International Law Aspects of Patriation

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In this article the matter of patriation is considered from the view of international law and from a historical perspective. Contrary to the views of certain Canadian provinces and several British M.P.'s, the author points out that viewed from the perspective of international law the U. K. Parliament has no right to look behind a request from the Parliament of Canada. Indeed, in terms of international law the British Parliament may well have a duty to pass automatically any such request, even if it involves an important constitutional amendment.

Dans cet article, le sujet du rapatryement de la constitution est considéré du point du vue des lois internationales et dans une perspective historique. Contrairement à certaines provinces canadiennes ainsi que quelques membres du parlement Britannique, l'auteur nous fait remarquer qu'au point de vue du décrés de la loi international, le gouvernement Britannique n'a aucun droit de chercher la raison d'une demande faite par le parlement du Canada. Effectivement, le parlement Britannique pourrait avoir un devoir de passer automatiquement une demande même s'il crée un important changement constitutionel.

THE ISSUE

At the date of preparation of the following article, it is virtually certain that the U.K. Parliament will be passing, in a matter of weeks, the *Canada Act,*[1] as submitted to it through an address of the Parliament

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[1]An Act to give effect to a request by the Senate and House of Commons of Canada, contained in a joint address to Her Majesty, presented as a Government Notice of Motion to the Canadian House of Commons on November 18, 1981 (Order Paper and Notices, First Session, 32nd Parliament, No. 259) Section 1 of the proposed *Canada Act* provides:

> "The *Constitution Act, 1981* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act."

Schedule B contains (a) the Canadian Charter of Rights and Freedoms; (b) constitutional commitments regarding equalization and regional disparities; (c) the constitutional amending formula; (d) certain amendments to the *British North America Act, 1867;* (e) a statement that the new Constitution is the supreme law of Canada; and (f) certain consequential amendments and repeals of other pieces of legislation making up the constitution of Canada.

of Canada,[2] to patriate the Canadian Constitution. Several weeks earlier, the last remaining political obstacle to the enactment of the *Canada Act* — the action begun in the U.K. Courts by several Canadian native associations — was dismissed by the Court of Appeal in England.[3] While the issue of Quebec's so-called right of veto over constitutional amendment where its rights, powers and privileges are affected has not yet been judicially determined, pursuant to a reference initiated by that province's executive[4], the U.K. government and Parliament are reportedly prepared to take positive action to accede to the request by the Parliament of Canada.[5]

Although the patriation issue will thus be a matter of history within a short while, an extremely pertinent issue remains for consideration, namely, whether there is — or was — an international law dimension to the patriation issue. During the extensive public discussion of the constitutional issue in Canada and in the U.K.,[6] attention was focussed almost exclusively on the Commonwealth constitutional aspects as between Canada and the U.K. and on the proper role of the respective Parliaments on the basis of constitutional law and convention. Very little discussion

[2]The address, adopted in identical terms by the House of Commons (Debates, Vol. 124, 1st sess., 32nd Parlt., Dec. 2, 1981, at 13632 and by the Senate (Debates, Vol. 128, 1st sess., 32nd Parlt., Dec. 8, 1981, at 3428) requests Her Majesty to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses as contained in the joint address. The use of the joint address method has been almost consistently followed in Canadian and U.K. constitutional practice and can now be said to have become constitutional convention. Background Paper, prepared by the Department of External Affairs, October 2, 1980. See also Gérin-Lajoie, *Constitutional Amendment in Canada*, (1950), at 150 et seq.

[3]*The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, Ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, 28 January 1982. (unreported).

[4]Gouvernement du Quebec, décret no. 3367-81, 9 Decembre 1981.

[5]Second reading in the U.K. Parliament of the Canada Bill was announced by the Government House Leader Francis Pym on February 11, 1982 to begin on February 17, 1982. Only a handful of British M.P.'s are believed to remain opposed to the Bill (Toronto Globe & Mail, February 12, 1982). Earlier, the U.K. House of Commons Foreign Affairs Committee that had been studying the procedural aspects of patriation had concluded, in light of the November 5, 1981 agreement between the Government of Canada and the governments of nine of the ten provinces, that "it would be proper for the U.K. Parliament to enact the proposals, notwithstanding that they will directly affect the powers of the Canadian provinces and are dissented from by one of those Provinces, Quebec." First Report from the Foreign Affairs Committee, Session 1981-82, at p.v.

[6]The extent of newspaper coverage in Canada and in the United Kingdom following the announcement of the Government of Canada's patriation package on October 2, 1980 was remarkable. Several lead editorials on the matter, together with feature articles, were carried in leading British newspapers. Three references were initiated in the Courts of Appeal by the provincial governments opposing the patriation measure, but only the Newfoundland Court of Appeal found in favour of the provincial position that it was both constitutional convention and constitutional law that agreement of the provinces first be obtained before the Parliament of Canada may request amendments to the Canadian Constitution by the U.K. Parliament where those amendments affect federal-provincial relationships or the rights, powers or privileges of the provinces. *Reference Re Amendment of the Constitution of Canada* (Man. C.A.) (1981), 117 D.L.R. (3d) 1; *Reference Re Amendment of the Constitution of Canada (No. 2)* (Nfld. C.A.) (1981), 117 D.L.R. (3d) 1; *Reference Re Amendment of the Constitution of Canada (No. 3)* (Que. C.A.) (1981), 120 D.L.R. (3d) 385. Subsequently, in a consolidated reference, the Supreme Court of Canada held, by a majority of six to three, that constitutional convention required consent of the provinces for constitutional change affecting provincial rights, powers and privileges. *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1981) 125 D.L.R. (3d) 1.

of the international law dimension of the patriation issue occurred in the public records.

