidence. Matters of privilege as to particular questions can arise only after he has attended and the questions have been put. Resolutions of the British House of Commons or of the House of Lords can have no effect or validity in Ontario, where lex et consuetudo parliamenti is not part of the law: Kielley v. Carson et al., supra; Doyle et al. v. Falconer, supra. The subpoena served could not interfere with the performance of duties either to the Assembly or to the Crown. There was no material before the judge, or any evidence of fact or admissions of counsel, upon which any claim of privilege, absolute or qualified, could be founded. We did not at any time admit that the Legislature was in lawful session at the time of the issue, or the return date, of the subpoena.

C.R. Magone, K.C., for the respondents and for the Attorney-General: The Colonial Laws Validity Act, 1865, 28-29 Vict. (Imp.), c. 63, does not apply to legislation passed after The Statute of Westminster, 1931 (Imp.), c. 4, by force of ss. 2 and 7(2) of the latter statute. [RIDDELL J.A.: Is it your argument that Canada has been made an independent nation since 1931, and that the Province has practically the same power as regards legislation?] Yes. The Province lacks the extra-territorial powers possessed by the Dominion, but that is the only difference.

But for The Controverted Elections Act, R.S.O. 1937, c. 11, the Court could not inquire into the right of an individual to b elected; its power is limited, and it may not inquire into the right of any person to sit in Parliament, this being exclusively a privilege of Parliament, i.e., of the Legislature: May, Parliamentary Practice, 15th ed., p. 64. Unless such a power is expressly given to the Court by statute (and it is not), it deos not possess it: Rex v. Grahem-Campbell; Ex parte Herbert, [1935] 1 K.B. 594 at 602. [HENDERSON J.A.: The appellant contends that the Ontario

Legislature, being a statutory body, has only such privileges as are given to it by statute, and thus differs from the House of Commons.] Temple v. Bulmer, [1943] S.C.R. 265, was an application for an order in the nature of a mandamus, to compel the holding of a by-election, and it was decided that this matter was solely within the jurisdiction of the Legislature. [RIDDELL J.A.: From what statute does the Legislature derive its powers?] The Constitutional Act, 1791, 31 Geo. III, c. 31; The Act of Union, 1840, 3-4 Vict., c. 35; The Colonial Laws Validity Act, supra, and The British North America Act, 1867. The appellant contends that the legislatures of Nova Scotia and New Brunswick have inherited certain privileges, but that those of Ontario and Quebec have not, because their existing legislatures were not continued by special provision. Obviously, the legislature of the Province of Canada could not be contineud when it was divided into two Provinces. [RIDDELL J.A.: Why could it not have been said that each of the legislatures would have the same power as the one legislature formerly had? The question is, has it been done?] Further authorities in support of the proposition that this is a matter exclusively within the jurisdiction of the Legislature itself are Re North Perth; Hessin v. Lloyd (1891), 21 O.R. 538 at 545; In re Centre Wellington Election (1879), 44 U.C.Q.B. 132 at 139.

The proceedings are improperly taken as a means of testing the validity of a statute. The appellant could have raised the question in an ordinary action, or by suing the Attorney-General for a declaratory judgment. [HENDERSON J.A.: How can Rule 124 be invoked to quash proceedings instituted by originating notice? There is no pleading.] Rule 124 merely embodies the inherent right of the Court to prevent abuse of its process: Orpen v. Attorney-General for Ontario, 56 O.L.R. 327, [1925] 2 D.L.R. 366; Keewatin Power Co. Ltd. v. Keewatin Flour Mills Co. Ltd., 59 O.L.R. 406, [1926] 4 D.L.R. 531.

Quo warranto does not lie in the circumstances of this case. The respondents do not hold an "office" within the meaning of Darley v. Reg. (1845), 12 Cl. & F. 520, 8 E.R. 1513, which case must be taken as the starting-point in considering the present

law as to quo warranto. If these proceedings are properly brought here, they might equally be brought in England, since what is involved is an alleged common law right to have the Court inquire into the right of an individual to sit in Parliament. [RIDDELL J.A.: One parliament has created another parliament; the first parliament has certain powers, and by implication the created one has the same powers, unless they are expressly reserved.] The extension of the Legislative Assembly's term by 1930, c. 4, s. 2, was never questioned, nor was a similar earlier statute, 1918, c. 4, s. 2.

As to the validity of the statute, I refer also to Fielding et al. v. Thomas, [1896] A.C. 600 at 610, C.R. [11] A.C. 278, 5 Cart. 398; Reference re "Supreme Court Act Amendment Act", [1940] S.C.R. 49 at 117, [1940] 1 D.L.R. 289 (sub nom. Reference re Privy Council Appeals).

V. Evan Gray, K.C., in reply.

Cur. adv. vult.

11th June 1943. RIDDELL J.A.:-- This is an appeal from the judgment of Mr. Justice Hope, delivered 7th April, allowing a motion by the respondents.

I refrain from going into the facts, as it was on the argument of the appeal admitted on all hands that the real -- substantially the sole -- matter to be decided was the power of the Legislature of Ontario to extend its term of office by a statute.

The Legislature of Ontario, by a statute, extended its fixed term of office. This, the appellant here attacks as beyond its powers.

The case was argued at great length -- not too great, be it said; and now the question is before us for decision.

Our task is materially lightened by the candid acceptance by all concerned of the principle laid down in such cases as

Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited (1908), 18 O.L.R. 275, affirmed in the Court of Appeal (1909), 19 O.L.R. at 282, and the Judicial Committee of the Privy Council (1910), 43 O.L.R. 474, 102 L.T. 375, C.R. [1911] 2 A.C. 412, that "the Legislature within its jurisdiction can do everything that is not naturally impossible and is restrained by no rule human or divine." In other words, the Court is to look to the ambit of the jurisdiction conferred on the Legislature, and has no right to consider the justice, the wisdom, the result of the legislation. By the British North America Act, from which legislation of the mother country the Legislature receives its powers, -- it is provided, by s. 85, that "Every Legislative Assembly of Ontario ... shall continue for Four Years from the Day of the Return of the Writs ..." This provision, I conceive, is a part of the "constitution" of the Province.

The British North America Act, however, by s. 92, expressly gives power to the Legislature to amend "from Time to Time", notwithstanding anything in this Act "the Constitution of the Province, except as regards the Office of Lieutenant-Governor."

As was pointed out in the Blumenthal Lectures in Columbia University twenty years ago (The Canadian Constitution in Form and in Fact, 1923, p. 4), advantage has been taken of this power, and "the term of a Legislature has been extended by the Legislature itself".

That the length of time an elected legislature may remain without a new election is a part of the constitution cannot be successfully contested -- and I am wholly unable to see how the extension of its term by a legislature can in any sense be considered anything that affects the rights, power, functions, etc. of the Lieutenant-Governor.

It was suggested that if the Lieutenant-Governor wished a new House, the Secretary of State might refuse to bring him the Great Seal -- but surely, if anything of that kind took place, the Lieutenant-Governor could at once dismiss the recalcitrant and appoint a new Secretary, who would do as he was told.

The propriety of quo warranto proceedings being resorted to in such a case was raised and carefully argued. I find that my learned brother Laidlaw has fully considered the question. Having read his judgment, I think that there is no necessity for me to discuss the question, and content myself with saying that I agree with his reasoning and conclusion.

The appeal should be dismissed, with costs throughout.

FISHER J.A.:-- Since all my brethren in this appeal agree -- as I do -- that Hope J. was right in striking out the notice of motion in the nature of quo warranto, on the grounds that it was frivolous and vexatious and that it disclosed no reasonable cause of action, I do not deem it necessary to discuss the question of the power of the Legislature of Ontario to extend its term of office by statute.

I would dismiss the appeal with costs. HENDERSON J.A.:-- An appeal from an order of Hope J., dated 17th April 1943, quashing the proceedings and setting aside the subpoena in question as frivolous and vexatious. The proceedings are by way of quo warranto, initiated by originating notice dated the 15th day of March 1943, and the order appealed from was made on motion of the respondents under Rule 124.

The respondents are all members of the Ontario Legislature, James H. Clark being the Speaker of the Legislature, Gordon D. Conant the Attorney-General, and George A. Drew the Leader of the Opposition.

Chapter 24 of the Statutes of Ontario, 6 Geo. VI, being An Act to extend the Duration of the present Legislative Assembly, was passed by the present Legislative Assembly in the session of 1942, and was assented to by the Lieutenant-Governor on behalf of the Crown on 15th April 1942. Its provisions are as follows:

"HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

"1. Notwithstanding anything in The Legislative Assembly Act or in any other Act contained, the present Assembly shall continue until the 19th day of October, 1943, and it shall not be necessary to hold any general election to choose members of the Assembly until such date.

"2. Nothing in this Act shall affect or amend the provisions of section 4 of The Legislative Assembly Act, nor be taken or deemed to affect or abridge any prerogative of the Crown or the power of the Lieutenant-Governor to dissovle the Assembly at an earlier date than that mentioned in section 1.

"3. This Act may be cited as The Legislative Assembly Extension Act, 1942".

The originating notice is for an order that the respondents "do show cause why you do, and each of you doth, unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the British North America Act (sec. 85 of Vic. cap. 3) whether or not the same are lawfully amended by the provisions of The Legislative Assembly Act (R.S.O. 1937, cap. 12, sec. 3), notwithstanding the provisions of an 'Act to extend the Duration of the present Legislative Assembly Act' (6 Geo. VI, cap. 24), which last-mentioned Act is ultra vires of the Legislature and void".

In the reasons for his order, Mr. Justice Hope has analyzed and discussed the legislation and the authorities, and I agree with the result of his order, and I think very little need be added.

S. 92 of The British North America Act, 1867, reads in part as follows:

"In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,--

"(1) The Amendment from Time to Time, notwithstanding

anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor".

It was strenuously argued before us that the statute now sought to be declared ultra vires is in conflict with this provision because it affects the office of Lieutenant-Governor.

It is well settled by authority that the Legislature, when legislating upon a subject matter within its jurisdiction, has plenary powers with which the courts have no jurisdiction to interfere. In numerous cases the courts have exercised jurisdiction to examine the legislation in question before the court to ascertain whether it falls within a matter coming within the classes of subjects assigned to it by s. 92 of The British North America Act, and whether it is in pith and substance and in good faith legislation upon that subject matter, but beyond this no court has gone.

The statute now attacked in my opinion deals with an amendment to the constitution of the Province, and does not affect or prejudice the office of Lieutenant-Governor.

The functions and authority of the Lieutenant-Governor have been the subject of much discussion recently, and in my view it is unnecessary to discuss them here, except to say that the right of the Lieutenant-Governor to call for the advice of his responsible ministers and to act or not to act upon it, as seems best to him, and to dissolve the Assembly if he sees fit to do so, is in no way interfered with by the Act now attacked.

Further, in my opinion, the respondents are not unlawfully exercising or usurping the offices, functions and liberties of a member of the Legislative Assembly of Ontario. As members of that Legislative Assembly they are not holding an office or franchise.

The case strongly relied upon for the applicants is Rex v. Speyer; Rex v. Cassel, [1916] 1 K.B. 595. This was an information in the nature of quo warranto against two members of the Privy Council whose appointment was alleged to be invalid because they were born abroad of foreign parents, and

later became naturalized British subjects, and were therefore not capable of holding the office of Privy Councillor. It was held that an information in the nature of a quo warranto would lie at the instance of a private relator against a member of the Privy Council whose appointment was alleged to be invalid, and it was further held that the respondents in that case were capable of being members of the Privy Council.

It was further held that a Privy Councillor holds an office. So far as the authorities cited to us go, and they were very exhaustive, no case has ever occurred in which it has been held that a member of Parliament or of a Legislative Assembly in the British Empire holds an office or franchise, and in my opinion he does not, and I am therefore of opinion that these proceedings do not lie against the respondents.

The validity of the Act in question is, in my view, only indirectly attacked. These proceedings do not necessarily result in declaring either its validity or its invalidity, except for the purpose of disposing of these proceedings. It may be that in other proceedings of a proper kind, the validity or invalidity of the Act may be properly before the Court.

As these proceedings were fully argued both as to their merits and as to the propriety of the method in which the motion was dealt with, it is unnecessary to discuss Mr. Evan Gray's objections on that ground, but I do not wish to be taken as expressing any opinion as to whether a proceeding begun by originating notice can be properly dealt with on a motion to quash under Rule 124. I entertain considerable doubt upon this question.

In the result I think the appeal fails and must be dismissed with costs.

GILLANDERS J.A.:-- For the reasons fully and clearly set out by my brother Laidlaw I agree that proceedings in the nature of quo warranto cannot be successfully utilized here. I express no opinion as to the validity of the legislation sought to be questioned. Should the validity of this or similar legislation be raised in the future by appropriate proceedings, it may then

be considered.

The appeal should be dismissed with costs.

LAIDLAW J.A.:-- This is an appeal from an order of Hope J., dated 17th April 1943, whereby certain proceedings commenced by the appellant by notice of motion were struck out. The notice is of a motion, in the nature of quo warranto, for an order than James H. Clark, Gordon D. Conant, and George A. Drew show cause why they "unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943 ... ."

An application was then made to the Court on behalf of James H. Clark and Gordon D. Conant for an order under Rule 124, striking out the notice of motion in the nature of quo warranto, on the grounds that it was frivolous and vexatious, and that it disclosed no reasonable cause of action.

While it appears that the appellant seeks an order of the Court to oust the respondents from the seats occupied by them in the Legislative Assembly of Ontario, the real object of the proceedings is to attack the validity of an Act of the Legislature entitled An Act to extend the Duration of the present Legislative Assembly, being chapter 24 of the Statutes of Ontario, 1942. But it is to be observed at once that the learned judge did not determine this question. On the contrary, he expressly refrained from doing so. He decided only that the proceedings taken by the appellant did not lie against a member of the Legislative Assembly, and, in the exercise of the Court's discretion, made an order that they be struck out. That order alone is the subject of appeal.

There can be no doubt that the Court has ample jurisdiction to make the order in appeal. The jurisdiction is inherent, and is found in Rule 124, as follows:--

"124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the

action to be stayed or dismissed, or judgment to be entered accordingly". See Chatterton v. Secretary of State for India in Council, [1895] 2 Q.B. 189; In re Norton's Settlement; Norton v. Norton, [1908] 1 Ch. 471 at 478; Orpen v. Attorney-General for Ontario, 56 O.L.R. 327 at 332, [1925] 2 D.L.R. 366; Keewatin Power Co. Ltd. v. Keewatin Flour Mills Co. Ltd., 59 O.L.R. 406, [1926] 2 D.L.R. 619, [1926] 4 D.L.R. 531.

The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: Evans v. Barclay's Bank et al., [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained. The action may be stayed if an action is brought to obtain relief which the Court has no power to grant: Dreyfus v. Peruvian Guano Company (1889), 41 Ch. D. 151; Wing et al. v. Burn et al. (1928), 44 T.L.R. 258; In re Visser; The Queen of Holland v. Drukker et al., [1928] 1 Ch. 877. It should also be apparent that the proceedings should be struck out if the applicant to the Court has no status to pursue the remedy, or no proper authority so to do. This result should follow, irrespective of the form of the proceedings. I cannot make any distinction between an action commenced by writ of summons and a proceeding commenced by originating notice. Under The Judicature Act, R.S.O. 1937, c. 100, s. 1(a), "'Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by the rules". Teh same principles are applicable and should govern the exercise of the Court's discretion in either case.

Proceedings in the nature of quo warranto must be instituted and taken by notice of motion, as provided in s. 141 of The Judicature Act, which reads as follows:

"141.(1) Except in the cases mentioned in sections 141 and 145 all proceedings against any person who unlawfully claims or usurps, or is alleged unlawfully to claim or to usurp any office, franchise or liberty, or who has forfeited or is

alleged to have forfeited any franchise, by reason of non-user or mis-user thereof, which have heretofore been instituted or taken by writ of quo warranto, or by information in the nature of a writ of quo warranto, hereafter shall be instituted and taken, where the proceeding is by the Attorney-General ex officio, by notice of motion calling on the person against whom the proceeding is taken to show cause why he unlawfully exercises or usurps such office, franchise or liberty.

"(2) Where the proceeding is at the instance of a relator it shall be taken in the name of His Majesty on the relation of such person, and such person shall before serving the notice of motion give security for the due and effectual prosecution thereof in like manner as nearly as may be and in the like amount as is, according to the practice of the Supreme Court, required to be given on an application to quash a conviction or order made by a justice of the peace, or in such manner and amount as the court may direct."

This section is procedural only. It substitutes proceedings by notice of motion in place of proceedings theretofore instituted or taken by writ of quo warranto or by information in the nature of a writ of quo warranto. It gives no new right whatsoever to any person, and does not enable anyone to pursue a remedy which he did not possess before the change in procedure. It is essential therefore to examine the right which the appellant would have had to institute or take proceedings by writ of quo warranto or by information in the nature of a writ of quo warranto. This necessitates a study of the nature and scope of such proceedings, not merely as a topic of antiquarian research, but to ascertain whether they afforded a remedy for the present complaint.

A concise history of the preceedings appears in the judgment of Lord Reading C.J. in Rex v. Speyer; Rex v. Cassel, [1916] 1 K.B. 595 at 608; also in the judgment of Riddell J. in Rex ex rel. Morton v. Roberts; Rex ex rel. Morton v. Rymal (1912), 26 O.L.R. 263 at 271, 4 D.L.R. 278. The ancient writ of quo warranto had its origin at common law. "Since the conquest, wherever land was held, or a franchise exercised by a subject, the King might call upon him to show what were the conditions

of his tenure, or by what authority the franchise was enjoyed; or, where the title to land or to a franchise was clear, he might require to be satisfied that the grantee had complied with the conditions upon which the grant had been made". Tancred, Quo Warranto, introduction, p. i. "The writ of quo warranto is in the nature of a writ of right for the King, against him who claims or usurps any office, franchise or liberty to inquire by what authority he supports his claim, in order to determine the right." Blackstone, Commentaries, Book iii, c. 17, s. 5, quoted in Shortt, Informations, Mandamus and Prohibition, p. 108. The essence of the procedure was that the Sovereign was calling on a subject to account for an invasion or usurpation of the Royal prerogative, or of the rights, franchises or liberties of the Crown. The quo warranto at common law was an original writ out of Chancery. Tancred, op. cit., p. v. The first Statute of Quo Warranto (Statute of Gloucester, 1278, 6 Ed. I) made the writ returnable in King's Bench or before the justice in eyre. In order to remedy delays and excessive expense, two statutes were passed in 1290 (18 Ed. I, stats. 2 and 3). Under these statutes the pleas were determined in the circuit of the justices. But the complicated nature of the process and the circumstances that the judgment on the writ was final and conclusive contributed to the disuse of the writ. In its place was substituted the information in the nature of a writ of quo warranto. Sir Matthew Hale thinks this was about 10 Edw. III (History of Common Law (1716 Ed.) 168), but Coke considers it to have been considerably later: see 2 Inst. 498. But "The Court ... will not extend this remedy beyond the limits prescribed to the old writ; and as that could only be prosecuted for an usurpation on the rights or prerogatives of the Crown, so an information in the nature of quo warranto, can only be granted in such cases": Chitty, Prerogatives of the Crown, p. 337.

For a long time the only informations were those filed ex officio by the Attorney-General or Solicitor-General on behalf of the Crown. Later, informations were exhibited and filed at the instance of private individuals. This practice was abused, and became oppressive and vexatious. To remedy this condition the statute of 1692, 4 and 5 W. & M., c. 18, was passed. It restrained the coroner and attorney from exhibiting, receiving

or filing an information for trespasses, batteries, or other misdemeanours, "without express Order to be given" by the Court, and without taking a recognizance from the person procuring the information before issue of any process. That Act became law in this Province, and resort must be had to it: The Property and Civil Rights Act, R.S.O. 1937, c. 145. The purpose and effect of the Act is to require a private individual first to obtain leave of the Court and to furnish a recognizance before proceeding by way of an information in the nature of quo warranto. The statute is restrictive. It does not enlarge the right of an individual, or enable him to institute proceedings in any case to which the procedure was not properly applicable before the statute was passed. Moreover, while, by s. 141(2) of The Judicature Act, a relator "shall before serving the notice of motion give security", the requisite leave of the Court to carry on proceedings of the kind in question has not been dispensed with, and is still necessary under the present practice.

The statute 9 Anne, c. 20, was passed in 1710 to enlarge the rights of the subject. It is "An Act for rendering the Proceedings upon Writs of Mandamus, and Informations in the Nature of a Quo Warranto, more speedy and effectual; and for the more easy Trying and Determining the Rights of Offices and Franchises in Corporations and Boroughs". The offices described in the Act are "Mayors, Bailiffs, Portreeves and other Offices, within Cities, Towns Corporate, Boroughs and Places, within that Part of Great Britain called England and Wales". But it is expressly provided that "it shall and may be lawful to and for the proper Officer ... with the Leave of the ... Court ... to exhibit one or more Information or Informations in the Nature of a Quo Warranto, at the Relation of any Person or Persons desiring to sue or prosecute the same". This Act is part of the law of this Province, but the procedure is by notice of motion: Statutes of Onatrio 1902, c. 1, ss. 11-16 and schedule to Act. This Act applies only to corporate offices in corporate places: per Bayley J. in Rex v. M'Kay (1826), 5 B. & C. 640 at 646, 108 E.R. 238; see also per Blackburn J. in Rex v. Backhouse (1866), 7 B. & S. 911 at p. 921. The franchises mentioned in the Act mean only corporation rights or rights to freedom in corporations: per Denison J. in

Rex v. Williams (1757), 1 Burr. 402 at 408, 97 E.R. 371.

It is said too that "the Act of the 9th of Anne extends only to the cases of individuals usurping offices or franchises in corporations, when the right of the body to act as a corporation is acknowledged: an information against the whole corporation, as a body, to shew by what authority they claim to be a corporation, can be brought only by, and in the name of the Attorney-General". Tancred, op. cit., p. 15. It has also been argued (per Sir F.E. Smith, arguendo, in Rex v. Speyer, supra, at p. 599) that there is a distinction between cases which affect individuals or groups of individuals, and cases which affect the nation as a whole, and that in the latter case the Attorney-General alone has the right to move. Be that as it may, it is quite certain that the circumstances in which the present proceedings were commenced do not bring the case within the statute of Anne. The individual must find his right to proceed as it existed apart from and before the passing of this Act, unless at a subsequent time his right in law has been enlarged by enabling statute. There is no such statute. The result is that an information in the nature of quo warranto could not, in such a case, be exhibited or filed at the instance of a private individual, without leave of the Court, and likewise the present proceedings by notice of motion in lieu of the former procedure cannot be carried on without such leave.

If such leave should properly be granted, the Court might stay the proceedings pending an application for it, but if the leave should not be given, the proceedings cannot be maintained, and should, accordingly, be struck out. I therefore examine the law to ascertain whether it would be right and proper to give leave in the particular circumstances of this case. The question is one for the exercise of the Court's discretion. "It would be very grievous", said Lord Mansfield, in Rex v. Wardroper (1766), 4 Burr. 1964, 98 E.R. 23, "that the information should go of course: and it would be a breach of trust in the Court, to grant it as of course. On the contrary, the Court are to exercise a sound discretion upon the particular circumstances of every case". See also Rex v. Dawes (1767), 4 Burr. 2023, 98 E.R. 54, and per Lord Kenyon

C.J. in Rex v. Sargent (1793), 5 Term Rep. 466, 101 E.R. 262; Rex v. Parry (1837), 6 Ad. & El. 810, 112 E.R. 311. No precise rule can be laid down: per Lord Mansfield in Rex v. STACEY (1785), 1 Term Rep. 1 at 3, 99 E.R. 928. "There are many cases in which, though the nature of the office is such as to make the procedure by quo warranto the appropriate method of testing the validity of the title to it, yet the Court in the exercise of its discretion will refuse its assistance". Shortt, Informations, Mandamus and Prohibition, p. 147: "The consequences which may result from granting the information will also influence the exercise of the Court's discretion": Ibid., p. 149. The fact that an objection to an individual member applies to every other member of a corporation, and may have the effect of dissolving the corporation, may be considered: per Abbott C.J., in Rex v. Trevenen (1819), 2 B. & Ald. 482, 106 E.R. 441; see also High's Extraordinary Legal Remedies, 3rd ed., p. 558, quoted by Hope J., as follows:

"And the principle is now firmly established, that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held. In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into consideration the necessity and policy of allowing the proceeding, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry. The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application ... . The expediency of permitting it to be filed is also a proper matter for the consideration of the court, and the fact that a successful prosecution of the proceedings, which are brought to test the title to a municipal office, may result in the suspension of all municipal government in a city for a long period of time, may properly be taken into account in deciding upon the application".

I have carefully considered all these matters, and concluded that the Court, in the exercise of its discretion, should not give leave to institute or carry on these proceedings, and therefore, in the absence of such authority, they cannot be maintained. On this ground alone the appeal should be dismissed. In view, however, of the argument of counsel on other grounds, I shall express my opinion in respect of them.

It was argued that a member of the Legislative Assembly occupies an "office" within the meaning and intent of s. 141 of The Judicature Act. The word "office" is used in the statute of Anne, but I do not find it in the Statute of Gloucester, 6 Ed. I, nor in the statute de quo warranto novum, 18 Ed. I. Those Acts refer to "liberties" and "franchiese". There is no substantial difference in the meaning of the words "franchise" and "liberty". The definition as quoted by Hope J. from Blackstone's Commentaries, Book II at p. 37, is "a royal privilege, or a branch of the king's prerogative, subsisting in a subject" by a grant from the King. Blackstone defines an "office" as "a right to exercise a public or private employment, and to take the office and emoluments thereunto belonging ... whether public, as those of a magistrate, or private, as bailiffs, receivers and the like" (quoted also by Hope J.). I think that the word "office" as used in The Judicature Act does not enlarge the class of cases in which the proceeding by writ of quo warranto, or by information in the nature of quo warranto could be instituted. It has been urged that the right to proceed was established by the authority of Darley v. Reg. (1845), 12 Cl. and F. 520, 8 E.R. 1513. I do not agree. Before that case there had been a conflict of judicial opinion on the question whether an information in the nature of a quo warranto would lie for the usurpation of an office created, not by charter, but by Act of Parliament. The House of Lords in that case adopted the opinion of the judges, delivered through Tindal C.J., viz., that there was no difference between an office created by charter and one created by Act of Parliament; in both cases the assent of the sovereign was necessary; and whether this was given by charter or by assent to an Act of Parliament passed by both branches of the legislature was altogether immaterial; see Shortt, op. cit., p.

121, and Darley v. Reg., supra, per Lord Lyndhurst L.C. at p. 543. Shortt says, at p. 121: "The rule, as previously understood, was that quo warranto was not the remedy unless there was an usurpation actually upon the Crown. This has now been altered, and a rule of much less definite character, and one more difficult of application, has been substituted. See per Coleridge J. in Rex v. The Guardians of the Poor of St. Martin's in the Field (1851), 17 Q.B. 149 at 162, 117 E.R. 1238". Nor does the case of Rex v. Speyer, supra, demonstrate that a member of the Legislative Assembly occupies such a position as to fall within the class of cases to which the procedure in question is applicable. A member of the Legislative Assembly holds a "seat", and may be appointed to some office in the body. He is a representative of the people, and a delegate elected by the majority of voters. But his position is not such as arises by virtue of charter or Act of Parliament, within the meaning and intention of the law.

It was contended that there was no jurisdiction in any court to inquire into the right of a person to sit in the Legislative Assembly; that a limited right only was given to a court in matters of controverted elections: see The Controverted Elections Act, R.S.O. 1937, c. 11, s. 87. It was also urged that the right of a person to sit in Parliament was a matter exclusively within the jurisdiction of Parliament, and was a privilege of Parliament. The power of determining matters touching the election of its members is peculiar to "the Commons". "This right had been regularly claimed and exercised since the reign of Queen Elizabeth, and probably in earlier times, although such matters had been ordinarily determined in chancery": May's Parliamentary Practice, 13th ed., p. 64. This power exists, in my opinion, in the Legislative Assembly of this Province, although it is not expressly conferred by statute. It is inherent, and it must be presumed that it was the intention that such jurisdiction should be given at the time when the constitution of the Legislature was created by the Imperial Parliament. It could not be supposed that the parliament of this Province should possess fewer privileges and rights of this kind than are enjoyed by the mother parliament, through whom it came into being. In Re North Perth; Hessin v. Lloyd (1891), 21 O.R. 538, Meredith J. at p. 545, says:

"... where jurisdiction is not expressly conferred, it was not intended that this Court should exercise any of the rights or powers of the high Court of Parliament in any proceedings under the Acts respecting the representation of the people in Parliament". See also Rex v. Grahem-Campbell; ex parte Herbert, [1935] 1 K.B. 594 at 602; also Temple v. Bulmer, [1943] S.C.R. 265.

The Legislature has surrendered part of its jurisdiction by Acts relating to controverted elections. But those Acts must be construed strictly and literally. They do not take away from the Legislative Assembly all power to deal with matters pertaining to election of its members. In Valin v. Langlois (1879), 3 S.C.R. 1, Ritchie C.J. at p. 10, says: "As the House of Commons in England exercised sole jurisdiction over all matters connected with controverted elections, except so far as they may have restrained themselves by statutory restrictions, the several House of Assembly always claimed and exercised in like manner the exclusive right to deal with, and be sole judges of, election matters, unless restrained in like manner, and this claim, or the exercise of it, I have never heard disputed". Speaking of the Quebec Controverted Elections Act, the Lord Chancellor (Lord Cairns) in the case of Th]berge et al. v. Laudry (1876), 2 App. Cas. 102 at 106, C.R. [8] A.C. 1, 2 Cart. 1, says, "They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly". And at p. 107 he continues: "Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges

which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist". It must not be overlooked too that the real object of these proceedings is to attack the validity of the statute to extend the duration of the Legislative Assembly. The aim is to compel an election in the Province as if the prerogative right to dissolve the Assembly had been exercised by the Lieutenant-Governor. Under the guise of these proceedings the Court is invited to bring about the same result as would follow from such dissolution, and this in the absence of assent by the Lieutenant-Governor. This would clearly be an interference and encroachment by the Court on the prerogative right of the Crown, enjoyed and exercisable by the Lieutenant-Governor. Such a condition of affairs could not be permitted, and any attempt to bring it about must be promptly arrested.

It becomes unnecessary to say anything as to the service of a subpoena on Alex. C. Lewis, except that it was properly set aside by Hope J. For all the reasons I have given, I am of the opinion that the order of Hope J. should be affirmed, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

The relator applied, under s. 41 of The Supreme Court Act, R.S.C. 1927, c. 35, for special leave to appeal to the Supreme Court of Canada.

23rd June 1943. The motion was heard by ROBERTSON C.J.O. and KELLOCK and LAIDLAW JJ.A.

V. Evan Gray, K.C., for the relator, applicant.

C.R. Magone, K.C., for the respondents and the Attorney-General, contra.

At the conclusion of the argument, THE COURT delivered judgment orally, dismissing the motion with costs. The following written reasons were subsequently (on 5th July 1943) delivered for the Court by

ROBERTSON C.J.O. [after setting out the nature of the proceedings]:-- The applicant urges a number of grounds upon which he contends that leave to appeal to the Supreme Court of Canada should be granted. After hearing full argument on both sides, we are of opinion, substantially upon the ground that the order desired to be appealed from was a discretionary order, that we should not grant leave to appeal, as asked.

It may be stated at the outset that while the motion before Hope J. did not require him to exercise the discretion which the judge hearing the applicant's motion for quo warranto might have exercised in determining whether or not the case was one in which the order asked for yby the applicant should be made, yet, on the appeal from the order of Hope J., the whole merits of the applicant's original motion were gone into and argued at length.

The applicant, in opening his argument on the present motion, made it abundantly plain that the real purpose of his proceeding was to obtain the opinion of the Court that the Act of the Legislature of the Province of Ontario, being c. 24 of the statutes of 1942, whereby the life of the present Legislative Assembly was continued until the 19th day of October 1943, is invalid. It seems to us that it was quite within the province of the Court of Appeal to consider, and to exercise a discretion, as to whether the applicant should be permitted to continue this proceeding for the avowed purpose. The applicant is not a resident of, nor a voter in, the electoral district that any of the respondents was elected to represent, and he has only the same interest in the Act in question as any other resident of the Province who is a voter at a Provincial election. Whether that affords a sufficient status for the quo warranto proceeding we need not discuss, but, obviously, there are persons who have a much greater and an entirely different interest in maintaining or in attacking the validity of the statute, for there were numerous Acts passed by the Legislature in the session of 1943 that directly affect the rights and interests of many individuals and corporations. On other grounds, discussed in the judgments, the propriety of the proceeding is attacked. Whether the applicant should, in all the circumstances, be allowed to use a

quo warranto proceeding for obtaining a declaration or decision as to the validity of that statute, was a matter upon which, in our opinion, the Court of Appeal had a right to exercise its discretion, after hearing argument upon the whole case. In our opinion, it is not desirable that the applicant should be given special leave to carry this proceeding further, and to further litigate the questions that it raises. We are also of the opinion that s. 38 of The Supreme Court Act applies.

Upon these grounds we, therefore, refuse to grant special leave to appeal to the Supreme Court of Canada, and the applicant's motion is dismissed with costs.

Leave to appeal refused.

Solicitor for the relator, appellant: W.A. Toogood, Toronto.

Solicitor for the respondents: C.R. Magone, Toronto.

Norman Sterriah, on behalf of all members of the Ross River Dena Council Band, and the Ross River Dena Development Corporation *Appellants*

v.

Her Majesty The Queen in Right of Canada and the Government of Yukon *Respondents*

and

The Attorney General of British Columbia and the Coalition of B.C. First Nations *Interveners*

INDEXED AS: ROSS RIVER DENA COUNCIL BAND *v.* CANADA

Neutral citation: 2002 SCC 54.

File No.: 27762.

2001: December 11; 2002: June 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

Indians — Reserves — Creation of reserves in non-treaty context — Indian Band occupying lands in Yukon Territory since 1950s — Lands set aside by officials — Legal requirements for establishment of a reserve — Whether lands set aside have reserve status — Indian Act, R.S.C. 1985, c. I-5, s. 2(1) "reserve" — Territorial Lands Act, R.S.C. 1952, c. 263, s. 18(d).

Following a claim for the refund of taxes paid on tobacco sold in an Indian village in the Yukon, a dispute arose concerning the status of the village. If it was a reserve, an exemption from the tax could rightfully be claimed. The respondents maintained that a reserve had never been created there. In the 1950s, members of the appellant Band, which is recognized as a band under the *Indian Act*, were allowed to settle on the site of what is now their village, there being no treaty governing the lands. Various administrative discussions

Norman Sterriah, au nom de tous les membres du Conseil de la bande dénée de Ross River, et la Ross River Dena Development Corporation *Appelants*

c.

Sa Majesté la Reine du chef du Canada et le gouvernement du Yukon *Intimés*

et

Le procureur général de la Colombie-Britannique et la Coalition of B.C. First Nations *Intervenants*

RÉPERTORIÉ : CONSEIL DE LA BANDE DÉNÉE DE ROSS RIVER *c.* CANADA

Référence neutre : 2002 CSC 54.

N^{o} du greffe : 27762.

2001 : 11 décembre; 2002 : 20 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU TERRITOIRE DU YUKON

Indiens — Réserves — Création de réserves en l'absence de traité régissant la question — Terres occupées par une bande indienne au Yukon depuis les années 1950 — Terres mises de côté par des fonctionnaires — Conditions légales d'établissement des réserves — Les terres mises de côté ont-elles la qualité de réserve? — Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 2(1) « réserve » — Loi sur les terres territoriales, S.R.C. 1952, ch. 263, art. 18d).

À la suite d'une demande de remboursement de taxes sur le tabac vendu dans un village indien au Yukon, un différend a pris naissance relativement au statut de ce village. Si celui-ci constituait une réserve, une exemption de la taxe pouvait à bon droit être demandée. Les intimés ont plaidé qu'aucune réserve n'avait été créée à cet endroit. Dans les années 1950, les membres de la bande appelante, qui est une bande reconnue en vertu de la *Loi sur les Indiens*, ont été autorisés à s'établir à l'endroit qui est maintenant leur village, les terres en

and actions with respect to the status of the community took place between 1953 and 1965. In 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch of the then Department of Citizenship and Immigration that the village site had been reserved for the Branch. The letter was entered in the Reserve Land Register under the *Indian Act*. On a motion by the appellants, the chambers judge declared the lands occupied by the Band to be a reserve. The Court of Appeal, in a majority decision, allowed the respondents' appeal.

Held: The appeal should be dismissed.

Per Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ.: Given the absence of intention to create a reserve on the part of persons having the authority to bind the Crown, no reserve was legally created. In the Yukon Territory, as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. The Band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. The statutory framework for reserve creation in the Yukon Territory has limited, but not entirely ousted, the royal prerogative. In any case, whether the authority to create a reserve is derived from the royal prerogative or from statute, the Governor in Council is the holder of the power in both cases.

In this case, land was set aside but there was no intention to create a reserve on the part of persons having the authority to bind the Crown. The facts demonstrate that Crown agents never made representations to the members of the Band that the Crown had decided to create a reserve for them, nor did any person having the authority to bind the Crown ever agree to the setting up of a reserve

question n'étant visées par aucun traité. De 1953 à 1965, des discussions et des mesures administratives ont, selon le cas, été tenues ou prises relativement au statut de la collectivité. En 1965, le chef de la division des ressources du ministère du Nord canadien et des Ressources nationales a informé la division des Affaires indiennes du ministère de la Citoyenneté et de l'Immigration de l'époque que le site du village avait été réservé pour la division des Affaires indiennes. Cette lettre a été inscrite au registre des terres de réserve prévu par la *Loi sur les Indiens*. Par suite d'une requête présentée par les appelants, le juge qui en était saisie a déclaré que les terres occupées par la bande constituaient une réserve. Dans une décision rendue à la majorité, la Cour d'appel a accueilli l'appel formé par les intimés contre cette déclaration.

Arrêt : Le pourvoi est rejeté.

Les juges Gonthier, Iacobucci, Major, Binnie, Arbour et LeBel : Vu l'absence d'intention, par des personnes habilitées à lier la Couronne, de créer une réserve, aucune réserve n'a été créée sur le plan juridique. Tant au Yukon qu'ailleurs au Canada, il ne semble pas exister une seule et unique procédure de création de réserves, quoique la prise d'un décret ait été la mesure la plus courante et, indubitablement, la meilleure et la plus claire des procédures utilisées à cette fin. Quelle que soit la méthode utilisée, la Couronne doit avoir eu l'intention de créer une réserve. Il faut que ce soit des représentants de la Couronne investis de l'autorité suffisante pour lier celle-ci qui aient eu cette intention. Par exemple, cette intention peut être dégagée soit de l'exercice du pouvoir de l'exécutif — par exemple la prise d'un décret — soit de l'application de certaines dispositions législatives créant une réserve particulière. Des mesures doivent être prises lorsqu'on veut mettre des terres à part. Cette mise à part doit être faite au profit des Indiens. La bande visée doit avoir accepté la mise à part et avoir commencé à utiliser les terres en question. Le cadre législatif pourvoyant à la création des réserves au Yukon a restreint — sans toutefois l'écarter — l'application de la prérogative royale à cet égard. Quoi qu'il en soit, que le pouvoir de créer des réserves tire son origine de la prérogative royale ou de dispositions législatives, c'est le gouverneur en conseil qui est titulaire de ce pouvoir dans un cas comme dans l'autre.

En l'espèce, des terres ont été mises de côté, mais aucune intention de créer une réserve n'a été manifestée par des personnes habilitées à lier la Couronne. Les faits démontrent qu'à aucun moment des représentants de la Couronne n'ont déclaré à la bande que la Couronne avait décidé de créer une réserve à leur intention, et qu'aucune personne habilitée à lier la

at the site in question. Those Crown officials who did advocate the creation of a reserve never had the authority to set apart the lands and create a reserve. While lands were set aside for the Band, they do not have the status of a reserve.

Per McLachlin C.J. and L'Heureux-Dubé and Bastarache JJ.: LeBel J.'s conclusion that the Crown never intended to establish a reserve in this case was agreed with. However, the royal prerogative to set aside or apart lands for Aboriginal peoples has not been limited by statute, either expressly or by necessary implication. The *Indian Act* does not provide any formal mechanism for the creation of reserves. The definition of "reserve" in s. 2(1) of the Act does not limit the Crown's ability to deal with lands for the use of aboriginal peoples. It simply serves to identify which lands have been set apart as reserves within the meaning of the Act. Nor does s. 18(*d*) of the 1952 *Territorial Lands Act* place limits on the Crown's prerogative with respect to the creation of reserves. This section is not directed at the creation of reserves *per se*, but rather permits the Governor in Council to protect from disposition those Crown lands for which other use is contemplated. While s. 18(*d*) provides a mechanism to set apart lands for the creation of a reserve, it is merely one avenue to achieve this result. It has not placed any conditions or limitations on the Crown's prerogative to create a reserve.

Cases Cited

By LeBel J.

Applied: *R. v. Sioui*, [1990] 1 S.C.R. 1025; **referred to:** *R. v. Marshall*, [1999] 3 S.C.R. 456; *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; *Town of Hay River v. The Queen*, [1980] 1 F.C. 262; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657.

By Bastarache J.

Referred to: *R. v. Operation Dismantle Inc.*, [1983] 1 F.C. 745, aff'd [1985] 1 S.C.R. 441; *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015.

Couronne n'a jamais donné son aval à la création d'une réserve à l'endroit en question. Les fonctionnaires qui préconisaient effectivement la création d'une réserve n'ont jamais détenu le pouvoir de mettre des terres à part et de créer une réserve. Bien que des terres aient été mises de côté pour la bande, elles n'ont pas la qualité de réserve.

Le juge en chef McLachlin et les juges L'Heureux-Dubé et Bastarache : Il y a accord avec la conclusion du juge LeBel selon laquelle la Couronne n'a à aucun moment eu l'intention d'établir une réserve en l'espèce. Toutefois, la prérogative royale de mettre des terres de côté pour les peuples autochtones n'a jamais été limitée par voie législative, ni expressément ni par implication nécessaire. La *Loi sur les Indiens* n'établit pas de mécanisme formel de création de réserves. La définition de « réserve » au par. 2(1) de cette loi ne limite pas la capacité de la Couronne de mettre des terres de côté à l'usage des peuples autochtones, mais elle sert uniquement à identifier, parmi les terres mises de côté, celles qui l'ont été en tant que réserves au sens de la Loi. L'alinéa 18*d*) de la *Loi sur les terres territoriales* de 1952 ne restreint pas non plus l'application de la prérogative de la Couronne en matière de création de réserves. Cette disposition n'a pas pour objet la création de réserves comme telles, mais vise plutôt à permettre au gouverneur en conseil de soustraire à l'aliénation des terres de la Couronne pour lesquelles on envisage un autre usage. Bien que l'al. 18*d*) établisse un mécanisme de mise à part de terres aux fins de création d'une réserve, il n'est pas le seul mécanisme permettant de réaliser cette fin et il n'a pas pour effet d'assortir de conditions ou restrictions l'exercice de la prérogative de la Couronne en matière de création de réserves.

Jurisprudence

Citée par le juge LeBel

Arrêt appliqué : *R. c. Sioui*, [1990] 1 R.C.S. 1025; **arrêts mentionnés :** *R. c. Marshall*, [1999] 3 R.C.S. 456; *Attorney-General c. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; *Ville de Hay River c. La Reine*, [1980] 1 C.F. 262; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Bande indienne de St. Mary's c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657.

Citée par le juge Bastarache

Arrêts mentionnés : *R. c. Operation Dismantle Inc.*, [1983] 1 C.F. 745, conf. par [1985] 1 R.C.S. 441; *Attorney-General c. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; *R. c. Eldorado Nucléaire Ltée*, [1983] 2 R.C.S. 551; *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015.

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Constitution Act, 1982, s. 35.
Dominion Lands Act, R.S.C. 1927, c. 113 [rep. 1950, c. 22, s. 26], s. 74.
Indian Act, R.S.C. 1952, c. 149, s. 21.
Indian Act, R.S.C. 1985, c. I-5, ss. 2(1) "band", "reserve" [rep. & sub. c. 17 (4th Supp.), s. 1(1)], "designated lands" [ad. *idem*, s. 1(2)], (2), 18(1), (2), 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58, 60, 87(1).
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Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 2(1) « bande », « réserve » [abr. & rempl. ch. 17 (4^{e} suppl.), art. 1(1)], « terres désignées » [aj. *idem*, art. 1(2)], (2), 18(1), (2), 20 à 25, 28, 36 à 38, 42, 44, 46, 48 à 51, 58, 60, 87(1).
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No. 121 (QL), 1999 BCCA 750, setting aside a decision of the Yukon Territory Supreme Court, [1998] 3 C.N.L.R. 284, [1998] Y.J. No. 63 (QL), declaring a tract of land an Indian reserve within the meaning of the *Indian Act*. Appeal dismissed.

Brian A. Crane, *Q.C.*, and *Ritu Gambhir*, for the appellants.

Brian R. Evernden and *Jeffrey A. Hutchinson*, for the respondent Her Majesty the Queen in Right of Canada.

Penelope Gawn and *Lesley McCullough*, for the respondent the Government of Yukon.

Richard J. M. Fyfe, *Paul E. Yearwood* and *Patrick G. Foy*, *Q.C.*, for the intervener the Attorney General of British Columbia.

Leslie J. Pinder, for the intervener the Coalition of B.C. First Nations.

The reasons of McLachlin C.J. and L'Heureux-Dubé and Bastarache JJ. were delivered by

1 BASTARACHE J. — I have had the opportunity to read the reasons of my colleague and I agree that no reserve was created in this case. As noted by my colleague, the essential conditions for the creation of a reserve within the meaning of s. 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5, include an act by the Crown to set aside Crown land for the use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown. The evidence in this case reveals that the Crown never intended to establish a reserve within the meaning of the Act.

2 Though I agree with the disposition, I respectfully disagree with my colleague's assertion that the royal prerogative to create reserves has been limited by s. 18(*d*) of the *Territorial Lands Act*, R.S.C. 1952, c. 263. In addition, I think it is important to state clearly the interaction between the Crown prerogative and s. 2(1) of the *Indian Act*. Section 2(1) does not constrain the Crown's prerogative to

121 (QL), 1999 BCCA 750, qui a infirmé un jugement de la Cour suprême du Territoire du Yukon, [1998] 3 C.N.L.R. 284, [1998] Y.J. No. 63 (QL), qui avait déclaré qu'une parcelle de terrain constituait une réserve indienne au sens de la *Loi sur les Indiens*. Pourvoi rejeté.

Brian A. Crane, *c.r.*, et *Ritu Gambhir*, pour les appelants.

Brian R. Evernden et *Jeffrey A. Hutchinson*, pour l'intimée Sa Majesté la Reine du chef du Canada.

Penelope Gawn et *Lesley McCullough*, pour l'intimé le gouvernement du Yukon.

Richard J. M. Fyfe, *Paul E. Yearwood* et *Patrick G. Foy*, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Leslie J. Pinder, pour l'intervenante la Coalition of B.C. First Nations.

Version française des motifs du juge en chef McLachlin et des juges L'Heureux-Dubé et Bastarache rendus par

LE JUGE BASTARACHE — J'ai lu les motifs de mon collègue et, tout comme lui, je suis d'avis qu'il n'y a pas eu création de réserve en l'espèce. Comme l'a souligné mon collègue, parmi les conditions essentielles à la création d'une réserve au sens du par. 2(1) de la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5, mentionnons l'existence d'un acte de la Couronne ayant pour effet de mettre de côté des terres de la Couronne à l'usage d'une bande indienne et l'intention, manifestée par des personnes ayant le pouvoir de lier la Couronne, de créer une réserve. En l'espèce, la preuve révèle que la Couronne n'a jamais eu l'intention d'établir une réserve au sens de cette loi.

Bien que je sois d'accord avec le dispositif proposé par mon collègue, je ne peux, en toute déférence, souscrire à son affirmation selon laquelle l'al. 18*d*) de la *Loi sur les terres territoriales*, S.R.C. 1952, ch. 263, a restreint la prérogative royale de créer des réserves. De plus, j'estime qu'il est important d'indiquer clairement comment interagissent la prérogative de la Couronne et le par. 2(1) de la *Loi*

deal with lands for the use of Indians, but rather provides a definition of "reserve" for the purposes of the Act. Section 18(*d*) of the 1952 *Territorial Lands Act* gives the Governor in Council a discretionary power to protect Crown lands from disposal for a wide range of public purposes, including the welfare of Indians. In my view, neither provision, either expressly or by necessary implication, limits the scope of the Crown's prerogative to set aside or apart lands for Aboriginal peoples.

sur les Indiens. Ce paragraphe ne limite pas la prérogative que possède la Couronne d'agir en matière de terres destinées à l'usage des Indiens, mais il définit plutôt le mot « réserve » pour l'application de cette loi. L'alinéa 18*d*) de la *Loi sur les terres territoriales* de 1952 confère au gouverneur en conseil le pouvoir discrétionnaire de soustraire à l'aliénation des terres de la Couronne, et ce pour un large éventail de fins d'intérêt public, y compris le bien-être des Indiens. À mon avis, ni l'une ni l'autre de ces dispositions — expressément ou par implication nécessaire — n'ont pour effet de limiter l'étendue du pouvoir de la Couronne de mettre des terres de côté pour les peuples autochtones.

All of the parties agree that the power to create reserves was originally based on the royal prerogative. The power is thought to be part of the Crown's prerogative to administer and dispose of public property including Crown lands (see P. Lordon, Q.C., *Crown Law* (1991), at p. 96). The appellants nonetheless contend that this power has long been regulated by statute, including the successive Indian Acts which date back to Confederation as well as various statutes governing the disposition and management of Crown lands. They assert in particular that the right to establish reserves in the Yukon Territory is found in the *Indian Act* and the *Territorial Lands Act* which have replaced the prerogative. My colleague disagrees with the appellants that the prerogative has been displaced, but concedes that it has been limited.

3 Toutes les parties sont d'avis que le pouvoir de créer des réserves était initialement fondé sur l'exercice de la prérogative royale. On estime que ce pouvoir fait partie de la prérogative royale concernant l'administration et l'aliénation des biens publics, y compris les terres de la Couronne (voir P. Lordon, c.r., *La Couronne en droit canadien* (1992), p. 107). Les appelants soutiennent néanmoins que l'exercice de ce pouvoir est depuis longtemps régi par des textes de loi, notamment les diverses lois sur les Indiens adoptées depuis la Confédération et diverses autres lois portant sur la disposition et la gestion des terres de la Couronne. Ils affirment tout particulièrement que le droit d'établir des réserves au Yukon est prévu par la *Loi sur les Indiens* et la *Loi sur les terres territoriales*, qui auraient remplacé la prérogative. Mon collègue ne souscrit pas à la thèse des appelants selon laquelle la prérogative aurait été écartée, mais il admet que son exercice a été restreint.

There is no doubt that a royal prerogative can be abolished or limited by clear and express statutory provision: see *R. v. Operation Dismantle Inc.*, [1983] 1 F.C. 745, at p. 780, aff'd [1985] 1 S.C.R. 441, at p. 464. It is less certain whether in Canada the prerogative may be abolished or limited by necessary implication. Although this doctrine seems well established in the English courts (see *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.)), this Court has questioned its application as an exception to Crown immunity (see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551,

4 Il ne fait aucun doute qu'une prérogative royale peut être abolie ou restreinte par une disposition législative claire ou explicite : voir *R. c. Operation Dismantle Inc.*, [1983] 1 C.F. 745, p. 780, conf. par [1985] 1 R.C.S. 441, p. 464. Il est toutefois moins certain que, au Canada, la prérogative puisse être abolie ou restreinte par implication nécessaire. Bien que cette doctrine semble bien établie dans la jurisprudence britannique (voir *Attorney-General c. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.)), notre Cour a mis en doute son application en tant qu'exception à l'immunité

at p. 558; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at pp. 1022-23). Assuming that prerogative powers may be removed or curtailed by necessary implication, what is meant by "necessary implication"? H. V. Evatt explains the doctrine as follows:

> Where Parliament provides by statute for powers previously within the Prerogative being exercised subject to conditions and limitations contained in the statute, there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the statute. "Otherwise," says Swinfen-Eady M.R., "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on Prerogative?" [Emphasis added.]
>
> (H. V. Evatt, *The Royal Prerogative* (1987), at p. 44)

de la Couronne (voir *R. c. Eldorado Nucléaire Ltée*, [1983] 2 R.C.S. 551, p. 558; *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, p. 1022-1023). En supposant que les pouvoirs de prérogative puissent être éliminés ou réduits par implication nécessaire, qu'entend-on par « implication nécessaire »? Voici comment H. V. Evatt explique cette doctrine :

> [TRADUCTION] Lorsque le Parlement précise dans une loi que l'exercice de pouvoirs relevant jusque-là de la prérogative est assujetti aux conditions et restrictions prévues par cette loi, il entend implicitement que ces pouvoirs ne puissent être exercés qu'en conformité avec la loi. « Sinon », comme l'affirme le maître des rôles Swinfen-Eady, « quelle serait l'utilité d'imposer des restrictions, si la Couronne pouvait en faire fi à son gré et continuer d'avoir recours à la prérogative? » [Je souligne.]
>
> (H. V. Evatt, *The Royal Prerogative* (1987), p. 44)

5 In my view, s. 2(1) of the *Indian Act,* which sets out the definition of "reserve", does not in any way "provid[e] by statute for powers previously within the Prerogative being exercised subject to conditions and limitations contained in the statute". It is well established that the *Indian Act* does not provide any formal mechanism for the creation of reserves. The Act is, and always has been, confined to the management and protection of existing reserves, many of which were established long before the federal government assumed jurisdiction over Indians pursuant to s. 91(24) of the *Constitution Act, 1867* (see R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland — A Study in Law and History* (1990), at pp. 24-25).

À mon avis, le par. 2(1) de la *Loi sur les Indiens*, où l'on trouve une définition de « réserve », n'est aucunement un exemple de cas où le législateur [TRADUCTION] « précise dans une loi que l'exercice de pouvoirs relevant jusque-là de la prérogative est assujetti aux conditions et restrictions prévues par cette loi ». Il est bien établi que la *Loi sur les Indiens* n'établit pas de mécanisme formel de création de réserves. Cette loi s'applique uniquement, et ce depuis toujours, à la gestion et à la protection des réserves existantes, dont bon nombre ont été constituées bien avant que le gouvernement fédéral soit investi de la compétence sur les Indiens par le par. 91(24) de la *Loi constitutionnelle de 1867* (voir R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada : A Homeland — A Study in Law and History* (1990), p. 24-25).

6 In the past, the Crown exercised its prerogative to create reserves in a number of ways. Although some lands set apart for Indian bands constitute "reserves" within the meaning of the *Indian Act*, other lands have been set apart or aside for the use of Indian bands, yet are not recognized as "reserves" under the Act. For example, in this case, the Crown exercised its prerogative to "reserve" or set aside lands for the

Dans le passé, la Couronne a exercé de diverses façons sa prérogative de créer des réserves. Si certaines des terres mises à part pour des bandes indiennes constituent des « réserves » au sens de la *Loi sur les Indiens*, il en existe d'autres qui ont été mises à part ou de côté à l'usage des bandes indiennes, mais qui ne sont pas pour autant reconnues comme des « réserves » visées par cette loi.

use of the Ross River Band, but did not manifest an intention to create a "reserve" within the meaning of s. 2(1) of the *Indian Act.* In my view, the definition of "reserve" in s. 2(1) serves to identify which lands have been set apart as "reserves" within the meaning of the Act; the definition does not limit the Crown's ability to deal with lands for the use of aboriginal peoples. A "reserve" is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". The legislation does not indicate precisely when land will be considered to have been "set apart" for the use and benefit of a band, nor does it indicate the steps necessary for a "setting apart" of land to have occurred. This is, essentially, the issue that is before us here. As I stated earlier, we have determined that for land to have been "set apart" within the meaning of the Act, there must, at the very least, exist an act by the Crown to set apart land for the use of the band combined with an intention to create a reserve on the part of persons having authority to bind the Crown.

En l'espèce, par exemple, la Couronne a exercé sa prérogative de « réserver » ou mettre de côté des terres à l'usage de la bande de Ross River, mais elle n'a pas manifesté son intention de créer une « réserve » au sens du par. 2(1) de la *Loi sur les Indiens.* À mon avis, la définition du terme « réserve » au par. 2(1) sert à identifier les terres qui ont été mises de côté à titre de « réserves » pour l'application de la Loi; la définition ne limite pas la capacité de la Couronne d'agir à l'égard des terres à l'usage des peuples autochtones. Une « réserve » est une « [p]arcelle de terrain dont Sa Majesté est propriétaire et qu'elle a mise de côté à l'usage et au profit d'une bande ». La disposition ne précise pas les circonstances dans lesquelles une terre sera considérée comme ayant été « mise de côté » à l'usage et au profit d'une bande, ni les démarches nécessaires à la « mise de côté » de terres. Il s'agit là essentiellement de la question dont nous sommes saisis. Comme je l'ai mentionné précédemment, nous avons établi que, pour qu'il y ait « réserve » au sens de la Loi, il faut à tout le moins que la Couronne ait accompli un acte ayant eu pour effet de mettre de côté des terres à l'usage de la bande et que des personnes habilitées à lier la Couronne aient eu l'intention de créer une réserve.

My colleague asserts that the definition of "reserve" in s. 2(1) limits the royal prerogative to create reserves in that it precludes the possibility of transferring the title to the land from the Crown to the First Nation (since the definition provides that legal title is "vested in Her Majesty"). I agree with him that if a tract of land meets the definition of "reserve" under the *Indian Act*, the title must remain in the Crown and the land must be dealt with subject to the Act. However, I do not see how the definition otherwise limits the royal prerogative to set aside or apart land for Aboriginal peoples. In other words, it merely defines with greater specificity which of these lands will be considered "reserves" for the purposes of the Act. In my opinion, the Crown is still free to deal with its land in any other manner it wishes, including, as noted by my colleague, the transfer of title by sale, grant or gift to a First Nation or some of its members, though

Mon collègue affirme que la définition de « réserve » au par. 2(1) a pour effet de limiter l'application de la prérogative royale de créer des réserves en écartant la possibilité de transport, de la Couronne à une première nation, du titre relatif à une parcelle de terrain donnée (puisque le mot « réserve » est défini comme étant une parcelle de terrain « dont Sa Majesté est propriétaire »). Je reconnais, comme le dit mon collègue, que si une parcelle de terrain correspond à la définition de « réserve » dans la *Loi sur les Indiens* le titre afférent à cette parcelle demeure la propriété de la Couronne et les mesures prises à l'égard de la parcelle doivent l'être sous réserve des dispositions de la Loi. Cependant, je ne vois pas comment la définition limite de quelque autre façon la prérogative royale de mettre de côté des terres pour les peuples autochtones. En d'autres mots, la disposition définit simplement avec plus de précision les terres qui sont considérées comme des « réserves » pour

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that land would not then constitute an *Indian Act* "reserve".

8 Nor do I agree that s. 18(*d*) of the 1952 *Territorial Lands Act* has placed limits on the Crown's prerogative with respect to the creation of reserves. Section 18 (the predecessor to the current s. 23(*d*)) finds its origin in the *Dominion Lands Act*, R.S.C. 1927, c. 113. That Act allowed for entry onto vacant Crown lands for agricultural purposes. Section 74 of the *Dominion Lands Act* authorized the Governor in Council to keep lands reserved for Indians outside of the scheme of the Act so that the lands would be protected from disposition. The provision also permitted the Governor in Council to protect lands from entry for various other public purposes, including "places of public worship, burial grounds, schools and benevolent institutions". Section 18 of the 1952 *Territorial Lands Act* consolidates and continues the *Dominion Lands Act* powers. Similar to the *Dominion Lands Act*, it authorizes the Governor in Council to set apart areas of land for the welfare of Indians, and also permits the Crown to protect Crown lands from disposal for a wide range of public purposes.

9 It seems clear from the above that s. 18 of the 1952 *Territorial Lands Act* is not directed at the creation of reserves *per se* but rather permits the Governor in Council to protect from disposition those Crown lands for which other use is contemplated. As my colleague points out, the setting apart of Crown lands which might otherwise be disposed of pursuant to s. 18 of the Act does not in and of itself imply that a "reserve" within the meaning of the *Indian Act* has been created since the Crown must also manifest an intent to make the land a reserve under the Act. Where, however, evidence of this intention is

l'application de la *Loi sur les Indiens*. Je suis d'avis que la Couronne demeure libre de prendre toute autre mesure qu'elle désire à l'égard des terres lui appartenant, y compris, comme l'a souligné mon collègue, en cédant par voie de vente, concession ou don à une première nation ou à certains de ses membres le titre relatif à de telles terres, qui ne constitueraient toutefois pas, dans un tel cas, une « réserve » au sens de la *Loi sur les Indiens*.

Je ne partage pas non plus l'opinion selon laquelle l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 aurait restreint l'application de la prérogative de la Couronne en matière de création de réserves. L'article 18 (remplacé par l'al. 23*d*)) tire son origine de la *Loi des terres fédérales*, S.R.C. 1927, ch. 113, qui permettait l'accès aux terres vacantes de la Couronne à des fins agricoles. L'article 74 de la *Loi des terres fédérales* autorisait le gouverneur en conseil à conserver des terres qui avaient été réservées aux Indiens autrement que sous le régime prévu par la Loi de façon à soustraire ces terres à l'aliénation. Cette disposition lui permettait également d'interdire l'accès à des terres utilisées à diverses autres fins, notamment « aux fins d'emplacements ou terrains destinés au culte public, de cimetières, d'écoles, d'institutions de bienfaisance ». L'article 18 de la *Loi sur les terres territoriales* de 1952 codifie et maintient les pouvoirs prévus par la *Loi des terres fédérales.* Tout comme cette dernière loi, la *Loi sur les terres territoriales* autorise le gouverneur en conseil à mettre à part des étendues de terre pour le bien-être des Indiens et permet aussi à la Couronne de soustraire à l'aliénation des terres de la Couronne pour un large éventail de fins publiques.

Il semble nettement ressortir de ce qui précède que l'art. 18 de la *Loi sur les terres territoriales* de 1952 n'a pas pour objet la création de réserves comme telles, mais vise plutôt à permettre au gouverneur en conseil de soustraire à l'aliénation des terres de la Couronne pour lesquelles on envisage un autre usage. Comme le souligne mon collègue, la mise de côté, conformément à l'art. 18 de la Loi, de terres de la Couronne qui autrement pourraient être aliénées n'emporte pas en soi création d'une « réserve » au sens de la *Loi sur les Indiens*, puisque la Couronne doit également manifester

present, the setting apart of land under s. 18(*d*) of the 1952 *Territorial Lands Act* would certainly suffice as the formal act by which the Crown sets apart land for the use and benefit of an Indian band.

Though I agree that the setting apart of land under s. 18(*d*) of the 1952 *Territorial Lands Act* would be sufficient to establish an *Indian Act* reserve if the necessary intention on the part of the Crown to do so were present, I cannot see how s. 18(*d*) has placed any conditions or limitations on the Crown prerogative to create reserves. Historically, a wide array of formal and informal instruments has been used to set apart lands as *Indian Act* reserves. In my view, any one of these instruments may be sufficient to constitute the action by which the land is set apart so long as intention on the part of the Crown to create a reserve under the *Indian Act* is also present. I think that there is a danger in saying that s. 18(*d*) of the 1952 *Territorial Lands Act* has somehow limited the Crown's prerogative to create reserves since this implies that only an application under the Act will suffice as the formal action to set apart the lands as a reserve. While s. 18(*d*) provides one mechanism to set apart lands for the creation of a reserve, it is not the only mechanism available to the Crown for this purpose and I would not wish to imply this as a necessary condition for the creation of a reserve. If the setting apart of land under s. 18(*d*) is not a necessary condition for the creation of a reserve but merely one avenue to achieve this result, then I cannot see how the authority to set apart lands for a reserve under s. 18(*d*) limits the Crown's prerogative to create a reserve.

l'intention de constituer une réserve au sens de cette loi. Cependant, lorsque la preuve atteste l'existence de cette intention, la mise à part de terres en vertu de l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 serait certainement suffisante pour constituer l'acte formel par lequel la Couronne met de côté des terres à l'usage et au profit d'une bande indienne.

10 Bien que je reconnaisse que la mise à part de terres en vertu de l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 serait suffisante pour établir une réserve au sens de la *Loi sur les Indiens*, dans la mesure où la Couronne a également manifesté l'intention requise à cet égard, je ne vois pas comment cet alinéa a pu avoir pour effet d'assortir de conditions ou restrictions l'exercice de la prérogative de la Couronne en matière de création de réserves. On a historiquement utilisé un large éventail d'instruments formels et informels pour mettre à part des terres en tant que réserves au sens de la *Loi sur les Indiens*. À mon avis, n'importe lequel de ces instruments pourrait suffire à constituer l'acte de mise de côté de terres, dans la mesure où la Couronne a également manifesté l'intention de créer une réserve au sens de la *Loi sur les Indiens*. Selon moi, il y a un risque à affirmer que l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 a, d'une certaine façon, limité la prérogative de la Couronne de créer des réserves, puisque cet argument suppose que seule la démarche prévue par cette loi saurait constituer l'acte formel de mise à part de terres en tant que réserve. Bien que l'al. 18*d*) établisse un mécanisme de mise à part de terres aux fins de création d'une réserve, il n'est pas le seul mécanisme dont dispose la Couronne à cette fin et je ne voudrais pas donner à penser que le recours à cette disposition est une condition nécessaire à la création d'une réserve. Si la mise à part de terres en vertu de l'al. 18*d*) ne constitue pas une condition nécessaire à la création d'une réserve, mais seulement un moyen d'atteindre ce résultat, alors je ne vois pas comment le pouvoir prévu par l'al. 18*d*) de mettre à part des terres pour l'établissement d'une réserve a pour effet de restreindre la prérogative de la Couronne de créer une réserve.

The judgment of Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ. was delivered by

LeBel J. —

I. Introduction

11 This appeal raises the issue of how *Indian Act* reserves were created in the Yukon Territory, in a non-treaty context. The appellants claim that the Government of Canada created a reserve by setting aside land for the Ross River Band. The federal government answers that, although land was set aside, no reserve was ever created; no intention to create it has been established on the evidence. For the reasons which follow, I conclude that no reserve was created and that the appeal should fail.

II. Background of the Litigation

12 This case arose out of a claim for a refund of tobacco tax from a store in a small village in the Yukon. According to the appellants, this village is a reserve; hence, an exemption was claimed. The respondents disputed this claim, saying that a reserve had never been created in this place. What began as a tax problem has become a question of aboriginal law which, in turn, requires a survey of the historical background to the procedure governing the creation of reserves in the Yukon Territory. The particular facts of the long history of the dealings of the Ross River Band with the Department of Indian Affairs must also be reviewed.

13 The Ross River Dena Council Band (the "Band") is recognized as a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is now located at Ross River, in the Yukon, on lands which it claims are a reserve. Norman Sterriah is the chief of the Band. In 1982, the Band incorporated the appellant, Ross River Dena Development Corporation. The Corporation was set up to provide services for the benefit of Band members and to carry on business as

Version française du jugement des juges Gonthier, Iacobucci, Major, Binnie, Arbour et LeBel rendu par

Le juge LeBel —

I. Introduction

Le présent pourvoi soulève la question de savoir comment étaient créées les réserves visées par la *Loi sur les Indiens* dans le Territoire du Yukon (« Yukon »), où aucun traité ne régissait la question. Les appelants prétendent que le gouvernement du Canada a créé une réserve en mettant de côté des terres pour la bande de Ross River. Le gouvernement fédéral réplique que, bien que des terres aient été mises de côté, aucune réserve n'a jamais été créée, et que la preuve ne révèle aucune intention en ce sens. Pour les motifs qui suivent, j'estime qu'aucune réserve n'a été créée et qu'il y a lieu de rejeter le présent pourvoi.

II. Historique du litige

La présente affaire découle d'une demande de remboursement de la taxe sur le tabac présentée par un magasin situé dans un petit village du Yukon. Selon les appelants, ce village est une réserve, d'où la demande d'exemption. Les intimés ont contesté cette demande, affirmant qu'aucune réserve n'avait jamais été créée à cet endroit. Ce qui, à l'origine, était un problème de fiscalité est devenu une question qui porte sur le droit relatif aux Autochtones et requiert l'examen du contexte historique de la procédure de création des réserves au Yukon. Il faut également examiner les faits particuliers de la longue histoire des rapports entre la bande de Ross River et le ministère des Affaires indiennes.

Le Conseil de la bande dénée de Ross River (la « Bande ») est reconnu comme une bande au sens de la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5. La Bande est maintenant établie à Ross River, au Yukon, sur des terres qui, affirme-t-elle, constituent une réserve. Norman Sterriah est le chef de la Bande. En 1982, l'appelante Ross River Dena Development Corporation a été constituée, à la demande de la Bande, pour fournir des

their agent. Despite the dispute about the legal status of the community, it is at least agreed that there is a village at Ross River and that Band members have been living there for a number of years.

services aux membres de la Bande et agir comme mandataire de ceux-ci. Malgré le litige concernant la situation juridique de la collectivité, les parties s'accordent à tout le moins sur le fait qu'il existe un village à Ross River et que les membres de la Bande y vivent depuis un certain nombre d'années.

After a long history of being shifted or pushed from place to place since the predecessors of the Department of Indian Affairs and Northern Development ("DIAND") took them under its wing, in the 1950s, at long last, the members of the Ross River First Nation were allowed to settle down on the site of what is now their village, located at the junction of the Pelly and Ross Rivers. The lands in dispute in this case are not governed by treaty, as the Yukon Territory belongs to those regions of Canada where the treaty-making process with First Nations had very little practical impact, particularly in respect of the creation of reserves. (See *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2, *Restructuring the Relationship*, Part 2, at pp. 479-84.)

14 Après avoir été déplacés ou ballottés à maintes reprises d'un endroit à un autre depuis que les organismes qui ont précédé le ministère des Affaires indiennes et du Nord canadien (le « MAINC ») les ont pris sous leurs ailes, les membres de la Première nation de Ross River ont enfin été autorisés, dans les années 50, à s'établir à l'endroit qui est maintenant leur village, au confluent des rivières Pelly et Ross. Les terres litigieuses ne sont pas régies par traité, car le Yukon est une des régions du Canada où la pratique qui consistait à conclure des traités avec les Premières nations n'a eu que très peu d'effets concrets, tout particulièrement en ce qui concerne la création de réserves. (Voir *Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 2, *Une relation à redéfinir*, partie 2, p. 528-534.)

Despite the absence of a treaty, the agents of the Department in the 1950s knew that the Band was living on the shores of the Ross River. The acknowledgement of this fact triggered a process of administrative discussion and action which led or not to the creation of a reserve on this site. By letter dated October 21, 1953, the Superintendent of the Yukon Agency sought the permission of the Indian Commissioner for British Columbia to establish an Indian reserve for the use of the Ross River Indians. By letter dated November 10, 1953, the Indian Commissioner for British Columbia supported the recommendation. On April 1, 1954, the Superintendent of the Yukon Agency wrote to the Dominion Lands Agent in Whitehorse to advise that tentative arrangements had been made to apply for a tract of land for an Indian reserve at Ross River; Ottawa did not act on the request.

15 Malgré l'absence de traité, les fonctionnaires du ministère savaient, dans les années 50, que la Bande vivait sur les rives de la rivière Ross. La reconnaissance de ce fait a déclenché un processus de discussions et de mesures administratives qui a ou n'a pas abouti à la création d'une réserve à l'endroit en question. Dans une lettre datée du 21 octobre 1953, le surintendant de l'Agence du Yukon a demandé au commissaire aux Affaires indiennes pour la Colombie-Britannique l'autorisation d'établir une réserve indienne à l'usage des Indiens de Ross River. Dans une lettre datée du 10 novembre 1953, le commissaire aux Affaires indiennes pour la Colombie-Britannique a appuyé cette recommandation. Le 1er avril 1954, le surintendant de l'Agence du Yukon a écrit à l'agent des terres fédérales à Whitehorse pour l'informer que des démarches préliminaires avaient été effectuées en vue de demander une parcelle de terres aux fins d'établissement d'une réserve indienne à Ross River; Ottawa n'a pas donné suite à la demande.

16 On May 4, 1955, the federal Cabinet issued a procedural directive entitled Circular No. 27 which set out an internal government procedure for reserving lands in the territories for the use of a government department or agency. In 1957, the federal government decided to dismiss the recommendation to establish 10 reserves. On November 27, 1962, the Superintendent of the Yukon Agency applied to the Indian Affairs Branch (then in the Department of Citizenship and Immigration) to reserve approximately 66 acres of land under s. 18 of the *Territorial Lands Act*, R.S.C. 1952, c. 263, to be used for the Ross River Indian Band Village site. Correspondence was then exchanged over the following three years with respect to the proposed size and location of the site. On January 26, 1965, the Chief of the Resources Division in the Department of Northern Affairs and National Resources advised the Indian Affairs Branch that the site had been reserved for the Indian Affairs Branch. The letter was entered in the Reserve Land Register pursuant to s. 21 of the *Indian Act*, R.S.C. 1952, c. 149. It was also recorded in the Yukon Territory Land Registry of the Lands Division of the former Department of Northern Affairs and National Resources.

Le 4 mai 1955, le Cabinet fédéral a établi une directive procédurale intitulée Circulaire nº 27, qui précisait la procédure gouvernementale interne à suivre pour réserver des terres dans les territoires à l'intention des ministères ou autres organismes gouvernementaux. En 1957, le gouvernement fédéral a décidé de rejeter la recommandation proposant la création de 10 réserves. Le 27 novembre 1962, le surintendant de l'Agence du Yukon a demandé à la Division des affaires indiennes (qui faisait alors partie du ministère de la Citoyenneté et de l'Immigration) de réserver, en vertu de l'art. 18 de la *Loi sur les terres territoriales*, S.R.C. 1952, ch. 263, environ 66 acres de terres devant servir comme site du village de la Bande. Au cours des trois années qui ont suivi, il y a eu échange de correspondance concernant la superficie et l'emplacement proposés pour le site du village de Ross River. Le 26 janvier 1965, le chef de la division des ressources du ministère du Nord canadien et des Ressources nationales a informé la Division des affaires indiennes que le site avait été réservé pour la Division des affaires indiennes. Cette lettre a été inscrite au registre des terres de réserve en vertu de l'art. 21 de la *Loi sur les Indiens*, S.R.C. 1952, ch. 149. Elle a aussi été notée au bureau d'enregistrement des droits fonciers du Yukon (Yukon Territory Land Registry) de la Division des terres du ministère du Nord canadien et des Ressources nationales de l'époque.

17 The Band takes the view that this administrative process, combined with the actual setting aside of land for its benefit, created a reserve within the meaning of the *Indian Act*. It appears that this opinion was not shared either by the Yukon territorial government or the Indian Affairs Branch. The dispute may have remained dormant for a while. It broke into the open and reached the courts on the occasion of a problem concerning the applicability of tobacco taxes.

Selon la Bande, ce processus administratif, conjugué à la mise de côté des terres à son profit, a eu pour effet de créer une réserve au sens de la *Loi sur les Indiens*. Il semble que ni l'administration territoriale du Yukon ni la Division des affaires indiennes ne partageaient cet avis. Le différend, qui aurait pu demeurer latent encore pendant un certain temps, a éclaté au grand jour et les tribunaux en ont été saisis dans le cadre d'un problème touchant l'applicabilité des taxes sur le tabac.

18 The respondent Government of Yukon had imposed taxes on the Band under the *Tobacco Tax Act*, R.S.Y. 1986, c. 170. The Band claimed an exemption and asked for a refund of taxes already paid on tobacco sold in the village. It asserted that the Government of Yukon was taxing personal property of an Indian or of a band on a reserve, which

En effet, le gouvernement du Yukon intimé a imposé à la Bande des taxes en application de la *Loi de la taxe sur le tabac*, L.R.Y. 1986, ch. 170. La Bande a revendiqué une exemption et demandé le remboursement de taxes déjà payées sur le tabac vendu dans le village. Elle a fait valoir que le gouvernement du Yukon se trouvait à taxer des biens

was exempt pursuant to s. 87(1) of the *Indian Act*. The Government of Yukon refused to make the refund because it did not recognize that the Band occupied a reserve. According to the Yukon government, the Band was merely located on lands which had been "set aside" for its benefit by the Crown in right of Canada. The federal government gave full support to this position and subsequently fought the claim of the appellants as to the existence of a reserve.

In the meantime, negotiations were taking place in the Yukon with respect to the land claims and rights of First Nations. An agreement known as the "Umbrella Final Agreement" was entered into by the Council for Yukon Indians, the Government of Yukon and the Government of Canada in 1993. It is a framework agreement which provides for its terms to be incorporated into subsequent agreements with individual First Nations. According to the Yukon government, seven of these agreements are now in force, dealing, among other topics, with land "set aside" and not part of a reserve. The Band chose to remain outside this process of treaty negotiation pending a decision from the courts regarding whether a reserve was created pursuant to the *Indian Act*.

III. Judicial History

A. *Yukon Territory Supreme Court*, [1998] 3 C.N.L.R. 284

The appellants filed a motion in the Yukon Territory Supreme Court asking for a declaration that the lands the Band occupied at the Ross River site constitute a reserve within the meaning of the *Indian Act*. The federal government replied that the land had only been set aside for the Indian Affairs Branch on behalf of the Band. There had been no intent to create a reserve. Moreover, the creation of a reserve in the Yukon required an Order-in-Council, under the royal prerogative. This step had never been taken in the case of the Ross River Band.

personnels d'un Indien ou d'une bande dans une réserve, biens qui sont exempts de taxation en vertu du par. 87(1) de la *Loi sur les Indiens*. Le gouvernement du Yukon a refusé le remboursement demandé, au motif qu'il ne reconnaît pas que la Bande occupe une réserve. Selon le gouvernement du Yukon, celle-ci occupe tout simplement des terres qui ont été « mises de côté » à son profit par Sa Majesté du chef du Canada. Le gouvernement fédéral a souscrit entièrement à cette thèse et a par la suite contesté la prétention des appelants concernant l'existence d'une réserve.

19 Dans l'intervalle, des négociations se déroulaient au Yukon relativement aux droits des Premières nations et à leurs revendications territoriales. En 1993, le Conseil des Indiens du Yukon, le gouvernement du Yukon et le gouvernement du Canada ont conclu une entente intitulée « Accord-cadre définitif ». Ce document prévoit les modalités de base devant être incorporées aux accords conclus subséquemment par les Premières nations individuellement. Selon le gouvernement du Yukon, il existe à ce jour sept accords de ce genre, qui traitent chacun de nombreuses questions, notamment des terres qui ont été « mises de côté » et ne font pas partie d'une réserve. La Bande a décidé de ne pas participer à ce processus de négociation de traités tant que les tribunaux n'auraient pas statué sur la question de savoir si une réserve au sens de la *Loi sur les Indiens* a été créée.

III. Historique des procédures judiciaires

A. *Cour suprême du territoire du Yukon*, [1998] 3 C.N.L.R. 284

20 Par requête déposée devant la Cour suprême du territoire du Yukon, les appelants ont sollicité un jugement déclaratoire portant que les terres occupées par la Bande à Ross River constituaient une réserve au sens de la *Loi sur les Indiens*. Le gouvernement fédéral a répondu que les terres avaient seulement été mises de côté pour la Division des affaires indiennes pour le compte de la Bande, qu'on n'avait pas eu l'intention de créer une réserve et, en outre, que la création d'une réserve au Yukon exigeait la prise d'un décret en vertu de la prérogative royale, démarche qui n'a jamais été accomplie dans le cas de la bande de Ross River.

21 Maddison J. declared the tract of land in question "to be an Indian Reserve within the meaning of the *Indian Act*" (para. 33). Maddison J. held that the definition of "reserve" in s. 2 of the *Indian Act* does not require any particular form of proclamation, conveyance, notification, transfer, order or grant; rather, the statutory definition emphasizes the act of "setting apart". He recognized that there was no Order-in-Council or other such official instrument creating or recognizing the Ross River lands as an Indian reserve, but he found that such formal recognition was not necessary to bring the lands within the definition of "reserve" in the *Indian Act*. Maddison J. found, at para. 29, that:

> The area reserved on January 26, 1965, was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the *Indian Act* definition of "reserve". The active words of the document reserving the land are as close to the wording of the statute as all but one of the four admitted Yukon Reserves for which the Court has been provided the wording. The public servants who put the setting-aside in process were Her Majesty's agents.

Le juge Maddison a déclaré que la parcelle de terrain en question [TRADUCTION] « constituait une réserve indienne au sens de la *Loi sur les Indiens* » (par. 33). Il a estimé que la définition de « réserve » à l'art. 2 de la *Loi sur les Indiens* n'exige aucune forme particulière de proclamation, de notification, de décret ou d'acte de transport, transfert ou concession, mais qu'elle met plutôt l'accent sur le fait de la « mise de côté ». Il a reconnu qu'il n'existait aucun décret ou autre texte officiel faisant des terres de Ross River une réserve indienne ou leur reconnaissant cette qualité. Cependant, il a conclu qu'une telle reconnaissance officielle n'est pas nécessaire pour que les terres soient visées par la définition de « réserve » dans la *Loi sur les Indiens*. Le juge Maddison a tiré les constatations suivantes, au par. 29 :

> [TRADUCTION] La superficie réservée le 26 janvier 1965 était une parcelle de terrain dont Sa Majesté était (et est encore) propriétaire. On avait demandé que les terres servent à l'usage et au profit d'une bande : la bande de Ross River. On les a demandées aux fins d'affectation à un usage permanent : site d'un village. Il s'agit d'une affectation « à l'usage et au profit d'une bande » au sens de la définition de « réserve » dans la *Loi sur les Indiens*. Les termes performatifs du document réservant les terres correspondent d'aussi près au texte de la loi que ceux utilisés dans les documents ayant établi trois des quatre réserves du Yukon dont l'existence a été admise et dont le texte a été fourni au tribunal. Les fonctionnaires qui ont mis en branle le processus de mise de côté étaient les agents de Sa Majesté.

B. *Yukon Territory Court of Appeal* (1999), 182 D.L.R. (4th) 116

B. *Cour d'appel du territoire du Yukon* (1999), 182 D.L.R. (4th) 116

22 The respondents then appealed to the Yukon Territory Court of Appeal. A majority of the court allowed the appeal, with Finch J.A. in dissent.

Les intimés ont ensuite interjeté appel auprès de la Cour d'appel du territoire du Yukon, qui a accueilli l'appel à la majorité, le juge Finch étant dissident.

(1) Richard J.A.

(1) Le juge Richard

23 Richard J.A., for the majority, held that the decision of the Yukon Territory Supreme Court should be overturned. He found that the lands occupied by the Band and its members were "lands set aside" but not a "reserve" under the *Indian Act*. He noted that the distinction between "lands set aside" and "reserves" was well established in the history of the

S'exprimant au nom de la majorité, le juge Richard a estimé qu'il y avait lieu d'infirmer la décision de la Cour suprême du territoire du Yukon. Il a conclu que les terres occupées par la Bande et ses membres constituaient des « terres mises de côté », mais non une « réserve » au sens de la *Loi sur les Indiens*. Il a souligné que, au Yukon, il existe

Yukon, although the terminology may have varied over time.

Richard J.A. found that it was the prerogative of the Crown to establish a reserve which was usually formally evidenced by an Order-in-Council. He found that there was no evidence that in 1965 the Crown ever intended to create a reserve for the Band, either directly or by express or implied delegation. He held that there was in fact a deliberate decision not to create a reserve. He added that there was also no evidence that the Head of the Resources Division had authority to create a reserve and the letter did not purport to be an act of the Governor in Council or an exercise of the royal prerogative. A generous or liberal reading of the definition of "reserve" in the *Indian Act* would not have provided any assistance, because the land was not set apart for the use and benefit of a "band". Richard J.A. commented that the question at issue was whether a reserve had in fact been created and not whether a reserve should have been created.

(2) Hudson J.A. (concurring)

Hudson J.A. held that the chambers judge's suggestion that some Crown officers had conspired to impose the policy of integrating Aboriginal peoples into the dominant society was not supported by the evidence. He stated that the evidence indicated that the public servants complained about the policy adopted by the government and, in fact, expressly favoured the goal of cultural preservation through the reservation of land for the benefit of Aboriginal peoples.

(3) Finch J.A. (dissenting)

Finch J.A. noted that neither the *Indian Act* nor the *Territorial Lands Act* provided any formal mechanism for the creation of an "Indian reserve" as defined in the *Indian Act*. He determined that the definition of a reserve must be read against the background of the Crown's relationship with

historiquement une distinction bien établie entre les « terres mises de côté » et les « réserves », même si la terminologie qui a été utilisée a pu varier au fil des ans.

24 De l'avis du juge Richard, l'établissement d'une réserve relevait de l'exercice par la Couronne de sa prérogative à cet égard, mesure qui était habituellement constatée formellement par un décret. Il a conclu à l'absence de preuve établissant que, en 1965, la Couronne aurait eu l'intention de créer une réserve pour la Bande, soit directement soit par délégation expresse ou implicite. Il a jugé qu'il y avait en fait eu décision délibérée de ne pas créer de réserve. Il a ajouté qu'il n'y avait aucune preuve que le chef de la division des ressources avait le pouvoir d'en créer une, et que la lettre ne se voulait pas un acte du gouverneur en conseil ni l'exercice de la prérogative royale. Il n'aurait été d'aucune utilité d'interpréter de manière libérale ou généreuse la définition de « réserve » de la *Loi sur les Indiens*, puisque les terres n'avaient pas été mises de côté à l'usage et au profit d'une « bande ». Le juge Richard a précisé que la question en litige était de savoir si une réserve avait effectivement été créée et non s'il aurait fallu en créer une.

(2) Le juge Hudson (motifs concourants)

25 Le juge Hudson a ajouté que rien dans la preuve n'étayait l'affirmation du juge des requêtes selon laquelle certains fonctionnaires de la Couronne avaient comploté en vue d'imposer une politique d'assimilation des peuples autochtones à la société dominante. Il a affirmé que la preuve indiquait que les fonctionnaires s'étaient plaints de la politique adoptée par le gouvernement et qu'ils avaient de fait explicitement favorisé l'objectif de préservation de la culture au moyen de la mise en réserve de terres au profit des peuples autochtones.

(3) Le juge Finch (dissident)

26 Le juge Finch a estimé que ni la *Loi sur les Indiens* ni la *Loi sur les terres territoriales* ne comportaient de mécanisme formel en vue de la création d'une [TRADUCTION] « Réserve indienne » au sens de la *Loi sur les Indiens*. Il a jugé que la définition de réserve doit être interprétée dans le contexte

Aboriginal peoples to whom the Crown owed a fiduciary duty.

27 Finch J.A. found that the correspondence and conduct of officials from the federal government responsible for Indian Affairs created a reserve in 1965, despite the absence of any Order-in-Council or other official instrument reflecting an exercise of the Crown's prerogative. In his opinion, the statutory powers conferred in the *Territorial Lands Act* displaced the Crown's prerogative and allowed the Department of Northern Affairs and National Resources to create reserves in the course of exercising statutory powers delegated to them by the Governor in Council. Finch J.A. further found that the Cabinet directive contained in Circular No. 27 was a delegation of statutory authority sufficient to authorize public officials to create a "reserve" as defined in the *Indian Act*.

28 Finch J.A. found that the definition of "reserve" in the *Indian Act* required only an intention to allocate an area of Crown land for the use and benefit of a band, and an act by a public official with the authority to give effect to that intent. Finch J.A. decided that the appropriate government official had set apart certain land intending it to be reserved for the use and benefit of the Band. To hold otherwise would be inconsistent with the Crown's fiduciary obligations.

IV. Relevant Statutory Provisions

29 *Indian Act, 1876*, S.C. 1876, c. 18

3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them, unless such meaning be repugnant to the subject or inconsistent with the context: —

. . .

6. The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal

des rapports qu'entretient l'État avec les peuples autochtones, peuples envers lesquels l'État a une obligation de fiduciaire.

Le juge Finch a estimé que la correspondance et la conduite des fonctionnaires des Affaires indiennes du gouvernement fédéral avaient eu pour effet d'entraîner la création d'une réserve en 1965, malgré l'absence de décret ou autre instrument officiel témoignant de l'exercice de la prérogative de la Couronne. De l'avis du juge Finch, les pouvoirs d'origine législative prévus par la *Loi sur les terres territoriales* avaient remplacé la prérogative de la Couronne et permis au ministère du Nord canadien et des Ressources nationales de créer des réserves dans l'exercice des pouvoirs d'origine législative qui lui étaient délégués par le gouverneur en conseil. Le juge Finch a également conclu que la directive énoncée dans la Circulaire n^{o} 27 emportait délégation d'un pouvoir légal suffisant pour autoriser des fonctionnaires à créer une « réserve » au sens de la *Loi sur les Indiens*.

Le juge Finch a conclu que la définition de « réserve » dans la *Loi sur les Indiens* n'exigeait que deux choses : l'intention d'affecter une parcelle de terre de la Couronne à l'usage et au profit d'une bande et un acte accompli par un fonctionnaire habilité à donner effet à cette intention. Le juge Finch a décidé que le fonctionnaire compétent avait mis de côté certaines terres dans l'intention de les réserver à l'usage et au profit de la Bande. Conclure autrement, de l'avis du juge Finch, serait incompatible avec les obligations fiduciaires de la Couronne.

IV. Les dispositions législatives pertinentes

L'Acte des Sauvages, 1876, S.C. 1876, ch. 18

3. Les expressions qui suivent, usitées dans le présent acte, seront censées avoir la signification qui leur est ci-dessous attribuée, à moins que cette signification ne soit inconciliable avec le sujet ou incompatible avec le contexte : —

. . .

6. L'expression « réserve » signifie toute étendue ou toutes étendues de terres mises à part, par traité ou autrement, pour l'usage ou le bénéfice d'une bande particulière

title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

Indian Act, R.S.C. 1985, c. I-5

2. (1) In this Act,

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purpose of this Act;

. . .

"reserve"

(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(*b*) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60 and the regulations made under any of those provisions, includes designated lands;

. . .

(2) The expression "band", with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.

. . .

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be

de Sauvages, ou qui lui est concédée, dont le titre légal reste à la Couronne, mais qui ne lui sont pas transportées, et comprend tous les arbres, les bois, le sol, la pierre, les minéraux, les métaux ou autres choses de valeur qui s'y trouvent, soit à la surface, soit à l'intérieur;

Loi sur les Indiens, L.R.C. 1985, ch. I-5

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« bande » Groupe d'Indiens, selon le cas :

a) à l'usage et au profit communs desquels des terres appartenant à Sa Majesté ont été mises de côté avant ou après le 4 septembre 1951;

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent;

c) que le gouverneur en conseil a déclaré être une bande pour l'application de la présente loi.

. . .

« réserve » Parcelle de terrain dont Sa Majesté est propriétaire et qu'elle a mise de côté à l'usage et au profit d'une bande; y sont assimilées les terres désignées, sauf pour l'application du paragraphe 18(2), des articles 20 à 25, 28, 36 à 38, 42, 44, 46, 48 à 51, 58 et 60, ou des règlements pris sous leur régime.

. . .

(2) En ce qui concerne une réserve ou des terres cédées, « bande » désigne la bande à l'usage et au profit de laquelle la réserve ou les terres cédées ont été mises de côté.

. . .

18. (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

21. Il doit être tenu au ministère un registre, connu sous le nom de Registre des terres de réserve, où sont

entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Territorial Lands Act, R.S.C. 1952, c. 263

18. The Governor in Council may

. . .

(*d*) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians;

Territorial Lands Act, R.S.C. 1985, c. T-7

23. The Governor in Council may

. . .

(*d*) set apart and appropriate such areas or lands as may be necessary

(i) to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for that purpose, or

(ii) for any other purpose that the Governor in Council may consider to be conducive to the welfare of the Indians;

inscrits les détails concernant les certificats de possession et certificats d'occupation et les autres opérations relatives aux terres situées dans une réserve.

