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The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing

Hon. Allan E. Blakeney*

Professor Whyte, in his article "Sometimes Constitutions are Made in the Streets: the Future of the *Charter*'s Notwithstanding Clause," raises some intriguing points.[1] He gives a historical review of the origin of the "notwithstanding" clause as it appears in the *Canadian Charter of Rights and Freedoms*,[2] enacted in 1982. In the course of so doing, he appears to propose a distinction between "rights" – those claims which are included in the *Charter*, and "policies" – those claims which are protected by the activities of the legislative and executive arms of government. This is, I argue, a false dichotomy. It leads to the conclusion that the use of the "notwithstanding" clause can only amount to a suspension of rights in favour of achieving government policy.

In this paper I argue that the framers of the *Charter* selected specific rights and freedoms for constitutional protection knowing that infringements of those rights by the state would appropriately be dealt with by the courts. The decision to leave other rights out of the *Charter* was made knowing that those other rights would best be enforced by the legislative, executive, and administrative arms of government. Section 33, the "notwithstanding" clause, was included in the *Charter* to ensure that the state could, for economic or social reasons, or because other rights were found in the circumstances to be more important, choose to override a *Charter*-protected right. This involves an acceptance of the idea, which I believe to be correct, that the rights enumerated in the *Charter* are *not* more important than other human rights. The belief that the rights enumerated in the *Charter* are somehow more important than other human rights is unsound. The *Charter* should not be regarded as creating a hierarchy of rights.

The rights included in the *Charter* were selected not because of their importance, but rather because of the way they were to be defined and enforced. Where the likely violator of a human right is the state, and where enforcement is largely by way of prohibition of state action, the best instrument for enforcing the right is the judicial system. Conversely, where the likely violation of a human right stems from the operation of the economic and social systems, then the best instruments for enforcing these rights are the legislative, executive, and administrative arms of government.

I contend that in the protection of human rights there will be instances where rights collide, and that there will need to be a mediating mechanism. Section 1 of the *Charter* can serve such a role. Section 33, the "notwithstanding" clause, can also serve such a role. But neither can serve the role adequately unless it is made clear to the public how each functions and what its purpose is. The public cannot be properly informed if the language used in *Charter* discourse refers to a "suspension of rights"[3] or a weighing of the "relative importance of rights

and legislated social purposes"[4] when either section 1 or section 33 is invoked.

To make my point I will embark upon a more detailed review of human rights as this term is understood in the political and judicial world of Western democracies, and particularly in Canada.

Developing Human Rights – A Brief History

In Canada, we are heirs to many proud traditions. The way we govern ourselves and think about government has come to us from the great traditions of Greece and Rome and from the Near East.[5] These traditions settled in Western Europe and came to Canada with the early settlers from Britain and France.[6] After the fall of New France in 1759 and 1760, British ideas of government and justice came to dominate the way that Canadians think about how they govern themselves.[7]

In this way the history of Britain, and British thought about governments and rights, has become part of our history. The British developed from a feudal system in the Middle Ages, to the divine right of kings, to parliamentary democracy where citizens began to have rights and freedoms. Thomas Hobbes contended that for an ordinary person the greatest freedoms were to have food and shelter and to be free from threats to life, well-being, and property.[8] These freedoms were necessary so that a citizen could raise a family. He said (to oversimplify) that in order to enjoy basic rights, the citizen had to give up his rights to freedom of speech, freedom of religion, and many other freedoms in favour of the monarch or central authority. John Locke essentially agreed with Hobbes but said that it was not necessary for the monarch or central authority to have all of these powers in order to guarantee to the citizen the basic freedoms. The citizen should be able to enjoy these basic freedoms and *participate* in the government by the monarch or central authority.[9]

For the last 350 years societies in Britain, much of Western Europe, the United States, Canada, and elsewhere have been in a debate on how much authority must be exercised by the monarch or central authority and how much should remain with the people. This is the enduring question at the root of all democratic governments. Citizens cannot enjoy unrestricted freedom – unrestricted rights. Rights collide, freedoms collide.