In testimony on December 10, 1980, before the Foreign Affairs Committee of the U.K. House of Commons,[7] however, the matter of international law was raised by Mr. E. Lauterpacht, a lecturer in international law at the University of Cambridge[8] in the following terms:

> There is no other situation in the world in which one sovereign state is dependent upon an Act by another sovereign state for the amendment of the Constitution of the first. That relationship is a relationship which, if one approaches it in terms of international law, must be identifiable in terms of international law. Either it is a relationship of quasi-treaty character or it is a relationship of customary international law as it has specially evolved between the two states. For present purposes it does not matter how you classify it, provided you accept that there are rules of international law which could be applicable in this situation. If those rules of international law accord the United Kingdom Parliament a role in the affairs of Canada, within her geographical boundaries, then there is no reprehensible or improper or illegal interference by the United Kingdom Parliament in Canadian domestic affairs because that very act of the United Kingdom stems from the rules of international law, or inter-Commonwealth law if you like, that are operative between the UK and Canada."[9]

The view was accepted *in toto* by the U.K. Select Committee, as follows:

> ". . .in terms of international law, the role of the U.K. Parliament in the functioning of the Canadian constitution involves a relationship between the U.K. and Canada which is a relationship either of 'quasi-treaty character' or of 'customary international law as it has specially evolved between the two states'. Action by the U.K. Parliament which conforms to the rules of that quasi-treaty or special customary international law cannot be said to amount to an improper or unlawful interference by the U.K. in Canadian domestic affairs or 'domestic jurisdiction'. Nor does such action involve a diminution of Canadian sovereignty. Canada has accepted, indeed invited, the constitutional role of the U.K. Parliament, just as the U.K. has accepted the activities in relation to the U.K. of the European Commission on Human Rights or the European Court of Human Rights.[10]

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[7]The Foreign Affairs Committee of the U.K. House of Commons decided on November 5, 1980 to inquire into the role of the United Kingdom Parliament in relation to the British North America Acts due to the fact that, as stated by the Committee, "some such inquiry is appropriate, because — anachronistic as the law may be considered to be — the U.K. Parliament retains in law the unchallenged power and duty to enact amendments fundamental to parts of Canada's constitution. Any improper exercise of that power, or evasion of the duty, would amount to a violation both of the constitutional system of Canada and of correct relations between the U.K. and Canada." First Report from the Foreign Affairs Committee, House of Commons Paper No. 42, session 1980-81, January 30, 1981, at p. ix. In the writer's opinion, the Foreign Affairs Committee, in large part, was motivated to embark upon this enquiry as a result of extreme pressure by provincial representatives lobbying against the federal patriation measure in London.

[8]Only three independent witnesses were heard by the Committee in the preparation of its first report. Two of these witnesses, Professor H.W.R. Wade and Professor Lauterpacht, had earlier given advice to provinces opposing the patriation measure. First Report from the Foreign Affairs Committee, *supra* note 7, Vol. II, at 107 and 117.

[9]*Ibid.*, at 121.

[10]*Supra*, note 7, paragraphs 86 and 87.

The foregoing, however, merely states the problem rather than answers it. It is impossible to raise the issue of possible interference in Canada's internal affairs by the U.K. and, as the Committee does, dismiss such possibility so easily by alleging that Canada has "invited" the role of the U.K. Parliament similar in legal effect to the U.K.'s acceptance of the European Commission and Court of Human Rights.[11] The real international legal issue in the context of the patriation debate is whether — quite apart from constitutional law and convention — the U.K. Government or Parliament can look behind a request by the Canadian Parliament without breaching international law by interfering in Canadian affairs. In other words, is there any requirement *under international law* that the U.K. Government or Parliament must act on the face of a request for patriation by federal authorities in Canada (either by the federal government or Parliament)? Is there, secondly, any requirement *under international law* by which a refusal to act as requested or an enquiry into the internal procedures leading to the making of the request constitutes an infringement of Canadian sovereignty?

THE SOVEREIGNTY OF CANADA

There is no question that Canada is a fully-sovereign and independent state.[12] Canadian sovereignty, brought about through an evolutionary process, is reflected in modern terms in the *Statute of Westminster*[13] and the preceding Imperial Conferences of 1926 and 1930. Nothing more need be said than this, since the legal status of Canada as a sovereign state, equal in every respect in legal terms with the U.K., is an irrefutable fact.[14]

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[11]In these instances, the U.K. has specifically signed and ratified the European Convention on Human Rights, whereby the parties to the Convention agreed to become legally bound by the institutional procedures as set out in Article 32 respecting decisions flowing from reports of the Commission of Human Rights in any case to which they are parties. Brownlie, *Basic Documents on Human Rights* (1981), Part six; Fawcett, *The Application of the European Convention on Human Rights* (1969).

[12]Independence and statehood are closely related concepts. As Brownlie points out, independence has been stressed by many jurists as the decisive criterion of statehood. Brownlie, *Principles of International Law* (1979), at 76. He goes on to note that statehood, and hence independence, is *prima facie* evidenced by separate nationality, autonomous juridical and executive organs, independent conduct of foreign relations and a separate legal system. The fact that the U.K. Parliament exercises a residual legislative function in respect of the Canadian constitution does not affect Canadian sovereignty or statehood, since the U.K. exercises no *control* over Canadian affairs.

[13]R.S.C. 1970, Appendices, No. 26.

[14]"Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations". Report of the Inter-Imperial Relations Committee of the 1926 Imperial Conference, Ollivier, *Colonial and Imperial Conferences*, Vol. III, (1954), at 146. The Committee earlier stated that the position and mutual relations between Great Britain and the Dominions may be defined as follows: "They are autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth Nations". *Ibid.*, at 146.