87. (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83, les biens suivants sont exemptés de taxation :

a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;

b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

Loi sur les terres territoriales, S.R.C. 1952, ch. 263

18. Le gouverneur en conseil peut

. . .

d) mettre à part et affecter les étendues de territoire ou les terres qui peuvent être nécessaires afin de permettre au gouvernement du Canada de remplir ses obligations d'après les traités conclus avec les Indiens et d'accorder des concessions ou des baux gratuits pour ces objets, ainsi que pour tout autre objet qu'il peut considérer comme devant contribuer au bien-être des Indiens;

Loi sur les terres territoriales, L.R.C. 1985, ch. T-7

23. Le gouverneur en conseil peut :

. . .

d) réserver les périmètres ou terres nécessaires :

(i) soit en vue de permettre au gouvernement du Canada de remplir ses obligations aux termes des traités conclus avec les Indiens et d'accorder des concessions ou des baux gratuits à cette fin,

(ii) soit en vue de réaliser toute fin qu'il juge de nature à contribuer au bien-être des Indiens;

V. Analysis

A. *The Issues*

30 This appeal raises two well-defined issues about the creation of reserves. The first one is the nature of the legal requirements which must be met for the establishment of a reserve as defined in the *Indian*

V. Analyse

A. *Les questions en litige*

Le présent pourvoi soulève deux questions bien définies à propos de la création de réserves. La première porte sur la nature des conditions légales qui doivent être réunies pour l'établissement

Act. The second issue concerns whether, given these requirements, the lands set aside for the Ross River Band have the status of a reserve.

B. *The Position of the Parties*

(1) Appellants

The appellants submit that reserves have been created in a number of ways. In their view, while the power to create reserves may originally have been exercised under the royal prerogative, this was displaced beginning in 1868 with the passage of *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42. The royal prerogative has been further displaced by the combination of the definition of "reserve" in s. 2(1) of the *Indian Act* and s. 18(*d*) of the 1952 *Territorial Lands Act* (now s. 23(*d*)). The exercise of this statutory authority thus requires no formal instrument signifying the exercise of the royal prerogative such as an Order-in-Council or letters patent.

The appellants submit that reserves can be created by treaty or otherwise, including by being set aside by survey. The lack of an Order-in-Council setting lands aside has not been determinative of the creation of a reserve. Indeed, the courts should continue to take a flexible approach to the Crown's actions in its relations with First Nations. The appellants adopt the view of Finch J.A. that two conditions are required to create a reserve: (1) an intention to create a *de facto* reserve, and (2) an act by a public official with authority to give effect to the intention. The appellants have also stated the criteria for creating a reserve as follows: (1) the Crown, as a matter of fact, has set apart a specific tract of land; (2) the specific tract has been set apart for the permanent use and benefit of a band of Indians; and (3) the underlying title to these lands remains in the Crown.

d'une réserve au sens de la *Loi sur les Indiens*. La deuxième consiste à se demander si, eu égard à ces conditions, les terres mises de côté pour la bande de Ross River ont la qualité de réserve.

B. *Les thèses des parties*

(1) Les appelants

31 Les appelants prétendent que les réserves ont été créées par des méthodes variées. À leur avis, bien que le pouvoir de créer des réserves puissent au départ avoir été exercé en vertu de la prérogative royale, cette procédure a été écartée, à partir de 1868, par suite de l'adoption de la loi intitulée *Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, S.C. 1868, ch. 42. La prérogative royale a également été écartée par l'effet combiné de la définition de « réserve » au par. 2(1) de la *Loi sur les Indiens* et de l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 (maintenant l'al. 23*d*)). L'exercice de ce pouvoir d'origine législative ne requiert donc aucun instrument formel constatant l'exercice de la prérogative royale, par exemple un décret ou des lettres patentes.

32 Les appelants plaident qu'une réserve peut être créée par traité ou autrement, y compris par mise de côté au moyen d'un arpentage. L'absence d'un décret mettant des terres de côté n'est pas déterminante pour ce qui concerne la création d'une réserve. De fait, les tribunaux devraient continuer d'appliquer une approche souple à l'égard des mesures prises par la Couronne dans le cadre de ses rapports avec les Premières nations. Les appelants souscrivent à l'opinion du juge Finch suivant laquelle deux conditions doivent être réunies pour qu'il y ait création d'une réserve : (1) l'intention de créer une réserve *de facto*; (2) un acte accompli par un fonctionnaire habilité à donner effet à cette intention. Les appelants ont également décrit ainsi les critères qui doivent être respectés pour qu'une réserve soit créée : (1) la Couronne a, dans les faits, mis de côté une parcelle de terrain déterminée; (2) cette parcelle a été mise de côté à l'usage et au profit permanents d'une bande indienne; (3) le titre sur ces terres continue d'appartenir à la Couronne.

33 The appellants submit that the village site inhabited by the Band meets the test for the creation of a reserve. They claim that a specific tract of land was set apart for their use in 1965. The lands have been used by the Band ever since. Government officials as early as 1953 expressed an intention to create a reserve for the Band, and continued to take this view in spite of Ottawa's intransigence. However, since the lands were set aside under the *Territorial Lands Act* according to the appellants, a reserve was created. The Crown had a clear purpose in setting aside the lands: to establish a settled community where the Band would be able to live in permanent dwellings. Further, DIAND adopted a policy in 1971 which recognized the Band's beneficial interest in the land and required the Department to consult and compensate the Band if a right-of-way should be needed over its lands.

(2) Respondents

(i) *Government of Canada*

34 The Government of Canada submits that the power to create reserves in the Yukon Territory continues to be an exercise of the royal prerogative. The Crown in this case never intended to create a reserve, and never by a duly authorized official or body exercised the royal prerogative to do so. Intention to create a reserve is key, and the evidence accepted in the courts below was that no such intention ever existed. The Government of Canada submits that, as the Band is not the signatory of any treaty, reserve-creation principles based on treaty-created reserves are inapplicable. Further, the *Territorial Lands Act* does not grant authority to create reserves; even if it did, the authority to do so would reside in the Governor in Council who has not exercised that power to create a reserve for the Band.

35 The Government of Canada submits that the power to create reserves is part of the royal prerogative because of the special nature of the relationship of First Nations to the Crown. By convention and

Les appelants affirment que le site du village habité par la Bande satisfait aux critères requis pour qu'il y ait création d'une réserve. Ils prétendent que, en 1965, on a mis de côté une parcelle de terrain déterminée à leur usage, parcelle qu'utilise la Bande depuis cette date. Dès 1953, des fonctionnaires ont exprimé l'intention de créer une réserve pour la Bande et ils ont continué à préconiser cette mesure malgré l'intransigeance d'Ottawa. Cependant, de prétendre les appelants, puisque les terres ont été mises de côté en vertu de la *Loi sur les terres territoriales*, une réserve a été créée. La Couronne avait un objectif clair lorsqu'elle a mis ces terres de côté : établir une communauté où la Bande pourrait vivre dans des habitations permanentes. De plus, le MAINC a adopté, en 1971, une politique qui reconnaissait l'intérêt bénéficiaire de la Bande sur les terres et obligeait le ministère à consulter et indemniser la Bande, s'il devenait nécessaire d'établir un droit de passage sur ces terres.

(2) Les intimés

(i) *Le gouvernement du Canada*

Le gouvernement du Canada fait valoir que le pouvoir de créer des réserves au Yukon continue de se faire par l'exercice de la prérogative royale et que, en l'espèce, la Couronne n'a jamais eu l'intention de créer une réserve et n'a jamais — que ce soit par l'intermédiaire d'un fonctionnaire ou d'un organisme dûment autorisé — exercé la prérogative royale à cette fin. L'intention de créer une réserve est l'élément clé et, selon la preuve retenue par les juridictions inférieures, une telle intention n'a jamais existé. D'affirmer le gouvernement du Canada, comme la Bande n'est signataire d'aucun traité, les principes touchant la création de réserves par traité ne s'appliquent pas. Le gouvernement prétend également que la *Loi sur les terres territoriales* ne confère pas le pouvoir de créer des réserves et que, même si elle le faisait, ce pouvoir appartiendrait au gouverneur en conseil, qui ne l'a pas exercé pour créer une réserve pour la Bande.

Le gouvernement du Canada plaide que le pouvoir de créer des réserves fait partie de la prérogative royale en raison du caractère spécial des rapports entre les Premières nations et la Couronne. Par

long-standing practice, only the Governor in Council is able to exercise this power; its exercise cannot be delegated to ministers of the Crown or other delegates. The exercise of the royal prerogative requires an outward public manifestation through an Order-in-Council; warrants, commissions or orders under the sign manual; or proclamations, writs, letters patent, letters close, charters, grants and other documents under the Great Seal. In most cases, reserves have been created by means of Orders-in-Council, although there have been exceptions. In the view of the Government of Canada, these exceptions do not prove that the creation of reserves is no longer a prerogative power. In this case, there is no treaty manifesting an intention to create a reserve, nor any other concrete evidence of it. While some Crown servants may have favoured the creation of a reserve, their views were never adopted by the Crown which had a stated policy against the creation of reserves in the Yukon Territory.

The royal prerogative can only be limited by means of express language in statute. Neither the *Indian Act* nor the *Territorial Lands Act* supplants the prerogative by means of explicit language with respect to reserve creation. The Government of Canada rejects the trial judge's application of the definition of the word "reserve" in the *Indian Act* as inconsistent with the purposive, contextual approach to interpretation advocated by this Court. The Government of Canada adds that the context of the *Indian Act* makes it clear that not all lands occupied by Indians under the Act are reserve lands; First Nations may also reside on Crown lands that have not been set apart as reserves. Moreover, in many cases, powers in relation to reserves under the Act must be exercised by the Governor in Council. Finally, because the creation of a reserve has effects upon the general population as well as the specific band, it is critical that the process of establishing a reserve be appropriately public to ensure clarity, certainty and public notice.

convention et conformément à une pratique de longue date, seul le gouverneur en conseil peut exercer ce pouvoir, qui ne peut être délégué aux ministres ou à qui que ce soit d'autre. L'exercice de la prérogative royale exige une manifestation publique concrète : décrets; mandats, commissions ou ordonnances sous seing royal; ou encore proclamations, brefs, lettres patentes, lettres scellées, chartes, cessions ou autres documents délivrés sous le Grand Sceau. Les réserves ont dans la plupart des cas été créées par décret, mais il y a eu des exceptions. De l'avis du gouvernement fédéral, ces exceptions n'établissent toutefois pas que la création de réserves ne relève plus de la prérogative de la Couronne. En l'espèce, il n'existe ni traité témoignant de l'intention de créer une réserve, ni quelque autre élément de preuve concret établissant cette intention. Bien que certains fonctionnaires puissent avoir été en faveur de la création d'une réserve, leur point de vue n'a jamais été retenu par la Couronne, dont la politique déclarée consistait à ne pas créer de réserves au Yukon.

36

L'exercice de la prérogative royale ne peut être limité qu'au moyen d'une disposition explicite en ce sens dans le texte de loi concerné. Ni la *Loi sur les Indiens* ni la *Loi sur les terres territoriales* n'ont écarté en termes exprès la prérogative en ce qui concerne la création de réserves. Le gouvernement du Canada rejette l'interprétation qu'a donnée le juge de première instance de la définition de « réserve » dans la *Loi sur les Indiens*, parce qu'elle serait incompatible avec l'interprétation téléologique et contextuelle préconisée par notre Cour. Il ajoute qu'il ressort clairement du contexte de la *Loi sur les Indiens* que les terres occupées par des Indiens en application de la Loi ne sont pas toutes des terres de réserve, et qu'il est possible que des Premières nations résident sur des terres de la Couronne n'ayant pas été mises de côté à titre de réserves. Qui plus est, dans de nombreux cas, les pouvoirs relatifs aux réserves prévus par la Loi doivent être exercés par le gouverneur en conseil. Enfin, comme la création d'une réserve a des effets sur l'ensemble de la population ainsi que sur la bande concernée, il est crucial que le processus d'établissement des réserves soit suffisamment public pour garantir la transparence, la certitude et la notification des mesures qui sont prises.

(ii) *Government of Yukon*

37 The Government of Yukon has taken no position on the questions in this appeal. However, the Government of Yukon stated its concern about the impact of any decision in this case on the Umbrella Final Agreement, which sets the pattern for land settlement agreements between it and the First Nations of the Yukon Territory. The Umbrella Final Agreement treats reserves and lands set aside, or settlement land, differently. Lands set aside must become settlement land, outside of the *Indian Act*, under the Umbrella Final Agreement; on the other hand, reserves are to be retained or converted to settlement land. Different tax regimes affect each type of land, with reserves entitled to the exemption under s. 87 of the *Indian Act*, whereas lands set aside have been granted a moratorium on the collection of certain types of tax. Further, federal grants in lieu of taxes are paid to the Government of Yukon on lands set aside, but not on reserve lands. A judgment of this Court finding that the Ross River lands are a reserve would impact on other First Nations in the Yukon Territory and could disrupt the current land agreement.

(ii) *Le gouvernement du Yukon*

Le gouvernement du Yukon n'a pas pris position sur les questions soulevées dans le présent pourvoi. Cependant, il s'est dit inquiet de l'incidence éventuelle de toute décision rendue en l'espèce sur l'Accord-cadre définitif, qui constitue le modèle des accords sur les revendications territoriales qu'il conclut avec les Premières nations du Yukon. L'Accord-cadre définitif ne traite pas de la même façon les réserves et les terres mises de côtés, ou terres visées par un règlement. Conformément à l'Accord-cadre définitif, les terres mises de côté doivent devenir des terres visées par un règlement, non assujetties à la *Loi sur les Indiens*; par contre, une réserve peut soit conserver cette qualité, soit devenir une terre visée par un règlement. Chaque type de terre est régi par un régime fiscal différent. Certains biens bénéficient de l'exemption prévue par l'art. 87 de la *Loi sur les Indiens*, alors que les terres mises de côté font l'objet d'un moratoire visant la perception de divers types d'impôts. De plus, des subventions fédérales tenant lieu d'impôts sont versées au Yukon à l'égard des terres mises de côté, mais non à l'égard des réserves. D'affirmer le gouvernement du Yukon, si notre Cour jugeait que les terres de Ross River constituent une réserve, une telle décision aurait une incidence sur les autres Premières nations du Yukon et pourrait perturber l'harmonie qui règne actuellement sur la question du territoire.

(3) Interveners

38 Two interveners, the Attorney General of British Columbia and the Coalition of B.C. First Nations (the "Coalition") made sharply conflicting submissions on the key issues raised in this appeal. In support of the Government of Canada, the Attorney General of British Columbia submitted that the creation of reserves remains essentially a matter of royal prerogative. The *Indian Act* is concerned with the management of reserves but does not provide for their creation. Moreover, a finding that an *Indian Act* reserve has been established requires evidence of an outward manifestation of intent to bring a tract of land

(3) Les intervenants

Deux intervenants, le procureur général de la Colombie-Britannique et la Coalition of B.C. First Nations (la « Coalition ») ont présenté des observations diamétralement opposées sur les questions clés soulevées dans le présent pourvoi. Appuyant la position du gouvernement du Canada, le procureur général de la Colombie-Britannique a fait valoir que la création des réserves demeure essentiellement une question relevant de l'exercice de la prérogative royale. La *Loi sur les Indiens* porte sur la gestion des réserves, mais ne pourvoit pas à leur création. En outre, pour que le tribunal puisse conclure qu'une réserve au sens de la *Loi sur les Indiens* a été

under the management and protection scheme of the Act.

The Coalition submitted broad arguments on the nature of the relationship between the Crown and First Nations. It views reserve creation as an exercise of the royal prerogative, constrained by the Crown's legal and equitable obligations to First Nations, as well as by statute. In this context, it submits that reserves may come into existence by various means like the treaty process, unilateral government action, or even *de facto* through the historical development of a particular native community which gives the reserve definite boundaries over time.

Given the position of the parties and the issues they raise, I will review the legal process of reserve creation in the Yukon Territory, after a few comments about the history of the process in Canada. I will then turn to the evidence in order to determine whether it establishes that a reserve was created at Ross River.

C. *The Creation of Reserves*

A word of caution is appropriate at the start of this review of the process of reserve creation. Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.

établie, il faut lui apporter la preuve d'une manifestation concrète de l'intention de soumettre une parcelle de terrain au régime de gestion et de protection prévu par cette loi.

39 La Coalition a présenté des arguments généraux sur la nature des rapports entre la Couronne et les Premières nations. Il considère que la création d'une réserve résulte de l'exercice de la prérogative royale et doit respecter les dispositions législatives pertinentes ainsi que les obligations fondées sur la common law et l'equity qui incombent à la Couronne envers les Premières nations. Dans ce contexte, la Coalition avance qu'une réserve peut être créée de diverses façons, notamment par voie de traité ou par une mesure gouvernementale unilatérale — et qu'elle peut même être créée *de facto*, savoir par suite de l'évolution historique d'une collectivité autochtone donnée, qui aurait permis à la réserve d'acquérir des limites précises au fil des ans.

40 Vu les thèses avancées par les parties et les questions qu'elles soulèvent, je vais examiner le processus juridique de création des réserves au Yukon, après avoir fait quelques commentaires sur l'historique de ce processus au Canada. Je vais ensuite déterminer si, au regard de la preuve, une réserve a été créée à Ross River.

C. *La création des réserves*

41 Une mise en garde s'impose en amorçant l'examen du processus de création des réserves. Des intervenants ou des parties ont tenté d'élargir la portée du présent pourvoi qui, à leur avis, donne à notre Cour l'occasion de se prononcer de façon définitive et exhaustive sur les conditions légales de création des réserves prévues par la *Loi sur les Indiens*. Cependant, aussi intéressante et difficile que puisse sembler une telle démarche, elle serait prématurée et nuirait à l'évolution normale du droit dans ce domaine. Malgré son importance, le présent pourvoi s'attachera à la situation juridique au Yukon et à l'expérience observée historiquement en matière de création des réserves dans ce territoire, et non à l'évolution historique et juridique de cette question pendant près de quatre siècles dans les diverses régions du Canada.

42 The key issue in this case remains whether the lands set aside nearly half a century ago for the Ross River Band have the status of a reserve as defined in the *Indian Act*. Was the process purely an exercise of the prerogative power? Did statute law displace this power completely or in part? These questions must be answered in order to determine whether a reserve now exists at the junction of the Ross and Pelly Rivers.

43 Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments. Procedures and legal techniques changed. Different approaches were used, so much so that it would be difficult to draw generalizations in the context of a specific case, grounded in the particular historical experience of one region of this country.

44 In the Maritime provinces, or in Quebec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, reserves were created by various methods. The legal and political methods used to give form and existence to a reserve evolved over time. It is beyond the scope of these reasons to attempt to summarize the history of the process of reserve creation throughout Canada. Nevertheless, its diversity and complexity become evident in some of the general overviews of the process which have become available from contemporary historical research. For example, in the course of the execution of its broad mandate on the problems of the First Nations in Canada, the Royal Commission on Aboriginal Peoples reviewed the process in its report ("*RCAP Report*") (see *Looking Forward, Looking Back*, vol. 1, at pp. 142-45; *Restructuring the Relationship*, vol. 2, at pp. 464-85). The report gives a good overview of the creation of reserves, emphasizing its very diversity. A more detailed study of the topic may also be found in R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland — A Study in Law and History* (1990); see also

En l'espèce, la question clé demeure celle de savoir si les terres mises de côté il y a près d'un demi-siècle pour la bande de Ross River ont la qualité de réserve au sens de la *Loi sur les Indiens*. Cette mesure constituait-elle simplement l'exercice de la prérogative royale? Le droit d'origine législative a-t-il remplacé entièrement ou partiellement ce pouvoir? Il faut répondre à ces questions pour déterminer s'il existe maintenant une réserve au confluent des rivières Ross et Pelly.

L'examen de l'histoire du Canada confirme que le processus de création des réserves a traversé de nombreuses étapes et résulte d'un certain nombre d'expériences administratives et politiques. Les procédures et techniques juridiques ont évolué. Diverses approches ont été utilisées, à tel point qu'il serait difficile de généraliser, dans le contexte d'un cas précis, à partir de l'expérience historique particulière d'une région du Canada.

Tant dans les provinces maritimes qu'au Québec durant le régime français ou après la conquête britannique, de même qu'en Ontario et, plus tard, dans les Prairies et en Colombie-Britannique, on a recouru à diverses méthodes pour créer des réserves. Les méthodes juridiques et politiques employées pour donner forme et existence aux réserves ont évolué au fil des ans. La synthèse historique du processus de création des réserves dans l'ensemble du Canada n'entre pas dans le cadre des présents motifs. Néanmoins, la diversité et la complexité de ce processus ressortent clairement de l'examen général qui en est fait dans des travaux contemporains de recherches historiques. Par exemple, dans l'exécution du large mandat qu'on lui avait confié relativement à l'étude des problèmes des Premières nations au Canada, la Commission royale sur les peuples autochtones a examiné le processus de création des réserves dans son rapport (le « *Rapport de la CRPA* ») (voir *Un passé, un avenir*, vol. 1, p. 152-156; *Une relation à redéfinir*, vol. 2, p. 513-535). Ce rapport donne un bon aperçu de la création des réserves et fait bien ressortir la diversité même de ce processus. On peut consulter une étude plus détaillée de la question dans R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada :*

J. Woodward, *Native Law* (loose-leaf), at pp. 247-48.

Northern Canada

In this appeal, more detailed attention must be given to a review of the process of reserve creation in Northern Canada. Treaties 8, 10 and 11 provided for the creation of reserves in Northern Canada (consisting in part of the northern Prairie provinces and the western portions of the Northwest Territories, southeastern Yukon Territory, and northeastern British Columbia). These have been characterized as "resource development" agreements in the sense that there was no desire to turn the Aboriginal peoples of these areas into farmers as had been the case in the South. Moreover, First Nations were told generally that they would not be forced to live on the reserve allotments nor would their traditional economic life be disrupted. However, as in the more southerly numbered treaties, the federal government was often slow to meet its obligation to create reserves, leaving many First Nations to continue the struggle to settle land claims into very recent times (see *RCAP Report*, vol. 2, *supra*, at pp. 479-84). In a number of cases, some First Nations never acceded to treaties purporting to cover their lands. In other cases, no treaties were ever signed, as is the case in most of the Yukon Territory. However, in the last two decades there has been some movement to formulate land settlement claims with the Inuit (which led to the creation of Nunavut), the Dene and Yukon First Nations. These agreements generally provide for some form of Aboriginal self-government, but do not necessarily provide for the creation of reserves (as in the Umbrella Final Agreement in the present case).

The legal methods used to give a form of legal existence to these reserves have varied. Each of them must be reviewed in its own context. I will hence focus now more narrowly on the legal nature

A Homeland — A Study in Law and History (1990); voir aussi J. Woodward, *Native Law* (feuilles mobiles), p. 247-248.

Le Nord canadien

45 Dans le présent pourvoi, il faut se pencher de façon plus particulière sur le processus de création des réserves dans le Nord canadien. Les traités 8, 10 et 11 prévoyaient la création de réserves dans cette région (qui comprend notamment le Nord des provinces des Prairies, les parties occidentales des Territoires du Nord-Ouest, le sud-est du Territoire du Yukon et le nord-est de la Colombie-Britannique). Ces traités ont été qualifiés d'accords « d'exploitation des ressources », en ce sens qu'on ne désirait aucunement faire des peuples autochtones de ces régions des agriculteurs comme ce fut le cas dans les régions du Sud. De plus, on avait généralement expliqué aux Premières nations qu'elles ne seraient pas contraintes de vivre sur les terres ainsi réservées et que leur économie traditionnelle ne serait pas perturbée. Cependant, comme dans le cas des traités numérotés visant les régions plus au sud, le gouvernement fédéral s'est souvent montré lent à s'acquitter de son obligation de créer des réserves, avec pour conséquence que de nombreuses Premières nations négocient encore le règlement de revendications territoriales (voir le *Rapport de la CRPA*, vol. 2, *op. cit.*, p. 528-534). Dans certains cas, des Premières nations n'ont jamais adhéré aux traités censés viser leurs terres, alors que dans d'autres aucun traité n'a été signé, comme ce fut le cas pour la majeure partie du Yukon. Cependant, durant les deux dernières décennies, un processus de négociations en vue du règlement de revendications territoriales s'est amorcé avec les Inuits (qui a entraîné la création du Nunavut), les Dénés et les Premières nations du Yukon. Ces accords prévoient généralement une certaine forme d'autonomie gouvernementale, sans pourvoir nécessairement à la création de réserves (comme dans le cas de l'Accord-cadre définitif en l'espèce).

46 On a eu ainsi recours à diverses méthodes juridiques pour donner légalement existence à ces réserves. Chacune d'elles doit être examinée au regard du contexte qui lui est propre. Je vais en conséquence

of the process which prevailed in the Yukon and on its application to the facts in this case.

D. *Reserve Creation in the Yukon*

47 Three different sources for the authority to create reserves have been identified by the parties. The appellants essentially submit that the authority to create a reserve is statute based. In their view, statute law has displaced the royal prerogative as the primary source of authority. As mentioned above, the federal government answers that the reserve-creation power in the Yukon Territory continues to flow from the royal prerogative. One of the interveners, the Coalition, advances the submission that the authority to create reserves derives from the combined application of prerogative powers and statute.

(1) Statute

48 In order to determine whether statutory authority exists, it is necessary to turn first to the provisions of the *Indian Act*. Under s. 2(1) of the *Indian Act*, the term "reserve" in the context of the Act is defined as follows: "[A] tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band". In certain sections of the *Indian Act* (namely, ss. 18(2), 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60, and the regulations made under those sections), the definition of "reserve" is extended to include "designated lands", which s. 2(1) defines to mean "a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition". This latter expansion of the definition is not of relevance in the instant case, so my analysis will focus on the definition proper.

49 The definition in s. 2(1) of "reserve" exists primarily to identify what lands are subject to the terms of the Act. The Act outlines property rights of Indians on reserves, establishes band governments and

m'attacher maintenant au caractère juridique du processus retenu au Yukon ainsi qu'à son application aux faits de l'espèce.

D. *La création des réserves au Yukon*

Les parties ont plaidé que le pouvoir de créer des réserves repose sur trois sources différentes. Essentiellement, les appelants prétendent que ce pouvoir découle d'un texte de loi. À leur avis, ce droit d'origine législative a remplacé la prérogative royale comme source première du pouvoir en question. Comme je l'ai indiqué plus tôt, le gouvernement fédéral répond que le pouvoir de créer des réserves au Yukon continue de découler de la prérogative royale. L'un des intervenants, la Coalition, avance que ce pouvoir découle de l'application combinée des pouvoirs fondés sur la prérogative et de ceux prévus par des dispositions législatives.

(1) Pouvoir d'origine législative

Pour déterminer s'il existe vraiment un pouvoir d'origine législative, il faut d'abord examiner les dispositions de la *Loi sur les Indiens*. Au paragraphe 2(1) de cette loi, le mot « réserve » est défini ainsi, pour l'application de cette loi : « [p]arcelle de terrain dont Sa Majesté est propriétaire et qu'elle a mise de côté à l'usage et au profit d'une bande ». Pour l'application de certaines dispositions de la *Loi sur les Indiens* (le par. 18(2), les art. 20 à 25, 28, 36 à 38, 42, 44, 46, 48 à 51, 58 et 60, et les règlements pris sous leur régime), la définition de « réserve » est élargie et s'entend également des « terres désignées », terme qui est défini comme suit au par. 2(1) : « [p]arcelle de terrain, ou tout droit sur celle-ci, propriété de Sa Majesté et relativement à laquelle la bande à l'usage et au profit de laquelle elle a été mise de côté à titre de réserve a cédé, avant ou après l'entrée en vigueur de la présente définition, ses droits autrement qu'à titre absolu ». Cette définition élargie n'est pas pertinente en l'espèce et, en conséquence, mon analyse s'attachera à la définition première du mot.

La définition de « réserve» au par. 2(1) vise principalement à identifier les terres qui sont assujetties à la Loi. Celle-ci indique quels sont les droits fonciers des Indiens sur les réserves,

outlines their powers, identifies how Indians are or are not subject to taxation, and provides for a variety of other matters.

Under the *Indian Act*, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve. It may be that, in some cases, certain political or legal acts performed by the Crown are so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown to effect a setting apart to create a reserve. For example, the signing of a treaty or the issuing of an Order-in-Council are of such an authoritative nature that the mental requirement or intention would be implicit or presumptive.

While s. 2(1) of the *Indian Act* defines "reserve" for the purposes of the Act as land set apart by the Crown for the use and benefit of Indians, nothing in the Act bestows upon the Governor in Council, the Minister of DIAND, or any other statutory delegate, the authority to perform the actions necessary to create a reserve. Nor does the Act explain what must be done to set apart lands for the purpose of creating a reserve: the Act neither sets out the material element nor the intentional element required for the setting apart of land to take place. One must look elsewhere for sources of any such statutory authority.

The appellants concede that the royal prerogative was the original source of the Crown's authority to create a reserve. In such instruments as the Mi'kmaq treaties in the early 1760s discussed in *R. v. Marshall*, [1999] 3 S.C.R. 456, the Crown interacted directly with the First Nations without the interposition of any statutory authority. Such a situation is a pure act of prerogative authority. Only since the latter part of the eighteenth century has legislation been enacted which could eliminate or reduce

elle pourvoit à l'établissement de gouvernements locaux pour les bandes et énonce leurs pouvoirs, et elle précise l'assujettissement des Indiens à la taxation en plus de régir diverses autres questions.

50 La mise de côté d'une parcelle de terrain à titre de réserve en vertu de la *Loi sur les Indiens* suppose à la fois une action et une intention. En d'autres termes, la Couronne doit non seulement prendre certaines mesures pour mettre des terres de côté, mais elle doit également agir dans l'intention de créer une réserve. Dans certains cas, il est possible que certaines mesures politiques ou juridiques prises par la Couronne aient un caractère tellement définitif ou concluant qu'il devient inutile de prouver que cette dernière avait subjectivement l'intention de mettre de côté des terres pour créer une réserve. Par exemple, la signature d'un traité ou la prise d'un décret ont une telle autorité que l'élément moral — ou intention — serait implicite ou présumé.

51 Bien que, pour l'application de la *Loi sur les Indiens*, le mot « réserve » soit défini au par. 2(1) comme étant des terrains que la Couronne met de côté à l'usage et au profit des Indiens, la Loi n'a pas pour effet de conférer au gouverneur en conseil, ni au ministre du MAINC ou à tout autre délégataire prévu par la loi le pouvoir de prendre les mesures nécessaires à la création d'une réserve. De plus, la Loi ne précise pas non plus les mesures à prendre pour mettre de côté des terres aux fins de création d'une réserve; elle n'identifie pas davantage les éléments matériel et moral requis pour la mise de côté de terres. Il faut chercher ailleurs les sources d'un tel pouvoir d'origine législative.

52 Les appelants reconnaissent que, à l'origine, la prérogative royale était la source du pouvoir de la Couronne de créer des réserves. Dans des textes tels les traités conclus avec les Mi'kmaq au début des années 1760, qui ont été examinés dans l'arrêt *R. c. Marshall*, [1999] 3 R.C.S. 456, la Couronne avait noué directement des relations avec les Premières nations, sans le truchement de quelque pouvoir d'origine législative. Il s'agit là d'un exemple d'exercice de la prérogative. Ce n'est que depuis

the scope of the royal prerogative with respect to reserve creation.

53 The appellants submit that, while the royal prerogative may have once been the source of authority for creating reserves, it has been superseded by statute. The question, then, which must first be answered is whether and to what degree the royal prerogative has been limited in the scope of its application to reserve creation. This analysis necessarily implies determining how the royal prerogative is limited.

(2) Royal Prerogative

54 Generally speaking, in my view, the royal prerogative means "the powers and privileges accorded by the common law to the Crown" (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 1:14). The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute". (See P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 17; see also, Hogg, *supra*, at pp. 1:15-1:16; P. Lordon, Q.C., *Crown Law* (1991), at pp. 66-67.) In *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.), Lord Dunedin described the interplay of royal prerogative and statute, at p. 526:

> Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

Lord Parmoor added, at p. 568: "The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place

la dernière partie du dix-huitième siècle qu'ont été édictées des lois susceptibles d'écarter le recours à la prérogative royale pour créer des réserves ou de restreindre la portée de son application à cet égard.

Les appelants affirment que, bien qu'elle ait pu jadis constituer la source du pouvoir de créer des réserves, la prérogative royale a été écartée par un pouvoir d'origine législative. En conséquence, il faut d'abord se demander si l'application de la prérogative royale aux fins de création des réserves a été restreinte et, si oui, dans quelle mesure. Cette question implique nécessairement qu'on établisse comment la prérogative royale peut être restreinte.

(2) La prérogative royale

D'une manière générale, j'estime que la prérogative royale s'entend [TRADUCTION] « des pouvoirs et privilèges reconnus à la Couronne par la common law » (voir P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, p. 1:14). La prérogative royale se limite aux pouvoirs exercés par l'exécutif, tant au niveau fédéral que provincial. Il est possible, au moyen d'une loi, d'abolir la prérogative ou de restreindre la portée de celle-ci : [TRADUCTION] « dès qu'une loi régit un domaine qui relevait jusque-là d'une prérogative, l'État est tenu de se conformer à ses dispositions ». (Voir P. W. Hogg et P. J. Monahan, *Liability of the Crown* (3e éd. 2000), p. 17; voir aussi Hogg, *op. cit.*, p. 1:15-1:16; P. Lordon, c.r., *La Couronne en droit canadien* (1992), p. 75-76). Dans l'arrêt *Attorney-General c. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.), lord Dunedin a décrit ainsi l'interaction de la prérogative royale et des textes de loi, à la p. 526 :

> [TRADUCTION] Dans la mesure où la Couronne est partie à chaque loi fédérale, il est logique d'affirmer que, dans les cas où la loi porte sur quelque chose qui, avant cette loi, pouvait être effectué au moyen de la prérogative, et qu'elle a particulièrement pour effet d'habiliter la Couronne à accomplir la même chose, sous réserve de certaines conditions, la Couronne consent à cette situation et, par cette loi, à ce que la prérogative soit restreinte.

Lord Parmoor a ajouté, à la p. 568, que [TRADUCTION] « [l]a prérogative royale est nécessairement réduite de façon graduelle, au fur et à

of an uncertain and arbitrary administrative discretion". In summary, then, as statute law expands and encroaches upon the purview of the royal prerogative, to that extent the royal prerogative contracts. However, this displacement occurs only to the extent that the statute does so explicitly or by necessary implication: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; Hogg and Monahan, *supra*, at p. 17; Lordon, *supra*, at p. 66.

mesure qu'une règle de droit bien établie remplace un pouvoir discrétionnaire administratif de nature arbitraire et incertaine ». En résumé, donc, à mesure que le droit d'origine législative s'élargit et empiète sur la prérogative, celle-ci se contracte de façon correspondante. Toutefois, un tel remplacement ne se produit que lorsque la loi le dit explicitement ou lorsque ce remplacement ressort de celle-ci par implication nécessaire : voir *Loi d'interprétation*, L.R.C. 1985, ch. I-21, art. 17; Hogg et Monahan, *op. cit.*, p. 17; Lordon, *op. cit.*, p. 75-76.

The appellants submit that statute has long since displaced the royal prerogative in the area of reserve creation. The first post-Confederation statute which dealt with Indians, *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, gave the Secretary of State authority to control and manage the lands and property of Indians and, in s. 3(6) of the *Indian Act, 1876*, defined a reserve to include any land "set apart by treaty or otherwise", implying that there were several ways by which a reserve could be created. The essential element then, and which continues today, is that the lands be set apart.

55 Les appelants prétendent que, en matière de création de réserves, la prérogative royale a depuis longtemps été écartée par des dispositions législatives. Après la Confédération, la première loi portant sur les Indiens — *Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance* — conférait au secrétaire d'État le pouvoir de contrôler et d'administrer les terres et biens des Indiens, et le par. 3(6) de *l'Acte des Sauvages*, *1876*, précisait qu'une réserve se composait de terres « mises à part, par traité ou autrement », ce qui laissait supposer qu'il existait plusieurs façons de créer une réserve. L'élément essentiel à l'époque, et encore d'ailleurs de nos jours, est le fait que des terres soient mises de côté.

Further, s. 18(*d*) of the 1952 *Territorial Lands Act*, the successor to the *Dominion Lands Act*, R.S.C. 1927, c. 113, repealed S.C. 1950, c. 22, s. 26, states that the Governor in Council may "set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians". The appellants submit that this provision, in combination with the provisions discussed above in the *Indian Act*, has supplanted the royal prerogative.

56 Qui plus est, l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 — loi qui a remplacé la *Loi des terres fédérales*, S.R.C. 1927, ch. 113, abrogée par S.C. 1950, ch. 22, art. 26 — précise que le gouverneur en conseil peut « mettre à part et affecter les étendues de territoire ou les terres qui peuvent être nécessaires afin de permettre au gouvernement du Canada de remplir ses obligations d'après les traités conclus avec les Indiens et d'accorder des concessions ou des baux gratuits pour ces objets, ainsi que pour tout autre objet qu'il peut considérer comme devant contribuer au bien-être des Indiens ». Les appelants estiment que, conjugué aux dispositions de la *Loi sur les Indiens* examinées précédemment, cet alinéa a eu pour effet d'écarter la prérogative royale.

The respondents counter that s. 18(*d*) provides for the creation of a land bank from which the

57 Les intimés répliquent que l'al. 18*d*) prévoit la constitution d'une banque de terrains à partir de

Crown may create reserves, but that it does not provide for the actual creation of reserves themselves. The respondents rely upon *Town of Hay River v. The Queen*, [1980] 1 F.C. 262 (T.D.), in which Mahoney J. stated in *obiter*, at p. 265, that "the authority to set apart Crown lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal Prerogative, not subject to any statutory limitation".

laquelle la Couronne peut créer des réserves, mais qu'il ne pourvoit pas à la création même des réserves. Au soutien de leur argument, ils invoquent l'affaire *Ville de Hay River c. La Reine*, [1980] 1 C.F. 262 (1re inst.), dans laquelle le juge Mahoney a affirmé, à la p. 265, dans des remarques incidentes, qu'« il appert que le pouvoir de mettre à part des terres de la Couronne pour une réserve indienne dans les Territoires du Nord-Ouest se fonde entièrement sur la prérogative royale, qui n'est soumise à aucune limitation statutaire ».

58 In my view, the statutory framework described by the appellants has limited to some degree but not entirely ousted, the royal prerogative in respect of the creation of reserves within the meaning of the *Indian Act* in the Yukon. Whenever the Crown decides to set up a reserve under the *Indian Act*, at a minimum, s. 2(1) puts limits on the effects of the decision of the Crown in the sense that the definition of a "reserve" in the *Act* means (1) that the title to reserve lands remains with the Crown, and (2) that the reserve must consist of lands "set apart" for the use and benefit of a band of Indians. If the royal prerogative were completely unlimited by statute, the Crown would essentially be able to create reserves, in any manner it wished, including the transfer of title by sale, grant or gift to a First Nation or some of its members. However, in the Yukon, so long as the Crown intends to create a reserve as defined by the *Indian Act*, Parliament has put limits on the scope and effects of the power to create reserves at whim, through the application of the statutory definition of a reserve in s. 2(1). If the Crown intended to transfer land to a First Nation outside the scope of the *Indian Act*, the role and effects of the prerogative would not be constrained by this Act and would have to be examined in a different legal environment.

À mon avis, ce cadre législatif a restreint dans une certaine mesure — sans toutefois l'écarter — l'application de la prérogative royale en matière de création, au Yukon, de réserves indiennes au sens de la *Loi sur les Indiens*. Chaque fois que la Couronne décide d'établir une réserve au sens de la *Loi sur les Indiens*, le par. 2(1) de celle-ci a à tout le moins pour conséquence de limiter les effets de cette décision, en ce sens que la définition de « réserve » y figurant permet d'établir les points suivants : (1) Sa Majesté continue d'être propriétaire des terres formant la réserve; (2) la réserve doit être constituée de terres « mise[s] de côté » à l'usage et au profit d'une bande indienne. Si la loi n'assortissait la prérogative royale d'aucune limite à cet égard, la Couronne serait essentiellement en mesure de créer des réserves de la façon qui lui plairait, y compris en cédant le titre de propriété à une première nation ou à certains de ses membres par vente, concession ou don. Cependant, au Yukon, pour autant que la Couronne entend créer une réserve au sens de la *Loi sur les Indiens*, le Parlement a, par l'application de la définition de réserve prévue au par. 2(1) de la Loi, limité la portée et les effets du pouvoir de l'État de créer des réserves à son gré. Si la Couronne entend céder des terres à une première nation en dehors du régime de la *Loi sur les Indiens*, le rôle et les effets de la prérogative ne seraient pas limités par cette loi et devraient être examinés dans un contexte juridique différent.

59 Section 18(*d*) of the 1952 *Territorial Lands Act* has similarly placed limits on the royal prerogative with respect to the creation of reserves by establishing a new and different source of authority whose exercise may trigger the process of reserve creation.

L'alinéa 18*d*) de la *Loi sur les terres territoriales* de 1952 limite lui aussi de manière analogue l'application de la prérogative royale en matière de création de réserves en établissant des pouvoirs de source nouvelle et différente, dont l'exercice peut mettre en

It indicates that at least some of the lands used to fulfill treaty requirements, which include the creation of reserves for signatory First Nations, are to be drawn from lands set apart and appropriated for that purpose by the Governor in Council under the terms of the 1952 *Territorial Lands Act*.

That said, it would not be accurate to state that the royal prerogative has been completely ousted from the field by the 1952 *Territorial Lands Act*. Section 18(*d*) does, on its face, seem to bestow a power on the Governor in Council to set apart lands for the creation of reserves. However, as the respondent Government of Canada points out, this does not necessarily mean that this section grants authority to actually create the reserve and that the prerogative no longer plays any part in the process. The setting apart and appropriating of land is not the entire matter; the Crown must also manifest an intent to make the land so set apart a reserve. The use of the words "as may be necessary" implies a separation in time between the appropriation of the lands and the fulfilment of the treaty obligations. In other words, once the land is appropriated, it does not yet have the legal status of a reserve; something more is required to accomplish that end. This requirement reflects the nature of a process which is political, at least in part. Given the consequences of the creation of a reserve for government authorities, for the bands concerned and for other non-native communities, the process will often call for some political assessment of the effect, circumstances and opportunity of setting up a reserve, as defined in the *Indian Act*, in a particular location or territory.

The appellants have not pointed to any other statutory provision which identifies the process by which the Crown takes lands set apart and appropriated under s. 18(*d*) and turns them into a reserve. Indeed, the Act remains entirely silent in this respect. Rather, the appellants seem to rely on a logical leap from the fact of setting apart and

branle le processus de création d'une réserve. Cette disposition précise qu'au moins certaines des terres utilisées pour satisfaire aux obligations prévues par les traités — y compris la création de réserves pour les Premières nations signataires — doivent provenir des terres mises à part et affectées à cette fin par le gouverneur en conseil conformément à la *Loi sur les terres territoriales* de 1952.

60 Cela dit, il serait inexact d'affirmer que la prérogative royale a été complètement écartée dans ce secteur d'activité par la *Loi sur les terres territoriales* de 1952. À première vue, l'al. 18*d*) semble conférer au gouverneur en conseil le pouvoir de mettre à part des terres pour créer des réserves. Cependant, comme le souligne le gouvernement du Canada intimé, il ne s'ensuit pas nécessairement que cette disposition accorde le pouvoir de créer concrètement une réserve ni que la prérogative n'intervient plus dans ce processus. Il ne suffit pas que la Couronne mette à part et affecte les terres concernées, elle doit aussi manifester l'intention de constituer en réserve les terres ainsi mises à part. L'expression « qui peuvent être nécessaires » suppose un laps de temps entre le moment où il y a affectation des terres et celui où il y a exécution des obligations prévues par le traité. En d'autres termes, même une fois affectées, les terres n'ont pas encore la qualité juridique de réserve; il faut quelque chose de plus pour que cela se réalise. Cette exigence témoigne de la nature du processus, qui revêt, au moins en partie, un caractère politique. Compte tenu des conséquences qu'entraîne la création d'une réserve pour les autorités gouvernementales, les bandes visées et les collectivités non autochtones, il est souvent nécessaire de procéder à une certaine évaluation, sur le plan politique, des effets, des circonstances et de l'opportunité de l'établissement d'une réserve au sens de la *Loi sur les Indiens* dans un endroit ou territoire particulier.

61 Les appelants n'ont fait état d'aucune autre disposition législative précisant le processus par lequel la Couronne prend des terres affectées en vertu de l'al. 18*d*) et en fait une réserve. De fait, la Loi est muette sur ce point. Les appelants semblent plutôt inférer un rapport de cause à effet entre l'affectation de terres et la création d'une réserve. Comme je

appropriating the land to the creation of a reserve. As I have said, the language of s. 18(*d*) does not make that leap. If Parliament had meant in s. 18(*d*) to grant the Governor in Council the power to both appropriate lands for the purpose of meeting treaty obligations to create reserves and to create the reserves from the lands appropriated, it would have used more specific language to effect such a grant of authority.

62 Even if I were to find that s. 18(*d*) has occupied the field with respect to the creation of Indian reserves, it is nevertheless clear from the language of the section that the Governor in Council has been given the power to create reserves from lands set apart. The Governor in Council is given discretion (indicated by the use of the word "may") to decide whether to set apart lands and whether to designate said lands as the reserve of any particular First Nation. Further, the Governor in Council is under no obligation to set apart particular lands for the use and benefit of a band, unless that has been provided for under treaty or some other land settlement agreement. Otherwise, the Governor in Council is free to designate any Crown land the Crown chooses as a reserve for a particular band. Although this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*.

63 It is worth noting that, in either situation, it is the Governor in Council who exercises the authority granted. The royal prerogative in Canada is exercised by the Governor General under the letters patent granted by His Majesty King George VI in 1947 (see *Letters Patent constituting the office of Governor General of Canada* (1947), in *Canada Gazette*, Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31)). In the usual course of things, the Governor General exercises these powers for the Queen in right of Canada, acting on the advice of a Committee of the Privy Council (which consists of the Prime Minister and Cabinet of the

l'ai dit plus tôt, le texte de l'al. 18*d*) ne permet pas de tirer cette inférence. Si le législateur avait voulu, à l'al. 18*d*), donner au gouverneur en conseil à la fois le pouvoir d'affecter des terres pour qu'il respecte ses obligations prévues par traités en matière de création de réserves et le pouvoir de créer des réserves sur les terres ainsi affectées, il aurait utilisé des termes plus explicites pour accorder de tels pouvoirs.

Même si je devais conclure que la question de la création des réserves indiennes est entièrement régie par l'al. 18*d*), il ressort néanmoins clairement du texte de cette disposition que le gouverneur en conseil a reçu le pouvoir de créer des réserves à partir des terres mises à part. Le gouverneur en conseil s'est vu accorder le pouvoir discrétionnaire (comme en témoigne l'utilisation du mot « peut ») de mettre à part des terres et de les désigner comme réserve d'une Première nation donnée. En outre, le gouverneur en conseil n'a aucune obligation de mettre à part des terres précises à l'usage et au profit d'une bande, à moins d'y être tenu aux termes d'un traité ou d'un autre accord sur des revendications territoriales. Hormis cette situation, il lui est loisible de désigner comme réserve d'une bande donnée toute terre de la Couronne choisie par cette dernière. Bien qu'il ne s'agisse pas là d'une question en litige dans le présent pourvoi, il ne faut cependant pas oublier que l'exercice de ce pouvoir particulier demeure évidemment assujetti au respect des obligations et droits constitutionnels établis par l'art. 35 de la *Loi constitutionnelle de 1982* ainsi qu'aux obligations de fiduciaire de la Couronne.

Il convient de signaler que, quoi qu'il en soit, c'est le gouverneur en conseil qui exerce le pouvoir ainsi conféré. Au Canada, la prérogative royale est exercée par le gouverneur général en vertu des lettres patentes délivrées par Sa Majesté le Roi George VI en 1947 (voir *Lettres patentes constituant la charge de gouverneur général du Canada* (1947), *Gazette du Canada*, partie I, vol. 81, p. 3109 (reproduites dans L.R.C. 1985, App. II, nº 31)). Dans le cours normal des choses, le gouverneur général exerce ces pouvoirs pour le compte de la Reine du chef du Canada, sur l'avis du Comité du Conseil privé (qui comprend le premier ministre et le Cabinet du

government of the day). Thus, if the power to create reserves is derived from the royal prerogative, the Governor General, or Governor in Council, would normally exercise that power. On the other hand, s. 18(*d*) of the 1952 *Territorial Lands Act* specifically designates the Governor in Council as the holder of the power to set apart and appropriate lands for the fulfilment of treaty obligations. In effect, the holder of the power is the same person in both cases.

The question arises in both cases as to whether the powers of the Governor in Council must be exercised personally or if those powers may be delegated to a government official. As the intervener Coalition submits, one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve. In my view, the correct test of this is to be found in this Court's judgment in *R. v. Sioui*, [1990] 1 S.C.R 1025, at p. 1040:

> To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.

While these words were said in the context of treaty creation, they seem relevant in principle to the creation of a reserve. In both cases, an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown. The Crown agent makes representations to the First Nation with respect to the Crown's intentions. And, in both cases, the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made

gouvernement de l'heure). Par conséquent, si le pouvoir de créer des réserves découle de la prérogative royale, c'est le gouverneur général — ou le gouverneur en conseil — qui exerce normalement ce pouvoir. Par contre, l'al. 18*d*) de la *Loi sur les terres territoriales* de 1952 désigne explicitement le gouverneur en conseil en tant que titulaire du pouvoir de mettre à part et d'affecter des terres pour satisfaire aux obligations prévues par les traités. En fait, le titulaire du pouvoir est la même personne dans les deux cas.

64 La question qui se pose dans l'un et l'autre cas est de savoir si les pouvoirs du gouverneur en conseil doivent être exercés par lui personnellement ou s'ils peuvent être délégués à un représentant du gouvernement. Comme le soutient la Coalition intervenante, il faut examiner à la fois le point de vue de la Couronne et celui des Autochtones pour déterminer, au regard des faits d'une affaire donnée, si la partie qui, prétend-on, aurait exercé le pouvoir de créer une réserve pouvait raisonnablement être considérée comme titulaire du pouvoir de lier la Couronne lorsqu'elle a mis à part et affecté des terres et les a ensuite désignées comme réserve. À mon avis, le critère applicable dans un tel cas est celui qui a été énoncé dans l'arrêt de notre Cour *R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1040 :

> Pour en arriver à la conclusion qu'une personne avait la capacité de conclure un traité avec les Indiens, il faut donc qu'elle ait représenté la Couronne britannique dans des fonctions très importantes d'autorité. Il faut ensuite se placer du point de vue des Indiens et se demander s'il était raisonnable de leur part, eu égard aux circonstances et à la position occupée par leur interlocuteur direct, de croire qu'ils avaient devant eux une personne capable d'engager la Couronne britannique par traité.

65 Bien que ces propos aient été formulés dans le contexte de la conclusion de traités, ils semblent en principe pertinents relativement à la création d'une réserve. En effet, dans les deux cas, un représentant de la Couronne dûment autorisé exerce un pouvoir délégué pour établir des rapports entre une Première nation et la Couronne ou pour renforcer ceux qui existent déjà. Le représentant de la Couronne communique à la Première nation concernée les intentions de la Couronne. Et, dans les deux cas, l'honneur de la Couronne dépend de l'empressement du

to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land.

66 However, from the passage from *Sioui*, it is also clear that not just any Crown agent will do. Many minor officials who are Crown agents could hardly be said to act to bind the Crown in this case or any other, in a process which involves significant political considerations or concerns about the Crown's duties and obligations towards First Nations. The Crown agent must "have represented [the Crown] in very important, authoritative functions" (*Sioui*, *supra*, at p. 1040). Similarly, where reserves have been created by means of an Order-in-Council, there is no question that it is the Governor in Council who is making the representations and who is exercising the power to create the reserve. On the other hand, in the circumstances of this case, the registration in the Yukon Territory Land Registry of the setting aside of land for the Indian Affairs Branch is not sufficient to show intent to create a reserve given the widely varying types of interests in land recorded in that Register.

E. *Summary of Principles Governing the Creation of Reserves Applicable to this Case*

67 Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions

gouverneur en conseil à respecter les déclarations faites à la Première nation dans le but de l'inciter à contracter certaines obligations ou à accepter un règlement relativement à une parcelle de terre donnée.

Cependant, il ressort également de façon claire de ce passage de l'arrêt *Sioui* que ce ne sont pas tous les représentants de la Couronne qui peuvent lier cette dernière. Il serait difficile d'affirmer que les actes qu'accomplissent de nombreux fonctionnaires subalternes en qualité de représentants de la Couronne ont pour effet de la lier dans le cadre d'un processus mettant en jeu d'importantes questions touchant aux devoirs et obligations de la Couronne envers les Premières nations. L'agent doit « [avoir] représenté la Couronne [. . .] dans des fonctions très importantes d'autorité » (voir *Sioui*, précité, p. 1040). De même, lorsqu'il y a création d'une réserve par décret, il ne fait aucun doute que les déclarations qui sont faites à cet égard émanent du gouverneur en conseil et que c'est ce dernier qui exerce le pouvoir de créer la réserve. Par contre, dans les circonstances de la présente affaire, l'inscription au bureau d'enregistrement des droits fonciers du Yukon des terres mises à part pour la Division des affaires indiennes n'est pas suffisante pour établir l'intention de créer une réserve, compte tenu du large éventail de droits fonciers inscrits dans le registre concerné.

E. *Sommaire des principes qui régissent la création des réserves et s'appliquent en l'espèce*

Par conséquent, tant au Yukon qu'ailleurs au Canada, il ne semble pas exister une seule et unique procédure de création de réserves, quoique la prise d'un décret ait été la mesure la plus courante et, indubitablement, la meilleure et la plus claire des procédures utilisées à cette fin. (Voir : *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654, p. 674-675; Woodward, *op. cit*., p. 233-237.) Quelle que soit la méthode utilisée, la Couronne doit avoir eu l'intention de créer une réserve. Il faut que ce soit des représentants de la Couronne investis de l'autorité suffisante pour lier celle-ci qui aient eu cette intention. Par exemple, cette intention peut être dégagée soit de l'exercice du pouvoir de

creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.

l'exécutif — par exemple la prise d'un décret — soit de l'application de certaines dispositions législatives créant une réserve particulière. Des mesures doivent être prises lorsqu'on veut mettre des terres à part. Cette mise à part doit être faite au profit des Indiens. Et, enfin, la bande visée doit avoir accepté la mise à part et avoir commencé à utiliser les terres en question. Le processus demeure donc fonction des faits. L'évaluation de ses effets juridiques repose sur une analyse éminemment contextuelle et factuelle. En conséquence, l'analyse doit être effectuée au regard des éléments de preuve au dossier.

It should be noted that the parties did not raise, in the course of this appeal, the impact of the fiduciary obligations of the Crown. It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights: see the comments of Lamer C.J. in *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at paras. 14-16.

68 Il convient de signaler que, dans l'affaire qui nous occupe, les parties n'ont pas soulevé la question de l'incidence des obligations de fiduciaire de la Couronne. Il faut se rappeler que, dans le cadre de la procédure de création des réserves, comme dans les autres aspects de ses rapports avec les Premières nations, la Couronne doit rester consciente de ses obligations de fiduciaire et de leur incidence sur cette procédure, et prendre en considération la nature *sui generis* des droits fonciers des Autochtones : voir les commentaires du juge en chef Lamer dans l'arrêt *Bande indienne de St. Mary's c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657, par. 14-16.

F. *The Evidence Relating to the Creation of a Reserve at Ross River*

To succeed, the appellants in this case have to show at least that land had been set apart for them. No real dispute arises with respect to the setting aside of land, nor with respect to the absence of an Order-in-Council, which latter issue, in my view, is not determinative of the issue. The key question remains whether there was an intention to create a reserve on the part of persons having the authority to bind the Crown. In other words, what is critical is whether the particular Crown official, on the facts of a given case, had authority to bind the Crown or was reasonably so seen by the First Nation, whether the official made representations to the First Nation that he was binding the Crown to create a reserve, and whether the official had the authority to set apart lands for the creation of the reserve or was reasonably so seen.

F. *La preuve relative à la création d'une réserve à Ross River*

69 Pour avoir gain de cause en l'espèce, les appelants doivent au moins démontrer que des terres ont été mises à part pour eux. Personne ne conteste vraiment la mise de côté des terres ni l'absence de décret, fait qui, à mon avis, n'est pas à lui seul déterminant quant à la question en litige. La question clé demeure celle de savoir si des personnes ayant le pouvoir de lier la Couronne ont eu l'intention de créer une réserve. En d'autres mots, il est essentiel de déterminer si, eu égard aux faits d'une affaire donnée, le représentant de la Couronne concerné avait le pouvoir de lier la Couronne ou a raisonnablement été considéré comme tel par la Première nation concernée, si ce représentant a déclaré à la Première nation qu'il engageait la Couronne à créer une réserve et s'il avait le pouvoir de mettre des terres de côté en vue de la création d'une réserve ou s'il a raisonnablement été considéré comme tel.

70 The appellants pointed to parts of the evidence which, in their opinion, indicated that such an intention had existed and had led to the setting apart of the lands where the Band had been living for many years. The appellants point to a number of individuals involved in the management of native affairs in the Yukon who recommended to the Minister of Citizenship and Immigration, Indian Affairs Branch, and/or the Supervisor of Lands and Mining, Department of Northern Affairs and National Resources, that a reserve be created for the Band. They placed strong emphasis on their recommendations as well as on the fact that a village was established at Ross River, as had also been recommended.

71 In my view, the critical flaw in the appellants' reliance on the authority of these Crown officials to bind the Crown appears when one asks whether these agents either (1) made representations to the Ross River Band that they had authority to create reserves; or (2) both made the representations and set apart the lands by legal act. On this appeal, the appellants have made no attempt to show that in fact these Crown agents ever made representations to the members of the Ross River Band that the Crown had decided to create a reserve for them. Nowhere in the appellants' lengthy review of the facts is there any reference to such evidence. Nor did Maddison J., in his reasons for judgment at trial, make any such reference. The evidence presented by the appellants all relates to recommendations made by Crown officials to other Crown officials, which recommendations were generally ignored or rejected. There appears to have been a long-lasting and deep-seated tension, even disagreement, as to the opportunity of creating new reserves between the civil servants working directly with native groups in the Yukon and their superiors in Ottawa. The evidence shows that no person having the authority to bind the Crown ever agreed to the setting up of a reserve at Ross River. Every representation made by those Crown officials actually in a position to set apart the lands was to the effect that no reserves existed in the Yukon Territory and that it was contrary to government policy to create reserves there. There is simply no evidence provided by the appellants which suggests that any Crown agents with the authority to set

Les appelants ont fait état d'éléments de preuve qui, selon eux, indiquaient que cette intention avait existé et avait abouti à la mise de côté des terres qui étaient habitées par la Bande depuis de nombreuses années. Ils ont mentionné certaines personnes ayant participé à la gestion des affaires autochtones au Yukon qui ont recommandé au ministre de la Citoyenneté et de l'Immigration (Division des affaires indiennes) ou au Superviseur des terres et des mines (ministère du Nord canadien et des Ressources nationales) la création d'une réserve pour la Bande. Les appelants ont attaché une grande importance à ces recommandations ainsi qu'au fait qu'un village avait été établi à Ross River, conformément à une autre recommandation.

À mon avis, la faille cruciale de l'argument des appelants reposant sur le pouvoir des représentants de la Couronne de lier celle-ci apparaît lorsque l'on se demande si ces mandataires ont (1) soit déclaré à la bande de Ross River qu'ils avaient le pouvoir de créer des réserves; (2) soit fait une telle déclaration et mis les terres de côté au moyen d'un acte juridique. Dans le présent pourvoi, les appelants n'ont pas tenté de démontrer que, dans les faits, ces représentants de la Couronne avaient à quelque moment que ce soit déclaré aux membres de la bande de Ross River que la Couronne avait décidé de créer une réserve à leur intention. Nulle part dans l'examen approfondi des faits effectué par les appelants il n'est fait mention d'une telle preuve. Le juge Maddison du tribunal de première instance n'en parle pas non plus dans ses motifs. La preuve produite par les appelants porte entièrement sur les recommandations qui ont été présentées par certains fonctionnaires à d'autres fonctionnaires et qui, de façon générale, ont été ignorées ou rejetées. Il semble avoir existé pendant longtemps, entre les fonctionnaires qui travaillaient directement avec les groupes autochtones au Yukon et les supérieurs de ces fonctionnaires à Ottawa, des tensions profondes voire un désaccord quant à l'opportunité de créer de nouvelles réserves. La preuve indique qu'aucune personne habilitée à lier la Couronne n'a donné son aval à l'établissement d'une réserve à Ross River. Toutes les déclarations faites par les fonctionnaires réellement en mesure de mettre de côté des terres précisaient qu'il n'existait pas de réserve au Yukon

apart lands went to the members of the Band and in effect said: "The Crown is now creating a reserve for you, a reserve of the type contemplated under the *Indian Act* and which will be subject to all of the terms of that Act". Conversely, those Crown officials who did advocate the creation of a reserve, whether or not they made representations to the Band, never had the authority to set apart the lands and create a reserve.

et que la création de réserves allait à l'encontre de la politique du gouvernement pour ce territoire. Les appelants n'ont tout simplement pas présenté d'élément de preuve tendant à indiquer qu'un représentant de la Couronne habilité à mettre des terres de côté soit allé rencontrer les membres de la Bande et leur ait dit : « La Couronne est actuellement en train de créer, à votre intention, une réserve du type prévu par la *Loi sur les Indiens*, qui sera assujettie à toutes les dispositions de cette loi ». Au contraire, aucun des fonctionnaires qui préconisaient effectivement la création d'une réserve, qu'ils aient ou non fait des déclarations à la Bande, n'a jamais détenu le pouvoir de mettre des terres à part et de créer une réserve.

Some specific facts are particularly telling in this respect. They confirm that the appellants failed to demonstrate the existence of the intentional component of the reserve-creation process. At most, as indicated above, they proved that there had been a long-standing disagreement between the local agents of DIAND and its predecessors and its central administration in Ottawa. This conflict originated in the 1950s. For example, the Indian Commissioner for British Columbia, who was also in charge of native affairs in the Yukon, recommended that a number of new reserves, including one at Ross River, be created in the territory. The Deputy Minister of the Department of Citizenship and Immigration, Indian Affairs Branch, advised the Acting Minister against such a move and no action was taken.

72 Certains faits sont particulièrement révélateurs à cet égard. Ils confirment que les appelants ont omis de démontrer l'existence de l'élément intentionnel du processus de création des réserves. Comme je l'ai indiqué ci-dessus, ces faits établissent tout au plus qu'il y avait depuis longtemps désaccord entre les représentants locaux du MAINC et de ses prédécesseurs et l'administration centrale à Ottawa. Ce conflit remontait aux années 50. Par exemple, le commissaire aux Affaires indiennes pour la Colombie-Britannique, qui était également responsable des affaires autochtones au Yukon, avait recommandé la création d'un certain nombre de nouvelles réserves au Yukon, notamment à Ross River. Le sous-ministre de la Citoyenneté et de l'Immigration, Division des affaires indiennes, avait déconseillé au ministre par intérim de l'époque de donner suite à cette recommandation et aucune mesure n'avait été prise.

A few years later, in 1957, the Deputy Minister recommended against the creation of new reserves. As a result, the Government of Canada decided not to implement a recommendation to set up 10 new reserves including one at Ross River. In 1958, the Deputy Minister received new recommendations against the creation of reserves.

73 Quelques années plus tard, en 1957, le sous-ministre a recommandé qu'on ne crée pas de nouvelles réserves. Le gouvernement du Canada a en conséquence décidé de ne pas donner suite à la recommandation d'établir 10 nouvelles réserves, dont une à Ross River. En 1958, le sous-ministre a reçu de nouvelles recommandations défavorables à la création de réserves.

In 1962, the Yukon Agency of the Indian Affairs Branch of the Department of Citizenship and Immigration applied to the Department of Northern

74 En 1962, l'Agence du Yukon de la Division des affaires indiennes du ministère de la Citoyenneté et de l'Immigration a présenté au ministère du

Affairs and National Resources and asked that land be set aside for the Ross River Indian Village site, presumably pursuant to the *Territorial Lands Act.* After a series of correspondence about the location and size of the site, the Department of Northern Affairs and National Resources informed the Indian Affairs Branch that land had been set aside "for [the] Indian Affairs Branch", but not specifically for the Ross River Band.

75 After the village was established and the land was set aside, the Department constantly maintained the position that it had not intended to create a reserve. In 1972, a published list of reserves restated the official position that no reserve had been created in the Yukon, within the meaning of the *Indian Act.* In 1973, the Department reversed in part its previous stance. It acknowledged that six reserves had been created by Orders-in-Council, between 1900 and 1941. The Ross River site was not among them.

76 After 1965, the reality of these set-asides which do not constitute reserves seems to have been well established. There was an early illustration of this fact. In 1966, the Government of Yukon took back control of a lot on the site of the Ross River Indian Village and leased it to a private citizen. There was consultation with the Band, but no authorization or consent was requested from it. No suggestion was made at the time that the Band's consent would be required. Finally, as we shall see, the existence of these lands set aside, while not having the status of reserves, was recognized during the negotiations leading to the conclusion of the Umbrella Final Agreement.

G. *The Effect of the Setting Aside*

77 As argued by the respondent, the Government of Canada, what happened in this case was the setting aside of lands for the use of the Band. No reserve was legally created. This procedure may raise concerns because it may amount to a bureaucratic attempt to sidestep the process of reserve creation and establish communities which remain in legal limbo. The use of this procedure may leave

Nord canadien et des Ressources nationales une demande sollicitant que des terres soient mises de côté comme site du village indien de Ross River, vraisemblablement en vertu de la *Loi sur les terres territoriales*. Après un échange de correspondance concernant l'emplacement et la superficie du site envisagé, le ministère du Nord canadien et des Ressources nationales a informé la Division des affaires indiennes que des terres avaient été mises de côté [TRADUCTION] « pour la Division des affaires indiennes », mais non expressément pour la bande de Ross River.

Après l'établissement du village et la mise de côté des terres, le ministère a continué de maintenir qu'il n'avait pas voulu créer une réserve. En 1972, sur une liste publique des réserves, on réitérait la position officielle indiquant qu'aucune réserve au sens de la *Loi sur les Indiens* n'avait été créée au Yukon. En 1973, le ministère a partiellement modifié sa position antérieure, reconnaissant que six réserves avaient été créées par décret de 1900 à 1941. Le site de Ross River ne figurait pas parmi celles-ci.

Après 1965, la réalité de ces mises de côté n'ayant pas pour effet de constituer des réserves semble avoir été bien établie. On trouve une illustration de ce fait dès 1966, date à laquelle le gouvernement du Yukon a récupéré un lot sur le site du village indien de Ross River et l'a loué à un particulier. La Bande a été consultée, mais on ne lui a pas demandé son autorisation ni son consentement. À l'époque, personne n'avait suggéré qu'une telle démarche serait nécessaire. Finalement, comme nous le verrons plus loin, on a reconnu l'existence de ces terres mises de côté — qui n'ont pas la qualité de réserves — au cours des négociations ayant abouti à la conclusion de l'Accord-cadre définitif.

G. *L'effet de la mise de côté de certaines terres*

Comme l'a fait valoir le gouvernement du Canada intimé, il y a eu en l'espèce mise de côté de terres à l'usage de la Bande. Aucune réserve n'a été créée du point de vue juridique. Une telle façon de faire peut inquiéter du fait qu'elle pourrait être une tentative, par l'administration, en vue d'éviter le recours au processus de création des réserves et d'établir des collectivités qui demeurent dans une situation

considerable uncertainty as to the rights of the Band and its members in relation to the lands they are allowed to use in such a manner. Nevertheless, it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band. It would certainly be in the interests of fairness for the Crown to take into consideration in any future negotiations the fact that the Ross River Band has occupied these lands for almost half a century.

The Umbrella Final Agreement acknowledges that these set asides were common practice in the Yukon. Indeed, as pointed out in the factum of the Government of Yukon, the Umbrella Final Agreement provides for rules and procedures designed to deal with the status of lands set aside, which set-aside lands are clearly distinguished from *Indian Act* reserves. Under this agreement, lands set aside must become settlement land under a Yukon First Nation Final Agreement. Such settlement land is specifically identified as not being reserve land. Thus, it may well be thought that the alleged claim of the appellants should have been pursued through the negotiation process, given the absence of intention to create a reserve on the part of the Crown.

juridique incertaine. L'utilisation de cette procédure peut créer beaucoup d'incertitude quant aux droits de la Bande et de ses membres sur les terres qu'ils sont ainsi autorisés à utiliser. Néanmoins, il ne faut pas oublier que les actes accomplis par la Couronne relativement aux terres occupées par la Bande sont régis par les rapports de fiduciaire qui existent entre cette dernière et la Couronne. Il serait certainement conforme à l'équité que, dans toutes négociations futures, la Couronne tienne compte du fait que la bande de Ross River occupe ces terres depuis près d'un demi-siècle.

78 L'Accord-cadre définitif constitue une reconnaissance que ces mises de côté étaient pratique courante au Yukon. De fait, comme on le souligne dans le mémoire du gouvernement du Yukon, l'Accord-cadre définitif établit des règles et des procédures applicables aux terres mises de côté, terres que l'on différencie clairement des réserves au sens de la *Loi sur les Indiens*. Aux termes de cet accord, les terres mises de côté doivent devenir des terres visées par un règlement en vertu de l'accord définitif conclu par une Première nation du Yukon. On précise explicitement que ces terres visées par un règlement ne sont pas des terres de réserve. Par conséquent, il est permis de considérer que, vu l'absence d'intention par la Couronne de créer une réserve, les appelants auraient dû avoir recours au processus de négociation pour faire valoir leur revendication.

VI. Conclusion

For these reasons, the appeal should be dismissed, with no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Gowling Lafleur Henderson, Ottawa.

Solicitor for the respondent Her Majesty the Queen in Right of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the respondent the Government of Yukon: The Minister of Justice of the Yukon Territory, Whitehorse.

VI. Conclusion

79 Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi. Aucune ordonnance n'est rendue en ce qui concerne les dépens.

Pourvoi rejeté.

Procureurs des appelants : Gowling Lafleur Henderson, Ottawa.

Procureur de l'intimée Sa Majesté la Reine du chef du Canada : Le procureur général du Canada, Ottawa.

Procureur de l'intimé le gouvernement du Yukon : Le ministre de la Justice du Territoire du Yukon, Whitehorse.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Coalition of B.C. First Nations: Mandell Pinder, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Le procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante la Coalition of B.C. First Nations : Mandell Pinder, Vancouver.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20110110

Docket: A-237-10

Citation: 2011 FCA 6

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

ZOLTAN ANDREW SIMON

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard at Edmonton, Alberta, on December 2, 2010.

Judgment delivered at Ottawa, Ontario, on January 10, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] A Judge of the Federal Court struck out the statement of claim filed by Mr. Simon in Federal Court file T-639-10 without leave to amend. The Judge also decided that Mr. Simon should pay costs to the defendant Crown set in the amount of $500.00. The Judge's decision was based upon his conclusion that Mr. Simon's claim did not fall within the jurisdiction of the Federal Court. See: 2010 FC 617.

[2] Mr. Simon appeals from the order of the Federal Court. He asks this Court to set aside the order and to issue a number of declarations. The declarations sought by Mr. Simon are not available on appeal from the order striking out the statement of claim. Therefore, the sole issue for this Court is whether the Federal Court was correct in law when it struck out the statement of claim without leave to amend.

[3] For the reasons that follow, I would allow this appeal in part and vary the order appealed from so as to grant leave to Mr. Simon to file an amended statement of claim or, alternatively, to seek an extension of time in order to bring an application for judicial review.

The Facts

[4] The relevant facts are set out in paragraphs 2 to 4 of the Judge's reasons. There he wrote:

> 2. In January 1999 the plaintiff sponsored Margarita Reyes, his then wife, and her two sons as permanent residents of Canada. He signed a sponsorship agreement with her whereby he undertook to provide her essential needs. He is adamant that he had no such agreement with Canada.
>
> 3. In June 2000, she and her sons left him and they began to receive social assistance benefits from the Province of British Columbia. Mr. Simon was unaware of these payments or that the Province of British Columbia held him as their sponsor liable to repay them until some time in 2007.
>
> 4. In 2008 and again in 2009 the Province of British Columbia garnisheed funds standing to his credit in his tax account with Revenue Canada.

The Decision Under Appeal

[5] The defendant's motion to strike the statement of claim was brought on four grounds. The defendant asserted that:

1. The statement of claim did not sufficiently disclose the material facts.

2. The statement of claim did not disclose a reasonable cause of action.

3. The statement of claim was frivolous, vexatious or constituted an abuse of process.

4. The statement of claim mirrored an action the plaintiff had commenced in the Supreme Court of British Columbia.

[6] The Judge characterized Mr. Simon's claim in the following terms:

> 8. Mr. Simon argues that there is no "effective debt" owed by him because there was no agreement between him and the Government of Canada to repay the payments that were made by British Columbia, that the payments to Mrs. Reyes were excessive and improper, and that, in any event, the amounts claimed from him are statute barred. In short, his position is that he has never owed anything to the Province of British Columbia on account of its payments to Mrs. Reyes and that it improperly garnisheed his tax account with Revenue Canada.

The Judge found the action the plaintiff had commenced in British Columbia to be irrelevant.

[7] On this basis, the Judge reasoned as follows:

> 10. What is critical is that the plaintiff's financial dispute is not directly with Canada and the real dispute he has does not fall within the jurisdiction of this Court. In my view, he should be seeking his declaration and repayment of the funds taken illegally, in his view, against the Provincial authorities in the B.C. Superior Court, either in the action already commenced or in a new one.

Was the Federal Court wrong to strike the statement of claim without leave to amend?

[8] Motions to strike are governed by Rule 221 of the *Federal Courts Rules* which provides that a pleading may be struck out with or without leave to amend. For such a motion to succeed it must be plain and obvious or beyond reasonable doubt that the action cannot succeed. See:

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at paragraphs 30 to 33. To this I would add that to be struck without leave to amend any defect in the statement must be one that is not curable by amendment. See: *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.) cited by the Supreme Court in *Hunt v. Carey Canada Inc.* at paragraph 28 and *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (C.A.) cited by the Supreme Court in *Hunt Carey Canada Inc.* at paragraphs 23 and 24.

[9] Without doubt, the Federal Court was correct in striking Mr. Simon's statement of claim for reasons including that:

1. Contrary to Rule 174, the statement of claim did not contain a concise statement of the material facts on which Mr. Simon relied.
2. Contrary to Rule 174, the statement of claim extensively pleaded evidence.
3. Contrary to Rule 221(1)(*a*), the statement of claim did not disclose a reasonable cause of action.
4. Contrary to Rule 221(1)(*c*), the statement of claim was frivolous or vexatious because it was so deficient that the defendant could not know how to answer the claim. As well, the Court would be unable to regulate or manage the proceeding. See: *Kisikawpimootewin v. Canada*, 2004 FC 1426, [2004] F.C.J. No. 1709, citing *Ceminchuk v. Canada*, [1995] F.C.J. No. 914 (Proth.).
5. Finally, while a party may raise any point of law in a pleading (Rule 175), a statement of claim cannot consist of legal argument. The extensive legal submissions contained in the statement of claim violate Rule 174 because

> Mr. Simon's submissions, including the extensive references to case law and hypothetical cases, are not concise statements of material fact.

[10] However, the Judge did not strike the claim on this basis. Instead, he found that the matters set out in the statement of claim did not fall within the jurisdiction of the Federal Court.

[11] I agree that large aspects of Mr. Simon's narrative do not fall within the jurisdiction of the Federal Court because they relate solely to the propriety of British Columbia's claim to reimbursement for social assistance benefits paid to Mr. Simon's former wife. For the Federal Court to have jurisdiction the three-stage test articulated by the Supreme Court of Canada in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 (ITO) must be met. Neither the *Federal Courts Act* nor other federal legislation grants jurisdiction to the Federal Court to adjudicate upon the existence or extent of any liability owed by Mr. Simon to the government of British Columbia in respect of social assistance benefits. The absence of such legislation is fatal to the first stage of the ITO test.

[12] That said, in my view the Judge overlooked an important aspect of Mr. Simon's claim: whether the Canada Revenue Agency improperly paid monies owing to Mr. Simon under the *Income Tax Act* to the government of British Columbia, without any notice or explanation to Mr. Simon. There is no suggestion that any garnishment order issued from a court of competent jurisdiction. It may be that monies otherwise owing to Mr. Simon were applied to Mr. Simon's alleged sponsorship debt pursuant to subsection 164(2) of the *Income Tax Act*, R.S.C. 1985,

(5th Supp.), c. 1. The propriety of the Canada Revenue Agency's treatment of monies otherwise owing to Mr. Simon unquestionably falls within the jurisdiction of the Federal Court. It follows, in my respectful view, that the Federal Court erred in law by concluding that none of the matters complained of by Mr. Simon fell within its jurisdiction.

[13] The Federal Court was correct to strike the statement of claim, but not on the ground that the Court lacked jurisdiction.

[14] After determining that a pleading will be struck, Rule 221 requires consideration of whether a pleading is struck with or without leave to amend.

[15] It is not plain and obvious that if amended Mr. Simon's claim that the Canada Revenue Agency erred in its treatment of monies he was otherwise entitled to would not disclose a reasonable cause of action. Therefore, the Federal Court erred in striking the statement of claim without leave to amend.

[16] Three points should be made concerning Mr. Simon's right to amend, or file a further pleading.

[17] First, it is important to caution Mr. Simon that any further pleading must comply with all of the rules of the Federal Court governing pleadings. Failure to comply with those rules would expose the pleading to the risk of being struck out.

[18] The requirement that a pleading contain a concise statement of the material facts relied upon is a technical requirement with a precise meaning at law. Each constituent element of each cause of action must be pleaded with sufficient particularity. A narrative of what happened and when it happened is unlikely to meet the requirements of the Rules. Mr. Simon would be well advised to seek legal advice, at least with respect to the elements that must be contained in any pleading he may wish to file.

[19] Second, materials relating to the propriety of the claim to reimbursement advanced by authorities in British Columbia are unlikely to fall within the jurisdiction of the Federal Court. Any claim not within the jurisdiction of the Federal Court will again be liable to be struck out.

[20] Third, as a matter of law, certain relief sought against federal entities may only be claimed by way of a notice of application seeking judicial review. This is a legal issue of some complexity where Mr. Simon would again benefit from legal advice.

Conclusion

[21] For these reasons, I would allow the appeal in part and vary the order of the Federal Court so as to grant leave to file an amended statement of claim, or, alternatively, to seek an extension of time to file an application for judicial review.

[22] In the circumstances, I would make no award of costs.

"Eleanor R. Dawson"

J.A.

"I agree.
Carolyn Layden-Stevenson J.A."

"I agree.
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-237-10
STYLE OF CAUSE:	ZOLTAN ANDREW SIMON v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	December 2, 2010
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	LAYDEN-STEVENSON J.A. MAINVILLE J.A.
DATED:	January 10, 2011

APPEARANCES:

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Camille N. Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Myles J. Kirvan Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT

Articles

The Courts and The Conventions of The Constitution

THE HONOURABLE EUGENE A. FORSEY*

This article addresses the somewhat evasive topic of conventions. In the first part of the article, the author discusses conventions in a very general way as part of our "working Constitution of Canada". In so doing, he considers such questions as: What constitutes a convention?; How does it change?; and, In what circumstances does it change? Numerous examples of conventions are presented and examined. The second part of the article is more specifically concerned with the relationship between the courts and these conventions. Particular emphasis is placed on the patriation reference of 1982 to the Supreme Court of Canada. The author concludes by assessing the appropriate role of the courts with respect to matters of convention.

Cet étude adressera le sujet quelque peu évasif des conventions. En premier lieu, l'auteur donnera au aperçu général des conventions en rapport avec le rôle de la Constitution du Canada dans notre vie quotidienne. Entre autres, l'auteur discutera les questions suivants: Quelle est une convention?; Comment peut-on modifier une convention?; Dans quelles circonstances est-ce qu'une convention change? L'étude présentera et examinera plusieurs exemples de conventions. En deuxième lieu, l'auteur démontrera la relation qui existe entre les Cours et les conventions et, en particulier, il attirera l'attention sur la référence de patriation à la Cour Suprême du Canada en 1982. Finalement, l'étude évaluera le rôle des Cours le plus approprié en rapport aux affaires des conventions.

INTRODUCTION

The working Constitution of Canada has two basic parts: law, and convention. Together they make up the rules by which we are governed.

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The law of the Constitution, in its turn, has two parts: written and unwritten. The written Constitution, consists of fourteen Acts of the Parliament of the United Kingdom, seven Acts of the Parliament of Canada, and four Orders of the Imperial Privy Council.[1] The unwritten law is that part of the English Common Law dealing with constitutional matters which are still applicable in Canada. The most notable example is, of course, the royal prerogative. The law of the Constitution is the skeleton of our body politic.

Convention is the acknowledged, binding, extra-legal customs, usages, practices and understandings by which our system of government operates.[2] The conventions are the sinews and nerves of our body politic.

The law of the Constitution is interpreted and enforced by the courts; breach of the law carries legal penalties.[3] The conventions are rarely even mentioned by the courts. Breach of the conventions carries no legal penalties. The sanctions are purely political.

But the conventions are immeasurably important. The law of our Constitution confers enormous power on the Queen and her representatives, the Governor-General and the Lieutenant-Governors. A foreigner, reading only the law, would conclude that we live under a despotism. In fact, these powers are exercised by Ministers responsible to the House of Commons, which in turn is responsible to the people. But the law of the Constitution barely mentions the most powerful Minister, the Prime Minister; it says nothing about how he is appointed or removed; it confers on him only two powers, both very minor.[4] The other Ministers are not mentioned at all; nor is the Cabinet; and of the Cabinet's responsibility to the House of Commons there is not one syllable.[5]

In the United Kingdom, "unconstitutional" means contrary to the conventions. In Canada, it may mean either contrary to the law of the Constitution, *ultra vires*, or contrary to the conventions. For instance, an Act of a provincial Legislature dealing with banking would be "unconstitutional" because it would violate section 91(15) of the *Constitution Act*, 1867. Likewise, an Act of the Parliament of Canada dealing with municipal institutions would be "unconstitutional" because it would violate section 92(8) of the *Constitution Act*, 1867. But if a Government defeated in the House of Com-

[1]*Constitution Act*, 1982, section 52(2) and Schedule 1. Another British Act which presumably is part of our written Constitution, as being subject to amendment only by section 41 of the *Constitution Act*, 1982 (unanimous consent of the provinces, since it is "in relation to the office of the Queen") is the *English Act of Settlement*, 1701. Other English statutes, e.g., the *Petition of Right*, 1628, the *Habeas Corpus Act*, 1679 and the *Bill of Rights*, 1689 might be considered part of our written Constitution, but whether they can be amended only by constitutional amendment I leave to others better qualified than I to judge.

[2]For a more elaborate statement, see Freedman, C.J., quoting Professor Hogg, in (1981), 117 D.L.R. (3d) 14.

[3](1982), 125 D.L.R. (3d) 82.

[4]*Constitution Act*, 1982, ss. 37 and 49.

[5]Though it is implied in the preamble of the *Constitution Act*, 1867.

mons (or a provincial Legislative Assembly) on a motion of censure or want of confidence refused either to resign or to ask for a dissolution of Parliament (or the Legislature), that conduct also would be "unconstitutional". It would be perfectly legal; the courts would be powerless to prevent or punish it. But it would be contrary to a basic convention of our Constitution, the convention of responsible government.[6] It would, to quote a favourite expression of the late R. B. Bennett, "strike at the very foundation of our institutions".

NATURE AND SOURCES OF CONVENTIONS

What, if any, is the function of the courts in relation to the conventions?

Before attempting to answer that question, it is necessary to be clear about the nature of conventions, where they are to be found, and the criteria for recognizing them. First and foremost, they are political: political in their birth, political in their growth and decay, and political in their application and sanctions. In politics they live and move and have their being.

Practicing politicians, faced with a new problem, find that neither the law nor the established way of doing things offers any solution. So they try something new. If it works, and the same problem recurs, they use it again; and, sometimes quickly, sometimes gradually, it becomes generally recognized and accepted. If it doesn't work, it's dropped. If the problem which brought it into being disappears, the convention likewise disappears. If the old problem recurs, the convention which solved it may reappear. In short, the conventions are essentially, and intensely, practical. They are, accordingly, flexible and adaptable.

Where are they to be found?

Occasionally, in the preambles of Acts of Parliament; for example, the *Constitution Act*, 1867 and the Statute of Westminster, 1931. Less occasionally in the resolutions of Imperial Conferences, notably that of 1926.[7] Sometimes, in the decisions of Dominion-provincial Conferences, or in official texts agreed on by the Dominion and the provinces, as in the Favreau White Paper of 1965.[8] Very occasionally, in Orders-in-Council, notably the Canadian Order-in-Council of May 1, 1896, and its successors, on the "prerogatives" of the Prime Minister.[9]

But mainly, they are found in precedents: the record of how various problems have in fact been dealt with. The relevant precedents are, of course, primarily Canadian, Dominion and provincial, pre-Confederation

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[6](1982), 125 D.L.R. (3d) 83.

[7]*Report of the Imperial Conference, 1926*, 12-13, 21.

[8]Guy Favreau, *The Amendment of the Constitution of Canada* (1965).

[9]Arnold Heeney, "Cabinet Government in Canada: Some Recent Development of the Machinery of the Central Executive" 12 *Canadian Journal of Economics and Political Science*, 268-9.

and post-Confederation. Some of the pre-Confederation precedents have become obsolete; some provincial precedents would almost certainly be considered too eccentric to be relevant, at any rate beyond the jurisdiction where they occurred.[10] Because our system of government is based on the British, British precedents may also be relevant as may also those of the Commonwealth countries where similar practices prevail. (Some British, Australian, New Zealand, South African and Newfoundland precedents may be irrelevant because of particular features in the other Constitutions which have no counterpart in Canada; some may have become obsolete; some, again, may be too eccentric to be accepted here).[11]

Other sources of conventions may be found in the utterances of eminent statesmen and the writings of recognized authorities on the Constitution. The criteria for recognizing conventions have been succinctly stated by Sir Ivor Jennings:

> We have to ask ourselves three questions: first, what are the precedents, secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?[12]

He adds:

> A single precedent with a good reason may be enough to establish a rule. A whole string of precedents will be of no avail, unless it is perfectly certain that the persons concerned regarded them[selves] as bound by it.[13]

He also says:

> Conventions imply some form of agreement, whether expressed or implied . . . The conventions are like most fundamental rules of any constitution in that they rest essentially upon general acquiescence . . . If the authority itself and those connected with it believe that they ought to do so, then the convention exists. This is the ordinary rule applied to customary law. Practice alone is not enough. It must be normative.[14]

I would be inclined to add that conventions rest ultimately on what Sir Robert Borden, too optimistically perhaps, called "the commonplace quality of commonsense".

SOME EXAMPLES OF CONVENTIONS

A few examples of conventions and alleged conventions may be instructive both in clarifying the foregoing and in indicating the limits of the courts in dealing with them.

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[10]See, for example, Frank MacKinnon, *The Government of Prince Edward Island* (1951), 152-3, 173-4, 188-9, 191-4; *The Crown in Canada* (1976), 112-13.

[11]Some may be inapplicable either because of varying constitutional features or simply because they are too eccentric; see, for example, S.J.R. Noel, *Politics in Newfoundland* (1971), 128-9.

[12]*The Law and the Constitution*, 5th ed. (1959), 81.

[13]*Ibid.*, 117.

[14]*Ibid.*, 135-6.

The Supreme Court of Canada, in a majority judgment of September 28, 1981 on the proposals for patriation of the Canadian Constitution, gave one example of what has long since been a recognized convention: "It is a fundamental requirement of the Constitution that if the Opposition obtains a majority at the polls, the Government must resign forthwith".[15]

But in Britain, till 1868, this statement would have been regarded as the wildest heresy. Till that year, whatever Government was in office when an election took place invariably stayed in office till the new House of Commons met, and resigned only if defeated in that House on a motion of censure or want of confidence, or other vote the Government considered equivalent to these. In all the self-governing colonies, the practice was the same. Any other course would have been considered almost, or quite, a contempt of Parliament.

Then in 1868, Disraeli abruptly broke with precedent. The election having given the Liberals a clear majority of the seats, it would have been sheer waste of time to wait for the new House to defeat him. So he resigned forthwith. This was so clearly sensible that when the Conservatives won an absolute majority in 1874, Gladstone, if reluctantly[16], followed Disraeli's example. And so a new practice developed.

Why was the pre-1868 invariable practice abruptly abandoned, and its direct opposite followed in three successive cases? Because the circumstances had changed drastically, and the old practice, perfectly sensible, indeed inevitable, in the old circumstances, had become absurd in the new. Before the Reform Bill of 1867, the British franchise was restricted, and the electorate small. Candidates were generally personally known to their electors, and, accordingly, were elected largely on their individual merits or their individual popularity. They might have generally Conservative, or Whig, or Radical proclivities. But they were essentially independent gentlemen: what Sir John A. Macdonald called "loose fish." There was no party organization to threaten them with defeat at the next election if they changed sides. Accordingly, in the House, they voted as they pleased, changing sides from issue to issue; moving easily, and without discredit, from party to party. Often, on the morrow of an election, no one could be sure whether a particular newly elected Member would support or oppose the Government when the new House met. Both sides might claim him. The uncertainties were increased, for more than a decade after 1846, by the existence of the Peelites, who had left the Conservative party when Peel repealed the Corn Laws.

By 1868, the Peelites were gone. Some were dead. Some had left public life. Some had gone over to the Liberals, some had gone back to the Conservatives. Moreover, the household suffrage introduced by the Reform Bill of 1867 had greatly increased the number of voters. Few of the new

[15](1982), D.L.R. (3d), 82; John P. Mackintosh, *The British Cabinet* (1962), 172.

[16]John Morley, *The Life of William Ewart Gladstone* (1903), II, 492-3.

voters could know the candidate personally. So they tended to vote for the party rather than the man. The candidates, accordingly, tended to be party men rather than independent gentlemen. In short, the "loose fish" disappeared.

If Britain had been able to keep a two-party system, the new practice would have completely superseded the old. But she wasn't. The "loose fish" were gone. But loose schools, or "shoals", of fish took their place: first the Irish Nationalists, then the Liberal Unionists, then the Labour party. The same thing happened in Canada after 1920: first the Progressives, then the CCF, then Social Credit, then the NDP.

In the British election of 1885, the Liberals and the Conservatives won exactly the same number of seats. The Irish Nationalists held the balance of power, and no one was sure which way they would vote when the new House met. So the pre-1868 convention came to life again with a jerk. Lord Salisbury met the new House, and resigned only when it had defeated him. In the election of 1886, fought on Home Rule, the anti-Home Rulers won such an overwhelming majority that Gladstone resigned at once. In the 1892 election, no party got a clear majority. So Lord Salisbury met the new House, and resigned only after it had defeated him. In the election of 1923, again no party got a clear majority of the seats. So Mr. Baldwin met the new House, and resigned only after it had defeated him. In Canada, in the election of 1925, the King (Liberal) Government got 101 seats, the Conservatives 116, the Progressives 24, Labour 3, and Independents 1. Mr. King met the new House, and was for some months sustained by it.

So now we have, in Britain and Canada, two conventions on the subject. If an opposition party gets more than more than half the seats in a general election, the Government must resign forthwith. If no party gets a majority, then the Government may resign promptly (as Mr. Baldwin did in 1929, and Mr. Heath—after a brief abortive attempt to get the Liberals to join a coalition—in 1974 in Britain, and as Mr. St. Laurent did in 1957, Mr. Diefenbaker in 1963, and Mr. Trudeau in 1979), or it may meet the new House and let it decide (as Mr. Diefenbaker did in 1962, and Mr. Trudeau in 1972).

