Articles

The Courts and The Conventions of The Constitution

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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-

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[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

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[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.

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[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

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[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)?"[52]

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.[53] 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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[52](1982), 130.

[53]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.

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[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".[38] Why did it not do so? Perhaps because this would have abolished also the Lieutenant-Governors' power

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[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

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[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

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[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!*