The second point is that it is beyond all doubt that the federal government in Canada *alone* is competent to speak for Canada in all matters concerning Canada's foreign relations and to enter into treaties on behalf of Canada.[15] The exclusive responsibility of the federal government in foreign affairs has been judicially recognized in the *Labour Conventions Case*[16] and is embodied in the *Department of External Affairs Act.*[17]

Thirdly, it flows from sovereign status of states in international law that other states owe a duty of non-intervention in the internal or external affairs of that state. This duty of non-intervention, which Brownlie refers to as "a master principle which draws together many particular rules on the legal competence and responsibility of states",[18] is reflected in the *Charter of the United Nations*[19] and has become part of the corpus of international law. As a result, it is beyond doubt that as a general principle the U.K. is under a duty under international law to not interfere in Canada's internal affairs. The question, therefore, is whether under rules of international law the U.K. (its government or Parliament) can do any act in the context of constitutional change which interferes in Canada's internal affairs where such act is without Canada's consent. This issue requires an examination of history, practice and precedent to determine whether there is anything that clearly evidences full and unequivocal Canadian consent to some measure of U.K. interference — through the constitutional legislative process — in internal Canadian affairs. To answer the latter question requires an analysis of the effect of the existing constitutional conventions and of the Statute of Westminster *in terms of international law* on Canada's legal relationship with the U.K.

THE NATURE OF TREATY RELATIONSHIPS

If the constitutional relationship between Canada and the United Kingdom is something akin to a treaty relationship, as the Foreign Affairs Committee Report has suggested, what are the contents of any such

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[15]Gotlieb, *Canadian Treaty-Making* (1968), at 4.

[16]*A.G. Can. v. A.G. Ont. et al.*, (1937) 1 D.L.R. 673. Lord Atkin, whose views on the divided competence within Canada regarding *implementation of treaties* is well-known, said in respect of *formation* of treaties, "...it can not be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone", at 676.

[17]R.S.C. 1970, C.E-20.

[18]Brownlie, *supra*, note 12, at 291.

[19]Article 2, paragraph 7, reads as follows; "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." 1945 C.T.S. No. 7.

treaty or quasi-treaty relationship? On what international treaty law basis is the U.K. Parliament entitled to determine the extent to which it can enter into an examination of or directly affect matters of internal Canadian concern? Is it justified on the basis of treaty law, as Mr. Lauterpacht suggests in his brief to and his testimony before the Foreign Affairs Committee, to state that Canada is bound to accept an examination into its internal affairs by the U.K. Parliament in the same way that the U.K., by treaty, has accepted a role in its affairs by the European Commission of Human Rights?

The basis of treaty relationships is *consent* between the contracting parties.[20] Absent consent, there can be no legal relationship. Normally, an expression of consent takes written form as a treaty, but the law contemplates binding agreements between states that are in other, non-treaty forms.[21] States may even become bound by unilateral oral expressions of intention or consent in the absence of any written document.[22] Although the latter is an exceptional case, it may well be pertinent in the present context.

The other essential element in any relationship between Canada and the U.K. under international law akin to treaty — apart from the requirement of some form of consensual relationship — is the requirement of *equality* or *symmetry* in the relationship. This requirement for symmetry flows from the principle that states (with certain exceptions related to international organizations) are exclusively the subjects of international law. It makes no difference under international law whether the state is for internal constitutional purposes a unitary state or a federal state.[22]

Of course, sub-units of a state may be accorded certain juridical rights to form treaty relationships under the constitutions of that state.[24]

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[20]Thus, the *Vienna Convention on the Law of Treaties*, U.N. Doc. A/Conf. 23 May, 1969, provides, *inter alia*, that "a treaty enters into force as soon as consent to be bound by that treaty has been established for all the negotiating States" (Article 24). The Convention defines a contracting state to a treaty as "a State which has consented to be bound by the treaty" (Article 2).

[21]While the *Vienna Convention on the Law of Treaties* only covers international agreements concluded between States in written form, the Convention expressly recognizes that international agreements *not* in written form have legal force and effect.

[22]See McNair, *The Law of Treaties* (1961), at 6-15; Gotlieb, *Canadian Treaty-Making* (1968), at 22.

[23]Thus, contrary to the direction taken by Mr. Lauterpacht, referred to above, to the effect that the U.K. Parliament under international law may enquire into the constitutional affairs *within* Canada, the Permanent Court of International Justice held that it was inimical to international law for one state to adduce as against another state its own constitution with a view to evading obligations incumbent upon it under either international law or under treaties in force. *Case of the Polish Nationals in Danzig* (1931) P.C.I.J., Ser. A/B, no. 44, at 24. This principle is the corollary of the primary rule that municipal law is not relevant to legal relationships among states.

[24]Brownlie, *supra*, note 12, at 65, says that,

> "Entities acting as the agents of states, with delegated powers, may have the appearance of enjoying a separate personality and considerable viability on the international plane."

In Canada's case however, no such rights have been accorded to the provinces of Canada under the *BNA Act* and it is accepted under Canadian constitutional law and under the law of nations that the provinces of Canada have no legal status beyond the boundaries of Canada. Only the federal authority therefore can enter into a consensual relationship with other states of a treaty or — assuming such a concept exists — of a "quasi-treaty" nature.[25]

This being the case, if the constitutional conventions or agreements between Canada and the U.K. can be viewed as something akin to treaty, they could only amount to such as a result of the expression of consent given by the federal level of government who alone have competence in this matter (either the federal executive or perhaps by the Canadian Parliament). Given the need for symmetry, consent on the U.K. side would have to have been similarly expressed either by its government or Parliament. There can, in terms of constitutional and international law, be no treaty or quasi-treaty relationship between the U.K. or its Parliament on the one hand, and the provinces or their legislatures in Canada, on the other. The only possible relationship in the present context based on commonwealth convention that might have some quasi-treaty nature, linking Canada and the U.K., would result from some sort of consensual relationship expressed as existing between the U.K. and Canadian Parliaments.