An instance in which an old convention has been completely superseded by a new, both in Britain and Canada, has to do with the Premiership. In Britain, down to 1902, no one would have dreamt of saying that it was a convention of the Constitution that the Prime Minister could not be a peer. Between 1832 and 1902, Britain had eleven Prime Ministers. Three were Commoners throughout their periods in office: Peel, Palmerston and Gladstone. Six were in the Lords throughout: Grey, Melbourne, Derby, Aberdeen, Salisbury and Rosebery. Russell and Disraeli began in the Commons but ended in the Lords. Over the 70-year period, the Prime Minister was in the Lords for nearly 30, and for 14 of the final 16.

But in 1924, when Lord Curzon confidently expected to become Prime Minister on the death of Mr. Bonar Law, the King explained to him that,

with the Labour party now the second party in the state, the Prime Minister must be in the Commons. In 1940, on Mr. Chamberlain's resignation, the King would have liked to ask Lord Halifax to form a Government, placing his peerage "in abeyance for the time being," and neither Halifax nor anyone else concerned apparently thought his being in the Lords an obstacle. But the King's proviso (curiously vague) shows that he clearly recognized the convention, or the realities of the situation, even if others did not.[17] In fact, of course, the Labour party would never have stomached a Prime Minister in the Lords. Halifax was impossible.

By the time Mr. Macmillan resigned the Premiership, Parliament had passed the *Peerage Act*, 1963, allowing peers to renounce their peerages.[18] This enabled Lord Home to renounce his earldom, seek a seat in the House of Commons, and become Prime Minister, as Sir Alec Douglas-Home.

In Canada, in 1891, Senator Sir John Abbott became Premier on the death of Sir John A. Macdonald; and in 1894, Senator Sir Mackenzie Bowell became Premier on the death of Sir John Thompson. In 1891, the Liberals attacked Abbott's appointment on the grounds that he was too close to the Canadian Pacific Railway.[19] But neither in 1891 nor 1894 does anyone seem to have even suggested that a Prime Minister in the Senate was constitutionally improper. With Lord Salisbury as Prime Minister in Britain in 1891, and Lord Rosebery in 1894, any such claim would have been looked upon as ridiculous.

But it is safe to say that in Canada for many years now it has been a settled convention that the Prime Minister cannot be a Senator. This was made clear, for example, in 1941, when the Conservatives chose Senator Arthur Meighen as leader. He promptly resigned his senatorship and ran for the House of Commons. In Canada it was not the rise of a Labour party which produced the change, but the growth of democratic ideas, reinforced by the change in British practice.

Two other conventions which have changed completely because of changing circumstances have to do with the composition of the Canadian Cabinet.

At Confederation, the Irish Roman Catholics were so large and formidable a group, in all four provinces, that everyone agreed that they had to have at least one Minister in the Cabinet. The difficulty in meeting this requirement very nearly prevented Sir John A. Macdonald from forming a Government at all.[20] It remained a conventional requirement in the formation of Governments till, certainly, the 1960's. But will anyone say that it holds now? Will anyone say that Mr. Trudeau put Mr. Whelan or Mr.

[17]E.C.S. Wade and G.G. Phillips, *Constitutional Law*, 8th. ed. (1969), 82-3.

[18]D.L. Keir, *The Constitutional History of Modern Britain Since 1485*, 9th. ed. (1969), 487.

[19]*Debates of the House of Commons of the Dominion of Canada*, 1891, cols. 1106-09 (Laurier), 1123-4 (Cartwright), 1129 (Mills), 1145-6 (Davies).

[20]Donald Creighton *John A. Macdonald, The Young Politician* (1966), 473-4.

Regan or Mr. MacGuigan into the Cabinet because there had to be at least one Irish Roman Catholic Minister? As long as the Irish Roman Catholics were a real political force, this was a convention of the Canadian Constitution. When they ceased to be such a force, that convention disappeared.

On the other hand, at Confederation, and for more than fifty years after, no one thought of even suggesting that every Cabinet must have at least one French-speaking Minister from outside Quebec. In 1926, Mr. Meighan appointed the first one; Dr. Raymond Morand, from Windsor, Ontario. Since then, every Cabinet except Mr. Bennett's (and Mr. Diefenbaker's for most of its life) has had at least one. The present Cabinet has three. For the first half-century of Confederation, French-speaking Canadians outside Quebec were politically negligible. They were too few, too inarticulate, too unorganized. As their numbers, their articulateness and their cohesiveness grew, they became a political force, increasingly formidable. Now it is most certainly a convention of our Constitution that they must have at least one Minister. It is noteworthy that Mr. Clark, with his very slim French-Canadian support, nonetheless put Mr. de Cotret into the Cabinet, even though he had to find him a seat in the Senate to do it.

In Britain, the office of Prime Minister is wholly conventional, in Canada almost wholly. But in both countries, since the beginning of the twentieth century, the powers of the office have changed enormously; in Britain wholly, in Canada almost wholly, by convention.

In Britain, where formerly the Prime Minister was *primus inter pares*, or, in Sir William Harcourt's phrase, *inter stellas luna minores*, he (or she) is now unquestionably master (or mistress) to a degree that would have staggered Gladstone or Salisbury. A single example is that, down to 1918, dissolution of Parliament was almost invariably on the advice of the Cabinet, after discussion in Cabinet. Since 1918, it is on the advice of the Prime Minister alone.[21]

In Canada, till 1957, dissolution was, formally and explicitly, "by and with the advice and consent of Our Privy Council for Canada" (that is, the Cabinet).[22] Since then, the advice to the Governor-General is no longer by Order-in-Council, embodying the opinion of the Cabinet, but by "instrument of advice", a document emanating from, and signed by, the Prime Minister alone; and the Proclamation of dissolution now reads: "by and with the advice and consent of Our Prime Minister of Canada". The same thing has happened to the "Convocation of Parliament" (which, till 1963 at least, was "by and with the advice and consent of Our Privy Council for Canada"), and the appointment of Senators (which, till 1976, was advised by the Cabinet).[23]

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[21]Sir Ivor Jennings, *Cabinet Government*, 3d. ed. (1969), 417-19.

[22]*A Guide to Canadian Ministries since Confederation, July 1, 1867-January 1, 1957* (1957), p. 62; *Supplement, January 1, 1957-August 1, 1965* (1966), 5.

[23]*Debates of the House of Commons of the Dominion of Canada*, 1948 (unrevised), 538; information from the Privy Council Office.

In this instance, the change seems to have been brought about by a *coup de plume*, based on a mis-reading of an Order-in-Council first passed by the Government of Sir Charles Tupper on May 1, 1896, and repeated by Sir Wilfrid Laurier on July 13, 1896; Sir Robert Borden (with one minor deletion because the committee concerned had ceased to exist) on October 10, 1911; Mr. Meighen on July 19, 1920; Mr. Bennett (with a very slight change in wording in one clause) on August 7, 1930; and Mr. King on October 25, 1935. This Order set forth, *inter alia*, that "certain recommendations are the special prerogative of the Prime Minister". Among them are the dissolution and summoning of Parliament and the appointment of Senators.[24]

But the Orders-in-Council concerned have nothing whatever to do with *advice* to the *Governor-General*. What they deal with is "*recommendations*" to "*Council*" (the Cabinet). The clause immediately preceding the one on dissolution of Parliament makes this crystal clear: "A Minister cannot make *recommendations* to *Council* affecting the discipline of another department" (italics mine). Besides, "recommendation" is the standard word used in Orders-in-Council for something brought forward by a *particular Minister* for *adoption* by *the Cabinet*: "The Committee of the Privy Council [the Cabinet], on the *recommendation* of the Minister of" such-and-such, "*advise*" thus-and-so. The *Minister recommends* to *Council*, the *Council advises* the Governor-General. Indeed, the very Orders at issue begin: "The *Committee of the Privy Council*, on the *recommendation* of" So-and-So, "*the Prime Minister*, submit". The *recommendation* was made to the *Cabinet* by the *Prime Minister*, and the Cabinet having accepted it, the *decision* of the *Cabinet* was then *submitted* to the Governor-General for his approval. What was approved by the Governor-General was a Minute of *Council*, transmitted, of course, by the Prime Minister; not the "advice" of the *Prime Minister*.

Plainly, also at least some of the appointments which are described as "the special prerogative" of the Prime Minister are still made by Order-in-Council; that is, on the advice of the *Cabinet* (having, of course, first been *recommended* to the *Cabinet* by the Prime Minister). A notable example is: "Deputy Heads of Departments".

These particular aggrandisements of the power of the Canadian Prime Minister seem to have passed almost unnoticed, and unchallenged,[25] and are certainly now established, recognized conventions of the Canadian Constitution.

Another convention which has undergone drastic change both in Britain and Canada as a result of changing circumstances is that governing the Crown's choice of Prime Minister. The classic nineteenth (and early twentieth) century doctrine was that, if a Prime Minister dies in office, or resigns for personal reasons (such as ill health, leaving his party still in power) the

[24]Heeney, *loc. cit.*

[25]Except by me!

Queen or her representative, after consulting leading members of the party, and perhaps elder statesmen, chooses his successor; that a retiring Prime Minister is not entitled to proffer advice as to his successor; that even if, at the Crown's request, he gives such advice, it is not binding.[26] But in Britain, now, if a Labour Prime Minister resigned for personal reasons, the Labour party has the machinery for promptly electing a new leader, whom the Queen would have to call upon to become Prime Minister; and if a Conservative Prime Minister resigned for personal reasons, the Conservative party now has the machinery for electing a new leader promptly, and the Queen would have to call upon him (or her). Similarly, in Canada, now that party leaders are chosen by national conventions (not, as before 1919 for the Liberals and 1927 for the Conservatives, by the party caucus), if a Liberal or Conservative Prime Minister resigned for personal reasons, he would not do so till after his party, in a national convention, had already chosen a new leader, whom the Governor-General would then automatically call upon to form a new Government.

In Britain, now, if the Prime Minister died, his (or her) party would immediately elect a new leader who would automatically be called on to form a Government. In Canada, on the other hand, if a Prime Minister died, the old practice would still have to be followed. It would take months for the party in power to choose a new leader. But a new Prime Minister would have to be appointed immediately. So the Governor-General would have to take soundings among the leading members of the party to see which of them would be most likely to be able to command a majority till the new leader had been chosen. The party might, of course, simplify his task by holding a caucus which would elect an interim leader.

Of course it remains true that a retiring Prime Minister has no right to name his successor. It would be preposterous that a defeated Liberal Prime Minister should be able to advise the Governor-General to send for some Conservative other than the leader of the victorious Conservative party. Mr. Mackenzie King, after being soundly defeated in the general election of 1930, announced that he had "advised" the Governor-General to send for Mr. Bennett. But he had no shadow of right to do anything of the sort, and I am reliably informed that the sailorly comments of King George V on reading this egregious announcement left nothing to be desired.

Of course also it remains true that if a Prime Minister resigns because his party breaks up, the Queen or the Governor-General will have to choose his successor (after such soundings and consultations as may seem necessary), as George VI did when Mr. Chamberlain resigned, or as the Governor-General, here, would have had to to if dissension in the Liberal party in 1944 had forced Mr. King to resign. (Mr. King's contention, at the time,

[26]Sir Robert Borden, in J.R. Mallory, *The Structure of Canadian Government* (1971), 74; Hon. Herbert Bruce, in *Debates of the House of Commons of the Dominion of Canada*, 1944, 6823-4.

that he could not resign unless he was in a position to tell the Governor-General whom to appoint as is successor, is, of course, nonsense.)[27]

Some people have suggested that Mr. Pearson's action in retaining office upon his Government's defeat in the House of Commons on a Finance Bill, in 1968, instead of resigning, or asking for a dissolution of Parliament, is an example of a convention being superseded because of changing circumstances. This is not so. A Government defeated in the House of Commons on an explicit motion of censure or want of confidence (which includes defeat on the Budget motion, as phrased in Canada) must, of course, either resign or ask for a dissolution of Parliament; and a Government can always choose to consider defeat on any motion, even a mere motion to adjourn, as tantamount to defeat on a motion of censure or want of confidence. But a Government defeated on anything but an explicit motion of censure or want of confidence need neither resign nor ask for a dissolution of Parliament. Sir John A. Macdonald's Government was defeated ten or a dozen times in the first six years after Confederation, and neither resigned nor asked for a dissolution of Parliament.[28] In Britain, in very recent years, Governments have been defeated in the House of Commons scores of times, and have neither resigned nor asked for a dissolution.[29]

The Supreme Court of Canada, in its judgment of September 28, 1981, said that, by convention, the Queen, the Governor-General and the Lieutenant-Governors could not, "of their own motion", exercise their legal power to refuse assent "to any bill passed by the two Houses of Parliament or by a provincial Assembly, as the case may be, . . . on the ground, for instance that they disapprove of the policy of such bill".[30] Sir John A. Macdonald, in 1882, went even farther: "The power of veto by the Crown is now admitted to be obsolete and practically non-existent".[31]

But Professor McWhinney, in his recent book, *Canada and the Constitution, 1979-1982*, suggests that this convention, and others, have been rendered obsolete, at least for the Governor-General, by the fact that that personage is no longer an 'alien' (British and "imperially appointed").

> "The claimed conventions that would override the positive law powers of the governor-general rest on two conditions no longer applicable; in Canada the powers are no longer exercised (as in the past) by an 'alien' or (as in Britain) by a hereditary monarch. The governor-general is a truly Canadian office-holder, and, unlike the British monarch, he has his position for a limited term only. He may well conclude that he has a constitutional legitimacy in his own right, and that he has his own role to play as part of the

[27]Eugene Forsey, *Freedom and Order* (1947), 88-9.

[28]*Ibid.*, 123-8.

[29]Philip Norton, LIX *The Parliamentarian*, 232-4.

[30][1982] 125 *D.L.R.* (3d), 85.

[31]Frank Mackinnon, *The Government of Prince Edward Island*, 154-5; *Dominion-Provincial Legislation*, 1867-1896 (1896), 78; *Sessional Papers* (Canada), 1924, No. 276 (not printed).

> system of checks and balances if the need for the exercise of his legal powers should arise in his own, proper constitutional judgment . . . Why should not a Canadian governor-general who is both a Canadian citizen and also effectively appointed by the government of Canada, exercise the reserve, discretionary, prerogative powers conferred upon him by the BNA Act (sections 50 and 54-7)?"[32]

Before examining the precise application of these contentions, two preliminary comments are in order. First, what "system of checks and balances"? This is a basic feature of the United States Constitution, with its separation of powers. It is no part of ours. Are we being asked to accept it as a substitute for responsible government? Second, what is the foundation for saying that the "claimed conventions" rested on the Governor-General's having been formerly a resident of the United Kingdom and appointed by the United Kingdom Government?; or on the fact that his office is not hereditary? Is there a single Canadian Prime Minister in our whole history who would have said: "Oh! if the hereditary monarch, or a British-appointed Governor-General, exercised of his own motion the power to dissolve Parliament, or the power to refuse to recommend an expenditure to the House of Commons; or if a British-appointed Governor-General exercised the power to refuse assent, or to reserve bills for the signification of the Queen's pleasure, that would never do. That would violate responsible government. But if a Canadian Governor-General, Canadian-appointed, with a limited term, did these things, there could be no objection"? The concept of responsible Cabinet government is perfectly distinct from the concept of Canadian self-government.

What the Governor-General's being now a Canadian citizen, Canadian-appointed, and not hereditary, has to do with the conventions governing the exercise of the powers in sections 50 and 54-7 of the Constitution Act, 1867, is a mystery to me. What is not a mystery is that the exercise of the power to veto, and these other powers, by the Governor-General of his own motion, would end responsible government. The evolution of Canadian sovereignty has made some conventions of earlier times obsolete. Responsible government is not one of them.

Now for the details. Section 50 empowers the Governor-General to dissolve Parliament. He already has a reserve power to refuse dissolution in certain very special circumstances.[33] To concede him the power to dissolve of his own motion would be to put responsible government at his mercy. Section 54 makes it "unlawful" for the House of Commons "to adopt or pass any Vote, Resolution, Address or Bill for the Appropriation of any part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not first recommended to that House by Message of the Governor-General". If the Governor-General could, in the exercise of "his own, proper,

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[32](1982), 130.

[33]Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1968. Note also the Government's *White Paper: The Constitution and the People of Canada* (1969), 66; 76; and the Government's Bill C-60, 1978, clause 53.

constitutional judgment", refuse to send the message, he could prevent any expenditure he disapproved of. He could, in effect, stop Supply. What Prime Minister, what Cabinet, what House of Commons, what electorate, would ever accept that? On the other powers in sections 54-7, I comment below.

The dissenting opinion in the patriation reference case says there is "the rule that after a general election the Governor-General will call upon the leader of the party with the greatest number of seats to form a government".[34] This is not altogether accurate. If the Government in office gets a clear majority of the seats, it simply stays in office. There is no occasion for the Governor-General to call upon anyone. If an opposition party gets a clear majority, then, as the majority judgment in the same case correctly says, the Government resigns forthwith, and the Governor-General calls on the leader of the party with a clear majority to form a Government. If no party gets a clear majority, then the Government in office, even if it has fewer seats than the official Opposition, or some third party, is entitled to meet the new House of Commons and let it decide whether to keep the Government in or throw it out. Mr. King's action on the morrow of the election of 1925 is conclusive on this.

Immediately after the election of 1972, when, for a few days, it looked as if the Conservatives would have 109 seats to the Liberals' 107, there was a considerable chorus of voices claiming that the Governor-General should call on Mr. Stanfield to form a Government. In fact, it would have been grossly improper for him to do so. In such a case, it is not for the Governor-General to decide who shall form the Government. It is for the newly elected House of Commons, and the Governor-General has no right whatever to usurp its authority. (Had the Governor-General, in November 1925, dismissed Mr. King (whose party, be it remembered, had 101 seats, while Mr. Meighen's had 116), and asked Mr. Meighen to form a Government, he might very well have found that the new House of Commons would have defeated Mr. Meighen and he would have had to recall Mr. King. In any event, the welkin would have rung, and properly, with denunciations of the unconstitutionality of His Excellency's intervention.)

Only if Mr. King, in 1925-26, or Mr. Trudeau in 1972-73, had attempted to carry on for an extended period without calling Parliament (financing the country's business by means of Governor-General's special warrants) would His Excellency have had the right, indeed the duty, to insist on the summoning of Parliament. He would have had to refuse to sign any more special warrants; if the Prime Minister had still refused to advise the summoning of Parliament, the Governor-General would have had to dismiss him and call on the leader of the largest party to form a Government and advise the summoning. In taking this action, he would not have been usurping the right of the House of Commons to decide who should form the Government: he would have been preserving its right to do so.

[34] [1982] 125 *D.L.R.* (3d), 114.

I have used the phrase "for an extended period". What does that mean? But, if the newly elected House of Commons were not summoned for, say, three months, or four, or five, or six, at some point there would be a public outcry: "Responsible government means government by a Cabinet with a majority in the House of Commons. Has this Government a majority in the House of Commons? The only way to find out is to summon Parliament and let the House vote. If this Government won't advise that action, then we'd better get a Government that will, and it's the duty of the Governor-General to see that we do get it. His action is our only protection against a gross violation of responsible government".

There are a number of practices which may or may not have acquired the status of constitutional conventions. One is the alternation, since 1944, of the Chief Justiceship of Canada, between French-speaking and English-speaking Justices. Before 1944, there had been only one French-speaking Chief Justice (there had been also one English-speaking Quebec Civil Law Chief Justice). Plainly, in the first sixty-nine years of the Court's existence, there was no alternation. Since 1944, there has been. I have heard it suggested that this is simply the result of following an established practice that, when the Chief Justiceship fell vacant, the senior puisne judge succeeds. But in fact there was no such established practice. In 1906, Sir Charles Fitzpatrick went straight from Minister of Justice to Chief Justice; in 1924, Mr. Justice Anglin was not the senior puisne judge; nor was Mr. Justice Laskin in 1973.

That the alternation since 1944 is simply accidental or coincidental, I find it hard to believe. It seems to me at least arguable that its persistence is one of the results of the Quiet Revolution which transformed Quebec and Quebec-Dominion relationships. Perhaps we have here an example of the truth of Sir Ivor Jennings' dictum that, where there is a good reason, a single precedent (let alone a series over a period of almost forty years) may suffice to establish a constitutional rule.

The Dominion Government's statutory power to disallow provincial Acts[35] has not been used since 1943 (though the threat of disallowance was effectively used in 1948 to take the stuffing out of the Prince Edward Island Trade Union Act of that year),[36] despite the fact that there have been several occasions when earlier Governments would have found strong grounds for using it. Is the power now constitutionally obsolete? Is there now a convention which precludes its use?

The case for saying, "Yes", would be stronger if the *Constitution Act*, 1982, had not left the statutory power untouched. If such a convention had existed, here was a golden opportunity for putting the obsolescence of the power beyond doubt by simply abolishing it. The provinces surely would not have objected, and the Dominion Government had repeatedly indicated that it was prepared to give up the power in return for a Charter

[35]*Constitution Act*, 1867, sections 56 and 90.

of Rights. It got the Charter (albeit with a "notwithstanding" clause); it apparently made no attempt to get the power abolished. This certainly suggests that it is not willing to admit that there is a convention against its exercise; which would mean that Jennings' third criterion has not been met.

The 1982 *Constitution Act*'s retention of the Dominion power of disallowance of provincial Acts (and the Lieutenant-Governors' power to reserve provincial bills for the Governor-General's pleasure, to which the same comments apply) is matched by its retention of the Governor-General's power to reserve Dominion bills for the signification of the Queen's pleasure, and the British Government's power to disallow provincial Acts. Section 57 of the *Constitution Act*, 1867, provides that a reserved Dominion bill dies unless within two years it receives the assent of the Queen of the *United Kingdom* in her *United Kingdom* Privy Council, of which there is now not one single Canadian member. Section 56 of the 1867 Act provides that a Canadian Act, to which the Governor-General has assented in the Queen's name, can, within two years of its enactment, be wiped off the statute books by the Queen of the *United Kingdom* in her *United Kingdom* Privy Council.

Till 1982, there was unquestionably a convention that these powers were constitutionally obsolete. It was not merely that no Dominion bill had been reserved since 1886, and no Dominion Act disallowed since 1873. There was also the unanimous, clear, authoritative, unchallenged pronouncement of the 1929 Imperial Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation. That body declared that reservation could be exercised only "in accordance with constitutional practice in the Dominion governing the exercise of the powers of the Governor-General", and that "it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom against the views of the Government of the Dominion". It also said that "the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation". Further, it declared that "it would be in accordance with constitutional practice that if so requested by the Dominion . . . the Government of the United Kingdom should ask Parliament to pass the necessary legislation" to abolish both powers.[37]

The Government could easily have got rid of both powers in the Act of 1982, simply by adding, in the first Schedule, opposite "British North America Act, 1867", this: "(5) Section 55 is amended by striking out all the words after the words 'withholds the Queen's Assent'. (6) Section 56 is repealed. (7) Section 57 is repealed".[34] Why did it not do so? Perhaps because this would have abolished also the Lieutenant-Governors' power

[36]Frank MacKinnon, *The Crown in Canada*, 108-09.

[37]*Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation*, 1929, 16, 19, 20. Abolition could now be accomplished only with the unanimous consent of the provincial Legislatures, under section 41 of the *Constitution Act*, 1982.

to reserve provincial bills for the Governor-General's pleasure and the Dominion Government's power to disallow provincial Acts, unless there had been a consequential amendment to section 90, which confers these powers by reference to sections 55-57. If so, this confirms the view that the Dominion Government is not prepared to admit the existence of a constitutional convention precluding the use of its power of disallowance of provincial Acts (or the Lieutenant-Governors' use of their power of reserving provincial bills).

Is this discussion nothing more than arguing how many angels can stand on the point of a needle? Surely everyone would agree that the conventions set forth by the Imperial Conference of 1929 still hold, and that for all practical purposes the Governor-General's power to reserve bills for the Queen's pleasure, and the power of the Queen-in-Council to disallow Dominion Acts, are as dead as the dodo?

But at this point, enter again Professor McWhinney: Why should not the Governor-General exercise the power of reservation "in his own, proper constitutional judgment"?[38] Why should he not resume the performance of his statutory duty (abandoned, I understand, these many years) to send "an authentic Copy" of every Act he has assented to "to one of Her Majesty's Principal Secretaries of State" in the United Kingdom, which would set in motion the whole process of disallowance?

Why not? Because it would drive a coach-and-four through Canada's sovereignty. The power of the British Parliament to legislate for Canada is gone. But the power of the British Cabinet to negate Canadian legislation would remain.

THE PATRIATION REFERENCE

What part have the courts played in the development of the conventions? Till 1981, none. They have from time to time noted it, commented on it. They have not been part of it. But on September 28, 1981, six of the nine judges of the Supreme Court of Canada handed down a decision that convention, though not law, required that certain amendments to the Canadian Constitution must have a "substantial measure" or a "substantial degree" of provincial consent.[39]

The specific question is now, of course, of merely historical interest. *The Constitution Act*, 1982, makes amendments of our Constitution a matter of strict law. It lays down four precise formulas for different types of amendments that set down the degree of provincial consent required. There is no need to resort to conventions.

But there are plenty of conventions, or alleged conventions, on which someone, inspired by the decision of September 28, 1981, might seek a

[38] *Op. cit.*, p. 130.

[39] (1982), 125 D.L.R. (3d) 103.

judicial decision. What, if any, is the function of the courts in relation to these? Have the courts the right to decide what they are? If so, what force has the decision? Is it desirable, or even safe, to have the courts making such decisions at all?

These questions had not been seriously considered by anyone in Canada till a very few years ago. In 1980, the Government of Canada proposed a series of amendments to the written Constitution, to be procured by simple Address of the Senate and the House of Commons to the Queen asking for the necessary British legislation. Only two provinces, Ontario and New Brunswick, supported the proposed Address. The other eight opposed it, particularly the method of proceeding, without the consent of the provinces. Newfoundland, Manitoba and Quebec referred the matter to their Courts of Appeal.

The Newfoundland and Manitoba references asked three identical questions:

1. Would the proposed amendments affect "federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments, . . . and if so, in what respect or respects?"
2. "Is it a constitutional convention that the House of Commons and the Senate will not request . . . the Queen to lay before the Parliament of the United Kingdom . . . a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?"
3. "Is the agreement of the provinces of Canada constitutionally required" for amendments of the kinds stated?[40]

The answer to the first question is a matter of strict law. It does not concern us here. The answer to the third depends partly on the answer to the second. There is certainly no such requirement in any statute.[41] But that does not end the matter. If there is a convention that provincial consent is required, has that convention acquired the force of law? Both the second and third questions therefore are relevant to our inquiry. The Newfoundland reference had a fourth question, purely legal, in relation to the terms of union on which Newfoundland entered Confederation. This does not concern us here.

The Quebec reference asked two questions:

A. Would the proposed amendments "affect (i) the legislative competence of the provincial legislatures . . .?" (ii) "the status or role of the provincial legislatures or governments within the Canadian Constitution?"
B. "Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons . . . to cause the Canadian Constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such manner as to affect" (i) or (ii) above?[42]

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[40](1982), 125 D.L.R. (3d) 12.

[41]*Ibid.*, 37-42.

[42]*Ibid.*, 12-13.

Question A is essentially the same as question 1 in the Newfoundland and Manitoba references, and so does not concern us here. Question B covers the same ground as questions 2 and 3 in those references.

In the Newfoundland Court of Appeal, all three judges said "Yes" to questions 2 and 3. In the Manitoba Court of Appeal, Freedman, C.J.M. and Matas, J.A. said "No" to questions 2 and 3. Hall, J.A. refused to answer question 2 "because it is not appropriate for judicial response", and said "No" to question 3. O'Sullivan, J.A. said "Yes" to both 2 and 3. Huband, J.A. said "No" to 2 and "Yes" to 3. In the Quebec Court of Appeal, four of the five judges answered "Yes" to both parts of question B; that is, that there is no convention of provincial consent, and no legal requirement for such consent.[43]

The judgments of all three Courts of Appeal were appealed to the Supreme Court of Canada.

The Chief Justice, and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer, JJ.A. ruled that the provinces had the right to put to the courts questions that were not matters of strict law, and that the courts had "a discretion to refuse to answer such questions".[44] The seven judges found no statutory requirement for provincial consent, and rejected the contention that convention could harden or crystallize into law.[45]

Martland and Ritchie, JJ. dissented. They had joined with Dickson, Beetz, Chouinard and Lamer, JJ. in holding that there was a constitutional convention requiring "substantial agreement" of the provinces for amendments affecting the powers, rights or privileges of the provinces (a decision which is the main subject of this inquiry). It followed, in the opinion of Martland and Ritchie, JJ., that this agreement was "constitutionally required".[46] The rest of their dissent deals with the question of whether the power to proceed without provincial consent has been conferred on the two Houses "otherwise than by statute or convention".[47] This does not concern us here.

We come now to the decision of Dickson, Beetz, Chouinard, Lamer, Martland and Ritchie, JJ. (the Chief Justice and Estey and McIntyre, JJ., dissenting on the question of a convention requiring provincial consent to amendments affecting the powers, rights or privileges of the provinces).

The reasons for judgment confine themselves wholly to this part of question 2 in the Newfoundland and Manitoba references and the second

[43] *Ibid.*, 13-14.

[44] *Ibid.*, 16 and 88.

[45] *Ibid.*, 29.

[46] *Ibid.*, 53.

[47] *Ibid.*, 53-79.

part of question A in the Quebec reference. They leave out any consideration of the question raised in the other parts of those questions.[48]

This is an extraordinary and wholly unwarranted exclusion, especially in view of the Court's own judgment in the Senate Reference Case.[49] The dissenting opinion rightly insists that amendments "affecting federal-provincial relationships" or "the status or role of the provincial legislatures or governments" must also be considered.[50] To do otherwise is to ignore the plain meaning of the word "or" in the Newfoundland and Manitoba references, and questions A (ii) and B (ii) in the Quebec reference, and hence to fail to answer one of the two questions asked.

The reasons for judgment, while admitting that "Counsel for several provinces strenuously argued that the convention exists and requires the agreement of all the provinces", reject this latter contention, relying especially on the Quebec Reference's "and in spite of the objection of several of them".[51]

In my view, this is a forced interpretation of the question in the Manitoba and Newfoundland References, and it is not helped by the extra phrase in the Quebec Reference. If the "consent of the provinces" means consent of *all* the provinces, then the phrase is surplus verbiage. If "consent of the provinces" means *less than all*, then it presumably means that the consent of some undefined number, less than ten, would suffice, provided some undefined number did not explicitly object. What numbers? There is no indication.

For the reasons set out in the dissenting opinion "agreement of the provinces" or "consent of the provinces" must mean agreement or consent of all the provinces, particularly because, as that opinion points out, "the question assumes that all provinces are equal regarding their respective constitutional positions".[52] Moreover, *every one of the precedents* cited in the reasons for judgment in support of a convention of provincial agreement or consent shows the agreement or consent of *all* the provinces as will be seen.

Under the head, "Requirements for establishing a convention", the reasons for judgment (quoting Sir Ivor Jennings) say that "the first question we have to ask ourselves is "what are the precedents?"[53] They then enumerate twenty-two amendments to the Canadian Constitution. Of these, the last, "Amendments by Order in Council" (the admission to Confed-

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[48]*Ibid.*, 89-90.

[49](1980), 102 D.L.R. (3d), 8-9.

[50](1982), 125 D.L.R. (3d), 118.

[51]*Ibid.*, 80.

[52]*Ibid.*, 105.

[53]See note 12, *supra*.

eration of Rupert's Land, the North-Western Territory, and British Columbia, and Prince Edward Island by United Kingdom Order in Council, under the provisions of section 146 of the British North America Act, 1867) are not really amendments at all. They are merely the implementation of the provisions of section 146 of the act of 1867 in accordance with the precise procedures it prescribed. Of the other twenty-one, thirteen affected neither federal-provincial relationships nor the powers, right and privileges of the provinces. Only the remaining nine call for examination.

(i) *The British North America Act, 1871*. This may be said to have affected federal-provincial relationships by empowering Parliament to create new provinces out of territories not included in any province; and to have affected both federal-provincial relationships and the powers of the provinces by empowering Parliament to change the limits of any province with the consent of that province's legislature.

To this amendment, provincial agreement or consent was neither asked for nor given.

(ii) *The British North America Act, 1886*. This, as the dissenting opinion says, "substantially affected the Provinces . . . [It] gave power to Parliament to provide for parliamentary representation in the Senate and the House of Commons for territories not forming part of any province, and therefore altered the provincial balance of representation".[54]

To this amendment also, provincial agreement or consent was neither asked for nor given.

(iii) *The British North America Act, 1907*. This, to quote again the dissenting opinion, "changed the basis of federal subsidies payable to the Provinces and thus directly affected the provincial interests".[55] For the first time, the provinces were consulted. All except British Columbia, consented. British Columbia actively opposed the amendment. It wanted more money, and it objected to the statement in the proposed Act that the settlement of the subsidy question in the Act was to be "final and unalterable". It did not get more money, but it got "final and unalterable" struck out. The Government of Canada and the Governments of the other provinces accepted this, and, in the words of the reasons for judgment, "the Premier of British Columbia did not refuse to agree to the Act being passed".[56] In short, there was, eventually, unanimous (if, on the part of the Government of Canada and the Governments of the other provinces, somewhat reluctant, or grudging) consent.

(iv) *The British North America Act, 1915*. This Act created a new Senatorial Division, the four Western provinces, with twenty-four Senators, the

[54](1982), 125 D.L.R. (3d), 119.

[55]*Ibid.*, 119.

[56]*Ibid.*, 97.

same number as Ontario, Quebec and the Maritime Provinces. This, in the words of the dissenting opinion, "had a potential for altering the provincial balance".[57] In fact, it did alter the provincial balance.

To this amendment, provincial consent was neither asked for nor given.

(v) *The British North America Act, 1930.* This gave the Prairie provinces their natural resources, and British Columbia its Peace River Belt (which had been withheld when it entered Confederation). The Act confirmed agreements between the Government of Canada and the Governments of the four provinces. The other provinces had already given general approval at the Dominion-provincial Conference of 1927. Their interests were affected by the alienation of assets formerly under the control of the Dominion,[58] but their formal agreement or consent was not even asked for, let alone obtained.

In this case, formally, there was the agreement or consent of only the four provinces directly concerned. The agreement of the other five (as they then were) was informal or tacit: they did not object. It can be argued that this case shows either (a) that there must be unanimous agreement or consent, at least tacit, or (b) that any amendment affecting only a particular province, or particular provinces, must have the agreement or consent of that province or those provinces. The case does nothing to establish any general principle that every amendment "affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments" must have the agreement or consent of some undetermined number of provinces, more than two but less than ten.

(vi) *The Statute of Westminister, 1931.* This, though not in form an amendment to the British North America Acts, 1867-1930, did in fact amend them by giving both Parliament and the provincial legislatures extra powers. It did not, however, change the pre-existing division of legislative power between Parliament and the provincial legislatures.

To this Act, there was unanimous provincial agreement or consent.

The same holds for (vii) *The British North America Act, 1940* (unemployment insurance), (viii) *The British North America Act, 1951* (old age pensions), and (ix) *The British North America Act, 1964* (disability and survivors' pensions).

The last five of these amendments provide what the reasons for judgment call the "positive precedents".[59] It could be argued that they provide a basis for concluding that, for the kinds of amendments specified in the Manitoba and Newfoundland References, and, in effect, in the Quebec

[57] *Ibid.*, 119.

[58] *Ibid.*, 119.

[59] *Ibid.*, 94.

Reference, the unanimous agreement or consent of the provinces is required. They provide no basis whatever for a convention that the agreement or consent of more than two but less than ten provinces is required.

The reasons for judgment, however, say[60] that we must look also at the "negative" precedents: the cases where a proposed amendment failed of adoption. Of these, they cite four.

(i) The proposed amendment of 1951, to give the provinces a limited power of indirect taxation. Ontario and Quebec did not agree, and the proposed amendment was dropped. This would not appear to show that the agreement or consent of eight provinces was not enough to meet the requirements of the alleged convention; or perhaps that the agreement of eight provinces which did not include Ontario, or Quebec, or perhaps both Ontario and Quebec, was not enough.

(ii) The proposed amending formula of 1960. "The great majority of the participants" (the Dominion and the provinces, in the Constitutional Conference of that year), say the reasons for judgment,[61] "found the formula acceptable but some differences remained and the proposed amendment was not proceeded with". This would appear to show that even the agreement or consent of "the great majority" of the provinces was not enough to meet the requirements of the alleged convention.

(iii) The proposed amending formula of 1964. Here there was, initially, unanimous agreement, but Quebec "subsequently withdrew its agreement and the proposed amendment was not proceeded with".[62] This would appear to show that even the agreement or consent of nine provinces was not enough to meet the requirements of the alleged convention; or at least that the amendment or consent of nine provinces which did not include Quebec, was not enough.

(iv) The proposed Victoria Charter of 1971. Here eight provinces agreed; Quebec, say the reasons for judgment,[63] "disagreed and Saskatchewan which had a new government did not take a position because it was believed the disagreement of Quebec rendered the question academic. The proposed amendments were not proceeded with". This appears to show that the agreement or consent of eight provinces was not enough; or at least that the agreement or consent of eight provinces without Quebec was not enough; or perhaps that the agreement or consent of eight provinces without Quebec and Saskatchewan was not enough. So the "negative" precedents seem to indicate that the agreement or consent of nine provinces, or of eight provinces, or of "the great majority" of the provinces, is not enough; or at least that Quebec must be one of the eight or nine consenting provinces.

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[60] *Ibid.*, 94-5.

[61] *Ibid.*, 94-5.

[62] *Ibid.*, 95.

[63] *Ibid.*, 95.

From all the precedents, positive and negative, it would therefore seem to follow that the agreement or consent of eight provinces, or nine provinces, or of "the great majority of the provinces" is not enough to meet the requirements of the alleged convention.

The reasons for judgment[64] actually admit that "the precedents taken alone point at unanimity" as being conventionally required for the kinds of amendments contemplated in the three References. The "positive" and the "negative" precedents they cite might, indeed, be taken to provide the basis for a constitutional convention requiring the unanimous consent of the provinces; though in my opinion they are too few, and spread over too short a period to do so. (In the reasons for decision on the purely legal question, the Court itself says that a convention depends "on a consistent course of political recognition . . . developed *over a considerable period of time*".[65]

The majority decision relies heavily on the *White Paper* of 1965. That paper, it notes, was "circulated to all the provinces prior to its publication and . . . found satisfactory by all of them", and sets forth "accepted constitutional rules and principles" on the amendment of the Constitution. The "fourth general principle" was "that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces". It adds: "This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance". In the Manitoba Court of Appeal, Freedman, C.J.M., had drawn attention to the fact that "it is only *increasing* recognition and acceptance that have been achieved". The majority in the Supreme Court rejected this. It also ignored the *White Paper*'s own statement that the "principles" are "not constitutionally binding in any strict sense", and that "the nature and degree of provincial participation in the amending process . . . have not lent themselves to easy definition".[66]

But neither the "positive" nor the "negative" precedents provide any basis at all for a convention that the agreement or consent of less than ten but more than two provinces is required to give constitutional validity to amendments of the two kinds at issue. Indeed, the negative precedents strongly suggest that the agreement or consent of Quebec is indispensable; hence, that the agreement or consent of seven provinces, provided the seven include Quebec, might be sufficient, but that the agreement or consent of even nine, without Quebec, would not. However, the Quebec Reference has now squashed this possibility.[67]

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[64]*Ibid.*, 95, 100.

[65]*Ibid.*, 22.

[66]*The Amendment of the Constitution of Canada*, 11, 15; (1981), 117 D.L.R. (3d) 21; (1982), 125 D.L.R. (3d) 96, 98-100.

[67]*Re Attorney-General of Quebec and Attorney-General of Canada* (1983), 140 D.L.R. (3d), 385.

Seven of the nine judges answering the question whether the agreement or consent of the provinces is *legally* necessary for amendments of the two kinds contemplated by the three References reject Professor Lederman's theory that "substantial provincial compliance or consent . . . is sufficient". They say (in the reasons for judgment on that question): "Although Professor Lederman would not give a veto to Prince Edward Island, he would to Ontario or Quebec or British Columbia or Alberta. This is an impossible position for a Court to manage."[68] Yet six of the seven judges, dealing with the contention that the agreement or consent of the provinces is *conventionally* necessary, in effect adopt Professor Lederman's view, which, significantly, rested on the basis that *there already existed* a convention that required at least "substantial" agreement or consent of the provinces, *and that this convention had hardened or crystallized into law.* But what the seven judges called "an impossible position for a Court to manage" in respect of a legal requirement mysteriously becomes, for six of the seven, perfectly acceptable in respect of a convention on which the alleged legal requirement was based.

The whole argument of the reasons for judgments leads, indeed, to

> a gulf profound as that Serbonian bog.
> Betwixt Damiata and Mount Cassius old,
> Where armies whole have sunk.

The one conclusion that emerges unmistakably from examination of the precedents is that, for a constitutional convention requiring the agreement or consent of more than two but less than ten provinces to amendments of the kind contemplated, there is no precedent whatsoever. A constitutional convention without a single precedent to support it is a house without any foundation. Sir Ivor Jennings, in the passage already quoted, says "the first question we have to ask ourselves is, what are the precedents?" True, he adds that "a single precedent with a good reason may be enough to establish the rule". But, indisputably, at least one precedent is essential. If there is no precedent, there is no convention.

The six judges nonetheless affirmed that, though there was no convention requiring unanimous consent of the provinces (for which they could have produced, and indeed did produce, substantial precedent), there was a convention requiring something less than unanimous consent (for which they could produce no precedent at all). Undismayed, they proceeded to set it out.

They said, correctly, that the Court was not being asked "to enforce a convention. We are asked to recognize if it exists". They answered that it did.[69]

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[68](1982), 125 D.L.R. (3d), 29.

[69]*Ibid.*, 88.

If it existed, the judges should have been able to tell us what it was. But all we get is that the allegedly indispensable agreement or consent of the provinces must be of "substantial degree"; a "substantial measure". This need not be the agreement of ten, but must be the agreement or consent of more than two. The agreement of Ontario and New Brunswick alone "does not disclose a sufficient measure of provincial agreement".[70]

So it's less than ten, but more than two. Then how many? No answer. What are the excuses offered for this astonishing silence?

First:

> In 1965, the *White Paper*[71] had stated that 'the nature and degree of provincial participation in the amending process have not lent themselves to easy definition'. Nothing has occurred since then which would permit us to conclude in a more precise manner. Nor can it be said that this lack of precision is such as to prevent the principle from acquiring the constitutional *status* of a conventional rule. If a consensus had emerged on the measure of provincial agreement, an amending formula could quickly have been enacted and we would not longer be in the realm of conventions.[72]

On this, three comments are necessary. First, the *White Paper* said "*nature* and degree". In other words, what was in question involved not only the *number* of provinces required but also specification of *which* provinces. Secondly, if a consensus had emerged we should have got an amending formula written into the fundamental law. But that would have involved getting an amendment, an amendment which would most certainly have affected federal-provincial relationships, and the "powers, rights or privileges granted or secured to the provinces, their legislatures or governments". Getting that amendment would, on their Lordships' argument, have involved getting the agreement of a "substantial" number of provinces, less than ten but more than two. We "evermore come out by that same door wherein we went". Thirdly, in 1964, we did get the agreement or consent of nine provinces. But Quebec balked, and the proposed amendment died. The "degree" of consent, less than ten but more than two, was certainly "substantial". But the "nature" of that consent, a consent which left out Quebec, apparently was defective.

The second excuse for not saying even how many (let alone which) provinces' consent was required by the alleged convention is:

> It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial consent is required for the convention to be complied with. Conventions by their nature develop in a political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.[73]

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[70] *Ibid.*, 103.

[71] *The Amendment of the Constitution of Canada*, 15.

[72] (1982), 125 D.L.R. (3d), 103.

[73] *Ibid.*, 103.

On this also, three comments are necessary.

First, no one asked the Court to "devise" any formula. It was asked, in its own words, "to recognize if [a convention] exist[ed]". It answered, in effect, "Yes; it's there; we recognize it; we see it". But if it recognized something which it assures us already existed, it should have been able to tell us what it was. If we are constitutionally bound by a rule, we have a right to know what the rule is. Otherwise, how can we know whether, or when, or how, it is being transgressed?

Must the "substantial" consent include Quebec? Ontario? Both of them? Must it include one, or more, of the Atlantic provinces? Of the Western provinces? Would the consent of the four Atlantic provinces plus Manitoba and Saskatchewan be enough? The permutations and combinations are numerous and fascinating.

Professor Soberman has pointed out that if the consent of nine provinces is "sufficient" but eight is not,

> then Ontario with over 35% of the population, or Quebec with over 25% cannot veto, but Prince Edward Island and Newfoundland together, with less than 3% of the population can veto. If eight is enough but seven is not, the straight nose counting leads to an even more unacceptable result: Ontario and Quebec, with over 60% of the population of Canada cannot block an amendment, but the two Atlantic provinces noted above, joined by New Brunswick, and together containing less than 6% of the population can exercise a veto![74]

All the clue we get to solving the puzzle is: more than two, but less than ten, must consent.

The Prime Minister of Canada, confronted by the Court's decision, could not know whether he was conventionally bound, on the Court's showing, to get the consent of six provinces, or seven, or eight, or nine; or which of them it must include. But let him stray one inch from the path of the convention the six judges professed to have marked out for him and his action would be branded "unconstitutional", even "immoral", "morally wrong".[75]

The second comment relates to the statement "It *will be* for the political actors . . . to determine the degree of provincial consent required" (italics mine). Note the tense: future. In other words, the convention the judges professed to "recognize" existed only in embryo. A constitutional *rule*, a *binding* constitutional rule, of that kind is something new. It certainly does not meet Jennings' test of general acceptance.

The third comment is that "devise in the abstract" is exactly what the Court did. It plucked out of the air a "convention" without a single-precedent to support it.

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[74]*The Court and the Constitution: Some Comments On The Supreme Court Reference on Constitutional Amendment*, Queen's University (1982), 68.

[75]Press comments, notably in the Toronto *Globe and Mail*.

The dissenting opinion of the Chief Justice and Estey and McIntyre, JJ., hits the nail squarely on the head:

> For the Court to postulate some . . . convention requiring less than unanimous provincial consent to constitutional amendments would amount, in effect, to an attempt by judicial pronouncement to create an amending formula for the Canadian Constitution which . . . would be incomplete for failure to specify the degree or percentage of provincial consent . . . A convention must be recognized, known and understood with sufficient clarity that conformance is possible and a breach of conformance immediately discernible.[76]

Closely examined, then, the decision of the six judges is not a very impressive performance,[77] despite the rapture with which it was greeted by (surprise!) the eight provincial Governments and much of the press.

But ought they to have made any decision at all? In the Manitoba Court of Appeal, Hall, J.A., as we have seen, said flatly that the question was "not appropriate for judicial response"; and in the Supreme Court of Canada the three dissenting judges were clearly unhappy answering it. They pointed out that it raised

> no legal question . . . and ordinarily, the Court would not undertake to answer . . . for *it is not the function of the Court to go beyond legal determinations.* Because of the unusual nature of these References and because the issues raised . . . were argued at some length before the Court *and have become the subject of the reasons of the majority*, with which, with the utmost deference, we cannot agree, we feel obliged to answer the questions *notwithstanding their extra-legal nature.*[78] (Italics mine.)

I think they had good reasons for their qualms.

Knowledge of constitutional conventions is not easily come by. The subject is complex. As already noted, it involves examining the precedents and a variety of documents, the pronouncements of eminent statesmen and important politicians, and the writings of constitutional authorities. It involves also deciding which of these were soundly based and whether changes in the political situation or culture have made them irrelevant.

Not every judge, even of the superior courts, will have been able to do this (some, of course, will be veterans of active politics, with direct experience of the prevailing usages, practices and customs; but some will not).[79] Not every counsel, however learned in the *law*, will be equipped to help the judges. And there are sometimes plausible constitutional quacks, or authors rich in learning but poor in judgment, to muddy the waters.

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[76](1982), 125 D.L.R. (3d), 114, 125.

[77]For exhaustive professional critiques, see *The Court and the Constitution*; McWhinney, 80-9; Peter Hogg, in 60 *Canadian Bar Review*, 307-34, notably 317-20.

[78](1982), 125 D.L.R. (3d), 107.

[79]None of the present justices of the Supreme Court of Canada seems to have been a member of either Parliament or a provincial Legislature.

If the Supreme Court's decision on the conventions governing the amendment of the pre-1982 Constitution becomes a precedent, and the courts undertake authoritative definition of other conventions, what force will their definitions have?

Legally, of course, none. A Supreme Court of Canada decision on a matter of law is final and binding. A Supreme Court of Canada decision on a matter of convention is merely an expression of opinion by five to nine eminent persons learned in the law, but not necessarily in the conventions, and is entitled to no more respect, perhaps less, than the opinion of other eminent (or even not so eminent) persons with a specialized knowledge of conventions.

So the answer to the question, "Is it desirable, or even safe, to have the courts making such decisions?" might appear to be, "It doesn't really matter. Such decisions are just *obiter dicta*.

But that does not wholly dispose of the matter. Gertrude Stein, in a celebrated *morceau*, said: "A rose is a rose is a rose". For a larger part of the Canadian public, a decision of the Supreme Court of Canada, whether on law or convention, is a decision is a decision is a decision; and woe betide the Government or the political party that dares question, or disregard, or run counter to it. The reception accorded to the decision of September 28, 1981, on the convention governing amendment of the pre-1982 Constitution, is proof of that. In general, the media, parliamentarians, the public, accepted it as settling the question;[80] and the Government of Canada knuckled under at once. Back it obediently went to the bargaining table, and out came a drastically changed proposal which had the consent of nine provinces, which almost everybody, except Quebec, felt met the Court's requirement of "substantial" consent.

THE IMPLICATIONS OF THE DECISION: CONCLUSION

There is, I submit, grave danger that the Court will increasingly be asked to rule on constitutional conventions; that, its appetite whetted by its triumph of September 28, 1981, it will succumb to the temptation; that its decisions, on conventions, however unclear, ill-founded, illogical or impracticable, will be accepted as, for all practical purposes, final, binding and infallable; though they may set every practising politician's hair standing on end "like quills upon the fretful porpentine".

Take, for instance, the alleged "rule" that after a general election the Governor-General will call upon the leader of the party with the greatest number of seats to form a Government. Acceptance of this would transfer to the Governor General a most important power which properly belongs, and in a parliamentary democracy must belong, to the House of Commons.

[80]At least two critics, Professor Soberman, in *The Court and the Constitution* 67-71, and Professor McWhinney, *op. cit.*, 87-8, pointed out that this particular emperor was inadequately clothed.

But the next time an election fails to give any party more than half the seats, the leader of the largest party might well call on the Court to give its imprimatur to that part of the dissenting opinion of September 28, 1981. If the Court obliged, he would then be in a position to say that it was the constitutional duty of the Governor-General to dismiss the Government in office, and call on him to form a Government. Refusal would be branded "unconstitutional".

Or suppose a future Supreme Court rules that a particular defeat in the House of Commons, on a bill or a resolution (like, for instance, the Pearson Government's defeat in 1968), is a vote of want of confidence, requiring the Government either to resign (to make way for another Government in the existing House of Commons) or to ask for a dissolution of Parliament (a fresh election). This would be a misreading of the true convention; but how could that stand against a "decision" of the highest court in the land? It is for the House of Commons, not any court, to decide what is or is not a snap vote, or whether a particular defeat constitutes censure or want of confidence; and the House, as 1968 proved, is perfectly able to do it. It should not have a change of Government or a general election imposed on it by the judiciary. And the case would be no better if the Court undertook to decide whether the particular defeat had been "substantial", or whether there had been a "sufficient" number of members present.

Nor can we exclude the possibility that a future Bench might excogitate out of its own inner consciousness a convention that no bill dealing with language or culture, passed by Parliament, was constitutionally valid unless it had received a majority of the votes at both the English-speaking and the French-speaking members, of one House or both. Conjured by the Supreme Court, the ghost of poor old Sandfield Macdonald's pet notion of "double majority" (which was never accepted even in the old province of Canada) would walk, would indeed rule the roost; especially since to use the word "culture", nowadays, is to "open the gates as wide as the sky and 'let a whole troop of kings' come riding by".[81] The "principle of duality" would be made part of our Constitution, not by constitutional amendment but by judicial fiat. This is not democracy.

Then, there is the Senate's absolute veto over legislation. This has not been exercised for over forty years. What is there to prevent someone from asking the Supreme Court to rule that, by convention, the veto has become unconstitutional?

It may be objected that these hypothetical cases are mere figments of an overheated imagination. But the six judges themselves said: "A federal constitution provides for the distribution of powers between various Legislatures and Governments and may also constitute a fertile ground for the growth of constitutional conventions between these Legislatures and Gov-

[81]For examples of just how wide might be the scope of "duality", see *Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on Senate Reform*, No. 1, p. 31, and No. 7, pp. 60, 72, 76.

ernments. It is conceivable for instance that usage and practice might give birth to conventions in Canada relating to the holding of federal-provincial conferences, the appointment of Lieutenant-Governors, and the reservation and disallowance of provincial legislation.[82]

And who would decide when the birth had taken place? Who would decide the nature of the offspring? Who would give it legitimacy, and the power, for practical purposes, to modify or override the law? Why, the Supreme Court, of course! Who else? The patriation case settled that long ago!

Even if the judges state a convention correctly, there is the danger that they may freeze it, embalm it, petrify it; prevent "the political actors" from modifying it to meet a new situation, or jettisoning it completely because it is no longer relevant or practicable. Or they may present the revival of an old convention superseded by political developments, which new circumstances have made relevant again (as with the pre-1968 convention about a Government after an election, waiting for the verdict of the new House of Commons).

If, as the six judges themselves said, "Conventions develop in a political field";[83] if, as they said of their "convention", "it will be for the political actors to determine" the precise content;[84] if, as the dissenting opinion said, "the sanction for non-observance of a convention is political in that disregard of a convention may lead to a political defeat, to loss of office, or to other political consequences"[85], then it follows that any attempt by the courts to define conventions is a judicial invasion of the independence of

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[82](1982), 125 D.L.R. (3d), 84.

[83]*Ibid.*, 103.

[84]*Ibid.*, 111.

[85]Clause 53 of Bill C-60 of 1978 contained this extraordinary provision: "In the event that the Cabinet is unable to command the confidence of the House of Commons . . ., the Prime Minister shall forthwith so inform the Governor General . . . and as soon as possible thereafter tender to the Governor General his or her advice on (a) whether Parliament should . . . be dissolved, or (b) if the dissolution is not advised by the Prime Minister or is refused by the Governor General, whether the Prime Minister *should be invited to form another administration*, or whether the resignation of the Prime Minister *and of the other members of the Cabinet should be accepted* to permit some person other than himself or herself to be called upon by the Governor General to form the administration for the time being of Canada" (italics mine). This provision was presumably drafted by a lawyer. It provides a good illustration of the fact that lawyers may be very imperfectly acquainted with constitutional usage. In the first place, the draftsman was evidently unaware of the fact that the resignation of a Prime Minister carries with it, automatically, that of the whole Cabinet. In the second place, it suggests that a Prime Minister who has just lost the confidence of the House of Commons might nevertheless advise that his resignation should not be accepted (though dissolution of Parliament has not been advised, or has been refused). Third, it suggests that a Prime Minister whose Cabinet has just lost the confidence of the House of Commons might advise the Governor General to appoint him head of a new Government. At the time, I publicly pointed out that this meant that a Prime Minister who had just been censured by the House could "prance into Rideau Hall and say: 'Well, Your Excellency, I have just been censured by the House of Commons. I now invite you to call on me to form a new Government' ". The reply: "Oh! The House of Commons would defeat him". I said: "Yes, and he could then march into Rideau Hall and say, 'Well, Your Excellency, I have now been twice censured by the House of Commons. My claim to be asked to form a new Government is now, therefore, twice as strong as it was the day before yesterday' ". Anybody who could draft that clause simply has no idea of what responsible government means.

the political power and a usurpation of its rights. Nor should the courts, whether on a plea of "bold statescraft" or otherwise, pull politicians' chestnuts out of the fire.

Nor is this all. Acceptance of Supreme Court decisions on constitutional conventions is likely to strengthen the hands of those who complain of the "silences" in the *Constitution Act*, 1867 (which the *Constitution Act*, 1982, has, fortunately, hardly touched); who want to write the conventions into the formal, written law Constitution; who want to have the written law Constitution define responsible government (which would involve either a statement so summary as to be completely at the mercy of judicial interpretation; or impossibly elaborate, in a hopeless effort to provide for every conceivable situation—which, again, might leave crucial *political* decisions in the hands of the judges). It is, say the proponents of their nostrum, such a nuisance not to have the rules laid down in black and white, in section Umpty-Three of the Constitution Act, 198? to 199?; beyond question or cavil, except, of course, the legal argument about what the words of the section mean in a particular case; on which the Supreme Court of Canada then renders a final and binding decision, to the general satisfaction. That it may be to the general dissatisfaction, and that remedying the situation would then require a constitutional amendment, which would have to have the assent of at least the Legislatures of seven provinces with half the population of the ten, does not seem to have occurred to them.

The "silences" of our written Constitution are, in fact, one of its greatest glories. They leave us room to adapt, to innovate, to experiment, to grow; room for Borden's "exercise of the commonplace quality of common sense".

The Quebec Liberal party's *Beige Paper* of 1980 provides one illustration of just how far this yearning to get everything set down in black and white in the written Constitution (and therefore changeable only by the elaborate, probably long drawn out, process of constitutional amendment) can go. That document even saw "merit" in the idea that the Standing Orders of the House of Commons should be written into a new *Constitution Act*.

This might be considered the *ne plus ultra* of the invasion of the rights and powers of the House of Commons, and the most glaring attempt to destroy a most important part of the flexibility of our political system. But perhaps even worse, because vaguer and more sweeping, and actually embodied in a Government bill to amend the Constitution, was clause 35 of Bill C-60 of 1978. That clause read: "The Constitution of Canada shall be the supreme law of the Canadian federation, and all of the institutions of the Canadian federation shall be governed by it" (so far, so good) "and by *the conventions, customs and usages hallowed by it*". This would have placed the conventions at the mercy of the Supreme Court of Canada. The conventions would, in fact, have been abolished; replaced by judicial decisions on what would have become matters of strict law. The usurpation of political power by the judiciary would have been, *pro tanto*, complete and unchallengeable,

except, of course, by the long drawn out—and probably fiercely fought—process of constitutional amendment. It would have constituted a bloodless but sweeping and drastic revolution in our system of government.

So my answers to the three questions I raised earlier in this article are: The Courts have not, nor should they have, the right to decide what the conventions of the Constitution are. If they attempt to do so, the decision has no force at all, legal or other. It is not desirable, or even safe, to have the courts making such decisions. On the contrary, it is most dangerous. Acceptance of the Supreme Court's decision on conventions in the patriation case would mean a Quiet Revolution in our system of government. It would blur the distinction between convention and law. It could lead to supersession of the law set out in the written Constitution by judicially determined "convention". It could provide a means of circumventing the explicit provisions for constitutional amendment set out in the *Constitution Act*, 1982. It could subvert parliamentary government. *Facilis descensus Averni!*

Second Edition

CANADIAN CONSTITUTIONAL CONVENTIONS

The Marriage of Law & Politics

Andrew Heard

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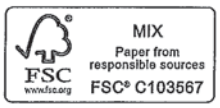

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the years without the ensuing demise of parliamentary government. Forsey appears to ignore the judicial interpretation of our formal constitution that has effected substantial constitutional change since very soon after Confederation, thereby sidestepping the previous amending procedures; indeed, judicial interpretation is a fundamental avenue of constitutional evolution. Furthermore, one must point out in just as strong terms that the development of constitutional conventions, regardless of their treatment in the courts, has also brought fundamental alterations to the constitution without recourse to the formal amending procedures. The very basis of parliamentary government Forsey wishes to uphold is founded on conventional rules that arose outside the existing formal amending procedures. Finally, while Dodek is correct in viewing conventions as a class of rules that may shift and change over time, his argument is less convincing when it becomes apparent that there are a group of fundamental conventions that have only evolved slowly over time, if at all, and whose existence and terms are widely acknowledged and respected. One may well be able to identify a subset of conventions that are not only more suitable for judicial consideration, but that are so vital to the operation of the constitution that the courts would risk doing damage to the political system by ignoring them.

Perhaps the most practical objection to the courts making more use of conventions is that Canadian judges have proven themselves rather maladroit when they have examined them. The *Patriation Reference* surprised most observers at the time, by finding that there was a convention requiring a substantial degree of provincial consent—but not unanimity—for constitutional changes to provincial powers. In that same ruling, the Court also repeated a common misperception that the party with the most seats in a minority situation has the right to form the government following an election. As Adam Dodek convincingly argues, the Court's position on this point was simply wrong.[73] The Federal Court also managed to misapply or ignore important issues when it upheld Stephen Harper's early election call in 2008.[74]

No author has seriously contended that a formal legal remedy, such as a prerogative writ, will be granted by the courts purely on the grounds that a convention has been broken. There is no evidence that in judicial proceedings conventions have been treated in exactly the same way as statute or common law.[75] Nevertheless, Jennings,[76] Russell,[77] Allan,[78] and Marshall[79] have clearly shown that various Commonwealth courts have on occasion referred to conventions for guidance and defined their terms in the course of interpreting statutes and extending particular common law principles.

The Supreme Court of Canada's handling of the reference questions on the amendment of the constitution illustrates both aspects of the treatment

of conventions given by the judiciary: the Court was prepared to discuss in detail the conventions, but not to consider them as court-enforceable rules. On the one hand, the majority said:

> The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. . . . [T]he legal system from which they are distinct does not contemplate formal sanctions for their breach.[80]

On the other hand, they also argued that they would be following judicial practice in discussing the existence and content of a convention:

> We are asked to recognize if it exists. Courts have done this very thing many times in England and the Commonwealth to provide aid for and background to constitutional statutory construction. . . . In so recognizing conventional rules, the Courts have described them, sometimes commented upon them and given them such precision as is derived from the written form of judgment.[81]

The explicit discussion of particular conventional rules in both the *Patriation and Quebec Veto* reference cases appears to have settled the issue in Canada about the justiciability of constitutional conventions. In these two cases the Supreme Court was asked to decide whether a convention existed and, if so, what its terms were. Marshall, however, denies that the Court's answering of these reference questions implied that conventions were dealt with as legal rules, claiming that it dealt with them as questions of fact rather than of law:

> The Canadian courts only felt able to declare the existence of the convention because under widely drawn provincial and federal statutes providing for the furnishing of advisory opinions, they were specifically authorized to give such opinions on questions either of law or of fad. The power to recognize the conventions derived therefore from statute. Where such statutes exist the law will treat the existence of a convention simply as a question of fact—though not a simple question of fad . . . .[82]

Legislation explicitly permits reference questions in all federal and provincial jurisdictions in Canada. Although there are slight variations in the phrasing of the various Acts, they essentially provide that the governor-in-council may refer *any* matter to the appeal court of that jurisdiction for an opinion. The Supreme Court of Canada intimated that the courts could place their own restrictions on what matters they would hear: "The scope of the authority in each case is wide enough to saddle the respective Courts with

the determination of questions which may not be justiciable and there is no doubt that those Courts, and this Court on appeal, have a discretion to refuse to answer such questions."[83] However, the Supreme Court also held that the questions relating to constitutional conventions in the *Patriation* case should be answered. The majority did not reach this position because they would be answering questions of fact, as Marshall suggested. Rather, the majority opinion stated that the question about the existence and terms of the convention dealing with amendments to the constitution "is not confined to an issue of pure legality but it has to do with a fundamental issue of constitutionality and legitimacy."[84]

The justiciability of conventions should not be denigrated simply because they can be most clearly litigated in reference questions. As Gerald Rubin concluded after a review of the treatment of reference cases in subsequent litigation: "Theoretically in law, reference opinions are 'advisory only'—no doubt about that. But in practice they are treated with the respect due to judgements."[85] In some ways the status of reference opinions is moving towards that of the "opinions" of the Judicial Committee of the Privy Council, which are now conventionally taken to be legal decisions of a court of law.[86]

Furthermore, the judicial consideration of conventions is not restricted to reference questions. In two cases decided before the *Patriation Reference*, the Supreme Court relied heavily on the conventional relationship between a legislature and its government: in *Arseneau v. The Queen*[87] this relationship was relied upon to allow prosecution, under a charge of bribing a member of the legislature, of a person who had corruptly paid money to a minister; in *Blaikie* (No. 2, 1981),[88] it was used to explain an earlier decision to extend the bilingualism required under s. 133 of the 1867 Constitution Act to cover regulations enacted by the government of Quebec. Since the *Patriation and Quebec Veto* references Canadian courts have faced a number of cases in which conventions were raised, but none have seen conventions given such prominence again in judicial decisions.[89] In 1990, the Federal Court rejected a challenge to the practice of Supreme Court justices sitting as Deputy Governor General and granting royal assent; the challenge had raised the concern that the independence of the judiciary was undermined by judges acting in this executive capacity. Teitelbaum J. rejected this concern, however, by citing the "constitutional convention prohibiting them from refusing to give royal assent on their own initiative."[90] In 1991, the British Columbia Appeal Court heard a reference case put by the provincial government, in which questions were posed concerning the constraints on the appointment of extra senators under s. 26 of the Constitution Act, 1867; in one question, the government wished to know whether conventions limited the appointment of extra senators to occasions

where there was legislative deadlock between the two houses of Parliament. Given the Supreme Court of Canada's discussion of the importance of conventions to the constitution and the need to answer questions touching on fundamental constitutionality, one might have expected the BC Court of Appeal to tackle the question head on. But the court unanimously declined to answer the question on convention. The judges' reasoning was rather curious, because they argued "there can be no constitutional significance to any question that raises matters of constitutional convention only."[91] Both the BC Court of Appeal and the Supreme Court of Canada also refused to entertain questions about whether conventions constrained the federal government's unilateral changes to the Canada Assistance Plan.[92] The BC Court of Appeal's insistence on rejecting anything but uniquely legal dimensions of constitutionality is odd, since the BC Constitutional Questions Act has as broad a reference provision as those that launched the *Patriation* and *Quebec Veto* references: "The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court must then hear and consider it."[93]

Perhaps the most relevant legal development has been the Supreme Court of Canada's blurring of the traditional bounds of constitutional law in several decisions since the early 1990s, in which it has drawn repeatedly from the "unwritten principles" of the constitution.[94] These are the same principles that give life to constitutional conventions. The question arises, then, whether constitutional conventions may now be drawn upon by the Court as evidence for these unwritten principles. This topic will be the subject of much deeper inquiry in the last chapter of this book.

The dichotomy between law and convention may not be as distinct as many constitutional theorists would have us believe. The next chapters of this book dealing with the operation of particular conventions will include discussions of the use made of conventions in a number of court decisions that involve a good deal of litigation outside the context of reference legislation. Only with a broader perspective on the issues involved can we draw an informed conclusion.

THE TASK AHEAD

The main task of this book is to provide an insight into the nature of the conventional rules at work in the Canadian constitution: What are they? How do they arise? How are they enforced? Also, it is important to know what the terms of the conventions of the Canadian constitution actually are. Given the controversy some conventions have generated, it is important to consider the desirability and practicality of codifying some of the

for the largest provinces. Quebec, for example, has never had less than three ministers since 1917, with the fleeting exception of Meighen's 1926 government.[18]

A range of other representational considerations must be taken into account when forming the cabinet, in particular the number of francophone ministers.[19] There have always been a considerable number of francophone members of the cabinet, usually including at least one francophone from outside Quebec; for instance, between 1867 and 1965, 28 per cent of all cabinet positions were held by francophones, which was close to the francophone portion of the population.[20] While religious representation used to be a consideration, modern prime ministers are no longer obliged to balance Catholics and Protestants.[21] In the modern era, it has become essential to include women in cabinet, as well as members of visible minority groups and, where possible, Aboriginal people. These inclusions signal the importance of the politics of identity and group recognition. A more ambiguous question is whether conventions require the representation of major cities in cabinet, or whether this is simply good politics.[22] There was a mixed reaction when Harper voiced the need for representation from Montreal as a reason for appointing Fortier to the cabinet and Senate in 2006 rather than appointing other MPs from elsewhere in Quebec.

RESPONSIBLE GOVERNMENT

The principle of responsible government figures prominently in the rules relating to the formation and operation of the cabinet, since the government must be held continually accountable to the elected representatives in the legislature. This principle involves two general aspects: the responsibility of individual ministers for their departments and their own personal activities, and the collective responsibility of the cabinet as a whole. Both individual ministers and the government collectively must answer to the legislature for their actions and resign if the legislature loses confidence in their performance.

Although responsible government has taken shape through conventions, the courts have several times relied on their combined effect in settling points of law. Two cases from the Supreme Court of Canada illustrate the use the judiciary can make of conventional rules.[23] In the 1979 *Arseneau* decision, the Court allowed a prosecution against someone who had paid monies to a minister, under a charge of corruptly paying a member of a legislature. The reasons that Mr Justice Ritchie gave in his unanimous opinion are worth quoting at length:

> In the absence of evidence to the contrary, I am prepared to proceed on the basis that it was as a member of the Legislature that Van Horne was appointed to be Minister of Tourism. This would be in accord with the generally accepted practice in this country whereby ministers are accountable to the elected representatives of the people in Parliament or the Legislature as the case may be, and it is in his capacity as a member of the Legislature that a Cabinet Minister participates in the process of securing legislative authority for the implementation of the policies which he proposed. In the final analysis, it is as a member and not as a minister that he approves the expenditures which he may have recommended as a minister. In view of the above, I am unable to accept that Van Horne's capacity as a member of the Legislature can be so severed from the functions he performs as a Minister of Tourism as to make it an offence under s. 108 to corruptly pay money to him as a member of the Legislature and no offence to corruptly pay money to the same man in his capacity as minister.[24]

Thus the Court used the conventional relationship between the cabinet and the legislature to extend the circumstances in which a criminal charge could be laid.

In *Blaikie* (No.2),[25] the Court relied on the relationship between the Quebec legislature and the provincial Executive Council (the cabinet) to extend s. 133 of the 1867 Constitution Act to executive regulations. In reaching this conclusion, the Court mentioned that the Lieutenant Governor would appoint to the Executive Council only persons who, "according to constitutional principles of a customary nature referred to in the preamble of the B.N.A. act as well as in some statutory provisions . . . , must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of the elected branch." Thus:

> The Government of the province is not a body of the Legislature's own creation. It has a constitutional status and is not subordinate to the Legislature in the same sense as other provincial agencies established by the Legislature. Indeed, it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures, and in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body. Legislative powers so delegated by the Legislature to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the Legislature and the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature for the purposes of s. 133 of the B.N.A. Act.[26]

In this case, as in *Arseneau*, conventions were used as an interpretative means to extend a rule of positive law.

INDIVIDUAL RESPONSIBILITY

Two particular meanings are generally attributed to the responsibility of individual ministers: first, questions concerning a department may be directed in the legislature to the minister; second, the minister is culpable for wrongful actions and will have to correct the wrong and/or, depending on the circumstances, suffer the penalty of loss of office. In what might be called the classic theory, ministers were responsible in both these senses for the activities of their officials as well as for their own actions. As Herbert Morrison once told the British House of Commons, a minister "is responsible for every stamp stuck on an envelope."[27] However, post-war political practice has seen great changes in the rules of individual responsibility, and the classic view no longer holds. While the requirement of ministers to give an account to the legislature remains intact, a minister's duty to accept responsibility and pay a penalty for inaction or wrongdoing is now essentially limited to his or her own personal actions or those few subordinates under the minister's personal supervision.[28] A controversial aspect of the narrowing of individual ministerial responsibility is whether civil servants, particularly deputy ministers, should now be considered personally accountable to the legislature.[29] While there may be serious defects in aspects of ministerial responsibility, this doctrine at least provides, as Diana Woodehouse observed, "symbolic, if not actual accountability."[30]

A telling emphasis appears in a 2011 Privy Council Office (PCO) document on ministerial accountability, with its initial statement that "Ministers are accountable to the prime minister: they are appointed by the Governor General on the advice of the prime minister and the prime minister may ask for their resignation at any time." Only after this point is made clear, does the document go on to add: "Ministers are also accountable to Parliament."[31] This ordering and emphasis has both political and constitutional significance: the prime minister, not Parliament, hires and fires individual ministers.

Informational Answerability

The most widely accepted aspect of ministerial responsibility is the doctrine that members of the legislature may direct questions to ministers concerning their administrative responsibilities. As Sharon Sutherland writes of the classic understanding of this principle, "The minister is the sole

able to settle issues during a heated constitutional confrontation. However, the mere presence of such extensive and fairly authoritative accounts of conventions may help defuse and avoid some conflicts that might otherwise escalate into more serious crises.

It should be noted that the Canadian government also has some useful manuals of its own, which tend to be forgotten or ignored by many scholars in this country. The PCO has published guidelines on a range of subjects, including accountable government, the roles of deputy ministers, the appearance of public servants before parliamentary committees, and responsible government.[26] Taken together, these documents amount to a substantial collection, but the range of issues covered in them still do not extend as far as those covered in the NZ or UK Cabinet Manuals.

LAW AND CONVENTION REVISITED

It is also important to make distinctions among conventional rules when examining the relationship between law and convention. When A.V. Dicey first wrote about conventions as an amorphous group of political ethics, he was content to dismiss all these informal rules as a subject that "is not one of law but politics."[27] Modern constitutional defenders of Dicey's rigid division between law and convention have continued to base their assumptions about the nature of conventions on observations of all informal rules lumped together. For example, both Hood Phillips and Colin Munro point to the ambiguity of many conventional rules in criticizing the notion that conventions can be properly justiciable in the courts.[28] In his denial of justiciability, Munro objected to the fact that there is no system of rule-making that conventions emerge from. But the ability to distinguish among different classes of informal rules allows one to eliminate controversial, ambiguous, and rarely followed supposed rules and focus on the core of precise and accepted conventions. Fruitful discussion of the relationship between law and convention begins with the recognition that informal rules fall into various categories that have differing relationships to positive law.

Dicey's dichotomy between law and convention clearly needs rethinking in the light of judicial practice in the late twentieth century. Although the courts have not treated conventional rules exactly as they would rules of statutory or common law, it is quite evident that some conventions can be a fit subject for litigation. A wide range of cases has been discussed here, in the early chapters, where conventions were dealt with in some manner by Canadian courts. And there is great potential for judicial consideration of other conventions in future cases dealing with such matters as the legal powers and immunities of governors, cabinet government, judicial independence, the powers of reservation and disallowance, and the international

competence of provincial governments. The relevant question to be posed in contemporary constitutional debates is not whether conventions are subject to judicial adjudication, because they have been many times. The more pressing question for Canadian constitutional jurisprudence is which conventions should be justiciable and in what manner.

If there is a place for conventions in the courtroom, it will apply to fundamental conventions and semi-rigid conventions, because of their general acceptance and their vital role in the practical operation of the constitution. It is also crucial to distinguish the most important types of conventions from the others, as there is a general and high degree of obligation to obey them. This focus on the most fundamental conventions eliminates one of the objections to conventions, their seemingly varying levels of obligation. As Joseph Jaconelli notes, laws are either binding or not; but he opined that conventions have different degrees of obligation.[29] However, an analysis of conventions shows that the varying degrees of obligation are associated with distinct classes of convention; within the most important categories of conventions, all are equally binding. In the total absence of specific rules belonging to these two classes of convention, the constitution would function in a significantly different manner. Any judicial decision based only on positive laws alone, and ignoring relevant fundamental or semi-rigid conventions, would enforce a legal framework bearing little semblance to the actual character of the constitution. The courts could thus provoke a crisis of political legitimacy. A rigorous examination of the relationship between law and convention would be best approached by recognizing the distinctions to be drawn among informal rules, and by excluding flexible conventions, infra-conventions, and usages from the analysis. With this approach we would be left to study what relationship judges should foster between the positive laws of the formal constitution and only those true conventional rules that are widely accepted, equally binding, are fundamentally important to the structure and operation of the political system, and are capable of fairly clear formulation.

The main defence of Dicey's dichotomy between law and convention rests on an insistence that legal rules are judicially enforced while conventions are not. However, it is important to note that not all laws are enforceable in any event. For example, the provisions relating to equalization payments in s. 36 of the Constitution Act, 1982 are not regarded as justiciable. And it is hard to envision any enforcement of the National Anthem Act, beyond a declaration of its terms. Nevertheless, it is a crucial to consider whether conventions have been or should be considered judicially enforceable.

The particular uses to which judges put conventions have varied a great deal, and although conventions have been dismissed or ignored in some cases, others may arguably amount to "enforcement." On the one

extreme Sir Lyman Duff banished them completely from his consideration of any restrictions on the powers of reservation and disallowance;[30] Mr Justice James Jerome declared that explicit statutory provisions relating to the authority of the Auditor General must prevail over the conventions of cabinet secrecy;[31] and a 1969 decision of the Judicial Committee of the Privy Council refused to consider that conventions could affect the legal power of the British Parliament to legislate for post-Unilateral Declaration of Independence Rhodesia.[32] These cases would support the rigid dichotomy proposed by Dicey.

There are other examples, however, of conventions receiving more favourable attention from the courts. The Australian High Court in 1958 explicitly referred to conventions in deciding that a British Act did not have effect in Australia;[33] in *Jonathan Cape* (1975),[34] discussed in Chapter 3, the judge was prepared to use the convention of cabinet secrecy to extend the application of an existing common law rule dealing with confidentiality; and the Ontario trial judge in *Stopforth* (1978) similarly employed a convention to extend a common law defence against defamation.[35] In 1986 the Supreme Court of Canada referred to the conventions supporting the neutrality of the public service in upholding the dismissal of a federal official and in justifying the legitimacy of Ontario legislation limiting the political rights of civil servants.[36] The convention that the monarch or Governor General acts on the advice of the prime minister or cabinet has also played an important role in judicial findings that Crown prerogatives may be exercisable by the ministers rather than by the Queen or Governor General.[37] Furthermore, the Supreme Court has twice used the conventions of responsible government as an interpretative guide to extend statutory provisions.[38] The Federal Court relied on the convention requiring that royal assent must be granted to all bills duly passed by the Senate and House of Commons in order to find that judges of the Supreme Court of Canada do not contravene the principle of judicial independence when they act as deputy governors general in granting royal assent to bills.[39] The terms of a range of conventions have often been defined in *obiter dictum* passages of a decision.[40] The most direct adjudication of conventions came in the two reference cases heard by the Supreme Court over the amendment of the constitution. In the first case in 1981 the Court both recognized the existence of the convention requiring substantial provincial consent and commented on its terms, even though it considered them to be ambiguous; and in the *Quebec Veto* case (1982), the Court held that there had never been a convention giving Quebec a veto over constitutional amendments affecting provincial powers.[41]

The potential for parties to seek a declaratory judgement about the existence or terms of conventions also requires one to consider judicial enforcement of conventions in a new light. In *Conacher*, two levels of court seemed

prepared to discuss whether a convention constrained the prime minister's discretion to advise an early election in 2008. While the trial and appeal level judges believed no convention existed, the precedent clearly exists for other applications to be launched seeking a declaratory judgement. While there is no formal enforcement mechanism for a declaratory judgement, these operate within a constitutional culture that assumes that relevant parties will comply with an authoritative declaration from the court. While the Harper government simply ignored a declaratory judgement that the Minister of Agriculture had acted contrary to his legal obligations under the Wheat Board Act in 2011, such disregard is rare.[42]

These cases pose a strong challenge to Dicey's litmus test of court-enforceability. Although it is quite plain that some distinction between conventions and law ought to be maintained because formal legal sanctions may be provided by a court for the breach of most rules of positive law, this distinction is not clear-cut because the recognition and formulation of conventional rules in the course of a court decision may provide some manner of "enforcement" in a broad sense. For instance, the Supreme Court's declaration in the *Patriation Reference* that unilateral amendment would breach existing conventions may have resulted in the enforcement of those conventions, since it has been widely credited with spurring on political leaders to reach an accord. As T.R.S. Allan has argued: "No water-tight divide exists, however, between recognition and enforcement. To recognize a convention, in a context where legal doctrine can be invoked in its support, is in practice to enforce it."[43]

Since the essence of enforcement of a rule by the courts is to ensure compliance with that rule, the courts may be "enforcing" conventions even without formal legal sanctions. If this kind of enforcement of conventions is admitted, then Dicey's distinction between laws and convention wears quite thin. The dichotomy is further eroded in instances where conventions are used to extend the application of a statutory or common law rule, because a formal court sanction may then be offered for the breach of convention. It seems rather pedantic to insist that the sanction is issued for the *legal* rule and that the convention is merely an interpretative guide; in the absence of the convention, the legal rule would not have been extended and no enforcement by the court would be possible. Judicial enforcement of conventions is quite possible, even if it is formally indirect.

The use of conventions as guides for understanding statute and common law raises the question of whether the courts are employing conventions as legal rules of interpretation. The answer is of more than just theoretical interest: if conventions are viewed as legal rules in this sense, then judges are under some obligation to consider them and to respect their terms in the course of resolving issues of interpretation. I would argue that judicial

decisions of recent decades illustrate that most judges have in fact referred to conventions where they are relevant to the matters at issue. The need to account for the conventional setting of constitutional law seems particularly acute where fundamental and semi-rigid conventions are involved. Without resort to these conventions, the courts would enforce a rather unreal set of rules.

The Supreme Court of Canada has made repeated use of unwritten constitutional principles and explicitly advocated the legitimate inclusion of these principles in judicial interpretations of the constitution. Protection of Canada's federal principle underlay both the *Senate Reference*[44] and *Patriation Reference*.[45] The Court relied heavily on the rule of law in *Reference re Manitoba Language Rights*,[46] to hold that the province could not be thrown into a legal vacuum as a result of its finding that almost 90 years of legislation was invalid because it had been enacted only in English. In *Beauregard v. the Queen*,[47] the Court declared that judicial independence was such an important principle that it must be considered part of the constitution. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,[48] the Court declared more generally that the preamble to the Constitution Act, 1867 should be considered as a source for fundamental constitutional matters not explicitly referred to elsewhere in the Act. Thus, it ruled that Canadian legislatures inherited the inherent privileges of the British Parliament and that those privileges constituted part of the formal constitution of Canada. In 1997, the Supreme Court built on the *New Brunswick Broadcasting* and *Beauregard* precedents to credit the 1867 preamble with providing basic constitutional status to the general principle of judicial independence.[49] A majority of the judges hearing this case declared that the existing provisions in sections 96 to 101 of the 1867 Act and s. 11(d) of the Charter of Rights could not in themselves cover all the aspects of judicial independence. Instead, Chief Justice Antonio Lamer concluded for the majority that the preamble to the Constitution Act, 1867 "recognized and affirmed" judicial independence. He added: "In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the constitution, that the true source of our commitment to this foundational principle is located."[50] This "grand entrance hall" once again provided the source for unwritten principles to play a key constitutional role in *Reference re Secession of Quebec*. A key discussion in this decision is worth quoting at length:

> A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate

> certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 462-63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."
>
> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference, supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada."[51]

The Court then went on to invoke both the federalism and democracy principles to find that a constitutional obligation would exist on the Canadian government to negotiate the terms of secession if a clear majority voted in favour of a clear question on separation.[52]

Chief Justice Beverley McLachlin not only gave a sterling defence of the Court's use of unwritten principles in a speech given in New Zealand in 2005, but she also went on to invoke a kind of natural law that should be considered as part of modern liberal democratic constitutions.[53] McLachlin quite clearly justified the possible use of these unwritten principles to nullify authoritarian laws. By referring to natural law, the Chief Justice seems to be envisioning relevant constitutional principles as what Alex Schwartz has called *transcendent* principles, which are not related to the existing experience or practice of a particular society. Schwartz has argued cogently that if judges are to draw from unwritten principles, it is more easily justified if they refer to *immanent* principles, which are to be deducted from the existing documents and established practices of a political system.[54] But despite her grand rhetorical allusions to transcendent natural law, McLachlin ultimately appears to favour drawing from mainly immanent principles when she discusses how to identify those principles that might take precedence over written law: "At least three sources of unwritten constitutional principles can be identified: customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered."[55] By "customary usage" she seems to mean constitutional convention.

Retired Supreme Court Justice Ian Binnie has also penned a strong defence of the necessity to include unwritten principles in constitutional cases. His argument is based on the fact that the formal constitutional documents are both incomplete and do not even claim to be the exclusive sources of constitutional law:

> The preamble of the *Constitution Act, 1867* says that Canada will have "a constitution similar in principle to that of the United Kingdom." The essential structure of the British Constitution is also, of course, unwritten. Apart from the division of powers and the *Canadian Charter of Rights and Freedoms*, many of the really important elements of our Constitution are not enacted by any formal legislative process. Section 52(2) of the *Constitution Act, 1982*, itself says only that the Constitution *includes* the enumerated "statutes." Nowhere does it say, nor could it plausibly say, that the listed statutes are exhaustive. Rather than being characterized as an exception, "unwritten" constitutional principles are more accurately described as the general rule. It is also salutary to point out that much of what the constitutional text does say is, in modern terms, unworkable.[56]

The novelty of the positions mapped out in these cases has generated a very lively debate in the scholarly literature over their logic and significance.[57] Critics of the use of unwritten principles are concerned that they would encourage a raft of cases seeking to nullify constitutional laws or executive actions on the grounds of nebulous, unwritten principles. As Peter Hogg particularly warned, "Unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy."[58] And Warren Newman has noted, "In the wake of the Supreme Court of Canada's opinions . . . the courts have been seized with an ever-burgeoning multitude of new cases in which constitutional principles of judicial independence, federalism, democracy, the rule of law and the protection of minorities have been invoked to challenge the validity of constitutional amendments, statutory provisions and government action."[59] While many of these cases have been unsuccessful, several have borne fruit; for example, in the *Monfort Hospital* case the Ontario Court of Appeal held that the unwritten principle of minority group representation was violated by decisions to limit services available to Franco-Ontarians at the Monfort Hospital.[60] In 2005, the BC Court of Appeal partially invalidated a provincial statute on the grounds that it offended the unwritten principle of the rule of law by potentially limiting access of low-income people to the courts.[61] And in 2011, a group secured a declaration from the Federal Court that the minister responsible for the Wheat Board, Gerry Ritz, had breached the rule of law by introducing a bill in the House of Commons to gut the

Board without first having held a referendum of producers, as required by statute.[62] With litigants making fairly frequent use of unwritten principles, it is crucial to consider whether they open the door for further judicial consideration of constitutional conventions.

Since constitutional conventions are born out of and protect the largely unwritten principles of the constitution, they would appear to have become all the more suitable for judicial consideration given the courts' willingness to incorporate unwritten principles into the law of the land. Conventions are, in essence, evidence of the acceptance of these principles and of the rules of behaviour expected when these principles are applied to real-world constitutional processes. It seems odd to embrace principles *simpliciter* but object to widely accepted rules that demonstrate the application and limits of these principles.

While there is a good argument that conventions *could* be judicially considered, there still remains the greater question of whether they *should* be. Those who support the traditional categorical exclusion of conventions from the courtroom will simply say no, on principle. A more practical concern is that reliable analysis of conventions may be beyond the specific professional competence of judges. Academics have roundly criticized judges for perceived mistakes in identifying either the terms or existence of particular conventions. For example, Adam Dodek has castigated the Supreme Court for misstating the terms of the conventions surrounding the formation of governments; he objected to the Court's declaration that a convention requires the leader of the largest party to be appointed prime minister after an election.[63] And I have argued that a Federal Court judge was wrong to find that no convention had arisen to constrain Prime Minister Harper from calling an election in 2008, contrary to the spirit of his own legislation establishing a fixed election date.[64] Both Dodek and I have objected to judges' inability to process and properly weigh a wide enough range of information before coming to their conclusions. My objections stem from the reliance of judges on what I believe to be the fundamentally unreliable Jennings test endorsed in the *Patriation Reference*. However, there should be much less chance of faulty analysis when dealing with fundamental conventions, whose terms are clear and widely accepted.

A good argument can be advanced that the observed weaknesses of the courts in dealing with conventions may be outweighed by the importance of constraining judges from simply pronouncing *ex cathedra* on unwritten principles. If judges are going to invoke unwritten principles, and they appear to have already fully embraced them, then reference to the most fundamental and semi-rigid conventions can provide a more rigorous evidentiary grounding for the accepted application and limits of these norms. Deference to and the legitimacy of judicial decisions are firmly rooted in

the normal requirement to offer reasons, and judicial opinions based on established and fundamental conventions can provide clearer explanations than extemporizing on vague principles. The use of conventions as evidence of unwritten constitutional principles would be consistent with a focus on immanent principles based on an existing consensus in the society, rather than vague transcendent ones. It would also provide a useful congruity with the sources of law that judges consider in public international law. The different sources of international law are concisely summed up in Article 38 the *Statute of the International Court of Justice*:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>   b. international custom, as evidence of a general practice accepted as law;
>   c. the general principles of law recognized by civilized nations;
>   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is a useful symmetry between the examination of customary practice in international law and the proposal that conventions be considered for constitutional law; both serve as evidence of what are generally considered binding rules. The parallels go even further, with the Supreme Court's acceptance of general constitutional principles. As well, the Court regularly draws from the writings of leading scholars for support in its interpretation and development of constitutional law.[65] In structuring judges' creativity in this way, one may find the limits that critics believe are needed to constrain judges as much as possible within accepted rules. The danger is that judges can otherwise use vague and undefined principles to launch themselves in any direction they wish to fill legal lacunae.

Canadian judges will eventually have to deal more explicitly with the nature of the judicial enforcement already accorded to conventions. The issue may become quite critical in matters regulated by semi-rigid conventions, and especially fundamental conventions. For instance, in 1981 the Supreme Court of Canada answered the reference dealing with the conventions governing an amendment to the constitution because the questions raised "a fundamental issue of constitutionality and legitimacy."[66] I would suggest that such crucial issues are posed whenever these most important conventions are involved. Courts should not shrink from granting these conventions broad enforcement through authoritative declarations of their terms, or from indirect formal enforcement by using these conventions

to extend or define an existing rule of positive law. Furthermore, a court might seriously consider whether formal enforcement should be given to an archaic legal rule that conflicts with a fundamental convention. Rather than resting on legal formalism and declaring simply that the legal rule must prevail, the courts might better fulfill their role of defending the constitution by declaring that conventions have so changed a particular legal rule that, despite being valid law, it may not be actively enforceable. An example of an archaic provision that should not be enforceable is the requirement in s. 56 of the Constitution Act, 1867 that the Governor General send a copy of all bills passed by Parliament to a British Secretary of State. The alternative to judicial recognition of conventions is the enforcement of a very incomplete and often archaic constitutional framework that bears little semblance to our current parliamentary democracy.

A final way to consider the appropriateness of judicial consideration of conventions is to view the question in terms of a basic justiciability. Justice Boris Laskin, at that time of the Ontario Court of Appeal, provided a useful litmus test: "The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament."[67] As the Supreme Court held in the *Canada Assistance Plan* case, "the court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch."[68] While conventions as a general class of rule are political, they should not all be dismissed as the province of politicians. The most fundamental conventions are essential corollaries to the constitutional law they modify and imbue a critical legitimacy to those laws by ensuring they operate only in certain ways, and in some cases not at all. In the absence of those conventions, many provisions of the formal constitution would be simply indefensible in a modern parliamentary democracy, or in our modern federal system.

Canadian constitutional scholars and political actors must come to terms with the way in which our most important conventions are inextricably intertwined with positive law, linked by the basic principles that underlie both the legal and conventional rules of the constitution. That linking must be fully appreciated in order to reconcile the rule of law with the fact that our political system, by necessity, operates in contradiction to much of the "supreme law" of the constitution. Indeed, one could argue that our studied defiance of constitutional law reduces the rule of law to a minor and often ignored principle of the constitution. One way to resolve this conflict between constitutional reality and the positive law of the constitution is to embrace the most important categories of convention as practical manifestations of the unwritten principles already endorsed by the Supreme Court of Canada

as part of the legal fabric of the constitution. Without accommodating the most essential conventions, the rule of law would require the paramountcy of legal rules so antiquated and divorced from constitutional reality that they would amount to a revolution if ever fully enforced.