What we have witnessed over time is the gradual development of a consciousness that people, because they are human, have certain rights: "inalienable rights" as they are sometimes called, though a great number of them seem to have been alienated at one time or another. This gradual development came in part as a result of writers such as Voltaire[10] and Rousseau in France, Thomas Jefferson in the United States, and the Englishman Tom Paine, who in 1791 and 1792 wrote a seminal work called *The Rights of Man*.[11] Bills of Rights emerged in Britain and the U.S. In Britain, the Glorious Revolution of 1688 culminated with the Bill of Rights.[12] The United States in 1789 produced a Bill of Rights, the name given to the first ten amendments of the U.S. Constitution.[13]

During the nineteenth century, ideas of human rights gradually expanded. Then came the twentieth century and World War I. This was a cataclysmic event. It toppled some of the great monarchies of the world, including the German Empire, the Austro-Hungarian Empire, and the Russian Empire. It also gave to many who fought and survived a belief that somehow they had earned a right to greater freedom, whatever that might mean.

The years that followed World War I, and particularly the years of the world-wide depression, were years of great economic privation and, accordingly, years when traditional human rights were frequently ignored. Large numbers of people throughout the globe had great difficulty attaining the "Hobbes basics" of food, shelter and the ability to rear a family. It became all too evident that if there were not acceptable minimums of these basic freedoms, the public was not prepared to defend traditional human rights against those who promised food, shelter, and safety.

World War II followed. In his State of the Union Address to Congress of 1941, which has come to be known as the "Four Freedoms speech," President Franklin D. Roosevelt set out four essential freedoms: freedom of speech, freedom of religion, freedom from fear, and freedom from want.[14] He attempted to include in one broad definition of freedom, those freedoms of the human spirit articulated by philosophers from Locke to Voltaire to Jefferson to Paine with the elemental freedoms that I have called the "Hobbes basics." These ideas of what freedoms we should seek in a postwar world gained support from the oft-discussed visionary war aims that sought to shape the Second World War as a war for human freedom.

The immediate post-World War II years commenced a new era in rights and freedoms. For much of the Western world there was economic stability and comparative material prosperity, fuelled by the efforts to wage war and by a relatively enlightened approach to post-war reconstruction. The basics of food and shelter, as described by Hobbes, were met, thus allowing the concept of other rights and freedoms to flourish.

In 1945 the United Nations was created after delegates of fifty nations met in San Francisco for the United Nations Conference on International Organization. Its overarching objective was to attempt to build a framework that would preserve international peace. Its first and arguably most important document was the *Universal Declaration of Human Rights*,[15] signed on December 10, 1948 by forty-eight states. The Universal Declaration contains thirty articles which articulate international human rights standards. Following the signing of the *Declaration*, the *International Covenant on Civil and Political Rights*,[16] and the *International Covenant on Economic, Social and Cultural Rights*,[17] which elaborate on the rights articulated in the *Universal Declaration,* were signed. Together, the three documents comprise the *International Bill of Human Rights*.

The very substantial ratification of these declarations and covenants by a large number of countries so that the declarations and covenants entered into force, at least as ideals, indicated a growing acceptance across the world of the willingness of governments to provide – to the extent they could given other competing needs and rights – a minimal standard of freedom of speech, freedom of thought and religion, freedom from fear, and freedom from want. This process of articulation and acceptance continues until this day.

Enforcing Human Rights

Declarations and covenants set out objectives to which governments, with greater or lesser levels of sincerity, commit themselves. Declarations and covenants are far from self-enforcing. Whether they bring about any practical changes depends upon the willingness of those with power to design effective internal mechanisms to ensure their protection and enforcement. There is, of course, another very important element. As more countries become democratic, it is critical that any infringements of basic, necessary rights in the interest of, for example, security against external and "terrorist" foes, or in the interest of maintaining a viable economy, or in the interest of preserving a religion or culture, be carefully monitored. The public, and through the public their governments, must be willing to protect basic human rights even in light of other issues of importance.

Through their governments, countries have chosen various instruments for the enforcement of rights. If we divide governmental institutions broadly into legislative, executive and judicial institutions, we note that all have played a major role, both in the direct enforcement of rights and in stimulating public discussion, which allows citizens to understand and appreciate the issues associated with their rights and freedoms.

If we look about the world to see where the most progress has been made in protecting and fostering the four freedoms articulated by Roosevelt, we would, I think, give high marks to countries such as Norway, Sweden, Denmark, Holland, New Zealand, and perhaps Britain, Canada, Australia, France, Switzerland, the United States, and others. Some of these countries have relied heavily on actions by the legislative and executive branches of their govern-

ments, and some have relied more heavily on the judicial branch to protect at least two or perhaps three of the four freedoms. All have felt that if there was to be an acceptable measure of freedom from economic want, and the fear which flows from economic want, then there were major roles for the legislative and executive branches of government. Based upon results throughout the world, it is difficult to conclude that any one mix of instruments of enforcement is markedly superior to any other.