COMMONWEALTH CONVENTIONS AS INTERNATIONAL LAW

If the conventions and legal norms that govern commonwealth relations have become incorporated into or have merged with international legal norms as the U.K. Foreign Affairs Committee suggests, then it becomes essential to examine the elements or ingredients of those con-

[25]In the Canadian constitutional context, there has been no delegation by the central authority to the provinces to engage in the conduct of acts having international legal significance such as the conclusion of treaties. The decision of the British Court of Appeal in *Mellenger et al. v. New Brunswick Development Corporation* [1971] 2 All E.R. 593, relied on by Mr. Lauterpacht before the U.K. Foreign Affairs Committee to support his thesis that the U.K. Parliament was entitled to peer within Canada's constitutional veil, was a decision on the narrow grounds of New Brunswick's right to claim sovereign immunity under the rules of common law as an emanation of the British Crown. The judgement certainly did not stand for the proposition that the provinces of Canada had any manner of independent, sovereign status as recognized under international law. The correct view, it is submitted, was stated by Duff, C.J.C. in *Reference Re Weekly Rest in Industrial Undertakings Act* (Labour Conventions Case), (1936), 3 D.L.R. 673 at 690;

> "As regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a Province represent the Crown in respect of relations with foreign governments. The Canadian executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs."

The Constitutional position has been summarized as well in a paper published by the Canadian Government entitled "Federalism and International Relations" (1968), at 15-16.

ventions and norms. The Foreign Affairs Committee Report seems to assume that the commonwealth constitutional norms and conventions admit *prima facie* of a right of the U.K. Parliament to examine the degree of provincial consent behind any federal request for constitutional amendment. Examination of commonwealth law, practice and convention governing Canada's constitutional relationship with the U.K. does not, however, support this conclusion.

At the outset, it must be stated that jurists are not agreed on whether commonwealth conventions and norms are properly within the body of international law as such. To some extent, the issue is theoretical. To begin with, flowing from the *inter se* doctrine,[26] Commonwealth members have entered reservations to the jurisdiction of the International Court of Justice,[27] thereby restricting the general enforceability of commonwealth law to restricted tribunals that might be agreed to on an *ad hoc* basis. This being said, however, there are arguments that have been made to the effect that Commonwealth conventions, norms, usages and understandings, regulating the relationships between this important segment of the international community, have become elevated to the plane of international law.

Thus, R.T.E. Latham, whose work *The Law and the Commonwealth* is regarded by many as the *locus classicus* on the subject, wrote as early as 1937:

> "A number of conventions, understandings, political practices and obligations, both general and particular, have come into existence to perform for the Commonwealth the function which is performed for centralized empires, for the most part, by constitutional law, and for the comity of nations, so far as it is performed at all, by international law — that is, to regulate the mutual relations of its members so far as they are capable of and require regulation by established and explicit rules. Neither municipal law (of which constitutional law is an integral part) nor international law is merely a convenient descriptive classification of a number of essentially unrelated rules; both form more or less coherent systems — municipal law more, international law less. The question therefore arises whether the conventions, understandings, and obligations of the Commonwealth form likewise in any degree a coherent system, or are merely a congeries of rules connected only by a certain similarity of subject-matter. If they should be found to constitute a coherent system, the further question will arise, what is the relation of that system to municipal law on the one hand and international on the other; *and the possibility must not be*

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[26]The basis for the *inter se* doctrine is the concept of the indivisibility of the Crown, whereby the Crown cannot or should not be party to a suit or a cause against itself. Fawcett, *The British Commonwealth in International Law* (1963), at 149-194.

[27]The Canadian reservation, under Article 36 of the Statute of the Court, covers *inter alia;*

> ". . .disputes with the Government of any other country which is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree."

Multilateral Treaties in Respect of which the Sec.-Gen. Performs Depository Functions, United Nations, 1980, at 11.

> *excluded that Commonwealth conventions may prove to be or to have become indistinguishable from rules of municipal or of international law.* These questions constitute at the moment a vital legal problem of the Commonwealth."[28]

Latham's views were tentative, but contain the nucleus of an important approach to commonwealth law that must be considered even more compelling today, given the many developments since the above passage was written. The modern view could be stated as follows: The development of commonwealth conventions before, but particularly since, 1931, firmly establishing the basis of the relations between commonwealth states and their Parliaments on the principle of sovereign status and equality, has led to the formation of emergent rules of international law. And whether these rules by common agreement are only enforceable by restricted tribunals under the *inter se* doctrine cannot affect their force or validity as rules, albeit circumscribed rules, of general international law.

The basic legal ingredient in commonwealth law *qua* international law and the starting point in any analysis of the subject is the fundamental principle of equality among commonwealth states. This relationship of equality between Britain and the (then) Dominions was laid down in the now famous Balfour Declaration enshrined in the Report of the Inter-Imperial Relations at the Imperial Committee Conference of 1926 and which affirmed:

> "This is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development — we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs,* though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."[29]

Thus, the Report went on to state:

> "Equality of status, so far as Britain and the Dominions are concerned, is thus the *root principle* governing our Inter-Imperial Relations."[30]

The 1929 Conference on the Operation of Dominion Legislation (the ODL Conference) and the Imperial Conference of 1930 were convened for purposes of finding the appropriate solutions to give effect to the foregoing statement of the "root principle" of equality since existing administrative, legislative and judicial forms were admittedly not wholly in accord with the position as described, a condition of things following

[28]Oxford Univ. Press, 1949, at 595. (emphasis added.)

[29]Ollivier, *Colonial and Imperial Conferences* (1954), Vol. III, at 146. (emphasis added.)