CONCLUSIONS

Although the particular scheme for classifying conventions suggested here certainly contains ambiguities, it is offered as a means of drawing attention to the distinctions that can be found among particular groups of informal rules operating in the constitution. Discussions about the obligation attached to a particular informal rule of the constitution, the general desirability of codifying conventional rules, or the broad role conventions should play in judicial decisions would be greatly enhanced by recognizing that differences exist among constitutional conventions. While there may be characteristics in common, one can identify significant differences between usage and infra-convention, on the one hand, and true conventions on the other. The most fundamental and semi-rigid conventions merit being separately identified and treated as such. If distinctions are not perceived among the informal rules of the constitution, an understanding of the nature of constitutional conventions is incomplete, and a study of the close relationship between law and convention will be made from an unsatisfactory foundation.

It is important that theories about the nature of constitutional conventions continue to evolve from those first propounded by Dicey a century ago. Even at the time when Dicey wrote that law and convention should be rigidly separated, constitutional conditions in Canada differed from those in Britain. With Canada's constitutionally entrenched provisions and some powers of judicial review, which are foreign to British jurisprudence, there can be more serious consequences in Canada than in Great Britain if outdated legal rules are enforced by the courts without regard for the relevant conventions.

One must recognize the full extent to which the constitution's legal framework has been indirectly, but fundamentally, transformed by conventions. By insisting on a rigid division between law and convention, Canadian jurists may imperil our constitutional system. The political arena gives birth to conventions so that constitutional laws can function acceptably. The most important conventions thus depend on a healthy marriage between law and politics. Any estrangement or divorce between the two would only produce grave consequences.

NOTES

CHAPTER 1

1. In the discussions that follow I shall maintain this distinction between the whole "constitution" and the subset of rules found in the entrenched documents of the "Constitution" that are described in s. 52 and in the Schedule of the Constitution Act, 1982.
2. F.F. Ridley, "There Is No British Constitution: A Dangerous Case of the Emperor's Clothes," *Parliamentary Affairs* (1988): 340.
3. For further discussion on this event, see Andrew Heard, "Just What Is a Vote of Confidence? The Curious Case of May 10, 2005," *Canadian Journal of Political Science* 40 (2007): 395–416.
4. Colin Munro, *Studies in Constitutional Law*, 2nd edn (Oxford: Oxford University Press, 2005), 82.
5. This latter convention is what underlies the Governor General's right to insist that Parliament be summoned. It also underlies his or her right to dissolve Parliament and call a new one if the current Parliament is unable to function.
6. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1924), 30. Dicey is often credited with enunciating the difference between law and convention, but a number of earlier scholars laid the groundwork; see O. Hood Phillips, "Constitutional Conventions: Dicey's Predecessors," *Modern Law Review* 29 (1966): 137.
7. Peter W. Hogg, *Constitutional Law of Canada*, student edn (Toronto: Carswell, 2012). Other useful discussions can be found in Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy*, 2nd edn (Toronto: Irwin Law, 2011); Patrick J. Monahan, *Constitutional Law*, 3rd edn (Toronto: Irwin Law, 2006).
8. Henri Brun, Guy Tremblay, and Eugénie Brouillet, *Droit Constitutionnel*, 5th edn (Cowansville, Que.: Editions Yvon Blais, 2008). Other discussions may be found in

A. Barbeau, *Le Droit Constitutionnel Canadien* (Montreal: Wilson & Lafleur, 1974); Gérald-A. Beaudoin, *La Partage des Pouvoirs*, 3rd edn (Ottawa: Université d'Ottawa, 1983); F. Chevrette and H. Marx, *Droit Constitutionnel* (Montreal: Université de Montréal, 1982); Gérald-A. Beaudoin, *Le Fédéralisme au Canada* (Montreal: Wilson & Lafleur, 2000); Nicole Duplé, *Droit Constitutionnel: Principes Fondamenteaux*, 2nd edn (Montreal: Wilson & Lafleur, 2004); Réjean Pelletier and Manon Tremblay, *Le Parlementarisme Canadien*, 3rd edn (Quebec: Université Laval, 2008).

9. Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950); Frank MacKinnon, *The Crown in Canada* (Calgary: McClelland and Stewart West, 1976); John T. Saywell, *The Office of Lieutenant Governor*, rev. edn (Toronto: Copp Clark Pitman, 1986); Eugene Forsey, *Freedom and Order*, Carleton Library 73 (Toronto: McClelland and Stewart, 1974); Peter H. Russell et al., *The Courts and the Constitution* (Kingston: Institute of Intergovernmental Relations, 1982); Eugene Forsey, "The Courts and the Conventions of the Constitution," *UNB Law Journal* 33 (1984): 11–42; Marc Gold, "The Mask of Objectivity: Politics and the Supreme Court of Canada," *Supreme Court Law Review* 7 (1985): 455; Edward McWhinney, *The Governor General and the Prime Ministers: The Making and Unmaking of Governments* (Vancouver: Rosedale Press, 2005); Peter H. Russell and Lorne Sossin, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009); Peter Aucoin, Mark D. Jarvis, and Lori Turnbull, *Democratizing the Constitution* (Toronto: Emond Montgomery Press, 2011). A large number of articles and chapters on the personal powers of the Governor General were published following the constitutional crisis in 2008; these are too numerous to list here in detail, but they are discussed in the next chapter.
10. Dicey, *Law of the Constitution*.
11. Sir Ivor Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1959).
12. T.R.S. Allan, "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case," *Cambridge Law Journal* 45 (1986): 305; Michael J. Allen and Brian Thompson, *Cases and Materials on Constitutional and Administrative Law*, 9th edn (Oxford: Oxford University Press, 2008); A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 14th edn (London: Pearson, 2007); David Butler, Vernon Bogdanor, and Robert Summers, eds, *The Law, Politics, and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford, Oxford University Press, 1999); O. Hood Phillips, *Constitutional and Administrative Law*, 5th edn (London: Sweet and Maxwell, 1973); Joseph Jaconelli, "The Nature of Constitutional Convention," *Legal Studies* 19 (1999): 24; Colin Munro, *Studies in Constitutional Law*; Joseph Jaconelli, "Do Conventions Bind?" *Cambridge Law Journal* 64 (2005): 149; William Maley, "Law and Conventions Revisited," *Modern Law Review* 48 (1985): 121; Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution* (London: Hutchinson, 1959); Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law," *Modern Law Review* 71 (2008): 853; H. Street and R. Brazier, eds, *de Smith's Constitutional and Administrative Law*, 2nd edn (London: Penguin, 1973); E.C.S. Wade, "Introduction" to Dicey, *Law of the Constitution*; Jeremy Waldron, *The Law* (London: Routledge, 1990); Jeremy Waldron, "Are Constitutional Norms *Legal* Norms?" *Fordham Law Review* 75 (2006–7): 1697.

13. Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Oxford University Press, 1984). For another full-length book on conventions, see: L.J.M. Cooray, *Conventions, the Australian Constitution and the Future* (Sydney: Legal Books, 1979). Cooray drew attention in this work to the importance of distinguishing between "constitutional" conventions, which affect the basic operation of constitutional structures and processes, and what he called "governmental" conventions, which regulate the internal workings of government departments.
14. Forcese and Freeman, *Laws of Government*, 556.
15. Forsey, "The Courts and the Conventions."
16. Hood Phillips, "Constitutional Conventions: Dicey's Predecessors," 77.
17. Hogg, *Constitutional Law of Canada*, p. 1-22.1.
18. Marshall and Moodie, *Some Problems of the Constitution*, 29.
19. Munro, *Studies in Constitutional Law*, 80–6.
20. See, for example: Hogg, *Constitutional Law of Canada*, 25–6; Munro, *Studies in Constitutional Law*, 81, 86.
21. Forsey, "The Courts and the Conventions," 34.
22. *Conacher and Democracy Watch v. The Prime Minister et al.*, 2009 FC 920.
23. As Geoffrey Marshall puts it, most conventions arise "from a series of precedents that are agreed to have given rise to a binding rule of behaviour." Marshall, *Constitutional Conventions*, 8.
24. This author's translation: "A usage, practice, or a way of doing things gives way to an agreement or consensus. A convention is necessarily bilateral or multilateral; it implies more than one party. It is a kind of contract. It is a way of doing things that happens to be sanctioned by agreement rather than by time, as in the case of custom. Time does not have the importance it does in customary law; the determinative element of a convention is the agreement by virtue of which actors consider themselves bound." Brun et al., *Droit Constitutionnel*, 43.
25. Eric Colvin, "Constitutional Jurisprudence in the Supreme Court of Canada," *Supreme Court Law Review* 4 (1982): 15. E.C.S. Franks made a similar point in testimony before a parliamentary committee; see House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 40th Parliament, 3rd Session, no. 12, 4 May 2010, 12.
26. Note that some years later another government unilaterally amended this position, by allowing itself to choose any candidate from an unranked list, in the interests of appointing members of under-represented communities to the bench.
27. Bradley and Ewing, *Constitutional and Administrative Law*, 23–4; they note that this "could have been sufficient to establish a new convention binding on future Lord Chancellors." At the time, the Lord Chancellor was a member of cabinet, the speaker of the House of Lords, and nominal head of the judiciary. Previous lords chancellor had insisted on their right as the most senior judicial officer to sit as a judge in cases heard by the House of Lords. However, the office of Lord Chancellor was redefined two years later by the Constitutional Reform Act.
28. *Reference re Secession of Quebec*, [1998] 2 SCR 217.
29. The court held that all Manitoba legislation had to be enacted in both English and French, but since 1890 the legislation had only been passed in English. *Re Manitoba Language Rights*, [1985] 1 SCR 721.

30. The Supreme Court of Canada has drawn from "unwritten principles" on a number of occasions in recent years. For a discussion of this phenomenon, see Mark D. Walters, "The Common Law Constitution in Canada: Return of lex non scripta as Fundamental Law," *University of Toronto Law Journal* 51 (2001): 91.
31. Beverley McLachlin, "Unwritten Constitutional Principles: What Is Going On?" *New Zealand Journal of Public and International Law* 4 (2006): 148.
32. *Reference re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 (Hereafter the *Patriation Reference*).
33. Jennings, *The Law and the Constitution*, 136.
34. Forsey, "The Courts and the Conventions," 34.
35. A detailed examination of the Supreme Court's use of the Jennings test in the *Patriation Reference* will be undertaken in Chapter 5.
36. In 1873, Prime Minister Sir John A. Macdonald requested and received prorogation timed to prevent a committee reporting on a scandal involving the Pacific Railway. Once the new session began, the report was tabled and a subsequent censure motion against the government was passed; Macdonald subsequently resigned.
37. Adrian Vermeule, "The Atrophe of Constitutional Powers," *Oxford Journal of Legal Studies* 32 (2012): 434.
38. Ibid., 423.
39. Aaron Wherry, "Great Moments in Candour," *Macleans.ca*, 9 Sept. 2009, at: <www2.macleans.ca/2009/09/09/great-moments-in-candour/>. (14 Oct. 2009)
40. Peter Russell, "The Supreme Court Decision: Bold Statecraft Based on Questionable Jurisprudence," in Russell et al., *The Courts and the Constitution*, 15.
41. Hood Phillips, "Constitutional Conventions: Dicey's Predecessors," 77.
42. Ridley, "There Is No British Constitution," 358.
43. Ibid., 354ff.
44. C.E.S. Franks, "To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?" in Russell and Sossin, eds, *Parliamentary Democracy in Crisis*, 33.
45. This degree of flexibility and low-level obligation is in fact quite different from Dicey's insistence that conventions were very much a set of *rules*. He conceded that there may be imprecision about the details of conventional rules (for example, when exactly the upper house should give way to the lower house) but had no doubt about the very real obligation to observe their essence (such as the ultimate pre-eminence of the elected lower house). A.V. Dicey, *The Law of the Constitution*, 10th edn, ed. E.C.S. Wade (London: Macmillan, 1959), 417–23.
46. Marshall, *Constitutional Conventions*, 9.
47. "Trudeau Responds from Seoul," *Globe and Mail*, 29 Sept. 1981, D7.
48. For a counter view, that conventions struggle to operate as rules of critical morality, see Joseph Jaconelli, "The Nature of Constitutional Convention," *Legal Studies* 19 (1999): 43–5.
49. Geoffrey Marshall, "What Are Constitutional Conventions?" *Parliamentary Affairs* 38 (1985): 39.
50. Bradley and Ewing, *Constitutional and Administrative Law*, 20ff.
51. Waldron, *The Law*, 62.
52. Hood Phillips, "Constitutional Conventions: Dicey's Predecessors," 137.
53. Dicey, *Law of the Constitution*, 417.
54. Jennings, *The Law and the Constitution*, 81.

55. Philip A. Joseph and Gordon R. Walker, "A Theory of Constitutional Change," *Oxford Journal of Legal Studies* 7 (1987): 158, n.18.
56. Jaconelli, "The Nature of Constitutional Convention," 34.
57. *Patriation Reference*, 87.
58. Peter H. Russell, "The Supreme Court and Federal–Provincial Relations: The Political Use of Legal Resources," *Canadian Public Policy* 11, 2 (1985): 161ff.
59. *Stopforth v. Goyer* (1978), 20 OR (2d) 262 (Ont. HCJ)—rev. (1979), 23 OR (2d) 696 (Ont. CA); *Arseneau v. The Queen*, [1979] 2 SCR 136; *A.G. Quebec v. Blaikie et al.* (no. 2), [1981] 1 SCR 312; *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 (SCC); *Re A.G. Quebec and A.G. Canada (Quebec Veto)*, [1982] 2 SCR 793; *Auditor General v. Minister of Energy, Mines and Resources et al.* (1986), 23 DLR (4th) 210 (FCTD); *Re Ontario Public Employees' Union et al. and A.G. for Ontario* (1987), 41 DLR (4th) 1 (SCC); *Penikett et al. v. The Queen et al.* [1987], 2 YR 262 (YTSC)—[1988], 2 WWR 481 (YTCA); *Osborne v. Canada (Treasury Board)* [1986] 3 FC 206 (FCTD)—rev. [1988], 87 NR 376 (FCA).
60. *Conacher and Democracy Watch v. The Prime Minister et al.*, 2009 FC 920. This ruling was upheld by the Federal Court of Appeal as well: *Conacher v. Canada (PM)*, 2010 FCA 131.
61. Dicey, *Law of the Constitution*, 23.
62. Hood Phillips, *Constitutional and Administrative Law*; Munro, *Studies in Constitutional Law*; Marshall and Moodie, *Some Problems of the Constitution*.
63. Forsey, "The Courts and the Conventions," 13.
64. Jennings, *The Law and the Constitution*, ch. 3.
65. Illustrations of this can be found in Canada in the Ontario Cabinet Management Board Act, which presupposes the conventional creation of the cabinet; also, the British Columbia Attorney General Act, RSBC 1979, c. 23, s. 2(e), grants the Attorney General such powers as belong to the Attorney General or Solicitor General of England "by law or usage."
66. Wade, "Introduction," cxxxvi–cxlvi.
67. J.R. Mallory, *The Structure of Canadian Government*, rev. edn (Toronto: Gage, 1984), 442.
68. *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645; *Adegbenro v. Akintola*, [1963] AC 614. He also noted the House of Lords' decision in *A.G. v. Jonathan Cape Ltd.*, [1976] 1 AC 645.
69. Munro, *Studies in Constitutional Law*, 66, 68.
70. Rodney Brazier and St J. Robilliard, "Constitutional Conventions: The Canadian Supreme Court's Views Reviewed," *Public Law* 28 (1982): 33.
71. Forsey, "The Courts and the Conventions," 42.
72. Adam M. Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*," *Supreme Court Law Review* 54 (2011): 132.
73. Ibid., 117.
74. *Conacher and Democracy Watch v. The Prime Minister et al.*, 2009 FC 920; this ruling was upheld by the Federal Court of Appeal as well: *Conacher v. Canada (PM)*, 2010 FCA 131. I have argued elsewhere that the analysis in this case was flawed and that a convention did indeed exist at the time the 2008 election was called; see Andrew Heard, "*Conacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates," *Constitutional Forum* 19, 1 (2010): 21–32.

75. This situation may well change in Canada, with redress being made, outside of reference legislation, for a declaratory judgement by a court concerning the terms or obligation of a party to respect a particular conventional rule. See, for instance, the unsuccessful application made by Yukon's administration to have a declaration made that the Meech Lake Accord contravened a convention the territorial administration believed existed concerning the admission of new provinces to Confederation. *Penikett et al. v. The Queen et al.* [1987], 2 YR 262 (YSC); [1988], 2 WWR 481 (YTCA).
76. Jennings, *The Law and the Constitution*, 122–.
77. Russell, "The Supreme Court Decision," 20–4.
78. Allan, "Law, Convention, Prerogative," 312–19.
79. Marshall, *Constitutional Conventions*, 13–15.
80. *Patriation Reference*, 880.
81. Ibid., 88–9.
82. Marshall, *Constitutional Conventions*, 16–17.
83. *Patriation Reference*, 768.
84. Ibid., 884.
85. Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law," in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964). See also Hogg, *Constitutional Law of Canada*, 180–1; Barry L. Strayer, *The Canadian Constitution and the Courts*, 2nd edn (Toronto: Butterworths, 1983), 292.
86. *British Coal Corp. v. The King*, [1935] AC 500 at 510–11.
87. [1979] 2 SCR 136 at 149.
88. *A.G. Quebec v. Blaikie et al.* (No. 2), [1981] 1 SCR 312 at 319–20.
89. *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3; *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69; *Grant v Attorney General (Canada)*, [1994] FCJ No. 1001; *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 SCR 470; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 SCR 409; *Reid v. Canada*, [1994] FCJ No. 99.
90. *Tunda v. Canada (Minister of Citizenship and Immigration)*, [1999] FCJ. No. 962—FCTD, at para.42.
91. *Re Constitutional Question Act*, 1991 CanLII 405 (BC CA), 36. A similar question was also not answered by the Ontario Court of Appeal in a private case launched by some senators who objected to the extra senators' appointment in 1990: *Leblanc v. Canada*, 80 DLR (4th) 641.
92. *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525; (1990), 46 BCLR (2d) 273 (BC CA.).
93. Section 1, *Constitutional Questions Act*, [RSBC 1996] Chapter 68.
94. See. in particular: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319; *Manitoba Provincial Judges Association v. Manitoba (Minister of Justice)*, [1997] 3 SCR 3; *Reference re the Secession of Quebec*, [1998] 2 SCR 217. For discussion of these cases and their implications, see Warren J. Newman, "Réflexions sur la Portée Véritable des Principes

172. See the accounts of this episode in *The Times*, London, 14, 15, 25 Sept. 1974.
173. Bogdanor and Marshall, "Dismissing Governor-Generals," 206, n. 4.
174. For a detailed account of both incidents, see Saywell, *The Office of Lieutenant Governor*, ch. 9.

CHAPTER 3

1. *Reference re Canada Assistance Plan*, [1991] 2 SCR 525 at p.547.
2. *Wells v. Newfoundland*, [1999] 2 SCR 199 at paras 52–4.
3. Hansard, 7 Mar. 1966, 2281.
4. Executive Power Act, RSQ, ch. E-18; Executive Council Act, RSNB 2011, ch. 152; Executive Council Act, RSNS 1989, ch. 186.
5. Executive Council Act, SPEI, ch. E-12, s. 1.
6. Executive Council Act, SNL 1995, ch. E-16.1, s. 4(1). Note that the same Act also provides in s. 3: "Nothing in this Act affects a traditional prerogative of the Premier respecting the organization and composition of, appointments to and dismissals from, the Executive Council." See also Executive Council Act, SPEI, ch. E-12, s. 1.
7. Constitution Act, RSBC 1996, ch. 66, s. 9; Executive Government Organization Act, C.C.S.M. c. E170, ss. 2(1), 3(1). Executive Council Act, RSO 1990, ch. E.25, ss. 1, 2.
8. Constitution Act, RSBC, ch. 66, s. 13; Government Organization Act, SA, ch. G-10, s. 2; Government Organization Act, SS, ch. G-51, s. 12(1); Executive Government Organization Act, C.C.S.M. c. E170, s. 8; Executive Council Act, SNL 1995, ch. E-16.1, s. 5(1).
9. Kenneth Kernaghan and David Siegel, *Public Administration in Canada*, 4th edn (Toronto: ITP Nelson, 1999), 207; Gregory Tardi, "Departments and Other Institutions of Government," in Christopher Dunn, *The Handbook of Canadian Public Administration*, 2nd edn (Toronto: Oxford University Press, 2010), 25–6.
10. Library of Parliament, "Ministers Named from Outside Parliament," <www2.parl.gc.ca/Parlinfo/Compilations/FederalGovernment/OutOfParliamentMinisters.aspx?Language=E>. (12 Jan. 2013)
11. Fortier was appointed to the Senate within three weeks of his cabinet appointment.
12. These individuals were Arthur Meighen in 1932, Robert de Cotret in 1979, and Michael Fortier in 2006.
13. A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 14th edn (London: Pearson Education, 2007), 21. No newly appointed British minister has contested a by-election since 1965.
14. Stephen Harper's government leader in the Senate, Marjorie LeBreton, was also responsible for seniors. Lowell Murray held the Intergovernmental Affairs portfolio for five years under Brian Mulroney. Informal regional responsibilities may also be assigned to senators in cabinet. Jack Austin was Paul Martin's regional minister for BC, and Bernie Boudreau was Nova Scotia's regional minister in 1999–2000.
15. R. MacGregor Dawson, *The Government of Canada*, 5th edn, ed. Norman Ward (Toronto: University of Toronto Press, 1970), 178.
16. See Graham White, *Cabinets and First Ministers* (Vancouver: University of British Columbia Press, 2005), 41; Dawson, *The Government of Canada*, 179.
17. John Turner took office on 30 June 1984 and Parliament was dissolved on 9 July.
18. John Diefenbaker included only three Quebec ministers during his first minority government in 1957–8, as did Robert Borden between 1917 and 1920. Joe Clark

appointed two senators as well as the only two PC MPs from Quebec for a total of four in 1979; Quebec only hit this low of four again with the new Harper cabinet after the 2011 election. Quebec representation hit a twentieth-century low during Arthur Meighen's very short-lived government in 1926, when George Perley was the sole Quebec cabinet minister. Library of Parliament, "Ministers of the Crown," at: <www2.parl.gc.ca/parlinfo/Compilations/FederalGovernment/MinisterProvincial.aspx>. (19 June 2010)

19. Dawson, *The Government of Canada*, 179; J.R. Mallory, *The Structure of Canadian Government*, rev. edn (Toronto: Gage, 1984), 87–93; Joseph Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889), 183; R.M. Punnett, *The Prime Minister in Canadian Government and Politics* (Toronto: Macmillan, 1976), 65; Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985), ch. 5; David E. Smith, "The Federal Cabinet in Canadian Politics," in Michael S. Whittington and Glen Williams, eds, *Canadian Politics in the 1980s*, 2nd edn (Toronto: Methuen, 1984), 363–5; Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System*, 3rd edn (Toronto: McGraw-Hill Ryerson, 1981), 440–3.
20. Punnett, *The Prime Minister*, 66.
21. Van Loon and Whittington, *The Canadian Political System*, 447; see also Dawson, *The Government of Canada*, 182–3.
22. Graham White asserts that Vancouver, Toronto, and Montreal must be represented, as well as major regions within the biggest provinces: White, *Cabinets and First Ministers*, 41.
23. See also *Wells v. Newfoundland*, [1999] 2 SCR 199, discussed above.
24. *Arseneau v. The Queen*, [1979] 2 SCR 136.
25. *A.G. Quebec v. Blaikie* (No. 2), [1981] 1 SCR 312.
26. Ibid., 320.
27. Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution*, 3rd edn (London: Hutchinson, 1964), 84.
28. Kernaghan and Siegel, *Public Administration in Canada*, 425–32.
29. There is considerable debate on this point. See David E. Smith, "Clarifying the Doctrine of Ministerial Responsibility as It Applies to the Government and Parliament of Canada," in Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Research Studies*, vol. 1 (Ottawa: Government of Canada, 2006), 101–43. The Canadian government's position is articulated in a PCO document, "Guidance for Deputy Ministers," at: <www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/doc-eng.htm>.
30. Diana Woodehouse, *Ministers and Parliament: Accountability in Theory and Practice* (Oxford: Oxford University Press, 1994), 174.
31. Privy Council Office (PCO), *Accountable Government: A Guide for Ministers and Ministers of State* (Ottawa: Government of Canada, 2011), 1.
32. Sharon Sutherland, "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem," *Canadian Journal of Political Science* 24 (1991): 96.
33. Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy*, 2nd edn (Toronto: Irwin Law, 2011), 393–401.
34. It is worth noting the Canadian practice of ad hoc questions differs from the British requirement for written notice of the first question asked; only supplementary questions are unknown in advance by British ministers.

CHAPTER 7

1. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1924), 24.
2. Ibid., 417.
3. Sir Ivor Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1959), 134–6.
4. John P. Mackintosh, *The British Cabinet*, 3rd edn (London: Stevens and Sons, 1977), 20–1.
5. Geoffrey Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984), 211.
6. For one example, see the use made of constitutional authorities in Pearson's defence of his refusal to treat the 1968 defeat of a tax bill as a loss of confidence. Hansard, 23 Feb. 1968, 6923.
7. For example, the Supreme Court of Canada referred extensively to academic authorities on the nature of the conventions relating to constitutional amendment in *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1.
8. For a discussion of the importance of viewing conventions as rules of critical morality, see Marshall, *Constitutional Conventions*, 10–12.
9. See the more detailed discussion of the problems of relying on precedent in Chapter 1.
10. [1994] FCJ No. 1001; [1995] 1 FC 158 FCTD at para. 91. One could, of course, say the same thing about common law rules, as many have evolved considerably over time.
11. In the first edition I called these *meso-conventions*, since they can be viewed as lying alongside fundamental conventions. In the second edition, I have changed the labels originally used for meso- and semi-conventions to more accessible and meaningful terms.
12. In the first edition, I called these *semi-conventions*.
13. John T. Saywell, *The Office of Lieutenant Governor* (Toronto: University of Toronto, 1957), ch. 2.
14. Colin Munro, *Studies in Constitutional Law*, 2nd edn (Oxford: Oxford University Press, 2005), 148–9.
15. Your Canada-Your Constitution, "Media Release," at: <ycyc-vcvc.ca/84-of-canadians-want-powers-of-prime-minister-and-premiers-restricted-with-clear-enforceable-written-rules-only-9-disagree>. (23 Jan. 2013)
16. Peter Russell and Cheryl Milne, "Adjusting to a New Era of Parliamentary Government: Report of a Workshop on Constitutional Conventions" (Toronto: Asper Centre, 2011), at: <www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Events+and+Materials/Constitutional+Conventions+Workshop/Final+Report/Workshop+Report.pdf>. (3 Feb. 2012)
17. Peter H. Russell, "The Principles, Rules and Practices of Parliamentary Government: Time for a Written Constitution," *Journal of Parliamentary and Political Law* 6 (2012): 361–2.
18. Ibid., 354–5.
19. See Andrew Heard, 'Just What Is a Vote of Confidence? The Curious Case of May 10, 2005," *Canadian Journal of Political Science* 40 (2007): 395; Peter H. Russell and Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

20. Cheryl Saunders and Ewart Smith, "Identifying Conventions Associated with the Commonwealth Constitution," Australian Constitutional Convention, Standing Committee "D," vol. 2, 1982, 1. Unfortunately, these authors did not attempt this classification or suggest how it might be approached.
21. The two lists of conventional rules remain as informal codifications of Australian constitutional rules. For analyses and lists of the conventional rules recognized by the Australian Constitutional Convention, see Charles Sampford and David Wood, "Codification of Constitutional Conventions in Australia," *Public Law* (1987): 231; Charles Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions," *Oxford Journal of Legal Studies* 7 (1987): 369.
22. Some codified conventions in Caribbean constitutions, however, have been expressly prohibited from being subject to judicial review. Margaret de Merieux, "The Codification of Constitutional Conventions in the Commonwealth Caribbean Constitutions," *International and Comparative Law Quarterly* 31 (1982): 270–7.
23. J.R. Mallory, *The Structure of Canadian Government*, rev. edn (Toronto: Gage, 1984), 60.
24. Although the Monti cabinet consisted of technocrats who held no parliamentary seats, they still had to seek and maintain the confidence of Parliament. One should also remember that the Dominion of Newfoundland had to abandon responsible government, with the Commission of Government between 1934 and 1949, because of financial mismanagement.
25. New Zealand Cabinet Office, "Cabinet Manual," at: <cabinetmanual.cabinetoffice.govt.nz> (3 Feb. 2013); UK Cabinet Office, "Cabinet Manual," at: <www.cabinetoffice.gov.uk/resource-library/cabinet-manual> (3 Feb. 2013). The New Zealand manual is of many years standing, while the UK manual was first published in 2011. The Australian document is much shorter and limited in scope: Department of the Prime Minister and Cabinet, "Cabinet Handbook," at: <http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf> (5 August, 2013).
26. Privy Council Office (PCO), "Accountable Government: A Guide for Ministers and Ministers of State," 2011, at: <www.pco-bcp.gc.ca/docs/information/publications/ag-gr/2011/docs/ag-gr-eng.pdf>; PCO, "Guidance for Deputy Ministers," 2003, at: <www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/doc-eng.htm>; PCO, "Notes on the Responsibilities of Public Servants in Relation to Parliamentary Committees," 1990, at: <www.pco-bcp.gc.ca/docs/information/publications/notes/notes-eng.pdf>; PCO, "'Responsibility in the Constitution," at: <www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=constitution/table-eng.htm> (All accessed 3 Feb. 2013). It should be noted that the PCO also circulates other guidelines internally within government; for example, confidential guidelines cover the so-called "caretaker convention" that structures government activity during an election period.
27. Dicey, *Introduction to the Study of the Law*, 24.
28. O. Hood Phillips, "Constitutional Conventions: A Conventional Reply," *Journal of the Society of Public Teachers of Law* 8 (1964–5): 68–9; Munro, *Studies in Constitutional Law*, 60–87.
29. Joseph Jaconelli, "The Nature of Constitutional Convention," *Legal Studies* 19 (1999): 34.
30. *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] SCR 71.

31. *Auditor General v. Minister of Energy Mines and Resources et al.* (1986), 23 DLR (4th) 210 (FCTD).
32. *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645 at 723.
33. *Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Pty Ltd.* [1958], 100 CLR 597 at 613.
34. *A.G. v. Jonathan Cape Ltd. et al.*, [1975] 2 All ER 484 (QB).
35. *Stopforth v. Goyer* (1978), 20 OR (2d) 262 (Ont. HCJ); this decision was overturned on appeal: (1979), 23 OR (2d) 696 (Ont. CA).
36. *Re Fraser and the Public Service Staff Relations Board* (1986), 23 DLR (4th) 122; *Re Ontario Public Employees' Union et al. v. A.G. for Ontario* (1987), 41 DLR (4th) 1. See also *Grant v. Attorney General (Canada)*, (1995) 1 FC 158, at paras 90–1. The Supreme Court held in a later case, however, that these restrictions on most civil servants infringed the Charter of Rights; see *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69.
37. *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA).
38. *Arseneau v. The Queen*, [1979] 2 SCR 136; *A.G. Quebec v. Blaikie et al.* (no. 2), [1981] 1 SCR 312.
39. *Tunda v. Canada (Minister of Citizenship and Immigration)*, (1999) FCJ No.902, paras 42–4. The case challenged the constitutionality of all parliaments and elections held since Chief Justice Brian Dickson gave royal assent to the Constitution Act, 1985.
40. *British Coal Corp. v. The King*, [1935] AC 500 (JCPC); *Reference re the Disallowance and Reservation of Provincial Legislation*, [1938] SCR 71; *Currie v. MacDonald* (1949), 29 Nfld and PEIR 294 (Nfld CA); *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 (SCC).
41. Ibid.; *A.G. Quebec v. A.G. Canada* (1982), 140 DLR (3d) 385. Another case in which the existence of a convention was addressed is *Conacher v. Prime Minister (Canada)*, 2009 FC 920, affirmed 2010 FCA 131; in this case, however, the court concluded there was no convention.
42. Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd edn (Toronto: Carswell, 2000), 27.
43. T.R.S. Allan, "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case," *Cambridge Law Journal* 45 (1986): 312. See also William R. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment," in Peter H. Russell et al., *The Court and the Constitution* (Kingston: Institute of Intergovernmental Relations, 1982), 52.
44. *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54.
45. *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 754.
46. [1985] 1 SCR 721
47. [1986] 2 SCR 56, at para. 29.
48. [1993] 1 SCR 319.
49. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3.
50. Ibid., para. 109
51. [1998] 2 SCR 217 at paras 53–4.
52. Ibid., paras 87–8.
53. Beverley McLachlin, "Unwritten Principles: What Is Going On?" *New Zealand Journal of Public and International Law* 4 (2006): 147.

54. Alex Schwartz, "The Rule of Unwritten Law: A Cautious Critique of Charkaoui v. Canada," *Review of Constitutional Studies* 13 (2007–8): 179.
55. McLachlin, "Unwritten Principles," 156.
56. Ian Binnie, "Justice Charles Gonthier and the Unwritten Principles of the Constitution," paper presented at the Symposium in Honour of Charles Gonthier, Faculty of Law, McGill University 20–1 May 2011, at: <cisdl.org/gonthier/public/pdfs/papers/Confrence_Charles_D_Gonthier_-_Ian_Binnie.pdf>.
57. See, among others, Hilliar Aronovith, "Seceding the Canadian Way," *Publius* 36 (2006): 541; Michael D. Behiels, "Canada's Supreme Court, Constitutional Principles, and the *1998 Quebec Secession Reference Case*," paper presented at the 8th World Congress of the International Association of Constitutional Law, 8 Dec. 2010, Mexico City; Sujit Choudhry and Robert House, "Constitutional Theory and the Quebec Secession Reference," *Canadian Journal of Law and Jurisprudence* 13, 2 (2000): 145; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles," *Queen's Law Journal* 27 (2001–2): 389; Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec," *Publius* 29 (1999): 135; Hugh Mellon, "Secession and Constitutional Principles: Working with the Supreme Court's Statement of Principles," *British Journal of Canadian Studies* 20 (2007): 187; Patrick J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference," *National Journal of Constitutional Law* 11 (1999–2000): 65; Warren J. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada," *Supreme Court Law Review* 14 (2001): 197; Mark D. Walters, "The Common Law Constitution in Canada: Return of *lex non scipta* as Fundamental Law," *University of Toronto Law Journal* 51, 2 (2001): 91; John D. Whyte, "The Secession Reference and the Constitutional Paradox," in D. Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer, 1999); Robert A. Young, "A Most Politic Judgment," *Constitutional Forum* 10, 1 (1998): 14.
58. Peter W. Hogg, *Constitutional Law of Canada*, student edn (Toronto: Carswell, 2012), 15–51. See also his criticism in: Peter W. Hogg, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries," in Adam Dodek and Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010), 25–36.
59. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone?" 197–9; see the list of cases in footnotes 3 and 4, which is impressive for an accounting published in 2001. Many more cases have since been argued.
60. *Lalonde v. Ontario*, (2002) 56 OR (3d) 505 (CA).
61. *Christie v. British Columbia*, 2005 BCCA 631.
62. *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, (2011) FC 1432. In practice the Court's finding had no effect to the government, which simply ignored the outcome of the case.
63. Adam M. Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*," *Supreme Court Law Review* 54 (2011): 134–8.
64. Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," *Constitutional Forum* 19, 1 (2010): 21.

65. Vaughan Black and Nicholas Richter, "Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada, 1985–1990," *Dalhousie Law Journal* 16 (1993): 377; Peter McCormick, "Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship," *University of New Brunswick Law Journal* 45 (1996): 139.
66. *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 at 88.
67. *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215 at para. 50.
68. *Reference re Canada Assistance Plan*, [1991] SCR 525 at 545.

The Modern Senate of Canada

1925-1963

A RE-APPRAISAL

F. A. Kunz

UNIVERSITY OF
TORONTO PRESS

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a single word during the whole session. It is a curious fact that having recommended one woman for appointment to the Senate, King never again recommended another. It is doubtful whether this was because of any failing on the part of Mrs. Wilson or whether, as he said, it was his first and only experience of proposing and he did not wish to repeat it.[103]

As could have been expected, Canadian women were not satisfied with having only one representative in the Senate. Upon the agitation of the Women's Conservative Association, Prime Minister Bennett appointed Mrs. I. C. Fallis from Ontario in 1935. Further additions were made by the appointment in 1954 of M. Beauchamp Jodoin (Quebec), M. McQueen Fergusson and Nancy Hodges (BC),[104] who were joined in 1956 by Mrs. F. E. Inman (PEI), the sixth woman appointee. In 1960 the seventh and eighth woman entered the Senate with the appointment of Mrs. O. L. Irvine from Manitoba and Mrs. J. D. Quart from Quebec. By that time women could point out that they were more favourably represented in the Senate than in the House of Commons (where at the dissolution of Parliament in 1962 there were only five women MP's).

Is it any wonder that, surrounded by such a multitude of claims from an almost numberless variety of minority groups and loyal party men, prime ministers will often decide to defer decisions on appointments to the Senate? The result is an accumulation of vacancies over a certain period of time. It has been customary to describe this phenomenon purely in terms of party tactics—as a disciplinary device employed by an astute Prime Minister, "to keep his supporters eager, active, and toiling unceasingly for the party until the election is near at hand, and then, having wrung them dry, to reward the most faithful by translation to a higher and more restful sphere of usefulness."[105] What this interpretation ignores is the fact that it is usually the prime minister, rather than his supporters, who gets wrung dry by an unceasing flow of claims upon a limited number of seats. And although it is true that the bulk of appointments under each administration weighs heavily towards the closing months before dissolution of Parliament and a general election, the same evidence, I submit, could equally well support the argument that the accumulation of vacancies in the Senate reflects hesitancy as much as it reflects shrewdness on the part of a prime minister. This was

[103]*Ibid., 1955*, pp. 254–6.

[104]As ex-Speaker of the British Columbia Legislature in 1949, she was the first woman Speaker in the Commonwealth.

[105]R. M. Dawson, *The Government of Canada*, 4th ed. (Toronto, 1963), p. 309. Also see Mr. Green's remarks, *HD, 1955*, pp. 5340–1.

particularly the case during the second half of the St. Laurent Administration, when the Prime Minister was faced with the disturbing phenomenon of a growing political disequilibrium in the Senate's membership.

The maintenance, to be sure, of the specified number of members in the Senate was very carefully provided for by the wording of two sections of the BNA Act. In addition to section 24, which provides for the appointment of Senators, section 32 says: "When a vacancy happens in the Senate, by resignation, death, or otherwise, the Governor General shall by summons to a fit and qualified person fill the vacancy." The reason that the Senate does not have a provision similar to the one in force in the House of Commons regarding a time limit within which vacancies must be filled is that the constitution itself is so clear and plain upon that subject. It distinctly says that appointments shall (not "may") be made when vacancies occur. This certainly does not mean the moment they occur because that would be impracticable. The principle in interpreting directory words of this kind is that action must be taken within a reasonable time.[106]

However, this rule seems to have had no effect upon the actions of Prime Ministers. Prior to the election of 1930 all the Senate vacancies were filled. In the eighteenth Parliament, 1930–35, under the Bennett Administration, there was an accumulation of nineteen vacancies in the Senate. They were filled before the general election. In the next Parliament, under the King Government, there was an accumulation of fourteen vacancies. Again, all but one—that one in Quebec—were filled before the general election of 1940. The Parliament of 1940–45 saw the accumulation of eighteen vacancies. All but one, in Nova Scotia, were filled before the election in that year. All those vacancies occurred under the King Administration, except the one in Nova Scotia. In the next Parliament of 1945–49, there was an accumulation of eleven vacancies. Only three were filled before the election and eight remained unfilled. By 1953 the number of vacancies increased to twenty-three, approaching one-quarter of the normal membership of the Senate; ten were filled before the election of 1953 and thirteen were left vacant. In 1955 the number of vacancies reached twenty-one with the gloomy prospect of climbing higher towards the end of that Parliament. They applied to all of Canada, with the exception of British Columbia and Saskatchewan; there were one in Alberta, two in Manitoba, three in Ontario, four in New Brunswick, three in Nova Scotia, one in Prince Edward Island,

[106]See Mr. MacLean's (PC, Queens) argument. *Ibid.*, p. 5482.

and one in Newfoundland. One of them existed for less than a year, while six for a year, five for two years, three for four years, five for five years, and one was in its seventh year.

The number of vacancies in 1955, with no immediate sign of relief, was so alarming that it was declared "contrary to the public interest and a challenge to the usefulness of the Senate, threatening the integrity of this Branch of Parliament."[107] To remedy the situation Sen. Euler introduced a private member's bill on May 11 to amend section 32 of the BNA Act by making it mandatory—upon the pattern of the House of Commons Act of 1919—to fill every vacancy within a period of six months from the date on which it occurred. Although from a strictly legal point of view[108] his measure would have little, if any, effect at all, what the bill might have achieved was the moral effect of crystallizing something which was already in the Act, by defining the words "a reasonable time" within which Senate vacancies were to be filled as being a period not exceeding six months. However, in spite of the support it received from a number of influential members of the Senate, the bill was finally negatived on second reading by a vote of 37 to 12, mainly on the ground that its passage by the Senate might have proved embarrassing for the Government.[109]

The cause of so many vacancies under the Liberal Administration of 1949–57, and of the underlying vacillation of the Prime Minister to fill them, was the fact that by 1955, when there were twenty unfilled seats in the Senate, seven Conservatives faced seventy-five Liberals. The disproportion between the two groups grew steadily worse since 1949, with the Prime Minister facing the dilemma of how to fill the increasing number of vacancies without either violating the established precedents or further aggravating the state of disequilibrium. At the root of the dilemma lay the character of the Prime Minister; Mr. St. Laurent was a man of justice and of common sense enough to see the inherent unfairness of the continuation of the practice of appointments; but he was a politician enough not to be able to break with it. Unable to cut the Gordian knot, he, therefore, decided not to act. Nevertheless, under the pressure of continuing criticism he finally made up his mind and at the end of 1955 appointed eleven new Senators, including a Conservative and a few Independents.[110] However, the number of vacancies was still considerable. On April 11, 1957, Mr. Diefenbaker inquired whether it

[107] *SD, 1955*, p. 447.

[108] See P. B. Maxwell, *On the Interpretation of Statutes* (8th ed., London, 1937), pp. 189–90, 326–27, etc.

[109] *SD, 1955*, p. 540.

[110] See below, chap. 3.

was "the intention of the Prime Minister . . . to make any appointments to the Senate before the election writs are issued or after the writs are issued but before election day." Mr. St. Laurent told the House that since the writs were to be issued the following day there was no question of summoning anyone before that time. "As to whether or not there will be appointments made between the issue of the writs and the date of election," he said, "I would not like to make any commitment one way or the other." It "will depend upon whether I should find it in the public interest that I should take the responsibility . . . of recommending the appointments. . . ."[111] This was the last recorded statement of Mr. St. Laurent with regard to filling the fourteen vacancies which existed in 1957 and which were inherited by the appreciative Conservative Government that took office the same year.

[111]*HD, 1957*, p. 3402.

PARLINFO

FORTY-FIRST

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CURRENT PARLIAMENT

Term (yyyy.mm.dd): 2011.06.02 -
Duration: 1383 days (3 years, 9 months, 14 days)
Government Type: Majority Government
Government Party: Conservative Party of Canada
Number of Sessions: 2
Date of General Election: 2011.05.02
Prime Minister:
- Harper, Stephen (2006.02.06 -)

Leader of the Official Opposition:
- Mulcair, Thomas J. (2012.03.24 -)
- Turmel, Nycole (2011.08.23 - 2012.03.23)
- Layton, Jack (2011.05.02 - 2011.08.22)

Party Standings In The Senate

Date	C.P.C.	Lib.	Ind.	P.C.	Ind. P.C.	Vacant	Total
2015.01.31	52	30	4	0	1	18	105
2014.12.15	52	30	5	0	1	17	105
2014.12.01	53	30	5	0	1	16	105
2014.11.27	53	31	5	0	1	15	105
2014.08.10	54	31	5	0	1	14	105
2014.07.25	55	31	5	0	1	13	105
2014.07.17	55	32	5	0	1	12	105
2014.06.30	56	32	5	0	1	11	105
2014.06.17	56	31	6	0	1	11	105
2014.06.15	56	32	6	0	1	10	105
2013.11.30	57	32	6	0	1	9	105
2013.11.22	59	32	6	0	1	7	105
2013.11.16	59	33	5	0	1	7	105
2013.08.26	60	33	5	0	1	6	105
2013.08.02	60	33	6	0	1	5	105
2013.05.17	60	35	6	0	1	3	105
2013.05.16	61	35	5	0	1	3	105
2013.05.11	62	35	4	0	1	3	105
2013.05.10	63	35	4	0	1	2	105
2013.03.25	63	36	3	0	1	2	105
2013.03.22	62	36	3	0	1	3	105
2013.03.16	63	36	3	0	1	2	105
2013.02.11	64	36	3	0	1	1	105
2013.02.07	64	36	3	1	0	1	105
2013.01.25	65	36	2	1	0	1	105
2013.01.18	60	36	2	1	0	6	105
2013.01.10	60	37	2	1	0	5	105
2012.11.06	60	38	2	1	0	4	105
2012.10.19	61	38	2	1	0	3	105
2012.09.23	61	39	2	1	0	2	105
2012.09.17	62	39	2	1	0	1	105
2012.09.06	62	40	2	1	0	0	105
2012.07.21	57	40	2	1	0	5	105
2012.06.30	58	40	2	1	0	4	105
2012.06.18	59	40	2	1	0	3	105
2012.02.20	59	41	2	1	0	2	105
2012.02.09	58	41	2	1	0	3	105
2012.02.06	59	41	2	1	0	2	105
2012.01.17	60	41	2	1	0	1	105
2012.01.06	59	41	2	1	0	2	105
2011.12.17	54	41	2	1	0	7	105
2011.12.02	54	42	2	1	0	6	105
2011.10.17	54	43	2	1	0	5	105

LIST OF

2011.09.26	54	44	2	1	0	4	105
2011.09.21	54	44	2	2	0	3	105
2011.09.07	55	44	2	2	0	2	105
2011.06.13	55	45	2	2	0	1	105
2011.05.25	54	45	2	2	0	2	105
2011.05.13	52	45	2	2	0	4	105
2011.05.02 *(Election)*	52	46	2	2	0	3	105

CHANGES TO PARTY STANDINGS

Date	Change
2015.01.31	Senator: Rivest, Jean-Claude Province / Territory: Quebec Political Affiliation: Independent Resignation
2014.12.15	Senator: Seth, Asha Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Retirement
2014.12.01	Senator: Robichaud, Fernand Province / Territory: New Brunswick Political Affiliation: Liberal Party of Canada Retirement
2014.11.27	Senator: Kinsella, Noël A. Province / Territory: New Brunswick Political Affiliation: Conservative Party of Canada Resignation
2014.08.10	Senator: Buth, JoAnne L. Province / Territory: Manitoba Political Affiliation: Conservative Party of Canada Resignation
2014.07.25	Senator: Callbeck, Catherine S. Province / Territory: Prince Edward Island Political Affiliation: Liberal Party of Canada Retirement
2014.07.17	Senator: Champagne, Andrée Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Retirement
2014.06.30	Senator: Kenny, Colin Province / Territory: Ontario Political Affiliation: Independent Political Affiliation Change
2014.06.17	Senator: Dallaire, Roméo A. Province / Territory: Quebec Political Affiliation: Liberal Party of Canada Resignation
2014.06.15	Senator: Segal, Hugh Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Resignation
2013.11.30	Senator: Comeau, Gerald J. Province / Territory: Nova Scotia Political Affiliation: Conservative Party of Canada Resignation
2013.11.30	Senator: Braley, David Province / Territory: Ontario Political Affiliation: Conservative Party of Canada

	Resignation
2013.11.22	Senator: Kenny, Colin Province / Territory: Ontario Political Affiliation: Liberal Party of Canada Political Affiliation Change
2013.11.16	Senator: Oliver, Donald H. Province / Territory: Nova Scotia Political Affiliation: Conservative Party of Canada Retirement
2013.08.26	Senator: Harb, Mac Province / Territory: Ontario Political Affiliation: Independent Resignation
2013.08.02	Senator: De Bané, Pierre Province / Territory: Quebec Political Affiliation: Liberal Party of Canada Retirement
2013.08.02	Senator: Zimmer, Rod A. A. Province / Territory: Manitoba Political Affiliation: Liberal Party of Canada Resignation
2013.05.17	Senator: Wallin, Pamela Province / Territory: Saskatchewan Political Affiliation: Conservative Party of Canada Political Affiliation Change
2013.05.16	Senator: Duffy, Michael Province / Territory: Prince Edward Island Political Affiliation: Conservative Party of Canada Political Affiliation Change
2013.05.11	Senator: Finley, Doug Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Death
2013.05.10	Senator: Harb, Mac Province / Territory: Ontario Political Affiliation: Liberal Party of Canada Political Affiliation Change
2013.03.25	Senator: Tannas, Scott Province / Territory: Alberta Political Affiliation: Conservative Party of Canada Appointed
2013.03.22	Senator: Brown, Bert Province / Territory: Alberta Political Affiliation: Conservative Party of Canada Retirement
2013.03.16	Senator: Stratton, Terry Province / Territory: Manitoba Political Affiliation: Conservative Party of Canada Retirement
2013.02.11	Senator: McCoy, Elaine Province / Territory: Alberta Political Affiliation: Progressive Conservative Party Political Affiliation Change
2013.02.07	Senator: Brazeau, Patrick

	Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Political Affiliation Change
2013.01.25	Senator: Oh, Victor Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Batters, Denise Province / Territory: Saskatchewan Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Wells, David M. Province / Territory: Newfoundland and Labrador Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Beyak, Lynn Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Black, Douglas Province / Territory: Alberta Political Affiliation: Conservative Party of Canada Appointed
2013.01.18	Senator: Fairbairn, Joyce Province / Territory: Alberta Political Affiliation: Liberal Party of Canada Resignation
2013.01.10	Senator: Mahovlich, Frank W. Province / Territory: Ontario Political Affiliation: Liberal Party of Canada Retirement
2012.11.06	Senator: St. Germain, Gerry Province / Territory: British Columbia Political Affiliation: Conservative Party of Canada Retirement
2012.10.19	Senator: Peterson, Robert W. Province / Territory: Saskatchewan Political Affiliation: Liberal Party of Canada Retirement
2012.09.23	Senator: Cochrane, Ethel M. Province / Territory: Newfoundland and Labrador Political Affiliation: Conservative Party of Canada Retirement
2012.09.17	Senator: Poy, Vivienne Province / Territory: Ontario Political Affiliation: Liberal Party of Canada Resignation
2012.09.06	Senator: Bellemare, Diane Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: Ngo, Thanh Hai Province / Territory: Ontario Political Affiliation: Conservative Party of Canada

	Appointed
2012.09.06	Senator: Enverga, Jr., Tobias C. Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: McInnis, Thomas Johnson Province / Territory: Nova Scotia Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: McIntyre, Paul E. Province / Territory: New Brunswick Political Affiliation: Conservative Party of Canada Appointed
2012.07.21	Senator: Angus, W. David Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Retirement
2012.06.30	Senator: Di Nino, Consiglio Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Resignation
2012.06.18	Senator: Losier-Cool, Rose-Marie Province / Territory: New Brunswick Political Affiliation: Liberal Party of Canada Retirement
2012.02.20	Senator: White, Vernon Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Appointed
2012.02.09	Senator: Dickson, Fred Province / Territory: Nova Scotia Political Affiliation: Conservative Party of Canada Death
2012.02.06	Senator: Meighen, Michael A. Province / Territory: Ontario (Division) Political Affiliation: Conservative Party of Canada Resignation
2012.01.17	Senator: Dagenais, Jean-Guy Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Doyle, Norman E. Province / Territory: Newfoundland and Labrador Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Unger, Betty E. Province / Territory: Alberta Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Seth, Asha Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Maltais, Ghislain Province / Territory: Quebec

	Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Buth, JoAnne L. Province / Territory: Manitoba Political Affiliation: Conservative Party of Canada Appointed
2011.12.17	Senator: Banks, Tommy Province / Territory: Alberta Political Affiliation: Liberal Party of Canada Retirement
2011.12.02	Senator: Fox, Francis Province / Territory: Quebec Political Affiliation: Liberal Party of Canada Resignation
2011.10.17	Senator: Carstairs, Sharon Province / Territory: Manitoba Political Affiliation: Liberal Party of Canada Resignation
2011.09.26	Senator: Murray, Lowell Province / Territory: Ontario Political Affiliation: Progressive Conservative Party Retirement
2011.09.21	Senator: Kochhar, Vim Province / Territory: Ontario Political Affiliation: Conservative Party of Canada Retirement
2011.09.07	Senator: Pépin, Lucie Province / Territory: Quebec Political Affiliation: Liberal Party of Canada Retirement
2011.06.13	Senator: Verner, Josée Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Appointed
2011.05.25	Senator: Manning, Fabian Province / Territory: Newfoundland and Labrador Political Affiliation: Conservative Party of Canada Appointed
2011.05.25	Senator: Smith, Larry Province / Territory: Quebec Political Affiliation: Conservative Party of Canada Appointed
2011.05.13	Senator: Rompkey, Bill Province / Territory: Newfoundland and Labrador Political Affiliation: Liberal Party of Canada Retirement

THE CROWN

AND

CONSTITUTIONAL LAW

IN

CANADA

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8.0 CROWN INSTRUMENTS

This chapter examines the instruments of governance most closely associated with the Canadian monarchy. Since the Sovereign and the Sovereign's representative must act on the advice of their Councils, it is necessary to maintain written instruments and records to ensure that responsibility for the public acts of the monarchy can always be ascertained. Many of the instruments used in the Canadian monarchy were inherited from the constitutional law, practice and usage's of the United Kingdom.

8.1 Types of Executive or Crown Instruments

The instruments used in Canadian constitutional practice vary depending upon particular circumstances. If a new policy is being proposed to the cabinet for its consideration, a *Memorandum to Cabinet*, will be prepared by a Minister and the staff of the Minister's department for the consideration of the cabinet.[298] The Memorandum to Cabinet is usually divided into several sections. A section entitled "Ministerial Recommendations" contains a précis of relevant information and an analysis of political considerations, as well as specific recommendations for action. That may be followed by a short one page "Communications Synopsis", which summarises the communications strategy that is planned for the particular political initiative. A larger section entitled "Analysis" sets out the research and policy concerns which have led to the proposal put forth in the Memorandum to Cabinet. Supporting material may be appended as "Annexes" to the document. If the policy proposal is accepted by cabinet, a *Record of Decision* will be prepared and numbered. A cabinet R.D. number will be subsequently cited by Ministers and officials as the basis for the implementation of the policy proposal adopted by cabinet, and it is also the basic authority for the drafting of any new legislation by civil servants.

If, as a result of the Memorandum to Cabinet, it is necessary to provide formal advice to the Crown, a *Minute of Council* will be prepared and adopted at a meeting of the Committee of the Privy Council. A Minute of Council is used to record advice given to the Sovereign's representative. A minute can always be identified in government documents by its opening words: "The Committee of the Privy Council, on the recommendation of the Minister of XXXXX advise that ...". In recent times, Minutes of Council have declined in utility, owing to the growth in record keeping of cabinet decisions and by the innovative use of formal letters to the Sovereign's representative, which are now used whenever it is merely necessary to record political accountability for a particular action.[299]

Beginning in 1953, Canadian practice developed the *Instrument of Advice*, which was devised in order to reflect the constitutional role of the Prime Minister. An Instrument of Advice is used in those situations where the Prime Minister acts as a quorum of the Privy Council due to a constitutional necessity, such as in the case of the initial recommendation of appointments to the Privy Council and to the ministry upon a change in government, as well as in those instances where the Prime Minister exercises authority pursuant to an order in council to provide advice to the Crown on behalf of the Privy Council. An Instrument of Advice takes the form of a letter signed by the Prime Minister which is subsequently countersigned by the Governor General.[300]

If a formal legal act is required to be made by the Crown, an *Order in Council* will be issued pursuant to a statute or the royal prerogative to embody the Crown's decision. In effect, an order in council is a resolution of the Sovereign or Governor in Council.[301] The passage of an Order in Council is supported by a number of subsidiary documents. Generally speaking, a representative example of the documents required would include the following, in the case of an exercise of a routine statutory discretion vested in the Governor General in Council:

1. letter of transmittal of documents from departmental officials to a Minister;

2. an Explanatory Memorandum to the Minister containing an explanation of the approval which is sought from the Crown;

3. a Submission to the Governor in Council recommending the exercise of a discretion, which must be signed by the responsible Minister and which must have appended to it any necessary supporting documents;

4. a letter of transmittal from departmental officials to officials at the Privy Council Office; and

5. a draft Order in Council.

The *Submission* is a key document which is required whenever there are matters which require actions by the Sovereign or the Governor General to be formalised by the issuance of an Order in Council. A Submission generally appears in the following form:

> TO HIS EXCELLENCY THE GOVERNOR GENERAL
> IN COUNCIL:
>
> THE UNDERSIGNED has the honour to report:

THAT ...

THAT ...

THEREFORE the undersigned has the honour to recommend that Your Excellency in Council may be pleased, pursuant to section XX of the XX Act, to approve etc.

Respectfully Submitted

Minister of XXX

Once the Submission is considered and approved by a Committee of the Privy Council it will be forwarded to the Governor General, who considers the submission and, in accordance with the conventions relating to responsible government, signifies his or her approval to the order in council. The order in council is then issued by the Privy Council Office, under the seal of that office, in a form similar to the following:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of XXX, pursuant to section XX of the XXXX Act, is pleased hereby to approve, etc.

Clerk of the Privy Council

For the purposes of approving Orders in Council, drafts are put together in batches and display on their face the Privy Councillors who were present at the meeting of the Committee of the Council. The Governor General's name is also listed, as the Governor General will be presumed to be present for the purposes of approving the Orders in Council. In actual constitutional practice however, the Governor General is never present. Instead, at a subsequent date, the Governor General will sign the face page of a batch of orders in council which were considered at a meeting of a committee of the Privy Council and it is that signature which will give royal sanction to the issuance of the Order in Council.

Each individual Order in Council is subsequently signed and sealed by the Clerk of the Privy Council and issued. Orders in council are revocable; "An order in council is an Act of the Crown, on the advice of its responsible ministers, and can always be revoked"; *The King v Ottawa Electric Company* (1933), 40 CRC 295 (Ontario, S.C.)

ADDRESS

MR. JUSTICE MARSHALL ROTHSTEIN, SUPREME COURT OF CANADA

TO THE AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
AT THE ANNUAL SECTION DINNER,
TORONTO, ONTARIO
FRIDAY, AUGUST 5, 2011

Thank you, Jonathan Rusch,[1] for your generous introduction. And let me add my words of welcome to you and tell you that we are delighted that you chose Toronto for your annual meeting. And thank you for inviting me to address your Section. Although from what I can tell, this Section operates more like a family.

Like the Supreme Court of the United States, the Supreme Court of Canada is a generalist court. We don't decide too many administrative law cases each year, so I am only too mindful that I am speaking to an audience of experts in the field. It brings to mind the story of the Pope.

He had an engagement, so he came down to the car that was waiting for him. He decided that he wanted to drive, so he told the chauffeur to get in the back and he got in and started driving. Unfortunately, he was going too fast and he was stopped. The officer came to the car window. When he saw the Pope, he decided he had better call headquarters. He called headquarters and said, "We have an incident here." The desk sergeant said, "What's the problem?" The officer said, "Well I've stopped someone really important for speeding." The desk sergeant said, "Who is he?" The officer said, "I'm not sure, but the Pope is his chauffeur."

So today with this expert audience I feel like the guy sitting in the back seat with the Pope as my chauffeur.

1. *Editors' note:* Jonathan Rusch served as the 2011 Chair of the American Bar Association Section of Administrative Law and Regulatory Practice.

In view of your expertise, I'm going to have to be really careful. Like the story of the Old West. The farmer's wife had died, they put her in the casket, loaded the casket on the wagon for the trip to the cemetery. Along the way there was a hole in the road. The wagon hit the hole, the casket popped open and the farmer's wife revived. Well, they went back home. However, a year later she died again. They put her into the casket and loaded it on to the wagon. As they came to the place on the road where the hole was, the farmer said, "Now this is where we really have to be careful." So I'm going to have to be careful today.

Now, when I thought about the topic I should select for my presentation, I had to bear in mind that I certainly don't know very much about American administrative and regulatory law. And then coincidentally, I found in my sock drawer a little box and when I opened it I found a little document entitled, "2005 Chief Justice John Marshall Silver Dollar—Certificate of Authenticity." Unfortunately, the silver dollar wasn't there. However, it got me thinking about the only case I know that Chief Justice Marshall decided, which of course was the seminal *Marbury v. Madison*.[2]

And at the same time, I had just read a paper on the subject of justiciability by the most eminent scholar in administrative law in Canada today, Professor David Mullan, recently retired from Queen's University.[3]

So, today, I am going to speak to you about justiciability—what government decisions can be subject to review by the courts. In particular, the role of Canadian courts in reviewing the power exercised by the Executive Branch of government. And I am very confident in the accuracy of my remarks today because I have cribbed shamelessly from Professor Mullan's work.

The principle of the Judiciary having the power to review the actions of the Executive or Legislative Branches of government is well established in American, as well as Canadian, law. Where I'll start is with *Marbury v. Madison*. As you all know better than I do, there, in 1803, your Supreme Court established the basis for the exercise of judicial review in the United States. Chief Justice Marshall held that your courts could oversee and review the actions of other branches of the government and in doing so declare statutes unconstitutional.

Chief Justice Marshall also dealt with the question of justiciability. He wrote that "the question [of] whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. David Mullan, *Judicial Review of the Executive—Principled Exasperation*, 8 N.Z. J. PUBLIC & INT'L L. 145 (2010).

on the nature of that act."[4] He indicated that for some acts, which are political in nature and do not concern individual rights, that the decision of the Executive is conclusive and, in his words "can never be examinable by the Courts."[5] While for other acts, again in his words, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[6]

There are interesting parallels between the American approach and the Canadian approach to justiciability, which I hope will become clear as I further discuss the Canadian attitude towards the subject.

First, I should give you some background about the authority of the Executive Branch of government in Canada. There are two sources of power that enable the Executive Branch to exercise some form of discretion. The first being power granted by statute; the second, a residual discretion known as the Crown prerogative.

Why Crown prerogative? Because we didn't have a revolution. Queen Elizabeth is still our Head of State, and in legal matters, the State is often referred to as the Crown or the Queen. But the Queen's role is generally formal or ceremonial only. In practice, the prerogative power is exercised in Canada by the Executive Branch of government.[7] Scholars have described the Crown prerogative as "the residue of discretionary or arbitrary authority, which at any time is left in the hands of the Crown."[8]

The modern exercise of the prerogative power includes, among other things:foreign affairs, the making of treaties, national defence, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers.[9]

Traditionally, the power of the court to review the prerogative was limited. Courts could determine if a prerogative power existed, what its scope was, and whether the power had been restricted by statute. However, once a court determined that the prerogative power was in play, it would not review how that power was exercised.[10]

Canadian courts are still reluctant to find the review of certain exercises of the prerogative power justiciable. Recent examples of areas that

4. *Marbury*, 5 U.S. at 165.

5. *Id.* at 166.

6. *Id.*

7. *See* Black v. Canada (Prime Minister) (2001), 54 O.R. 3d 215 (Can. Ont. C.A.) para. 32.

8. ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 424 (10th ed. 1959).

9. *Black*, 54 O.R. 3d 215 para. 36.

10. *Id.* para. 45.

Canadian courts have concluded are nonjusticiable include: a government decision to enter into a treaty with aboriginal groups, the validity of a treaty with another country, the recall of a diplomat, and the decision to send troops on a combat mission. Two assumptions form the basis for this reluctance.

First, there is a divide between law and politics. There is some sense of illegitimacy that arises when courts engage in political matters. Some conflicts in a democratic society are best left to the political process to resolve, and should not be the subject of litigation.

Second, there are practical and functional limitations with respect to the ability of courts to determine certain matters. For some questions of policy, courts do not have the institutional competency to evaluate the merits of decisions made by the Executive. Courts deal with the litigants before them, rather than carrying out widespread public consultations. They don't have the resources of other branches of government to fully research the public policy implications of decisions.

While these two arguments have merit, in some instances Canadian courts today are no longer as reluctant to engage in the review of decisions of the Executive as they once were. In part, this is because of the constitutionalization of our Bill of Rights, the *Charter of Rights and Freedoms*, that occurred in the 1980s. The rule of law and our Constitution require courts to engage in the judicial review of executive decisions when they conflict with the Constitution or impact on individual rights. Just as in *Marbury v. Madison.*

A starting point about the increased willingness of Canadian courts to engage in the review of decisions of the Executive is a case heard by the Supreme Court of Canada in the 1980s called *Operation Dismantle v. The Queen.*[11] In this case, a number of peace groups alleged that the Canadian government's decision to allow American cruise missile testing in Canada violated their rights to life, liberty, and security of the person under the Charter of Rights. They claimed it did so because it increased the risk of nuclear conflict.

The majority of the Court struck the peace groups' claim, and concluded that the claim did not disclose any facts which, if taken as true, would prove that the testing of cruise missiles would violate their Charter rights. While the majority did not base its approach on the concept of justicability, it agreed with the concurring judgment of Madam Justice Wilson, who wrote that some "disputes of a political or foreign policy nature may still be properly cognizable by the courts."[12]

11. [1985] 1 S.C.R. 411 (Can.).
12. *Id.* para. 38.

She found that the peace groups' claim was justiciable because, in her view, it did touch on the violation of rights protected by the Charter, despite the fact that it dealt with the subject of foreign affairs. However, like the majority, she ultimately concluded that the facts, if taken as true, could not establish a violation of the Charter and dismissed the peace groups' appeal.

The questions of justiciability dealt with by *Operation Dismantle* were elaborated upon by the Ontario Court of Appeal in the 2001 case of *Black v. Canada*.[13] At issue was the decision of the Canadian Prime Minister to advise the Queen not to appoint a Canadian citizen, Conrad Black, as a member of the House of Lords of the United Kingdom. Black sought judicial review of that advice. The question of appointments being a prerogative power, the Canadian government argued that matter was nonjusticiable and not subject to judicial review.

The Court of Appeal observed that the proper way of determining if a matter involving the prerogative power is justiciable is to examine the subject matter of the decision. If the subject matter is concerned with matters of high policy or moral and political considerations, then it would be nonjusticiable.[14] In contrast, if the matter involved questions of individual rights, then it would be justiciable.[15] Like *Marbury v. Madison*. You might ask why it took us two hundred years to get to this point. We're a very cautious nation.

The Court of Appeal ultimately concluded that the Prime Minister's advice to the Queen about Mr. Black's peerage was nonjusticiable. Perhaps surprisingly, it held that no important individual interests were at stake, and that no Canadian citizen could have a legitimate expectation of receiving a British honour.[16]

I now turn to two recent cases that touch on the concept of justiciability in the context of foreign affairs. These two cases again illustrate the increased willingness of Canadian courts to subject certain decisions made by the Executive to judicial review. But they also illustrate that there may be a restrained approach to remedies when dealing with the judicial review of complex policy decisions.

The first case is *Smith v. Canada*,[17] a 2009 trial-level decision of the Federal Court of Canada. In Canada the death penalty was abolished in 1976. When a Canadian is convicted and sentenced to death in another

13. *See Black*, 54 O.R. 3d 215.
14. *Id.* paras. 52, 62.
15. *See id.* para. 54.
16. *Id.* paras. 60–61.
17. Smith v. Canada (Att'y Gen.), [2009] F.C. 228 (Can. Fed. Ct.).

country, it had been the practice of the Canadian government to seek clemency and ask for commutation of the death sentence to a sentence of imprisonment. In *Smith*, the government of Canada decided not to seek clemency for Mr. Smith, a Canadian citizen sentenced to death in Montana. Mr. Smith was seeking a court order compelling the government to assist him in his attempts to obtain clemency. The government claimed that this decision was nonjusticiable, as it involved questions of foreign policy, and involved moral and political questions rather than legal questions.

Despite the matter involving questions of foreign policy, the trial judge concluded that Mr. Smith's complaint was justiciable. He held that this case involved specific individual rights. The government's decision not to seek clemency involved a change in the long-standing previous policy, and as a matter of due process Mr. Smith was entitled to be consulted and to make submissions about the change and how it might affect him.

The trial judge ordered the government to continue to apply the previous policy, and assist Mr. Smith in his attempts to obtain clemency. The government did not appeal. However, when the Canadian government requested clemency, the family of the victim retaliated by petitioning the Governor to proceed with the execution. Today Mr. Smith is still on death row awaiting execution pending resolution of a challenge he has raised in the U.S. courts about the constitutionality of the lethal injection method of execution. So it looks like the Governor rejected the Canadian government's request of clemency. Am I being too cynical if I observe that there aren't too many Montana voters in Canada?

What *Smith* illustrates is that even in matters involving foreign relations that courts will be willing to engage in judicial review when individual rights are at stake and order governments to engage in some sort of positive action. But, not always.

Which brings me to the final case that I want to discuss, *Khadr v. Canada.*[18] This case involved Omar Khadr, a Canadian citizen, who has been detained in Guantanamo Bay since 2002. He was accused of killing a U.S. army sergeant in combat in Afghanistan in 2001 when he was fifteen. Khadr's father was a follower of Osama Bin Laden and brought his son to Afghanistan to fight for Al Qaeda. During Khadr's detention in Guantanamo Bay, Canadian officials interrogated him knowing that he had been subjected to sleep deprivation and then shared the information they obtained with U.S. authorities. The Canadian government refused Khadr's requests to seek his repatriation. Khadr sought judicial review of the decision, claiming it violated his rights to liberty and security of the

18. Khadr v. Canada (Prime Minister), [2010] S.C.R. 44 (Can.).

person guaranteed under the Canadian Charter.

The trial and appeal courts concluded that Khadr's Charter rights had been violated. They ordered the Canadian government to request his repatriation. The Crown appealed to the Supreme Court of Canada.

Our Court agreed that the Canadian government had violated Khadr's Charter rights to liberty and security of the person.[19] Canadian officials interrogated him after knowing he had been subjected to sleep deprivation.[20] It was determined that Khadr's treatment in Guantanamo Bay offended Canadian standards about the treatment of detained youth suspects.[21]

But the Court also recognized that Khadr's situation involved the Crown's prerogative power over foreign affairs.[22] If the Court ordered the Canadian government to ask the U.S. government to repatriate Khadr, then it would be stepping into the area of foreign relations — an area clearly within the competence of the Executive as opposed to the courts. Nevertheless, the Court found that this case was justiciable.

It relied on *Operation Dismantle* and found that "courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter*."[23] Again, shades of *Marbury v. Madison*.

What is interesting about the *Khadr* case is that the Court recognized that it had a duty to review the exercise of the prerogative power for constitutionality, yet it had to give weight to the constitutional responsibility of the Executive to exercise that power. The Executive made such decisions in the context of "complex and ever-changing circumstances" and had to take into account Canada's broader national interests.[24] The Court also recognized the limitations on its institutional competence with respect to making foreign affairs decisions.[25]

The Court concluded that the appropriate remedy was to issue a declaration that Canada had infringed Khadr's Charter rights and "leave it to the government to decide how to best respond to [the] judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."[26] So no specific positive duty was imposed by the Court on the government. The government did not ask the U.S.

19. *Id.* para. 26.
20. *Id.* para. 20.
21. *Id.* para. 25.
22. *Id.* para. 35.
23. *Id.* para. 36.
24. *Id.* para. 39 (emphasis omitted).
25. *Id.* para. 46.
26. *Id.* para. 39.

government to repatriate Khadr. However, it did ask the United States not to use any information obtained by Canadian officials and transmitted to U.S. officials in Khadr's prosecution. Just to complete the story, Khadr pleaded guilty and was sentenced to eight years. There is some speculation he may return to Canada in a few months to serve the rest of his sentence here. But right now, he is in Guantanamo Bay.

So, in some cases, ordering the government to take positive action has been found to be warranted as a remedy—such as the order in *Smith* requiring the government to assist a prisoner in his attempts to obtain clemency. However, in other cases, the government decision under consideration may be such that courts ought not to order the government to take positive action. This was the case in *Khadr*, where the Court issued a declaration that the government's actions were unconstitutional, but left it to the government to determine how best to respond in light of the complex nature of foreign policy.

Even in quiet, sedate Canada those cases can bring out strong reaction. The civil liberties groups in Canada praised the Federal Court decision in *Smith*. But did they ever condemn the Supreme Court decision in *Khadr*! Some of the comments from the academic community: the decision was objectionable; a remedial abdication; rights without meaningful remedies; dangerous deference; excess of restraint; missed opportunity to send a powerful statement; inadequate; lacking in courage; disappointing; timid.

Although not as noisy, other segments of Canadian society found the Federal Court decision in *Smith* to constitute judicial activism at its worst and endorsed the cautious approach adopted by the Supreme Court in *Khadr*.

And it probably won't surprise you to know that hot debate took place in our Court when we were considering the remedy in *Khadr*. But this was a case where all of us felt the Court should speak with unanimity and so we all put a little water in our wine and ended up where I told you—telling the government that there had been a Charter breach, but leaving it to the government to select the appropriate remedy.

What if the government chose not to take any remedial action? What if Khadr thought the remedial relief the government provided was inadequate and asked for judicial review of that decision? What if the Court did order the government to carry out a special remedy, like asking the U.S. government to repatriate Khadr, and the government just didn't do it? It brings to mind President Jackson, who didn't like another of Chief Justice Marshall's decisions and is supposed to have said, "Well, John Marshall has made his decision, now let him enforce it." Fortunately for us, these are all questions that we haven't yet had to answer. We'll cross those bridges if we come to them.

It's time for me to conclude. Jonathan's introduction was very generous. But that is not the universal view. A couple of months ago I left home and went to the office. That morning my wife Sheila had asked me to remove the bed linen for washing which I thought I had done before I left.

> E-mail: Sheila Rothstein to Justice Rothstein—10:53 a.m.
>
> I told you to remove all the linen including the blanket cover. You did not listen to my instructions and only did half a job. I hope you do your legal opinions / judgments better than removal of linen from a bed. When you get home you will make the bed all by yourself! Washing all the linen and pillows is enough of a job for me. We need . . . the fluff for the dryer, and pads for the swiffer, that's the floor mop . . . the length should be as long as possible . . . 8 to 12 inches . . . 12 is preferable but I'll accept shorter if they don't have 12. We need Kraft cheese fat free, fruit, egg whites and peanuts. Get peanuts that don't have that gawd awful brown covering over them. What's wrong with shelled naked peanuts? Why do you buy gross peanuts? Time to wake up and smarten up.

I'm sure glad you didn't ask Sheila to introduce me this evening.

I wish you well in your deliberations and I thank you for coming to Canada and for your attention.

TOWARDS A JURISPRUDENCE OF CONSTITUTIONAL CONVENTIONS

LÉONID SIROTA*

Introduction

The status of constitutional conventions (which I will refer to as simply 'conventions') is ambiguous. They are among the rules 'which make up constitutional law, as the term is used in England'.[1] But according to Dicey, whose treatment of the subject has become authoritative, they are not actually law, because they are not judicially enforceable.[2] This paradox has been the cause of scholarly and, especially in Canada, judicial controversy.[3] My purpose in this article is to apply to the question of the legal nature of conventions the insights of legal theorists, in particular those of HLA Hart and FA Hayek. Such attempts (focusing mostly on Hart's jurisprudence) have been made before, and have not settled the controversy.[4] My aim is twofold: on the one hand, to canvass the implications of legal theory for the issue of the conventions' status more fully than has so far been done; and, on the other, to bring to bear the experience of the polity where the status of conventions has attracted the most judicial attention.

The article will proceed as follows. Part I will consider the traditional understanding of constitutional conventions. Part II will examine the explanations offered by the defenders of the traditional understanding to justify the separation between conventions and law, in light of Hart's treatment of the distinctions between legal and other rules in *The Concept of Law*.[5] Finally, Part III will turn to a non-positivist theory of law and argue that it is a plausible basis for a jurisprudence of conventions.

* BCL/LLB (McGill); LLM (NYU); JSD candidate (NYU). I am grateful to Eran Fish, Fabien Gélinas, Pierre Gemson, Sean Kelly, Claude Lévesque, and Liam Murphy for helpful comments on previous versions of this article.

1 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, MacMillan 1915) 23.

2 ibid.

3 Especially in *Re: Resolution to amend the Constitution* [1981] 1 SCR 753 (Supreme Court of Canada (SCC)), which is probably the judicial decision in which conventions were studied at the greatest length, and with the gravest consequences. Note that the Court treated the 'legal' and the 'conventional' questions separately, with differently constituted majorities on each question. Laskin CJ and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ delivered the majority opinion on the legal question (at 762–809); Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ delivered the majority opinion on the conventional question (at 874–910).

4 Colin R Munro, 'Laws and Conventions Distinguished' (1975) 91 Law Quarterly Review 218; William Maley, 'Laws and Conventions Revisited' (1985) 48 Modern Law Review 121; Jeremy Waldron, 'Are Constitutional Norms *Legal* Norms?' (2006) 75 Fordham Law Review 1697.

5 HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994).

Part I: The Traditional Concept of Constitutional Conventions

For Dicey, who was the first to use the term,[6] 'conventions of the constitution' were judicially unenforceable 'understandings, habits, or practices which . . . regulate the conduct of the several members of the sovereign power, of the Ministry, or other officials'.[7] Dicey's source was the earlier work of a historian, who wrote of 'a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the statute or the common law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or the Petition of Right.'[8]

Constitutional conventions ensure that the relations between the institutions which make up the government of a polity are 'in accordance with the prevailing constitutional theory of the time.'[9] Thus while formal legal sources suggest that the government of the United Kingdom is carried out by a sovereign Parliament and a Crown possessing a residual discretionary power in the form of the royal prerogative,[10] conventions guarantee that these institutions 'shall in the long run give effect to the will of that power which . . . is the true political sovereign of the State—the majority of electors'.[11] Conventions can thus obviate the need for change in the formal legal sources—constitutional or ordinary legislation and the common law—in response to change in the prevailing political morality.

Conventions typically accomplish this by constraining the discretion which political institutions possess according to formal sources of law.[12] For example, as a matter of law the monarch (or her representative) might appoint the person of her choosing to be Prime Minister, or indeed not appoint anyone; but according to convention, she *must* appoint the person susceptible of commanding the confidence of the House of Commons. Similarly, although as a matter of law the monarch is free to refuse assent to any Bill passed by the houses of Parliament or the legislature, by convention she *must not* do so.

Constitutional conventions are thus duty-imposing.[13] In HLA Hart's terminology, they are 'primary rules', '[u]nder [which] human beings [or institutions] are required

[6] See WS Holdsworth, 'The Conventions of the Eighteenth Century Constitution' (1932) 17 Iowa Law Review 161, 161.
[7] Dicey (n 1) 23.
[8] ibid 414–15, quoting Edward A Freeman, *Growth of the English Constitution* (Macmillan 1872) 109–10.
[9] Holdsworth (n 6) 163.
[10] See the discussion in Dicey (n 1) 422–26.
[11] ibid 424.
[12] See eg Joseph Jaconelli, 'The Nature of Constitutional Convention' (1999) 19 Legal Studies 24, 27, arguing that 'to categorise any governmental issue as one that is regulated by constitutional convention is to argue that here is an area in which the freedom of the actors on the governmental stage is curtailed'.
[13] Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64 Cambridge Law Journal 149, 152, asserts that 'conventions . . . are not all of a duty-imposing kind', but he provides no examples of other kinds of convention.

to do or abstain from certain actions, whether they wish or not.'[14] Hart contrasts primary rules with secondary rules, which 'provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers'[15]—powers to vary one's own existing duties or those of other persons, or further to confer powers.

Jeremy Waldron argues that conventions are secondary rules rather than primary rules. His main example is the rule (which I will refer to as R_1) that the monarch must assent to Bills that have passed both Houses of Parliament. R_1, he writes, 'is plainly not a primary rule of the British legal system, since it operates to structure the creation of law.'[16] But notice the way in which R_1 does so operate. Before R_1 came into being, the old legal rule (R_0) provided that the monarch may, in her discretion, give or withhold assent to a Bill passed by the Houses of Parliament. R_0 was plainly a power-conferring rule; it made the monarch an active agent in the creation of law by Parliament. R_1 deprived her of that role. It does not confer any power on the monarch but on the contrary denies a power that would exist in its absence *and* imposes a strict duty specifying how the monarch is to behave. At most, we could say (borrowing an expression from Canadian constitutional law) that the distinction between primary and secondary rules is not always categorical, and that some rules, such as R_1, have a 'double aspect'—they can appear, from different perspectives, either primary or secondary. (Similarly, the prohibition on fraud can be seen either (as it is in criminal law) as a primary rule, a duty not to deceive, or (as it is in contract law) as part of the rules specifying the conditions of the formation of a valid contract, which Hart repeatedly provides as an example of power-conferring, secondary rules.[17])

So Waldron's example, R_1, can be seen as a secondary rule structuring the creation of law, but also as a primary one. And other familiar conventions, such as those pertaining to responsible government, do not have this 'double aspect' at all. They are straightforwardly primary rules imposing duties on the monarch and the members of the cabinet. And even for those few conventions that can also be seen as secondary rules, such a view does not do justice to the centrality of the conventions' role in replacing discretion with duty.

We may say then that conventions are those primary constitutional rules, limiting the powers of the several organs of government in a polity and governing the relations among them, which are not found in constitutional or ordinary statutes or the common law, and which reflect the 'constitutional theory' or political values of the day. Therefore to say that a convention exists, we must look

[14] Hart (n 5) 81.
[15] ibid.
[16] Waldron (n 4) 1706.
[17] See Hart (n 5) 27–28, 38, 41, 96.

to political practice. Yet, political '[p]recedents and usage are necessary but do not suffice. They must be normative.'[18] According to the classic statement of Sir W Ivor Jennings:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[19]

The 'reason' Jennings insists upon is the normative justification for the rule, and not merely a historical explanation for how it arose or a psychological one for why political actors comply with it.[20] Nick Barber writes that 'to refuse to acknowledge the rules that political actors treat as conventions simply because there were not, or were not perceived to be, adequate reasons to support them,'[21] would lead us to fail to identify the true rules of the constitution. Yet Barber does not provide any examples of conventions without a normative justification, and it would be strange if political actors constrained their freedom of action by following rules for no reason. Be that as it may, Barber also recognises the special importance of normative justifications for conventional rules for those whose study of conventions is likely to affect their existence and development: scholars, in his account,[22] but surely also, *a fortiori*, judges.

The Supreme Court of Canada endorsed Jennings' test in the *Patriation Reference* and applied it to resolve the question whether a convention prevented the Canadian Parliament from requesting the British government to introduce legislation to amend the Canadian constitution in the absence of provincial consent to such a request.[23] However, although it rejected the submission that this issue was 'purely political' and not fit for an answer by a court,[24] the Supreme Court was clear that it would not give legal effect—that is, it would not enforce—the convention it found to exist. As a matter of law, Parliament was free to act, even though as a matter of 'constitutionality and legitimacy' it was not.[25] The Court rejected '[t]he proposition . . . that a convention may crystallize into law'[26] and an 'attempted assimilation of the growth of a convention to the growth of the common law.'[27]

That is the traditional position of the authors who have written on the subject. Starting with Freeman and Dicey, they have insisted that conventions are not law

[18] *Re: Resolution to amend the Constitution* (n 3) 888.
[19] Sir W Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136.
[20] See NW Barber, *The Constitutional State* (OUP 2010) 84, distinguishing these three kinds of reason.
[21] ibid.
[22] ibid.
[23] *Re: Resolution to amend the Constitution* (n 3) 887–88.
[24] ibid 884–86.
[25] ibid 884.
[26] ibid 774.
[27] ibid 775.

and cannot be enforced by courts. Conventions are constitutional rules in a substantive sense; indeed they may be among the constitution's most important rules, and may be those 'with which [the citizens] are the most familiar because they are directly involved when they exercise their right to vote.'[28] But they 'are nowhere to be found in the *law* of the constitution.'[29] It is the object of the next part of this article to examine the various explanations given for this proposition, which the Supreme Court of Canada, in the *Patriation Reference*, conceded might come as a surprise to most citizens.[30]

Part II: Justifying the Conventions–Law Distinction

The defenders of the traditional understanding of constitutional conventions as fundamentally distinct from law have advanced a variety of justifications for this position. Among these we may distinguish a weaker and a stronger kind. The former hold simply that conventions are not part of law because they are not recognised as being part of law and the courts will not enforce them. The stronger—and more interesting—justifications are to the effect that conventions not only are not law, but are *incapable of being* law.

1 Conventions Not Now Part of Law

The weaker justification was first advanced by Dicey himself when he claimed that conventions 'are not in reality laws at all since they are not enforced by the Courts.'[31] Dicey cited no authority in support of his assertion; nor did he explain quite what he meant by it. An explanation would have been in order, for the statement that a rule is not enforced by courts is ambiguous. It might, on the one hand, be an external, empirical, statement meaning nothing more than that courts are not in the habit of enforcing the rule—perhaps because nobody ever seeks enforcement in court.[32] Consider for example the statement that 'contracts for less than $10 are not enforced by the Courts.' It may well be true in this external sense, because nobody ever seeks judicial enforcement of a contract for a trivial amount of money. But the statement that a rule is not enforced by courts might also be an internal statement meaning that courts will not enforce the rule, even if faced with such a demand. The statement about contracts for less than $10 not being enforced is not true in this sense; these contracts are perhaps not enforced, but they are nonetheless enforceable. So while one can say that 'contracts for less than $10 are not enforced by the courts,' it does not follow that they are 'not really contracts at all.'

[28] ibid 877–78.
[29] ibid 878 (emphasis added).
[30] ibid 877.
[31] Dicey (n 1) 23.
[32] See Hart (n 5) 102–103 on external and internal statements.

At the time when Dicey wrote about conventions, his remark was only true in the external sense. Conventions were not enforced because nobody had ever sought to enforce one. But there was no basis to conclude that they were not enforceable.[33] Things are of course different now. In the *Patriation Reference*, the Supreme Court of Canada expressly refused demands for enforcement of a constitutional convention the existence of which it went on to recognise.

The Court's holding that conventions were not part of constitutional law can be restated, using Hart's terminology, as a statement that conventions do not count among the sources of law contemplated by the existing rule of recognition in the Commonwealth's legal systems. In a sophisticated legal system, the rule of recognition identifies rules of the system 'by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions.'[34] In the Commonwealth, the rule of recognition points to legislation and judicial decisions as sources of law; in jurisdictions which have entrenched constitutions, these too are a distinct source of law. Conventions, originating in political practice, do not derive from any of these sources.

But the rule of recognition does not lead an ethereal existence; it is an inference from the current practice of the officials of a legal system, especially the judges.[35] It identifies what they consider to be sources of valid law. And thoughts on this subject are not immutable, contrary to Munro's assertion that '[l]aw comes into being in only a few recognised ways [and] the categories of law are closed.'[36] What is thought to be a matter of legally optional conduct today might become the subject of a legal obligation tomorrow, and might cease being so at some later date, if the relevant legal officials' opinion on this point shifts. In deciding cases 'on the fringes of the fundamental rules which specify the criteria of legal validity', courts are in a position to change the rule of recognition itself.[37] The current rule of recognition excludes conventions. But 'when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.'[38] For example, the Supreme Court of Canada decided that it could resolve difficult constitutional cases by reference not only to constitutional text and judicial precedent, but also to underlying constitutional principles, such as the rule of law and judicial independence.[39]

[33] There is a more fundamental flaw in Dicey's reasoning—his assumption that only enforceable rules are even capable of being legal—but I will consider it in part II.2.(b) below.

[34] Hart (n 5) 95.

[35] ibid 116.

[36] Munro (n 4) 232.

[37] Hart (n 5) 153.

[38] ibid (emphasis in the original); see also Barber (n 20) 93 (describing this process as 'juridification through bare-faced judicial fiat', which 'is perfectly possible' because '[j]udges often have more power to change the law than the legal system accords them'.

[39] See respectively *Re Manitoba Language Rights* [1985] 1 SCR 721 and *Reference re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 (SCC).

Thus concluding that a rule—say a constitutional convention—is not contemplated by the present rule of recognition should not end the story. The questions immediately arise whether it could, and ought to, be contemplated. Therefore it is not surprising that in the *Patriation Reference* the Supreme Court of Canada discussed not only prior cases in which enforcement of conventions was, in its opinion, either not granted or indeed expressly rejected,[40] and which thus supported what I have termed above the weaker justification for the distinction between law and conventions, but also reasons for concluding that conventions *could not be* or *ought not to be* judicially enforced, supporting the stronger justification for the distinction. I turn now to a consideration of such reasons, both those offered by the Court and by others.

2 Are Conventions Incapable of Being Law?

(a) Conflict with Existing Law

One reason, advanced by the Supreme Court of Canada in the *Patriation Reference*, is that conventions 'are generally in conflict with the legal rules . . . and the courts are bound to enforce the legal rules.'[41] Stated this way, however, the argument is question-begging. As Ronald Dworkin notes, everybody agrees that the courts are bound to obey the law; the difficulty is that there is disagreement over what the law is, and indeed over what its 'grounds' are.[42] If conventions are among the grounds of law that the courts can apply, the argument appears to lose its force, and indeed its meaning.

It can, however, be restated more narrowly, yet more powerfully. There is, in a sophisticated legal system, a hierarchy of rules, according to which some take precedence over others in case of conflict.[43] In the legal systems of the Commonwealth, rules first articulated by courts give way to those set out in legislation.[44] Because conventions, if recognised among the 'grounds of law', would belong to the same category, they ought to give way, in case of conflict, to clear provisions of (constitutional) legislation.

Put this way, the argument is more logical,[45] but its scope is narrow, for two reasons. First, it is important not to exaggerate the prevalence of conflict between conventions and constitutional provisions, as the Supreme Court of Canada has

[40] *Re: Resolution to amend the Constitution* (n 3) 775–83.
[41] ibid 880–81.
[42] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 5–6.
[43] Hart (n 5) 106.
[44] This is the effect of the principle of Parliamentary sovereignty, expounded for example by Dicey (n 1) 37–38.
[45] Which is not to say that it would be, in Canada anyway, legally correct, for the Supreme Court of Canada has held, in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 (SCC), that Parliamentary privilege, another set of rules political in origin but recognised by courts as part of the common law, is at the same hierarchical level as the written provisions of the Canadian constitution.

done in the *Patriation Reference*.[46] No real conflict arises between a legal rule and a conventional one where the former is permissive and the latter merely restricts the discretion conferred by the former, so that it is possible to act in conformity with both.[47]

Second, many legal rules which conventions contradict are not laid down in constitutional or ordinary legislation, but are part of the common law. Many conventions in Canada, and perhaps more in the United Kingdom, contradict or modify no legislated rule, but rather rules concerning the royal prerogative,[48] which are part of the common law. If, for example, the Queen refuses assent to a Bill passed by the House of Commons and the Lords, and the constitutionality of her action is challenged in court, it is no answer that 'the courts would be bound to enforce the law', according to which she 'could refuse assent to every Bill passed by both Houses of Parliament,'[49] rather than the convention requiring her to assent. The 'law' appealed to is a part of the royal prerogative, and 'the King hath no prerogative but that which the law of the land allows him'.[50] The common law is capable of redefinition by courts and, as Hart suggested, it is so also in constitutional cases. Thus courts can change the common law rule allowing the monarch to refuse assent to parliamentary Bills, either by recognising a duty to assent or simply treating all Bills passed by the two Houses of Parliament as law, whether or not they receive royal assent. Respect for precedent and considerations of separation of powers may militate against such a change of the law, but in sufficiently grave circumstances the principle to which a constitutional convention gives effect—such as democracy in our example—could outweigh them.