Our approach in Canada is instructive. We sought, through the *Constitution Act, 1867*, to give to Canada a constitution "similar in Principle to that of the United Kingdom."[18] We relied upon the practices of the United Kingdom to establish a regime of rights and freedoms for our citizens. As we, along with the rest of the world, considered and discussed ways to improve our record of ensuring for our citizens an appropriate level of rights and freedoms, and considered how we might implement the declarations and covenants of the United Nations which we had ratified, we passed, for example, the *Canadian Bill of Rights*[19] in 1960 and the *Canadian Human Rights Act*[20] in 1977, and several provinces passed their own provincial human rights acts. But it became clear to many Canadians that our regimes for protecting human rights were not fully effective. They depended heavily on the benevolence and understanding of a majority of the citizens. Without specific mechanisms for the protection and enforcement of rights, our citizens were essentially left to their own devices.

It is true that throughout history a good place to start in protecting rights and freedoms has been to protect them for a majority of the citizens. But clearly that is not enough. Minorities are frequently at risk from intolerant majorities. The idea developed that we ought to provide additional protection for minorities and for those who are disadvantaged, at least to the extent that they lack power and influence in political and economic circles, by giving a special role to the courts to intervene where they believe that the majority, acting through the legislature and the executive, have unfairly deprived the powerless of their rights to freedom of speech, to freedom of religion, and to freedom from fear of state power – the "protection against the state" freedoms. We recognized that this was fundamentally a defensive position. It was recognized that courts were ill-equipped to protect citizens from fears which might arise because of the operation of economic power by non-government entities, and want stemming from their unfavourable economic position – the "protection against economic adversity" freedoms.

So, a body of rights and freedoms was entrenched in our *Constitution Act, 1982* – the *Canadian Charter of Rights and Freedoms* – and the courts were given a special role in protecting the powerless against the breach of these rights and freedoms by the legislative and executive arms of government.

In selecting some rights and freedoms for inclusion in the *Charter*, there was no intention to create a hierarchy of rights in the sense that the rights included in that document were more important than others. Rather, the rights and freedoms chosen for inclusion in the *Charter* were selected because it was reasonable to give the courts a role in their enforcement. On the other hand, it was felt that the courts were ill equipped to enforce freedoms from fear and want.[21] The enforcement of these rights would remain with the legislative and executive branches of government.

It should be noted that the thought was to use the courts to protect the rights of the powerless and the disadvantaged by entrenching those rights in the *Charter*. That, I think, was what the *Charter of Rights and Freedoms* was designed to do. It was not designed to provide that a *Charter* freedom was more important than the freedom from (say) want. Nor was the *Charter* intended to give to the courts any general supervisory role over the way in which legislatures and executives operate to redistribute wealth and power in the society, except to the extent that the courts were to protect the inherent fairness of the decision-making processes in a democratic society.

The *Charter* was not intended and should not be interpreted to give the courts a role in

the distribution of the economic power in society. Thus, the *Charter* right of an individual to "security of the person"[22] does not trump the rights of other groups of persons. Rights and freedoms affecting distribution of economic wealth and power were not to fall to the courts to determine, except to the extent that a person or persons may have been subject to discrimination based upon race, ethnic origin, or like categories enumerated in section 15.[23]

Dealing with Collisions between Rights

The *Constitution Act, 1982* which brought us the *Charter* contemplated that there would inevitably be collisions between rights. Therefore, rights were articulated in broad-brush terms and the language used was intended to set out principles and values rather than particular answers to precise problems. It was recognized that in any dynamic democratic society there should be room for growth of ideas, as there would over time be changes in the public's thinking on rights and freedoms. Therefore, there are several provisions in the *Charter* which allow for changes in approaches over the years. Section 1 talks about limiting rights and freedoms to the extent that the limits can be "demonstrably justified in a free and democratic society."[24] Shortly put, this means that it is up to the legislative and executive branches to justify the limitation of any rights set out in the *Charter*. Limitations must be "reasonable" in the eyes of the court. It is the court that decides the scope of a "free and democratic society" at any given time in our history. Similarly, in section 7 of the *Charter,* persons are not to be deprived of rights "except in accordance with the principles of fundamental justice."[25] Here again it is the courts that are to define what are the principles of fundamental justice – concepts that evolve with time.