[30]*Ibid.*, at 146. (emphasis added.)

inevitably from the fact that most of these forms dated back to a time well antecedent to the present stage of constitutional development."[31]

The legal vehicle devised to give effect to the above expression of basic principle was, of course, the *Statute of Westminster, 1931*.[32] While the *Statute* reserved certain legislative functions in respect of the *BNA Act* to the U.K. Parliament on request and consent of the Canadian Parliament,[33] it was designed to give full-blown expression to and was not intended in any way to alter or detract from the fundamental norm of equality as between the Dominions and their Parliaments, on the one hand, and Britain and its Parliament on the other.[34] Nothing in the background to the preparation of the Statute of Westminster lends credence to the notion that the legal and conventional relationship was to be based on anything other than full equality between Canada and the U.K. and hence between the Canadian and U.K. Parliaments. Moreover, in spite of the suggestions of the U.K. Foreign Affairs Committee Report, nothing on the record suggests that federal states such as Canada and Australia as commonwealth members were viewed by participants as different in their legal status or in their constitutional relationship with the U.K. or the U.K. Parliament.[35]

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[31]*Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929*, Ottawa, King's Printer, 1930, at 10.

[32]*Supra*, note 13.

[33]Section 7(1) of the Statute provided that;

> "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts 1867 to 1930, or any order, rule or regulation made thereunder."

The effect of this subsection was to maintain the constraints imposed upon the Dominion Parliaments under the *Colonial Laws Validity Act, 1865*, making it impossible for the Parliament of Canada alone to repeal, amend or alter any of the *BNA Acts*, 1867 to 1930. The effect of section 7(1) was to maintain the existing constitutional convention respecting amendments to the *BNA Act*, that is, the requirement for the request and consent of Canada for such amendments to be expressed by a joint address to the Crown.

[34]As Duff, C.J.C. stated in *Reference Re Weekly Rest in Industrial Undertakings Act, supra*, note 25, at 676, in respect of the recognition of equality of status enshrined in the *Statute;*

> ". . .three declarations signalize in a striking way the *fundamental dogma of equality*. The first is in the preamble, and is concerned with the royal style and title and the succession to the Throne. In respect of these, the preamble declares that no alteration in the law could be made consistently with the constitutional position except with the consent of all. Then there is the declaration that no statute of the United Kingdom should have effect in any Dominion as part of its law without the consent of that Dominion. And lastly, it is declared that nothing in the Act shall be deemed to give the Parliament of Canada power to amend the B.N.A. Act. These reservations bring into relief the sweeping character of the legislative authority which is possessed by the Parliament of Canada and legislatures combined." (emphasis added.)

[35]As the Chief Justice again observed in *Reference Re Weekly Rest in Industrial Undertakings Act, supra*, note 25, at 677, in reference to the 1926 Balfour Declaration, reaffirmed by the 1930 Imperial Conference;

> "The possession of equality of status with Great Britain in respect of all aspects of external as well as domestic affairs is thus affirmed in language admitting of no dispute as to its intent or effect."

It must also be noted that the Canadian delegates to the 1926, 1929 and 1930 Conferences were exclusively federal representatives. There was no provincial contingent involved, nor, as far as can be determined, was there any suggestion that the Canadian delegation did not have full authority to discuss every aspect of the legal relationship between the U.K. and Canada, even insofar as the effect on provincial law-making powers was concerned. Finally, it must also be borne in mind that the request for and consent to the enactment of the *Statute of Westminster* was given by the Parliament of Canada, speaking for Canada. While, as correctly pointed out by the U.K. Foreign Affairs Committee's report, the joint address from Canada *recited* the fact of provincial concurrence in the enactment of the Statute of Westminster[36], it is a fact that the request for enactment was made from one Parliament to another on the basis of the "root principle" governing inter-Imperial relations — that is, on the basis of equality. There is absolutely no basis in fact or law for the suggestion that by virtue of the *Statute of Westminster* the U.K. Government or Parliament acquired any role whatsoever vis à vis the provinces of Canada as a matter of commonwealth law and convention.

It is, of course, correct that at the request of the Canadian representatives to the 1930 Imperial Conference, section 7(1) was inserted in the *Statute of Westminster* to preserve the status quo and avoid the legal effect of the removal of the constraints imposed by the *Colonial Laws Validity Act*,[37] thereby leaving ultimate legislative authority for material *BNA Act* amendments with the U.K. Parliament.[38] This, however, does not gainsay

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[36]The Joint Address reads in part, as follows:

> "We, Your Majesty's most dutiful and loyal subjects, the Senate and House of Commons of Canada, in parliament assembled, humbly approach Your Majesty praying that you may graciously be pleased to cause a measure to be laid before the parliament of the United Kingdom, pursuant to certain declarations and resolutions (at the Imperial Conferences of 1926 and 1930), and pursuant to certain other resolutions made by the delegates of your Majesty's government in Canada and of the governments of all the provinces of Canada, at a dominion-provincial conference held at Ottawa on (7 and 8 April 1931), the said act to contain the following. . ."

The Resolutions referred to read in part;

> "And whereas consideration has been given by the proper authorities in Canada as to whether and to what extent the principles embodied in the proposed act of the parliament of the United Kingdom should be applied to provincial legislation; and, at a dominion-provincial conference, held at Ottawa on (7 and 8 April 1931), a clause was approved by the delegates of His Majesty's government in Canada and of the governments of all the provinces of Canada, for insertion in the proposed act for the purpose of providing that the provisions of the proposed act relating to the Colonial Laws Validity Act should extend to laws made by the provinces of Canada and to the powers of the legislatures of the provinces; and also for the purpose of providing that nothing in the proposed act should be deemed to apply to the repeal, amendment or alteration of the British North America Acts of 1867 to 1930, or any order, rule or regulation made thereunder. . ."