(b) Conventions and Secondary Rules

Many explanations advanced by supporters of the distinction have to do with conventions' complexity and indeterminacy, and hence the difficulty for courts to deal with them. It is possible to restate again the objections in Hartian terms. Conventions, in my view, are a set of primary rules, and as Hart pointed out, a system of primary rules suffers from considerable inherent defects: it is uncertain,

[46] See Fabien Gélinas, 'Les conventions, le droit et la Constitution du Canada dans le renvoi sur la "secession" du Québec: le fantôme du rapatriement' (1997) 57 Revue du Barreau 291, 301–02 (arguing that even in such cases, the conclusion that there is a conflict between convention and law rests on a needlessly broad understanding of the notion of conflict inconsistent with that usually used by the Supreme Court of Canada in constitutional cases).

[47] ibid. See also Jaconelli, 'Do Constitutional Conventions Bind?' (n 13) 154–55 (observing that contrary to duty-imposing rules, to which the actor must conform, '[p]ower-conferring legal rules . . . permit scope for the play of constitutional conventions').

[48] See Dicey (n 1) 418, suggesting that most conventions 'will be found . . . on careful examination [to be] rules for determining the mode in which the discretionary powers of the Crown . . . ought to be exercised.' These discretionary powers of the crown are, as Dicey explains, what is called the royal prerogative: at 420.

[49] *Re: Resolution to amend the Constitution* (n 3) 881.

[50] *Case of Proclamations* (1610) 12 Co Rep 74, 77 ER 1352.

static, and inefficient.[51] To make such a system 'step from the pre-legal into the legal world',[52] it is necessary to surround it with secondary rules of recognition, change, and adjudication. Barber describes this process as 'formalization'.[53] The alleged difficulty we are now confronting is that no such rules are available to supplement the constitutional conventions a court might want to introduce into the legal system.

Take, first, the problem of uncertainty. 'The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of . . . a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group.'[54] Munro argues strenuously that such 'conclusive affirmative indications' do not exist for conventions:

> There is no authoritative mark of [the conventions'] existence, so that uncertainty abounds. The sources of convention are open-ended and diverse, and no importance attaches to them. Conventions have no unifying feature . . . The existence of a convention is tested, so far as it can be, by its individual content—an inference has to be made according to the strength and purpose of the particular political practice involved.[55]

This claim is unfounded. The extent of uncertainty over the existence of conventions is easily exaggerated, and students of constitutional conventions are able to identify a great many of them.[56] Contrary to Munro's assertion, conventions do have unifying features which can form the basis of a rule of recognition incorporating them. These features are those identified by Jennings: precedents, the opinion that the actors in the precedents were following a binding rule, and the reason for the rule.[57] And contrary to Dicey's claim that the matters were too complex or 'too high' for a lawyer,[58] it has been applied by courts—notably by the Supreme Court of Canada in the *Patriation Reference*.[59] Hart thought that in an advanced legal system the rule of recognition is likely to be complex.[60]

[51] Hart (n 5) 92–93.
[52] ibid 94.
[53] Barber (n 20) 97.
[54] ibid.
[55] Munro (n 4) 232–33.
[56] See Dicey (n 1) 416–18 for a list; Andrew Heard, *Canadian Constitutional Conventions: the Marriage of Law and Politics* (OUP 1991) is a much more comprehensive study.
[57] See text accompanying notes 19–20.
[58] A claim in any event belied by Dicey's own thorough and illuminating, albeit ultimately misguided, discussion of conventions.
[59] *Re: Resolution to amend the Constitution* (n 3) 888–909; see also *Conacher v Canada (Prime Minister)* 2009 FC 920, [2010] 3 FCR 411 [33]–[47], affirmed by *Conacher v Canada (Prime Minister)* 2010 FCA 131, for a very recent application of the same rule by the Federal Court of Canada (which concluded that an alleged convention limiting the Prime Minister's power to advise the Governor General to dissolve Parliament did not exist); for a UK example, see *A-G v Jonathan Cape Ltd* [1975] QB 752 at 770B ('find[ing] overwhelming evidence that the doctrine of joint responsibility is generally understood and practised').
[60] Hart (n 5) 95.

If the relevant legal officials are capable of applying it, its complexity does not present any intractable problem.

Before concluding this discussion on uncertainty, I wish to say something about a very different sense in which uncertainty of conventions has been argued to be an impediment to their recognition as legal rules. Geoffrey Marshall asserts that conventions are 'debatable in their implications. A convention's existence may not be doubted but many of its applications to particular factual situations may be open to argument.'[61] Uncertainty, in this sense, is not usually thought to be a fundamental defect sufficient to deny a rule or group of rules the status of law. The same problem, Jaconelli points out, affects common law rules:

> Those who are familiar with the problem of extrapolating rules from the reported decisions of the courts will recognise the difficulties [of identifying contents of a convention]. So often the ambit of a rule appears to have been conclusively determined, until a hitherto unenvisaged set of circumstances arises, thereby casting doubt on whether all the qualifications and exceptions to the rule had been comprehensively listed.[62]

Nevertheless, as Jaconelli later recognised, 'conventions, like any other rule, may be subject to exceptions—even exceptions which have yet to be exhaustively enumerated—and yet still retain that quality'[63] of rule. Although clarity is one element of the 'inner morality of law' described by Lon Fuller, and a 'total failure' of a system of rules to be clear 'results in something that is not properly called a legal system at all',[64] it would be disingenuous to pretend that conventions fail the clarity test to such a degree. Although some instances of application may be highly contentious, as Marshall argues, many will be clear. The Queen, when presented with a Bill passed by the Commons and the Lords, simply has to sign it. Furthermore, the vagueness of, for example, the provisions of a written constitution, and the contentiousness of their application, are not thought to render them unfit for being law.

The arguments regarding the uncertainty of conventions being unpersuasive, we may move on to the second alleged inherent vice of conventions as potential true legal rules. Munro claims that 'there is . . . no definite means of knowing when a new convention comes into being or an old one is amended or abolished.'[65] In the absence of such means, we are to presume that the old system of rules remains unchanged indefinitely—that is what Hart meant when he referred to 'the static quality of the regime of primary rules', 'The remedy for [which] consists in the introduction of what we shall call 'rules of change'. The simplest form of such a rule is that which empowers an individual or body of persons to introduce new

[61] Geoffrey Marshall, 'What Are Constitutional Conventions?' (1985) 38 Parliamentary Affairs 33, 34; see also Jaconelli, 'The Nature of Constitutional Convention' (n 12) 32.
[62] Jaconelli, 'The Nature of Constitutional Convention' (n 12) 33.
[63] Jaconelli, 'Do Constitutional Conventions Bind?' (n 13) 166.
[64] Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1969) 39.
[65] Munro (n 4) 233.

primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules.'[66]

There is some truth to Munro's argument, but it misses the point. Admittedly, given the importance of political precedents in the rule of recognition for constitutional conventions, and the potential difficulty of interpreting the significance of the precedents, identifying the point at which conventional rules are changed is not easy.[67] However, rules of change exist for the benefit of the participants in the legal system, not the legal historians; their purpose is to make legal change possible, not to allow one to pinpoint the moment when it has been effected. By that benchmark, conventions do well. Their very *raison d'être* is to allow a polity's constitution to change in accordance with the prevailing political values; their value is sometimes said to be their greater flexibility than that of traditional sources of law.[68] Thus although there may be no easily ascertainable 'rules of change' specifying how conventions can be brought into existence, there can be no doubt that conventional rules are in fact not static; they do change as a result of the behaviour of the relevant political actors.

The situation of conventions in this respect is similar to that of the common law. The rules of the common law change, and sometimes this change is effected by judges explicitly, so that it is possible to say that they apply a clear rule of change authorising them to modify the common law.[69] In other cases, however, the situation is more ambiguous: judges effect change by distinguishing past decisions or interpreting precedents or legislation, but do not claim to change the law. Although in retrospect, it might be clear that the law is now different from what it was at some past date as a result of this process, it might be very difficult to pinpoint the precise point in a line of cases at which the change occurred.

It is important to note, however, that recognition of conventions as legal rules may have an important effect on the rules of change associated with them. While judicial enforcement would have no effect on the ability of political actors to create new conventions by subjecting their exercising of legal discretion to new constraints, it may prevent them from departing from or modifying existing conventions through practice. But the true effect of this difficulty may not be very significant, for three reasons. First, social pressure already makes it difficult for political actors to violate established conventions—that is why we can speak of them as rules to begin with. Second, if a political actor's attempt to evade the

[66] Hart (n 5) 95.

[67] There may be a limited exception to this general observation, namely, a class of conventions created by deliberate explicit agreement: Peter W Hogg, *Constitutional Law of Canada* (Carswell 2007) 27; but as Hogg notes, such conventions might only exist in the area of the relations between Commonwealth countries, and not within their domestic constitutional systems. *Conacher* (n 58) illustrates the difficulty of attempting to introduce such a convention into a domestic constitutional system.

[68] See text accompanying notes 9–11.

[69] See *R v Salituro* [1991] 3 SCR 654 (SCC). The court held 'that in appropriate cases, judges can and should change the common law'.

application of a convention is based on some cogent constitutional principle, a court may be persuaded to adopt a new rule, reversing its precedents if need be. And third, the circumstances in which political actors may seek to change established conventions are likely to be those of constitutional crisis; in such a situation, the possibility that they will simply disregard a judicial order is, for better or worse, not to be discounted.

These observations bring us to the third supposed difficulty with the recognition of conventions as legal rules—the impossibility of their enforcement, except by uncertain political sanction. The suggestion is that conventions cannot be considered legal rules in the absence of 'rules of adjudication',[70] 'intended to remedy the inefficiency of . . . diffused social pressure [by] empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.'[71]

Here I briefly return to Dicey's claim that conventions are not legal rules 'since they are not enforced by the Courts.'[72] Dicey simply assumes that a rule must be enforced (or at least enforceable) in order to be a rule of law. This is not obviously so. Criticising Hart's endorsement of the Diceyan law-convention distinction, Waldron suggests that the issue of judicial enforcement is not relevant to the question of the status of conventions because, on Hart's own view, for secondary rules, which he considers conventions to be, 'the internal aspect is the key to their normativity.'[73] But even with primary rules, which conventions are in my opinion, judicial sanction is not a necessary element so long as the internal aspect is present, which it has to be for a convention to exist (recall Jennings' requirement that actors in the relevant precedents must have believed that they were bound by the rule). Certain rules might be non-justiciable, or give rise to 'political questions', or not lend themselves to judicial remedies, but not cease being legal.[74] It may be that conventions belong to the category of non-justiciable rules, or more likely that their enforcement would give rise to political questions unsuitable for judicial resolution.[75]

That said, this conclusion seems to me premature. It is important to avoid confusing two questions: whether rules of adjudication empowering judges to

[70] Hart (n 5) 97.
[71] ibid 96.
[72] Dicey (n 1) 23.
[73] Waldron (n 4) 1709.
[74] See eg *Official Languages Act*, RSC 1985, c 31 (4th Supp) imposing obligations on the government of Canada, but authorising courts to provide remedies for the non-fulfilment of only some of these obligations: subs 77(1); US Constitution art IV § 4, providing a guarantee of republican government to the states, and *Luther v Borden* 48 US (7 How) 1 (1849), holding that its enforcement is a political question; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (*Khadr (SCC)*), holding that while the violation of the respondent's rights could properly be recognised by courts, it was inappropriate to grant him a remedy beyond such recognition; see also Barber (n 20) 95 for a discussion of legal rules not enforceable by courts.
[75] This last interpretation would be consistent with the outcome of the *Patriation Reference*: courts can recognise conventions, but not enforce them; simply declaring conventions non-justiciable would not be consistent with the practice of Canadian courts.

make authoritative determinations of a convention's violation *do now* exist, and whether such rules *could* exist. Munro is guilty of such confusion when he writes that 'There is . . . no final judge of [the conventions'] violation or interpretation, any more than of their existence.' This disregards the fact that the distinction between primary and secondary rules means that a system of primary rules has no internal resources to determine by whom it is applied (just as it has no internal resources to determine its contents or the modes of its change). Rules of adjudication, like other secondary rules, must be added to this system from outside. A criminal code might contain a list of offences and applicable punishments, but no provisions determining who is to administer it. It can still be law, though for the effectiveness of the penal system, it will be best if it is accompanied by a code of criminal procedure specifying who is to administer the criminal code, and how. So from saying that there is no judge of conventions' existence or violation, it does not follow that there *could be* no such judge—or that the existing courts are unfit for the role.

The reasons of the Supreme Court of Canada in the *Patriation Reference* suggest a more interesting argument. It is that no judicial remedy could serve the enforcement of conventions. For example, faced with the monarch's refusal to assent to a Bill passed by Parliament, courts have no choice but to recognise that the Bill is not law.[76] Similarly,

> if after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office . . . there is nothing the courts could do about it . . . An order or a regulation passed by a minister under statutory authority and otherwise valid could not be invalidated on the ground that, by convention, the minister ought no longer be a minister. A writ of *quo warranto* aimed at ministers, assuming that *quo warranto* lies against a minister of the Crown, which is very doubtful, would be of no avail to remove them from office. Required to say by what warrant they occupy their ministerial office, they would answer that they occupy it by the pleasure of the Crown under a commission issued by the Crown and this answer would be a complete one at law, for at law the government is in office by the pleasure of the Crown although by convention it is there by the will of the people.[77]

Freeman probably had something similar in mind when he noted, in a passage which Dicey quotes with almost unreserved approval, that a ministry continuing in office despite not enjoying the confidence of the House of Commons would not thereby be committing an illegal act which could be the subject of a prosecution.[78]

But this argument too proves unpersuasive on further consideration. Indeed, it seems to collapse again into a circular argument based on the current contents of the rule of recognition. For the Supreme Court's explanation for why courts could not issue a remedy for a violation of the convention is really nothing more than

[76] *Re: Resolution to amend the Constitution* (n 3) 881.
[77] ibid 882.
[78] Dicey (n 1) 415, quoting Freeman (n 8) 109–10.

that the conventional rule contradicts the old legal one. Yet if the court is prepared to recognise that a ministry's duty to resign once it has lost an election is a legal one, then it would be no answer, to the question by what warrant they continue in office, to say only that Her Majesty appointed them to it, if it is shown that they lost an election since that appointment.

Whatever force there may be to the Court's argument is in the possibility that there may be no procedural vehicle available to a court to give effect to the conventional duties it is prepared to recognise as legal. Yet not only does it not follow that such recognition is impossible,[79] but this statement itself is incorrect.

Now it is true that the courts' remedial powers with respect to conventions may be constrained. Perhaps, as the Supreme Court of Canada suggests in the *Patriation Reference*, *quo warranto* does not lie against a minister of the Crown; certainly in Canada an injunction does not lie against the Crown itself (or its servants),[80] making it apparently impossible to force the monarch, for example, to assent to a Bill. This apparent difficulty highlights the distinction between rules of recognition and rules of adjudication. The two are closely connected because, as Hart explains, courts are able to modify the rule of recognition.[81] In doing so, they will often *eo ipso* modify the rule of adjudication, empowering themselves to make authoritative determinations of violations of primary rules now encompassed by the modified rule of recognition. But this will not always be so: a modification of the rule of recognition changes a court's subject-matter jurisdiction, but not its remedial powers; it changes the kinds of questions it is competent to answer, but not the kinds of answers it is competent to give.

However, this difficulty is not significant when applied to constitutional conventions. For even assuming that the courts are prevented from issuing any mandatory remedies that might serve to enforce conventions, they would not be altogether helpless in this enterprise. The remedy, as in proceedings against the Crown where an injunction is not available, would be a declaration.[82]

It may be objected that, not being coercive, this is not a real remedy; that a meaningful remedy is one backed by threat of sanction. Yet although it may of course be possible for political actors whose duties are the subject of a declaration to avoid fulfilling these duties, no legal system is proof against government officials attempting to evade or flatly disobeying court orders. As Alexander Hamilton observed, 'the judiciary . . . has no influence over either the sword or the purse' of the polity;[83] it is no position to coerce the other branches of government to comply with its decisions. Whatever the role of coercion in securing the effectiveness of the legal system as a whole when applied to private citizens, it can have none when

[79] See text accompanying notes 64–70.
[80] Crown Liability and Proceedings Act, RSC 1985, c C–50, s 22.
[81] See text accompanying notes 32–34.
[82] Crown Liability and Proceedings Act (n 80).
[83] Alexander Hamilton, 'No. 78' in *The Federalist on the New Constitution* (First Published 1788, Hallowell 1831) 384, 385.

securing the application of law to the apparatus of government. An order of damages is no more coercive when made against the state than a declaration, because there is nothing that can coerce the state to pay up.

In cases involving the state, the judiciary's lack of coercive capabilities matters little insofar as for a legal system to even exist, its secondary rules, including rules of adjudication, empowering courts to make authoritative and binding determinations of law, 'must be effectively accepted as common public standards of official behaviour by its officials.'[84] Some resistance, probably taking the form of evasion rather than outright refusal to follow judicial decisions, might be possible;[85] but any serious confrontation between the political branches and the judges will arguably result in a constitutional crisis. It is noteworthy, in this connection, that the Supreme Court's answer to the conventional question in the *Patriation Reference* had a practical effect. Despite the Court's holding that the Canadian government was legally free to seek the patriation of the constitution without any provincial consent, the government in fact chose to comply with its conventional obligations articulated by the Court and sought (and eventually obtained) substantial provincial consent to its proposed course of action.[86]

Thus, arguments having to do with the absence of secondary rules applicable to constitutional conventions cannot support the contention that conventions are fundamentally different from legal rules and incapable of being recognised as such. These rules are not yet part of the Commonwealth's legal systems to be sure, and Barber is right that laws and conventions differ in the degree of their 'formalization'.[87] But he is also right to conclude that 'the formalizing process identified by Hart could occur to constitutional conventions'.[88] What Barber has in mind is mostly a gradual process of extra-judicial formalisation, driven by political actors.[89] But should the courts of a Commonwealth polity be willing to take the initiative and modify the ultimate rule of recognition to embrace conventions, the secondary rules necessary to integrate conventions into the existing legal system are readily available.

[84] Hart (n 5) 116.

[85] See *Khadr v Canada*, 2010 FC 715 [2010] 4 FCR 36 [19]–[30], for the sorry tale of the Canadian government's actions in the wake of *Khadr (SCC)* (n 74): the government did next to nothing to remedy the violations of Mr Khadr's rights which the Supreme Court had recognised. (The Federal Court's decision was appealed, and its effect was stayed by *Canada (Prime Minister) v Khadr* [2010] FCA 199.)

[86] See Heard (n 56) 154: '[T]he Supreme Court's declaration in the 1981 *Patriation Reference* that unilateral amendment would breach existing conventions may have resulted in the enforcement of those conventions, since it has been widely credited with spurring political leaders on to reach an accord.'

[87] Barber (n 20) 89.

[88] ibid 98.

[89] ibid 99–101 for an argument that such a process is taking place in the United Kingdom with respect to some of the conventions of responsible government. At 95, however, Barber also says that 'on rare occasions, the direct enforcement of conventions by courts is both desirable and constitutional'.

3 The Political Origin of Conventions

I will deal briefly with a remaining justification for the distinction between law and conventions, which concerns the political origin of the latter. Dicey affected to 'find these matters too high for [him as a lawyer]. Their practical solution must be left to the profound wisdom of Members of Parliament; their speculative solution belongs to the province of political theorists'.[90] And the Supreme Court of Canada, in the *Patriation Reference*, rejected out of hand the idea that 'there was a common law of constitutional law, but originating in political practice'.[91]

The argument that lawyers are somehow incapable of dealing with political realities is either confused or disingenuous. There is of course a common law of constitutional law, as both Dicey and the Supreme Court well knew.[92] Courts have decided that the King cannot decide cases as a judge, or make laws by proclamation.[93] Could they not also decide that he is not at liberty to refuse assent to a Bill passed by the two Houses of Parliament?[94]

In the *Patriation Reference*, the Court asserted that 'What is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute'.[95] Fabien Gélinas suggests that this is a rejection of the idea that the common law can *evolve* in response to changing political values (rather than that it cannot reflect such values at all).[96] But, he notes, even so reformulated, the argument is unpersuasive: the common law is, in other cases, still evolving, for example to limit the discretionary powers of the Crown.[97] And 'what could be the justification of [this] evolution . . . if not its (broadly) political desirability?'[98]

What seems to be for the Supreme Court the key difference between law and conventions is not that that latter are desirable as a matter of political theory, but that they 'originat[e] in political practice'.[99] Constitutional common law might have political implications; it might make political sense and be politically desirable. But its origin can be traced to the courts, and not to the political arena. Unlike conventions, the common law 'is the product of judicial effort, based on

[90] Dicey (n 1) 20.
[91] *Re: Resolution to amend the Constitution* (n 3) 784.
[92] Dicey (n 1) 192: 'Our constitution, in short, is a judge-made constitution'; *Re: Resolution to amend the Constitution* (n 3) 876–77.
[93] *Prohibitions del Roy* (1607) 12 Co Rep 63, 77 ER 1342; *Anonymous* (Case of Proclamations) (1610) 12 Co Rep 74, 77 ER 1352.
[94] Waldron (n 4) 1706–07: 'A crisis in which . . . the Royal Assent [is] withheld might well prompt the courts to act as though Royal Assent were dispensable and to begin recognising as law bills enacted by Parliament, even though they had not been enacted by the Queen in Parliament.'
[95] *Re: Resolution to amend the Constitution* (n 3) 784.
[96] Gélinas (n 46) 312–13.
[97] ibid 317–18.
[98] ibid 312–13 (translation mine) ('en fin d'analyse, quelle pourrait être la justification d'une évolution de la common law en matière constitutionnelle si ce n'est sa désirabilité au plan politique (entendu au sens large)?').
[99] *Re: Resolution to amend the Constitution* (n 3) 784.

justiciable issues which have attained legal formulation and are subject to modification and even reversal by the courts which gave them birth when acting within their role in the state in obedience to statutes or constitutional directives. No such parental role is played by the courts with respect to conventions'.[100] Underlying the Court's argument is an idea of a water-tight separation between the legal and the extra-legal worlds. The law, on this view, is a self-contained vessel into which nothing can flow from the outside. The last part of this article will argue that this idea is misguided, and should not be allowed to prevent judicial enforcement of at least some conventions.

Part III: Constitutional Practice, Theory, and Law

The account of law as a self-contained realm thoroughly separate from other norms that exist in society endorsed by the Supreme Court in the *Patriation Reference* is inadequate, because constitutional values change from century to century,[101] yet a gradual evolution of judicial precedents, such as might occur in the various areas of private law to reflect social changes, may not be possible in the area of constitutional law. Gélinas explains that 'constitutional conventions sometimes emerge too quickly to allow courts adequately to integrate them, courts having only those opportunities that are given to them by others to adapt rules of law'.[102]

As Hart points out, to apply old rules in changed circumstances, 'whatever may be the social consequences . . . is to secure a measure of certainty . . . at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant'.[103] But in the constitutional context, what is at stake is not only the substantive wisdom of a judicial decision, which might sometimes rightly be sacrificed in the interest of legal certainty (as happens when a court declines to revisit a contested precedent despite thinking that it may well be wrong).[104] In constitutional cases, insisting on 'too clear a boundary between court-enforceable constitutional laws and conventional rules might see the courts enforcing out-dated rules that not only lack any political legitimacy but may also be destructive'.[105] In such cases, the courts' choice of legal theory may prove crucial; what might otherwise be the stuff of academic debates may determine a polity's future.

[100] ibid 775.
[101] See eg Holdsworth (n 6) 162–64, for a brief sketch of the evolution of constitutional values in England and the UK.
[102] Gélinas (n 46) 319 (translation mine) ('[L]es conventions constitutionnelles émergent parfois trop rapidement pour permettre aux tribunaux de les intégrer de manière adéquate, ces derniers ne disposant que des occasions que l'on veut bien leur donner pour adapter les règles de droit.')
[103] Hart (n 5) 129–30.
[104] As a plurality of the US Supreme Court famously did in *Planned Parenthood v Casey*, 505 US 833 (1992).
[105] Heard (n 56) 3.

What, then, is the jurisprudential approach that courts should take when confronted with cases with conventional aspects? Waldron argues that Hart's positivism, properly applied, has sufficient resources to deal with such cases. Hart himself did not think so, endorsing Dicey's distinction between law and convention without any discussion.[106] Waldron, however, believes that he was wrong to do so. He notes that, as developed by Hart, 'Modern positivism depends on the view that certain basic rules of the legal system consist of nothing more than certain generally accepted social practices, with an internal normative point of view.'[107] Conventions—his example of the convention requiring the monarch to assent to a Bill passed by the two Houses of Parliament at any rate—are among such basic rules, and are thus legal despite their having arisen from social (or political) practice.

The difficulty with this attempt to rescue Hart's positivism is that most conventions, fundamental though they are to the Commonwealth's *political* systems, are not among the basic secondary rules of the *legal* systems of which Waldron argues they are part. The conventions of responsible government, for example, are of little relevance to the day-to-day working of the legal system. If the Queen does not appoint as Prime Minister the person most likely to command the confidence of the House of Commons, this need not lead the courts to wonder whether they should change their understanding of what counts as law (as the Queen's failure to assent to a Bill might). As I argued above, most conventions are not secondary rules at all, but primary ones (and all conventions can be understood as primary rules).[108] And with primary rules, '. . . the felt need, among modern legal positivists, to draw a sharp line between law and morality'[109] and accordingly to insist on imposition of the rules rather than their grounding in social practice, becomes much stronger than with secondary ones.

Yet, like Waldron, I believe that when we consider conventions we must resist the temptation to draw a sharp line between law and political morality. Because of the importance of conventions to our political, if not always to our legal, practice, drawing such a line carries the risk, highlighted by Andrew Heard, that '[b]y insisting on a rigid division between law and convention . . . jurists may imperil our constitutional system.'[110] However, the theories of law best equipped to help us resist this temptation are, in my view, those that emphasise the importance of social practice not just for fundamental secondary norms, such as Hart's rule of recognition, but for the legal system as a whole, including its primary norms.

[106] Hart (n 5) 111; Waldron (n 4) 1709–10 believes this is an 'emphatic denial' of the possibility that conventions might be legal rules; while I do not find Hart's language 'emphatic', his uncritical acceptance of what Waldron rightly describes as 'the comparatively mindless position of British constitutionalists' is striking.

[107] Waldron (n 4) 1712.

[108] See text accompanying notes 13–15.

[109] Waldron (n 4) 1710.

[110] Heard (n 56) 156.

One understanding of a legal system as consisting primarily of rules having extra-legal origins was developed by FA Hayek in *Rules and Order*, the first volume of his book *Law, Legislation and Liberty*.[111] I will briefly summarise this model in order to explain how it could apply to constitutional conventions.

The basis of Hayek's account of law is his opposition to 'the whole conception of legal positivism which derives all law from the will of a legislator.'[112] Law, in the original sense of the word, is the product of spontaneous development rather than deliberate legislation. It arose in the process of individuals' adjusting their behaviour to match the expectations of others, and indeed 'individuals had learned to observe (and enforce) rules of conduct long before such rules could be expressed in words.'[113] Knowledge of the rules of one's society is 'a "knowledge how" to act and not . . . a "knowledge that" [the rules] could be expressed in such and such terms.'[114] It is acquired by imitation rather than by study.

Strikingly, at least in comparison with a positivist account of law such as Hart's, there is no place in Hayek's account for a rule of recognition. The transition between discussion of 'rules of conduct' and 'law' is quite seamless.[115] Law is simply those rules that are 'enforced'.[116] What accounts for its normative force is not the will of a sovereign but the advantage a group derives from its members following common rules, even when they are not aware that they are doing so.

At some point in the development of society, it becomes possible and indeed necessary to articulate some of a society's rules 'in a form in which they can be communicated and explicitly taught, deviant behaviour corrected, and differences of opinion about appropriate behaviour decided'.[117] This process of articulation of pre-existing rules, though bound to alter them to some extent because the articulation is difficult and often inaccurate, will not be regarded as altering the rules—the legislator[118] is not regarded as having the power to alter pre-existing rules.[119] The rules followed and enforced in society do continue to change, but 'the changes which occur [are] not the result of intention or design of a law-maker'.[120] The new rules, when they appear, must have 'developed outside the law enforced by the rulers, while the latter tended to become rigid precisely to the extent to which it had been articulated'.[121]

I do not mean to suggest that Hayek's account of the law is always preferable to a positivist one. As Hayek recognised, even legal orders which are based on

111 FA Hayek, *Law Legislation and Liberty* (Routledge & Kegan Paul 1973) vol 1.
112 ibid 73.
113 ibid 74.
114 ibid 76.
115 ibid 81, where after a long discussion of the emergence and development of 'rules', Hayek shifts to discussing 'law'.
116 ibid 72.
117 ibid 43.
118 The word literally means 'law-bearer', not 'law-maker'.
119 Hayek (n 111) 78.
120 ibid 81.
121 ibid.

spontaneously developed rules will include a great deal of deliberately enacted ones, and the insights of positivist theories are valuable to understand such rules, to which they are primarily turned. Nor do I mean to endorse Hayek's rather dismissive attitude towards deliberately made 'rules of organization', which he contrasted with rules of conduct and did not think worthy of the title of 'law'. Importantly, I believe that Hayek was wrong to claim that constitutional rules are always 'rules of organization' which do 'not define what law and justice are'.[122] On the contrary, some constitutional rules—and conventions first and foremost—are rules of just (political) conduct, dependent as they are on the prevailing political morality of a polity.

But Hayek's account is valuable for its emphasis on the spontaneous, social origin of (many) 'rules of just conduct', even when they are articulated and enforced by deliberately created institutions such as courts. The task of the courts, in dealing with spontaneously developed rules, is to protect 'the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices'[123] current in their society. In order to do so, they must find out what these practices are and 'tell [the parties] what ought to have guided their expectations, not because anyone had told them before that this was the rule, but because this was the established custom which they ought to have known'.[124] It is to discover rather than make law, articulating it for the first time or refining previous articulations, in response to the development of rules which occurs in the broader society. The judge will advert to precedent as the illustration of past practice and past articulations of rules, but keep in mind that precedent is only a statement of the law, not the law itself.[125]

This view is contrary to the positivist accounts of law based on a rule of recognition which points only to certain formal sources (such as legislation), and not to social practice, which cannot become law unless reflected in such a source. Jaconelli's claim, made as part of his defence of the distinction between law and convention, that 'long-standing social norms do not give rise to legal rights and duties that correspond in content to the relevant practices,'[126] reflects such a positivist view. But it is contradicted by the practice of courts. Allan points to the doctrine of legitimate expectations as an example. A government's past practice in its relations with those subject to its powers can create legitimate expectations that it will be followed, and courts can impose on the government a duty to adhere to such practices.[127] As a result, '[p]ublic law and political practice are no longer

[122] ibid 135.
[123] ibid 86.
[124] ibid 87.
[125] ibid 86. Hayek quotes Lord Mansfield's famous statement in *R v Bembridge* (1783) 3 Doug 327, 332; 99 ER 679, 681, that '[t]he law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases'.
[126] Jaconelli, 'Do Constitutional Conventions Bind?' (n 13) 154.
[127] See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (House of Lords); *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (SCC).

neatly severable'.[128] And public law is not the only area where the practice of the relevant actors provides the content of obligations enforced by courts,[129] though it is the most relevant for our topic.

On an understanding of the law as rooted in social practice, and the courts' role as consisting in discovering and articulating rules spontaneously developed in society, conventions are not different from other kinds of rules which the courts can, and ought to, enforce. They develop spontaneously as a 'system of concordant actions and expectations'[130] among a specific section of society, the political actors, just as, say, commercial custom develops in the business community. They are followed before they can be articulated, and when they are articulated, it is at first hesitatingly and imperfectly. Although at the outset this may be only vaguely understood, the adherence of political actors to conventional rules helps the polity realise those values which can then be identified as the reasons for the conventional rules, such as democracy.

Thus when a case comes for decision before a court in which the expectations of (one of) the parties are based on conventions, the court must protect these expectations, as it would protect those based on other spontaneously developed rules (and subject of course to the same restrictions). The court can look at judicial precedent (ie the common law) as an illustration of what expectations were protected in the past, but that does not absolve it from deciding whether the expectations resting on conventions are reasonable in light of the changes which have taken place in society since the previous articulation of the relevant rules. It is to the practices and values of today's society that it must look in identifying the rules applicable to the dispute.

The qualification that courts must give effect to conventional rules and expectations resting on them subject to the same restrictions as with other spontaneously developed rules is important. It means, for example, that in cases of genuine conflict between the relevant conventional rule and the provisions of a statute or entrenched constitutional text, the latter will prevail, as they prevail over other common-law rules. Furthermore, just as problems of justiciability sometimes prevent the courts from intervening in disputes turning on the application of ordinary legal rules, as *Khadr (SCC)* demonstrates,[131] they can also affect cases turning on the application of conventions. When a conventional issue is found not to be justiciable, courts could, even if they consider conventional questions as legal ones, decline to answer them, or to provide a precise remedy.

It is important, however, not to overstate the importance of the limit that justiciability imposes on the courts' capacity to enforce conventions. Jaconelli is wrong to assert that '[i]t is difficult . . . to envisage a constitutional convention

[128] TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45 Cambridge Law Journal 305, 314.
[129] ibid 312 (noting that courts enforce commercial custom).
[130] Jaconelli, 'The Nature of Constitutional Convention' (n 12) 42.
[131] *Khadr (SCC)* (n 74).

which would be apt for judicial enforcement'.[132] In practice, it may well be that political remedies will be more quickly implemented and more effective than legal ones. The Queen can dismiss a ministry which lost a confidence vote without the need for the courts to intervene. But if political remedies are not forthcoming—if for any reason the monarch fails to dismiss a government which lost a confidence vote and refuses to resign office—and the matter is brought to a court, the court could, as suggested above, issue a declaration to the effect that the ministry is acting illegally. If the monarch fails to sign a Bill that has passed the two Houses of Parliament, a court could declare that she has an obligation to do so or, in an appropriate case, simply enforce the Bill as if it had received royal assent.

Consider a real example, the Canadian prorogation crisis of 2008.[133] The Prime Minister, facing a scheduled vote of no-confidence, requested that the Governor-General prorogue Parliament. Following closed-door discussions with the Prime Minister, and consultations with constitutional experts, the request was granted. The propriety of this decision is debatable. Conventions pulled the Governor–General in opposing directions. On the one hand, the principle of responsible government prevents a ministry from continuing in office if it no longer enjoys the confidence of the House of Commons. On the other, a ministry is entitled to remain in office until it actually loses a vote of confidence, and the Governor–General must take the advice of the Prime Minister (or the Cabinet) in office. Could a court have disentangled this knot? Any judicial decision would, no doubt, have been controversial. But so was the one by the Governor–General who, after all, has no greater democratic legitimacy than judges. And a judicial decision has the advantage of being made following a public argument in which those interested can participate as parties or interveners, rather than a discussion behind the closed doors of a vice-regal residence.

Thus there is no reason for a court peremptorily to refuse to consider and apply a rule and enforce it, to the extent of its remedial powers, should the need arise, just because the rule in question is a convention. The decision to resolve or not a case that turns on conventional issues ought to be the result of an analysis of the justiciability of the specific issues of each case. Allan suggests that '[t]he justiciability of a constitutional convention will depend on its normative character and its significance as part of the general constitutional order'.[134] Those conventions founded on nothing more than convenience ought not to be justiciable. But if courts adopt Jennings' test for identifying conventions, as Canadian courts do, such conventions would arguably not be recognised as conventions at all. Rather, the justiciability analysis should focus on the courts' capacity to resolve the issue, which can be impaired by the difficulty either of ascertaining relevant facts (for example,

[132] Jaconelli, 'Do Constitutional Conventions Bind?' (n 13) 162.

[133] See Peter H Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (University of Toronto Press 2009); Adam Drew Perry, 'Book Review: *Parliamentary Democracy in Crisis*' (2010) 43 University of British Colombia Law Review 269 provides a helpful, concise summary of the events.

[134] Allan (n 128) 313.

whether, in the absence of a parliamentary vote, the ministry still enjoys the confidence of the House of Commons) or of crafting a suitable remedy. It may also be impaired, in some cases, by the genuine uncertainty of applicable rules—but it is important not to exaggerate this difficulty. As explained above, courts often face situations where applicable rules are not entirely clear, and this does not prevent them from deciding cases in which these situations arise.[135]

Conclusion

There exists, in the constitutional theory of Commonwealth jurisdictions, a long-standing distinction between constitutional law 'proper' and constitutional conventions—rules of political morality having a shadowy existence beside, above, and underneath the law. Conventions are not recognised as legal rules by the rule of recognition applied by the courts of the Commonwealth. But there is no reason they could not be so recognised. All that would be necessary to effect such a recognition is the addition to the existing legal systems of a limited number of secondary rules which are already available to the courts, and the desire on the part of the courts to change the existing rule of recognition. An understanding of law as giving effect to, rather than neatly separated from, rules and practices existing in the wider society, as outlined by FA Hayek, can supply the impetus for such a desire.

It seems vain to propose, as Munro did, to put an end to the 'tenacious dispute'[136] about the nature of conventions. Yet one can still hope that, in the future, more attention will be devoted to practical questions, such as when conventional issues are justiciable, indicating when it is appropriate for courts to enforce conventions (and when, by contrast, they should leave the task to political actors), who ought to have standing to ask that they do so, and what remedies they should use, than to the theoretical question, on which I have mostly focused here, namely whether conventions generally can *ever* be enforced by courts.

[135] See text accompanying notes 60–63.
[136] Munro (n 4) 218.

BOUNDARIES OF JUDICIAL REVIEW

The Law of Justiciability in Canada
Second Edition

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Columbia because the claim at issue did not concern a specific statute or administrative scheme and was not justiciable.[20]

As justiciability is often raised in public interest standing challenges, much of the case-law relating to justiciability has emerged from the case-law on standing.[21] In *Finlay*, Le Dain J. elaborated upon the relationship between standing and justiciability in the following terms:

> The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability, which Laskin, J., held in *Thorson* to be central to the exercise of the judicial discretion whether or not to recognize public interest standing. Of course, justiciability is always a matter of concern for the courts, but the implication of what was said by Laskin, J., in *Thorson* is that it is a matter of particular concern in the recognition of public interest standing.[22]

In this sense, both the law of standing and the law of justiciability may be said to be concerned with the appropriate boundaries of judicial intervention. This relationship is reviewed in greater detail in chapter six in the context of the procedural features of justiciability.

(b) Justiciability Distinguished from Enforceability

Occasionally, a court will refer to a matter as non-justiciable in the sense that a court will not or cannot enforce a remedy.[23] These are related concepts but it is important to distinguish between a non-justiciable matter and a matter unenforceable by the courts. The classic illustration of this distinction in Canadian law is the constitutional convention. Constitutional conventions are unwritten rules which governments are obliged to follow.[24] However, if these conventions are not followed, a court cannot enforce them. The violation of a convention, in other words, gives rise to political, not legal sanctions. Conventions are thus justiciable

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20 *Ibid.* at paras. 43-57. For a critique of this decision, see L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid" (2007) 40 U.B.C. Law Rev. 727-44.

21 For a summary of this case law, see K. Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1996), 5.95.

22 *Finlay*, *supra* note 9 at 632.

23 See for example *O.E.C.T.A. v. Ontario (Attorney General)*, 1998 CarswellOnt 2932, [1998] O.J. No. 2939 (Ont. Gen. Div.), at paras. 162-64, reversed in part (1999), 172 D.L.R. (4th) 193 (Ont. C.A.), leave to appeal allowed [1999] 3 S.C.R. x (S.C.C.), affirmed [2001] 1 S.C.R. 470 (S.C.C.).

24 See P. Hogg, *Constitutional Law of Canada*, 4th edition (Toronto: Carswell, 1997), 1.10(a) and (b).

in the sense that a court could interpret the scope of a convention and declare whether a convention had been breached by government action. They are unenforceable, however, in the sense that a court cannot compel a government to act in accordance with a convention.

Even outside the sphere of Constitutional Conventions, courts may sometimes conclude that a right is justiciable but that it would be inappropriate in the circumstances for the court to enforce that right. In *Khadr v. Canada (Prime Minister)*[25], for example, the Supreme Court of Canada held that, even where it finds the government to have committed a *Charter* violation, it will retain the discretion not to order a remedy that will interfere in a political sphere (for example, where such a remedy would have an impact on foreign relations or some other area outside the purview of the Court).

(c) Justiciability in Private and Public Law Settings

It is clear that litigants are more likely to press ahead with moot, unripe, hypothetical or political cases in public law rather than private law settings. Public law settings more often attracts litigants seeking to vindicate abstract rights or establish principles of broad application. Litigants in private law areas are less unlikely to invest resources and time in litigation where their interests were no longer, or not yet affected by a dispute. Robert Sharpe (now Mr. Justice Sharpe of the Court of Appeal of Ontario) distinguished between justiciability in public and private settings in the following terms:

> Characteristic of traditional or private law litigation is its bi-polar nature, presenting two opposed interests concerned about a situation of immediate tangible harm. The focus tends to be retrospective, the attention of the court being drawn to what happened in the past and how best to repair that harm. The dispute tends to be a self-contained, one-shot, once-and-for-all affair. There is a concrete problem requiring a concrete remedy and a close link between the substantive claim and the relief sought. In constitutional litigation, on the other hand, issues are more diffuse in nature, and because they tend to implicate a wider range of interests, departure from the bi-polar model through liberalized standing and intervention rules is often called for. The focus in constitutional litigation tends to be prospective, and attention is directed more to future improvement than to reparation for past wrongs.

25 [2010] 1 S.C.R. 44 (S.C.C.) [hereinafter *Khadr*].

The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black *v.* Chrétien

Lorne Sossin*

In *Black* v. *Chrétien*, the Ontario Court of Appeal addressed the issue of the courts' ability to review the exercise of Crown prerogative powers. While the court held that the exercise of prerogative powers is subject to judicial review in general, it stipulated that certain categories of prerogative powers are not reviewable. The court reasoned that judicial review is limited to instances where the nature and subject matter of the prerogative powers are amenable to the judicial process. In Conrad Black's lawsuit against the prime minister, the court found that the communication between the prime minister and the Queen represented an exercise of the prerogative to grant honours and that such a prerogative was non-justiciable.

The author is critieal of the court's use of the doctrine of justiciability to shield executive officials from judicial review. He argues that the court adopted an undesirably formalistic approach to justiciability, with the consequence that a significant sphere of executive action lies beyond the reach of the rule of law. The author maintains that justiciability should solely depend on the legitimacy and capacity of the courts to adjudicate a matter. In his opinion, Black's claim against the prime minister was justiciable.

Dans l'arrêt *Black* c. *Chrétien*, la Cour d'appel d'Ontario soulève le problème du pouvoir qu'a la cour de réviser l'exercice des prérogatives de la Couronne. Alors que la cour a décrété que ces privilèges sont sujets à la révision judiciaire de façon générale, elle a stipulé que certaines catégories de ces prérogatives étaient intouchables. La cour a jugé que la révision judiciaire se limite aux instances où la nature et le contenu des prérogatives de la Couronne sont sujet à être entendus par le processus judiciaire. Dans cet arrêt, la cour a décidé que la communication entre le premier ministre et la Reine représentait un exereice de la prérogative d'octroyer des honneurs et que co privilège n'était pas sujet à la révision judiciaire.

L'auteur critique l'utilisation que fait la cour de la doctrine de justiciabilité pour protéger un officier exécutif contre la révision judiciaire. Il démontre que la cour a adopté une approche formaliste de la justiciabilité, approche indésirable, qui a pour conséquence d'extraire de la primauté du droit une sphère importante de l'action exécutive. L'auteur maintient que la justiciabilité ne devrait dépendre que de la légitimité et de la capacité de la cour de se prononcer. Selon lui, la demande de Black à l'égard du premier ministre était justiciable.

* Assistant Professor, Faculty of Law, University of Toronto. I should note that I had some minor involvement in this case as a consultant to counsel for the appellant, and prior to that, expressed some criticism of the judgment of LeSage J. in the motion before the Ontario Superior Court. See L. Sossin, "Hoist on his Own Petard" *The Globe and Mail* (23 March 2000) A17. I wish to thank David Dyzenhaus, Julia Hanigsberg, Peter W. Hogg, Hudson Janisch, Patrick J. Monahan, and Mark Walters for helpful comments on earlier drafts of this article.

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> *Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.*[1]

Introduction

The odd case of *Black* v. *Chrétien*[2] may have resulted in a happy ending for the parties involved, but the judgment of the Ontario Court of Appeal represents, in my view, a mixed blessing for Canadian law relating to the judicial review of Crown prerogative powers. On the bright side, the court has confirmed that the source of governmental authority, whether a prerogative or statutory power, should have no bearing on whether the exercise of that authority is reviewable. By upholding the dismissal of Black's claim, however, the court used the justiciability doctrine as a shield to immunize a category of prerogative powers from the reach of the rule of law. This is a disturbing development which merits closer examination.

The litigation arose in June of 1999 when the Queen decided not to bestow a peerage on Conrad Black. The Queen had apparently been informed by Prime Minister Jean Chrétien that Canadian law prevented Canadian citizens from being nominated as peers. Chrétien allegedly cited a 1919 Parliamentary resolution known as the "Nickle Resolution"[3] as the source of this legal impediment.[4] That resolution, which was neither a statute nor an instrument with any legal effect, requested the then King not to bestow honours and titular distinctions on subjects domiciled or ordinarily resident in Canada. Prior to that communication, in May of 1999, both Black and the British government had allegedly been assured by the Canadian government that, as long as Black obtained British as well as Canadian citizenship, there was no bar to his nomination. Within a matter of days, Black promptly became a citizen of the United Kingdom.

Black alleged that the prime minister's intervention on the eve of his nomination as a peer was politically motivated, and was undertaken in response to negative coverage of the prime minister in the Southam chain of newspapers owned by Black. Black sued the government of Canada for negligence and the prime minister personally for

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[1] *Hurtado* v. *California*, 110 U.S. 516 at 535-36, 4 S. Ct. 516 (1884).

[2] (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.) [hereinafter *Black*].

[3] The exact text of the resolution is reproduced in *Journals of the House of Commons of the Dominion of Canada*, vol. 55 (22 May 1919) at 295.

[4] *Black*, *supra* note 2 at para. 11.

negligence and abuse of power, and sought $25,000 in damages. The quantum of damages sought suggests Black's suit was motivated more by pride and principle than by a desire for compensation (although, to be sure, quantifying the value of a lost peerage is an esoteric undertaking).[5]

The government of Canada and the prime minister brought a motion to have all the claims dismissed on the grounds they disclosed no reasonable cause of action.[6] LeSage J. granted the motion in part, and dismissed the claim against the prime minister for negligence and abuse of power on grounds that his exercise of the Crown prerogative relating to foreign affairs was non-justiciable.[7] The negligence claim against the government (for misrepresenting that there was no bar to Black's nomination) was allowed to proceed.[8]

The Ontario Court of Appeal unanimously upheld the ruling of LeSage J.[9] While concluding that a claim against a government decision was not non-justiciable simply because the decision was an exercise of a Crown prerogative, the court nonetheless held that the communication between the prime minister and the Queen represented an exercise of the prerogative of granting honours, and that such decisions were non-justiciable. Laskin J.A. explained this holding in the following terms:

> The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no

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[5] That Black sought damages through a civil suit indicates, however, that his concern was for having been harmed in some way. If public accountability had been Black's concern, presumably he would have initiated an application for judicial review instead of launching a civil suit. Judicial review might have resulted in a declaration or an order compelling the government to undertake some action but would not have resulted in damages.

[6] For the purposes of such a motion, the test is whether, based on the pleadings alone, it is "plain and obvious" that there is no cause of action, assuming all the facts alleged to be proven, and reading the pleadings in their most generous light. Further, where the law is not fully settled in a given area, the action should be permitted to continue. See *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 74 D.L.R. (4th) 321.

[7] LeSage J. concluded:

> The PM's conduct here complained of is not within the reach of the court because it was not a justiciable order or decision regulating conduct. It is not within the power of the court to decide whether or not the advice of the PM about the prerogative honour to be conferred or denied upon Black was right or wrong. It is not for the court to give its opinion on the advice tendered by the PM to another country. These are non-justiciable decisions for which the PM is politically accountable to Parliament and the electorate, not the courts. Similarly, any question about the propriety of the PM's motivation is for Parliament and the electorate, not for the courts.

Black v. *Chrétien* (2000), 47 O.R. (3d) 532 at para. 27, 184 D.L.R. (4th) 755 (Sup. Ct.).

[8] *Ibid.* at para. 10.

[9] *Black*, *supra* note 2 at para. 77.

> economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess".
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> In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on Mr. Black rests not with Prime Minister Chrétien, but with the Queen. At its highest, all the Prime Minister could do was give the Queen advice not to confer a peerage on Mr. Black.
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> For these reasons, I agree with the motions judge that Prime Minister Chrétien's exercise of the honours prerogative by giving advice to the Queen about granting Mr. Black's peerage is not justiciable and therefore not judicially reviewable.[10]

While his claim against Prime Minister Chrétien was dismissed, Black was able to become eligible for a peerage by renouncing his Canadian citizenship, which he did. On 31 October 2001 he took his seat in the House of Lords as Lord Black of Crossharbour.[11] Prime Minister Chrétien presumably is happy as well. He has had his dubious championing of the 1919 Nickle Resolution validated, and more to the point, will not have to endure the indignity of the disclosures and media scrutiny of a civil suit. The British government and Crown have avoided an embarrassing entanglement in Canadian affairs. Finally, the Canadian taxpayers will be spared funding an expensive defence against a litigant with near-bottomless resources.

Black represents, at first glance, a significant and positive watershed in Canadian public law. The Ontario Court of Appeal has confirmed that the Crown may be civilly liable for the misuse of a prerogative power. This judgment has helped to eliminate an obsolete vestige of Canada's monarchial past. However, as I argue below, by finding Black's claim against Prime Minister Chrétien to be non-justiciable, the court left intact a sphere of executive authority that is effectively immune from the rule of law. This is not an acceptable or a justifiable immunity, even for (and, perhaps, especially for) a constitutional monarchy rooted in the common law.

This comment is divided into three parts. In Part I, I outline the scope of judicial review of the Crown prerogative power and its application in *Black*. In Part II, I examine more specifically the justiciability of prerogative powers and the rationale adopted by the Ontario Court of Appeal in *Black*. Finally, in Part III, I analyze the im-

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[10] *Ibid.* at paras. 62-64 [reference omitted].

[11] See K. Makin & J. Saunders, "Black Set to Give Up Canadian Citizenship" *The Globe and Mail* (19 May 2001) A1; R. Furness, "Black Suit vs. PM Turfed by OCA" *The Lawyers Weekly* (1 June 2001) 8; "Lord Black of Crossharbour" *The Globe and Mail* (1 November 2001) A1. For this reason, Black also has decided not to appeal the case further to the Supreme Court of Canada.

plications of *Black* and situate this decision within a broader jurisprudence on the rule of law in Canada.

I. Judicial Review and the Crown Prerogative

The very nature of a Crown prerogative is that it is discretionary. Dicey famously described this common law set of powers as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[12] The Crown prerogative once constituted the central source of executive authority in England and its colonial holdings. Today, it remains the source for a disparate set of executive powers, including foreign affairs (*e.g.* treaty-making and diplomatic appointments); defence and the armed forces (*e.g.* sending peacekeepers abroad); passports, pardons, and the prerogative of mercy; the hiring and dismissal of certain public officials; honours and titles; copyright over government publications; the law of heraldry; incorporating companies by royal charter; collecting tolls from bridges and ferries; and the right to proclaim holidays.[13] This list is by no means exhaustive.

The scope of the Crown prerogative, over time, has been diminished. Since the House of Lords' landmark ruling in *A.G.* v. *De Keyser's Royal Hotel*,[14] it has been well settled that the prerogative power of the Crown could be displaced by statute. Hogg and Monahan set out six areas where the Crown prerogative power remains meaningful: powers relating to the legislature; powers relating to foreign affairs; powers relating to the armed forces; appointments and honours; immunities and privileges; and the emergency prerogative.[15]

The Crown prerogative has always been part of the common law, and because it is the function of the courts to declare what the law is, courts have accepted that judicial review is an appropriate means by which to define the existence and scope of pre-

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[12] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 424. This definition was cited by Laskin J.A. in *Black*, *supra* note 2 at para. 25, in turn citing the earlier adoption of this approach by the Supreme Court of Canada in *Reference as to the Effect of the Exercise by his Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269, (*sub nom. Re Royal Prerogative of Mercy Upon Deportation Proceedings)* [1933] 2 D.L.R. 348. More recently, the idea of the prerogative power representing a "residue of miscellaneous powers" was accepted in *Vancouver Island Peace Society* v. *Canada*, [1994] 1 F.C. 102, 64 F.T.R. 127 (T.D.), aff'd (1995), 16 C.E.L.R. (N.S.) 24, 179 N.R. 106 (F.C.A.). See generally P.W. Hogg & P.J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000); S. Payne, "The Royal Prerogative" in M. Sunkin & S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) 77.

[13] For a description of each of these prerogatives, see H. Olson & P. Lordon, "Crown Prerogatives" in P. Lordon, ed., *Crown Law* (Toronto: Butterworths, 1991) at 61.

[14] [1920] A.C. 508 (H.L.).

[15] Hogg & Monahan, *supra* note 12 at 18-19.

rogative powers.[16] Reviewing the exercise of those powers, however, was another story. Historically, these powers were understood as the unfettered terrain of the monarch and outside the province of the courts. This doctrine has been described in the following terms:

> If it is claimed that the authority for the exercise of discretiou derives from the royal prerogative, the courts have traditionally limited review to questions of vires in the narrowest sense of the term. They can determine whether the prerogative power exists, what is its extent, whether it has been exercised in the appropriate form and how far it has been superseded by statute; they have not normally been prepared to examine the appropriateness or adequacy of the grounds for exercising the power, or the fairness of the procedure followed before the power is exercised, and they will not allow bad faith to be attributed to the Crown.[17]

This approach largely has been discarded in the United Kingdom through a series of recent judgments which have held that the exercise of prerogative powers, including those exercised by ministers, will be generally subject to judieial review (a conclusion based on the plausible premise that prerogative powers can be abused or misused just as any other governmental authority).[18] Since the landmark ruling of the House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service*,[19] courts in the United Kingdom have accepted that there is now no principled distinction that flows from whether the source of governmental authority is statutory or prerogative in nature.

In the context of the prerogative of mercy, for example, courts have been willing to intervene to hold that a decision on whether to grant mercy was invalid because the minister failed to consider other forms of pardon.[20] In *R.* v. *Ministry of Defence, ex parte Smith*, the Queen's Bench Division reviewed a defence policy prohibiting gays and lesbians from serving in the military.[21] The government argued that the defence of the realm was a prerogative power. Brown L.J. held that the matter was justiciable and concluded, "To my mind only the rarest cases will today be ruled strictly beyond the

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[16] For an early confirmation of this approach, see *Case of Proclamations* (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). See also R. Brazier, "Constitutional Reform and the Crown" in Sunkin & Payne, *supra* uote 12, 337 at 359.

[17] S.A. de Smith, *de Smith's Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens & Sons, 1980) at 286-87 [footnotes omitted].

[18] For a review of this case law, see B. Hadfield, "Judicial Review and the Prerogative Powers of the Crown" in Sunkin & Payne, *supra* note 12, 197.

[19] [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (H.L.) [hereinafter *Civil Service Unions* cited to A.C.].

[20] See *R.* v. *Secretary of State for the Home Department, ex parte Bentley* (1993), [1994] Q.B. 349, [1993] 4 All E.R. 442.

[21] [1995] 4 All E.R. 427 (Q.B.D.) [hereinafter *Smith*], aff'd (1995), [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.).

court's purview."[22] As there were no national security interests at stake in *Smith*, the court held that the challenge to the policy on human rights and irrationality grounds could proceed.[23] In *Burmah Oil* v. *Lord Advocate*, the House of Lords concluded that the Crown was required to pay compensation to a party that had suffered damages as a result of the exercise of a Crown prerogative.[24]

Until recently in Canada, however, the traditional approach held sway and the exercise of a Crown prerogative generally was held to be immune from judicial review.[25] While the Canadian view was modified to accommodate judicial review of the exercise of the prerogative power under the *Canadian Charter of Rights and Freedoms*,[26] whether or not these powers are subject to judicial review on non-*Charter* grounds remained an open and somewhat murky question.[27]

Laskin J.A. adopted a similar approach in *Black*, acknowledging that "[t]he court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute."[28] Laskin J.A. found that the prime minister's communication was an exercise of the prerogative power related to granting honours, and concluded:

> In my view, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising his honours prerogative, a prerogative power that is beyond the review of the courts.[29]

The Ontario Court of Appeal's conclusion that the prime minister was in fact exercising the prerogative power relating to the conferral of honours seems open to challenge. The prime minister has no authority over the Queen's choice of whom to nominate for a peerage, nor was the prime minister in fact expressing any opinion on

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[22] *Ibid.* at 446.

[23] *Ibid.*

[24] [1965] A.C. 75 (H.L.).

[25] See *e.g. Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.), Cory J.

[26] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. In *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.], the Supreme Court confirmed that the exercise of a prerogative power, such as a decision relating to foreign affairs, was subject to review for consistency with the *Charter*.

[27] In *Operation Dismantle*, *ibid.* at 471, Wilson J. highlighted the words of Lord Devlin in *Chandler* v. *Director of Public Prosecutions*, [1962] 3 All E.R. 142 at 159: "It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative."

[28] *Black*, *supra* note 2 at para. 29.

[29] *Ibid.* at para. 5. It is worth noting that Laskin J.A. did not comment on whether the communication additionally was an exercise of the prerogative power over foreign affairs, as LeSage J. had held in the court below.

whether Black was a worthy nominee. Similarly, the conclusion of the motions judge that the prime minister's communication was an exercise of the prerogative relating to foreign affairs seems to lack an air of reality. The communication in question in no way related to Canadian-British affairs. Plainly, what the prime minister communicated to the Queen was a legal opinion which had the intent and effect of barring Conrad Black from eligibility for a peerage. There is no need to categorize this communication abstractly. Any act of a prime minister in his or her official capacity that is not authorized by statute and not *ultra vires* must by definition be authorized by another kind of authority, whether a common law or a prerogative power of some kind. The rationale for the Ontario Court of Appeal's desire to attach the label of a particular prerogative power to the prime minister's conduct in *Black* is analyzed below.

Certainly, the more significant aspect of the judgment from the perspective of Canadian public law is the affirmation that the exercise of Crown prerogative powers properly may be the subject of judicial review on substantive grounds. Laskin J.A. stated this bluntly: "I agree with Mr. Black that the source of the power—statute or prerogative—should not determine whether the action complained of is reviewable."[30] Subsequently, he expressly adopted the House of Lords' expanded approach to reviewing the exercise of prerogative powers:

> [T]he expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the *Civil Service Unions* case. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals.[31]

Lord Roskill's embrace of judicial review over the exercise of prerogative powers in the United Kingdom, however, had some limitations. Lord Roskill saw the scope of this review power as limited to contexts where an individual's legal rights, obligations, or legitimate expectations are affected by the exercise of a prerogative power.[32] In

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[30] *Ibid.* at para. 44.

[31] *Ibid.* at para. 47 [reference omitted].

[32] *Civil Service Unions*, *supra* note 19 at 417:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory

Black, Laskin J.A. adopts this limitation as well.[33] Since Conrad Black had neither a right to nor an expectation of receipt of a peerage, the court concluded that not even the expanded scope for judicial review over the prerogative power applied in this case. Specifically, Laskin J.A. adopted what he referred to as the "subject matter" test from Lord Roskill's reasons in *Civil Service Unions*, under which, Laskin J.A. explained, in a somewhat circular fashion, that "[o]nly those exercises of the prerogative that are justiciable are reviewable."[34] In the passage from *Civil Service Unions* adopted in *Black*, Lord Roskill stated:

> Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers as well as others are not, I think, susceptible to judicial review *because their nature and subject matter are such as not to be amenable to the judicial process.* The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[35]

Laskin J.A. cited these remarks as support for his conclusion that the prerogative of granting of honours, as a category of prerogative powers, cannot support a justiciable, legal challenge.[36] In my view, Laskin J.A. has misapprehended the meaning of this passage. I do not believe Lord Roskill intended to categorize a set of powers that, in and of themselves, were immune from judicial review because they did not affect an individual's rights, obligations, or legitimate expectations. Indeed, if this was his intent, it seems odd to include the prerogative of mercy with the granting of honours. An exercise of the prerogative of mercy typically *will* affect an individual's rights, obligations, and legitimate expectations,[37] as Laskin J.A. himself observed elsewhere in

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> power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[33] *Black*, *supra* note 2 at para. 49.

[34] *Ibid.* at para. 50.

[35] *Civil Service Unions*, *supra* note 19 at 418 [emphasis added].

[36] *Black*, *supra* note 2 at para. 58.

[37] This point is echoed by Hadfield, *supra* note 18 at 217. Also, as mentioned above, U.K. courts post-*Civil Service Unions* have accepted the justiciability of decisions relating to the prerogative of mercy. See *Smith*, *supra* note 21.

his reasons.[38] Rather, I believe Lord Roskill was making the point that where a public decision calls for a delicate balance of competing policy, ideological, political, social, moral, and historical concerns, judicial resolution may be inappropriate. Some prerogative powers such as the granting of honours will often require such balancing. The exercise of other prerogative powers, such as the granting of a passport, will rarely involve such balancing. In *Black*, however, there was no delicate political or moral decision-making at issue. It should be reiterated that the prime minister was not deciding whether Black was *worthy* of an honour, but rather whether he was *legally entitled* to the honour.[39] In this sense, the prime minister's communication was no different than the communication of a transportation department official as to whether an individual is legally entitled to a driver's license. Why should one public official's legal opinion be reviewable while another public official's legal opinion be immune from judicial accountability?

The troubling aspect of the Ontario Court of Appeal's reasoning is that it simply exchanges one type of formalism for another. Now, the question is no longer "Is the exercise of authority based on a Crown prerogative?" but rather "Is the exercise of authority related to the conferral of honours?" For Laskin J.A., prerogative powers fall into specific subject-matter categories (for example, the prerogative of honours, the prerogative of foreign affairs), and these categories in turn fall along a spectrum of reviewability. In his reasons, he distinguished non-justiciable prerogative powers such as the granting of honours from those prerogative powers at the other end of the spectrum, such as granting passports and, significantly, the prerogative of mercy, which he observed are no longer viewed as "royal favours", and would presumably give rise to justiciable claims if exercised wrongfully.[40]

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[38] *Black*, *supra* note 2 at para. 55.

[39] Whether the prime minister expressed a legal opinion, or merely expressed Canadian policy, is open to interpretation. However, on a motion to strike a claim, all the facts as alleged must be accepted as true. Black alleged that the prime minister had informed the Queen that conferring a peerage on Black would represent a "contravention of Canadian law" (*ibid.* at para. 11). Laskin J.A. subsequently characterized the distinction between expressing a law or a policy as missing "what this case is about" (*ibid.* at para. 57). In that same passage, he stated that the prime minister was engaged in advising the Queen about Canadian policy (*ibid.*).

[40] Laskin J.A. explained this distinction with respect to the prerogative of mercy as follows:

> Though on one view mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in *Re Secretary of State for the Home Department, Ex p. Bentley*. There, the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

Ibid. at para. 55 [reference omitted].

Because Laskin J.A. adopted what he termed the "subject matter" approach, the question of how to characterize the prime minister's communication becomes crucially important. In this regard, he concluded as follows:

> Focusing on wrong legal advice or the improper interpretation of a policy misses what this case is about. As I see it the action of Prime Minister Chrétien complained of by Mr. Black is his giving advice to the Queen about the conferral of an honour on a Canadian citizen. The Prime Minister communicated Canada's policy on honours to the Queen and advised her against conferring an honour on Mr. Black.[41]

This characterization of the prime minister's action in *Black* is one-dimensional and difficult to sustain. Whether the prime minister communicated Canada's policy on honours to the Queen, or legal advice to the Queen, he made what could be characterized as an administrative decision pertaining to Mr. Black.[42]

In *Liability of the Crown*, which was written before the Ontario Court of Appeal's decision, Hogg and Monahan make a similar point in criticizing LeSage J.'s dismissal of Black's claim on justiciability grounds.[43] They are highly skeptical of immunizing a category of prerogative powers from judicial review (and emphasize that if the prime minister's actions had been taken pursuant to a statute, there would have been no suggestion that those actions were not reviewable).[44] In a variation of the *Civil Service Unions* approach, a key distinction for Hogg and Monahan is whether the power exercised relates to a particular, named individual. They view this distinction as analogous to the scope of procedural fairness in administrative law, where the duty of fairness will apply where the rights, interests, and privileges of a particular individual are affected. Since the action in *Black* was targeted at a specific, named individual, Hogg and Monahan conclude that it should have been considered justiciable.[45]

This approach, while overcoming the problem of formalism highlighted above, sidesteps the problem of justiciability. There may be prerogative decisions (for example, upon whom to bestow the Order of Canada) that are not matters capable of adjudication in a court even though they affect named individuals. The government may consider a range of partisan, social, and cultural factors in selecting individuals to honour that do not lend themselves to objective evidence or judicial resolution. On the other hand, certain legislative or policy decisions (for example, the decision to adhere

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[41] *Ibid.* at para. 57.

[42] It should be noted that the prime minister's advice was not binding on the Queen, either in law or convention. In practice, however, it would be hard to imagine circumstances in which the Queen would confer an honour on a Canadian citizen where the prime minister had advised against her doing so.

[43] Hogg & Monahan, *supra* note 12 at 19-21.

[44] *Ibid.* at 20.

[45] *Ibid.*

to a particular international treaty) may be well documented and turn on judicially cognizable questions of international and domestic law. Hogg and Monahan acknowledge the importance of a case by case approach, concluding: "In short, it seems preferable in each case to determine whether the particular issues raised in the litigation are amenable to judicial review, rather than to apply a blanket immunity for any and all exercises of the prerogative which fall within a particular category."[46] Therefore, it is neither the source nor the target of government action that should determine justiciability; rather, justiciability should turn solely on questions of legitimacy and capacity of the courts to adjudicate a matter.

II. Justiciability and the Crown Prerogative

In *Black*, Laskin J.A. linked his understanding of the "subject-matter" of the prerogative power (that is, which category or prerogative power it falls into) with the justiciability of the challenged government action:

> At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. Ouly those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch".
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> Under the test set out by the House of Lords, *the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.*[47]

Justiciability is an elusive concept, but generally is held to refer both to the capacity and legitimacy of courts to undertake the adjudication of a matter.[48] There are two germane questions before any court making a determination of justiciability. First, can the matter be determined according to objective, judicially cognizable standards and evidence? Second, is the matter appropriate for adjudication given the constitutional, political, and legal systems in Canada? In other words, does the court have the capacity and legitimacy to decide the case?

The Ontario Court of Appeal, in adopting Lord Roskill's finding in *Civil Service Unions* that the source of governmental authority (whether based on prerogative or

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[46] *Ibid.*

[47] *Black*, *supra* note 2 at paras. 50-51 [references omitted, emphasis added].

[48] See generally L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999) at 1-26 [hereinafter Sossin, *Boundaries*].

statute) should have no bearing on the question of judicial review, has resolved (in my view, correctly) the question of legitimacy. The court has held that the exercise of a prerogative power by the prime minister (or, presumably, by cabinet or by any individual minister) is not a "purely political" question, and that judicial review over the exercise of prerogative powers per se is not inappropriate.[49] This is in keeping with the recent trend in the Supreme Court, summarized succinctly by Lamer C.J.C. in the *Re Provincial Judges Remuneration* as follows: "[T]he exercise of all public power must find its ultimate source in a legal rule."[50] It follows that it is the duty of the courts to resolve claims that these legal rules have been violated.

It is problematic to suggest that some prerogative powers will give rise to justiciable claims while others will not, just as it would be problematic to suggest that some statutes give rise to justiciable rights and obligations but others are beyond the province of the courts. It is important to emphasize here that if the government wishes to immunize a public power from judicial review, it may attempt to do so through statutory means. Privative clauses in statutes that authorize executive action have been upheld as severely restricting the scope of judicial review.[51] Further, if the government wishes to subject a particular power to political rather than legal remedies, this also may be accomplished through legislative means. In *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines, and Resources)*,[52] the Court declined to intervene in a dispute between the auditor general and a minister over disclosure of documents because the statute empowering the auditor general contained a reporting requirement in response to non-compliance. In other words, since a mechanism was put in the statute for resolving (or at least airing) disputes, the Court held that it would be inappropriate to intervene.

While Canadian courts have yet to embrace a formal "political questions" doctrine of the kind that characterizes the American constitutional jurisprudence,[53] they

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[49] Even if the exercise of some prerogative powers has political dimensions, the Supreme Court held that it is incumbent on courts to disentangle the legal from the political dimensions of such decisions, and proceed to adjudicate the legal aspects where possible. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 26-28, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference*].

[50] [1997] 3 S.C.R. 3 at para. 10, 150 D.L.R. (4th) 577.

[51] Statutes cannot, however, entirely preclude judicial review of executive action. As a constitutional standard, review will always remain for executive authority taken without jurisdiction, or for executive action that is patently unreasonable. See *Crevier* v. *Quebec (A.G.)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

[52] [1989] 2 S.C.R. 49, 97 N.R. 241.

[53] See *Baker* v. *Carr*, 369 U.S. 186 at 208-37, 82 S. Ct. 691 (1962). The origin of the "political questions" doctrine is the U.S. Constitution, which provides, *inter alia*, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ...; to Controversies ..." (U.S. Const. art. III, § 2, cl. 1). This has been interpreted as limiting the power of judicial review in the U.S. to "cases and controversies", which exclude, for example, reference questions posed by the executive.

have found disputes non-justiciable that raise a purely political matter, or that impugn the wisdom of government action, or for which Parliament has provided, by statute, a political rather than legal remedy.[54] None of these are applicable to the *Black* case. Because the effect of *Black* is to allege an abuse of process on the part of the prime minister, this raises a prima facie legal issue. As Wilson J. affirmed in *Operation Dismantle*, once a legal issue is raised, the courts have no discretion to decline to adjudicate the matter simply because it also happens to raise issues of political sensitivity.[55]

Once the question of appropriateness has been resolved, the focus of the justiciability analysis turns to the capacity of the court to adjudicate the particular matter before it. Canadian courts have held that where a matter is hypothetical, abstract, premature, moot, of a purely political, spiritual or moral matter, or not susceptible to proof, the judicial process lacks the capacity to resolve the matter.[56] The action at issue in *Black* would appear to be a matter for which a court would have sufficient capacity to determine. The evidence that Mr. Black sought to proffer was not of a kind unsusceptible to proof or incapable of being weighed by the court. Indeed, much of the factual evidence is uncontested. The prime minister did not dispute providing the legal advice to the Queen regarding Black's nomination. The correctness of that legal advice, and the prime minister's motivations for offering it, are not beyond judicial understanding or expertise; indeed, the contrary appears to be the case.

According to Black's account of the facts, which must be accepted as true for the purposes of the motion to dismiss the claim based on the pleadings alone, the prime minister chose to intercede in an effort to exact retribution against Conrad Black for his Southam newspapers' coverage of the prime minister. This is a serious allegation of abuse of power. As to whether Black's evidence could bear out his claims if tested at trial, this is another question, and one which now is unlikely ever to be resolved.[57]

Judicial review is also excluded where a non-judicial forum is provided by the Constitution for the resolution of disputes, such as the power given to the Senate to adjudicate impeachment claims. See *Nixon* v. *U.S.*, 506 U.S. 224, 113 S. Ct. 732 (1993).

[54] See Sossin, *Boundaries*, *supra* note 48, c. 4.

[55] *Operation Dismantle*, *supra* note 26 at 472. Wilson J. was referring to the review of prerogative powers under the *Charter*, but there is no principled reason to adopt a different view to claims which go to the heart of the rule of law, as discussed in more detail below.

[56] It was on these grounds that the claim in *Operation Dismantle* was dismissed. In that case, proving the claim against the government would have required evidence that Canada had become a more likely target for nuclear destruction by the Soviet Union as a result of permitting the U.S. to test cruise missiles on Canadian soil. For further discussion, see Sossin, *Boundaries*, *supra* note 48 at 48-55.

[57] While much of the damaging evidence consisted of remarks made during private conversations between Black and Chrétien, which cannot be corroborated, the prime minister's eleventh-hour intervention, reversing Canada's stated position on Black's nomination, is suspicious. Black's allegation that the Nickle Resolution was a mere pretext for an ulterior agenda is at least credible. As Black pointed out in his factum, the Nickle Resolution applied only to persons resident or domiciled in Canada, which Black was not. Further, according to Black's claim, this resolution has been routinely ig-

Rather than consider the issue of the court's capacity in the context of the particular facts and circumstances of the case, the Court of Appeal in *Black* simply emphasized the discretion implicit in the prime minister's prerogative authority. Laskin J.A. asserted that "[e]ven if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review."[58] In my view, the Ontario Court of Appeal has used the doctrine of justiciability in an undesirably formalistic fashion, so as to remove a significant sphere of executive action from the reach of the rule of law. In the following section, I consider the implications of this holding for the rule of law, and for its cardinal principle that no discretion is absolute.

III. The Implications of *Black* and the Rule of Law

The rule of law is a contested notion.[59] In the *Secession Reference*, the Court described the importance of the rule of law in the following terms:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis* is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[60]

Following *Roncarelli* v. *Duplessis*, the rule of law has come to embrace the principle that no discretion is "untrammelled".[61] No matter how wide a grant of statutory authority (or how broad a prerogative power), all government decision-making must conform to certain basic tenets, such as being rendered in good faith and not for ulterior or improper motives.

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nored in numerous instances over the years, including the cases of Sir Conrad Swan and Sir Neil Shaw, who had received titles during the tenure of Chrétien's government. Whatever one makes of the Nickle Resolution, it does not appear to constitute an enforceable, legal barrier to a Canadian citizen's nomination for a titular honour. See plaintiff's Amended Statement of Claim, *Black* v. *Jean Chrétien and the Attorney General for Canada*, Court File No. C33887 at para. 16.

[58] *Black*, *supra* note 2 at para. 65.

[59] For recent appraisals, see A. Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in D. Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999) 196; J. Jowell, Q.C., "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Pub. L. 671; T.R.S. Allen, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q. Rev. 221.

[60] *Supra* note 49 at para. 70 [references omitted].

[61] [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689 [hereinafter *Roncarelli* cited to S.C.R.].

The rule of law has little meaning if it cannot be meaningfully enforced. Is there a principled basis on which to say that certain categories of executive action should be entirely immune from judicial review for breach of the rule of law? While justiciability concerns will sometimes render specific decisions inappropriate for adjudication (that is, courts may lack the legitimacy or capacity to adjudicate them), this must be considered on a case by case rather than a categorical basis. As a general point, I would contend that any allegation of a breach of the rule of law by the prime minister in the exercise of an executive power (whether statutory or prerogative in origin) raises a prima facie justiciable claim. As Professor Wade stated:

> The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. [...] This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest ... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.[62]

A similar notion has been adopted by the Supreme Court of Canada in *Roncarelli*,[63] and elevated in the *Secession Reference* to the status of part of Canada's unwritten constitution.[64] Nonetheless, as several observers have emphasized, notwithstanding the *Roncarelli* case and a handful of others,[65] the rule of law has rarely been the basis for a judicial remedy in Canada.[66] Indeed, the post-*Roncarelli* Supreme Court of Canada

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[62] W. Wade, *Administrative Law*, 6th ed. (New York: Oxford University Press, 1988) at 399-400, cited with approval by Laws J. in *R. v. Somerset County Council, ex parte Fewings*, [1995] 1 All E.R. 513 at 524.

[63] In *Roncarelli*, *supra* note 61 at 140, Rand J. stated: "there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator." This principle has been affirmed by the Supreme Court on many occasions, most recently in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281 at para. 16, 200 D.L.R. (4th) 193, 2001 SCC 41.

[64] *Supra* note 49. See also *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748-50, 19 D.L.R. (4th) 1, in which the Supreme Court held that the rule of law had constitutional status by virtue of the preamble to the *Constitution Act, 1867*.

[65] In *Roncarelli*, *supra* note 61, Premier Duplessis of Quebec, acting through the Manager of the Liquor Commission, revoked the liquor license of a tavern owner who had been actively supporting Jehovah's Witnesses. The Supreme Court quashed the revocation based on the premier's disregard for the rule of law. For examples of applications of *Roncarelli* in civil cases, see *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.); *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* (1999), 246 A.R. 201, [1999] 9 W.W.R. 203 (Q.B.), leave to appeal granted (1999), 181 D.L.R. (4th) 380 (Alta. C.A.).

[66] See H.W. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29 at 49, n. 31; D. Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality" in M.J. Mossman & G. Otis, eds., *The*

case law has made it less likely, from a practical perspective, that the rule of law will provide a meaningful restraint on government action in the future.

In *Thorne's Hardware* v. *Canada*,[67] a case cited by Laskin J.A. as authority for the non-justiciability of the prime minister's action in *Black*, a federal Order in Council that altered the boundaries of the port of St. John was challenged. The applicant claimed that the cabinet decision had been motivated by the ulterior and improper purpose of expanding the revenue base of the National Harbours Board. While conceding that there could be review in "an egregious case" of the cabinet's failing to observe jurisdictional limits or "other compelling grounds",[68] Dickson J. (as he was then), writing for the Court, held that "[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings."[69] Dickson J. was unwilling even to review the evidence that alleged that the cabinet had acted in bad faith, contrary to the rule of law. He found that it was "neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council"[70] and observed that "governments may be moved by any number of political, economic, social or partisan considerations."[71] Somewhat ironically, Dickson J. was prepared to examine the evidence to "show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence."[72]

In *Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City of)*,[73] the Supreme Court applied the *Thorne's Hardware* principle in the context of a municipal corporation's appointment of a board of inquiry under Ontario's municipal legislation. Writing for the Court, Binnie J. held that the applicants had no right to examine municipal councillors with a view to establishing that they had improper motives in voting for the creation of a board of inquiry, holding that the "motives of a legislative body composed of numerous individuals are 'unknowable' except by what it enacts."[74] As David Mullan observed in his analysis of *Consortium Developments*,

> In other words, provided there are no jurisdictional infirmities on the *face* of the text of the resolution appointing the board of inquiry, it may not matter whether all of the councillors acted on the basis of the most outrageous motivations or, put more accurately, it is not for the courts to assist the applicant in any way in

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Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy (Montreal: Thémis, 2000) 313 at 321.

[67] [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 [hereinafter *Thorne's Hardware* cited to S.C.R.].

[68] *Ibid.* at 111.

[69] *Ibid.*

[70] *Ibid.* at 112.

[71] *Ibid.* at 112-13.

[72] *Ibid.* at 115.

[73] [1998] 3 S.C.R. 3, 165 D.L.R. (4th) 25 [hereinafter *Consortium Developments*].

[74] *Ibid.* at para. 45.

> an attempt to build an evidential record establishing that that was the case. Only if the information is volunteered explicitly and that information goes as far as establishing that all members of council voting for the resolution were acting in "bad faith" will there be any possibility of success on an application to enjoin the continuation of such an inquiry or, presumably, any other form of legislative or executive action.[75]

Also in 1999, the Supreme Court of Canada decided the case of *Wells* v. *Newfoundland*.[76] Wells was a controversial consumer representative member of the Newfoundland Public Utilities Board, whose position was eliminated under the terms of a statutory restructuring of the board. His litigation concerned whether he was entitled to compensation for this constructive dismissal (at the time, Wells was six months short of having his pension vest). Writing for the Court, Major J. concluded that, while Wells' position could be terminated by statute, absent express statutory provisions to the contrary, contract law and contract remedies governed the employment relationship. Consequently, as the Crown was in breach of its contract with Wells, he was entitled to compensation by way of damages. Major J. framed the issue of the obligation upon governments to respect the rights of individuals in the following terms:

> In a nation governed by the rule of law, we assume that the government will houour its obligations unless it explicitly exercises its power not to. In the absence of a clear express inteut to abrogate rights and obligations—rights of the highest importance to the individual—those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship betweeu the state and its citizens.[77]

In the spirit of this comment, Major J. discussed, in *obiter*, whether the rule of law could apply to legislative action, which in this case might have entitled Wells to an administrative law remedy in addition to civil damages. Brushing aside "anecdotal" suggestions that the statutory restructuring was specifically intended to remove Wells from the Board, Major J. found no "evidence" of bad faith and on this basis, distinguished *Wells* from *Roncarelli*.[78] What Major J. could have stated but chose not to, is simply that the principle in *Roncarelli* had no application in the legislative context.[79]

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[75] Mullan, *supra* note 66 at 327 [emphasis added]. I also drew this conclusion in L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000) 11 Supreme Court L.R. (2d) 37 at 87-88.

[76] [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73 [hereinafter *Wells*].

[77] *Ibid.* at para. 46.

[78] *Ibid.* at para. 58.

[79] Major J. did reaffirm that the duty of procedural fairness has no application to the legislative realm (*ibid.* at 222 [references omitted]):

> Both the decision to restructure the Board, and the subsequent decision uot to reappoint the respondent, were *bona fide* decisions. The decision to restructure the Board

As I have suggested elsewhere,[80] Major J. appeared to imply in *Wells* that if the evidence had established that "personal animus" motivated the enactment of the statute at issue, it could have been nullified as a breach of the rule of law and therefore *ultra vires* legitimate legislative power.[81]

The Supreme Court has emphasized that the *Charter* should not provide a right that has no remedy.[82] There is no reason that this same principle should not apply to the rule of law doctrine in Canada's unwritten constitution as well.[83] The Supreme Court's decisions in *Thorne's Hardware* and *Consortium Developments* appear at odds with this principle. While these decisions admittedly leave open a remedy for egregious violations in circumstances where executive officials publicly announce that they have acted in bad faith, the Court has removed most potential abuses of power from any judicial remedy.

The Ontario Court of Appeal in *Black* appears to have confirmed that the prime minister, in exercising the Crown prerogative relating to the granting of honours, has absolute discretion (although presumably subject, following *Operation Dismantle*, to judicial scrutiny under the *Charter*). This means that even if the prime minister's communication had been made in bad faith, it could not give rise to a judicial remedy.

> was deliberated and enacted by the elected legislature of the Province of Newfoundland. This is fatal to the respondent's argument on bad faith, as legislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate. The judgment in *Reference re Canada Assistance Plan* was conclusive on this point in stating that: "the rules governing procedural fairness do not apply to a body exercising purely legislative functions".

[80] L. Sossin, "Developments in Administrative Law: The 1999-2000 Term" (2000) 13 Supreme Court L.R. (2d) 45 at 67.

[81] For an intriguing example of this approach, see *Bacon* v. *Saskatchewan Crop Insurance Corp.*, [1997] 9 W.W.R. 258, 157 Sask. R. 199 (Q.B.) (holding that a legislative scheme that was "arbitrary" could offend the rule of law although the agriculture scheme at issue in the case could not be so characterized), aff'd [1999] 11 W.W.R. 51, 157 Sask. R. 199 (C.A.) (upholding the trial judge's finding that the legislation was valid, but expressly reversing the trial judge's reasoning on the rule of law issue).

[82] See *e.g. Nelles* v. *Ontario*, [1989] 2 S.C.R. 170 at para. 50, 69 O.R. (2d) 448, Lamer J. (as he was then).

[83] It is clear, however, that some aspects of the constitution, such as constitutional conventions, only provide for declaratory legal remedies, not substantive ones. See the *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (*sub nom Reference re Amendment of the Constitution of Canada*) 125 D.L.R. (3d) 1. On the renewed emphasis in Canada on the unwritten constitution, see M. Walters, "The Common Law Constitution of Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91; D. Dyzenhaus, "*Baker* and the 'Unwritten' Constitution" (2001) [unpublished, archived at McGill Law Journal].

Even if the prime minister, in communicating Canadian policy regarding honours to the Queen, had simply made up a legal rule that did not exist at all, no legal consequences would follow. While it is difficult to generate heartfelt sympathy for Black's plight, the target of a prerogative power could as easily have been a more vulnerable individual, and the basis for intervention could as easily have been that individual's ethnic, ideological, or social affiliations. To allow such abuses of power to remain immune from judicial scrutiny appears on its face to eviscerate the supremacy of the rule of law. Can *Roncarelli* and *Black* be reconciled?

Some have pointed to the fact that *Roncarelli* involved the revocation of a license, an administrative decision toward the judicial end of the decision-making spectrum, and thus attracts closer scrutiny than discretionary decisions at the legislative or policy end.[84] Once again, however, this approach tempts a return to formalism. The duty of fairness no longer turns on the categorization of a particular decision (unless, that is, it is a truly legislative decision to which no duty of fairness applies). Resurrecting such distinctions to justify immunizing certain governmental decisions from the reach of the rule of law is unjustified and potentially dangerous. An alternative approach would be to impose greater scrutiny on government decisions based on the authority vested in, and integrity expected of, the decision-maker. On this basis, where a premier and attorney general (as in *Roncarelli*) or a prime minister (as in *Black*) has his or her actions challenged, a higher standard is appropriate.

The better view is to err on the side of allowing rule of law claims to go forward. While Black's claim was framed in abuse of power, and sought damages rather than an administrative law remedy against arbitrary action, the principle at stake is analogous. It will be rare where evidence can be proffered that demonstrates decision-makers acted in bad faith, or for ulterior or arbitrary motives. *Roncarelli*, where Premier Duplessis testified as to his ulterior motives, was surely exceptional in this regard.[85] Other claimants, however, must be permitted to gather evidence to make their case. In *Consortium Developments*, this may well have meant compelling municipal councillors to testify, but limiting the questions they could be asked, or the use that could be made of the answers. The judicial regulation of discovery, however, can mitigate the potential for abuse or malicious civil suits. Fishing expeditions and open-ended attempts to harass governments can be filtered out.

As indicated above, it is unclear whether the facts as alleged by Black in this case could have been proven. What is clear, at least to me, is that the doctrine of justiciability should not be used as a shield to protect executive officials from the reach of the rule of law. This is equally important in claims raising the tort of abuse of process against a public official. As the Ontario Court of Appeal itself pointed out in *Odhavji*

[84] See Mullan, *supra* note 66 at 324.
[85] *Supra* note 61 at 134-37.

Estate v. *Woodhouse*,[86] the concern for the rule of law lies at the core of the tort of misfeasance in public office.[87]

In *Black*, Laskin J.A. is certainly correct that no Canadian has an entitlement to an honour, and that the interest at stake in this decision was trivial at best (except, of course, to Mr. Black).[88] I would argue, however, that the court's vigilance regarding alleged breaches of the rule of law should not depend on the gravity of a particular decision.

Conclusion

Any arbitrary decision for which a public official cannot be held accountable represents an important erosion of some of the most basic and fundamental tenets of our legal and political systems. Where such a decision emanates from the prime minister, careful scrutiny is justified. There is no clear basis in an enlightened, constitutional monarchy for "royal favours" of any kind, and certainly no justification to insulate such favours from judicial accountability. Any alleged breach of the rule of law raises an important and justiciable legal issue (subject to the concerns outlined above regarding judicially cognizable standards).

The Ontario Court of Appeal's decision in *Black* has significantly diminished the vestiges of monarchial power in Canada. By the same token, however, the court has given its imprimatur to the untrammelled discretion of the prime minister in exercising certain Crown prerogatives, such as the granting of honours. For these reasons, *Black* represents both one important step forward, and one disturbing step back, on the road to reconciling the exercise of prerogative powers with the rule of law.

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[86] (2000), 52 O.R. (3d) 181 at para. 22, 194 D.L.R. (4th) 577 (C.A.), leave to appeal to S.C.C. granted 7 September 2001.

[87] Borins J.A., writing for the majority, adopted the following remarks of Lord Steyn in *Three Rivers District Council* v. *Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 at 1230 (H.L.): "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."

[88] *Black*, *supra* note 2 at para. 62.

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THE UNFINISHED PROJECT OF *RONCARELLI V. DUPLESSIS*: JUSTICIABILITY, DISCRETION, AND THE LIMITS OF THE RULE OF LAW

*Lorne Sossin**

Roncarelli is remembered fifty years later particularly because of Justice Rand's now iconic statement that "there is no such thing as absolute and untrammelled discretion." Justice Rand defined "untrammelled discretion" as circumstances where action can be taken on any ground or for any reason that can be suggested to the mind of the decision maker. This statement has been understood to mean that all public regulation exercised through discretionary decision-making by executive officials has legal boundaries, and that the role of the courts is to ensure that decisions do not exceed those boundaries.

In this paper, the author explores several areas of public regulation in Canada that remain "untrammelled". These areas include realms of government action deemed to be non-justiciable, such as decisions involving foreign relations or the conferral of honours. The author argues that areas of untrammelled discretion are inconsistent with the Supreme Court of Canada's reasoning in *Roncarelli*. To complete the unfinished project of *Roncarelli*, the author argues that all discretionary decisions should be understood to have justiciable elements, which include, at a minimum, a requirement that public power be exercised in good faith. The author concludes by highlighting that while approaching all discretionary authority as justiciable is intended to alter the approach of Canadian public law, *Roncarelli*'s project is as much a political project as a legal one.

L'affaire *Roncarelli* demeure gravée dans les mémoires cinquante ans après sa rédaction, notamment grâce à l'affirmation par le juge Rand qu'« il n'y a rien de tel qu'une discrétion absolue et sans entraves ». Le juge Rand a défini la « discrétion sans entraves » comme étant la possibilité d'imposer une mesure pour n'importe quel motif ou raison qui puisse traverser l'esprit du décideur. Cet énoncé est compris comme signifiant que toute régulation publique exercée par la prise de décision discrétionnaire de cadres officiels connaît des limites juridiques, et que le rôle des tribunaux est de s'assurer que les décisions ne dépassent pas ces limites.

Dans cet essai, l'auteur explore plusieurs domaines de régulation publique au Canada qui sont demeurés « sans entraves ». Ces domaines comprennent des champs d'action gouvernementale qui sont réputés être non-justiciables, tels que les décisions touchant aux relations internationales ou la remise de distinctions. L'auteur fait valoir que ces domaines de discrétion « sans entraves » sont incompatibles avec le raisonnement de la Cour suprême du Canada dans l'affaire *Roncarelli*. Afin de terminer le projet inachevé de l'arrêt *Roncarelli*, l'auteur soutient que l'on devrait reconnaître que toute décision discrétionnaire doit comprendre des éléments justiciables incluant, au minimum, l'exigence de la bonne foi dans l'exercice du pouvoir public. L'auteur conclut en soulignant que si la reconnaissance du caractère justiciable du pouvoir discrétionnaire a pour objectif de modifier l'approche du droit public canadien, le projet de *Roncarelli* est tout aussi politique que juridique.

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Introduction

Roncarelli v. Duplessis[1] was a case about the limits of executive authority. Of all the reasons for which the case is remembered and discussed fifty years later, the most significant is Justice Rand's now iconic phrase: "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'."[2] Justice Rand defined "absolute and untrammelled discretion" as circumstances where an action can be taken on any ground or for any reason that can be suggested to the mind of the decision maker. The two enduring implications of *Roncarelli* are, first, that public regulation exercised through discretionary decision-making by executive officials has legal boundaries, and, second, that it falls to the courts through the mechanism of judicial review to elaborate those boundaries.[3] In short, *Roncarelli* made the courts' control of executive discretion emblematic of the rule of law.

Justice Rand might or might not be surprised to learn that fifty years after his statement was widely embraced there remain significant areas of absolute and untrammelled discretion in Canada. This is so, I suggest, because of the way in which Canadian courts have interpreted and applied the doctrine of justiciability. Courts have found important spheres of executive discretion to be non-justiciable, and, on this ground, have declined to impose legal constraints on the exercise of such discretion.

The purpose of this study is to explore the settings in which the exercise of public authority has been found to be non-justiciable, and to examine the relationship between justiciability and the rule of law as understood in *Roncarelli*. I argue that as long as justiciability is understood as totally exempting public discretionary decision-making from meaningful oversight, the project of *Roncarelli* remains unfinished.

I advance the view that for the rule of law to be safeguarded, exercises of discretionary authority should be subject to oversight by courts, and that this imperative should take precedence over the doctrines of justicia-

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1 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689 [*Roncarelli*].