We have noted that the *Charter* does not purport to include many of the key rights and freedoms set out in the *International Bill of Rights*. Nor, in my view, does the *Charter* in any way indicate that the rights and freedoms included are more important than other rights to be enjoyed by citizens, notably rights to freedom from fear and freedom from want, where those rights might be infringed by entities which are not governments. The *Charter* limits only governments. I do not think that it was ever intended to suggest that only governments threaten the freedom of citizens.

So it is entirely likely that the rights set out in the *Charter* will come into conflict with other equally important rights which are the responsibility of the legislative and executive arms of government to protect. This eventuality was contemplated by the drafters of the *Charter* when they included section 33. This "notwithstanding" section, as it has come to be known, allows a Parliament or a legislature to declare that it can act notwithstanding the provisions included in section 2 or in sections 7 to 15 of the *Charter*, and this includes decisions of the court about breaches of those sections. In other words, if Parliament or the legislature decides that the breach of a *Charter* right or freedom infringes another right or freedom not set out in the *Charter*, or where political or other circumstances are such that compliance with a *Charter* right will produce undesirable results, Parliament or the legislature may act "notwithstanding" the *Charter* right or notwithstanding a decision of a court that the *Charter* right has been breached.[26] This seems to me to be an elegant way to deal with the inevitable collisions that will occur between rights which we seek to protect through legislative and executive action, and rights which we seek to protect through judicial action. Based upon historical precedent, a strong case can be made for the use of all three arms of government in protecting rights and freedoms.

I think it is important that we formulate the problem as one of protecting the rights and freedoms of citizens – some of the these rights and freedoms are set out in the *Charter of Rights and Freedoms*, some of the rights are set out in other documents including declarations and covenants of the United Nations, ratified by Canada, and some are part of our unwritten constitution. Among these rights there is not a hierarchy of more important and less important, and it is inevitable that rights will come

into conflict with one another. The *Charter* should be viewed not as creating a hierarchy of rights, but rather as articulating those rights for which the courts have an appropriate role in enforcement. Viewed from this perspective, it will be seen that arguments based on slogans such as "a right is a right is a right," and suggesting that a right set out in a charter is a right but that a right to freedom from want as set out in the United Nations *International Covenant on Economic, Social and Cultural Rights* is not a right, are without force.

Responding to Professor Whyte's Article

Professor Whyte's very able article on the future of the *Charter's* "notwithstanding" clause is noteworthy for the power of the implicit as well as the explicit arguments it makes.[27] In this article, he quotes Professor Waldron as setting out two interpretations of section 33. One interpretation is that the section exists to allow the legislature or the executive to decide that a rights breach is not as important as a particular governmental policy. Another is that a legislature may disagree with the court's interpretation of rights and may therefore wish to legislate in the face of judicial conceptions of rights.[28] He pointedly does not include a case where the conflict for the legislative and executive branches of government is over the relative importance of a *Charter* versus a non-*Charter* right. There are circumstances where it is widely accepted by the legislative and executive branches of government, and the public, that a decision must be made about rights that conflicts with a judicial decision about a *Charter* breach. The suggestion in Professor Whyte's article that some rights, because they are not included in the *Charter*, are somehow less important than the rights included in the *Charter* is, in my view, wrong for the reasons alluded to above. To repeat, there are rights which were not included in the *Charter* because they were not on the list of rights where courts have a useful role to play in their enforcement. One thinks of the Hobbesian basics of rights to food and shelter and the rights to rear one's family. But this in no way suggests that these rights and others like them – I would include a right to basic medical care – are less important than some rights included in the *Charter*. This is not simply a case of using section 33 to achieve "governmental policy" (to use Professor Waldron's words).[29] Rather it is a case of using section 33 to protect a fundamental right that is not included in the *Charter*.

It may be that section 33 is not the correct instrument to deal with the situation that arises when a *Charter* right collides with a non-*Charter* right. But that situation cannot be fairly dealt with by denying the existence of the non-*Charter* right, and therefore denying the necessity of the democratic majority suspending a *Charter* right where it serves to undermine and possibly destroy an equally important non-*Charter* right.