Contrary to the suggestion contained in the FAC Report (paragraph 45), there is nothing in the above text which can arguably be said to reflect a constitutional convention that the provinces were to be part of the constitutional amendment process.

[37]See *supra*, note 33.

[38]See Wheare, *The Statute of Westminster and Dominion Status* (1953), at 1976-184.

the fact that as a matter of commonwealth law, the "root principle" of equality of status remained the governing norm. It would have been a denial of this norm for the U.K. to assert some right or some sort of relationship vis à vis the provinces of Canada.

When one examines the constitutional context of the *Statute of Westminster*, one sees an application of the inter-commonwealth relations doctrine of equality in status merging with the international legal norms respecting state sovereignty. International law notions of sovereignty have therefore become part and parcel of the law of commonwealth relations. The more correct articulation of Mr. Lauterpacht's theory that international law is merged with commonwealth law is rather as follows: Commonwealth law is founded on equality in status. Recognition of the full sovereignty of commonwealth states in 1931 and subsequently by state practice evidences this legal fact. Sovereignty, whether under international law or commonwealth law, requires non-interference in the internal affairs of the other.

CONTENTS OF A QUASI-TREATY RELATIONSHIP

The Report of the U.K. Foreign Affairs Committee makes two important assertions: first, that the history of the drafting of the *Statute of Westminster* reveals an intention on the part of Canada, through its representatives and Parliament, that the U.K. Parliament was to retain a certain "guardianship" or "trusteeship" over the federal structure of Canada to the extent that automatic amending action by the U.K. Parliament was not envisaged.[39] Second, the U.K. Parliament consequently owes a *duty* or *responsibility* to the Canadian people or community "as a federally structured community which has left its ultimate legal constituent powers in the hands of the U.K. legislature".[40] Thus, the Report asserts in a very broad fashion:

> "It seems to us that all Canadians (and thus the governments of the provinces, too) have, and have always had, a right to expect the U.K. Parliament to exercise its amending powers in a manner consistent with the federal nature of the Canadian constitutional system, *and not to act as an automaton or mere agent or tool of any one government or legislature within that system.*"[41]

It is difficult to know how such authority on the part of the U.K. Parliament is sustainable on any sort of quasi-treaty basis. As was demonstrated the central nature of treaty law is the double criterion of consent and symmetry. With respect to the latter, any quasi-treaty relationship would have to have sprung from the relationship between the

[39]Foreign Affairs Committee Report, *supra*, note 7, particularly paragraphs 52, 73, 83 and 103.

[40]*Ibid.*, paragraph 103. See also conclusions, paragraphs 8 and 9.

[41]*Ibid.*, paragraph 103. (emphasis added.)

two governments or their Parliaments. There can be no basis for a direct legal or conventional relationship between the U.K. Parliament and the people or provinces of Canada, unless such a relationship had been formed by the express consent of Canada, speaking through its Parliament. This brings us to the essential element of consent.

The Select Committee Report concludes that nothing in the 1926 or 1930 Imperial Conferences, or in the *Statute of Westminster* itself, evidences a requirement of automatic action on the part of the U.K. Parliament when it receives a request for constitutional change from the Canadian Parliament. It goes on to say that nothing in constitutional practice since 1931 supports the subsequent developmet of such a rule.[42] From this, the Report concludes that, since there is no evidence of a requirement of automatic action, it must surely follow that the U.K. Parliament has the responsibility of examining the constitutional propriety of a request from the Canadian Parliament to determine whether such request has the deemed degree of provincial consent.[43]

To justify such an assertion on the basis of international law, however, the proponents of the right of the U.K. Parliament to look behind a request by the Parliament of Canada must show and express an unequivocal consent by Canada — the equal partner in such a relationship — to such action. An examination of the record of the 1926, 1929 and 1930 Conferences reveals not the least evidence of such consent. Even admitting that the records do not expressly reveal a stated belief in the requirement for automatic action, nothing in the records of the conferences demonstrates that Canada, through its representatives or its Parliament, consented to a role by the U.K. Parliament such as the report asserts. The phrase "appropriate Canadian authorities" used in the ODL Report and the references to provincial consultations in the records of the 1930 Imperial Conference cannot support the conclusions which the Foreign Affairs Committee draws. As Matas, J.A. noted in the Manitoba Court of Appeal Reference,[44] the effect of the *Statute of Westminster* was simply to preserve the status quo and the making of amendments to the *BNA Act* exactly as they had been made prior to the statute — by Joint Address. Joint Address, therefore, remains by virtue of the *Statute of Westminster,* the *only* method of constitutional change that was preserved.

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[42]*Ibid.*, paragraph 62.

[43]In saying this, the Report also concluded (paragraph 114) that it is also the prerogative of the U.K. Parliament to impose its own version of an appropriate amending formula, choosing the 1971 "Victoria Formula" as the formula which, in its view, is one which had roots in the historic structure of Canadian federalism and which also broadly followed the proposed post-patriation formula. This is perhaps one of the more blatant elements of intercession in Canadian affairs contained in the report. Of course, as noted earlier in this article, in its last report the Committee changed its tune in light of the November 5, 1981 agreement between the federal government and all provincial governments save Quebec on the elements of a patriation "package". *Supra,* note 5, at p.vi.

[44]*Reference Re Constitution of Canada* (1981) 117 D.L.R. (3d) at 38.

The records, in sum, are at the very most equivocal, vague and unclear as to the recognition of a right, duty or responsibility of the U.K. Parliament to look behind a federal request for amendment, even where provincial opposition is voiced. On the contrary, to sustain some form of relationship akin to treaty, international law requires incontrovertible evidence of a consent that is *precise* and *clearly expressed*, showing an unambiguous intention to enter into a quasi-treaty relationship of the kind asserted by Mr. Lauterpacht and the Foreign Affairs Committee. In the absence of such clearly expressed consent, the U.K. Parliament would be in breach of an international law duty to not interfere in the affairs of Canada if it undertook an examination of a federal request for amendment.