2 *Ibid.*

3 In this paper, "executive discretion", "administrative discretion", and "discretionary public authority" will be used interchangeably to refer to settings where public officials have either (1) a power under statute or through a prerogative authority that they may exercise, or (2) a power that may be exercised in different ways. This analysis focuses on the exercise of authority by the executive branch, and therefore does not deal with the different dynamics that apply to constraints on the exercise of judicial discretion or the exercise of legislative discretion. Abuse of discretion may be distinguished from abuse of power, which was the specific concern raised in the context of *Roncarelli*. Rand J.'s judgment, however, has been adopted as a broader prohibition on abuse of discretion by subsequent courts. See e.g. *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 198 [*C.U.P.E.*] (the "Retired Judges Case" discussed at *infra* note 14 and accompanying text).

bility where the two principles cannot otherwise be reconciled. That courts should oversee *some* elements of discretionary authority does not mean that *all* elements of such authority should be subject to judicial review. Further, where courts decline to subject some elements of discretionary authority to judicial review, this does not mean that those decisions are immune to oversight. Other non-judicial actors—ranging from auditors general to ombudspersons, and from parliamentary committees to the ballot box—play a role in ensuring the accountability of discretionary decision-makers. Finally, the internal checks on executive discretion from published guidelines, to ministerial supervision, to the training, expertise, and professionalism of the public service are vital to building a culture of the rule of law from within.

This study will explore the boundary between legal and political accountability for the exercise of discretionary authority, and more particularly, will examine the distinction between the justiciable and non-justiciable aspects of discretionary authority. A general distinction, for example, between merits-based review, which looks to whether the exercise of authority was correct or reasonable, and an ultra vires–based review, which looks to whether the authority was exercised in good faith and for proper purposes, may be a sensible point of departure.

There are areas of government decision-making where courts lack the capacity and the legitimacy to engage in merits-based review, such as the conferral of the Order of Canada on individuals based on their contributions to Canadian society. While courts and the judicial process arguably are unsuited to reviewing the merits of a decision to confer or not confer the Order of Canada, the judiciary might still be well-suited to adjudicating allegations that the government acted in an ultra vires manner in exercising its authority—e.g., by withholding the Order on discriminatory grounds or conferring it in order to advance an ulterior agenda unrelated to the stated goals and mandate of the honour.[4]

In this way, I suggest that fulfilling the project of *Roncarelli* involves moving beyond the reasons of Justice Rand. Rather than asserting that there is simply no "untrammelled discretion" in public regulation of a paticular sort (in this case, the statutorily defined authority over the granting and termination of licences), I argue that there should be no "untrammelled discretion" in any public decision-making, of *any* sort.

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[4] The recent controversy involving the awarding of the Order of Canada to abortion activist Henry Morgantaler represents a reminder of the importance of the conferral of honours. See Sarah Barmak & Richard Brennan, "'I Deserve' Order of Canada, Morgantaler Says" *The Toronto Star* (2 July 2008), online: The Toronto Star <http://www.thestar.com>; Janice Tibbetts, "Chief Justice Sheds Light on Morgantaler's Order of Canada Appointment" *Ottawa Citizen* (16 August 2008), online: Ottawa Citizen <http://www.ottawacitizen.com>.

The analysis below is divided into three parts. In Part I, I discuss the relationship between the rule of law and the limits of judicial review over discretionary public authority. Part II focuses on the impact of the doctrines of justiciability on the legacy of *Roncarelli*. Part III and the Conclusion point the way to completing the unfinished project of *Roncarelli*.

I. The Rule of Law and Discretionary Authority

Discretionary authority arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances. At its root, discretion is about power and judgment. Its relationship with law is often in tension. As Ronald Dworkin memorably observed, "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[5] This often-cited "doughnut analogy" captures the conventional view of discretion. Two main assumptions are embedded in this view: that law is the primary instrument of social regulation, and that discretion is a residual category of law.[6] More recent scholarly analyses of discretion have begun to revisit and challenge this conventional view, re-evaluating discretionary authority and highlighting its progressive and dialogic potential.[7]

Discretionary authority ought to be seen as more than simply a sphere of potentially arbitrary power to be contained. Discretion is also bound up with the principle of deference to the experience and expertise of specialized administrative decision-makers. Discretionary authority, in other words, conveys the idea that the same power may be applied differently in different circumstances and that the official applying that power is best placed to tailor it to the circumstances. This leads to a distinctive framework for accountability. The relationship between discretionary authority and judicial oversight is therefore necessarily contextual and variable. In

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5 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 31.

6 Dworkin adopted a view well aligned with that of Rand J. in *Roncarelli* when he proposed that even where there are no explicit laws or rules that govern a decision, the constraining reach of the legal principles of the rule of law extends to cover the exercise of discretion. Therefore, Dworkin argued, there is really no such thing as absolute or unfettered discretion. Judicial decision-making is always constrained by legal principles. Dworkin's conception of discretion, however, still rests upon its binary opposition to law.

7 See e.g. Geneviève Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (S.J.D. Thesis, University of Toronto Faculty of Law, 2004) [unpublished]; Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) c. 3 ("Reframing Discretion"); Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27 Queen's L.J. 809; Joel F. Handler, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1988) 35 UCLA L. Rev. 999.

other words, the factors appropriate to the exercise of discretion by an immigration officer may not be appropriate for the exercise of discretion by a labour arbitrator.

Judicial oversight of discretionary authority is thus best understood as a spectrum. This metaphor of a spectrum pervades administrative law and reflects the idea that few principles apply in the same way across the diverse venues for executive decision-making. For example, the Supreme Court of Canada invoked the notion of a spectrum to explain the standard of review to capture the idea that context will justify differing degrees of curial deference.[8] Similarly, the duty of fairness is also understood as a variable obligation, to be contextually determined on a spectrum from a maximum to a minimum degree of fairness.[9]

Justiciability, by contrast, typically is understood as an on/off switch: either a matter is justiciable or it is non-justiciable. I would suggest, however, at least in the context of discretionary authority, that justiciability is better understood as part of the broader spectrum of judicial oversight.[10] For example, when courts engaging in judicial review assert that their role is not to second-guess the wisdom of government policy but to ensure that discretion has been exercised within the constraints of the decision maker's jurisdiction, this amounts to a finding that while the merits of government policy choices may be non-justiciable, the motivations of the decision maker are justiciable. This concept applies broadly in existing jurisprudence, ranging from the standard of review case law under administrative law to the section 1 case law under the *Canadian Charter of Rights and Freedoms*.[11] For this reason, the approach I endorse would not represent a dramatic shift in the current standard of review jurisprudence where courts already subject discretionary public authority to judicial review on reasonableness grounds. Rather, as a refinement to the existing jurisprudence, I would argue in favour of extending the scope of this review of exercises of discretionary authority to a broader range of decisions.

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8 See *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, 257 N.B.R. (2d) 207; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1. See also Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581.

9 See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21, 174 D.L.R. (4th) 193 [*Baker*].

10 The idea of justiciability as a spectrum is not new. See e.g. *R. v. Gibson*, *infra* note 40.

11 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

Understood in this fashion, the ultra vires doctrine, the *Wednesbury* unreasonableness,[12] the more recent move to reasonableness review for discretion in Canada, and the *Canadian Charter* all represent elaborations of the relationship between discretion, deference, the rule of law, and justiciability. In *Baker*, Justice L'Heureux-Dubé described this relationship in the following terms:

> Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions. In my opinion, these doctrines incorporate two central ideas—that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law, in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms.[13]

Baker, in other words, reiterates that the rule of law frames the exercise of discretionary authority. This notion of bounded discretionary authority has been a consistent thread through Canadian public law since *Roncarelli*.

An example of the way in which *Roncarelli* continues to shape the administrative law response to discretion is captured in Justice Binnie's majority reasons in *C.U.P.E.*, the "Retired Judges Case".[14] This case involved a challenge to the Ontario Minister of Labour's discretionary appointment of several retired judges to chair interest arbitration panels to resolve labour disputes in the health care sector. Justice Binnie wrote,

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[12] See *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* (1947), [1948] K.B. 223, [1947] 2 All E.R. 680 (U.K.C.A.) (recognition by the U.K. courts that an unreasonable decision will be one that no reasonable decision-maker could reach).

[13] *Baker*, *supra* note 9 at para. 53 [references omitted].

[14] *C.U.P.E.*, *supra* note 3.

> The decision in *Roncarelli*, despite the many factual differences, foreshadows, in part, the legal controversy in this case. There, as here, the governing statute conferred a broad discretion which the decision maker was accused of exercising to achieve an improper purpose. In that case, the improper purpose was to injure financially (by the cancellation of a liquor licence) a Montreal restauranteur whose activities in support of the Jehovah's Witnesses were regarded by the provincial government as troublesome. Here, the allegations of improper purpose behind the unions' challenge are that the Minister used his power of appointment to influence outcomes rather than process, to protect employers rather than patients, and, as stated by the Court of Appeal, to change the appointments process in a way "reasonably" seen by the unions as "an attempt to seize control of the bargaining process."
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> The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration." Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).[15]

Justice Binnie's observation was made in service of his view that a statute that empowered the minister of labour to appoint an interest arbitrator who "is, in the opinion of the minister, qualified to act,"[16] required the minister to abide by specific limits in exercising this discretion. Notwithstanding the expansive nature of statutory language, Justice Binnie, writing for the majority, held that the power to appoint was predicated on a set of factors that had to be considered by the minister and yet were not. In that case, such factors included the labour relations expertise of potential appointees, as well as independence, impartiality, and the general acceptance of potential appointees within the labour relations community.[17]

The Supreme Court of Canada has intervened at other times in discretionary settings where irrelevant factors were considered. For example, in *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality of)*,[18] a similar issue of failing to consider relevant factors arose where a municipal council refused to consider an application for the subdivision of some land prone to flooding. Although the council had considered the flooding issue, it failed to consider the severity of the floods and excluded consideration of any possible solutions to the problem. Justice Wilson stated,

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15 *Ibid.* at paras. 92-93 [references omitted], citing *Roncarelli*, *supra* note 1 at 140.

16 *C.U.P.E.*, *supra* note 3 at para. 52, citing *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14, s. 6(5).

17 *C.U.P.E.*, *supra* note 3 at para. 111.

18 [1985] 2 S.C.R. 164, 20 D.L.R. (4th) 641 [cited to S.C.R.].

> More specifically, was [the Council] entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, any discretionary administrative decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. ... The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.[19]

This kind of analysis, in my view, is exactly what Justice Rand foreshadowed in his reasons in *Roncarelli*. A grant of statutory discretion may appear on its face to be virtually unfettered, but, in a legal system governed by the rule of law, all discretionary authority has limits. On this view, however broadly a grant of discretionary authority may be worded,[20] there ought to be no conception of the exercise of public authority entirely outside the reach of the rule of law.

In the *Reference Re Secession of Quebec*, the Supreme Court of Canada described the importance of the rule of law doctrine flowing from *Roncarelli* in similar terms:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules

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19 *Ibid.* at 174-75 [references omitted].

20 One issue left open in *Roncarelli* itself is whether Parliament can, with express language, establish an unfettered discretion. Rand J. suggested in *Roncarelli* that this is possible when he stated, "[N]o legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute" (*supra* note 1 at 140). Nevertheless, the logic underlying such a proposition is doubtful. Whatever the case might have been in 1959, if such a law were purportedly enacted today, it is likely that it would be read down to impose some limits on the exercise of discretion through the *Canadian Charter*. See e.g. *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193. And in the absence of a Charter violation following from express language, an attempt to authorize unfettered discretion would likely either be read down or subject to a declaratory remedy that such statutory provisions were not consistent with the rule of law.

> and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. *It provides a shield for individuals from arbitrary state action.*[21]

The principle of aversion to absolute discretion, as articulated by Justice Rand in *Roncarelli,* has now become axiomatic in Canadian public law. However, as I discuss below, the principles of justiciability as currently applied by Canadian courts may operate at cross-purposes with this ideal.

II. The Dilemmas of Justiciability and the Legacy of *Roncarelli*

Justiciability reflects a common law set of doctrines addressing the circumstances under which a judge may decline jurisdiction over a dispute. It usually arises where there is a claim that a dispute is "not legal".[22] Such a dispute may be characterized as "purely political", or said to rest on determinations that are not subject to proof in a judicial process (e.g., spiritual convictions that can neither be proven nor disproven through the adversarial presentation of evidence).

Justiciability, as currently applied, may erode the rule of law as elaborated in *Roncarelli* because it exempts significant discretionary public authority from any judicial review.[23] Judicial review, I argue, is a necessary though not sufficient safeguard for the rule of law. Below, I discuss in more detail the relationship between the application of justiciability and these constraints on discretionary public authority.

The most significant exploration of non-justiciable categories of public authority may be found in the Ontario Court of Appeal's decision in *Black v. Chrétien.*[24] In that case, Conrad Black, then a Canadian citizen, had been nominated for appointment by the Queen as a peer. Then Prime

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21 *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70, 161 D.L.R. (4th) 385 [emphasis added, *Secession Reference*].

22 Justiciability may also characterize disputes that are moot, not yet ripe, or are hypothetical, abstract, or academic. These areas of justiciability are beyond the scope of this article. On the scope of justiciability, see Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) c. 1 [Sossin, *Boundaries*]; Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy", Foreword, *The Supreme Court, 2001 Term*, (2002) 116 Harv. L. Rev. 16; Wayne McCormack, "The Justiciability Myth and the Concept of Law" (1986–87) 14 Hastings Const. L.Q. 595.

23 At a minimum, rule of law grounds would include the traditional "abuse of discretion" constraints—namely, that no public authority can be exercised in bad faith, for improper purposes, or in an arbitrary fashion.

24 *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.) [*Black* cited to O.R.].

Minister of Canada Jean Chrétien intervened with the Queen to block Black's peerage, citing a contravention of Canadian law. Chrétien invoked the obscure and inconsistently applied Nickle Resolution,[25] passed by the Canadian House of Commons in 1919, which requested that the King refrain from conferring titles on any of his Canadian subjects. Black sued Chrétien for damages on the grounds of abuse of power, misfeasance in public office, and negligence. He also sued the government of Canada for negligent misrepresentation.

The prime minister and Attorney General brought a motion to dismiss the claims (except the claim of negligent misrepresentation against the government) on two grounds: first, that the claims were not justiciable and therefore disclosed no reasonable cause of action; and, second, that the Quebec Superior Court had no jurisdiction to grant declaratory relief against the defendants because that jurisdiction lay exclusively with the federal court. The motions judge held that the superior court had jurisdiction to entertain Black's claims, which he then dismissed. He held that what was involved was an exercise of the Crown prerogative, which is non-reviewable in court. Black appealed on the issue of justiciability.

> The Ontario Court of Appeal held that the impugned actions of the prime minister were non-justiciable. Justice Laskin, writing for the court, described justiciability in the following terms: "The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. Only those exercises of the prerogative that are justiciable are reviewable."[26]

Justice Laskin held that regardless of whether one characterized the prime minister's actions as communicating Canada's policy on honours to the Queen or as giving her advice on Black's peerage, the prime minister was exercising the prerogative power of the Crown relating to honours. Justice Laskin further held that the exercise of the honours prerogative, absent a Charter claim, is non-justiciable. The controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable, according to the Ontario Court of Appeal, is its subject matter. The exercise of the prerogative will be justiciable, or amenable to the judicial process, only if its subject matter affects the rights or the legitimate expectations of an individual. The exercise of the honours prerogative was described as "always beyond the review of courts,"[27] because no important individual interests are at stake and no one's rights are affected. No person, in other words, has a "right" to an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The discretion to

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[25] See Canada, *Journals of the House of Commons*, vol. 55 (22 May 1919) at 295.

[26] *Black*, *supra* note 24 at para. 50 [references omitted], citing *Ref Re C.A.P.*, *infra* note 73.

[27] *Black*, *supra* note 24 at para. 59.

confer or refuse to confer an honour, Justice Laskin concluded, is the kind of discretion that is not reviewable by the court.

I have argued elsewhere that the Ontario Court of Appeal's decision to characterize Black's allegations as non-justiciable was problematic.[28] By focusing on whether or not the affected party had a right to the benefit in question, the court, in my view, missed the ambition of Justice Rand's assertion in *Roncarelli*.

The rule of law operates not only to provide those with rights a mechanism to vindicate them, but also to constrain the exercise of arbitrary authority.[29] On this view, irrespective of whether the person affected by the exercise of discretion has a right or legitimate expectation to the benefit in question, no public official has the authority to make a decision that is arbitrary, improper, or in bad faith. Or, to put this point slightly differently, all those affected by discretionary decisions have a right to a decision made in good faith and for proper purposes. This constraint on arbitrary discretionary authority would apply equally to Prime Minister Chrétien as to a passport officer.

To return to *Black*, if Conrad Black could establish that Prime Minister Chrétien acted purely out of spite or a personal vendetta in communicating with the Queen, then, on my view, the rule of law requires that a court intervene. Justiciability addresses the capacity and legitimacy of the court to adjudicate a matter. It may well be that the subject matter of a dispute is ill suited to the adversarial process or to the kinds of evidence admissible in a court.[30] Thus, even where the merits of a discretionary decision are beyond review, oversight is both possible and necessary to ensure that discretion is not exercised in bad faith or for an improper purpose. As Justice Rand observed in his reasons in *Roncarelli*, "Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted."[31]

Following *Black*, the key question in relation to the justiciability of discretionary authority is whether the decision engages a person's rights or legitimate expectations. If one has neither a right to nor expectation of an honour, then the matter is non-justiciable. Where an honour *does* af-

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28 Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 McGill L.J. 435.

29 See *Secession Reference*, *supra* note 21.

30 This does not, however, appear to have been the case in the dispute between Black and Chrétien, as Black's allegations related to specific conversations and correspondence, all of which could have been determined through the conventional presentation and cross-examination of evidence.

31 *Roncarelli*, *supra* note 1 at 140.

fect someone profoundly, however, courts have deployed creative distinctions to ensure judicial oversight.[32] In my view, justiciability ought to turn on whether legal boundaries to discretionary authority need to be elaborated, not on whether the affected party had a right or an expectation at issue.

There is, to use the framework of Justice Rand, a context and a perspective within which all public decision-making must conform. Another (and, in my view, preferable) way of looking at this issue is to see a general right on the part of all members of the public to have executive discretionary authority exercised impartially, in good faith, and for proper purposes. This latter approach is similar to the principle that all members of the public have a right to an independent and non-partisan public service. The challenge in many settings of discretionary authority is simply that there may be no directly affected person reasonably able or willing to contest such a decision in court. There may well be other individuals or organizations, however, who would be willing and able to do so. To the extent that there may be issues of standing if a person or organization not directly affected by the decision wishes to challenge the exercise of discretionary authority, these can be addressed by analogy to the existing doctrine of public interest standing.[33] In other words, an allegation of abuse

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[32] See e.g. *Chiasson v. Canada*, 2003 FCA 155, 226 D.L.R. (4th) 351, 303 N.R. 54 [*Chiasson*]. *Chiasson* involved a challenge to the decision by the Honours and Awards Directorate of the Chancellery of Honours (an office of the Governor General) to refuse to consider Richard Chiasson's father for a Canadian Bravery Decoration for his part in a rescue of American sailors at Louisburg, Nova Scotia in 1943. The Canadian Bravery Decorations Committee had established a policy that only incidents occurring less than two years prior to the date of submission would be considered. Chiasson was some fifty-five years too late. Chiasson objected to the imposition of the two-year rule as being ultra vires the committee's powers, in light of the fact that it was not included anywhere in the regulations under which the committee operates. Relying upon *Black*, the Crown claimed that the committee was exercising the royal prerogative of granting honours, which was nonjusticiable. Strayer J.A. for the Federal Court of Appeal, distinguished the case from Laskin J.A.'s reasoning in *Black* on the basis that written instruments were available in this case to control the power being exercised (*Chiasson*, *supra* at para. 8). He noted that a matter is usually considered justiciable if there are objective legal criteria to apply or facts to be determined to resolve the dispute. Strayer J.A. held that on the facts of this case, the regulations could arguably provide criteria for determining whether the process they outline has been followed and whether the committee has exceeded its jurisdiction. Moreover, the regulations can create a legitimate expectation that the procedure in question will be followed (*ibid.* at para. 9).

[33] See the following trilogy: *Thorson v. Canada (A.G.)* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil* (1975), [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588. See also *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321. For an application of the public interest standing doctrine to analogous circumstances, see *Harris v. Canada*, [2000] 4 F.C. 37, 187 D.L.R. (4th) 419 (C.A.). Harris launched a class action on behalf of himself and all taxpayers required to file returns pursuant to s. 150 of the *Income Tax Act* (R.S.C. 1985 (5th Supp.), c. 1). He was

of discretion ought to be considered by a court whether or not a directly affected person can demonstrate that their rights or expectations were jeopardized by the decision.

The principle I advance above may well extend beyond what Justice Rand elaborated in *Roncarelli*. Since Roncarelli clearly did have an expectation interest in his tavern's liquor licence, the question of the importance of that interest in framing the legal constraints on executive discretion did not arise. Further, Justice Rand's qualification to the claim that there is no such thing as absolute and untrammelled discretion in "public regulation of *this* sort"[34] could be read as implying that in the context of public regulation of some *other* sort, absolute or untrammelled discretion may be tolerated.

If Justice Rand meant to suggest that executive discretion of some other sort lay beyond judicial oversight, we do not have any clear description of what types of discretion he had in mind. It is worth noting the irony, however, in the fact that Justice Rand was in a position to offer his judgment in *Roncarelli* precisely because of one of the most significant spheres of untrammelled discretion in our legal system—that of judicial appointment. I emphasize this connection in an earlier critique of Canada's discretionary judicial appointment system:

> *Roncarelli*, therefore, reflects the "Rand Paradox". The judge most credited with subjecting executive authority to the rule of law was himself appointed to the Supreme Court in an exercise of unchecked and unreviewable executive authority—that is, the authority of the federal executive to appoint judges to the Supreme Court, and to all federally appointed trial and appellate courts. The rule of law in Canada, in other words, is supervised by judges appointed according to a process that effectively lies beyond the reach of the rule of law.[35]

Discretionary authority over judicial appointments also serves as an example of a setting where it is difficult to imagine circumstances in which someone directly affected would ever be in a position to challenge it. Those who receive an appointment have no reasons to challenge this exercise of discretionary authority, and those passed over for an appointment are not provided reasons as a basis for such a challenge. Arguably, however, there is no setting where the rule of law is more crucial to safeguard, or where an abuse of discretion could have more pernicious consequences to judicial independence and public confidence in the administration of justice. In my view, the exercise of the government's discretion to

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granted standing to challenge the discretionary application of a tax status on a third party, private family trust.

34 *Roncarelli*, *supra* note 1 at 140 [emphasis added].

35 Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008) 58 U.N.B.L.J. 11 at 11.

appoint or not to appoint someone to the judiciary should be seen as a justiciable decision as a matter of law. However, if that is the extent of the oversight over such decisions, the rule of law cannot be safeguarded in a meaningful way. In this sense, justiciability should be seen as a point of departure for rule of law accountability, albeit an incomplete and sometimes inadequate response to the challenge. Fulfilling the project of *Roncarelli* may well require the development of shared values within judicial and executive perspectives on discretionary authority. In settings such as judicial appointments where judicial review is unlikely to arise, reliance on the executive may be greater.

It will fall, in other words, to institutional mechanisms developed within the executive branch to enhance accountability. To take the example of judicial appointments, the government could adopt a practice of transparency and justification, which would make partisan or arbitrary appointments far less likely.[36] Such institutional measures will depend on political leadership. In this sense, judicial review represents a necessary but not sufficient point of departure. The application of justiciability doctrines as an on-off switch of legal accountability for discretionary authority may erode the rule of law, precisely because political institutions tend to take seriously as "rule of law" issues those matters that courts have identified as such.

As I discuss below, however, there remain significant areas of executive discretion in Canada that continue to be seen as non-justiciable and, as such, beyond legal accountability. I now examine some of these areas to highlight the dilemmas posed by the justiciability jurisprudence. This discussion is not intended to be exhaustive, but rather illustrative.

A. The Acquisition and Exercise of Sovereignty

The exercise of state sovereignty is an example of a setting in which executive discretion has been understood as non-justiciable. In this section, I discuss two cases involving challenges to Canadian sovereignty by aboriginal litigants that illustrate this principle.

First, the courts have found that executive decisions to enter into treaties with aboriginal groups are not justiciable. In *Cook v. Canada (Minister of Aboriginal Relations & Reconciliation),*[37] two groups of petitioners sought to prevent British Columbia's Minister of Aboriginal Relations and Reconciliation from signing *The Tsawwassen First Nation Final Agreement* until such time as consultations were completed with the Semiahmoo First Nation and the Sencot'en Alliance, respectively. The petitioners claimed that their groups had overlapping claims with the Tsawwassen

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36 For discussion of this approach, see *ibid.*

37 2007 BCSC 1722, [2008] 7 W.W.R. 672, 80 B.C.L.R. (4th) 138.

First Nation and that the honour of the Crown required it to consult with the petitioners and to accommodate their interests prior to signing the agreement. Substantively, they argued that the duty to consult does not mean that the Crown must consult and accommodate every potential overlapping claim before agreeing to the terms of a treaty.[38] Ultimately, Justice Garson held for the petitioners, following the reasoning in *Black*. She acknowledged that exercises of Crown prerogative powers were subject to a duty of fairness where a decision affects the rights of individuals.[39]

Second, courts have also held that Crown sovereignty in criminal law matters is non-justiciable. The case of *R. v. Gibson* involved an application by the Crown to quash an application made by an individual member of the Akwesane First Nation for an order prohibiting the Ontario Court of Justice from hearing a preliminary inquiry in his case.[40] Gibson challenged the jurisdiction of the Crown to hold him criminally responsible for an assault causing bodily harm and robbery that was alleged to have taken place in a Canadian Tire parking lot in Caledonia.[41] Gibson put forward two arguments: (1) that the Crown had no jurisdiction over him as an aboriginal person and member of the Akwesane First Nation; and alternatively, (2) that his treaty rights prevail over the *Criminal Code* under the rubric of subsection 35(1) of the *Constitution*.[42] The court summarily dismissed Gibson's application, holding, *inter alia*, that the sovereignty of the Crown in criminal law matters has been consistently considered non-justiciable.[43] With respect to the first argument, Justice Whitten adopted the reasoning in *Black*, noting that the justiciability of the Crown's prerogative lies on a spectrum at one end of which lie matters of "high policy", which are immune from judicial review.[44] Justice Whitten further noted that attacks upon the sovereignty of the Crown as an attempt to circumvent criminal proceedings have been dealt with many

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38 *Ibid.* at para. 13.

39 *Ibid.* at para. 50.

40 [2007] O.J. No. 3948 (Sup. Ct. J.) (QL) [*Gibson*]..

41 *Ibid.* at para. 3.

42 *Ibid.* at para. 6; *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).

43 *Gibson*, *supra* note 40 at para. 12. The court also noted as an aside that the treaty in question, the *Nanfan Treaty* (17 August 1701, signed by the Hon. John Nanfan) "does not on its language appear to reserve sovereignty in the matters of criminal law to the Mohawks" (*Gibson*, *supra* note 40 at para. 24).

44 *Ibid.* at para. 11.

times before, and that each time, the courts have declined to adjudicate challenges to the acquisition of sovereign jurisdiction by Canada.[45]

These cases demonstrate types of authority that might be ill-suited to judicial review because courts lack the legitimacy to limit the sovereignty of the Crown. While there are good reasons to limit the scope of the judicial role in resolving disputes about sovereignty—particularly that the courts derive their authority from the same wellspring of sovereignty often impugned in these challenges—should sovereignty be available as a cloak behind which government may act with impunity? This question takes on added bite in the context of foreign relations where the reference to "high policy" has had even broader sweep.

B. Foreign Relations

Similar to issues engaging the sovereignty of the Crown, the cases below illustrate how the conduct of foreign affairs has been held to be a matter of "high policy" and, as such, immune from judicial review as a category.

In the case of *Copello v. Canada (Minister of Foreign Affairs)*, the applicant, a diplomat serving with the Italian Foreign Ministry in Ottawa, sought an order quashing a request made of the Republic of Italy by Canada's Minister of Foreign Affairs and International Trade that Copello be recalled.[46] This request came about as a result of two reports made of allegedly unacceptable behaviour on Copello's part and his threat of a civil suit against one of the complainants. His attempts to gain an audience with either the minister or the Chief of Protocol in order to clarify his position with respect to the two incidents were unsuccessful. In his judgment, Justice Heneghan held that the acceptance and expulsion of diplomatic agents is not justiciable as it is an element of the royal prerogative covering the conduct of diplomatic relations.[47]

Following Justice Laskin's focus on a subject matter test as a threshold of justiciability in *Black*, Justice Heneghan approached the question of whether the rights or legitimate expectations of an individual were affected by the exercise of the prerogative.[48] His reasoning was that since Copello held no independent rights or expectations under the framework

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[45] See *R. v. Francis* (2007), 85 O.R. (3d) 45, [2007] 3 C.N.L.R. 294 (Sup. Ct. J.); *R. v. David*, [2000] O.T.C. 120, 45 W.C.B. (2d) 471 (Sup. Ct. J.); *RO: RI: WI: IO v. Canada (A.G.)*, 2007 ONCA 100, 155 A.C.W.S. (3d) 324.

[46] 2001 FCT 1350, [2002] 3 F.C. 24, 213 F.T.R. 272 [*Copello*], aff'd 2003 FCA 295, 308 N.R. 175, 3 Admin. L.R. (4th) 214.

[47] *Copello*, *supra* note 46 at para. 71.

[48] *Black*, *supra* note 24 at para. 51.

of the *Vienna Convention on Diplomatic Relations*[49] (and since the relevant articles of the convention had not been brought into domestic Canadian law demonstrating an intention to keep the issue outside the legal arena), the minister's request lay inside the realm of the Crown prerogative in the conduct of foreign affairs, and thus outside the sphere of judicial oversight.

In *Ganis v. Canada (Minister of Justice)*,[50] the British Columbia Court of Appeal considered an application under section 57 of the *Extradition Act*[51] for judicial review of the minister of justice's surrender order in favour of the Czech Republic. Ganis had been convicted *in absentia* by a Czech court for being unlawfully at large after failing to return to prison following a temporary leave of absence for good behaviour.[52] He had been serving a prison sentence for the Czech offence of trade or dealing in women, which is analogous to the Canadian offence of procuring.[53] Among the arguments he put forward in seeking to quash the surrender order, Ganis questioned the validity of the treaty pursuant to which the Czech Republic was seeking surrender. In his decision, Chief Justice Finch held that the existence of a treaty was not a justiciable issue. As treaty making falls within the realm of foreign affairs, it falls within the sphere of subject matter that is not amenable to adjudication.[54]

Decisions to send troops abroad or to engage in military intervention comprise another sphere of discretionary public authority that has featured arguments regarding justiciability. *Aleksic v. Canada (A.G.)*, for example, involved an action against Canada for damages and a remedy under the *Canadian Charter* resulting from her participation in a bombardment of Yugoslavia in the spring of 1999.[55] The fifty-seven plaintiffs in the case attributed a variety of allegedly tortious acts to the Crown and a breach of their Charter right to life, liberty, and security of the person. The Attorney General brought a motion to strike the statement of claim arguing that the claim was not justiciable, and thus that the statement did not disclose any reasonable cause of action. Justice Heeney, writing for the majority of the court, agreed. Applying the subject-matter test from *Black*, Justice Heeney held that the decision to participate in the bombardment of Yugoslavia was closely analogous to a declaration of war,

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49 18 April 1961, 500 U.N.T.S. 95, Can. T.S. 1966 No. 29, art. 9 (entered into force 24 April 1964).

50 2006 BCCA 543, 233 B.C.A.C. 243, 216 C.C.C. (3d) 337 [*Ganis*].

51 S.C. 1999, c. 18.

52 For the analogous Canadian offence, see *Criminal Code*, R.S.C. 1985, c. C-46, s. 145(1)(b).

53 See *ibid.*, s. 212.

54 *Ganis*, *supra* note 50 at para. 20.

55 (2002), 215 D.L.R. (4th) 720, 165 O.A.C. 253 (Sup. Ct. J.) [*Aleksic* cited to D.L.R.].

which would place it well within the ambit of matters of "high policy".[56] Justice Heeney emphasized that the decision was beyond the review of the courts as it "was a pure policy decision made at the highest levels of government, dictated by purely political factors."[57] The sole exception to this non-justiciability would be where an individual claimed that their Charter rights had been violated.[58] Otherwise, without a cognizable standard by which to measure wrongful behaviour, this sort of review would not be well suited to court process.

Justice Wright provides a compelling dissent, holding that the action should be allowed to proceed on the basis that the *National Defence Act*[59] displaced Crown prerogative in this area.[60] He further noted that even if the prerogative did cover decisions to commit the armed forces to active service, it would still be subject to the rule of law, whether domestic or international.[61] While international law, unless written into domestic law, cannot be used to found a cause of action, Justice Wright suggested that international law, as it informs the honour of the Crown, provides a justiciable standard by which the use of royal prerogative as a shield can be measured.

Blanco v. Canada concerned an action by the plaintiff for an injunction against the federal government to prevent it from deploying armed forces to fight in Iraq without the consent of Parliament.[62] Justice Heneghan denied the interim injunction on three grounds: the question was not yet ripe, it was non-justiciable, and the plaintiff relied on inappropriate authorities.[63] Relying upon Justice Laskin's judgment in *Black* and the Supreme Court of Canada's decision in *Operation Dismantle*, Justice Heneghan affirmed that matters of high policy, including a decision to go to war, are not justiciable unless an individual claims that the exercise of royal prerogative has given rise to a breach of their Charter rights.

Finally, *Turp v. Canada (Prime Minister)* dealt with an attempt to prevent Canada from participating in the conflict in Iraq.[64] In that case,

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56 *Ibid.* at 732.

57 *Ibid.*

58 See *Operation Dismantle v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [*Operation Dismantle* cited to S.C.R.]. In *Aleksic*, Heeney J. found the Charter claim pleaded to be justiciable under this exception, though he expressed doubts as to whether this aspect of the claim was engaged by the facts as pleaded (*supra* note 55 at 733).

59 R.S.C. 1985, c. N.4.

60 *Aleksic*, *supra* note 55 at 730-31.

61 *Ibid.* at 731.

62 2003 FCT 263, 231 F.T.R. 3 [*Blanco*].

63 *Ibid.* at paras. 11-12.

64 2003 FCT 301, 237 F.T.R. 248, 111 C.R.R. (2d) 184.

the plaintiffs made an application for judicial review and a motion for interim relief. For reasons similar to those in *Blanco*, the Supreme Court of Canada declined to impose judicial constraints on the discretionary authority.

While none of the cases discussed above reached the Supreme Court of Canada, the Court offered its view of a similar dynamic in *Canada (Prime Minister) v. Khadr*.[65] *Khadr* involved a challenge to the Canadian prime minister's decision not to request that a Canadian citizen be transferred from the U.S. Guantanamo Bay detention facility. The Court concluded that the matter was justiciable and provided a declaratory remedy but declined to impose an order compelling the Canadian government to seek Khadr's repatriation. In justifying this decision, the Court observed,

> The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution.[66]

As *Khadr* demonstrates, the exercise of public authority is never "purely political". The very fact of it being a public form of authority brings with it the obligation to all of those affected that it be exercised in good faith and for proper purposes. Public authority, understood as I have suggested in this study, does not exist outside the rubric of the rule of law.

C. Political Questions

The question of the justiciability of foreign relations decisions and decisions bearing on sovereignty are species of a broader question hinted at above: the question of whether some disputes are inherently "political" and therefore beyond the realm of the judicial process, and subject to political rather than legal accountability.[67]

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65 2010 SCC 3, [2010] 1 S.C.R. 44 [*Khadr*].

66 *Ibid.* at para. 37 [references omitted].

67 For a more detailed discussion of this question, see Sossin, *Boundaries*, *supra* note 22, c. 4.

A vivid illustration of this dilemma was provided by the parliamentary crisis in December 2008, which was precipitated when the Governor General decided to accede to the Conservative government's request to prorogue Parliament in order to avoid a vote of non-confidence in the House of Commons. Would a court have the capacity or legitimacy to interfere with the discretionary authority exercised by the Governor General on deeply partisan matters going to the heart of the democratic credibility of Parliament?[68] On the other hand, if not by the court, how will the rule of law be vouchsafed in the midst of such a crisis? Consider what might have happened if, as rumours at the time suggested, the Conservative government threatened to remove the Governor General if she refused the request to prorogue.

The question of whether a "political questions" doctrine applies in Canada was addressed, at least in part, by the Supreme Court of Canada in the context of the reach of the *Canadian Charter* in *Operation Dismantle*.[69] In that decision, dealing with a challenge by an antinuclear NGO to the government's decision to permit U.S. cruise missiles to be tested in Canada, the Court concluded that the claim was non-justiciable because it turned on evidence (e.g., the Soviet Union's military strategy) that was incapable of being proven in a Canadian court. In her concurring reasons, Justice Wilson held that it was not open to a court to decline to deal with Charter claims of this kind merely because they involved cabinet decisions or dealt with politically sensitive issues.[70] However, she went on in the same judgment to recognize that an issue will be nonjusticiable if it involves "moral and political considerations which it is not within the province of the courts to assess."[71] In this fashion, while rejecting the American political questions doctrine per se, she opened the door to the development of a distinctly Canadian approach, which would turn on the ability of a court to parse a dispute into legal, moral, and political aspects.

The Court's approach in *Operation Dismantle* was put to the test in subsequent cases, notably the *Secession Reference*. The *amicus curiae* lawyer (appointed by the Court to argue Quebec's position in that case) challenged the justiciability of the questions referred by the government

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68 On the failure to provide reasons, see L. Sossin & A. Dodek, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture, and the Governor General" in Peter H. Russell & Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 91. While a court would be ill-suited to the task of reviewing the merits of the Governor General's exercise of discretion, once again, I see no reason why a court should not be able to review allegations that the discretion was exercised for an improper purpose, in bad faith, or in violation of applicable constitutional conventions.

69 *Operation Dismantle*, *supra* note 58.

70 *Ibid.* at 472.

71 *Ibid.* at 465.

to the Court, which dealt with the legality of a unilateral declaration of secession. The Court indicated that the question, put simply, was whether the dispute "is appropriately addressed by a court of law."[72] The Court had also examined the issue earlier in the *Reference Re Canada Assistance Plan (B.C.)*:

> In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.[73]

In the *Secession Reference*, the Court held that a finding of nonjusticiability is called for where adjudicating an issue would take the Court beyond its own assessment of its proper role in the constitutional framework of Canada's democratic form of government, or "where the Court could not give an answer that lying within its area of expertise: the interpretation of law."[74] The Court concluded that the questions posed by the government on the issue of secession were strictly limited to aspects of the legal framework in which decisions about secession might be taken, and thus were justiciable. The Court observed,

> As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extra-legal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.[75]

This is significant, in my view, as the exercise of discretionary authority always involves a legal element. The legal element is precisely the one addressed by Justice Rand in *Roncarelli*: what are the boundaries imposed by the rule of law on the exercise of public authority? While questions of whether discretionary authority was exercised in bad faith would appear always to engage "a legal aspect", the Supreme Court of Canada has treated such issues as nonjusticiable in a number of settings.

In *Thorne's Hardware Ltd. v. Canada*,[76] a federal Order-in-Council that altered the boundaries of the Port of Saint John was challenged. The applicant claimed that the executive decision had been motivated by the ulterior and improper purpose of expanding the revenue base of the National Harbours Board. While conceding that there could be review in "an

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72 *Secession Reference*, *supra* note 21 at para. 26.

73 *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545, 83 D.L.R. (4th) 297 [*Ref Re C.A.P.*].

74 *Secession Reference*, *supra* note 21 at para. 26.

75 *Ibid.* at para. 28.

76 [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 [*Thorne's Hardware* cited to S.C.R.].

egregious case" of the cabinet failing to observe jurisdictional limits or "other compelling grounds,"[77] Justice Dickson (as he then was), writing for the Court, held that "[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings."[78] Justice Dickson was unwilling even to review the evidence that alleged that the cabinet had acted in bad faith and contrary to the rule of law. He found that it was "neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order-in-Council"[79] and observed that "governments may be moved by any number of political, economic, social or partisan considerations."[80] Nonetheless, Justice Dickson was at least prepared to examine the evidence "to show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence."[81] In this sense, he was not prepared to close the door entirely to review of Orders-in-Council.

In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City of)*,[82] the Supreme Court of Canada applied the *Thorne's Hardware* principle in the context of a municipal corporation appointing a board of inquiry under Ontario's municipal legislation. Writing for the Court, Justice Binnie held that the applicants had no right to examine municipal councillors with a view to establish that they had improper motives in voting for the creation of a board of inquiry. He held that the "motives of a legislative body composed of numerous individuals are 'unknowable' except by what it enacts."[83]

This approach has meant in practice that the rule of law may amount to little more than a velvet fist in an iron glove. If courts are unwilling to allow litigants to advance evidence of bad faith or improper motives in the exercise of discretionary authority, or to consider such evidence when it is presented, then judicial oversight will be limited to the rare occasions, such as *Roncarelli*, where a decision maker announces publicly that he wielded authority he did not have and did so for improper reasons.

Consider the example of *David Suzuki Foundation v. British Columbia (A.G.)*.[84] In *Suzuki Foundation*, an environmental NGO sought to challenge an Order-in-Council that exempted timber originating from the

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77 *Ibid.* at 111.

78 *Ibid.*

79 *Ibid.* at 112 [references omitted].

80 *Ibid.* at 112-13.

81 *Ibid.* at 115.

82 [1998] 3 S.C.R. 3, 40 O.R. (3d) 158 [cited to S.C.R.].

83 *Ibid.* at 36.

84 2004 BCSC 620, 17 Admin. L.R. (4th) 85, 8 C.E.L.R. (3d) 235 [*Suzuki Foundation*];

northwest regions of British Columbia from a prohibition on export, as set out in section 127 of British Columbia's *Forest Act*.[85] The petitioners claimed that subsection 128(3) creates conditions precedent to the jurisdiction of the Lieutenant Governor in Council (LGIC) to exempt timber from the provisions of section 127. Subsection 128(3) of the *Forest Act* requires that the LGIC be satisfied that the timber will be surplus to requirements of processing facilities in British Columbia, that the timber cannot be processed economically in the province, and further, that the exemption will prevent waste or improve the utilization of timber cut from Crown land. Justice Hood held that the *Forest Act* provided to the LGIC powers to exempt, conditional only on his or her own subjective assessment.[86] Justice Hood characterized this authority as a "complete, unfettered, subjective discretion."[87] Justice Hood found that the court's role was limited to determining whether the LGIC had performed its functions within the boundary of the legislative grant and in accordance with the terms of the legislative mandate.[88] He concluded that the LGIC had acted within the scope of its statutory powers.[89] He conceded, however, that there would need to be at least some consideration of relevant evidence for the decision to be made appropriately, and that the LGIC must act in good faith.[90] Justice Hood noted,

> The important factor is the subject matter of the decision. Where it involves the consideration of political, economic, social, and other matters so vital to the legislators, but which the Courts are ill-equipped to weigh or consider, the Court must defer to legislators where no error in law or jurisdiction is found. Finally, the difficulties in differentiating between legislative and administrative functions should be avoided by taking this basic jurisdictional supervisory role approach, and interpreting the statutory provisions in a context of the pattern of the statute in which it is found. I note that this seems to me to lead inevitably to a pragmatic and functional analysis.[91]

Courts have expressed particular unease when confronted with challenges to decisions of government that reflect clear policy preferences, particularly around public spending. For example, in *Canadian Bar Association v. British Columbia*,[92] where the Canadian Bar Association (CBA)

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85 R.S.B.C. 1996, c. 157.

86 *Suzuki Foundation*, *supra* note 84 at para. 12.

87 *Ibid.*

88 *Ibid.* at para. 91. On the reluctance of the Court to impose constraints on the legislative decision-makers, see *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1.

89 *Suzuki Foundation*, *supra* note 84 at paras. 142, 258.

90 *Ibid.* at paras. 125-28.

91 *Ibid.* at para. 121.

92 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, [2007] 1 W.W.R. 331.

sought to establish a constitutional right to legal aid in civil justice settings, Chief Justice Brenner held that

> [i]n the case at bar, there is no challenge to a specific governmental decision, act, or statute. The case cannot be characterized as raising an issue with respect to the limits of statutory, administrative, or executive authority. The challenge is to the funding, content, administration, operation, and effect of an entire public program that invokes various federal and provincial statutes, ministries, agencies, and non-governmental entities and actors.
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> ...
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> What the plaintiff effectively seeks in the case at bar is to have the court conduct an inquiry on the subject of civil legal aid, define a constitutionally compliant civil legal aid scheme, order the defendants to implement such a scheme, and oversee the process to ensure compliance.[93]

In *Friends of the Earth v. Canada (Governor in Council)*,[94] the federal court was faced with a challenge to the government's policy response to its Kyoto Protocol commitments, and particularly to the duties of the government as elaborated in the *Kyoto Protocol Implementation Act*[95]—a private member's bill committing the government to certain steps implementing the Protocol. With specific regard to this case, Justice Barnes held that the court has no role to play reviewing "the government's response to Canada's Kyoto commitments within the four corners of the KPIA."[96] He expressed doubts that the court has any role to play in controlling or directing the other branches of government in the conduct of their legislative and regulatory functions outside of the constitutional context.[97] Justice Barnes rejected an approach that would have him separate the *KPIA* policy imperatives into justiciable and nonjusticiable components.[98] He noted that orders made under such an approach would be substantially empty of content.[99] For example, he could mandate a regulatory response by a certain date, but he would lack any control over its significance or substance.

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93 *Ibid.* at paras. 47, 49.

94 2008 FC 1183, [2009] 3 F.C.R. 201, 299 D.L.R. (4th) 583 [*Friends of the Earth (F.C.)*]. The Federal Court of Appeal dismissed an appeal from this decision, indicating simply that it agreed with the reasons of the trial judge: *Friends of the Earth v. Canada (Governor in Council)*, 2009 FCA 297, 313 D.L.R. (4th) 767, 93 Admin. L.R. (4th) 72.

95 S.C. 2007, c. 30 [*KPIA*].

96 *Friends of the Earth (F.C.), supra* note 94 at para. 46.

97 *Ibid.* at para. 40.

98 *Ibid.* at para. 34.

99 *Ibid.* at para. 39.

Justiciability, on this view, is tied not only to the subject matter of a dispute but also to the court's remedial reach.[100] This approach, however, ignores important principles from other spheres of Canadian public law. Courts have articulated the scope of constitutional conventions in significant detail, for example, while noting that such standards are unenforceable. A remedy, moreover, may not require enforcement of any kind. For example, it is always open to a court to issue a declaratory remedy when the scope of intervention is limited, as the Supreme Court of Canada did in *Khadr*, discussed above.[101]

In my view, the focus on remedies, like the focus on rights in *Black*, places undue and unwise limits on judicial oversight for potential abuse of discretionary authority. As an alternative, I have argued that no subject matter of discretionary authority, in and of itself, should be viewed as nonjusticiable. Justiciability should be seen as a spectrum on which varying levels of judicial scrutiny may be situated. No form of public authority, however, ought to be seen as lying entirely outside the spectrum of legal oversight. As I discuss below, the key to fulfilling *Roncarelli*'s promise is to approach justiciability as an elaboration of the rule of law principle, rather than its outer boundary.

Conclusion: Beyond *Roncarelli*

This article has explored the relationship between the doctrine of justiciability and the principles of the rule of law. In particular, I have examined judicial decisions in a range of settings such as exercises of sovereignty, foreign relations, and political questions, where courts have opened the door to "untrammelled discretion" through their application of justiciability. I argue that the Supreme Court of Canada's justiciability case law should be re-evaluated from a rule of law perspective. Rather than finding spheres of discretionary authority to lie outside the realm of justiciability, I argue for a more nuanced approach. Recognizing that some merits-based judgments lie outside the capacity or legitimacy of the courts, I argue that other aspects of discretionary authority, such as whether that authority was exercised in good faith and for proper purposes, lie within the core of the courts' guardianship role over the rule of law.

In other words, in the context of particular disputes, there may be a range of matters on which courts lack the capacity or legitimacy to adjudicate. I do not believe, however, that the rule of law can be safeguarded if there are entire spheres of discretionary public authority that are immune from judicial review of any kind. While the spectrum of justiciability may

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[100] *Ibid.* at para. 47.

[101] See *supra* notes 65-66 and accompanying text.

permit minimal judicial oversight at the more political end of discretionary authority, fulfilling the project initiated in *Roncarelli* means vigilance against arbitrary exercises of discretion.

A number of scholars have remarked how often *Roncarelli* has been invoked over the past fifty years, but how rarely the rule of law is actually relied upon as a basis for invalidating executive discretion.[102] Even where an incidence of improper discretion can be addressed through judicial review (as in *Roncarelli*), judicial intervention depends on litigants with sufficient resources, patience, and initiative to come forward. In some key settings—judicial appointments, as discussed above, is one example—it is unlikely that a directly affected litigant will ever seek to contest an exercise of executive discretion. In such settings, respect for the rule of law must come through a partnership between the courts and the executive branch.

The aspect of *Roncarelli* that has received too little attention in my view, and with which my study concludes, is the implication for the executive of its commitment to the rule of law. While I have argued that judicial oversight ought to be available for the exercise of discretionary authority, not even the most effective oversight can identify and remedy the varied ways in which discretionary authority might be abused. In such settings, while it is the role of the courts to articulate the requirements of the rule of law, only executive leadership can promote and protect a rule of law culture among discretionary decision-makers.[103]

To conclude, the first step to completing the project that Justice Rand began in *Roncarelli* is to revisit the case law on justiciability to confirm that no category of executive discretion lies outside the scope of judicial oversight. *All* discretionary authority, irrespective of the subject matter, must be subject to legal boundaries. The point of departure for elaborating those boundaries is judicial oversight, but its destination is to internalize

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[102] See Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715. Hogg and Zwibel observed that the rule of law is invoked far more often than it is relied upon as grounds for invalidating discretion. David Mullan, in a similar vein, observed that *Roncarelli* never had the impact it should have had. See David J. Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality" in Mary Jane Mossman & Ghislain Otis, eds., *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montreal: Thémis, 1999) 313.

[103] An example of this relationship may be seen in the context of the Supreme Court of Canada's *Baker* decision (*supra* note 9). In *Baker*, the Court elaborated a different approach to exercising a discretionary exemption for humanitarian and compassionate grounds. Following this decision, a new guideline was issued and a new training initiative established in order to integrate the Court's standards into the day-to-day decision making of front-line officials. For a discussion of this process, see Lorne Sossin, "The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion" in David Dyzenhaus, ed., *The Unity of Public Law* (Portland, Or.: Hart, 2004) 87.

a rule of law culture through the institutional mechanisms and practices of executive decision-making. Only then may *Roncarelli*'s promise come to fruition.

The Law behind the Conventions of the Constitution: Reassessing the Prorogation Debate

Mark D. Walters[*]

In December of 2008 and again in December of 2009, Prime Minister Stephen Harper obtained from Governor General Michaëlle Jean orders proroguing the Parliament of Canada in circumstances that were deeply controversial. The topic of constitutional conventions, which does not generally attract much public attention, suddenly became the subject of considerable interest. The Governor General, as the Queen's representative in Canada, has the legal power under the royal prerogative to make key decisions about parliamentary government, including the appointment and dismissal of prime ministers and other ministers who form the government, the summoning of parliaments, the making of legislation by assenting to bills passed by the upper and lower chambers, the proroguing or ending of parliamentary sessions, and the dissolving of parliaments and the calling of elections. However, by constitutional convention the royal prerogative is almost always exercised on the advice of ministers of the Crown, in particular prime ministers, who are responsible to the elected members of Parliament. Through this principle of responsible government, royal authority is exercised in a democratic fashion. But what if a Prime Minister uses the Governor General's powers to shut down Parliament in a bid to *avoid* responsibility to elected representatives? Was this Prime Minister Harper's intent when he sought to prorogue Parliament on the above-mentioned occasions? Did he violate any constitutional conventions when advising the Governor General? Did the Governor General violate any conventions by accepting his advice? In the debate that has raged on how to answer these questions there are, of course, serious differences of opinion.[1] But most protagonists in this debate seem to agree on at

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1 See, for example, "Forum: The 2008 Prorogation Question" (2009) 2 J.P.P.L. 207–215; Guy Tremblay, "Les dimensions constitutionnelles de la crise politique fédérale de 2008-2009" (2009) 3 J.P.P.L. 179; Kenneth Munro, "The Turmoil Surrounding the Prorogation of Canada's 40th Parliament & the Crown" (2009) 18 Const. F. 13; Bruce M. Hicks, "British and Canadian Experience with the Royal Prerogative" (2010) 33 Can. Parlia. Rev. 18; Andrew Heard, "The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?", *Points of View*, Discussion Paper No. 7 (Edmonton: Centre for Constitutional Studies, January, 2009); Andrew Heard, "The Governor General's Decision to Prorogue Parliament: A Chronology & Assessment" (2009) 18 Const. F. 1; Eric Adams, "The Constitutionality of Prorogation" (2009) 18 Const. F. 17; Frédéric Boily, "La 'crise de la prorogation' vue du Qué-

least one point: whatever we think about the actions of the Prime Minister and the Governor General in terms of constitutional convention, there cannot be any ground for questioning their actions in terms of constitutional *law*.

The assumption that the two Harper prorogation crises raise questions of convention but not law is based on established views about constitutionalism derived from the British tradition and affirmed by the Supreme Court of Canada in the 1981 *Patriation Refererence*.[2] However, this assumption has not gone unchallenged. Indeed, the prorogation crises have prompted several legal scholars to reassess those views and to argue that prerogative decisions affecting parliamentary democracy must be subject to *some* sort of legal limitation. Different arguments are made in this respect, but they share a common premise, namely, that established views on constitutional law and convention are in need of revision in light of the judicial narrative in Canada on unwritten constitutional principles that culminates with the Supreme Court of Canada's opinion in the 1998 *Quebec Secession Reference*.[3] For example, Lorne Sossin and Adam Dodek argue that a sharp distinction between law and convention is no longer possible, and legal principles of fairness should now be seen to overwhelm conventions on confidentiality that shield the reasons for decisions about such things as prorogation from public view.[4] Jean Leclair and Jean-François Gaudreault-Desbiens argue that unwritten principles of constitutional law relating to democracy may not be judicially enforceable in relation to decisions like prorogation, but these principles do empower the Governor General to inquire more closely into the propriety of prime ministerial advice on how prerogative powers are used.[5] More recently, Dean Sossin has gone a step further, arguing that the constitutional imperative of upholding the rule of law may sometimes require the judicial review of prerogative decisions like those on prorogation.[6] The basic idea underlying each of these arguments, that law disciplines prerogative power relating to parliamentary democracy in Canada, is easy to state in abstract but difficult to reconcile with practice and precedent. In arguing against the idea, Warren Newman

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bec" (2009) 18 Const. F. 21; Melissa Bonga, "The Coalition Crisis and Competing Visions of Canadian Democracy" (2010) 33 Can. Parlia. Rev. 8; Edward McWhinney, "The Constitutional and Political Aspects of the Office of the Governor General" (2009) 32 Can. Parlia. Rev. 2; Bradley W. Miller, "Proroguing Parliament: A Matter of Convention" (2009) 20 Public L. Rev. 100; Hon. Edward Roberts, "Ensuring Constitutional Wisdom During Unconventional Times" (2009) 32 Can. Parlia. Rev. 13.

2 *Reference re Resolution to amend the Constitution* (*sub nom. Constitutional Amendment References 1981, Re*) (*sub nom. Manitoba (Attorney General) v. Canada (Attorney General)*, [1981] 1 S.C.R. 753.

3 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

4 Lorne Sossin & Adam Dodek, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture, and the Governor General", in Peter H. Russell & Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) at 91–104.

5 Jean Leclair & Jean-François Gaudreault-Desbiens, "Of Representation, Democracy, and Legal Principles: Thinking about the *Impensé*", in Russell & Sossin, *ibid*. at 105–120.

6 Lorne Sossin, "The Unfinished Project of Roncarelli v. Duplessis: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55:3 McGill L.J. 661.

reminds us that the Supreme Court of Canada has recently reaffirmed the traditional understanding of constitutional conventions — and, in his view, rightly so, for the decisions about the formation of governments and the convening of parliaments are intensely and inherently *political* and are therefore properly left to political actors and extra-legal rules and principles. "[C]onstitutional lawyers," Newman writes (and we may note that he is one), "should not attempt to turn everything into law. . . ."[7]

It would therefore appear that the dispute about whether law controls prerogative power in relation to parliamentary democracy sets two visions of Canadian constitutionalism against each other — the more traditional and restrained vision of the *Patriation Reference* against the more dynamic and engaged vision of the *Quebec Secession Reference*. These cases certainly manifest different judicial methods and assumptions, which may in turn reflect changes in Canada's legal culture that emerged between the early 1980s and the late 1990s. However, in my view, the theoretical differences between them are not as profound as they first appear. While the *Patriation Reference* emphasizes ideas of political authority and pragmatism and the *Quebec Secession Reference* emphasizes ideas of moral legitimacy and integrity, both sets of ideas will be part of any compelling interpretation of constitutional order in Canada. The judicial narrative on unwritten constitutional principles represents an achievement that is as impressive as it is challenging, but it is a narrative that builds upon rather than deviates from traditional ideas about constitutionalism in the common law tradition.[8]

If we keep this general approach to Canadian constitutionalism in mind, certain conclusions follow in relation to the question of the royal prerogative and parliamentary democracy. In this essay, I will argue that we should acknowledge that the prerogative powers relating to parliamentary institutions are embedded within a fabric of law woven from written and unwritten sources that include principles of democracy and the rule of law that together shape the legal contours of political decisions. But I will also accept that courts will rarely, if ever, have occasion to intervene to enforce this law directly against prime ministers or governors general, and that there will remain considerable room for political actors to develop their own sense of what the extra-legal conventions surrounding the principle of responsible government mean in specific contexts. Engagement by political actors with constitutional conventions through public debate and discussion unencumbered by direct judicial oversight represents a distinctive "discourse of statecraft" that is an invaluable aspect of normative ordering in Canada, but one that must ultimately yield to the ideal of legality.

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7 Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2010) 27 N.J.C.L. 217 at 229.

8 I have explored this point in greater detail in "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) at 245–276; "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91; and, "Nationalism and the Pathology of Legal Systems: Considering the *Quebec Secession Reference* and Its Lessons for the United Kingdom" (1999) 62 Mod. L. Rev. 371.

In developing this argument, I will begin by reviewing the prorogation crises of 2008 and 2009, and I will identify more precisely the problems associated with the orthodox view of law and convention. I will then examine the legal character of the political advice given by prime ministers and the political decisions made by governors general under the royal prerogative in Canada. Finally, I will conclude by suggesting how we might rethink law and convention in a way that permits the practice of statecraft to be reconciled with the rule of law in Canada.

I.

On December 4, 2008, just several weeks after an election that left a minority Conservative government under Stephen Harper in power, a majority of the members of the House of Commons petitioned the Governor General indicating that they opposed the government's economic policies and would vote in favour of a motion of non-confidence in the government scheduled for December 8th, and they insisted as well that an alternative government — a Liberal-led coalition — could be formed that would command the confidence of the House. That same day, Prime Minister Harper requested and obtained from Governor General Jean an order proroguing Parliament until January 26, 2009, thus preventing the scheduled non-confidence vote. By the time Parliament reconvened, the government had changed its economic policies and the opposition coalition had unravelled. The Harper government survived.[9]

Just over one year later, on December 30, 2009, Prime Minister Harper again requested and obtained from the Governor General an order proroguing Parliament, this time for a period of two months. Although the legislative business of the parliamentary session was far from complete, the session was ended so that the government could, according to the Prime Minister, consult Canadians and recalibrate its economic policies.[10] But many observers concluded that the session was ended prematurely for other reasons.[11] Ten days earlier, the House of Commons had passed a motion stating that the government had violated the rights and privileges of Parliament by refusing to disclose documents concerning the treatment of detainees by Canadian forces in Afghanistan, and it ordered the documents to be produced forthwith.[12] The government disputed the right of the House of Commons to see these documents; but, many observers concluded, it wished to avoid a potentially embarrassing confrontation with the House on this issue, at least until the 2010 Vancouver Winter Olympics were over and until new Conservative senators were appointed, and that was why Parliament was prorogued.[13]

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9 Michael Valpy, "The 'Crisis': A Narrative" in Russell & Sossin, *supra* note 4 at 3–18.

10 Gloria Galloway, "Harper's prorogation retort? 'We need the time'" *The Globe and Mail* (8 January 2010).

11 Jeffrey Simpson, "The budget will expose the absurdity of 'recalibration'" *The Globe and Mail* (3 March 2010) A19.

12 Order of the House of Commons, *Journals of the House of Commons Canada*, December 10, 2009, 2d Session, 40th Parliament (Ottawa: Queen's Printer for Canada, 2009), item 6.

13 "Harper goes prorogue; Canada's Parliament" and "Halted in mid-debate; Canada without Parliament" *The Economist* (9 January 2010) 10, 45.

The actions of the Prime Minister just described were certainly unusual and arguably contrary to democratic values and the conventions that help secure those values. The decisions of the Governor General, in contrast, followed the general convention that prime ministerial advice governs on these matters, though perhaps the unusual nature of the advice might have justified different responses. But what of the *lawfulness* of the advice and the decisions?

The orthodox legal assessment of these events, already sketched above, is based on the British constitutional tradition, and it is worth pausing to consider that tradition first. As noted, the royal prerogative clothes the Crown with vast power over the functioning of parliamentary institutions.[14] Of course, the Queen rarely acts on her own initiative. The issuing of formal prerogative instruments by the "Queen in Council", i.e., by the Queen with the advice of her Privy Council, is a reminder of the fact that by convention the Crown almost always acts on advice, and that the advice always come from a small subset of the Privy Council, the Prime Minister and other cabinet ministers who form the government of the day.[15] In his book, *Law of the Constitution*, A.V. Dicey called the royal prerogative "the residue of discretionary or arbitrary authority . . . left in the hands of the Crown", and he also said that because it contains rules that are "enforced by the Courts" the royal prerogative is part of the "law of the constitution"; in contrast, the rules that require the prerogative to be exercised on the advice of ministers responsible to elected representatives are "not enforced by the Courts" and so Dicey insisted that they are "not in reality laws at all" but "conventions of the constitution" that ensure that laws are applied consistently with "constitutional morality."[16] Thus, the rules that secure a meaningful sense of democracy in Britain are not rules of law. How ministers advise the Crown on the operation of parliamentary government and whether or not the Crown acts on that advice are, in law, matters of unfettered or arbitrary ministerial and royal discretion respectively. Turning to the specific issue of prorogation, Dicey posited this hypothetical question: what if Parliament was prorogued for more than one year? "Here we have a distinct breach of a constitutiional practice or understanding," he wrote, "but we have no violation of law."[17] Not just the Crown but also the ministers who "sanctioned or tolerated" this undemocratic use of the power of prorogation would have violated constitutional convention, but they would not have acted unlawfully.[18]

It is important to make several observations about this account of the British

14 Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law*, 8th ed. (London: Penguin Books, 1998) 117–145.

15 *Ibid.* 159–165.

16 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915) at 420, 23.

17 *Ibid.* at 442. Dicey was of course addressing the situation in the United Kingdom in the early twentieth century. Today in Canada the rule that Parliament must convene at least once each year is legally entrenched by section 5 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

18 *Ibid.* Dicey did say, however, that in this example appropriation and army statutes would expire and so the law would likely be violated indirectly.

tradition before turning to its application in Canada. First, drawing a crisp distinction between law and convention based on what courts do and do not enforce may be commonplace now, but it is worth recalling that it was acceptance of Dicey's argument over time that made it so. At first, *Law of the Constitution* was seen as a novelty, with one reviewer going so far as to describe Dicey as "an iconoclast" whose ideas were "heretical eccentricities . . ."[19] This point should remind us that the distinction between law and convention should be accepted today not because Dicey said it exists, but only if there is some compelling reason for it, and that reason, if there is one, may offer better grounds for explaining the distinction than Dicey offered.

Second, it is important to recall that in Dicey's day an exalted view of the royal prerogative still prevailed. In the exercise of his prerogative power the King was, as Blackstone had written, "irresistible and absolute", and courts would not review how the power was used.[20] For Dicey, prerogative power was therefore "arbitrary" power, and arbitrary power was in his view totally inconsistent with the rule of law.[21] At the centre of British constitutional law, then, was a legal power with qualities that offended democracy *and* the rule of law. These related problems are theoretically distinct. Prerogative powers are unconstrained by democracy insofar as they can be legally exercised without regard to the will of the people as expressed through their elected representatives. But aside from this problem, prerogative powers are unconstrained by the rule of law insofar as they can be legally exercised in an arbitrary manner, i.e., unconstrained by any general norms, standards, purposes, or principles that may be interpreted through impartial legal analysis and (ideally) upheld by independent judges. The traditional British view will therefore be problematic for any legal system that purports to embrace democracy and the rule of law.

Third, although the British Constitution may appear in the Diceyan account to be static, it is in fact dynamic. Medieval Kings made decisions of state personally within the *curia regis*, but customs (or conventions) emerged whereby judicial power came to be exercised only by judges and legislative power only upon the advice and consent of lords and commons in Parliament. These two limits on prerogative power were so well-established by the early seventeenth century that Chief Justice Sir Edward Coke was able to assert that they were points of *law*.[22] In other words, the common law of prerogative power was capable of reinterpretation over time. More recently, courts have ruled that at least some prerogative powers may be

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19 Review of *Lectures Introductory to the Study of the Law of the Constitution, Athenaeum*, no. 3043 (20 February 1886), 259-260. See also "Dicey's Law of the English Constitution. — I." *Nation*, 41 (24 December 1885), 537-538 (books on the constitution exist but Dicey "has aimed at a different thing" in focusing on "*the law* of the Constitution . . ."); F.H., Review of *Lectures on the Law of the Constitution* (1885) 1 L.Q.R. 502 at 503 (previous works on the constitution consider its historical, political, and legal aspects mixed together, but Dicey's book "for the first time" analyses these aspects separately from a legal perspective).

20 Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69), vol. 1, at 244.

21 Dicey, *supra* note 16 at 420, 183.

22 *Prohibitions del Roy* (1607), 12 Co. Rep. 63; *Proclamations* (1611), 12 Co. Rep. 74.

judicially reviewed to ensure they are exercised consistently with general standards of legality, rationality and procedural fairness, much as statutory powers of ministerial discretion are reviewed.[23] The House of Lords has concluded, however, that prerogative powers relating to matters of general politics or policy, like decisions on the formation of governments and the dissolving of parliaments, are not "amenable to judicial process" and so remain beyond judicial review[24] — though over time there has been a gradual "rolling back" of the excluded categories and an expansion of judicial review of prerogative power.[25] Looking at common law developments as a whole, however, it may be said that of the two problems with prerogative power identified above, that it offends democracy and the rule of law, it has been judicial concern with the rule of law that has shaped these developments. Supremacy of law over royal will rather than democracy as such seems to have been Coke's objective. As for more recent developments, the concern has been to check arbitrary power where it affects individual rights, interests or expectations rather than to address broader issues of democratic process. Whether concerns about the rule of law and democracy can be separated in this way is an important question to which we shall return. For now, however, we can conclude that, as things stand, in the orthodox view of the British constitutional tradition, ministerial advice and royal decisions on the prerogative powers relating to parliamentary democracy are as "irresistible and absolute" as ever.

According to the Diceyan account of British constitutionalism, then, there seems to be a legal-democratic hole at the very heart of constitutional law, one that is mended only by aid of an *extra*-legal cure. Dicey himself did not emphasize this point — on the contrary he asserted in *Law of the Constitution* that the two basic principles of British constitutional law are parliamentary sovereignty and the rule of law, an assertion at odds with the character of prerogative power. The inconsistency did not go unnoticed at the time. "The exact legal position of the powers of the Crown in England is not quite satisfactorily dealt with in the book," wrote Henry Jenkyns, for although "[i]t may be true in a political and practical sense" that prerogative powers are subject to statute and therefore to parliamentary sovereignty and the rule of law, "in a legal sense they are independent powers" and may only be limited or abrogated by statute if the Crown agrees "to surrender them . . ."[26] Dicey saw this flaw in the British Constitution, but, ever the pragmatist, he became concerned only after it became apparent that with the rise of "partisanship" and the "party machine" the combination of law and convention left prime ministers and cabinets with immense powers that could be used to subvert fundamental aspects of

23 *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374.

24 *Ibid.* at 418. See, in general, Brigid Hadfield, "Judicial Review and the Prerogative Powers of the Crown" in Maurice Sunkin & Sebastian Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 197–232.

25 Thomas Poole, "Judicial Review at the Margins: Law, Power, and Prerogative" (2010) 60 U.T.L.J. 81 at 102.

26 H. Jenkyns, "Remarks on Certain Points in Mr. Dicey's 'Law of the Constitution'" (1887) 3 L.Q.R. 204 at 209.

the Constitution.[27] In the democratic age, an unelected King or Queen would never dare to use the royal prerogative in an undemocratic or arbitrary manner — but a Prime Minister might.

Turning now to Canada, the influence of the British tradition of parliamentary democracy is evidenced in the national institutions established by the *British North America Act, 1867*, now *Constitution Act, 1867*: section 9 of the Act states that the "Executive Government" of Canada is vested "in the Queen"; section 10 recognizes that there will be a Governor General whose functions include "carrying on the Government of Canada on behalf and in the Name of the Queen"; section 11 provides for a Queen's Privy Council for Canada to "aid and advise" in the Government of Canada; and section 17 vests legislative authority for Canada in a Parliament consisting of the Queen, an appointed Senate, and an elected House of Commons.[28] These provisions do not provide a full statement of the laws let alone the conventions that combine to constitute the British model of parliamentary democracy, but of course that was the model the framers of the Act had in mind. The Quebec Resolutions of 1864, upon which the Act was based, provided in article 3 that "[i]n framing a Constitution for the General Government" it was desired "to follow the model of the British Constitution", and article 4 provided that "[t]he Executive authority or government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution . . ."[29] In the parliamentary debates on confederation in 1865, John A. Macdonald, then Attorney General for the province of Canada, defended the proposed Constitution by reference to weaknesses in the American system. In the United States, he said, the President is "perfectly uncontrolled by responsible advisers", for his cabinet ministers are departmental officers "whom he is not obliged by the Constitution to consult with, unless he chooses to do so."[30] "With us," Macdonald continued, "the Sovereign, or in this country the Representative of the Sovereign, can act only on the advice of his ministers, those ministers being responsible to the people through Parliament."[31] This idea was hardly new in Canada. "In the Constitution we propose," Macdonald concluded, there would "continue the system of Responsible Government, which has existed in this province since 1841 . . ."[32]

One might be forgiven, after reading the Quebec Resolutions and Macdonald's statements, for thinking that the framers intended to give the principle of responsible government a firmer constitutional foundation in Canada than convention secured for it in Britain. However, in the Act the reference to the "well understood

27 Dicey, "Introduction" to the 8th ed. of *Law of the Constitution* published in 1915, *supra* note 16 at xcviii, c.

28 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

29 Quebec Resolutions, 10 October 1864, in W.P.M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution, 1713–1929* (Toronto: Oxford University Press, 1930) at 541–547.

30 *Parliamentary Debates on the subject of the Confederation* (Quebec: Hunter, Rose & Co., 1865) at 33.

31 *Ibid.*

32 *Ibid.*

principles of the British Constitution" were removed from the provisions that identify the Queen as the executive authority and the Governor General as her representative, and the commitment to British principles was instead expressed in the preamble, which states that Canada has a Constitution "similar in Principle to that of the United Kingdom . . ." That Macdonald, who was so absolute in his assertion that responsible government was secured by the new Constituion, would accept a legal text that, when read literally, was silent in this respect, is a testament to the incredible power of unwritten practice and tradition at that time. But whether Macdonald and the other framers of the Act even distinguished between law and convention in the rigid way that Dicey would later make famous is, of course, a good question.

One thing that is clear, however, is that Dicey's *Law of the Constitution* gave early writers on the Canadian Constitution a convenient statement of both the unwritten law of the royal prerogative and the unwritten conventions governing how the prerogative was to be exercised.[33] It was hardly surprising, then, that, when forced to consider the nature of constitutional law and convention in Canada in the 1981 *Patriation Reference*, a majority of the justices of the Supreme Court of Canada also turned to Dicey.[34] The justices echoed Dicey and observed that the primary purpose of conventions is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period", so that, in particular, the Crown's prerogative powers are exercised consistently with "the democratic principle."[35] The conventions on responsible government may be essential to democracy in Canada, they said, but "none of these essential rules of the constitution can be said to be a law of the constitution", and indeed their function in modifying existing laws prevents their ever "crystallizing into laws".[36] There is, we may say, little of Coke's judicial spirit evident here — though the Court did take at least one adventurous step, ruling that it could settle a dispute about whether a contested convention exists, even if the convention could not be judicially enforced once identified.

If the analysis were to stop here, we would have to accept that decisions on prorogation may be questioned in light of convention, but not law. Although Canadian judges now accept that prerogative acts may be judicially reviewed on administrative and constitutional law grounds where individual rights, interests or expectations are concerned, like their British counterparts they have assumed that politically sensitive prerogative decisions, including those relating to the formation of governments and the holding of parliaments, are not justiciable.[37] The orthodox

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33 J.A. Bourinot, *A Manual of the Constitutional History of Canada* (Toronto: Copp, Clark Co., 1901) at 48, 159–165; W.H.P. Clement, *The Law of the Canadian Constitution*, 2d ed. (Toronto: Carswell, 1904) at 16, 20, 23-24; A.H.F. Lefroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) at 40.

34 *Ref. re Resolution to amend the Constitution*, *supra* note 2.

35 *Ibid.* at 880.

36 *Ibid.* at 878, 882.

37 *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441; *Black v. Canada (Prime Minister)* (2001), (sub nom. *Black v. Chrétien)* 54 O.R. (3d) 215 (C.A.); *Conacher v. Canada (Prime Minister)* (2009), 352 F.T.R. 162, 2009 FC 920; aff'd (2010), 320 D.L.R. (4th)

view of things therefore leaves us with a system of constitutional law that, when stripped of the ameliorating influence of convention, is, as Robert MacGregor Dawson once observed, "a dictatorship".[38]

II.

The orthodox view of the matter just described cannot be right. It is possibly incorrect in relation to British law (though we shall not pursue that possibility here), and it is certainly incorrect in relation to Canadian law. The problem is that it fails to account for a long line of cases in which Canadian judges have slowly worked out the implications of Canada's commitment to the British sense of parliamentary democracy within a constitutional system dominated but not exhausted by entrenched written constitutional texts. From this judicial narrative, which may be said to begin with the 1938 *Alberta Press Case* and culminate with the 1998 *Quebec Secession Reference*, a distinctive sense of Canadian constitutionalism emerges which is differentiated from traditional views of British constitutionalism in at least three ways: first, the structure or fabric of Canadian constitutional law consists of written texts and underlying unwritten principles both of which have a durability or rigidity — a legal supremacy with respect to ordinary legal norms — that the British constitution lacks; second, this durable legal fabric stretches across the entire domain of governance in Canada preventing the possibility of legal gaps or holes, with unwritten principles supplying legal substance where the written texts seem threadbare; and, third, this durable and complete legal fabric is woven from strands of political theory that claim for law moral legitimacy, and therefore integrate into the very fabric of constitutional law unwritten principles of democracy and the rule of law that are complex, rich and textured.[39] In the orthodox view of the Britain tradition, law's illegitimate features are cured by extra-legal remedies. Legality and legitimacy are separated. This proposition is rejected in Canada. "In our constitutional tradition," states the Supreme Court of Canada in the *Quebec Secession Reference*, "legality and legitimacy are linked."[40] Once it finds its place in the fabric of Canadian constitutional law, the unwritten democratic principle derived from the British tradition obtains a *legal* durability and completeness that it does not have under traditional interpretations of British constitutional law. "[T]he preamble's recognition of the democratic nature of Parliamentary governance", states Chief Justice Antonio Lamer in the 1997 *Provincial Judges Reference*, reflects the fact

530, 2010 FCA 131; David Mullan, "Judicial Review of the Executive — Principled Exasperation", The Lord Cooke of Thorndon Lecture, 2009, University of Victoria at Wellington, New Zealand.

38 R. MacGregor Dawson, *The Government of Canada*, 4th ed. (Toronto: University of Toronto Press, 1963) at 62.

39 *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299; *Switzman v. Elbling*, [1957] S.C.R. 285; *Ontario (Attorney General) v. O.P.S.E.U.*, [1987] 2 S.C.R. 2; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, (sub nom. *R. v. Campbell)* [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. See, in general, Walters, "Written Constitutions and Unwritten Constitutionalism", *supra* note 8.

40 *Quebec Secession Reference*, *ibid*. at para. 33.

that democratic institutions are "fundamental to the 'basic structure of our Constitution' . . . and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy."[41] If it was ever possible to say that in Canada the democratic principle was not part of the country's constitutional *law*, that point in time has long since past.

We must concede right away, however, that while these general principles are easily stated, they are difficult to apply. Their implications have not yet been fully explored in terms of the Governor General's prerogative powers relating to Parliament. In working out those implications, there are two very important points to keep in mind. First, as Warren Newman rightly reminds us, the Supreme Court of Canada did not intend by its exposition of unwritten constitutional principles in the *Quebec Secession Reference* to overrule its observation in the *Patriation Reference* that the conventions on responsible government are not law.[42] We must leave open the possibility, then, that sometimes the democratic principle will be expressed through unwritten *extra*-legal conventions. Second, the Court in the *Quebec Secession Reference* insisted that unwritten constitutional principles may be manifested in binding legal norms that may or may not be judicially enforceable — the "legal framework" for secession being an example of a judicially unenforceable legal norm.[43] Taking these two points together, we may say that the Court wishes to retain the distinction between law and convention, at least for some purposes, but that it has cast us adrift from the positivist moorings that Dicey gave us for defining the difference between law and convention, for no longer can we simply assume that laws are rules enforced by courts and conventions are rules enforced politically. How do we now draw the line between these types of normative principle, and how do we know which type of norm serves to ensure that prerogative powers relating to parliamentary institutions are exercised in democratic ways? And, finally, how can the democratic principle sometimes be left to the protection of extra-legal norms without threatening the general idea that legality and legitmacy are linked?

The answers to these questions must build upon a general theory of how law and politics interact in Canada. To understand the ways in which unwritten constitutional law may be seen to discipline the exercise of intensely political decisions, it is important, first, to examine more closely the legal character of ministerial advice and decisions relating to prerogative powers affecting parliamentary government to determine if they are as intensely political as is often assumed, and, second, to develop a theory of law and convention that replaces the positivist understanding of these two types of normative order that has dominated for so long. The last two sections of this essay address these two points in turn.

III.

Before we can understand the sense in which law discplines the political discretion exercised by governors general and prime ministers in relation to Parlia-

41 *Reference re Remuneration of Judges of the Provincial Court*, *supra* note 39 at para. 103.

42 Newman, *supra* note 7 at 228.

43 *Quebec Secession Reference*, *supra* note 39 at paras. 98–102.

ment, it is important to be clear about the legal character of their roles, powers, and responsibilities.

Looking first to the Governor General, it is essential to recall that he or she is not, in law, in the same position as the Queen. Whatever special attributes may still be attached to the Crown by virtue of its ancient origins and to the royal prerogative by virtue of its inherent as opposed to delegated character, those attributes are not shared by the Queen's representative or by his or her exercise of the royal prerogative in Canada. The office of Governor General is created by the Crown by prerogative instrument, and the person holding the office enjoys powers that are defined by that instrument. Under British imperial law, colonial governors — including governors general in Canada after 1867 — were not viceroys and therefore did not enjoy prerogative power merely by virtue of their office; rather they possessed only those powers delegated to them by letters patent or commission.[44] A colonial governor was "an officer, merely with a limited authority from the Crown", and so the "assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect."[45] As a practical matter, this distinction between the Crown and the Governor General in Canada may not be significant today because the Letters Patent constituting the present office of the Governor General, issued in 1947, confer *all* prerogative powers of the Crown relating to Canada on the Governor General — including, it may be noted, the power of "summoning, proroguing or dissolving the Parliament of Canada."[46] As a legal matter, however, the distinction remains important. The 1947 Letters Patent define the terms upon which the prerogative is delegated to the Governor General, and so prerogative acts violating those terms may be legally challenged in court.[47] Although one former Governor General has said that the Letters Patent "transferred" royal prerogatives from the Crown to the Governor General,[48] in fact the Queen enjoys her prerogative powers in relation to Canada concurrently with the Governor General[49] and she may revoke the delegation altogether.[50] In other words, the basic legal character of the office of the Governor General has not changed. W.P.M. Kennedy concluded that despite the breadth of authority conferred by the 1947 Letters Patent, the Governor General is "still under legal liabilities and all the older judgements

44 *Windsor & Annapolis Railway Co. v. Canada* (1885), 10 S.C.R. 335, per Strong J., citing *Musgrave v. Pulido* (1879), 5 App. Cas. 102.

45 *Cameron v. Kyte* (1835), 3 Knapp 332, per Baron Parke at 344.

46 Letters Patent Constituting the Office of Governor General of Canada (October 1, 1947; reprinted at R.S.C. 1985, App. II, No. 31), articles 2 and 6.

47 E.g., *Tunda v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. No. 902, 190 F.T.R. 1 (Fed. T.D.); aff'd [2001] F.C.J. No. 835 (Fed. C.A.) (the Governor General's appointment of Supreme Court of Canada justices as Deputy Governors was challenged, unsuccessfully).

48 Rt. Hon. Adrienne Clarkson, "Foreword", in Russell & Sossin, *supra* note 4 at x.

49 *Singh v. Canada* (1991), *(*sub nom. *Leblanc v. Canada)* 3 O.R. (3d) 429 (C.A.).

50 Letters Patent 1947, *supra* note 46 at article 15.

and case-law in relation to 'colonial' governors are of authority. . . ."[51]

The grant of power to the Governor General is found in article 2 of the 1947 Letters Patent, which states:

> And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the *Constitution Acts, 1867 to 1940* and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada.

Although the Governor General thus acquires the authority to exercise the Queen's prerogative discretion relating to Canada, according to general principles of public law in the common law tradition there is "no such thing as absolute and untrammelled 'discretion'", for no delegation of power will "be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant"; there is "always a perspective" within which the power granted is intended to operate, a perspective that is judicially presumed to include the "rule of law" and other unwritten constitutional principles.[52] Article 2 is clear about the "perspective" within which powers conferred are to be exercised. Its purpose is to clothe the Governor General with the necessary authority to perform the office established by the *Constitution Acts*, in particular the role identified in section 10 of the *Constitution Act, 1867* of carrying on the government of Canada on behalf of the Queen, and we have already seen how the deep structure of the *Constitution Acts* embraces the principles of democracy and the rule of law. A prerogative act by the Governor General that is blatantly irrational or undemocratic — the appointment of a Prime Minister on the basis of his or her hair colour or religious persuasion, for example, or the proroguing of Parliament upon the flip of a coin or to assist a friend in cabinet — could not be lawful under the terms of article 2 of the Letters Patent. It would, according to the old cases on colonial governors, be "out of the limits of the authority so given" and therefore "purely void".

There is nothing mystical about the Governor General's powers. Like other officials, the Governor General exercises powers that are, in constitutional theory, delegated and circumscribed by law, and, barring special concerns about justiciability to be addressed below, it falls to the ordinary courts in upholding the rule

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51 W.P.M. Kennedy, "The Office of the Governor-General in Canada" (1947-48) 7 U.T.L.J. 474 at 474.

52 *Roncarelli v. Duplessis*, [1959] S.C.R. 121, per Rand J. at 140. See also *Lalonde v. Ontario (Commission de restructuration des services de santé* (2001), 56 O.R. (3d) 505 (C.A.). These cases involved statutory delegations of discretionary power rather than the delegation of prerogative powers by prerogative instrument — but the argument here is that there is, or should be, no difference in constitutional principle as to how the two forms of delegation are treated. Lorne Sossin makes a similar argument: "The Unfinished Project of *Roncarelli*", *supra* note 6.

of law to determine whether those legal limits have been honoured or not in any given case. Of course, we should not push the argument about the delegated character of the prerogative too far. One would expect that a patently irrational and undemocratic decision by the Queen herself would also be unlawful in Canada, for although her prerogative powers are inherent not delegated, they are, like the Governor General's powers, embedded in a constitutional structure dominated by legality and democracy. This is not a newfangled idea, but rather it is one that lies at the heart of Lord Mansfield's classic judgment in the 1774 case of *Campbell v. Hall*, which held an act of the royal prerogative issued by King George III in relation to Grenada void as contrary to the system of representative government established for that colony.[53] But even if the conclusions are similar in relation to the Queen and her representative in Canada, it is worth being precise about the different legal arguments for why prerogative power is legally embedded, if only as a way of seeing that these arguments are not as fantastical as one might think.

The legal status of the Governor General's prerogative powers are clear, but the legal status of ministerial advice as to how those powers should be exercised is not. In most cases, convention means that advice on how a prerogative decision should be made *is* the prerogative decision itself, with the Crown or Governor General providing a mere rubber stamp. As a result the legal status of advice *as advice* is largely ignored. Vernon Bogdanor rightly states that ministerial advice to the Crown is "distinct" in that it is not at all like, for example, the advice given by one friend to another, but he attributes its distinctiveness to convention rather than law.[54] What is needed, however, is a *legal* theory of ministerial advice.

In articulating a legal theory of ministerial advice in Canada, attention must be given to the Queen's Privy Council for Canada established by section 11 of the *Constitution Act, 1867*. That ministers are advisors is purely a matter of convention; it is only through their membership in the Privy Council that the ministerial role as advisor gains a *legal* aspect. Written constitutional provisions addressing the status of Privy Council advice are admittedly confusing. The *Constitution Act, 1867* vests certain powers in the "Governor General in Council" and others in the "Governor General". Section 13 defines Governor General in Council as meaning "the Governor General acting by and with the Advice of the Queen's Privy Council for Canada", thus suggesting that Council advice is legally necessary in some cases but not others. Of course, many of the important prerogative powers are exercised by the Governor General by virtue of the 1947 Letters Patent rather than the Act, and here too we find a complication. Article 2 of that instrument appears to provide that prerogative powers must *always* be exercised "with the advice of Our Privy Council for Canada or of any members thereof or individually . . . ." So the *Constitution Act, 1867* and the Letters Patent of 1947 create some interesting interpretive problems about when advice is legally required and when it is only required by convention. No doubt the original point of these provisions had to do more with affirming the identity of the relevant advisors as Canadian as opposed to British than with legally entrenching the requirement of advice as such. But the task of

53 *Campbell v. Hall* (1774), 1 Cowp. 204.

54 Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 66.

resolving these interpretive problems need not detain us here. It is sufficient simply to note that the Privy Council exists and that its advice is expressly recognized in written constitutional instruments, and this fact should affect our view of the legal status of ministerial advice when it is given, whether it given as a result of a legal or a conventional requirement. These written provisions are one important way by which the concept of "advice" to the Crown or Governor General relating to prerogative power is woven into the fabric of constitutional law.

Understanding the legal status of ministerial advice to the Crown or Governor General in Canada is greatly illuminated by considering *Black v. Canada*, in which Conrad Black claimed that Prime Minister Jean Chrétien acted unlawfully when advising the Queen not to exercise the honours prerogative and make Black a peer in the House of Lords in Britain.[55] In his judgment, Laskin J.A. concluded that the Prime Minister was not advising the Queen in his personal capacity, since "[p]rivate citizens cannot ordinarily communicate private advice to the Queen."[56] But if the decision to intervene was taken in his official capacity as Prime Minister and it was not the exercise of a statutory power (there being no statute applicable), then, Laskin J.A. observed, it must have been the exercise of a "prerogative power".[57] Laskin J.A. therefore concluded: "In communicating Canada's policy to the Queen, in giving her advice on it, right or wrong, in advising against granting a title to one of Canada's citizens, the Prime Minister was exercising the Crown prerogative relating to honours."[58] Focusing on this part of the judgment, it might be said that ministerial advice on how a particular prerogative power should be exercised is therefore itself an exercise of the prerogative power. Indeed, this was how the case was interpreted by Shore J. in *Conacher v. Canada*, in which Prime Minister Harper's advice to the Governor General to dissolve Parliament and call elections in 2008 was challenged as violating statutory fixed-date election rules.[59] Faced with the argument that the Prime Minister's advice was not a decision and so could not be the subject of judicial review, Shore J. applied *Black v. Canada* and concluded that the Prime Minister's advice on how the prerogative of dissolution should be exercised was an exercise of the prerogative power itself and was therefore (subject to concerns about justiciability) judicially reviewable.

With respect, this conclusion is mistaken. While ministerial advice to the Crown or Governor General on how a prerogative power should be exercised has a status in law and therefore *may* be the subject of judicial review, advice in these circumstances cannot be said to be, in law, the exercise of the power itself, unless we collapse the concepts of law and convention. It is true that where, by convention, the Crown exercises a prerogative power on ministerial advice, the giving of the advice may be the *de facto* exercise of the power — at least in cases where the Crown accepts the advice without reflection or the exercise of any judgment. For

55 *Black v. Canada (Prime Minister)* (2001), (sub nom. *Black v. Chrétien)* 54 O.R. (3d) 215 (C.A.).

56 *Ibid.* at para. 40.

57 *Ibid.* at paras. 39, 41.

58 *Ibid.* at para. 38.

59 *Conacher v. Canada (Prime Minister)* (2009), 352 F.T.R. 1, 2009 FC 920 (T.D.); aff'd (2010), 320 D.L.R. (4th) 530, 2010 FCA 131 (C.A.).

this reason, Rodney Brazier uses the expression "*Ministerial* prerogative powers" rather than Crown or royal prerogative powers.[60] Certainly, when courts review decisions made under statute by the "Governor in Council", decisions in which the Governor General invariably plays no effective part at all, it is appropriate for judges to acknowledge convention and focus upon the legality of the acts of the ministers who are the *de facto* decision makers.[61] But we should not lose sight of the fact that on certain occasions it will be very important for constitutional reasons to be precise about where *de facto* and *de jure* power lies. Two reasons immediately come to mind why this is so.

First, we should not obscure from view instances where ministers of the Crown really do exercise the royal prerogative themselves, without even the formality of Crown participation. When the Canadian Embassy in Washington issued a diplomatic note to the American Government concerning Omar Khadr, to take one recent example that was the subject of litigation, the legal authority for the decision embodied in the note was the prerogative over foreign affairs, yet the note bore no outward or formal manifestation of having been approved by either the Queen or the Governor General.[62] This is just one example of what must be an almost countless number of decisions made regularly by government that derive legal authority from the prerogative but which do not require the promulgation of a formal prerogative instrument by the Crown or Governor General and so do not involve "advice". However, the legal status of these decisions, which *are* accurately described in law as direct exercises of prerogative power, must be different from the legal status of ministerial decisions to advise the Crown or Governor General as to how a prerogative power should be exercised. In these latter cases, advice is only the exercise of power, if at all, by convention, not law.

Second, in relation to the constitutionally important decisions about the formation of governments and the proroguing and dissolving of parliaments, the possibility always exists for the Governor General to exercise meaningful judgment upon receiving advice from a prime minister. In these cases, convention may still dictate that the decision should follow the advice, but it is misleading to say that the advice is even the *de facto* let alone the *de jure* exercise of the power. To take the 2008 prorogation decision as an example, Governor General Jean has revealed that she took two hours to consider Prime Minister Harper's request because the decision "warranted reflection" and that she might have asserted a "reserve power" — the right, by convention, to act against or without advice.[63] The decision to prorogue Parliament in December of 2008 was made on the advice of Prime Minister Harper and it is a decision for which he was responsible to Parliament, but, at the same time, it would not be inaccurate to say that it was the Governor General's decision as a matter of both fact and law. In these cases, muddling the concepts of advice and power will only produce deep misunderstandings about constitutional roles and responsibilities.

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60 Rodney Brazier, *Ministers of the Crown* (Oxford: Clarendon Press, 1997) at 203-204.