Because of the success of the *Charter* enthusiasts in propagating the view that if a right was not in the *Charter* then it was somehow not a right, attempts have been made to explicitly articulate in the Constitution a statement of other rights, notably social and economic rights, so that they would have similar cachet as *Charter* rights. The proposal to introduce into the Charlottetown Accord (1992) a social and economic charter, which would not be justiciable, sought to deal with those who persist in the view that our basic rights come from the historical events which happened in the United States in 1789, and not the rights represented by the history of Britain and Canada before and after the United States Bill of Rights. In 1982, rights to provincial equalization payments were articulated in section 36 of the *Constitution Act* and made non-justiciable. The attempt at Charlottetown to add a constitutional statement of social and economic rights, which would similarly be non-justiciable, failed for other reasons. But that lack of success in no way suggests that these rights did not or do not exist, or that a Canada acceptable to Canadians could long survive without them.

It is not lawyers who tell us what our constitution is. It is not politicians who tell us what our constitution is. In a democratic society it is citizens who tell us what our constitution is, and I believe they have told us that our constitution, in its complete written and unwrit-

ten form, includes, at some level, freedom of speech, freedom of religion, freedom from fear, and freedom from want.

One can only be amused by the tendency of legal scholars to characterize freedom of speech and freedom of religion as "fundamental" rights and freedom from want as not a "fundamental" freedom. In the 2008 earthquake in China by an act of nature, millions were deprived of their basic human rights.[30] The Chinese government marshalled emergency aid, for which it was widely commended and widely criticized – the fate of most governments. But among all the critical comments, I have detected none which deal with its prohibiting advertising to sell cigarettes, or its refusal to allow shops (when they were rebuilt) to open on Sunday, or its prohibition of students carrying ceremonial daggers when they go to school (as soon as they have a school to go to). Another definition of "fundamental freedoms" is at work; and should be.

It is readily conceded that unless there is a good measure of the fundamental freedoms referred to in the *Charter*, democracy will be imperilled. But, equally, unless there is a good measure of economic equality so as to reduce the fear and want of ordinary citizens, democracy will be imperilled. Roosevelt got it right.

Our task is to devise a system which will recognize these realities. It might be argued that the "notwithstanding" clause could be used to protect policy positions which could not fairly be called freedoms. And that must be conceded. The courts, in their zeal to protect *Charter* rights, could ignore what would be widely recognized as non-*Charter* rights. That too must be conceded.

If the "notwithstanding" clause is not the right instrument to mediate the clash of *Charter* and non-*Charter* rights, it would be helpful if scholars would suggest other appropriate instruments.

Perhaps an amendment of the wording of the "notwithstanding" clause would be helpful. Perhaps another attempt to include in the Constitution a statement of non-justiciable social and economic rights would be desirable in order to remind the courts of the existence of important rights whose enforcement has been assigned to other arms of government.

Whatever may be attempted, it is my view that it would be helpful if scholars took pains to formulate the public issues which will inevitably arise in a context of the articulation and enforcement of all human rights which citizens can reasonably expect to enjoy in a free and democratic society.

Notes

* The Honourable Allan E. Blakeney was Premier of Saskatchewan from 1971 to 1982 and is a signatory of Canada's patriated constitution. He is now a visiting scholar at the University of Saskatchewan, College of Law and recently published his memoirs: *An Honourable Calling* (Toronto: University of Toronto Press, 2008).

1 John Whyte, "Sometimes Constitutions are Made in the Streets: the Future of the *Charter*'s Notwithstanding Clause" (2007) 16 *Constitutional Forum constitutionnel* 79.

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 *Supra* note 1 at 80.

4 "Under section 1, governments are required to place their rights calculations before a court and to show how they have weighed the relative importance of rights and legislated social purposes." *Ibid*. at 85.

5 See Richard Wollheim, "Democracy" (1958) 19:2 *Journal of the History of Ideas* 225.

6 See Law Reform Commission of Saskatchewan, *The Status of English Statute Law in Saskatchewan* (Saskatoon: Law Reform Commission of Saskatchewan, 1990).

7 See *Constitution Act*, *1867* (U.K.), 30 & 31 Vict., c. 3, Preamble. British dominance of Canadian constitutionalism is enunciated in the constitution itself where the preamble states: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with *a Constitution similar in Principle to that of the United Kingdom*" (emphasis added).