Thus, the record discloses no clear evidence that Canada, through its federal authorities, consented to a role of the U.K. Parliament that would permit it to look behind a federal request for constitutional change to inquire as to the degree of provincial concurrence. On the contrary, developments before and after 1931 strongly support the argument that there is an obligation, indeed a duty, of "automatic" action on the part of the U.K. Parliament that is owed by it to the Canadian Parliament. Put another way, the facts clearly point to the existence of a commonwealth convention which may well amount to an international legal obligation that the U.K. Parliament will act as requested and when requested by its sister Parliament in Canada in matters of constitutional change. The basis for such a conclusion is as follows:

1. The FAC Report emphasizes the circumstances surrounding the 1907 BNA Act amendment and the statement made by Mr. Churchill in the House of Commons.[45] Clearly, the 1907 amendment is not representative of the proper view of the existing convention between Canada and the U.K. Even if the 1907 Bill was altered against the wish of the federal government, which is not clear, this instance pre-dates the important developments in constitutional evolution following the First World War, particularly the Imperial Conferences of 1926 and 1930 and the *Statute of Westminister* and is therefore entirely out of context.

2. Apart from the 1907 amendment, there have been thirteen *BNA Act* amendments, and several other important constitutional enactments, and in none of these instances did the U.K. Parliament

[45]The *BNA Act, 1907*, altered the grants secured by the provinces under section 118 of the *BNA Act, 1867*. The government of British Columbia opposed the alterations of the grant system, and in particular opposed the inclusion in the amendment of the words "final and unalterable" as proposed by the Parliament of Canada in its joint address. In introducing the 1907 amendment in the U.K. House of Commons, Mr. Churchill indicated that the objectionable words had been deleted from the Bill in deference to the representations of the province. (HC Parl. Deb., Fourth Series, vol. 175, vols. 1616-17 13 June 1907)

in its collective action look behind the request from the Canadian Parliament.[46]

3. Not only did the U.K. Parliament, prior and subsequent to 1931, not look behind a federal request for constitutional amendment, successive statements by government spokesman have clearly affirmed the existence of a duty owed directly to the Canadian Parliament.

The Foreign Affairs Committee Report downplays to the point of insignificance these successive statements and misleadingly suggests that they can only be of value in relation to the specific circumstances in which they were made and that they did not entail commitments of automatic action in response to any and every request. This is an incorrect conclusion, both in terms of constitutional convention and in terms of international law. The proper interpretation to be placed on these very important statements is that in cumulative effect they confirmed the *belief* by the U.K. Parliament and government in the existence of a *duty* owed to the Canadian Parliament to enact whatever may be presented to it by the Canadian Parliament. These statements reinforce the basis for the action which the U.K. Parliament indeed undertook on the face of the Canadian requests. The combination of successive instances of virtual automatic action by the U.K. Parliament, combined with these authoritative statements by successive U.K. governments as to the necessity for so acting, are irrefutable evidence of the existence of a commonwealth convention which may well amount to an obligation akin to treaty under international law. What could more evidence the belief in a duty to act than the words of the Solicitor-General (later Lord Chancellor) Sir William Jowitt on July 10, 1940:

> "My justification to the House for this Bill — and it is important to observe this — is not on the merits of the proposal, which is a matter for the Canadian Parliament; if we were to embark upon that, we might trespass on what I conceive to be their constitutional position. *The sole justification for this enactment is that we are doing in this way what the Parliament of Canada desires to do*. . .In passing this Bill, we are merely carrying out the wishes of the Dominion Parliament in accordance with the constitutional position. . .It is sufficient justification for the Bill that we are morally bound to act on the ground that we have here the request of the Dominion Parliament and that we must operate the old machinery which has been left over at their request in accordance with their wishes."[47]

Similar statements relating to the *duty* of the U.K. Parliament were made during the debate in the House of Commons at the time of the 1943

[46]The complete history of these amendments was recited in the judgement of the Supreme Court of Canada, in both the majority and dissenting opinions in *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1981), 125 D.L.R. (3d)1.

[47]House of Commons Debates 1940, at 1180-81. (emphasis added.)

BNA Act amendment[48] and, importantly, by the Labour Solicitor-General in 1946 (confirming what the Conservative Solicitor-General said in 1940):

> "The Bill comes to this House from another place. It deals, of course, with a matter which is primarily within the discretion and judgement of the Canadian Legislature. The Canadian Legislature had decided upon this change, and is desirous that legislation in the terms of its Address to His Majesty should be enacted as speedily as possible by the United Kingdom Parliament. I hope that the House will agree that it would be proper to accede to the desire of the Canadian Legislature, and I accordingly ask that this Bill may be accorded a Second Reading. I would add that, in view of the wish of the Canadian Legislature that the matter should be dealt with expeditiously, I hope that the House will be able to see its way to pass the Bill through its remaining stages this morning."[49]

These important statements were clear affirmations of a general principle and — contrary to what the Foreign Affairs Committee has suggested — are *not* qualified in any way that could distinguish them from the present context. These views were successively repeated in unqualified fashion in 1976, 1979 and 1980 in governmental statements in Parliament.[50]

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[48]In the case of the 1943 amendment, the Deputy Prime Minister, Mr. Attlee, said, in reply to whether there had been opposition to the measure in Canada:

> "I have no information as to any Province objecting, but, in any case, the matter is brought before us by an Address voted by both Houses of Parliament, and it is difficult for us to look behind that fact."

Other statements made in course of debate, particularly by Sir Edward Grigg, indicate the view that it was "improper' for the U.K. Parliament to question the discretion of a sister Parliament. House of Commons Debates 1940, at 1102-3.