61 E.g., *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106.

62 *Khadr v. Canada (Prime Minister)*, [2010] F.C.J. No. 818.

63 Alexander Panetta, "Jean had hidden message in the prorogation crisis" *The Globe and Mail* (29 September 2010) A11.

So, in short, advice on a prerogative power cannot be, in law, an exercise of that power. In fact, Laskin J.A. in *Black v. Canada* did not say that it is. Although he might have been clearer on this point, he proceeded upon the assumption that the prime ministerial advice in that case was advice to a "foreign head of state."[64] In other words, Prime Minister Chrétien, in advising the Queen not to give Black a peerage, was not advising her on how to exercise a prerogative power relating to Canada, and she did not receive his advice in her capacity as Queen of Canada; rather he was advising the Queen as a foreign head of state in her capacity as the Queen of the United Kingdom of Great Britain and Northern Ireland as to Canada's policy regarding the conferral of foreign honours on its citizens, an act he could have done for *any* foreign head of state. In short, he was exercising a prerogative power directly rather than through "advice" in the constitutionally meaningful sense.[65]

The confusion surrounding *Black v. Canada* should remind us of the importance of defining with precision who, in any given case, is exercising prerogative power, and what sort of advice may inform the exercise of that power — and that *ministerial* advice has a very particular legal status. To say that ministerial advice is different from the prerogative decision made is not to deny the inherent link between the two. There is an important constitutional truth underlying the conclusion of Stratas J.A. in the Federal Court of Appeal in *Conacher v. Canada*, that the status of the "Prime Minister's advice-giving role" is so important and integral to the Crown's prerogative that it is implicitly protected by the statutory affirmation of prerogative powers.[66] Indeed, it is that integral link that forces us to distinguish constitutionally relevant advice from other forms of advice. As *Black v. Canada* confirms, ministerial advice is legally different from personal or private advice that the Governor General may receive from friends. It is different as well from non-ministerial advice on matters of state, such as, for example, advice from a constitutional law professor as to the proper exercise of the power of prorogation. To identify constitutionally relevant advice, we must keep two separate points in mind. First, the identity of the person giving the advice is relevant — the advisor must be a member of the Privy Council for their advice to be constitutionally relevant. Second, the legal character of the advice given by a Privy Councillor is important, since not all advice from Privy Council members to the Crown or Governor General is constitutionally relevant. *Black v. Canada*, once properly interpreted, offers an excellent example of this second point, showing how even prime ministerial "advice" to the Queen on how to exercise a prerogative power may not be *advice* in the constitutionally relevant sense that concerns us here.

These observations suggest that what is needed is a full theory of *constitutionally relevant ministerial advice*. On this point, as in so many others, we must go behind the written text of the Constitution of Canada to common law context for guidance. The "Privy Council" established for Canada by section 11 of the *Consti-*

64 *Black v. Canada*, *supra* note 55 at para. 41.

65 For a different view of the characterization of the Prime Minister's actions in this case, see Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien"* (2002), 47 McGill L.J. 435 at 442-443.

66 *Conacher v. Canada (Prime Minister)*, 2010 FCA 131, ¶5.

tution Act, 1867 does not exist in the air but rather exists against an historical narrative that helps us to understand its role within the modern Canadian Constitution. The legal status of the Privy Council derives originally from the feudal origins of the English constitution. The legal relationship between a feudal lord and his tenants was based on the relationship of tenure. Tenants who held land from a lord owed various incidents, services and duties, one of which was attending the lord's manorial court to give counsel. The common law came to see it as "incident to the manor" that the lord held the right to hold an assembly or court of his tenants for this purpose.[67] The right of the medieval King as lord paramount to gather his tenants in chief in a *curia regis*, or royal court, may be seen as this legal right writ large.[68] As Dicey states in his study of the Privy Council, "the interchange of advice between the King and his nobles" was an inherent part of every feudal monarchy, something demanded of nobles as a show of submission and allegiance to their sovereign lord.[69] From this feudal *curia regis* there emerged a Common Council, or Parliament, and a smaller permanent body of advisors, the Privy Council.[70] We may say, then, that historically it was the Crown's prerogative or common law right to summon advisors to gather in the Privy Council. It follows that the act of attending upon the Crown to give advice in the Privy Council was not itself a *power* or a *right*, but is better described in law as either a *privilege* derived from the Crown's prerogative act of summoning the advisor, or, more accurately, as a form of common law *duty*.

What do the feudal origins of the Privy Council have to do with Canadian constitutional law today? Section 11 of the *Constitution Act, 1867* empowers the Governor General to "summon" a Privy Council to "aid and advise" in the Government of Canada. As J.A. Bourinot observed, in deciding to make provision for a Privy Council rather than a prime minister or a cabinet it was "the desire of the Canadian people to adapt as far as possible to their own circumstances the ancient institutions of the parent state."[71] In constructing a constitutional theory of ministerial advice as to exercises of prerogative power, we do well to recall the ancient origins of the Privy Council — not because of sentimental attachment to the past, but because legal continuity may be justified by normative constitutional theory today. From the history of the Privy Council we may, I think, derive two very basic principles that we can accept as justifiable aspects of a sound theory of modern Canadian constitutionalism. First, advice given to the Crown by members of the Council has a very distinct constitutional status *in law* not just in convention, and,

67 *The King v. Stanton* (1606), Cro. Jac. 260, 79 E.R. 223 (K.B.). See also *Dominus Rex v. Staverton* (1606), Yelv. 190, 80 E.R. 126, 1 Bulst. 54, 80 E.R. 756.

68 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957, reissue 1987) at 107–109; Theodore Plucknett, *A Concise History of the Common Law*, 4th ed. (London: Butterworth & Co., 1948) at 137, 479.

69 A.V. Dicey, *The Privy Council* (London: Macmillan and Co., 1887) at 2-3.

70 *Ibid.* at 5-6. See also F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1911) at 62–64.

71 J.A. Bourinot, *A Manual of the Constitutional History of Canada* (Toronto: Copp, Clark Co., 1901) at 164.

second, one aspect of that distinct legal status is that the act of rendering advice is not the exercise of a constitutional power or right, but the performance of a constitutional duty. When a member of the Queen's Privy Council for Canada aids and advises in the Government of Canada by counselling the Crown or Governor General on how to exercise the royal prerogative relating to Parliament, he or she performs a constitutional duty recognized in law by section 11 and also in the common law that still shapes our understanding of what the Privy Council is. It is a duty to advise on matters of state and so the bounds for constitutionally appropriate advice are extremely broad. However, because the act of giving advice is the performance of a *duty* in constitutional *law*, it is an act that arises from and is conditioned by the general legal framework that defines the Constitution of Canada, including the unwritten principles of legality and democracy inherent in the very structure of the Constitution, and so it follows that there are *legal* limits to the advice that can be given. For a Prime Minister of Canada to advise the prorogation of Parliament because he or she has been bribed, for example, would be unlawful not just because it would be fraudulent, but also because it could not constitute a lawful performance of the duty to aid and advise in the Government of Canada under section 11 of the *Constitution Act, 1867*, as interpreted in light of the common law of the Privy Council and the unwritten principles of legality and democracy that are woven into the durable and complete fabric of law that provides the normative backdrop for the performance of all governmental acts in Canada.

IV.

It should be clear, then, that advice and decisions involving the royal prerogative, while obviously political, cannot be absolutely or purely political. They are decisions made in the course of performing constitutional duties and exercising constitutional powers that are embedded in a structure or fabric of law. This conclusion does, however, leave two unanswered questions. First, does it follow that the decisions of prime ministers and governors general on matters central to parliamentary democracy must be policed by the courts? And, second, what happens to the rules surrounding responsible government that were assumed to be conventions rather than laws? These are, in fact, closely related questions. Answering them requires a consideration of the general idea of justiciability and the way in which that concept applies to laws and conventions. These considerations will in turn force us to confront the question with which we started: how can the *Patriation Reference* and the *Quebec Secession Reference* be reconciled — or, in other words, how can the idea of statecraft be reconciled with the ideal of legality?

When it comes to the justiciability of political questions in Canada, courts in the past assumed, first, that either a matter was justiciable, in which case they would adjudicate the dispute and enforce the relevant laws, or it was not, in which case they would refuse to do anything; and, second, that in assessing whether a matter was justiciable judges would weigh such factors as the legal and political aspects of the case, whether evidence could be gathered and considered in a judicial way, and whether judicial intervention would be consistent with the constitutional

role of the courts in relation to other branches of state.[72] The *Quebec Secession Reference* forces us to reconsider the idea of justiciability in fundamental ways, for three reasons. First, the Court separated more clearly than before the question of whether a matter is legal from whether it is justiciable. Although it accepted that for a matter to be justiciable it must be legal rather than purely political, it also emphasized that just because a matter is legal rather than purely political it does not necessarily follow that it is justiciable, for there may be other considerations relating to the role of courts within a democratic system that make judicial intervention inappropriate. Second, whereas courts previously assumed that the decision about justiciability was a choice between holding the case to be a legal one, in which case the court would determine, apply and enforce relevant laws, and holding the case to be a political one, in which case the court would refuse to do anything, the *Quebec Secession Reference* suggests an intermediary option: where a case is intensely political in character and full judicial oversight of political behaviour is deemed inappropriate, the court may still take steps to articulate principles of law according to which political behaviour is expected to be structured — a "legal framework" for political actors — even if that framework cannot be applied and enforced when specific disputes arise about its interpretation. And, finally, third, reading the *Quebec Secession Reference* and the *Patriation Reference* together, it may be said that, in the Court's view, unwritten principles of constitutional law may sometimes be manifested in unwritten extra-legal conventions that are not judicially enforceable and they may sometimes be manifested in unwritten legal norms that may or may not be judicially enforceable.

In short, what is law, what is justiciable, and what is judicially enforceable are three separate questions. Indeed, it is possible to identify a range of ways in which answers to these three questions may affect how judges respond to intensely political cases. First, judges may decide the case in the regular way, by identifying the law, applying it to the specific issues of the case, and rendering a judgment that enforces the law. Second, judges may identify the law, apply it to the specific issues of the case, but, due to political sensitivies, like concern about interfering with a prerogative power, refuse to issue a specific remedy and instead offer only a "legal framework" to guide political actors in their resolution of the matter — as in the case of *Khadr*.[73] Third, judges may identify legal norms at a general level only, again as a "legal framework" for political action, but then refuse to apply it to specific claims that might arise or to enforce it — as in the *Quebec Secession Reference*. Fourth, judges may conclude that the norms governing intensely political matters are not laws at all but conventions, but they may nevertheless identify what those conventions are at a general level, and then refuse to apply them to specific facts or to enforce them — as in the *Patriation Reference*. And, fifth, judges may simply regard the matter as wholly non-justiciable and refuse to get involved at all — as in, for example, the case of *Operation Dismantle*.[74] It is perhaps not a coincidence that the cases cited as examples of the third and fourth approaches,

72 Lorne Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).

73 *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 at 47.

74 *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.

where judges offer only general statements of principle without attempting to apply them to specific facts or to enforce them, were references from government rather than litigation in the usual sense. It is possible that in regular litigation involving an intensely political matter, judges may conclude that if it is inappropriate for them to apply general legal principles to specific facts or to enforce those principles, then the fifth option, refusing to intervene at all, may be better than the third option. But even if this route is taken, it does not follow that there is no "legal framework" at all to guide political behaviour; it simply means that under the circumstances judicial involvement, even if limited to general statements about that legal framework, is considered to be inappropriate.

We may now return to the question of prerogative powers and parliamentary democracy. It should be clear at this point that to say that law discplines prerogative power relating to the operation of parliamentary institutions is not to say that judges will enforce that law, or even make determinations on how that law applies in specific cases; judges may decide to address the legal framework for prerogative power at a general level, or they may decide not to address it at all. We have, in other words, left Dicey's jurisprudential world where law is what courts enforce. But what jurisprudential world are we in? What, for example, is the difference between the third and fourth approaches identified above? What, in other words, is the difference between unwritten laws that are not judicially enforceable and unwritten conventions that are not judicially enforceable? In answering these questions we can begin to build a theory of law and politics in Canada that reconciles the practice of statecraft with the ideal of legality.

In the jurisprudential world in which we find ourselves, it will be helpful to consider "law" not as fact or a thing but as a method or process of reasoning. We may say that law is "law" because it represents the sort of normative order that is susceptible to a distinctive legal analysis, interpretation or discourse. What makes an interpretive discourse "legal" as opposed to political or moral? To engage in legal discourse concerning an issue or problem, one must adopt what Dicey called a "legal turn of mind"[75] with respect to that issue or problem. The legal turn of mind is an interpretive attitude in which the interpreter endeavours sincerely to apply a set of general normative standards to a specific problem in an impartial and independent manner on the assumption that answers to the problem are dictated by interpretations of those standards rather than personal or partisan preferences, and that the best interpretation in any given case will be the one that shows the general body of normative standards to be unified, coherent and justified in light of the underlying principles of political morality that they are supposed to instantiate.[76] Dicey's focus on judicial enforceability as a definition for law is too simple, but it does serve as a rough proxy for the idea that law is a distinctive form of interpretive discourse, since the most public and authoritative manifestation of this form of dis-

75 Dicey, *supra* note 16 at 183.

76 I have tried to explore this conception of law more fully in "Written Constitutions and Unwritten Constitutionalism", *supra* note 8. The approach is, of course, roughly Dworkinian: Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986); Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press of Harvard University Press, 2006).

course is the judicial judgment. But judges do not hold a monopoly over legal discourse. The role that judges play in upholding the rule of law means that the courts should generally be open to considering any legal problem. Prudential considerations or political sensitivities alone should not exclude legal issues from judicial consideration. However, there may be times when, due to political sensitivities, the very idea of the rule of law will be hindered rather than helped by judicial intervention. In these cases, it may be right to say that a legal norm exists but is not judicially enforceable, or even justiciable.[77]

With this general sense of what makes law "law", we can now turn to conventions. Conventions, like some laws, are not judicially enforceable due to the political contexts or sensitivities involved, but conventions are not judicially enforceable for another reason too: namely, they are not laws. Legal problems or questions can be approached and solved if we adopt the "legal turn of mind." The question of whether a convention exists or is properly respected, in contrast, cannot be answered in that way. While it is true that conventions are normative and uphold principles that are constitutionally and legally fundamental, they are operative within a discourse that is distinctively political, not legal. Like law, conventions compel political actors to have regard to reasons for action that, given their centrality to constitutional principle, transcend personal, partisan or purely political motivations or calculations; but unlike legal interpretation, the application of convention in any given case will never require the political actor to exclude totally these distinctively political reasons for action. Indeed, the real value and purpose of conventions is to inject the politics of principle into the politics of power so that an equilibrium emerges between the two. Political respect for constitutional conventions requires what used to be called statesmanship — or what we may now call (to borrow a term that John Whyte often uses) "statecraft."[78] Decisions of statecraft must always be, in some sense at least, principled decisions; but they may also be intensely political, even partisan at times, in ways that legal decisions should never be.

In light of the dynamics of political ordering, especially in a complex country like Canada, it is often preferable to allow an equilibrium between the politics of power and the politics of principle to emerge organicially through the interaction of political actors and citizens, rather than through adjudication on points of law. The brilliance of conventions is that they give rise to the possibility of this equilibrium between power and principle — the possibility for statecraft — to develop through political debate and discussion. Let us return to the first Harper prorogation crisis as an example. In the midst of a sudden and severe economic crisis, when political stability and the material well-being of citizens are so closely connected, would it be "right" for a new government, just weeks after an election, to be replaced immediately upon the formation of an alternative coalition government whose leader planned to resign within several months of appointment to be replaced by an as-yet unknown successor as Prime Minister? Or would calling another election immedi-

77 *Cf.* David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 17–65.

78 E.g., John D. Whyte, "Federalism Dreams" (2008) 34 Queen's L.J. 1 at 1-2. I may, however, be using this term in a slightly different way that Whyte does.

ately be "right"? Or, finally, would it be "right" for all political actors involved to have several weeks breathing space, so to speak, to respond to these unprecedented events before a decision one way or the other was made? The answer to the question of what is "right" in these circumstances cannot be determined solely on partisan political considerations or on impartial legal considerations. The "right" answer will involve reconciling political strategy, judgment, and calculation with constitutional practice, principle and morality, or convention, to reflect, ideally at least, an exercise of "statecraft" that will show Canadian democracy in the best light possible in difficult circumstances.

The conventions of responsible government in Canada are not laws because they form part of the discourse of statecraft rather than the distinctive discourse of law. But these conventions are manifestions of unwritten principles of constitutional law in political form, and they therefore operate against the normative backdrop of that law and not in a legal vacuum. In a constitutional system committed to the rule of law there is always a legal limit to political decisions, even decisions of statecraft. If the advice of a Prime Minister on how the prerogative relating to Parliament should be exercised, or even the decision of a Governor General about whether to accept that advice or not, is sufficiently undemocratic as to enable judgments to be made that respect the unique demands and constraints of legal discourse, then it may be possible to conclude that the advice and/or the decision is or are unlawful. Even where a decision may be unlawful, however, it will not necessarily follow that the courts will take full ownership of the issue. Depending on the circumstances, it may be true that the exercise of prerogative power relating to the formation of governments or the holding of parliaments is simply not "amenable to the judicial process." Judicial process and legal analysis are different things. There will always be a "legal framework" disciplining state power, even if the application of that framework to specific cases or the granting of specific judicial remedies for breaches of law may not be possible given the sensitivities associated with some exercises of prerogative authority and the effect that judicial intervention may have on the values associated with the rule of law. Indeed, we may say that, in the end, it is the rule of law that makes a political problem a legal one, and it is the rule of law that may lead us to conclude that the legal problem is not a justiciable one.

As noted above, the concern with prerogative power relating to parliamentary government is that it may be exercised inconsistently with democracy and the rule of law. Leaving problems of democracy to the operation of conventions is generally appropriate, because democracy means working towards acceptable and principled forms of communal life through public participation, debate and discussion, rather than through adjudication. However, a prerogative decision may be so deeply offensive to the democratic principle that we may begin to analyze its character not just within the normative discourse of statecraft, but also within the distinctive normative discourse of law. It may be said, then, that law will be engaged at the point when it is clear that the decision is not just undemocratic but also arbitrary — when it offends not just democracy but also the rule of law. In such cases, we should never rule out the possibility of judicial intervention, even where nobody's individual rights, interests or expectations are affected differently from anyone else's, because the superior courts have an inherent constitutional role to play in upholding the rule of law. But if the courts conclude that the values associated with the rule of law would be hindered rather than helped by judicial intervention, they may decline

to intervene. In that case, however, the character of the problem as a *legal* problem is unaffected. It simply falls to other political actors and citizens to make the legal case.

It is beyond the scope of this essay to determine whether in 2008 and 2009 Prime Minister Harper and Governor General Jean exceeded the legal bounds of the duty to advise and the power to decide on the prorogation of Parliament. But the question is a real one. An arbitrary violation of the democratic principle by a Prime Minister or a Governor General in relation to the prerogative powers on parliamentary governance will be a violation of the rule of law and will therefore be susceptible to legal analysis even if not necessarily susceptible to judicial process. This conclusion follows from the existence in Canada of a durable and complete fabric of democratic legality behind the conventional norms that shape the practice of statecraft in this country. Rather than finding a legal-democratic hole at the heart of our system of constitutional law, we find a dynamic, pervasive, and rich reserve of democratic legality which forms the normative context for all governmental decisions, including advice and decisions about the exercise of prerogative powers affecting the integrity of parliamentary democracy in Canada.

FEDERAL COURT JURISDICTION: WILL THE BLEEDING EVER STOP?

By Harry J. Wruck, Q.C.*

> [T]he basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada.[1]

By posing the question in the title of this article, I am not for one moment suggesting that the death knell is about to ring for the Federal Court. Rather, I am suggesting that the Federal Court's jurisdiction continues to be in flux, with no end in sight. Courts at all levels have handed down decisions which have, slowly but surely, whittled away the Federal Court's exclusive jurisdiction over federal administrative law matters. However, there are some recent provincial appellate decisions which suggest that, temporarily at least, the bleeding is beginning to subside.

As the above quotation from the Supreme Court of Canada demonstrates, the jurisdiction of the federal courts is exceptional and statutory. Therefore, it is not surprising that there has been an obsessive preoccupation with the question of the jurisdiction of the Federal Court since its inception in 1971. It is fair to say that one of the most bedevilling problems for courts, lawyers and commentators is to determine where the Federal Court's jurisdiction ends and the superior courts' jurisdiction begins in the field of federal administrative law.

The purpose of this article is to examine the constitutional limitation of the jurisdiction of the Federal Court in the area of federal administrative law. In particular, four key areas will be examined: division of powers disputes, *Canadian Charter of Rights and Freedoms* cases, Aboriginal and treaty rights litigation under s. 35 of the *Constitution Act, 1982* and bare declarations of unconstitutionality. Each of these areas have been the subject of a fair amount of litigation. In this review, I will also examine why and how the Federal Court came about, the importance of this court in the Canadian legal system and how the jurisdiction of the Federal Court to determine constitutional issues in the area of federal administrative action has

* The views expressed in this article are those of the author and should not be attributed to the Department of Justice or as a statement of the position of the Canadian government.

been eroded since the creation of this court. It is impossible to understand the evolution of judicially imposed limitations on the Federal Court without also understanding the political background to the resistance of the creation of the Federal Court.

THE CREATION OF THE FEDERAL COURT

The Federal Court of Canada was created in 1971[2] under s. 101 of the *Constitution Act, 1867*, which confers upon Parliament the power "to establish courts for the better administration of the laws of Canada". This is confirmed in ss. 3 and 4 of the *Federal Courts Act*,[3] whereby the two divisions of the Federal Court of Canada were reconstituted as separate courts. Accordingly, references to the Federal Court must be read with the new structure: the Federal Court of Appeal and the Trial Division, which is called the Federal Court.[4] In the *Federal Courts Act*, Parliament has expressly stated that the Trial Division and the Court of Appeal are continued as additional courts of law for the better administration of the laws of Canada.

The Federal Court not only replaced the Exchequer Court but also assumed a great deal of additional jurisdiction in the field of federal administrative law as well as entertaining claims by and against the federal Crown.

At the very outset of the creation of what some dubbed a "Super Exchequer Court", in the form of the Federal Court of Canada, there were many politicians, academics and commentators, as well as some provinces, with serious misgivings about the need for such a court. During the Commons debates leading up to the enactment of the *Federal Court Act* in 1971, Opposition members and academics advanced a number of arguments against the creation of this new court. First, they argued that lawyers practising in a particular province were familiar with the rules of the provincial court, but were not familiar with the rules of the Exchequer Court, nor would they be familiar with the rules of the new Federal Court of Canada. As a consequence, litigants pursuing claims against the federal Crown would be prejudiced by the creation of this new court just like they were in the Exchequer Court. Accordingly, critics argued that it made more sense to allow the provincial superior courts to maintain jurisdiction over not only administrative action involving federal tribunals, but also to take on the jurisdiction of the Exchequer Court. Second, they argued that the creation of a Federal Court would result in the same type of difficulties encountered in the United States, where there were so many different courts that one needed to be an expert simply to determine which court should deal with the matter. Third, the critics argued that judges sitting in a Federal Court in Ottawa would not be familiar with the local circumstances that exist in a particular province. This remoteness would result in injustice being done

to litigants.[5] It appears clear that some of those criticisms were indeed warranted and proved to be presciently accurate.

At the same time, it is also worth noting that some have suggested that one of the reasons for the jurisdictional quagmire that the Federal Court has found itself in arose, to some extent, from judicial personalities. Richard Pound makes this very point in his very thorough biography of Chief Justice Jackett, who became the first Chief Justice of the Federal Court, on June 1, 1971.[6]

As Pound describes it, Chief Justice Jackett was a highly respected lawyer, former Deputy Minister of Justice and Rhodes scholar and was generally recognized as the epitome of judicial administration. One would have thought that those qualifications would not result in difficulties as a Chief Justice. However, Chief Justice Laskin apparently saw this as a slight upon him as the Chief Justice of the Supreme Court of Canada, since he felt he was the epitome of judicial administration. Some have argued that it led to a number of decisions from the Supreme Court which were designed to cut down the jurisdiction of the Federal Court.

Chief Justice Laskin, in one dissenting decision by way of innuendo, made a suggestion of improper conduct and bullying of counsel by Chief Justice Jackett which, quite frankly, was baseless.[7] In any event, given this backdrop, it is not surprising to see how all of this played out in the field of Federal Court jurisdiction.

Even after the court's creation, the debate about the need for the Federal Court would not die. As one leading counsel, and later an appellate judge on the British Columbia Court of Appeal, stated:

> [T]he Federal Court as we know it is largely unnecessary...It is common to speak of Provincial Courts and Federal Courts but this conceals the importance of the Superior Courts in each of the Provinces; only these Courts are truly Courts of original jurisdiction and form the bedrock of the administration of justice in the provinces of this country.[8]

The Supreme Court of Canada, in *Attorney General of Canada v. Law Society of British Columbia (Jabour)*, further underscored the important position that superior courts occupy in Canada's legal system:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They crossed the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under section 92(14) of the Constitution Act and are presided over by judges appointed and paid by the federal government.[9]

The Federal Court is, on the other hand, a statutory court that requires statutory authority for all of its jurisdiction. This has two important con-

sequences. First, the Federal Court is limited in subject matter to matters concerning the "laws of Canada" as provided for in s. 101 of the *Constitution Act, 1867*. Second, the Federal Court has no inherent jurisdiction, thereby limiting its jurisdiction to subject matters conferred on it by the *Federal Court Act* or other federal statute.[10]

In 1989, when Parliament sought to enact a number of amendments to the *Federal Court Act*, the Attorney General of British Columbia and the Canadian Bar Association, British Columbia Branch, led the charge in arguing that the Federal Court should be abolished.[11] It was again suggested in 1989 that the Federal Court had proven to be too remote and too costly and was designed for a privileged few. Furthermore, the critics argued that, although a subject may sue the federal Crown only in the Federal Court, the federal Crown had the option of suing the subject in either the federal or provincial court. In addition, they submitted that there were many provisions in the *Federal Court Act* which unfairly favoured the federal Crown. Finally, they argued that many of the technical areas of Federal Court jurisdiction, such as tax, intellectual property, admiralty law, bills of exchange, promissory notes and aeronautics, as well as federal administrative law matters, could just as easily be handled in the provincial superior courts.[12]

As a result of the considerable criticism directed at the Federal Court, Parliament decided to enact the *Crown Liability and Proceedings Act* and amend the *Federal Court Act* in order to deal with some of these criticisms. In enacting this legislation, Parliament sought to achieve several purposes. Under the old Act, the federal Crown could sue in either the Federal Court or the superior court. Under the amendments, Parliament removed the Federal Court's exclusive jurisdiction over claims for relief against the federal Crown and made it concurrent with that of provincial superior courts. At the same time, however, Parliament sought to strengthen the Federal Court's exclusive jurisdiction over federal administrative decisions and actions by enlarging the scope of those matters that fell within the definition of a "federal board, commission or other tribunal", thereby giving the Federal Court even greater exclusive jurisdiction.[13] In conjunction with this latter objective, Parliament sought, by enacting s. 18.1(4) of the *Federal Court Act*, to expand the remedies that could be sought and granted exclusively by the Federal Court with regard to federal administrative decisions.[14]

Leaving aside the debate on whether the Federal Court (or for that matter, its predecessor, the Exchequer Court) ought to have been created, the jurisprudence is clear that once Parliament decided to enact legislation under s. 101 to establish a court for the better administration of the laws of Canada, that new court has jurisdiction to entertain the claim. As the Supreme Court of Canada made clear, s. 101 provides Parliament with

unfettered power to establish courts for the better administration of the laws of Canada.[15]

The courts have long recognized the jurisdiction of s. 101 courts, and the Supreme Court of Canada has expressly held that the federal Parliament can add or take away from the jurisdiction of the provincial courts if Parliament so desires. In fact, Parliament can even create new courts of criminal jurisdiction despite the fact that the constitution, maintenance and organization of provincial courts of criminal jurisdiction is given to the provincial legislatures.[16]

As the British Columbia Court of Appeal held in *Nanaimo Community Hotel v. Board of Referees*,[17] Parliament has full authority under s. 101 to create a court with jurisdiction to decide disputes relating to any matter falling within s. 91 of the *Constitution Act, 1867*.

Counterbalancing the authority of the federal Parliament to take away from the jurisdiction of the provincial superior courts is the principle that, although Parliament has the authority, it is still necessary that Parliament use clear and explicit statutory language before it is entitled to oust the jurisdiction of the provincial superior courts. After all, the provincial superior courts are courts of original and inherent jurisdiction and, therefore, those courts are assumed to have jurisdiction unless Parliament has expressly ousted it in specific federal legislation.[18]

THE IMPORTANCE OF THE FEDERAL COURT

As the Supreme Court of Canada has made clear, there is a need to give a fair and liberal interpretation of federal statutes granting jurisdiction to the Federal Courts.[19] In *Liberty Net*, the Supreme Court underscored the rationale for the creation of the Federal Court. As the court pointed out, prior to the creation of the Federal Court, there was significant confusion regarding the law as it related to the disposition of applications for judicial review of federal administrative decision-makers because superior courts in different provinces were reaching conflicting outcomes. Furthermore, the court held that the increasing number of federal administrative decision-makers, adjudicating an increasing number of laws within federal competence, made it critical to create the Federal Court because what was needed was a single court below the Supreme Court of Canada to supervise that structure.

There are also four other important reasons for the creation of the Federal Court. First, the Federal Court was created to ensure that federal administrative law cases are heard by judges who are familiar both with the area of law and with the administrative structure to which it applies.[20]

Second, it was important to create the Federal Court because the jurisdiction exercised by provincial superior courts over federal tribunals arose

out of pre-Confederation legislation and, as a result, no improvement over the superintendence of federal tribunals could be effected by provincial legislatures. Therefore, only the federal Parliament could effect the necessary changes.[21]

Third, having the provincial superior courts supervise federal tribunals could well result in forum shopping and overburden certain of the provincial courts.

Fourth, the Federal Court has the advantage of making decisions that will have effect across Canada. By contrast, decisions of provincial superior courts apply only to the province in question. This has great benefits in cases such as those involving, for example, the need of Canada-wide injunctions as occurs in seeking to halt an illegal strike of federal employees (e.g., Coast Guard, Canada Post).

THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURT

The creation of the Federal Court some 36 years ago gave birth to a never-ending stream of litigation relating to the question of whether the Federal Court has exclusive jurisdiction over federal administrative law when the constitutionality of federal administrative action is impugned.

There is no doubt that when Parliament enacted the *Federal Court Act* in 1971, it clearly intended to grant exclusive jurisdiction over the review of federal administrative action and decisions to the Trial Division and the Court of Appeal of the Federal Court. Even with the amendments in 1992 to the *Federal Court Act* and the *Crown Liability and Proceedings Act* granting concurrent jurisdiction to provincial superior courts in respect to claims brought against the federal Crown, the Federal Court continued to retain exclusive jurisdiction over judicial review proceedings against federal administrative boards.

In order to understand why the Federal Court has exclusive jurisdiction over judicial proceedings against federal administrative boards, it is necessary to begin by examining ss. 18 and 28 of the *Federal Courts Act*.

Section 28 of the *Federal Courts Act* confers exclusive jurisdiction on the Federal Court of Appeal to hear and determine applications for judicial review in respect of a number of federal boards created under federal legislation. All other decisions from federal administrative boards are judicially reviewed by the Trial Division pursuant to s. 18 of the *Federal Courts Act*.

Section 18 clothes the trial court with the exclusive and original jurisdiction for the judicial review of all other federal administrative decisions and actions. It is only the Federal Court that can grant judicial review remedies against any federal board, commission or other tribunal under the superintending and reforming power of the Federal Court.[22]

It did not take long after the creation of the Federal Court for the provincial superior courts to exercise some muscle to ensure that they retained jurisdiction where those courts were called upon to determine the constitutionality of legislation, in a division of powers sense, in cases that came before them.[23]

However, this was only the beginning. With the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 and Part II of the *Constitution Act, 1982*, provincial superior courts had another opportunity to assert jurisdiction over the judicial review of federal administrative decisions and actions. Soon after the *Charter*'s creation, the provincial superior courts did exactly that.[24] More recently, the same issue arose in relation to Aboriginal rights and treaty claims under s. 35 of the *Constitution Act, 1982*.[25]

EXCEPTION TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS

An analysis of this issue must begin by examining two seminal decisions from the Supreme Court of Canada: (*Jabour*, *supra*; and *Canada (Labour Relations Board) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147 ("*Paul L'Anglais*"). In each of those decisions, the court held that the only exception to the exclusive jurisdiction of the Federal Courts under ss. 18 and 28 of the *Federal Court Act* arises in respect to division of powers disputes. The Supreme Court has not had an opportunity to examine this issue in the context of the *Charter* or in relation to s. 35 of the *Constitution Act, 1982*. There have, however, been a number of decisions relating to those last two subject matters from provincial appellate courts as well as from provincial superior courts, which will be examined in this article.

Constitutional Limitations

Division of Power Disputes

The *Jabour* and *Paul L'Anglais* decisions stand for the proposition that where the issue raised relates to a division of powers issue, the Federal Courts cannot have exclusive jurisdiction even if the case involves the judicial review of federal administrative action.

In order to understand the rationale for this proposition, it is necessary to examine each of these two decisions. *Jabour* involved a challenge to the constitutional validity and applicability of a federal statute on a division of powers basis. The Law Society of British Columbia had taken steps to initiate disciplinary proceedings against Mr. Jabour, a lawyer, for advertising contrary to the Law Society's rules. Mr. Jabour sought a declaration from the British Columbia Supreme Court that the Law Society's rulings ran afoul of the *Combines Investigation Act*, a federal statute. The Law Society took

the position that the statute was unconstitutional or, alternatively, inapplicable in a division of powers sense. At issue was whether the Federal Court had exclusive jurisdiction to grant injunctive or declaratory relief against the Attorney General of Canada, and others, in connection with the interpretation or constitutional applicability of a federal statute to the Law Society or whether the British Columbia Supreme Court had concurrent jurisdiction.

The court held that the British Columbia Supreme Court had concurrent jurisdiction on the grounds that a constitutional limitation must be imposed on the exclusivity of the Federal Court in respect of s. 18 of the *Federal Court Act*. It further held that that statute must be construed so as not to remove from the provincial superior courts the jurisdiction to declare the constitutional validity of federal legislation in a division of powers sense. In other words, the court concluded that Parliament lacks the legislative competence under ss. 91 and 101 of the *Constitution Act, 1867* to prohibit provincial superior courts from determining the constitutional validity of federal legislation in a division of powers dispute.

In coming to that conclusion, the court pointed out that the provinces are given legislative power over the administration of justice in the province, thereby authorizing provincial legislatures to establish superior courts, while Parliament is given the power to establish courts for the better administration of the laws of Canada.[26] The provincial superior courts are the descendants of the superior courts of law and equity in England and are courts of general jurisdiction in all matters, federal and provincial. The Federal Court, on the other hand, is a statutory court and requires statutory authority in order for it to exercise its jurisdiction. It is limited to matters relating to the laws of Canada.

In *Jabour*, the court held that the reason why a superior court must have the jurisdiction to deal with division of powers cases is twofold. First, if it is not given such jurisdiction, it would be denied the power to determine the constitutionality of federal legislation. As Estey J. stated in *Jabour*, at 329:

> To do so would strip the basic constitutional concepts of judicature of this country, namely, the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*.

Second, and just as importantly;

> it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws...while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes.

The finding of concurrent jurisdiction in *Jabour* was animated by federalism concerns. In other words, when considering Parliament's grant of exclu-

sive jurisdiction to the Federal Courts over matters involving federal administrative action, one needs to ask: does the grant of such power threaten the federal system? Or, to quote Strayer J., as he then was, in *Groupe des Eleveurs de Volailles De l'Est l'Ontario v. Chicken Marketing Agency*,[27] in order to fall within the *Jabour* exception, a court would have to conclude that the finding of exclusive Federal Court jurisdiction could "menace the federal system or constitutional safeguards of individual rights and freedoms".

As a consequence, had the court in *Jabour* not found that the British Columbia Supreme Court had concurrent jurisdiction, it would have had the effect of placing provincial superior courts in the invidious position of having to apply unconstitutional legislation.

In *Paul L'Anglais*, the Supreme Court of Canada applied the principles enunciated in *Jabour* to a case that only involved the constitutional applicability of federal legislation. *Paul L'Anglais* was, like *Jabour*, a division of powers case. In that case, two corporations had brought a motion in Quebec Superior Court seeking a declaration that the Canada Labour Relations Board had no jurisdiction over them since they were engaged in a provincial undertaking. The Quebec Superior Court ruled it had no jurisdiction to grant the declaration in light of the exclusive jurisdiction of the Federal Court as set out in ss. 18 and 28 of the *Federal Court Act*. The Supreme Court of Canada disagreed with that conclusion because, in its view, the case really dealt with the unconstitutional application of a constitutional law (*Canada Labour Code*) that, when applied, trenched on a field of jurisdiction of the provincial legislature under s. 92.

The issue in *Paul L'Anglais* was whether the board had jurisdiction over the labour relation activities of Paul L'Anglais. In order to make that determination, it had to decide whether those activities fell within the scope of federal authority or provincial authority. Clearly, the board was applying the Constitution in a division of powers sense, and therefore the matter did not fall within the exclusive jurisdiction of the Federal Court.

The *Paul L'Anglais* case in turn has given rise to countless decisions outside of division of powers disputes because of the language employed by the court in describing the limitation of the exclusive jurisdictional power of the Federal Court:

> Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada, understood in the sense defined above, will be exercised exclusively by the Federal Court, a court created for the better administration of those laws. However, it cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of the laws of Canada, but the interpretation and application of the Constitution.[28] [emphasis added]

The court's use of the words "the interpretation and application of the Constitution" has spawned a great deal of litigation in the field of the *Charter* and s. 35 of the *Constitution Act, 1982*. If those words are to be given a broad meaning, it follows that the jurisdiction of the Federal Court must by necessity be limited. However, those words have to be examined in their proper context. In particular, they must be seen to be based upon what the court specifically said in *Jabour* of the two rationales for limiting the exclusive jurisdiction of the Federal Court in relation to the judicial review of federal administrative action. If that is done, it follows that the limitation of Federal Court jurisdiction is restricted to division of power disputes. This result logically follows from *Jabour* because that decision was premised on the need to resolve federal-provincial disputes in a ss. 91–92 context and did not go any further than that.

Finally, it is also important to recognize that the jurisdiction of the various courts of Canada is fixed by the provincial legislatures and by the Parliament of Canada, not by the courts. As the Supreme Court of Canada held in *R. v. Mills*:

> It is not for the judge to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. In fact, the jurisdictional boundaries created by Parliament and the Legislatures are for the very purpose of restraining the courts by confining their actions to their allotted spheres.[29]

Courts must therefore demonstrate significant deference to the will of Parliament in determining which court has the jurisdiction. This principle has, unfortunately, not always been followed by the courts as strictly as it should have been.

Charter of Rights and Freedoms Disputes

The second source of a constitutional limit on the exclusivity of the Federal Court jurisdiction is potentially found in the *Canadian Charter of Rights and Freedoms*. In the *Charter*, there are potentially two constitutional limitations which will be examined. First, do provincial superior courts have a power to determine the validity of federal legislation if such legislation conflicts with the *Charter*? Second, do provincial superior courts have a power to review the actions of a federal board on the ground that those actions infringe rights protected by the *Charter*?

A number of courts, including the British Columbia Court of Appeal, have held that since superior courts have jurisdiction as provincial courts of general original jurisdiction to declare that a particular application of federal legislation is contrary to the Constitution, it follows that, since the *Charter* is part of the Constitution, the provincial superior courts would also have jurisdiction to declare that federal legislation is contrary to the

Charter, even where the underlying litigation relates to federal administrative action.[30]

In *Lavers v. Minister of Finance of British Columbia*[31] two individuals and a corporation sought a declaration under s. 24(1) of the *Charter* that the actions of the Minister of National Revenue in authorizing and levying civil penalties for tax evasion under federal and provincial income tax provisions violated s. 11(h) of the *Charter* since it punished them for the same offence for which they had been previously convicted. The Court of Appeal applied *Paul L'Anglais* and *Jabour* and held that the issue raised in *Lavers* involved the unconstitutional application of an otherwise constitutional law and, therefore, the Supreme Court of British Columbia had jurisdiction. The court had no difficulty applying the principles enunciated by the Supreme Court of Canada in the *Charter* context because the *Charter* is part of the Constitution and therefore the issue raised relates to the "interpretation and application of the Constitution".

Unfortunately, the court failed to consider carefully what the "interpretation and application of the Constitution" meant in the sense used by the Supreme Court in *Paul L'Anglais* and in *Jabour*. Had the Court of Appeal done so, it would have had to consider whether those words applied only to federalism disputes. It is my view that those words were never intended to apply in any other circumstance, including *Charter* disputes either involving laws that are contrary to the *Charter* or where federal administrative action is contrary to the *Charter*.

Another important point never considered by the Court of Appeal in *Lavers* was the meaning of "a court of competent jurisdiction" under s. 24 of the *Charter*. The meaning of that phrase was of prime importance in *Lavers* because the petitioners sought s. 24 *Charter* relief in order to obtain relief from penalty tax assessments issued by the Minister of National Revenue. As the Supreme Court of Canada made clear in *R. v. Mills*[32] and *Singh v. Minister of Employment and Immigration*,[33] "a court of competent jurisdiction" presumes the existence of jurisdiction from a source external to the *Charter* itself. In *Lavers*, the Court of Appeal arguably should have found that only the Federal Court had jurisdiction by virtue of s. 18 of the *Federal Court Act*, which in effect made the Federal Court a "court of competent jurisdiction". Instead, the Court of Appeal did not deal with that issue and simply decided the case on the basis that the real issue was the unconstitutional application of a constitutional law.

There are, however, a number of other decisions of provincial appellate courts that lie on the other end of the spectrum. Those cases have concluded that provincial superior courts do not have concurrent jurisdiction

with the Federal Court in relation to federal administrative action that is challenged under the *Charter*.

The Ontario Court of Appeal, in *Wakeford*,[34] took a more middle of the road position to the application of the *Charter*. In *Wakeford*, the applicant had been issued an exemption by the federal Minister of Health to possess and grow marijuana for medical purposes under s. 56 of the *Controlled Drugs and Substances Act*. The exemption did not, however, exempt his caregivers from prosecution, yet they, at times, assisted in providing him with marijuana for his medical disability.

The Ontario Court of Appeal held that the provincial superior court had the jurisdiction to determine whether the *Controlled Drugs and Substances Act* violated Wakeford's s. 7 *Charter* rights because of the lack of a caregiver exemption. On the other hand, the Ontario superior court did not have the jurisdiction to determine whether the minister should have granted an exemption to the caregivers. In the opinion of the court, the review of such administrative action taken by the minister was within the exclusive jurisdiction of the Federal Court.

Applying the *Jabour* analysis to the *Wakeford* case, the Ontario Court of Appeal should have found that the Federal Court had exclusive jurisdiction in both instances because the *Charter* attack on the *Controlled Drugs and Substances Act* did not give rise to a federalism issue.

In *Mousseau v. Canada* (A.G.),[35] certain status Indians lost their status after marrying non-natives. Federal legislation was enacted restoring their status but they claimed that the band council, a federal tribunal, continued to refuse them certain benefits under this new legislation. As a result, they brought an application to the Nova Scotia Supreme Court alleging that they were being discriminated against by the band council and Canada, contrary to s. 15 of the *Charter*. The Indian band and Canada in response brought an application seeking an order that the Nova Scotia Supreme Court lacked jurisdiction to hear the matter by virtue of s. 18 of the *Federal Court Act*.

The Court of Appeal ultimately decided that not every attack of a decision made by a federal board based on a constitutional argument automatically clothes a provincial superior court with concurrent jurisdiction. The court held that there is a distinction to be drawn between jurisdiction to determine the constitutional validity or applicability of legislation on the one hand and jurisdiction to pass upon the manner in which a board or a tribunal functions under such legislation on the other.

The court held that what was really at the heart of the challenge brought by the applicants was the manner in which the federal board functions under the federal legislation in question. The fact that the applicants

alleged that their *Charter* rights were infringed did not assist the applicants, because only a court which is a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter* has the authority to decide the dispute. Only the Federal Court, not the superior court, has that authority.

The Appeal Division of the Prince Edward Island Supreme Court came to an identical conclusion in *P.E.I. v. Canada (Fisheries & Oceans)*[36] with respect to a s. 15 *Charter* challenge of certain licensing decisions made by the Minister of Fisheries and Oceans under s. 7 of the *Fisheries Act*. Interestingly, this case involved not only a s. 15 *Charter* challenge, but also a s. 36 *Constitution Act, 1982* challenge. The latter challenge was based on the argument that these same s. 7 *Fisheries Act* licensing decisions breached Canada's constitutional obligation to promote equal opportunities for the well-being of Canadians and to further economic development to reduce disparity and opportunities as provided for in s. 36 of the *Constitution Act, 1982*.[37]

As the Appeal Division of the Prince Edward Island Supreme Court held, there is a distinction between jurisdiction to determine the constitutional validity or applicability of legislation and the jurisdiction to decide upon the manner in which a board makes decisions under such legislation. The former is within the concurrent jurisdiction of provincial superior courts. The latter does not amount to a constitutional issue over which a provincial superior court has any jurisdiction in the face of s. 18 of the *Federal Courts Act*.[38]

The Appeal Division held that in determining this question, it is critical for the court to properly characterize the issue that is before it. In the *P.E.I.* case, it was ultimately held that the attack launched by the P.E.I. government related to the way in which the fishery was managed and, in particular, the way licensing decisions were made under the *Fisheries Act*. In other words, the court did not just look at the words used in the pleading, but rather at the substance or the true nature and character of the challenge. Notwithstanding the fact that the P.E.I. government raised constitutional and *Charter* breaches, it mattered not because those arguments were only incidental to the exercise of an otherwise valid power by a federal board and, therefore, the Federal Court has the exclusive jurisdiction under s. 18 to hear and decide these matters.[39]

While there are numerous decisions of the courts in Canada which take a much more restrictive approach to Federal Court jurisdiction,[40] it is fair to say that the emerging trend in relation to the *Charter* appears to be that provincial superior courts have concurrent jurisdiction to determine whether federal legislation conflicts with the *Charter*, but that remedies against the activities of federal authorities that impugn *Charter* rights must be sought in the Federal Court.[41]

Some commentators have, however, advocated for a more practical approach that has some attractiveness. They argue that, as a matter of logic, if the superior courts of the provinces can determine the constitutional validity and applicability of legislation, why should they not also be able to determine the constitutional validity and applicability of federal administrative action?[42] The problem with this approach is not only that it is far too results-oriented, but that it would gut the Federal Court of its jurisdiction. This is because there are very few cases in the public law arena that do not involve some type of constitutional attack—*Charter* or otherwise.

Ultimately, these two approaches will have to be considered by the Supreme Court of Canada in order eventually to lay to rest the conflicting jurisprudence in this area of the law.

Aboriginal and Treaty Rights Litigation Under Section 35 of the *Constitution Act, 1982*

The third source of a possible constitutional limit on the exclusivity of Federal Court jurisdiction is found under s. 35 of the *Constitution Act, 1982*. Pursuant to that provision, the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. There is no question that if an Aboriginal right or treaty claim is brought by way of action by an Aboriginal person or group against the federal Crown, both the provincial superior court and the Federal Court would have concurrent jurisdiction over those claims under s. 17 of the *Federal Courts Act* and s. 21(1) of the *Crown Liability and Proceedings Act*.

The more difficult question is whether provincial superior courts have the power to review the actions of a federal board on the grounds that those actions infringe rights either flowing from, or protected by, s. 35 of the *Constitution Act, 1982* or incidental thereto. In *Chief Joe Hall v. Canada (Attorney General)*,[43] the Supreme Court of British Columbia held that it has concurrent jurisdiction with the Federal Court to entertain actions to determine the issue of whether the Treasury Board satisfied the duty to consult and accommodate the interests of Aboriginal people in the sale of certain lands by the Treasury Board over which the Aboriginal people alleged Aboriginal title under s. 35 of the *Constitution Act, 1982*.

A five-member panel of the British Columbia Court of Appeal disagreed and held that the *Jabour, L'Anglais* and *Lavers* decisions did not provide a basis upon which the B.C. Supreme Court could obtain concurrent jurisdiction to decide whether the Treasury Board had satisfied any duty to consult and accommodate. The court held that those three decisions involved the constitutional validity or applicability of a federal statute. It followed, therefore, in the court's opinion, that since the *Hall* case did not raise those

issues, the B.C. Supreme Court could not have the jurisdiction to try that case. In the opinion of the court, the issue in *Hall* simply involved the review by a court of a federal administrative decision by the Treasury Board. Clearly, the B.C. Supreme Court did not have the jurisdiction to entertain such a matter. Whether the duty to consult is constitutional or flows from s. 35 did not, in the opinion of the court, have any bearing on the ultimate jurisdictional issue before the court.[44]

This is a particularly important decision in respect to not only s. 35 but also generally in relation to the jurisdiction of the B.C. Supreme Court to review federal administrative action. This decision marked a clear departure by the court from its previous decisions, where it had expanded the jurisdiction of the B.C. Supreme Court.[45]

In fact, before the *Chief Joe Hall* appeal was heard, there was a serious question whether there was anything left of the Federal Court's exclusive jurisdiction over federal administrative matters when the constitutionality of federal administrative actions is being challenged in British Columbia. The court clearly answered that question in the affirmative, making it clear that provincial superior courts only have the jurisdiction to deal with federal administrative action where the constitutional validity or applicability of a federal statute is at issue in a division of powers sense or is inconsistent with the *Charter* but in no other cases.

This decision appears, at least on a limited basis, to be in accord with the *Wakeford*, *Mousseau* and *P.E.I.* decisions. However, it would still be beneficial if the Supreme Court of Canada could lay the issue of concurrent jurisdiction of provincial superior courts to rest where a constitutional argument is put forward in the context of federal administrative action. This is particularly so in *Charter* challenges to the validity of federal legislation where the provincial appellate courts have not yet reached consensus as to whether the provincial superior courts have concurrent jurisdiction with the Federal Courts.

Does the Federal Court Have Jurisdiction to Grant a Bare Declaration of Constitutional Validity?

Another issue that has been troubling for the Federal Court for some time relates to the ability of that court to entertain a Dyson-type declaration[46] where the core of the action relates solely to a constitutional attack or a bare declaration of unconstitutional validity. The Supreme Court of Canada in *Jabour*[47] questioned, without deciding, the Federal Court's jurisdiction to grant such relief.

The Supreme Court of Canada shortly afterwards, in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*,[48] concluded that the Federal

Court can determine the constitutional validity or applicability of a federal law if it arises in the context of the execution and administration of a federal law; otherwise, the Federal Court would be placed in the invidious position of having to enforce an invalid law. However, the court went further and cast doubt on the Federal Court's ability to entertain a proceeding founded on the Constitution.

In *obiter dicta*, the court suggested that, since the *Constitution Act, 1867* is not a "law of Canada" because it was not enacted by the Parliament of Canada, it must follow that the Federal Court cannot grant relief based on a claim relying solely upon the Constitution. This arguably follows because s. 101 only authorizes the Federal Court to entertain claims based on the laws of Canada. Clearly, a law of Canada must mean a law passed by Parliament under its s. 91 power.

Professor Hogg adopts the *obiter* comments of the court in *Northern Telecom* in his constitutional text without undertaking any analysis.[49]

The Alberta Court of Appeal in *Pearson v. CRTC*[50] also agreed that it was doubtful that the Federal Court could grant a bare declaration of unconstitutionality of federal legislation.[51]

It is arguable, however, that this issue is far from clear. Prior to 1982, there was no question that the "laws of Canada" did not include the Canadian Constitution because the statutes making up the Canadian Constitution were passed by the U.K. Parliament. This has, however, arguably changed with the enactment of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Section 1 of the *Canada Act, 1982* states that the *Constitution Act, 1982* is "enacted for and shall have the force of law in Canada..."

Section 52(1) of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the *supreme law of Canada*, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect. [emphasis added]

Given that the Constitution of Canada is the supreme law of Canada, it follows that it must be a law of Canada. The Constitution of Canada not only includes the *Constitution Act, 1982*, but it also includes the *British North America Act, 1867* as provided for in subs. 52(2) of the *Constitution Act, 1982* and the schedule to the *Constitution Act, 1982*.

The Supreme Court of Canada in *Northern Telecom*[52] were unable to consider the effect of s. 1 of the *Canada Act, 1982* and s. 52 of the *Constitution Act, 1982* since the facts giving rise to the *Northern Telecom* case arose in 1978, some four years prior to the coming into force of the *Constitution Act, 1982*.

However, the authors of *Federal Courts Practice 2007*[53] suggest that this issue has not yet been resolved. No court has considered this issue in the

context of s. 1 of the *Canada Act, 1982* and s. 52(1) of the *Constitution Act, 1982*.

The importance of this issue cannot be overstated. If the *obiter dicta* in *Northern Telecom* is good law, it has serious adverse implications for the Federal Court. For example, s. 19 of the *Federal Courts Act* provides that if a provincial legislature passes a statute agreeing that the Federal Court has jurisdiction to determine controversies between Canada and a province or between two or more provinces that have passed similar legislation, the Federal Court has jurisdiction to determine the controversy.

As history demonstrates, these controversies usually involve constitutional disputes, as occurred in *P.E.I.* and later in British Columbia, regarding the impact of the Terms of Union, which are constitutional instruments.[54]

If *Northern Telecom* is correctly decided, the Federal Courts do not have the jurisdiction to decide those controversies, as in the past, because such litigation is not based on a law of Canada, but rather on the *Constitution*. It seems difficult to understand how the Federal Courts cannot decide these types of cases given the important role that these courts play in Canada's judicature and in the constitutional landscape of this country. Clearly, this is another reason why the Supreme Court of Canada needs to revisit this important issue.

It is also difficult to understand how the Federal Court can interpret and apply laws enacted by Parliament, but it cannot interpret and apply those laws if the only challenge to those laws is based on the Constitution.

Although *Jabour* is the starting point in support of the proposition that the Federal Court's jurisdiction is limited, it must be recognized that all *Jabour* decided is that provincial superior courts cannot be deprived of the jurisdiction to determine the constitutional validity of federal laws, in a division of powers sense, by the conferring of exclusive jurisdiction on the Federal Court. Such reasoning does not, and should not, preclude the Federal Court from having concurrent jurisdiction to grant a bare declaration of constitutional validity.

CONCLUSION

Although the bleeding over Federal Court jurisdiction has been temporarily staunched in British Columbia, Saskatchewan, Ontario, Nova Scotia and Prince Edward Island by a series of appellate decisions, the fact remains that many of these decisions are inconsistent with each other and, in some cases, do not reflect the two key touchstones emanating from *Jabour*. This state of affairs, coupled with unending criticism by commentators, cries out for some resolution by the Supreme Court of Canada. Until that hap-

pens, it is only a matter of time before some new issue will arise which will reopen old wounds.

ENDNOTES

1. *R. v. Thomas Fuller Const. Co. (1958) Ltd.*, [1980] 1 S.C.R. 695 at 713, Pigeon J.
2. *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10.
3. R.S.C. 1985, c. F-7, as amended by the *Court Administration Act*, S.C. 2002, c. 8, s. 27.
4. See ss. 3 and 4 of the *Federal Courts Act*, 2002, c. 8, ss. 14 and 16.
5. *House of Commons Debates*, Vol. 1 (1970), pp. 696–711; and *Carpenter Fishing Corp. v. Canada*, [2002] B.C.J. No. 2536 (C.A.). This very argument was made before the British Columbia Court of Appeal—see para. 6 of the reasons in *Carpenter Fishing, ibid.*
6. Richard Pound, *Chief Justice Jackett: By the Law of the Land* (Montreal & Kingston: McGill-Queen's University Press, 1999).
7. *Ibid.* at 263–269.
8. D.M.M. Goldie, Q.C., "Notes on the Federal Court" (1977) 35 Advocate 17.
9. [1982] 2 S.C.R. 307 (*Jabour*) at 326–327, Estey J.
10. It is also important to note that in order for the Federal Court to have jurisdiction over a case, three requirements must be met. First, there must be specific legislation giving the Federal Court jurisdiction over the case such as is found in the *Federal Courts Act*; for example, under ss. 17 and 18. Second, the cause of action must be based on a federal law. In other words, it is not enough for the federal Parliament to have legislative competence over, for example, the international transportation of goods, but if the cause of action is based on breach of contract relating to those goods, Parliament must have created that cause of action. Third, the federal law relied upon to found the court's jurisprudence must be within the legislative competence of the Parliament of Canada.
11. *A Proposal for the Merger of the Federal Court of Canada into the Provincial Superior Courts* (August 1989); *The Report on Proposed Abolition of the Federal Court of Canada* (November 22, 1989).
12. By virtue of the *Crown Liability and Proceedings Act*, S.C. 1990, c. 8, effective February 1, 1992, provincial superior courts now have concurrent jurisdiction over claims against the federal Crown in respect to many of these areas of the law.
13. See s. 18(3) of the *Federal Courts Act*, which makes it even clearer that the Federal Courts have been given exclusive jurisdiction over judicial review of federal administrative action.
14. For a more comprehensive discussion of the 1990 amendments to the *Federal Court Act* and the *Crown Liability and Proceedings Act*, see Jennifer Hocking, "Why the Federal Court Should Be Preserved" (1990) 48 Advocate 555.
15. *Consolidated Distilleries Ltd. v. Consolidated Exporters Corp.*, [1930] S.C.R. 531 at 535 and 537–538.
16. *Valin v. Langlois*, [1980] 3 S.C.R. 1 at 74–75.
17. [1945] 3 D.L.R. 225 at 255.
18. *Orden Estate v. Grail*, [1998] 3 S.C.R. 437, at 474.
19. *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at 657 ("*Liberty Net*").
20. Law Reform Commission of Canada, *Report 14, Judicial Review and the Federal*

Court (Ottawa: Minister of Supply and Services Canada, 1980).

21. *Three Rivers Boatmen Ltd. v. Canadian Labour Relations Board*, [1969] S.C.R. 607 at 618; *House of Commons Debates*, I (October 28, 1970) at 679–680 (John Turner); Ian Bushnell, *The Federal Court of Canada, A History, 1875–1992* (Toronto: University of Toronto Press, 1997) at 162.
22. *Grenier v. Canada* (2005), 262 D.L.R. (4th) 337 at paras. 22 and 26.
23. Morris & Sinclair, "The Exclusive Jurisdiction of the Federal Court of Canada Over Federal Administrative Law—Ongoing Jousting Over Ousting" (1998) 12 CJALP 119.
24. *Ibid.*
25. *Chief Joe Hall v. Canada*, 2006 BCSC 479; appeal allowed 2007 BCCA 133.
26. *Constitution Act, 1867*, ss. 92(14) and 101.
27. [1985] 1 F.C. 280 at 304.
28. *Canada (Labour Relations Board) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147 at 162.
29. [1986] 1 S.C.R. 863 at 952.
30. See, for example, *Longley v. Canada (Minister of National Revenue)*, [1992] 4 W.W.R. 213 (B.C.C.A.) (*"Longley"*); *Wakeford v. Canada* (2002), 58 O.R. (3d) 65 (Ont. C.A.) (*"Wakeford"*); and *R.L. Grain Im. v. Couture* (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.). *Contra: Pecheries MPQ Ltée v. Hache* (1986), 25 D.L.R. (4th) 66 (N.B.Q.B.) at 72.
31. (1989), 64 D.L.R. (4th) 193 (B.C.C.A.) (*"Lavers"*).
32. *Supra* note 29.
33. [1985] 1 S.C.R. 177.
34. *Supra* note 30.
35. (1993), 107 D.L.R. 4th 727 (N.S.C.A.).
36. [2006] P.E.S.C.A.D. 27 (P.E.I.).
37. *Ibid.* at para. 13.
38. *Ibid.* at para. 34.
39. See also *R. v. Daniels* (1991), 65 C.C.C. (3d) 366 (Sask. C.A.).
40. See *Longley*, *supra* note 30; *Re Williams and Canada (A.G.)* (1983), 45 O.R. (2d) 291 at 293–294 (Div. Ct.); and *Pearson v. C.R.T.C.* (1997), 152 D.L.R. (4th) 83 (Alta. C.A.) at 89–91.
41. B.J. Saunders et al., *Federal Courts Practice 2007* 25.
42. Lokan & Burbridge, "The Federal Courts' Jurisdiction to Apply the Constitution", Fifth Annual Charter Conference, September 29, 2006.
43. 2006 BCSC 479.
44. *Chief Joe Hall v. Canada*, 2006 BCSC 479 at paras. 40, 45 and 46.
45. See *Lavers*, *supra* note 31; and *Longley*, *supra* note 30.
46. *Dyson v. A.G.*, [1911] 1 K.B. 410.
47. *Supra* note 9 at 323 and 328.
48. [1983] 1 S.C.R. 733 at 740–745 (*"Northern Telecom"*).
49. Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 7–16.8.
50. (1997), 152 D.L.R. (4th) 83 at 87–88.
51. See also *Southam Inc. v. Canada*, [1990] 3 F.C. 465 (C.A.) and *Canada Post Corp. v. C.U.P.W.*, [1989] 1 F.C. 98 (T.D).
52. *Supra* note 48 at 745.
53. *Supra* note 41 at 9.
54. *Canada v. P.E.I.*, [1978] 1 F.C. 533 (C.A.); and *B.C. (A.G.) v. Canada (A.G.)*, [1990] 3 W.W.R. 49 (B.C.S.C.).

DOMINION OF CANADA

OFFICIAL REPORT

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HOUSE OF COMMONS

SECOND SESSION—TWENTIETH PARLIAMENT

10 GEORGE VI, 1946

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VOLUME CCXLIX FOR THE PERIOD 1875-1946

INDEX ISSUED IN A SEPARATE VOLUME

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1947

CANADIAN CORPS OF FIREFIGHTERS

Mr. LENNARD:

For a copy of all correspondence exchanged between the Minister of National War Services and the Minister of National Defence (Army), from January, 1942, to September, 1945, respecting the Canadian corps of firefighters.

Mr. McCANN: I will have to oppose this order on the ground that this is correspondence between ministers and is therefore privileged. I would ask the hon. gentleman if he would be good enough to withdraw it.

Some hon. MEMBERS: Dropped.

Mr. SPEAKER: Dropped.

VETERANS LAND ACT—OLIVER FARM

Mr. LENNARD:

For a copy of all correspondence, reports and other documents in the possession of the Department of Veterans Affairs, in connection with the enquiry made by Mr. D. M. Brodie, of Windsor, Ontario, regarding the price paid by Veterans Land Administration for the Oliver farm.

Mr. MACKENZIE: I understand from discussion with the hon. member that he has received the information he seeks.

Mr. LENNARD: Yes.

Mr. SPEAKER: Dropped.

ST. SIMEON, QUE., POST OFFICE BUILDING

Mr. DORION:

For a copy of all correspondence, telegrams, reports and other documents, from 1936 to March 15, 1946, in the possession of the Post Office Department and the Department of Public Works, relative to the erection of a post office at St. Simeon, Charlevoix county.

DEPARTMENT OF MUNITIONS AND SUPPLY ACT—ORDERS IN COUNCIL

Mr. DESMOND:

For a copy of all orders in council approved since September 6, 1945, under the authority of the Department of Munitions and Supply Act.

Mr. McILRAITH: I have discussed this motion with the hon. member for Kent (Mr. Desmond) and he has arranged to examine the index of the orders in council asked for. Until he has an opportunity of doing so I suggest that the motion be permitted to stand.

Mr. SPEAKER: Stands.

HOUSING ACT, 1944—ORDERS IN COUNCIL

Mr. FRASER:

For a copy of all orders in council and regulations passed under the National Housing Act, 1944.

VETERANS' INSURANCE ACT—REGULATIONS

Mr. FRASER:

For a copy of all regulations made by the governor in council under the authority of the Veterans' Insurance Act.

Mr. MACKENZIE: Return tabled.

FARM IMPROVEMENT LOANS ACT—REGULATIONS

Mr. HENDERSON:

For a copy of all regulations made by the governor in council pursuant to the Farm Improvement Loans Act.

PRAIRIE FARM ASSISTANCE ACT—ORDERS IN COUNCIL

Mr. HENDERSON:

For a copy of all orders in council approved since July 1, 1945, under the authority of the Prairie Farm Assistance Act.

FISHERIES PRICES SUPPORT ACT—REGULATIONS

Mr. BROOKS:

For a copy of all regulations made by the governor in council pursuant to the Fisheries Prices Support Act.

INDUSTRIAL DEVELOPMENT BANK—BY-LAWS

Mr. FRASER:

For a copy of all by-laws of the Industrial Development Bank.

*PRIME MINISTER'S SPECIAL PREROGATIVES

Mr. DESMOND:

For a copy of all orders in council prescribing the special prerogatives of the Prime Minister.

Mr. MACKENZIE KING: The motion is for a copy of all orders in council prescribing the special prerogatives of the Prime Minister. I may say there is nothing unusual about this particular order. It is one that was first adopted by Sir Charles Tupper when he came into office. It has been part of the normal procedure as each new administration came into office to enact similar orders. I have here the various orders that have been passed. The first by Sir Charles Tupper was passed on May 1, 1896. Then there was one by Sir Wilfrid Laurier on July 13, 1896, one by Sir Robert Borden, on October 10, 1911, and another by Sir Robert Borden when he was head of the Union government. Then there is one by the Right Hon. Arthur Meighen, approved on July 19, 1920, and one by Mr. Bennett, approved on August 7, 1930. Then there is one by myself, approved on October 25, 1935.

I seem to have overlooked passing a similar order between 1921 and 1926. Mr. Meighen also overlooked his opportunity from June to September of 1926. Again I recommended

no order from 1926 to 1930. I am told that the clerk of the privy council has assumed that where a prime minister has been in office on a previous occasion, and is returned and continues in office, the old order still has force.

The only variation in the orders passed by myself and by my predecessors since the time of Sir Charles Tupper has been that in the original recommendation of Sir Charles the railway committee was included in the list of appointments designated as the prerogative of the Prime Minister in section 4 of the first two orders in council. This committee was deleted for obvious reasons from the list of appointments, under P.C. 2437 of October 10, 1911, and from subsequent orders in council.

Then in the case of the last two orders in council, namely P.C. 1930 of 1930 and P.C. 3374 of 1935, the original wording of section 3 has been slightly altered to read "recommendations affecting the discipline of the department of another minister" instead of "the discipline of another department".

That is the extent of the changes made. I have been told to be sure to inform the house that this list does not include all the prerogatives of the Prime Minister.

Mr. COLDWELL: Is the list being tabled?

Mr. MACKENZIE KING: I am tabling all the orders.

Motion agreed to.

WAR ASSETS—ESTEVAN AIRPORT BUILDINGS AND EQUIPMENT

Mr. McCULLOUGH (Assiniboia):

For a copy of all correspondence, since July 1, 1944, in the possession of War Assets Corporation or any department of the government with reference to the disposition of Estevan airport buildings and equipment.

R.C.A.F. BUILDINGS AT NORTH BATTLEFORD

Mr. CAMPBELL:

For a copy of all correspondence and telegrams exchanged between any department of the government and the city council of North Battleford or any other person or persons, from July 1, 1945, to date, regarding the sale of R.C.A.F. buildings at North Battleford.

CURRIE MEMORIAL AND SOLDIERS' CONVALESCENT HOSPITAL, MONTREAL

Mr. DIEFENBAKER:

For a copy of all correspondence between Mr. David, of Montreal, Quebec, an architect, and any of his employees with the Department of National Defence, and/or the Department of Public Works, and/or the Department of Veterans Affairs, regarding plans for the prospective erection (including the cancellation of such plans, if any) of the Currie Memorial hospital and/or the Soldiers' Convalescent hospital in the city of Montreal.

[Mr. Mackenzie King.]

PEACE RIVER DISTRICT

RAILWAY OUTLET TO PACIFIC COAST

Mr. WILLIAM IRVINE (Cariboo) moved:

That, in the opinion of this house, the government should give immediate consideration to the building of a railway outlet from the Peace River country to the Pacific coast.

He said: Mr. Speaker, I need hardly say that the resolution which I now rise to discuss is not worded as forcefully and as specifically as I should like it to be. But for certain restrictions imposed upon me by the rules of the house I should have the resolution read: "That this parliament endorse the building of the Peace River outlet, forthwith." However, members know full well that private members are not permitted to offer motions which might involve the expenditure of public moneys. I do not see why such motions should not be made by private members. We represent the people who are taxed; we should have some say in how much they are taxed, and how their taxes are to be expended. However, I shall not stop now to discuss amendments to the rules of the house. I merely say in passing that we are compelled by the limitations of the rules to restrict our expressions in matters of this kind. So that the resolution can only ask that the government give consideration to the building of the line, as desired.

I wish to express the hope that hon. members will not talk the resolution out. It is a practice sometimes indulged in. I should like in that connection to say that a long-deferred hope has saddened the hearts of the people in the area which will be directly affected by the proposed railway. I am asking that the house pass the resolution, and thus give them at least some basis for encouragement. But if we cannot see our way clear to pass the resolution, I think it would be better to face it squarely and fairly and vote it down, thereby putting out the *ignis fatuus*, that dazzling, sparkling, phosphorescent light of political promises which, in the past, has been leading the people toward futility. It would be better for us to put out forever these tantalizing, false beacon-lights which mark the road to nowhere.

The proposal which I would ask the government to consider, and which I would ask hon. members to authorize the government to consider, is to build a railroad line to connect the Pacific Great Eastern with the Northern Alberta railroad, which would incorporate both lines into the Canadian National railway system, and would connect the two branch lines mentioned.

Second Session
Thirty-ninth Parliament, 2007-08

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chair:
The Honourable JOAN FRASER

Wednesday, May 7, 2008
Thursday, May 8, 2008

Issue No. 17

Sixth (final) meeting on:

A comprehensive review of the amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24)

and

Third and Fourth (final) meetings on:

Bill S-224, An Act to amend the Parliament of Canada Act (vacancies)

INCLUDING:
THE ELEVENTH REPORT OF THE COMMITTEE
(Amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24))
THE TWELFTH REPORT OF THE COMMITTEE
(Bill S-224)

APPEARING:
The Honourable Peter Van Loan, P.C., M.P.,
Leader of the Government in the House of Commons and Minister for Democratic Reform

WITNESSES:
(*See back cover*)

Deuxième session de la
trente-neuvième législature, 2007-2008

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Présidente :
L'honorable JOAN FRASER

Le mercredi 7 mai 2008
Le jeudi 8 mai 2008

Fascicule n^{o} 17

Sixième (dernière) réunion concernant :

L'examen complet des modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24)

et

Troisième et quatrième (dernière) réunions concernant :

Le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants)

Y COMPRIS :
LE ONZIÈME RAPPORT DU COMITÉ
(Modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24))
LE DOUZIÈME RAPPORT DU COMITÉ
(Le projet de loi S-224)

COMPARAÎT :
L'honorable Peter Van Loan, C.P., député,
leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique

TÉMOINS :
(*Voir à l'endos*)

45383-45387

MINUTES OF PROCEEDINGS

OTTAWA, Wednesday, May 7, 2008
(36)

[*English*]

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 4 p.m., in room 257, East Block, the chair, the Honourable Joan Fraser, presiding.

Members of the committee present: The Honourable Senators Andreychuk, Baker, P.C., Cowan, Fraser, Joyal, P.C., Merchant, Milne, Moore, Oliver, Stratton, Tardif and Watt (12).

Other senators present: The Honourable Senators Banks, Murray, P.C. and Phalen (3).

In attendance: Michel Bédard, Analyst, Parliamentary Information and Research Services, Library of Parliament.

Also in attendance: The official reporters of the Senate.

Pursuant to the order of reference adopted by the Senate on Tuesday, March 4, 2008, the committee continued its consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies). (*For complete text of the order of reference, see proceedings of the committee, Issue No. 15.*)

APPEARING:

The Honourable Peter Van Loan, P.C., M.P., Leader of the Government in the House of Commons and Minister for Democratic Reform.

WITNESSES:

Privy Council Office:

Dan McDougall, Director, Strategic Analysis and Planning, Democratic Reform;

David Anderson, Senior Policy Advisor, Democratic Reform.

Mr. Van Loan made an opening statement and, together with Mr. McDougall and Mr. Anderson, answered questions.

At 5:05 p.m., the committee suspended.

At 5:06 p.m., pursuant to rule 92(2)(f), the committee resumed in camera to consider a draft report.

Pursuant to the order of reference adopted by the Senate on Thursday, December 6, 2007, the committee continued its consideration of a comprehensive review of the amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24) (*For complete text of the order of reference, see proceedings of the committee, Issue No. 12.*)

It was moved that the draft report, as amended, be adopted and that the chair table the report at the next sitting.

The question being put on the motion, it was adopted.

PROCÈS-VERBAUX

OTTAWA, le mercredi 7 mai 2008
(36)

[*Traduction*]

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles se réunit aujourd'hui, à 16 heures, dans la salle 257 de l'édifice de l'Est, sous la présidence de l'honorable Joan Fraser (*présidente*).

Membres du comité présents : Les honorables sénateurs Andreychuk, Baker, C.P., Cowan, Fraser, Joyal, C.P., Merchant, Milne, Moore, Oliver, Stratton, Tardif et Watt (12).

Autres sénateurs présents : Les honorables sénateurs Banks, Murray, C.P. et Phalen (3).

Également présent : Michel Bédard, analyste, Service d'information et de recherche parlementaires, Bibliothèque du Parlement.

Aussi présents : Les sténographes officiels du Sénat.

Conformément à l'ordre de renvoi adopté par le Sénat le mardi 4 mars 2008, le comité poursuit son examen du projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants). (*Le texte complet de l'ordre de renvoi figure au fascicule n° 15 des délibérations du comité.*)

COMPARAÎT :

L'honorable Peter Van Loan, C.P., député, leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique.

TÉMOINS :

Bureau du Conseil privé :

Dan McDougall, directeur, Analyse et planification stratégique, Réforme démocratique;

David Anderson, conseiller principal en politiques, Réforme démocratique.

M. Van Loan fait une déclaration liminaire puis, aidé de MM. McDougall et Anderson, répond aux questions.

À 17 h 5, la séance est interrompue.

À 17 h 6, conformément à l'alinéa 92(2)f) du Règlement, le comité reprend la séance à huis clos pour examiner une ébauche de rapport.

Conformément à l'ordre de renvoi adopté par le Sénat le jeudi 6 décembre 2007, le comité poursuit son examen complet des modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24). (*Le texte complet de l'ordre de renvoi figure au fascicule n° 12 des délibérations du comité.*)

Il est proposé que l'ébauche de rapport modifiée soit adoptée et que la présidente la dépose à la prochaine séance du Sénat.

La question, mise aux voix, est adoptée.

At 5:30 p.m., the committee adjourned to the call of the chair.

ATTEST:

OTTAWA, Thursday, May 8, 2008
(37)

[*English*]

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:50 a.m., in room 257, East Block, the chair, the Honourable Joan Fraser, presiding.

Members of the committee present: The Honourable Senators Andreychuk, Campbell, Di Nino, Fraser, Joyal, P.C., Merchant, Milne and Watt (8).

Other senators present: The Honourable Senators Banks and Moore (2).

In attendance: Michel Bédard, Analyst, Parliamentary Information and Research Services, Library of Parliament.

Also in attendance: The official reporters of the Senate.

Pursuant to the order of reference adopted by the Senate on Tuesday, March 4, 2008, the committee continued its consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies). (*For complete text of the order of reference, see proceedings of the committee, Issue No. 15.*)

It was agreed, on division, that the committee proceed to clause-by-clause consideration of Bill S-224.

It was agreed that the title stand postponed.

It was agreed, on division, that clause 1 carry.

It was agreed, on division, that clause 2 carry.

It was agreed, on division, that the title carry.

It was agreed, on division, that the bill carry.

It was agreed, on division, that the chair report the bill without amendment to the Senate.

At 10:52 a.m., the committee adjourned to the call of the chair.

ATTEST:

À 17 h 30, le comité suspend ses travaux jusqu'à nouvelle convocation de la présidence.

ATTESTÉ :

OTTAWA, le jeudi 8 mai 2008
(37)

[*Traduction*]

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles se réunit aujourd'hui, à 10 h 50, dans la salle 257 de l'édifice de l'Est, sous la présidence de l'honorable Joan Fraser (*présidente*).

Membres du comité présents : Les honorables sénateurs Andreychuk, Campbell, Di Nino, Fraser, Joyal, C.P., Merchant, Milne et Watt (8).

Autre sénateurs présents : Les honorables sénateurs Banks et Moore (2).

Aussi présent : Michel Bédard, analyste, Service d'information et de recherche parlementaires, Bibliothèque du Parlement.

Également présents : Les sténographes officiels du Sénat.

Conformément à l'ordre de renvoi adopté par le Sénat le mardi 4 mars 2008, le comité poursuit son examen du projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants). (*Le texte complet de l'ordre de renvoi figure au fascicule n° 15 des délibérations du comité.*)

Il est convenu, avec dissidence, que le comité procède à l'examen article par article du projet de loi S-224.

Il est convenu de reporter l'étude du titre.

Il est convenu, avec dissidence, d'adopter l'article 1.

Il est convenu, avec dissidence, d'adopter l'article 2.

Il est convenu, avec dissidence, d'adopter le titre.

Il est convenu, avec dissidence, d'adopter le projet de loi.

Il est convenu, avec dissidence, que la présidence fasse rapport du projet de loi non modifié au Sénat.

À 10 h 52, le comité suspend ses travaux jusqu'à nouvelle convocation de la présidence.

ATTESTÉ :

Le greffier du comité,

Adam Thompson

Clerk of the Committee

EVIDENCE

OTTAWA, Wednesday, May 7, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), met this day at 4 p.m. to give consideration to the bill.

Senator Joan Fraser (*Chair*) in the chair.

[*English*]

The Chair: Honourable senators, we are continuing our study of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies).

We have the great pleasure this afternoon of welcoming as a witness the Honourable Peter Van Loan, who is the Leader of the Government in the House of Commons and Minister for Democratic Reform. He has with him witnesses from the Privy Council; Dan McDougall, Director, Strategic Analysis and Planning, Democratic Reform; and David Anderson, Senior Policy Adviser, Democratic Reform. Welcome, minister.

Honourable senators, the minister has not one but two engagements at five o'clock. Therefore we must be careful to listen closely to him and to put other questions in an appropriately concise form.

Minister, the floor is yours to make your opening statement.

Hon. Peter Van Loan, P.C., M.P., Leader of the Government in the House of Commons and Minister for Democratic Reform: Thank you. It is a pleasure to be here. There are many familiar faces around the table discussing familiar issues.

The debate over the future of our democratic institutions, in my view, comes down to a simple choice: Either you support change or you support the status quo. Those who support change will work to find ways of achieving that change. Those who support the status quo will not only argue creatively and vociferously against any change, but will seek to find ways to entrench the status quo and to make change even more difficult to achieve in the future.

Our government believes firmly that our institutions must become more democratic, more accountable and more transparent. In short, they must change. In this area, our government has led the way. Since forming the government, we have substantially changed the way business is done in Ottawa.

[*Translation*]

We've passed the Federal Accountability Act which banned union and corporate donations to candidates and riding associations; limited individual donations to political parties to $1,100 per year; expanded access to Information laws to include crown corporations such as Canada Post, VIA Rail, and the CBC as well as organizations such as the Canadian

TÉMOIGNAGES

OTTAWA, le mercredi 7 mai 2008

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles auquel a été renvoyé le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui à 16 heures pour examiner le projet de loi.

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente : Honorables sénateurs, nous poursuivons donc notre étude du projet de loi S-224, Loi modifiant la Loi sur le Parlement (sièges vacants).

Nous avons le grand plaisir d'accueillir l'honorable Peter Van Loan qui est leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique. Il est accompagné de témoins du Conseil privé en la personne de Dan McDougall, directeur, Analyse et planification stratégique, Réforme démocratique, et de David Anderson, conseiller principal en politiques, Réforme démocratique. Bienvenue, monsieur le ministre.

Honorables sénateurs, le ministre n'a pas un, mais bien deux engagements à 17 heures et nous allons devoir l'écouter attentivement afin de lui adresser des questions qui soient les plus concises possible.

Monsieur le ministre, vous avez la parole pour vos remarques liminaires.

L'honorable Peter Van Loan, C.P., député, leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique : Merci. Je suis heureux de me trouver parmi vous et de voir tous ces visages familiers pour parler de sujets également familiers.

Le débat concernant l'avenir de nos institutions démocratiques repose en fait sur un choix tout simple : le changement, ou le statu quo. Les personnes en faveur du changement s'efforceront de trouver des solutions afin d'aller de l'avant. Celles en faveur du statu quo non seulement s'insurgeront contre tout changement, parfois au moyen d'arguments rusés, mais tenteront d'implanter encore plus le statu quo et de faire obstacle au changement.

Notre gouvernement croit fermement que nos institutions doivent être davantage démocratiques, responsables et transparentes. Autrement dit, elles doivent changer. En ce sens, le gouvernement a préparé le terrain. Depuis notre arrivée au pouvoir, nous avons modifié considérablement les façons de faire à Ottawa.

[*Français*]

Le Parlement a adopté la Loi fédérale sur la responsabilité qui prévoit des mesures telles que l'interdiction pour les syndicats et les entreprises de faire des dons à des candidats ou à des associations de circonscription; la limite de 1 100 $ par année concernant les dons individuels à des partis politiques; l'élargissement des mesures législatives touchant l'accès à

Wheat Board; and created new independent officers of Parliament such as the recently appointed Parliamentary Budget Officer.

Legislation was passed which improves voter identification rules and strengthens the electoral process. The extension of the Afghanistan mission was put twice to a vote in Parliament.

Parliamentary hearings were held into the appointment of Justice Rothstein to the Supreme Court, and two bills were introduced to modernize the Senate to make it consistent with 21st century democratic values, principles, and traditions. On the other hand, we have faced a stiff resistance by the opposition to these and other measures.

For example, the Federal Accountability Act was resisted by the Liberals and the Bloc. Our bill to expand the opportunities for people to vote was gutted in committee by the opposition and our Bill to require voters to show their face before voting is being delayed by the opposition in committee.

Our bill to make incremental changes to the Senate by introducing 8-year term limits — instead of potentially 45 year terms — and to consult Canadians on who they want representing them in the Senate, have run into considerable delay and obstruction at the hands of those defending the status quo.

[*English*]

This leads us today to Bill S-224. It seeks to compel the Prime Minister to make appointments to the Senate within six months of a vacancy occurring. As I have noted earlier, there are those who seek to achieve change and those who seek to maintain and entrench the status quo. This bill seeks to do the latter — entrench the status quo — by entrenching the existing appointment process and making it more difficult to achieve a modern, democratic, accountable Senate.

This bill is unacceptable to the government. We will not support a bill that seeks to force the Prime Minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.

Some have suggested this bill is nothing more than an attempt by the Liberal Party to legitimize patronage appointments to the Senate by a future Liberal Prime Minister. Given the lack of support by the Liberal Party for real reforms to the Senate, it is easy to understand why such a view is credible and believable. I can picture it now: A future Liberal prime minister justifying patronage appointments to the Senate by saying, "I had no option. The law forced me to do it."

l'information afin d'y inclure Postes Canada, VIA Rail, la Société Radio-Canada, ainsi que des organisations telles que la Commission canadienne du blé; la création de postes d'agents indépendants du Parlement, par exemple le poste à la Direction parlementaire des budgets, poste comblé récemment.

Une mesure législative a été adoptée pour renforcer les règles concernant l'identification des électeurs et pour améliorer le processus électoral. La question du prolongement de la mission en Afghanistan a été mise aux voix au Parlement à deux reprises.

Des audiences parlementaires ont été tenues concernant la nomination du juge Rothstein à la Cour suprême du Canada et deux projets de loi ont été déposés en vue de moderniser le Sénat afin d'en faire une institution démocratique reflétant les valeurs, les principes et les traditions du XXI^{e} siècle. Mais l'opposition s'est montrée extrêmement rigide à l'égard de ces mesures et des autres propositions.

Par exemple, le Parti libéral et le Bloc québécois se sont opposés à la Loi fédérale sur la responsabilité. Le projet de loi visant à offrir aux électeurs davantage de possibilités pour exercer leur droit de vote a été disséqué par l'opposition à l'étape de l'étude en comité, et celui exigeant que les électeurs montrent leur visage au moment de voter est bloqué par l'opposition à l'étape de l'étude en comité.

Le projet de loi concernant une réforme sénatoriale graduelle et qui vise à limiter les mandats des sénateurs à huit ans — comparativement au maximum de 45 ans — et à consulter les Canadiens en ce qui touche leur choix concernant leurs représentants au Sénat, a été retardé et bloqué par les défenseurs du statu quo.

[*Traduction*]

Cela nous amène au projet de loi S-224, qui vise à obliger le premier ministre à faire des nominations au Sénat dans les six mois suivant la date à laquelle un siège est devenu vacant. Comme je l'ai mentionné plus tôt, il y a ceux qui souhaitent que les choses changent, et il y a ceux qui veulent maintenir voire renforcer le statu quo. Ce projet de loi maintient le statu quo : il aurait pour effet de consolider le processus de nomination actuel et de rendre encore plus complexe tout effort visant à rendre le Sénat plus moderne, démocratique et responsable.

Le gouvernement estime que cela est inacceptable. Nous n'appuierons pas un projet de loi qui obligerait le premier ministre à faire des nominations non démocratiques au sein d'une institution qui ne respecte pas les principes modernes de la démocratie.

Certains sont d'avis qu'il ne s'agit rien de plus qu'une tentative du Parti libéral pour justifier les nominations partisanes au Sénat par un futur premier ministre libéral. Si l'on considère le manque d'enthousiasme des libéraux à l'égard d'une véritable réforme du Sénat, cette hypothèse est loin d'être invraisemblable. Je peux très bien m'imaginer un futur premier ministre libéral justifiant de telles nominations en disant : « Je n'avais pas le choix, c'est la loi qui le veut. »

Respectfully, I say to the members of this committee, you do have an option. You can say no to the old ways of doing things, you can say no to the status quo and you can say no to this bill. You can work with our government to achieve real change to our parliamentary institutions such as the Senate; change that will modernize and reform our institutions, including the Senate, to make them consistent with 21st century democratic values, principles and traditions.

For example, we have consistently stated that we are open to different approaches to reforming the Senate. Therefore, in the context of a process for selecting senators, such as that envisioned in Bill C-20, the Senate consultations bill, if a similar proposal were to be included in Bill S-224, it could be seen as enhancing democracy, as well as the legitimacy of the Senate. Absent a democratic process, Bill S-224 will simply maintain the status quo by entrenching the lack of democratic legitimacy of the Senate.

Those are my views and I will be pleased to take any questions.

Senator Joyal: I had the opportunity to read the presentation of the minister. Minister, when Bill S-4 was referred to this chamber by the government, this committee conducted an extensive study of the bill and made recommendations to the government to refer to the Supreme Court the question of the constitutionality of section 44; how much power was vested in Parliament to change essential characteristics of the Senate without the concurrence of the provinces. I think this committee came to that conclusion on the basis of briefs it received from the provincial Government of Quebec, from Ontario, from New Brunswick, from Newfoundland and Labrador and from other provinces who expressed a similar concern.

When this report was published, why did the government not act upon it? Today, we could have had parameters available to Parliament whereby the government, or Parliament as such, could act and proceed with changes in respect of the letter of the Constitution.

Mr. Van Loan: I have indicated our view in the past that we believe those two bills are entirely constitutional. Every considered, thoughtful opinion by leading academics says the same thing. If you believe the bills are not constitutional, if that is your considered opinion, then, to be consistent, you will find that the bill in front of you today is not constitutional. The two have their constitutional grounds for the exact same reason. They draw their basis on the notion that we can make some kind of incremental reform as to how appointments to the Senate are made without violating the Constitution. You cannot vote in favour of Bill S-224 and then suggest that Bill C-19 and Bill C-20 as they are now are unconstitutional. That view would be entirely inconsistent.

Chers membres du comité, je vous dis très respectueusement que vous avez le choix. Vous pouvez embrasser le changement et rejeter le statu quo. Vous pouvez vous opposer à ce projet de loi. Vous pourrez collaborer avec le gouvernement pour véritablement changer nos institutions parlementaires telles que le Sénat, les moderniser, les transformer; autrement dit, faire en sorte qu'elles reflètent les valeurs, les principes et les traditions, ancrés dans la démocratie, du XXI^{e} siècle.

Par exemple, nous avons répété que nous étions prêts à considérer d'autres approches. Donc, si un processus de sélection des sénateurs — comme celui que prévoit le projet de loi C-20 — était inclus dans le projet de loi S-224, ce dernier serait considéré comme renforçant la démocratie et la légitimité au Sénat. Mais puisqu'il ne prévoit aucun processus démocratique, le projet de loi S-224 ne fera que maintenir le statu quo en renforçant l'absence de légitimité démocratique au Sénat.

Je viens de vous exprimer mon point de vue et je serai heureux de répondre à vos questions.

Le sénateur Joyal : J'ai eu l'occasion de lire le texte de l'allocution du ministre. Monsieur le ministre, quand le gouvernement a renvoyé le projet de loi S-4 à notre Chambre, notre comité a effectué une étude approfondie de ce texte et recommandé au gouvernement qu'il fasse un renvoi à la Cour suprême relativement à la constitutionnalité de l'article 44. En effet, de quel pouvoir le Parlement dispose-t-il pour modifier des caractéristiques essentielles du Sénat sans l'aval des provinces. Notre comité était arrivé à cette conclusion à partir de mémoires qu'il avait reçus des gouvernements du Québec, de l'Ontario, du Nouveau-Brunswick, de Terre-Neuve-et-Labrador ainsi que d'autres provinces qui avaient exprimé les mêmes réserves.

Pourquoi le gouvernement n'a-t-il pas donné suite à ce rapport, après sa publication? S'il l'avait fait, nous disposerions aujourd'hui de paramètres en fonction desquels le gouvernement ou le Parlement pourrait apporter des changements dans le respect de la Constitution.

M. Van Loan : J'ai déjà dit que, selon nous, ces deux projets de loi sont tout à fait constitutionnels. Tous les théoriciens ayant émis des avis réfléchis sur cette question se sont dit du même avis. Si vous estimez que ces projets de loi ne sont pas constitutionnels, si c'est la conclusion à laquelle vous parvenez après y avoir mûrement réfléchi, alors la logique veut que vous concluiez également que le texte qui vous est soumis n'est pas plus constitutionnel. Les deux s'articulent autour du même fondement constitutionnel. Ils partent du principe voulant que l'on peut apporter des réformes progressives au Sénat dans la façon de nommer les sénateurs sans enfreindre la Constitution. Dès lors, vous ne pouvez voter pour le projet de loi S-224 et insinuer par ailleurs que les projets de loi C-19 et C-20, tels qu'ils se présentent aujourd'hui, sont inconstitutionnels. Voir les choses ainsi c'est faire preuve d'incohérence.

I am not challenging you that Bill S-224 is unconstitutional, but I can tell you that it will take considerable mental and academic gymnastics to suggest that it is somehow constitutional when the other two are not.

Senator Joyal: You are a lawyer. I am sure you understand the scope of section 44 of the Constitution and the limits placed on Parliament by section 42(1)(*b*) that specifically mentions the selection, appointment or choosing of senators is within the confines of the general amending formula of the Constitution. That formula provides for the concurrence of at least seven provinces representing 50 per cent of the Canadian population. That issue is the fundamental one at stake.

When I say the provinces, it is not a political speech; the provinces tabled a brief with this committee. You know government machinery; therefore, I am sure that when the brief was signed by their ministers of intergovernmental affairs, it went through the Attorneys General and ministers of justice to ensure that the position put forward by the provinces is sound.

In the end, they may be compelled to defend that position in a court of justice. Statements made by provincial Attorneys General are on record stating that if the bills are adopted as the government has defined them, they will take the issue to court.

If we are to embark on a long process of judicial squabble, why not solve it at the beginning and seek reference from the Supreme Court of Canada to clear the case?

