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Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction

Constitutional Conventions

V. Can conventions become laws? 2: Patriating the Canadian constitution

As chapter seven suggested in discussing the Lords' disinclination to invoke its delaying powers under the Parliament Act 1949, there may be areas of constitutional practice in which conventional reluctance to deploy legal authority eventually leads to the law shedding its political legitimacy. This chapter indicates that conventions might plausibly be seen as a melting pot in which differing concentrations of legal and political ingredients are constantly mixed. If so, we might ask if a diametrically opposite process to delegitimisation could occur? Might it ever be possible for conventions to have been respected for so long, become so precisely defined, and be so important, that they could 'crystallise' into laws?

One obvious way to give conventions legal effect is to enact them as statutes. The Parliament Acts are themselves an illustration of that process. A more radical proposition is that the courts can achieve that effect through the common law. *Crossman Diaries* suggests the courts can de facto do so by finding that the common law 'coincidentally' mirrors conventional understandings. This is not the same however, either in symbolic or practical terms, as de jure acknowledgement of crystallisation. Events in the early 1980s offered an opportunity for that constitutional development to occur.

Patriating the Canadian constitution

The country of Canada, as a legal entity, was created by the UK Parliament's British North America Act 1867. The Act gave Canada a federal structure, which, reflecting the USA's system, granted some powers to the national Parliament and government, and others to the (now) ten provincial governments and legislatures. However, while the USA's Constitution could be amended by its 'people', the British North America Act required 'Canada' to ask Westminster to enact amending legislation. In the 1931 Statute of Westminster, the UK Parliament recognised that several of its former colonies had de facto achieved the status of independent nations. Section 4 provided:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend ... to a Dominion as part of the

> law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented, to the enactment thereof.

Section 4's political consequence seemed to be that Parliament had sought to bind its successors never to legislate on Canadian issues unless requested to do so by 'Canada'. That consequence would of course be a legal impossibility if one adhered to orthodox notions of parliamentary sovereignty.[1] The 1931 Act also permitted the Canadian national Parliament to amend some parts of the Canadian constitution through domestic procedures. But 'Canada' was still obliged to place a Bill before the UK Parliament to amend the balance of power between the national and provincial spheres of government.

However, the Act did not specify what was meant by 'Canada'. Was this just the national Parliament, or the national government; or some or all of the Provinces as well; and/or the country's various racial and ethnic sub-groups? Nor did the Act say if there were circumstances in which the British Parliament might refuse to enact a measure passed from 'Canada'.

During the next fifty years, two conventions filled these legal gaps in the Canadian and UK constitutions. The first was that the Canadian national government would not send a Bill to Britain which altered the national/provincial division of power unless it enjoyed the support of all Provinces. The second was that the British Parliament would always enact Bills sent by the Canadian national government. The conventions arose (to adopt Asquith's typology) through 'tradition', 'unbroken practice' (several amendments had been effected in this way) and a lengthy passage of time (some fifty years). Their force was further strengthened by codification in a national government white paper published in the 1960s.

The reasons for the conventions are readily apparent. The first ensures that the federal nature of Canada's governmental system was safeguarded against unilateral amendment by the central legislature, or factional alteration by a majority or even minority of provincial governments. The particular form of federalism provided for by the allocation of powers between the national government and the provinces, in other words, sat atop Canada's hierarchy of constitutional principles. The second acknowledges that 'Canada' had achieved sufficient economic and political maturity to wield de facto, if not de jure control of its own constitutional destiny.

In the late 1970s, Pierre Trudeau's national government wished to 'patriate' the Canadian constitution—to make all amendments a matter solely of domestic law. The patriation Bill also contained proposals significantly to amend federal/provincial relations. The Bill provoked considerable controversy in Canada; its contents had been supported by only two provincial governments.[2] The Bill's opponents pursued two strategies to

[1] As a matter of Canadian constitutional law however, one may safely assume that Canadian courts would not obey a subsequent British statute purporting to restore Parliament's previous authority. Nor, one assumes, would Parliament ever legislate in such a way. This 'transfer of sovereignty' to Canada was the source of Lord Sankey's oft-quoted dictum in *British Coal Corpn v R* (1935] AC 500 at 520, PC: 'It is doubtless true that the power of the [UK] Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired .... But that is theory and bears no relation to realities'.

[2] For a detailed examination of the background see Romanov R, Whyte J and Leeson H (1984) *Canada notwithstanding*, esp chs 3–4.

prevent its passage. The first attempted to convince the British Houses of Parliament that the Bill had not been sent by 'Canada', and should therefore not be enacted. The second involved litigation before the Canadian Supreme Court to establish firstly that the Canadian constitution recognised a convention that demanded unanimous provincial consent before the Bill could be sent to Westminster; and secondly that the Canadian courts could give that convention legal effect.