[49]While admittedly, use of the word "primarily" may render the above passage less absolute than the statement by Sir William Jowitt in 1940, the two must be read in conjunction and in relation to action taken in respect of all other *BNA Act* amendments since 1871, save for 1907.

[50]June 10, 1976: Mr. Hattersley; July 25, 1979, Lord Trefgarne; July 27, 1979, Mr. Luce; all reproduced in Annex VI to the Minutes of Evidence, November 12, 1980 Foreign Affairs Committee, session 1979-80, Cmmd. 362-XXI. In addition, Prime Minister Thatcher, in reply to a question in the House of Commons, said on December 9, 1980:

> "We have as yet received no request from Canada. When a request comes, we shall try to deal with it as expeditiously as possible and in accordance with precedent."
>
> "On 14 previous occasions the House has been asked to deal with a request from the federally elected Parliament of Canada. It has been done so in accordance with well-established precedent, bearing in mind that we are an elected Parliament and that the Federal Parliament is a similarly elected Parliament. When we receive the request, we shall try to deal with it as soon as we can."

On December 19, 1980, the Lord Privy Seal defined the U.K. Government's position in the House of Commons as follows:

> "The British Parliament. . .is *bound* to act in accordance with a proper request from the Canadian authorities and cannot refuse to do so. The British Parliament and Government may not look behind *any* federal request for amendment, including a request for patriation of the Canadian constitution."

(House of Commons Debates 1980, at 1049.) This statement reiterates in almost identical language the conclusion contained in the Background Paper of October 2, 1980, prepared by the Legal Bureau of the Department of External Affairs, Ottawa, *supra*, note 2.

The cumulative effect of these affirmations, combined with the action taken by the U.K. Parliament, amount to recognition of a duty to act which may well amount to an international legal obligation on the part of the U.K. and its Parliament.

In addition to the presumptive facts supporting the existence of a legal or quasi-legal duty as described above, the U.K. Parliament by analogy to and extrapolation from general principles of international law may be *estopped* from denying the existence of such duty as a result of its past actions. In his evidence before the U.K. Committee, Dr. Marshall pointed out that statements by U.K. Ministers in the past have led the Canadian government to believe that there exists a requirement for automatic action.[51] The Committee claims that none of the statements since 1931 need be interpreted as going so far. However, the contrary may be the case. These precise and successive statements, the most recent one made by the Lord Privy Seal in Parliament on December 19, 1980, in clear terms stating that the U.K. Parliament is "bound", may now estop the U.K. Parliament from denying the existence of the rule thus expressed.[52] What could be more convincing of a duty to act than clear affirmations of that duty by persons who have the authority to make such statements?

CONCLUSIONS

Constitutional amendment in Canada involves the application of commonwealth conventions as between the U.K. and Canadian Parliaments. These conventions may have become incorporated into or merged with rules of international law. There are strong arguments, therefore, that there is a relationship between Canada and the U.K. in the matter of constitutional amendment which is subject to the rules of international law.

As a matter of international law, the two fundamental principles that govern the relationship between Canada and the U.K. are (a) Canada's sovereign status and (b) the duty owed by the U.K. to not interfere in the internal or external affairs of Canada.

The foregoing principles are reinforced by the recognition of the sovereign and equal status of all commonwealth members and their Parliaments vis à vis the U.K. and its Parliament as expressed by the

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[51] *Supra*, note 7, Volume II, Minutes of Evidence and Appendices, at 94.

[52] The concept of estoppel, or preclusion as it has been called, has been applied in several important international law cases whereby a state has been held bound by its statements or conduct as against another state. *Case Concerning the Arbitral Award of the King of Spain* (Honduras v. Nicaragua), I.C.J. Reports 1960, at 2; *Temple of Preah Vihar Case* (Cambodia v. Thailand), I.C.J. Reports 1962, at 6. See also Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957), 33 B.Y.I.L. 1976.

Imperial Conferences of 1926 and 1930 and by the adoption of the *Statute of Westminster, 1931.*

It is clear that the status of federal states within the Commonwealth and under international law is no different from that of unitary states. Moreover, because of the constitutional position in Canada; (a) only federal authorities can speak on behalf of Canada in matters of foreign affairs and (b) the provinces have no *locus standi* under international law or in matters of constitutional change vis à vis the U.K., where federal authorities alone have exclusive competence.

Thus, by virtue of international law — reinforced by Canadian constitutional law — any relationship akin to a treaty relationship subject to rules of international law could only have been expressed as between Canadian federal authorities on the one hand and U.K. authorities on the other. In the matter of constitutional change, it was the respective Parliaments that expressed the nature and contents of such a relationship.

Because the essence of treaty relationships (whether written or oral) is consent, there must be a clear and unambiguous statement of consent by or on behalf of Canada that would permit the U.K. Parliament to examine or reject a request for constitutional amendment by the Canadian Parliament. In the absence of consent, the U.K. may be in breach of an international legal obligation to not interfere in the internal affairs of Canada if it did anything except enact the request as made to its Parliament by the Parliament of Canada. The records do not disclose any clear statement of such consent by or on behalf of Canada that would permit the U.K. or its Parliament to interfere in any manner in the internal affairs of Canada.

Contrary to the contention of the Foreign Affairs Committee Report, actions by the U.K. Parliament since 1871, combined with successive and consistent statements by authoritative government spokesmen have clearly affirmed the recognition of a *duty* owed by the U.K. Parliament to the Canadian Parliament. These actions and statements may well amount to legal undertakings toward Canada, particularly when viewed against the background leading to enactment of the *Statute of Westminster.* These factual matters must prevent the U.K. under international law from denying the existence of such a duty or from unilaterally altering the nature or contents of such a duty.