You will remember, that approach was taken in 1977 when the then government introduced Bill C-60. The provinces challenged the position taken in the bill and the government concluded it was better to refer the bills to the Supreme Court. Hence, the Senate reference was given to Canadians in 1979. That reference helped to define the context in which changes to the Senate could take place and proceed.

I do not see why the government stubbornly refuses this approach. The provinces are participants in defining the structure of the Senate. At least four provinces representing more than 50 per cent of the Canadian population have advised the federal Parliament and Canadians that they want to clarify the question and proceed with reform.

I am sure that if the government would have made that reference to the court, the Supreme Court of Canada would have clearly defined the scope of federal Parliament powers in relation to section 44, that is, Senate tenure. Then, this chamber would have considered the parameters of the court and acted upon the bill.

Je ne suis pas en train de vous dire que le projet loi S-224 est inconstitutionnel, mais je peux vous garantir que les universitaires de tout acabit devront se livrer à une véritable gymnastique intellectuelle pour arriver à conclure que ce texte est constitutionnel tandis que les deux autres ne le sont pas.

Le sénateur Joyal : Comme vous êtes juriste, je suis certain que vous comprenez la portée de l'article 44 de la Constitution ainsi que les limites que l'alinéa 42(1)*b*) impose au Parlement en précisant que la sélection, la nomination ou le choix des sénateurs doit se faire dans le respect de la formule générale d'amendement de la Constitution. Cette formule exige que sept provinces au moins représentant 50 p. 100 de la population du Canada soient d'accord sur tout amendement proposé. C'est précisément de cela dont il est question ici.

Quand je parle des provinces, je ne suis pas en train de tenir un discours politique, parce qu'elles nous ont envoyé des mémoires. Vous connaissez l'appareil gouvernemental et je suis donc certain que les mémoires qui nous sont parvenus et qui ont été signés par les ministres provinciaux des Affaires intergouvernementales sont passés par les procureurs généraux et les ministres de la Justice qui ont dû s'assurer que la position énoncée par leur province était solide.

Tous ces gouvernements risquent fort de devoir un jour défendre leur position en justice. Les procureurs généraux des provinces ont officiellement déclaré que si les projets de loi étaient adoptés tels quels, ils se rendraient devant les tribunaux.

Puisque nous risquons de nous retrouver aux prises avec une longue bataille judiciaire, pourquoi ne pas essayer de régler tout de suite la question dès le début par le truchement d'un renvoi à la Cour suprême du Canada afin de tirer les choses au clair?

Vous vous souviendrez que c'est l'approche qui avait été adoptée en 1977 quand le gouvernement de l'époque avait déposé le projet de loi C-60. Les provinces avaient contesté la position adoptée dans ce projet de loi et le gouvernement avait conclu qu'il valait mieux faire un renvoi à la Cour suprême au sujet du Sénat. Celui-ci, qui fait l'objet d'une décision en 1979, a permis de définir le cadre dans lequel il était possible d'apporter des changements au Sénat.

Je ne vois pas pourquoi le gouvernement s'entête à rejeter cette approche. Les provinces participent de plein titre à la définition de la structure du Sénat. Quatre provinces au moins, qui représentent plus que 50 p. 100 de la population du Canada, ont avisé le Parlement fédéral et l'ensemble des Canadiens qu'elles voulaient tirer la question au clair et s'attaquer à la réforme.

Je suis certain que, si le gouvernement avait accepté de faire ce renvoi à la Cour suprême du Canada, celle-ci aurait pu clairement définir la portée des pouvoirs du Parlement fédéral en regard de l'article 44, c'est-à-dire la durée du mandat des sénateurs. Notre Chambre aurait alors pu tenir compte des paramètres fixés par la cour et disposer du projet de loi en conséquence.

I do not understand the political stubbornness of the government, unless it wants to depict the Senate as the bad player. When you put the question in pure legal and constitutional terms, it makes sense to follow a logical and rational path to ask the court to clarify those questions.

Mr. Van Loan: We, of course, have responsibilities as legislators. We do not refer every question to the Supreme Court before we determine them as legislators. We carry out our responsibility. We take advice and counsel.

As I indicated in the first instance, when your committee studied the subject matter of those bills, it found that they were entirely constitutional.

With regard to the provinces' opinions, you know full well that there is a diversity of opinions among the provinces. In choosing to adopt the views of one or two of those provinces, you choosing not to adopt the views of others on the same subject. In no way can one say the views of one or two provinces, however politically motivated and whatever those political interests may be, are definitive when other provinces have contrary views. I do not consider the views of one or two provinces are definitive at all.

The key question is whether the structure of the Senate is affected. It is not. It is not affected by Bill S-224 in front of you today for study, and it is not affected by Bill C-19 or Bill C-20. None of those bills affects the manner in which the Senate is composed regarding the representation of the various provinces or the discretion of the Crown to continue to make appointments.

In fact, the most coercive of all those three pieces of legislation is the one before you today that compels the Prime Minister or the government to act in a particular fashion that the other bills do not. In terms of entrenching constitutionality, which is the basis on which Bill S-224 is justified, the other bills are far more justified as being proper and constitutional.

That is something your committee will need to wrestle with. How can you find in one direction on one set and another direction on another set?

I believe they are all constitutional. However, all of you who have made decisions in one regard must then decide how you can make the opposite decisions and pirouette on the head of a pin. I look forward to watching that.

The Chair: The deputy chair of the committee has graciously volunteered to yield what would normally be her slot to the sponsor of this bill, Senator Moore.

Senator Moore: Thank you minister, for coming today. In your statement, you say:

Je ne comprends pas l'entêtement politique du gouvernement, à moins qu'il ne veuille faire passer le Sénat pour un mauvais joueur. Si l'on aborde cette question sous des angles purement juridiques et constitutionnels, il apparaît logique de demander à la cour de tirer toutes ces questions au clair.

M. Van Loan : Les législateurs que nous sommes doivent assumer leurs responsabilités. Nous ne pouvons pas renvoyer toutes les questions que nous nous posons à la Cour suprême avant même d'en avoir débattu entre législateurs. Nous assumons nos responsabilités en la matière et nous prenons les avis qui nous sont donnés, juridiques et autres.

Comme je l'ai indiqué d'entrée de jeu, quand votre comité a étudié ces projets de loi, il a constaté qu'ils étaient tout à fait constitutionnels.

Par ailleurs, vous savez fort bien que les opinions varient énormément d'une province à l'autre. Quand vous adoptez le point de vue d'une province ou deux, vous décidez, délibérément, de faire fi de ce que pensent les autres. On ne peut certainement pas affirmer que les vues de deux provinces, peu importe leurs motivations ou les intérêts politiques en jeu, sont définitives quand d'autres provinces n'ont pas le même point de vue. Je ne considère certainement pas que les points de vue d'une province ou deux marquent la fin du débat.

La grande question revient à savoir si la structure du Sénat est visée. Eh bien non! Elle n'est pas visée par le projet de loi S-224 dont nous sommes saisis et elle n'est pas visée non plus par les projets de loi C-19 et C-20. Aucun de ces textes ne modifie la composition du Sénat en ce qui a trait à la représentation des provinces ou à la discrétion de la Couronne de nommer des sénateurs.

D'ailleurs, le plus contraignant de ces trois projets de loi est celui dont vous êtes saisis aujourd'hui parce qu'il oblige le premier ministre ou le gouvernement à agir d'une manière particulière, ce qui n'est pas le cas des deux autres textes. Si l'on veut juger la chose sous l'angle de la constitutionnalité des dispositions proposées, ce qui justifie le projet de loi S-224, force est de constater que les deux autres textes se tiennent davantage, parce qu'ils sont constitutionnels.

Votre comité devra trancher cette question. Comment pouvez-vous conclure à une certaine orientation pour un projet de loi et à une autre pour les deux autres textes?

J'estime qu'ils sont tous trois constitutionnels, mais ceux d'entre vous qui ont tranché dans un sens pour un texte devront se demander s'il leur est possible de changer d'avis et de faire une pirouette pour les deux autres. J'ai hâte de voir ce que vous allez faire.

La présidente : La vice-présidente du comité a gracieusement accepté de céder ce qui aurait normalement été son temps au parrain de ce projet de loi, le sénateur Moore.

Le sénateur Moore : Merci, monsieur le ministre de vous être déplacé. Dans votre déclaration, on peut lire :

We will not support a bill that seeks to force a prime minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.

We have a Constitution in this country, which is to be observed. When the Constitution changes, people will follow the new rule of law. I do not understand your comment about undemocratic appointments. I am from Nova Scotia. Under the compromise that created this country, we were guaranteed 10 Senate seats in our Maritime division. We currently have three vacancies, some of which have been outstanding for over two years.

I want to hear from you about your democratic adherence to the Constitution of Canada. We are entitled to having those vacancies filled. You can appoint Progressive Conservatives, Conservatives, Reformers or whomever you like. Preferably, they would be all women — if I had my way — to increase the gender balance in the chamber.

I do not understand your comment vis-à-vis the law of the land. Without that compromise from Nova Scotia and the other provinces, there would be no Canada. You cannot ignore that compromise and say it is undemocratic now to adhere to the law of the land.

Mr. Van Loan: I fail to follow your point there. My view is one about the principle of democracy and what democracy represents in the 21st century.

Senator Moore: That is exactly the point.

Mr. Van Loan: I think everyone, even Nova Scotians, believe strongly that the Senate needs to be reformed. If I look at a recent poll from Angus Reid, it asks the question: Which of these statements is closest to your point of view? First is that Canada does not need a Senate. All legislation should be reviewed by the House of Commons. Thirty-eight per cent of Atlantic Canadians believe that statement. Second is that Canada needs a Senate, but Canada should be allowed to take part in the process to choose senators. Forty-four per cent of Atlantic Canadians believe that statement. That is the dominant view. Third is that Canada needs a Senate and the current guidelines that call for appointed senators should not be modified. Four per cent of Atlantic Canadians agree with that sentiment.

Those are the Nova Scotians of whom you speak. You stand here —

Senator Moore: It is also —

Mr. Van Loan: If I may finish, you stand here saying that you are representative of those individuals. You have no democratic mandate from them. You were appointed by someone who was not from Nova Scotia. It is true that you

Nous n'appuierons pas un projet de loi qui obligerait le premier ministre à faire des nominations non démocratiques au sein d'une institution qui ne respecte pas les principes modernes de la démocratie.

Nous avons une Constitution qu'il faut respecter. Quand celle-ci est changée, le peuple suit la nouvelle règle de droit. Je ne comprends pas vos propos quand vous parlez de nominations non démocratiques. Je viens de la Nouvelle-Écosse. Eh bien, en vertu de l'entente qui a donné naissance à ce pays, on nous avait garanti 10 sièges au Sénat pour les Maritimes. Actuellement, trois de ces sièges sont vacants dont certains depuis plus de deux ans.

Parlez-moi donc de votre sens du respect démocratique de notre Constitution. Nous avons le droit de veiller à ce que ces vacances soient comblées. Vous pouvez toujours nommer des progressistes conservateurs, des conservateurs, des réformateurs ou peu importe. Personnellement — si la décision m'appartenait — je préférerais qu'il ne s'agisse que de femmes pour favoriser l'équilibre des sexes à la Chambre haute.

Je ne comprends pas ce que vous avez dit au sujet de la loi du pays. Sans l'entente signée par la Nouvelle-Écosse et les autres provinces, il n'y aurait pas eu de Canada. Vous ne pouvez faire fi de cette entente et dire qu'il est maintenant non démocratique de respecter la loi du pays.

M. Van Loan : J'ai du mal à vous suivre. Je m'exprime au sujet d'un principe de la démocratie et de ce que la démocratie représente au XXI^{e} siècle.

Le sénateur Moore : C'est précisément ce dont il est question.

M. Van Loan : Tous les Canadiens, mêmes les Néo-Écossais, sont fortement convaincus qu'il faut réformer le Sénat. Prenons un récent sondage d'Angus Reid où l'on a posé la question suivante : laquelle de ces déclarations exprime le mieux votre point de vue? D'abord : le Canada n'a pas besoin du Sénat. Toutes les lois devraient être examinées par les députés à la Chambre des communes. En réponse à cette question, 38 p. 100 des résidents de l'Atlantique se sont dit d'accord avec l'énoncé. Deuxièmement, on leur a demandé si, partant du principe que le Canada a besoin d'un Sénat, les Canadiens ne devraient pas avoir voix au chapitre dans le processus de sélection des sénateurs. Quarante-quatre pour cent des résidents de l'Atlantique se sont identifiés à cet énoncé. C'est le point de vue dominant. Troisièmement 40 p. 100 des résidents de l'Atlantique se sont dit d'accord avec le fait que le Canada a besoin d'un Sénat et qu'il ne faut pas modifier les actuelles lignes directrices régissant la nomination des sénateurs.

Voilà les Néo-Écossais dont vous parlez. Vous êtes en train...

Le sénateur Moore : C'est aussi...

M. Van Loan : Permettez-moi de terminer. Vous êtes en train de nous dire que vous représentez ces personnes-là. Or, ces gens-là ne vous ont pas donné de mandat démocratique. Vous avez été nommé par quelqu'un qui n'était même pas originaire de la

sit in a spot allocated to Nova Scotia. However, to say that is a kind of democratic representation in the 21st century, clearly the people of Atlantic Canada do not feel that way.

Senator Moore: That happens to be the law of the land today whether you like it or not.

Mr. Van Loan: They do not feel their senators should be selected that way.

Senator Moore: It is interesting that the Progressive Conservative Party, as you may know, is the party currently in power in the minority government of Nova Scotia. At its recent annual provincial convention, members decided that they did not want elected senators. I put that on the table for your information, minister.

I turn to the House of Commons aspect of this bill with regard to calling by-elections sequentially. In the Roberval—Lac Saint-Jean riding, between the time of vacancy and the time of the vote, 50 days transpired. With regard to the riding of Toronto Centre, 259 days transpired. The people in Toronto Centre were without their constitutionally guaranteed representative in the House of Commons for that period of time.

What public good was served by having a by-election eight and a half months after the vacancy occurred?

Mr. Van Loan: To answer your main question, which is the question of the provision in the private member's bill or the senator's bill regarding the dates, I do not have strong views on the order in which by-elections should be called. I am not sure it would solve the problem or the evil that you identified and are concerned with. I do not think it is problematic to require by-elections to be called. In the current context, however, you know that the writ for a by-election can be any length of time.

Senator Moore: I know that.

Mr. Van Loan: As such, the situation you are concerned about could still arise, even if this bill were to pass.

If this bill in front of us became law, the situation that you describe — where one seat can be open and vacant for a long time before having an elected representative and another for a shorter time — could still be the case.

Senator Moore: The six-month deadline is there, and it would mean the calling of the by-election sequentially. I am not sure that you are right on that point.

Mr. Van Loan: Those comments are both accurate, but there is no restriction on the period of time for the writ itself. It is an interesting concept; I do not know that it will change

Nouvelle-Écosse. Il est vrai que vous occupez un siège réservé à la Nouvelle-Écosse. Cependant, j'ai l'impression que les résidents de l'Atlantique ne sont pas du même avis que vous quand vous dites que vous illustrez un type de représentation démocratique au XXI^{e} siècle.

Le sénateur Moore : Il se trouve que c'est la loi du pays à l'heure actuelle, que vous soyez d'accord ou pas.

M. Van Loan : Ils n'ont pas l'impression que leurs sénateurs devraient être choisis de cette façon.

Le sénateur Moore : Il est intéressant que le Parti progressiste conservateur, comme vous le savez sans doute, soit le parti qui constitue l'actuel gouvernement minoritaire de la Nouvelle-Écosse. Lors d'un récent congrès annuel, les membres du parti ont dit qu'ils ne voulaient pas élire les sénateurs. Je vous transmets cela à titre d'information, monsieur le ministre.

Passons à l'aspect de ce projet de loi qui concerne la Chambre des communes plus précisément au déclenchement des élections partielles dans l'ordre de réception des demandes d'émission des brefs. Cinquante jours se sont écoulés dans la circonscription de Roberval—Lac Saint-Jean entre le moment où le titulaire est parti et la tenue du vote. S'agissant de la circonscription Toronto-Centre, cette période a été de 259 jours. Les résidents de Toronto-Centre ont ainsi, durant tout ce temps, été privés d'une représentation à la Chambre des communes qui leur est garantie par la Constitution.

Quel bien public peut-on voir dans le fait de tenir une élection complémentaire huit mois et demi après le début de la vacance?

M. Van Loan : Pour ce qui est de votre question principale, soit celle qui touche aux dispositions du projet de loi d'intérêt privé ou plus exactement du projet de loi du sénateur concernant les dates, je n'ai pas d'opinion bien tranchée quant à l'ordre dans lequel il faut déclencher des élections partielles. Je ne suis pas certain que cela réglerait le problème que vous avez mentionné ou qui vous préoccupe. Je ne vois pas de problème à ce que l'on exige que des élections partielles soient déclenchées dans un certain délai. Cependant, dans le contexte actuel, vous savez qu'il n'y a pas de délai fixé à cet égard.

Le sénateur Moore : Je le sais.

M. Van Loan : Cela étant, la situation qui vous préoccupe pourrait tout de même se reproduire dans l'avenir, malgré l'adoption de ce projet de loi.

Si ce projet de loi devenait loi, la situation que vous décrivez — c'est-à-dire qu'un siège peut être ouvert et demeuré vacant très longtemps avant qu'un autre député soit élu, tandis qu'un autre siège serait comblé plus rapidement — pourrait se reproduire.

Le sénateur Moore : Le délai de six mois est là et il obligerait la tenue d'une élection partielle en conséquence. Je ne pense pas que vous ayez raison sur ce point.

M. Van Loan : Vous avez raison dans vos deux remarques, mais aucun délai n'est imposé pour le dépôt des brefs d'élection. C'est un concept intéressant, mais je ne vois pas en quoi il va

a great deal. There are reasons why we want to have flexibility. I am not terribly wedded to them.

We have a situation right now, for example, with an existing vacancy in the riding of Guelph; we anticipate a vacancy in Don Valley West. Should the by-election in Guelph go ahead right away? Should we wait until Don Valley West is ready at the same time? We do not know that. That situation is similar to what happened in Quebec. There were two vacancies already; there was an announced resignation coming, and there was an anticipation of that resignation, which is why one of the vacancies in Quebec was significantly shorter than the other, with the notion that there were efficiencies in holding all the by-elections on the same day.

All those things were legitimate considerations. I do not feel strongly, but I do not feel that the concern you raise is something that the bill will do anything about.

Senator Andreychuk: If this bill passes, the witnesses before the committee to this point have indicated that it will compel and fetter the Prime Minister to act according to the terms of this bill. When asked what the sanctions would be against any particular prime minister who chose not to follow through, the sanctions seemed to come down to political sanctions. The remedy would not be a legal one in the broadest sense of the word. Therefore, we are back to public opinion. The next polls would determine whether that prime minister acted appropriately or not.

Is your opinion also that there would not be a legal remedy compelling the Prime Minister? There is no sanction, in other words?

Mr. Van Loan: That is my understanding of the bill, as I have read it.

Senator Andreychuk: One other issue that we have wrestled with here is that there have been vacancies, and Senator Murray put on the floor of the chamber that other prime ministers have not filled vacancies in the Senate for some considerable times, particularly in some regions. We have all that evidence from the start of this country.

Some witnesses came to this committee saying there is a crisis at this point, that we have hit that point. However, when pressed, are we doing our job? Am I, as a senator, doing my job? Are the senators opposite doing their job? They said yes but maybe with more difficulty, and of course, there are always reasons for those difficulties. They said it would be in the future that this would be critical. One witness said it was the nature of this Prime Minister, and cast aspersions that I would not.

changer quoi que ce soit. Il y a des raisons pour lesquelles nous voulons disposer d'une certaine souplesse. Nous n'y tenons pas particulièrement.

À l'heure actuelle, par exemple, la circonscription de Guelph est vacante et nous nous attendons à une autre vacance à Don Valley-Ouest. Devrait-on déclencher tout de suite les élections partielles de Guelph? Devrait-on attendre que la circonscription de Don Valley-Ouest se libère pour que les deux circonscriptions soient prêtes en même temps? Je ne sais pas. Cette situation est semblable à ce qui s'est passé au Québec. Il y avait déjà deux vacances, une démission annoncée et une démission à laquelle on s'attendait, ce qui explique pourquoi l'une des vacances au Québec a été comblée beaucoup plus rapidement que les autres étant entendu qu'il est plus rentable de tenir toutes les élections partielles le même jour.

Tous ces aspects sont autant de considérations légitimes. Je n'ai pas d'opinion bien arrêtée à ce sujet, mais je n'ai pas l'impression que ce projet de loi puisse contribuer à régler le genre de préoccupations que vous avez exprimées.

Le sénateur Andreychuk : Les témoins qui ont comparu devant le comité jusqu'ici nous ont dit que, si ce projet de loi était adopté, il contraindrait le premier ministre à agir en vertu de ce qu'il stipule. Quand nous leur avons demandé quel genre de sanction il conviendrait d'adopter contre un premier ministre qui déciderait de ne pas se plier aux exigences de ce texte, on nous a dit qu'il s'agirait de sanctions politiques. Le remède ne serait donc pas juridique au sens général du terme. Ce faisant, nous nous en remettrions à l'opinion du public. Ce sont les sondages suivants qui détermineraient si le premier ministre a agi correctement.

Estimez-vous également qu'il n'y a pas de disposition juridique contraignante pour le premier ministre? Autrement dit, que nous n'aurions aucune sanction?

M. Van Loan : C'est ainsi que j'ai compris le projet de loi.

Le sénateur Andreychuk : L'un des problèmes avec lequel nous sommes aux prises ici, c'est qu'il y a actuellement des sièges vacants et le sénateur Murray a déclaré au Sénat que les autres premiers ministres n'avaient pas comblé les vacances de la Chambre haute pendant très longtemps, surtout dans le cas de certaines régions. Il est possible de retracer cet historique depuis les origines du Canada.

Certains témoins que nous avons entendus au comité nous ont dit que nous en sommes à une situation de crise, que nous avons atteint un point critique. Cependant, quand nous leur avons demandé si nous faisons notre travail, si le sénateur que je suis fait son travail, si les sénateurs de l'opposition font leur travail, ces témoins nous ont dit que c'était peut-être le cas, mais que nous avions un peu plus de difficultés à le faire, étant entendu qu'il y a toujours de bonnes raisons pour expliquer ces difficultés. Ils nous ont dit que c'est dans l'avenir que la situation deviendrait particulièrement critique. Un témoin nous a précisé en des termes peu flatteurs pour le premier ministre — termes que je ne reprendrai pas — que cette situation de crise à venir est attribuable à la nature même de l'actuel premier ministre.

Therefore, on September 7, 2006, before the Special Senate Committee on Senate Reform, Prime Minister Harper stated:

> The government prefers not to appoint senators unless it has the necessary reasons to do so. I mentioned one of these reasons in the case of Senator Fortier. Frankly, we are concerned about the representation in the Senate and about the number and the age of our Senate caucus. It is necessary for the government, even in the present system, to have a certain number of senators to do the work of the government in the Senate. We have not reached a point where it is necessary to appoint certain senators to meet this objective. At this time, I prefer to have an election process where we can consult the population rather than to appoint senators traditionally.

Is that still the position of this Prime Minister and the government?

Mr. Van Loan: It most certainly is. That statement goes to the core of our concern with this bill. We made a commitment to Canadians in the last election to move to a process where they have a say in electing their senators. We have a bill that seeks to achieve that process. It is being studied right now at a special legislative committee of the House of Commons. The hope is that the bill will ultimately pass, become law and there will be an opportunity for Canadians to have a say in filling those vacancies so that those who are in the Senate can truly be representative of the people of the provinces that they say they are here representing so there is a genuine democratic element there. That is what we seek to do.

Were this law in place before that occurred, then the situation could arise where all the opportunities that exist to legitimatize the Senate — you spoke to a crisis being addressed. If there is a crisis of legitimacy of the Senate among Canadians, it is not that there are not enough of them; it is not that they are overworked; it is that they are not democratically elected and there is no democratic element. That is what Canadians say loud and clear is their concern about the legitimacy of the Senate.

I appreciate that there are senators who work hard; I appreciate it is a challenge particularly for the government side having to carry its weight, its workload, with relatively small numbers. However, the resolution is not, we think, one where we continue the deeper illegitimacy of an appointed body that is inappropriate in the 21st century. We think the appropriate solution is to allow that transition to occur from what has been, yes, a proud part of our tradition. The Senate is part of our history, and those old ways in which it operated reflect our roots; there is no doubt of that. There was a legitimate place for an appointed body that reflected, as is still in our Constitution, a propertied class of elite that needed to be protected against those masses. That place was part of our history. It is undeniable and

Voici ce qu'a déclaré le premier ministre Harper, le 7 septembre 2006, devant le Comité sénatorial permanent sur la réforme du Sénat :

> Le gouvernement préfère ne pas nommer de sénateurs à moins d'avoir des raisons nécessaires. J'ai mentionné une de ces raisons dans le cas du sénateur Fortier. Je peux être franc en disant que nous sommes préoccupés par la représentation au Sénat et par le nombre et l'âge de notre caucus sénatorial. Il est nécessaire pour le gouvernement, même dans le système actuel, d'avoir un certain nombre de sénateurs pour faire le travail du gouvernement au Sénat. Nous ne sommes pas au point où il est nécessaire de nommer certains sénateurs pour remplir cet objectif. Je préfère avoir, à ce moment-ci, un processus électoral où nous pouvons consulter la population au lieu de nommer des sénateurs de façon traditionnelle.

Cela demeure-t-il la position de ce premier ministre et de son gouvernement?

M. Van Loan : Très certainement. Cette déclaration illustre l'essentiel de nos préoccupations face à ce projet de loi. Lors des dernières élections, nous nous sommes engagés envers les Canadiennes et les Canadiens à adopter un processus qui leur permettrait d'avoir voix au chapitre dans le choix de leurs sénateurs. Nous avons déposé un projet de loi qui vise à y parvenir. Il est actuellement à l'étude par un comité législatif spécial de la Chambre des communes. Nous espérons que ce texte finira par être adopté, qu'il deviendra loi et que les Canadiennes et les Canadiens auront leur mot à dire dans le choix des personnes qui combleront les postes vacants pour que les sénateurs soient véritablement représentatifs de la population des provinces qu'ils prétendent représenter et que nous insufflions un peu de démocratie dans tout cela. C'est ce que nous voulons faire.

Si cette loi avait été adoptée avant que tout cela ne se produise, nous aurions pu sauter sur toutes les occasions possibles pour légitimer le Sénat, puisque vous avez vous-même parlé d'une crise. S'il y a une crise de légitimité du Sénat parmi les Canadiens, ce n'est pas parce qu'il n'y a pas suffisamment de sénateurs, ce n'est pas parce qu'ils sont surchargés de travail, c'est parce qu'ils ne sont pas démocratiquement élus et que le processus actuel n'est pas démocratique. C'est cela que les Canadiens expriment haut et fort quand ils parlent de la légitimité du Sénat.

Je suis conscient que des sénateurs travaillent fort et j'apprécie tout à fait le défi qui incombe plus particulièrement aux sénateurs du parti gouvernemental qui doivent faire leur part, qui doivent faire leur travail, bien qu'ils soient relativement peu nombreux. Quoi qu'il en soit, je pense que nous avons décidé de ne pas continuer à avaliser l'illégitimité d'un corps législatif nommé qui ne correspond pas aux réalités du XXI^{e} siècle. Nous estimons que la solution consiste à favoriser la transition à partir de la situation actuelle qui, je le reconnais, s'inscrit dans une tradition dont il y a lieu de s'enorgueillir. Le Sénat fait partie de notre histoire et les vieux mécanismes en fonction duquel ils fonctionnent reflètent nos racines, c'est indéniable. La Chambre haute a été et demeure dans notre Constitution un lieu constitué de personnes nommées

still there in our Constitution. The time has come to grow beyond that, to reflect the fact that we are in the 21st century. That is still the policy of the government.

This bill, if passed, would make that transition much more difficult and lengthy.

Senator Andreychuk: If it came to a crisis point, I understand that the Prime Minister is saying that the institution needs to continue and that situation may be a cause for appointment at some time but is not the case we are in now.

Mr. Van Loan: I have not heard a suggestion from Canadians that we have a crisis. We do not believe that crisis has occurred, and while I occasionally hear from Conservative senators who feel they are stretched and working hard, none of them are telling me it is time to abandon Bill C-20 and start filling other spots first.

Senator Baker: Minister, as you are aware, presently the Senate is dealing with Bill C-10 that passed the elected chamber with a provision of nine pages that nobody in the House of Commons knew existed. The word "film" was not used in any of the stages, any of the debates or any of the committee reports. You did not know it was there. Nobody else knew it was there. It was the unelected Senate that discovered it.

A short time ago, minister, you appeared before this committee and said we must pass the Elections Act without amendment, and of course there was a provision in there that would have released everyone's date of birth. We would have had telemarketers phoning every senior citizen if the Senate had not stepped in and overruled the elected chamber of the House of Commons.

In your speech, you said that the Federal Accountability Act was resisted by the Liberals. It is true, minister, that it was resisted by a great many Liberals in the Senate. One thing we objected to, minister, was that a summary conviction offence committed by a candidate or an official agent could be prosecuted 10 years after the fact. It was a disgraceful piece of legislation. From a search warrant that goes into the Conservative Party headquarters, a prosecution could result 10 years later for a minor infraction, whereas the Criminal Code says that for everything else it is six months. It was our recommendation to change it, but you said no.

The point is that we have important work to do here. We fix what the House of Commons does. Senator Moore is trying to say that we need to fill some Senate vacancies. More and more vacancies are coming open. They are not filled unless you have someone who wants to be in the cabinet but cannot be

représentant une classe de possédants, une classe d'élites qu'il fallait protéger contre les masses. Cela fait partie de notre histoire. C'est indéniable et ce mode de fonctionnement demeure entériné dans notre Constitution. Or, l'heure est venue d'aller au-delà, de réfléchir sur le fait que nous sommes au XXI^{e} siècle. Voilà la politique de notre gouvernement.

Si ce projet de loi était adopté, cette transition serait plus difficile et prendrait plus de temps.

Le sénateur Andreychuk : J'ai compris de ce que le premier ministre a dit que, si nous en arrivons à un stade de crise, il faudra maintenir l'institution en vie et éventuellement nommer des sénateurs à un moment donné, mais que nous n'en sommes pas encore là.

M. Van Loan : Les Canadiens ne nous ont pas laissé entendre que nous étions en crise. Nous ne pensons pas être en crise et même si j'entends parfois les sénateurs conservateurs dire qu'ils sont débordés et qu'ils travaillent très fort, aucun d'eux ne m'a indiqué qu'il fallait renoncer au projet de loi C-20 et commencer à combler les vacances.

Le sénateur Baker : Monsieur le ministre, comme vous le savez, le Sénat est en train d'étudier le projet de loi C-10 qui a été adopté à la Chambre basse, projet de loi qui comporte une disposition de neuf pages dont personne n'a entendu parler à la Chambre des communes. Le mot « film » n'a été employé à aucune des étapes de l'étude du projet de loi, dans aucun débat ni aucun rapport de comité. Vous ne saviez pas qu'il était là. Tout le monde l'ignorait. Eh bien, c'est un Sénat non élu qui s'en est rendu compte.

Monsieur le ministre, vous avez récemment rencontré notre comité pour nous dire que nous devions adopter la Loi électorale sans la modifier, mais voilà que celle-ci comportait une disposition qui aurait permis de publier la date de naissance de tous les électeurs. Des entreprises de télémarketing auraient pu appeler toutes les personnes âgées au Canada si le Sénat ne s'en était pas mêlé et n'avait pas renversé la décision de la chambre élue, c'est-à-dire de la Chambre des communes.

Dans votre discours, vous aviez dit que les libéraux s'étaient opposés à la Loi fédérale sur la responsabilisation. Il est vrai, monsieur le ministre, qu'un grand nombre de libéraux au Sénat étaient entrés en résistance contre ce texte. Nous nous étions alors objecté à l'adoption d'une infraction punissable par procédure sommaire, dans le cas des candidats ou des agents officiels, infraction qui aurait pu faire l'objet de poursuites 10 ans après les faits. Cette mesure législative était tout simplement honteuse. Ainsi, une poursuite intentée à la suite d'une perquisition au siège du Parti conservateur aurait pu donner lieu à une inculpation, 10 ans après les faits, tandis que le Code criminel parle de six mois. Nous avions recommandé de changer cette disposition, mais vous avez refusé.

Tout ce que je veux dire, c'est que nous effectuons un important travail ici. Nous réparons ce que fait la Chambre des communes. Le sénateur Moore essaie de vous dire que nous devons combler certaines vacances au Sénat. De plus en plus de postes sont en train de se libérer à la Chambre haute. Or, vous ne

elected. All these vacancies are increasing. We have this important work to do; the check, the sober second thought, on you. The examples are so numerous. We probably would not do it if we were elected because we would behave like politicians; like you people do.

The logical conclusion to what the minister has said here before this committee is this: Vacancies will not be filled, and if this government is re-elected, they still will not be filled. Second reading of the elected Senate bill never appeared in the Senate. It has been stuck in second reading in the House of Commons for four years. Ontario will probably take the Prime Minister to court.

The problem is that you have all these vacancies in the Senate, and we will soon be down to nothing. Is it your intent to eliminate that necessary check that Canadians need on your government?

The Chair: That was his question.

Mr. Van Loan: I know it was a question. When someone is bitter, you can never get a word in edgewise.

In any event, the question was about, as I gather it, sober second thought. I look at the issues you have covered, and it seems to me the place where the sober second thought needs to occur is within the Liberal caucus. I do not know what happens in the Liberal caucus.

We can look at the first issue you raised, which was that of the disclosure of birth dates on electoral lists. That proposal was supported by the Liberal Party at committee in the House of Commons and opposed by the Conservative members.

Senator Baker: You voted for it.

Mr. Van Loan: No, the Conservatives at committee voted against it.

Senator Baker: You voted for it in the House of Commons.

Mr. Van Loan: Only as part of an agreement to have the bill passed to the Senate.

Senator Baker: That is my point.

Mr. Van Loan: We objected. However, it was clear that, without that provision, unless we went along with it, it would not be supported.

Senator Baker: "I had no choice."

Mr. Van Loan: The Liberals in the Senate disagreed with the Liberals in the House of Commons who reversed their decision and restored the Conservative view of things, so we appreciated that. However, it would have been much easier had that position been worked out in the Liberal caucus in the first place.

les combler pas sauf quand vous voulez nommer quelqu'un au Cabinet qui ne peut se faire élire. Le nombre de vacances augmente. Nous avons un important travail à faire, nous devons vérifier, jeter un nouveau regard sur ce que vous faites. Les exemples abondent. Nous n'agirions certainement pas de la même façon si nous étions élus, parce que nous nous comporterions comme des politiciens, comme vous aux communes.

Voici la conclusion logique à laquelle nous conduisent les propos du ministre devant ce comité : les vacances ne seront pas votées et si ce gouvernement est réélu, rien ne changera. Le projet de loi sur un Sénat élu n'a pas été soumis à la Chambre haute parce qu'il n'a pas franchi l'étape de la deuxième lecture aux Communes. Il est demeuré bloqué à cette étape à la Chambre des communes pendant quatre ans. L'Ontario traduira sans doute le premier ministre devant les tribunaux.

Le problème, c'est qu'il y a tous ces sièges vacants à combler au Sénat et qu'il n'y aura bientôt plus personne ici. Avez-vous l'intention de supprimer cette étape de vérification nécessaire dont les Canadiens ont besoin face à l'action de votre gouvernement?

La présidente : C'était sa question.

M. Van Loan : Je sais que c'était une question. Face à quelqu'un d'amer, on ne peut pas en placer une.

Quoi qu'il en soit, si j'ai bien compris, vous posez la question du second regard. Quand je songe à tous les dossiers que vous avez énumérés, je ne peux m'empêcher de penser que ce second regard concerne le caucus libéral. Or, je ne sais pas ce qui se passe au sein du caucus libéral.

Prenons le premier dossier que vous avez mentionné, celui de la divulgation des dates de naissance des électeurs. Cette proposition avait été appuyée par le Parti libéral au comité de la Chambre des communes et ce sont les conservateurs qui s'y étaient opposés.

Le sénateur Baker : Vous avez voté en faveur de la proposition.

M. Van Loan : Non, les conservateurs siégeant au comité s'étaient prononcés contre.

Le sénateur Baker : Mais vous avez voté pour à la Chambre des communes.

M. Van Loan : Uniquement en vertu d'une entente que nous avions conclue pour que le projet de loi soit adopté au Sénat.

Le sénateur Baker : C'est ce que je veux dire.

M. Van Loan : Nous nous y sommes objectés. Quoi qu'il en soit, il était évident que, sans cette disposition et à moins que nous nous prononcions en faveur de ce texte, il n'aurait pas reçu l'appui des conservateurs.

Le sénateur Baker : Autrement dit, « je n'avais pas le choix ».

M. Van Loan : Les libéraux au Sénat n'étaient pas d'accord avec les libéraux à la Chambre des communes qui avaient retourné leur veste et épousé le point de vue des conservateurs, ce que nous avons apprécié. Cependant, les choses auraient été beaucoup plus faciles si le caucus libéral avait commencé par adopter cette position.

In Bill C-10, the provision we are dealing with is one that the Conservative Party position has never changed on. The Liberals are, of course, the ones who created that provision. It was first introduced by Sheila Copps for concerns she has laid out about funding films that she thought were inappropriate, and there seemed to be a broad public consensus for that position. It was repeatedly introduced by Liberal governments and voted for by Liberals. Although I am sure that bill was presented at caucus, every time it was introduced, Liberal senators were not doing the job at caucus to raise the issue, but they raised the issue once it reached the Senate.

I think the real concerns are, why does the Liberal Party keep changing its mind on where it stands? Why do the senators keep disagreeing with the Liberals in the House of Commons on where they stand? On those questions, Conservatives have been consistent throughout. We have not had need for sober second thought. We were in the right place the first time.

The Chair: Minister, for the record, may I say that this committee was the one that recommended removing birth dates from the electoral list.

Mr. Van Loan: I am well aware of that.

The Chair: The committee did so after evidence presented by the Privacy Commissioner. This decision was not a partisan one.

Mr. Van Loan: You will recall that I was at this committee and pointed out to this committee in evidence that the Conservative Party had opposed the introduction of that provision, and it was introduced by the other party.

Senator Baker: You did, minister. You certainly did. However, you prove my point, do you not? We are not politicians here. We are the chamber of sober second thought.

Mr. Van Loan: Right.

Senator Baker: Senator Moore suggests that, until that you have this constitutional problem straightened out that you are attacking here on how senators are elected or appointed or how they arrive here, for goodness sake, at least fill the seats. We have important work to do. I have described a portion of the work we do. You are making terrible mistakes in legislation in the House of Commons. The errors you have made are outrageous. You prove my point.

Mr. Van Loan: I say briefly in response that I do not believe there is any magic in the sober second thought if you people are appointed rather that elected, or rather than the product of some consultative process. I do not think it is a good thing. I do not think we should throw away the notion of democracy because some people happen to be unelected and can review things. While I appreciate the views of the aristocratic Newfoundlander on the importance of unelected people passing views on matters, I think that democracy is a good way of doing

Le Parti conservateur n'a jamais changé de position en ce qui concerne la disposition dont nous parlons dans le projet de loi C-10. Ce sont les libéraux qui sont à l'origine de cette disposition qui avait été proposée par Sheila Copps parce qu'elle pensait qu'elle était nécessaire afin de régler le genre de préoccupation qu'elle avait au sujet du financement de l'industrie du cinéma, outre que cette position semblait bénéficier d'un large consensus public. Elle a été régulièrement reprise par les gouvernements libéraux qui se sont succédé et les libéraux ont régulièrement voté pour la faire adopter. Je suis certain que ce projet de loi a été présenté au caucus chaque fois qu'il a été déposé en chambre, mais les sénateurs libéraux n'ont pas soulevé le lièvre lors de ces réunions de caucus et ont attendu que le texte arrive au Sénat pour le faire.

La véritable question est de savoir pourquoi le Parti libéral ne cesse de changer d'avis. Pourquoi les sénateurs sont-ils régulièrement en désaccord avec la position des libéraux de la Chambre des communes? Du côté conservateur, en revanche, nous sommes tout à fait cohérents. Nous n'avons pas eu à jeter un second regard. Nous avons adopté la bonne position dès le début.

La présidente : Monsieur le ministre, je tiens à vous préciser pour mémoire que c'est ce comité qui a recommandé de retirer la date de naissance des listes électorales.

M. Van Loan : Je le sais bien.

La présidente : Nous l'avons fait après avoir entendu le témoignage du commissaire à la vie privée. Cette décision était non partisane.

M. Van Loan : Vous vous souviendrez que je suis venu devant ce comité et que je vous ai signalé, dans mon témoignage, que le Parti conservateur était opposé à l'adoption de cette disposition qui avait été introduite par l'autre parti.

Le sénateur Baker : Effectivement, monsieur le ministre. C'est ce que vous avez fait. Toutefois, vous venez juste d'abonder dans mon sens, n'est-ce pas? Nous ne sommes pas des politiciens ici. Nous sommes la Chambre du second regard.

M. Van Loan : C'est ça.

Le sénateur Baker : Le sénateur Moore dit que, tant que ce problème constitutionnel ne sera pas réglé, soit la façon dont les sénateurs sont élus ou nommés ou se retrouvent ici d'une façon ou d'une autre, vous devriez pour le moins commencer par combler les sièges vacants. Nous sommes investis d'une mission importante. Je vous ai expliqué une partie de notre travail. Vous commettez d'horribles erreurs dans les textes législatifs à la Chambre des communes. Ces erreurs sont scandaleuses. Vous venez de confirmer ce que j'affirme.

M. Van Loan : Je vous répondrai brièvement en vous disant que je ne pense pas que la magie de ce second regard tienne au fait que vous soyez nommés plutôt qu'élus ou désignés à la suite d'un processus de consultation quelconque. Je ne pense pas que ce soit une bonne chose. Je ne pense pas que nous devrions renoncer à la notion de démocratie sous prétexte que certains non élus peuvent jeter un second regard. J'apprécie, certes, le point de vue d'un aristocrate terre-neuvien sur l'importance de recueillir l'avis de non-élus sur certaines questions, mais j'estime que la démocratie

things. Nothing will ever be perfect. That is why there are so many readings of these bills. I believe that elected senators will do as good a job, if not better, but they will at least enjoy legitimacy in the eyes of Canadians that will make it more acceptable when they make those decisions.

Senator Baker: The chair will not allow me to respond.

The Chair: The chair will put you down for a second round.

Senator Cowan: Welcome, minister. I want to repeat again the phrase that Senator Moore put to you from your own speech:

> We will not support a bill that seeks to force the Prime Minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.

Do you believe that only elected chambers are democratic?

Mr. Van Loan: I certainly believe that, in the 21st century, the time has come where people want to have a voice in who represents them. I think Canadians —

Senator Cowan: Do you believe that only elected chambers are democratic?

Mr. Van Loan: I believe that the core of democracy is elections, and any legislative body should have a democratic election.

Senator Cowan: The answer is yes?

Mr. Van Loan: Yes.

Senator Cowan: Do you also believe that only democratic institutions, as you describe them, elected institutions, are legitimate?

Mr. Van Loan: We have all kinds of institutions in our society. We have institutions like the court.

Senator Cowan: I am not talking about the court, minister. I am talking about legislative bodies.

Mr. Van Loan: We have a role that our head of state plays, ultimately, with legislation, which I believe is legitimate in our industry.

Senator Cowan: You believe that unless the Senate of Canada, as a legislative body, is elected or selected, that it is neither democratic nor legitimate?

Mr. Van Loan: I think it is certainly not democratic, and it certainly lacks legitimacy that Canadians wish to see in it.

Senator Cowan: You would say that the only way to make a Senate or this Senate legitimate or democratic is to have elected senators?

demeure une bonne façon de faire les choses. La perfection n'est pas de ce monde et c'est pour cela que les projets de loi sont soumis à autant de lectures. Je crois que les sénateurs élus feront un aussi bon travail, si ce n'est meilleur, et qu'en plus ils jouiront d'une véritable légitimité aux yeux des Canadiens ce qui rendra leurs décisions encore plus acceptables.

Le sénateur Baker : La présidente me permettra-t-elle de rétorquer?

La présidente : La présidente vous inscrit pour un second tour.

Le sénateur Cowan : Bienvenue parmi nous, monsieur le ministre. Je vais répéter la phrase que le sénateur Moore vous a lue et qui est extraite de votre discours :

> Nous n'appuierons pas un projet de loi qui obligerait le premier ministre à faire des nominations non démocratiques au sein d'une institution qui ne respecte pas les principes modernes de la démocratie.

Estimez-vous que seules les chambres élues sont démocratiques?

M. Van Loan : Je suis effectivement convaincu qu'au XXI[e] siècle, il est temps que le peuple ait voix au chapitre dans le choix de ses représentants. J'estime que les Canadiennes et les Canadiens...

Le sénateur Cowan : Croyez-vous que seules les chambres élues sont démocratiques?

M. Van Loan : J'estime que la démocratie repose sur les élections et que tout corps législatif devrait être choisi par le biais d'élections démocratiques.

Le sénateur Cowan : Donc, vous répondez par oui?

M. Van Loan : Oui.

Le sénateur Cowan : Estimez-vous que seules les institutions démocratiques, à la façon dont vous le décrivez, les institutions élues, sont légitimes?

M. Van Loan : Nous avons toutes sortes d'institutions dans notre société. Il y a également des institutions comme les tribunaux.

Le sénateur Cowan : Je ne vous parle pas des tribunaux, monsieur le ministre. Je vous parle de corps législatifs.

M. Van Loan : Le chef de l'État a un rôle à remplir en ce qui concerne la législation qui, je crois, est légitime au sein de notre industrie.

Le sénateur Cowan : Vous croyez qu'à moins que le Sénat du Canada, en tant qu'organe délibérant, soit élu ou choisi, il n'est ni démocratique ni légitime?

M. Van Loan : J'estime qu'il n'est certainement pas démocratique et qu'il n'a pas le genre de légitimité que les Canadiens recherchent.

Le sénateur Cowan : Selon vous, la seule façon de faire en sorte qu'une Chambre haute où ce Sénat soit légitime ou démocratique, consiste à faire élire les sénateurs?

Mr. Van Loan: There are all kinds of models on how one could do it. I prefer the approach that our government has laid out, where we consult Canadians and ask them who they wish to represent them at a provincial level. There are many ways of going about it. There are many variations on length of term and many variations on rotations of term. Americans have six-year terms and they rotate elections every two years. There are all kinds of different ways of approaching it, but we certainly believe there should be a democratic consultative element in selecting our senators.

Senator Cowan: Without some election, selection and consultation, this Senate is illegitimate and undemocratic; is that your position?

Mr. Van Loan: I do not think it meets the test for legitimacy in the 21st century.

Senator Cowan: Is that your position?

Mr. Van Loan: I do not want to be too critical of a body that is a legitimate part of our history.

Senator Cowan: I realize you do not want to be critical of the Senate.

Mr. Van Loan: We believe that we want it to change.

Senator Cowan: Do you suggest, minister, that you can move from an appointed Senate to some form of elected or selected consultative Senate without a constitutional amendment and without consulting the provinces?

Mr. Van Loan: Of course, the ideal would be a fully formalized process with the kind of consensus that would address issues like representations of the provinces, changes in growth and the representation formula that exists in the Constitution. I think everyone agrees that formula is less than perfect.

Senator Cowan: Minister, I was not talking about the composition of the Senate. I was talking about the method of selecting, electing or consulting senators. I want an answer to the question.

The Chair: Give him a chance to answer.

Mr. Van Loan: These are, of course, all related issues.

I know many on your side believe full-scale reform should be the only way that reform is carried out, or at least that was the message delivered in the past. However, this bill suggests otherwise.

Full-scale reform would involve all those issues and would involve a constitutional amendment. However, the consensus for that reform is absent at this time for a variety of reasons, which are all understandable based on the interests of the provinces involved.

M. Van Loan : Il existe toutes sortes de modèles que nous pourrions suivre, mais je préfère l'approche proposée par notre gouvernement voulant que l'on consulte les Canadiens et qu'on leur demande par qui ils veulent être représentés à l'échelon provincial. Il y a bien des façons d'y parvenir. Il existe de nombreuses variantes quant à la durée des mandats et au rythme de renouvellement des sénateurs. Chez les Américains, les mandats sont de six ans et il y a des élections tous les deux ans. Il existe bien des façons d'aborder la chose, mais nous croyons qu'il faudrait ajouter une pincée de démocratie dans la façon dont nous choisissons les sénateurs.

Le sénateur Cowan : Autrement dit, sans élection, sélection ou consultation, ce Sénat est illégitime et anti-démocratique. C'est ce que vous pensez?

M. Van Loan : Je ne pense pas qu'il réponde aux critères de la légitimité au XXI^{e} siècle.

Le sénateur Cowan : C'est ce que vous pensez?

M. Van Loan : Je ne veux pas trop critiquer un organe qui a joué un rôle légitime dans notre histoire.

Le sénateur Cowan : Je me rends bien compte que vous ne voulez pas critiquer le Sénat.

M. Van Loan : Je pense toutefois qu'il doit changer.

Le sénateur Cowan : Monsieur le ministre, êtes-vous en train de laisser entendre que vous pourriez passer d'un Sénat nommé à un Sénat élu ou composé de sénateurs dont la nomination aura fait l'objet d'une consultation sans toutefois apporter d'amendement à la Constitution et sans consulter les provinces?

M. Van Loan : L'idéal serait bien sûr d'officialiser ce processus en parvenant au genre de consensus qui nous permettrait de régler des questions comme la représentation des provinces, les changements sur le plan de l'évolution de la représentation et la formule de représentation qui est prévue dans la Constitution. Je crois que tout le monde est d'accord sur le fait que cette formule est moins que parfaite.

Le sénateur Cowan : Monsieur le ministre, je ne parlais pas de la composition du Sénat, mais de la méthode de sélection, ou d'élection des sénateurs ou du choix de ces derniers après une consultation. Je veux que vous répondiez à la question.

La présidente : Donnez-lui une chance de vous répondre.

M. Van Loan : Toutes ces questions sont liées.

Je sais que beaucoup de sénateurs de votre parti estiment que seule une réforme d'envergure est envisageable, du moins c'est le message que vous aviez envoyé dans le passé. Force nous est toutefois de constater que ce projet de loi pointe dans une autre direction.

Une réforme à grande échelle porterait sur toutes ces questions et exigerait un amendement constitutionnel. Toutefois, on ne s'entend actuellement pas sur la réforme, pour toute une diversité de raisons, toutes compréhensibles, dépendant des intérêts de chaque province concernée.

That lack of consensus should not stand as a barrier to improving the situation by doing what we can within our authority now to enhance the democratic legitimacy of the Senate through changes such as the consultation envisioned in Bill C-20 and the term limits envisioned in Bill C-19.

Senator Cowan: Which is part of a package.

Mr. Van Loan: They are all free standing. Each of those improvements would be good on their own, but bringing them together even further strengthens the legitimacy of the Senate. I think people may have trouble with elected 45-year terms, but they are better than appointed 45-year terms.

Senator Cowan: You would be hard-pressed to find people who have served in the Senate for 45 years, minister.

To be clear, your view is that is possible for the federal Parliament to move from the present appointed Senate to a selected or elected Senate without consultation, without the input of the provinces and without following through on the provisions of the Constitution Act with respect to amendment of the Constitution. Is that your position?

Mr. Van Loan: I will put it to you this way. You have a Senate colleague, Bert Brown, who is the product of a consultative process. Do you think in any way his position in the Senate is illegitimate?

Senator Cowan: Absolutely not; he was appointed in accordance with the Constitution. We were delighted to have him.

Mr. Van Loan: He was appointed following a democratic process. We believe that is a significantly improved approach.

Senator Cowan: That is your choice.

Senator Merchant: In practical terms can you tell me when you envision that you will start making appointments? Will there be a critical point when you will say we need more people in the Senate? You have talked about change, but we do not know how this change will come about. What are you doing as a government to set the stage so you can start filling some of these vacancies?

Mr. Van Loan: Our intention is to start filling vacancies after the process envisaged by Bill C-20 is adopted. If any province were to move ahead with a democratic consultation in advance of that process to recommend senators for vacancies that existed, I cannot say for sure that the Prime Minister would fill them. However, he has indicated by his actions already that that is what he would do and I expect he would.

Senator Merchant: When do you think that will be?

L'absence de consensus ne devrait toutefois pas être un obstacle à l'amélioration de la situation, parce que nous devrions faire ce que nous pouvons, dans les limites de nos pouvoirs actuels, pour améliorer la légitimité démocratique du Sénat en apportant des changements, comme la consultation envisagée dans le projet de loi C-20 et les limites de mandat prévues dans le projet de loi C-19.

Le sénateur Cowan : Ce qui fait partie d'un ensemble.

M. Van Loan : Ce sont des propositions indépendantes. Chacune de ces améliorations seraient valables en soi, mais si on les appliquait en même temps, on se trouverait à renforcer davantage la légitimité du Sénat. Je crois que les gens ont des problèmes avec des mandats d'élus qui dureraient 45 ans, mais ce serait toujours mieux que d'avoir des gens nommés pour la même période.

Le sénateur Cowan : Vous aurez du mal à trouver un sénateur ayant passé 45 ans à la Chambre haute, monsieur le ministre.

Soyons clairs. Selon vous, il est possible que le Parlement fédéral passe d'un Sénat nommé, comme à l'heure actuelle, à un Sénat sélectionné ou élu sans consultation, sans la participation des provinces et sans un amendement aux dispositions concernées de la loi constitutionnelle. C'est ce que vous pensez?

M. Van Loan : Laissez-moi vous dire une chose. Vous avez un sénateur parmi vous, Bert Brown, qui a été choisi à la suite d'un processus de consultation. Pensez-vous que sa position au Sénat est illégitime?

Le sénateur Cowan : Absolument pas. Il a été nommé conformément aux dispositions de la Constitution. Nous avons été ravis de l'accueillir.

M. Van Loan : Il a été nommé à la suite d'un processus démocratique. J'estime que cela a considérablement amélioré le mécanisme de désignation au Sénat.

Le sénateur Cowan : C'est votre position.

Le sénateur Merchant : Sur le plan pratique, pourriez-vous me dire quand vous envisagez de faire des nominations? Va-t-on en arriver à un stade critique où vous allez dire que nous avons besoin de plus de sénateurs? Vous avez parlé de changement, mais nous ne savons pas comment ce changement va se dérouler. Que fait votre gouvernement pour préparer le terrain afin que nous commencions à combler les postes vacants?

M. Van Loan : Nous avons l'intention de combler les postes vacants après l'adoption du processus proposé dans le projet de loi C-20. Si des provinces désirent entamer les consultations démocratiques avant l'adoption du processus en question, afin de recommander des sénateurs pour combler les postes vacants, je ne suis pas certain que le premier ministre nommera qui que ce soit. Cependant, il a déjà prouvé par ses actes que c'est ce qu'il ferait et je m'attends à ce qu'il le fasse.

Le sénateur Merchant : Quand pensez-vous qu'il le fera?

Mr. Van Loan: It depends on each province. My hope is that we will be able to pass Bill C-20 in this Parliament. If not, perhaps it will pass in a subsequent Parliament.

Senator Merchant: I understand that by the end of 2009, there will be almost 30 vacancies in the Senate, a third of its members.

Mr. Van Loan: I keep anticipating an election two months from now. The latest I heard was July, but then it is October. I do not know. We have set October 2009. It is not in our hands.

In any event, we have lots of time and opportunity to adopt Bill C-20 and put it in place. If the next federal election occurs later than this spring, we could select democratically elected senators or at least recommended senators. I think Canadians would be happy to see that development and that opportunity in the next federal election.

Senator Merchant: Do you feel that the government can act unilaterally to set up the process by which senators are elected? This process will be a long one because some provinces have indicated they will challenge it. I think this change will take longer than only a few months.

Mr. Van Loan: Provinces may well challenge it. I expect if that were to occur, courts will act quickly in making a determination, being aware of the issues at play. I have that confidence in the courts.

Senator Tardif: I take offence to your comments about the lack of legitimacy of the Senate. The Senate as it exists now is duly constituted as per our Constitution.

If you want to change the process, then you must begin the process of changing the Constitution. That process requires consultation with the provinces and, according to the process set out, agreement from seven provinces with 50 per cent of the population.

Why are you refusing to go in that direction?

Mr. Van Loan: I do not share your view that the bill before you requires seven provinces and 50 per cent of the vote. That is the view you expressed, that change to select people for the Senate —

Senator Tardif: No, you are talking about Bill C-19 and Bill C-20.

Mr. Van Loan: No, I am talking about Bill S-224, the legislation before us. You said that any change to the process requires including the provinces.

Senator Tardif: The Constitution —

Mr. Van Loan: You said the Constitution sets it up and I need to go to the provinces if I want to change it. That is one issue with this bill. You cannot be —

M. Van Loan : Cela dépendra de chaque province. J'espère que nous pourrons adopter le projet de loi C-20 durant cette législature. Dans la négative, il sera peut-être adopté lors de la prochaine législature.

Le sénateur Merchant : Si j'ai bien compris, d'ici la fin 2009, près de 30 sièges seront vacants au Sénat, soit un tiers de nos effectifs.

M. Van Loan : Je m'attends à ce qu'il y ait une élection d'ici deux mois. On m'a parlé du mois de juillet dernièrement, mais j'ai aussi entendu parler d'octobre. Je ne sais pas. La date fixe tombe en octobre 2009. Cela ne nous appartient pas.

Quoi qu'il en soit, nous aurons amplement la possibilité d'adopter le projet de loi C-20 et de le mettre en œuvre. Lors des prochaines élections fédérales, plus tard au printemps, nous pourrions choisir des sénateurs démocratiquement élus, ou du moins nous pourrions les recommander. Je pense que les Canadiens seront heureux de voir cela, peut-être dès les prochaines élections fédérales.

Le sénateur Merchant : Pensez-vous que le gouvernement puisse agir unilatéralement pour mettre en œuvre le processus d'élection des sénateurs? Sinon, il faudra du temps pour le mettre en œuvre, parce que certaines provinces ont indiqué qu'elles allaient le contester. Je pense que ce type de changement ne se fera pas en quelques mois seulement.

M. Van Loan : Des provinces pourront toujours le contester. Je pense que si tel devait être le cas, les tribunaux seraient rapidement appelés à trancher, étant donné les enjeux. J'ai confiance dans les tribunaux pour cela.

Le sénateur Tardif : Je suis offusqué par ce que vous avez dit au sujet du manque de légitimité du Sénat. Le Sénat, tel qu'il existe actuellement, a été dûment constitué dans le respect de la Constitution.

Si vous voulez changer le processus de sélection des sénateurs, vous devrez commencer par changer la Constitution. Pour cela, il vous faudra consulter les provinces et, d'après la formule prévue, vous devrez recueillir l'accord de sept provinces représentant 50 p. 100 de la population.

Refusez-vous de vous orienter dans ce sens?

M. Van Loan : Je ne suis pas d'accord avec ce que vous dites à propos de ce projet de loi qui exigerait l'accord de sept provinces représentant 50 p. 100 de la population. Votre position, c'est que pour changer la formule et passer à un Sénat élu...

Le sénateur Tardif : Non, vous parlez des projets de loi C-19 et C-20.

M. Van Loan : Non, je parle du projet de loi S-224, du texte dont vous êtes actuellement saisis. Vous avez dit que tout changement de processus exigera la participation des provinces.

Le sénateur Tardif : La Constitution...

M. Van Loan : Vous avez dit que la formule est enchâssée dans la Constitution et que je dois obtenir l'accord des provinces pour la changer. C'est un des problèmes que pose ce projet de loi. Vous ne pouvez être...

Senator Tardif: That is if you want to change the Constitution. The Constitution says when there is a vacancy in the Senate, the Governor General, upon the advice of the Prime Minister, shall name someone — shall name.

Mr. Van Loan: Upon the advice, yes.

Senator Banks: It does not say that. It says the Governor General shall name.

Senator Tardif: Shall.

Mr. Van Loan: It does not say the Prime Minister shall.

Senator Tardif: Therefore, the Governor General shall. It is not an option.

Mr. Van Loan: It is exactly the same. That will not be altered in any way by Bill C-19, Bill C-20 or Bill S-224. That will not be altered by any of those three pieces of legislation. If you think constitutional amendments are necessary, then you believe Constitution amendments are necessary for Bill S-224 as well.

That is case you made and that is the point I raised at beginning. I do not have that problem with it. I think the bills are all legitimate. You can debate them and make those changes if you want without a constitutional amendment. If you think we need a constitutional amendment for the others, we need it for this bill as well.

Senator Tardif: Not for Bill S-224, minister.

Mr. Van Loan: What is the difference? Enlighten me. I cannot see the distinction.

Senator Tardif: This bill does not change the essential characteristics.

Mr. Van Loan: Neither do the others.

Senator Tardif: They absolutely do.

The Chair: We will go to a second round, but before we do, I have a question, minister.

As you know, section 32 of the Constitution Act, 1867 says:

> When a Vacancy happens in the Senate by Resignation, Death or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

It says "when" a vacancy happens. It does not say from time to time, or at pleasure or when the sun comes out from behind a cloud one day. It says "when" a vacancy happens.

Now, I am not a lawyer. To me, the meaning of those words is plain. However, you are a lawyer, so I ask you to tell me what you think those words mean.

Le sénateur Tardif : Sauf si vous êtes prêts à changer la Constitution. La Constitution dit qu'en cas de vacance au Sénat, le gouverneur général, sur avis du premier ministre, doit nommer quelqu'un — on dit bien « doit nommer ».

M. Van Loan : Effectivement, sur l'avis du premier ministre.

Le sénateur Banks : Ce n'est pas ce que ça dit. Ça dit que le gouverneur général doit nommer...

Le sénateur Tardif : Doit.

M. Van Loan : On ne dit pas que c'est le premier ministre qui doit le faire.

Le sénateur Tardif : Donc, c'est le gouverneur général qui doit le faire. Ce n'est pas une option.

M. Van Loan : C'est exactement la même chose. Cela ne sera absolument pas modifié par le projet de loi C-19, le projet de loi C-20 ou le projet de loi S-224. Ce ne sera modifié par aucun de ces trois textes. Si vous jugez que les amendements constitutionnels sont nécessaires, à ce moment-là vous estimez que des amendements constitutionnels s'imposent également dans le cas du projet de loi S-224.

C'est la position que vous soutenez et c'est ce que j'ai dit au début. Je n'ai pas de problème avec cela. Je crois que ces projets de loi sont légitimes. Vous pourrez toujours en débattre et apporter ces changements sans avoir à modifier la Constitution. Si vous estimez qu'un amendement constitutionnel s'impose pour les autres textes, à ce moment-là il faudra aussi des changements du même ordre pour ce projet de loi.

Le sénateur Tardif : Pas pour le projet de loi S-224, monsieur le ministre.

M. Van Loan : Quelle est la différence? Éclairez ma lanterne. Je ne vois pas de distinguo.

Le sénateur Tardif : Ce projet de loi ne change rien aux caractéristiques essentielles du Sénat.

M. Van Loan : Les autres non plus.

Le sénateur Tardif : Mais si.

La présidente : Nous allons passer à une seconde série de questions, mais avant cela, je veux poser moi-même une question au ministre.

Comme vous le savez, l'article 32 de la Loi constitutionnelle de 1867 dit ceci :

> Quand un siège deviendra vacant au Sénat par démission, décès ou toute autre cause, le gouverneur-général remplira la vacance en adressant un mandat à quelque personne capable et ayant les qualifications voulues.

On dit bien « quand un siège deviendra vacant ». On ne parle pas de temps en temps, ni au bon plaisir du gouvernement, ni quand le soleil percera par une journée ennuagée. On dit « quand un siège deviendra vacant ».

Je ne suis pas avocate. Personnellement, j'estime que ces mots sont évidents. Cela étant, comme vous êtes avocat, dites-moi ce que ces mots signifient, selon vous.

Mr. Van Loan: I would want to instruct my opinion based on the practice in the past. I am unaware of any vacancies that were filled the same day that they occurred.

The Chair: The second most recent appointment was within a week, I think.

Mr. Van Loan: Generally speaking, that time would be about the shortest. Lots of vacancies have existed for a long time. That does not create a compelling situation that this legislation would foresee. Otherwise, I do not know why you would bother with the legislation if you think it is already in the law.

The Chair: One uses the tools one has, I suppose.

Senator Murray: I want clarification. The constitutional issue that the provinces of Ontario, Quebec and New Brunswick raise, as you know, with regard to Bill C-20, is that in their view, it is not within our unilateral power as the Parliament of Canada to cause elections or selections, whatever you call them, to be made for Senate seats.

When you suggest that Bill S-224 is in the same category, I do not follow the argument. Surely no one suggests that it is not within our unilateral power to do what Bill S-224 seeks to do with regard to vacancies in the Senate or the House of Commons. Why do we need to invoke the general amending formula for Bill S-224? What is the argument there?

Mr. Van Loan: I no more agree that you need to invoke it for Bill C-19 or Bill C-20 than for Bill S-224 because neither of those affects the representation of the provinces or the essential composition of the Senate.

Senator Murray: It is the method of selection, and as you know from the Senate reference case a long time ago, it relates to whether a change to the duration of the mandate changes an essential characteristic of the Senate. The argument our provincial friends make is that the general amending formula must be invoked for Bill C-20. You say if that is the case, then it needs to be invoked for Bill S-224. I do not follow that argument at all.

We are constraining or seeking to constrain the prerogative of the Prime Minister with regard to by-elections in the House of Commons and the Senate. Those matters are surely within our own unilateral jurisdiction, as you constrained the Prime Minister's prerogative when you passed Bill C-16, the bill for the fixed election dates, so I do not follow your argument.

Mr. Van Loan: I believe that none of the three bills, for the exact same reason, have the problem. In terms of the method of selection, the fundamental legal elements that are provided for the Prime Minister to recommend to the Governor General or the monarch to appoint remain unaffected in their discretion; it remains unaffected by all three bills. Requiring a selection to

M. Van Loan : Il faudrait que je fonde mon opinion sur la pratique passée. Je n'ai jamais entendu parler de sièges qui, s'étant libérés, ont été comblés le jour même.

La présidente : Si je ne m'abuse, l'avant-dernière nomination a été faite dans la semaine qui avait suivi la vacance.

M. Van Loan : Disons que ce serait sans doute la période la plus courte. Bien des sièges sont demeurés vacants pendant longtemps. Cela ne donne pas forcément lieu au genre de situation extraordinaire envisagée dans cette mesure. Je ne vois pas, sinon, pourquoi vous vous embêtez à pousser ce projet de loi si vous pensez que tout cela est déjà prévu dans la loi.

La présidente : Je suppose que c'est parce qu'on utilise les outils qu'on a.

Le sénateur Murray : Je voudrais une précision. Le problème constitutionnel soulevé par les provinces de l'Ontario, du Québec et du Nouveau-Brunswick au sujet du projet de loi C-20 tient à ce que, selon elles, le Parlement du Canada n'a pas le pouvoir d'imposer l'élection ou la sélection, peu importe la terminologie retenue, des sénateurs.

Quand vous dites que le projet de loi S-224 appartient à la même catégorie, je dois vous dire que je ne parviens pas à suivre votre argumentation. Personne n'est en train de dire qu'il n'est pas de notre pouvoir unilatéral de faire ce que le projet de loi S-224 envisage au sujet des vacances au Sénat ou à la Chambre des communes. Pourquoi devrait-on invoquer la formule d'amendement constitutionnel pour appliquer les dispositions du projet de loi S-224? Quel est l'argument?

M. Van Loan : Je ne suis pas plus d'accord avec le fait que vous deviez invoquer cette formule pour le projet de loi C-19 ou le projet de loi C-20, parce qu'aucun de ces textes ne modifie la représentation des provinces ou la composition fondamentale du Sénat.

Le sénateur Murray : Tout cela tient à la méthode de sélection car, comme vous le savez d'après le renvoi sur le Sénat, il y a déjà longtemps, la question est de savoir si un changement de durée du mandat vient modifier l'une des caractéristiques essentielles du Sénat. Ce que les provinces nous disent, c'est qu'il faut invoquer la formule générale d'amendement dans le cas du projet de loi C-20. Vous dites que, si tel est le cas, il faut faire la même chose pour le projet de loi S-224. Je ne vous suis pas du tout dans cet argument.

Nous contraignons ou cherchons à contraindre le premier ministre dans sa prérogative relative aux élections partielles à la Chambre des communes et au Sénat. Ces questions relèvent évidemment de notre compétence unilatérale, comme vous avez vous-même contraint la prérogative du premier ministre quand vous avez adopté le projet de loi C-16 qui prévoit des élections à dates fixes. Je ne vous suis donc pas dans votre argumentation.

M. Van Loan : J'estime qu'aucun de ces trois projets de loi, pour les mêmes raisons, ne font pas problème à cet égard. Pour ce qui est de la méthode de sélection, les éléments juridiques fondamentaux dont dispose le premier ministre pour recommander une nomination au gouverneur général ou à la Reine ne sont pas modifiés quant à la dimension discrétionnaire.

occur within a particular time touches upon the selection process. That requirement is part of affecting the process by which they are selected. I do not agree with that basis, but if that is the basis on which you constitutionally argue that Bill C-20 requires a constitutional amendment, the same process occurs. That is what this bill is about. It is all about process. You are affecting, altering, compelling and putting in place limits in that process. You are setting up a legal framework for that process. Therefore, if the issue is process, then they are all on the same footing. Yes, it is different aspects of the process, indisputably, but it is a process consideration and a question of process absolutely. I think those bills are all legitimate and do not require a constitutional amendment. You cannot argue on the other side for two but not for the third.

Senator Murray: With regard to Senator Joyal's suggestion, and mine and others that Bill C-20 ought to be referred to the Supreme Court of Canada — and I think it was Senator Merchant's observation about the three provinces — those three provinces have indicated if the bill receives Royal Assent they will challenge it. You seem to think that this challenge could be dealt with swiftly. You would know more about this than I would, but three cases going through three separate appeal courts and making their way up to the Supreme Court of Canada is time consuming. It seems to me that if you wanted to cut the whole thing off at the pass, you would go directly to the Supreme Court of Canada with a reference now.

Mr. Van Loan: You can make that argument for any electoral reform or electoral change laws that pass. I do not think it should be a prerequisite for any change to the Canada Elections Act that it go to the Supreme Court first on a reference because it will affect subsequent election that will occur. Anyone may object to it.

Senator Murray: Three provinces, minister, have made their intentions clear. We went through all this in 1980, and the Trudeau government finally saw the wisdom of going directly to the Supreme Court of Canada.

Mr. Van Loan: I think you would find that, in any case like that, one would face an effort for injunctive relief to prevent something from happening, and it would be up to the courts to determine whether to grant such injunctive relief in the circumstances.

Senator Murray: You will have to spell out this point for us.

Mr. Van Loan: They would deal with it on that basis, that if the situation was urgent because of an upcoming election, they would deal with it on that basis. Even if it did not go all the way to the Supreme Court, the court at the appropriate level would make its determination, and it would have that impact. I am not concerned.

Senator Murray: In that province.

Aucun des trois projets de loi ne modifie cela. Le fait d'exiger qu'une nomination intervienne dans un délai particulier touche au processus de sélection. C'est en partie cette exigence qui modifie le processus de sélection. Je ne suis pas d'accord avec ce fondement, mais si c'est celui à partir duquel vous soutenez qu'il faut apporter un amendement constitutionnel au projet de loi C-20, c'est alors la même chose. Il n'est question de rien d'autre dans ce projet de loi que de processus. Avec ce texte, vous vous trouvez à modifier, à imposer et à limiter le processus. Vous établissez un cadre juridique pour ce processus. Dès lors, si le problème réside dans le processus, les trois projets de loi sont sur un même pied. Indéniablement, il s'agit d'aspects différents d'un même processus, mais il est bien question de processus. J'estime que ces projets de loi sont tous légitimes et qu'ils n'exigent pas d'amendements constitutionnels. Vous ne pouvez pas soutenir qu'il convient d'apporter un amendement pour deux de ces textes et pas pour le troisième.

Le sénateur Murray : Pour en revenir à la suggestion faite par le sénateur Joyal, par moi-même et par d'autres, à savoir que le projet de loi C-20 devrait être renvoyé à la Cour suprême du Canada — je pense que c'est le sénateur Merchant qui vous a parlé de trois provinces — il se trouve que trois provinces ont indiqué que si ce projet de loi recevait la sanction royale, elles contesteraient devant les tribunaux. Vous semblez penser que cette contestation serait rapidement réglée. Vous en savez sans doute davantage que moi à ce sujet, mais il est certain qu'il faudra beaucoup de temps pour que trois causes, entendues par trois cours d'appel différentes, aboutissent devant la Cour suprême. J'estime que si vous voulez vraiment gagner du temps, vous devriez vous adresser directement à la Cour suprême du Canada en lui adressant un renvoi.

M. Van Loan : Vous pouvez toujours soutenir cela dans le cas de lois sur la réforme électorale ou sur le changement de processus électoral, mais je ne pense pas qu'il soit nécessaire de commencer par un renvoi à la Cour suprême en vue de modifier la Loi électorale du Canada, parce que le changement aura un effet sur les élections suivantes. N'importe qui pourra s'y objecter.

Le sénateur Murray : Monsieur le ministre, trois provinces ont clairement énoncé leur intention. Nous avons connu ce genre de situation en 1980, quand le gouvernement Trudeau a finalement eu la bonne idée de s'adresser directement à la Cour suprême du Canada.

M. Van Loan : Dans toute situation de ce genre, il faut s'attendre à ce que certains aient recours à des mesures injonctives et il appartient alors aux tribunaux de déterminer s'il convient de faire droit à de telles mesures injonctives eu égard aux circonstances.

Le sénateur Murray : Il va falloir que vous nous précisiez cela.

M. Van Loan : Si la situation était urgente à cause de la proximité d'élections, les tribunaux traiteraient de la chose en urgence. Même si la cause n'aboutissait pas devant la Cour suprême, les tribunaux de ressort compétent rendraient une décision qui aurait ce genre d'impact. Cela ne m'inquiète pas.

Le sénateur Murray : Dans la province concernée.

Mr. Van Loan: Well, no. You talk about provinces and the views of provinces. In reality, they must all be regarded to a larger extent as political positions, which reflect the interests of those provinces.

Senator Murray: And yours is not political; you rise above it.

Mr. Van Loan: One of the provinces you indicate, the same province, when its government changed, changed its opinion. Therefore, I think that is the clearest evidence that what we are dealing with are political positions. We are satisfied with the legal advice we have obtained, legal advice that your committee has heard from the most distinguished scholars that the process being followed is appropriate; that Bill C-20 would be constitutional; that Bill C-19 would be constitutional; and, by the same token, Bill S-224 now before you would probably pass the test too.

The Chair: We have time for one quick question from Senator Banks.

Senator Banks: I want you to comment on the distinction that I see. The Constitution refers to fundamental change in the nature of selection. The present bill determines when but not whether the convention of a prime minister making a recommendation to the Governor General will happen. It does not say the Prime Minister cannot. The other two bills constrain the Prime Minister's freedom of action by requiring the Prime Minister, at least by inference, to appoint whomever is selected, whatever that process would be, unless you agree that the Prime Minister could, in that event, ignore the selection and appoint someone else.

Mr. Van Loan: Legally, the Prime Minister could ignore that. That discretion is not affected by Bill C-20. I believe there would be political pressure, the same as there would be in this bill. What is the consequence in this bill? For failure to adhere to the law, one pays a political price. The same would be the case of a prime minister who failed to make an appointment of someone who was democratically elected. They would pay a political price.

This question is raised about constitutionality, this question of compelling the Prime Minister and whether the organization can exist. If there is a requirement that those spots be filled, if it is, as the chair has indicated, that they must be appointed when, again any one of you could take up that question with the courts. You could seek injunctive relief, a mandamus that the Prime Minister fill those appointments. If none of you are keen to try that approach, then I expect —

Senator Murray: Are you giving us legal advice?

Mr. Van Loan: I am saying the fact that this has not happened, that no one has done that, tells me that probably there is no requirement for that to occur.

The Chair: As the Court Challenges Program no longer exists, the question of finance might arise.

M. Van Loan : Non. Vous avez parlé des provinces et de leurs points de vue. En réalité, il faut considérer que chacune constitue une position politique qui traduit leurs intérêts.

Le sénateur Murray : Quant à vos intérêts à vous, ils ne sont pas politiques, vous vous élevez au-dessus de ça.

M. Van Loan : L'une des provinces dont vous avez parlé est celle-là même qui a changé d'avis quand son gouvernement a changé. Cela prouve bien que nous avons à faire à des positions politiques. Nous sommes satisfaits de l'opinion juridique que nous avons obtenue, opinion que vous avez vous-même recueillie par la voix d'éminents juristes qui vous ont dit que le processus appliqué convient, que le projet de loi C-20 serait constitutionnel, que le projet de loi C-19 serait constitutionnel et, par le fait même, que le projet de loi S-224 dont vous êtes saisi le serait également.

La présidente : Il reste assez de temps pour une brève question du sénateur Banks.

Le sénateur Banks : Je vois une différence et j'aimerais que vous me disiez ce que vous en pensez. La Constitution parle d'un changement fondamental dans la nature du processus de sélection. L'actuel projet de loi établit quand le premier ministre doit faire une recommandation au gouverneur général, mais pas s'il y est obligé. Il n'empêche pas le premier ministre de le faire. Les deux autres projets de loi contraignent la liberté d'action du premier ministre parce qu'elle exige de celui-ci, du moins par déduction, qu'il nomme toute personne sélectionnée, peu importe le processus appliqué, à moins que vous ne nous disiez que le premier ministre peut, dans tous les cas, faire fi de la sélection et nommer quelqu'un d'autre.

M. Van Loan : Légalement, le premier ministre pourrait faire fi de la sélection. Ce pouvoir discrétionnaire n'est pas modifié par le projet de loi C-20. Je crois qu'il y aurait des pressions politiques comme dans le cas de ce projet de loi. Quelle est la conséquence de ce projet de loi? Celui qui ne respecte pas la loi, on finit par en payer le prix politique. Il en irait de même d'un premier ministre qui ne nommerait pas une personne ayant été démocratiquement élue. Il en paierait le prix politique.

La question qui se pose sur le plan de la constitutionnalité est celle de la contrainte imposée au premier ministre et de l'existence de l'organisation. S'il faut que les sièges soient comblés et si cela, comme la présidente l'a indiqué, doit se faire par le biais de nominations, n'importe lequel de vous pourrait se pourvoir en justice avec cette question. Vous pourriez demander l'application d'une mesure injonctive, d'un mandamus, afin que le premier ministre comble les sièges vacants. Si aucun de vous n'est prêt à suivre cette démarche, alors je m'attends...

Le sénateur Murray : Êtes-vous en train de nous donner une opinion juridique?

M. Van Loan : Ce que je vous dis, c'est que tel n'est pas le cas et que si personne ne l'a fait, c'est ce que ce n'est pas nécessaire.

La présidente : Comme le programme de contestation judiciaire n'existe plus, il risque d'y avoir un problème de financement.

Mr. Van Loan: To finance the poor impoverished senators.

Senator Milne: You are the Minister for Democratic Reform. Do you stand by your government's decision to leave the citizens of Toronto Centre without an elected representative for over eight months? How is that democratic reform?

Mr. Van Loan: There are all kinds of reasons why by-elections might not be called at a particular time. I do not have a serious problem with what you have in the bill although I am not sure the bill addresses the situation you speak of. I am not sure it would prevent a situation like that one from having occurred. Lots of situations like that have occurred, and there are reasons; we might want to wait to have a series of by-elections in a common area together at the same time.

There are reasons why we might not want to have by-elections conflicting or overlapping with potential provincial elections, municipal elections and issues like that. I know those issues have been taken into consideration. In general, I do not think I have a problem with the element that is proposed here relating to elections.

Senator Milne: I am amazed that you can defend those eight months with a straight face, minister.

Mr. Van Loan: There have been situations like that over time. I do not have a problem with what you propose in this bill.

The Chair: Honourable senators, that brings us to our commitment to liberate the minister at five o'clock. I believe it is now five o'clock. This committee is now about to go in camera.

The officials were not invited to stay. However, before you leave, gentlemen, are there senators who would like to put questions to the officials, if they can stay?

Senator Joyal: I have one simple question. I read the brief that was presented. You do not have to concur with it. It is a political statement. I was left with a hungry taste because I thought there would be a legal or constitutional argument made relating to the nature of this bill and the exercise of the prerogative. We have heard witnesses, who have raised constitutional issues in relation to the framing of the prerogative. I am sure you have read the minutes of this committee. I was expecting that, in the two pages we received today, there would have been at least one paragraph answering those points.

I do not need you to comment on this point, but unfortunately the brief is a political speech. That is fine. The minister comes here, he is a political minister and he makes a political statement. I have no quarrel with that situation. However, the brief does not enlighten us much in trying to understand the legal

M. Van Loan : De financement pour les malheureux sénateurs appauvris.

Le sénateur Milne : Vous êtes ministre de la Réforme démocratique. Vous en tenez-vous à la décision de votre gouvernement d'avoir laissé les citoyens de Toronto-Centre sans représentant élu pendant plus de huit mois? C'est ça, la réforme démocratique?

M. Van Loan : Il y a toutes sortes de raisons pour lesquelles on peut ne pas pouvoir déclencher une élection partielle avant un certain temps. Je ne vois pas de gros problème avec ce que dit le projet loi, bien que je ne sois pas certain que celui-ci concerne la situation dont vous parlez. Je ne suis pas certain que celui-ci permettrait d'éviter le genre de situation que vous avez évoquée. Celle-ci n'a rien d'exceptionnel et elle s'explique. On peut vouloir attendre de tenir une série d'élections partielles en même temps dans une grande région.

On peut ne pas vouloir tenir d'élections partielles pour éviter d'entrer en conflit avec des élections provinciales, des élections municipales et autres considérations du genre. Je sais que l'on a tenu compte de tout cela. Je ne pense pas qu'en règle générale les dispositions concernant les élections fassent problème.

Le sénateur Milne : Je suis surpris que vous puissiez défendre une période de latence de huit mois sans sourciller, monsieur le ministre.

M. Van Loan : Ce n'est pas la première fois que ça se produit. Je n'ai rien contre ce que vous proposez dans le projet de loi.

La présidente : Honorables sénateurs, nous en sommes au point où nous allons devoir tenir parole envers le ministre et le libérer à 17 heures. Je pense qu'il est 17 heures. Notre comité est sur le point de passer à huis clos.

Nous n'avions pas invité les fonctionnaires à rester sur place, mais avant que vous ne partiez, messieurs, j'aimerais savoir si des sénateurs désirent vous poser des questions. À condition qu'on vous permette de rester.

Le sénateur Joyal : J'ai une simple question à poser. Je viens de lire le mémoire qui nous a été présenté et je ne suis pas d'accord avec ce qui y est dit. C'est une déclaration politique. Je suis resté sur ma faim, parce que je m'attendais à lire une argumentation juridique ou constitutionnelle sur la nature de ce projet de loi et sur l'exercice de la prérogative du premier ministre. Nous avons entendu des témoins à ce sujet qui nous ont parlé des problèmes que la question de la prérogative soulève sous l'angle de la Constitution. Je suis certain que vous avez lu les délibérations de notre comité. Je m'attendais à ce que les deux pages que nous avons reçues aujourd'hui contiennent au moins un paragraphe répondant à ces questions-là.

Je me passerai de vos commentaires à ce sujet, mais il se trouve malheureusement que ce mémoire est un discours politique. C'est bien. Le ministre vient nous rencontrer, il a un point de vue politique et il fait des déclarations politiques. Je n'ai rien contre cela. Cependant, ce mémoire ne nous éclaire pas beaucoup dans

implication of this bill in reference to the use of the prerogative or the framing of the prerogative of the Prime Minister to recommend an appointment to the Governor General.

I want to express to you that when the department comes with the minister, I do not want to prevent the minister from making a political speech, as is his privilege. On the other hand, you understand that this committee must study the bill on its merits and the basis of its constitutional implications. We do not have that information in this brief.

I do not know if you can provide us with additional comments, whether written or however you want to give them to us, but I express to you my dissatisfaction that those aspects of the bill have not been addressed by the minister or you on the basis of what we have in front of us today.

Dan McDougall, Director, Strategic Analysis and Planning, Democratic Reform, Privy Council Office: Perhaps I can make two points, if I may. I think, senator, in part, the issue of constitutionality was addressed in the minister's comments. I agree it was not in his opening statement per se, but the minister indicated that it is his view and the view of the government that there is not a constitutional issue with respect to the bill, and that what the bill proposes is constitutionally valid.

With respect to other elements of the prerogative, if you will, a point of order was raised during debate on this bill with regard to Royal Consent, and I believe you received a ruling from the Speaker indicating that Royal Consent in this instance was not required. That ruling was indeed touching on the prerogative. You, as a committee, have a ruling from your Speaker on that aspect.

Senator Joyal: Are you satisfied that this bill is constitutional as is?

Mr. McDougall: Yes.

Senator Moore: Are you the legal advisers to the minister?

Mr. McDougall: We are not legal advisers. We are policy advisers to the minister.

Senator Moore: Did you help prepare his remarks today?

Mr. McDougall: Those remarks, no.

Senator Moore: I listened to the minister saying that the provinces should not stand as a barrier to change, but yet the minister has no problem ignoring the provinces' rights as they exist today. All this talk about democracy and democratic reform, all of that, any democracy hinges on the rule of law. We have a Constitution that I guess the minister implies that he does not need to observe. I want to know —

The Chair: He is about to put his question, Senator Andreychuk. He said, "I want to know."

notre tentative visant à comprendre les répercussions juridiques de ce projet de loi en ce qui a trait à l'application de la prérogative ou à l'encadrement de la prérogative du premier ministre en matière de recommandation des nominations au gouverneur général.

Je tiens à vous dire que, quand les fonctionnaires viennent nous voir en compagnie de leur ministre, je ne cherche pas à empêcher le ministre de faire des déclarations politiques, parce que c'est son droit. D'un autre côté, vous comprendrez que notre comité doit étudier ce projet de loi sur le fond et en fonction de ses répercussions constitutionnelles. Or, ce document ne nous dit rien sur ces plans-là.

Je ne sais pas si vous pourrez nous en dire davantage, par écrit ou autrement, mais je peux vous dire que je suis mécontent que ces aspects du projet de loi n'aient pas été abordés par le ministre ni par les fonctionnaires, à partir du texte dont nous sommes saisis.

Dan McDougall, directeur, Analyse et planification stratégique, Réforme démocratique, Bureau du Conseil privé : Je pourrai peut-être vous dire deux choses. Sénateur, je pense que le ministre a en partie traité de la question de la constitutionnalité dans ses remarques. Je suis d'accord avec vous qu'il ne l'a pas fait dans sa déclaration d'ouverture, mais il vous a fait part de son point de vue et du point de vue du gouvernement qui estime que le projet de loi ne soulève pas de problème sous l'angle constitutionnel et que ce qu'il propose est constitutionnellement valable.

S'agissant des autres éléments de la prérogative, un sénateur a fait un rappel au Règlement lors du débat sur ce projet de loi au sujet de la sanction royale et je crois savoir que le président a rendu une décision indiquant que la sanction royale dans ce cas n'était pas nécessaire. Cette décision touchait évidemment à la prérogative. Votre comité dispose donc d'une décision du président du Sénat à cet égard.

Le sénateur Joyal : Vous êtes donc convaincu que ce projet de loi est constitutionnel?

M. McDougall : Oui.

Le sénateur Moore : Êtes-vous les conseillers juridiques du ministre?

M. McDougall : Nous ne sommes pas ses conseillers juridiques, nous sommes ses conseillers politiques.

Le sénateur Moore : L'avez-vous aidé à préparer son intervention?

M. McDougall : Pas celle-ci, non.

Le sénateur Moore : Le ministre nous a dit que les provinces ne devraient pas faire obstacle au changement, mais il ne voit rien de mal à passer outre les droits actuels des provinces. Tout le débat sur la démocratie et la réforme démocratique s'articule autour de la primauté du droit. Nous avons une Constitution que le ministre ne semble pas juger nécessaire de respecter. Je veux savoir...

La présidente : Il est sur le point de poser sa question, sénateur Andreychuk. Il vient de dire « Je veux savoir ».

Senator Moore: I want to know what you feel about the rule of law and whether the Constitution of Canada, as it currently exists, should be and must be followed until it is changed.

Mr. McDougall: I agree with you fully, senator.

The Chair: Gentlemen, thank you very much indeed. In particular, since you were not warned that we would hang on to you, we appreciate the fact that you let us hang.

Honourable senators, this committee will now go into an in camera session to consider a draft report and future business of the committee.

Senator Andreychuk: Madam Chair, you have sent out a notice saying we are going to clause-by-clause consideration.

The Chair: That is one of the things we will discuss in our in camera session.

The committee continued in camera.

OTTAWA, Thursday, May 8, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), met this day at 10:50 a.m. to give clause-by-clause consideration to the bill.

Senator Joan Fraser (*Chair*) in the chair.

[*English*]

The Chair: Honourable senators, welcome to this meeting of the Standing Senate Committee on Legal and Constitutional Affairs. On the agenda today is one item, which is the clause-by-clause consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies).

Is it agreed, senators, that we move to clause-by-clause consideration of Bill S-224?

Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Shall the title stand postponed?

Hon. Senators: Agreed.

The Chair: Carried.

Shall clause 1 carry?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Shall clause 2 carry?

Some Hon. Senators: Agreed.

Le sénateur Moore : Je veux savoir ce que vous pensez de la primauté du droit et si, selon vous, la Constitution du Canada, dans son état actuel, devrait et doit être appliquée comme telle jusqu'à ce qu'elle soit modifiée.

M. McDougall : Je suis tout à fait d'accord avec vous, sénateur.

La présidente : Messieurs, je vous remercie beaucoup, d'autant que nous vous avons retenus tandis que nous ne vous en avions pas prévenus. Nous apprécions de nous avoir permis de le faire.

Honorables sénateurs, nous allons maintenant passer à huis clos pour étudier une ébauche de rapport de même que les travaux futurs du comité.

Le sénateur Andreychuk : Madame la présidente, vous nous avez fait parvenir un avis indiquant que nous allions passer à une étude article par article.

La présidente : C'est une des choses dont nous allons parler à huis clos.

Le comité poursuit ses travaux à huis clos.

OTTAWA, le jeudi 8 mai 2008

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui, à 10 h 50, pour procéder à l'étude article par article du projet de loi.

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente : Honorables sénateurs, je vous souhaite la bienvenue à cette séance du Comité sénatorial permanent des affaires juridiques et constitutionnelles. Le seul point à l'ordre du jour aujourd'hui est l'étude article par article du projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants).

Êtes-vous d'accord, sénateurs, pour que nous entreprenions l'étude article par article du projet de loi S-224?

Des voix : Oui.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

L'étude du titre est-elle reportée?

Des voix : D'accord.

La présidente : Adopté.

L'article 1 est-il adopté?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

L'article 2 est-il adopté?

Des voix : D'accord.

Senator Di Nino: On division.

The Chair: Carried, on division.

Shall the title carry?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Is it agreed that this bill be adopted without amendment?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Does the committee wish to consider appending observations to the report?

Hon. Senators: No.

The Chair: Is it agreed that I report this bill to the Senate?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division. I shall do that this afternoon.

Does any senator wish to raise an item of other business?

An Hon. Senator: I move the adjournment.

The Chair: All in favour?

Hon. Senators: Agreed.

The committee adjourned.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

Le titre est-il adopté?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

Le projet de loi est-il adopté sans amendement?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

Le comité souhaite-t-il annexer des observations au rapport?

Des voix : Non.

La présidente : Puis-je faire rapport de ce projet de loi au Sénat?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence. Je devrais le faire cet après-midi.

Voulez-vous discuter d'autre chose?

Des voix : Je propose de lever la séance.

La présidente : Tous ceux qui sont pour?

Des voix : D'accord.

La séance est levée.