The opinion of the British House of Commons

The Canadian crisis presented Mr St John Stevas' newly invigorated Commons Select Committee system[3] with an opportunity to engage in a non-partisan investigation of constitutional principle and practice. The first Thatcher government had indicated that it had no power to look behind a Bill sent from the Canadian national government to examine the basis of consent which the measure had attracted. Any such Bill, would, per the second aforementioned convention, be introduced into Parliament. But as we have already established, there is no legal mechanism through which the three constituent parts of Parliament can be compelled to approve a Bill.[4] The question the Select Committee addressed was whether the Commons was morally or politically obliged simply to approve any Canadian Bill, or whether it should satisfy itself that the first of the aforementioned conventions (that the Bill enjoyed unanimous provincial support) had been satisfied. After taking evidence from many expert. academic and political sources, the Committee produced a report rejecting the Trudeau government's presumption that Parliament should unquestioningly enact any Canadian Bill.[5] The Committee suggested that the Commons was under no conventional obligation to approve a Bill enjoying so little provincial support. But nor need it withhold approval until unanimous support was obtained. Rather, it concluded:

> All Canadians (and thus the governments of the provinces too) have, and always have had, a right to expect the UK Parliament to exercise its amending powers in a manner consistent with the federal nature of the Canadian constitutional system …[6]

This expectation could be met if Parliament required Canadian Bills to enjoy a 'substantial' degree of provincial consent. The Committee proposed a complex formula, relating to geographical location and population patterns to determine if substantial consent had been achieved. Without such consent, Parliament could properly refuse to enact a Canadian Bill.

The Select Committee report nevertheless left several important questions unanswered. For example, if the two houses approved the Bill, would British courts override traditional understandings as to parliamentary privilege and Art 9 of the Bill of Rights and prevent the Bill being sent for

[3] See 'The 1979 reforms',ch 5, pp 150–152. For a detailed account of this stage of the episode see Romanov et al op citch 5.
[4] Although the Lords' objections could be by-passed by use of the Parliament Act 1949.
[5] House of Commons Foreign Affairs Committee (1981) *British North America Acts: the role of Parliament*.
[6] House of Commons Foreign Affairs Committee (1981) op cit at para 103.

the Royal Assent in a manner reminiscent of the *Trethowan* scenario?[7] Equally fascinating was the question of whether, if the British courts refused to intervene, the Queen would breach the convention of acting on her Ministers' advice and withhold her assent. Or, assuming assent was given, would a British court disregard the enrolled Bill rule and refuse to apply the statute? No doubt to the regret of constitutional lawyers, most of these questions never required a concrete answer. The eventual solution to Canada's difficulties was provided by its own Supreme Court.

The judgment of the Canadian Supreme Court

In *A-G of Manitoba v A-G of Canada*[8] the Canadian Supreme Court confirmed that there was a convention, established by years of practice and acknowledged by former federal governments, that the British Parliament should only be sent Bills supported by a substantial number of provinces. Two out of ten was not substantial. Consequently the federal government was breaching this constitutional convention. The reason for the convention was to ensure that 'Canada' retained its distinctively federal system of government.

Having recognised a convention of substantial provincial consent, the Court concluded that while a convention could be admissible as evidence in helping judges decide the correct legal response to a particular problem, it could not become a law, no matter how long it had been respected and no matter how important a principle it embodied. Conventions were not justiciable, and could not become so. 'Crystallisation' was a figment of overactive legal imaginations. The Supreme Court could not stop the Trudeau government sending the Bill to Britain.

But by laying such stress on the importance of the convention of substantial provincial consent, the Supreme Court completely undermined the legitimacy of the federal government's efforts to ignore the Provinces. It was not possible as a matter of morality or political practicality for the government to go ahead.[9] The initial Bill was therefore withdrawn, and the Trudeau government re-opened negotiations with the Provinces in order to produce a conventionally legitimate patriation proposal. A Bill was eventually produced which attracted the support of nine Provinces. This Bill was subsequently sent to the Westminster Parliament, where it was enacted as the Canada Act 1982.

We can only speculate as to how a British court would have viewed an 'Act' which seemed to alter Canadian law but did not contain any reference to Canadian consent to its terms. The Diceyan view would be that any such reference is unnecessary—for the courts to demand it would amount to recognition of 'manner and form' entrenchment as a valid principle of British constitutional law, and thereby create a new 'ultimate political fact'. The whole basis of the constitution would then be undermined; for if we accept one statute is 'special' because of the political substance of its subject

[7] See 'A-G for New South Wales v Trethowan (1931)',ch 2, pp 36–37.
[8] [1981] 1 SCR 753, sub nom *Reference re Amendment of Constitution of Canada (Nos 1, 2, 3)* 125 DLR (3d) 1. For other critiques from a British perspective see Turpin (1990) op cit pp 102–115; Allan T (1986) 'Law, convention, prerogative: reflections prompted by the Canadian constitutional case' *Cambridge LJ* 305.
[9] See Romanov et al pp 183–190.

matter, there is no logical barrier to prevent other 'special' statutes emerging, and indeed for different statutes to enjoy different degrees of 'specialness' according to the enacting Parliaments' and interpeting courts' perceptions of their political importance.