8 "[W]hatsoever is so tyed, or environed, as it cannot move, but within a certain space, which space is determined by the opposition of some externall body, we say it hath not Liberty to go

further.... *A* FREE-MAN, *is he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to*.... [A]s men, for the atteyning of peace, and conservation of themselves thereby, have made an Artificiall Man, which we call a Common-wealth; so also have they made Artificiall Chains, called *Civill Lawes*, which they themselves, by mutuall covenants, have fastned at one end, to the lips of that Man, or Assembly, to whom they have given the Soveraigne Power; and at the other end to their own Ears. These Bonds in their own nature but weak, may neverthelesse be made to hold, by the danger, though not by the difficulty of breaking them.... The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Soveraign hath praetermitted: such as is the Liberty to buy, and sell, and otherwise contract with one another; to choose their own aboad, their own diet, their own trade of life, and institute their children as they themselves think fit; & the like.... The Libertie ... is not the Libertie of Particular men; but the Libertie of the Common-wealth: which is the same with that, which every man then should have, if there were no Civil Laws, nor Common-wealth at all. And the effects of it also be the same. For as amongst masterlesse men, there is perpetuall war, of every man against his neighbour; no inheritance, to transmit the Son, nor to expect from the Father; no propriety of Goods, or Lands; no security; but a full and absolute Libertie in every Particular man: So in States, and Common-wealths not dependent on one another, every Common-wealth, (not every man) has an absolute Libertie, to doe which it shall judge (that is to say, what that Man, or Assemblie that representeth it, shall judge) most conducing to their benefit." Thomas Hobbes, *Leviathan*, revised student ed. by Richard Tuck (Cambridge: Cambridge University Press, 1996) at 145-149 (emphasis in original).

9 "The great end of men's entering into society being the enjoyment of their properties [Locke defines properties as 'lives, liberties, and estates'] in peace and safety, and the great instrument and means of that being the laws established in that society; the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it.... [The legislative] power, in the utmost bounds of it, is limited to the public good of the society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects." Paul E. Sigmund, ed., *The Selected Political Writings of John Locke: Texts, Background Selections, Sources, Interpretations* (New York: W.W. Norton, 2005) at 72-76.

10 In a letter to M. Damilaville, 1 March 1765, Voltaire reacts to a publication finding that a man Voltaire had believed innocent of parricide and who had been publicly executed on a wheel, had indeed been innocent, but who, in Voltaire's opinion, had been killed in consequence of religious fanaticism. Voltaire revealingly writes of the virtues of a philosopher, reflecting in a simple statement his rather comprehensive views on those virtues that enable free society: "Like the sage of Montbar, like the sage of Voré, he knows how to make the land fruitful and those who dwell on it happier. The real philosopher clears uncultivated ground, adds to the number of plows and, so, to the number of inhabitants: employs and enriches the poor: encourages marriages and finds a home for the orphan: does not grumble at necessary taxes, and puts the agriculturist in a condition to pay them promptly. He expects nothing from others, and does them all the good he can. He has a horror of hypocrisy, but he pities the superstitious: and, finally, he knows how to be a friend." Voltaire also wrote of the British Parliamentary model: "Here follows a more essential difference between Rome and England, which throws the advantage entirely on the side of the latter; namely, that the civil wars of Rome ended in slavery, and those of the English in liberty. The English are the only people on earth who have been able to prescribe limits to the power of kings by resisting them, and who, by a series of struggles, have at length established that wise and happy form of government where the prince is all-powerful to do good, and at the same time is restrained from committing evil; where the nobles are great without insolence or lordly power, and the people share in the government without confusion." Ben Ray Redman, ed., *The Portable Voltaire* (New York: Penguin, 1977) at 508, 513.

11 Thomas Paine, "The Rights of Man, Parts I & II" in Bruce Kuklick, ed., *Paine: Political Writings* (Cambridge: Cambridge University Press, 2000) 57, 155.

12 *An Act declaering the Rights and Liberties of the Subject and Setleing the Succession of the Crowne,* (U.K.), 1688 1 Will. & Mar. Sess. 2 c. 2 (known colloquially as the English Bill of Rights 1689).

13 U.S. Const. amend. I-X.

14 President Franklin D. Roosevelt, Annual Message to Congress on the State of the Union, January 6, 1941.

15 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [UN Charter]; and see *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948); and see *Statute of the International Court of Justice* 26 June 1945, Can. T.S. 1945 No. 7 (annexed to the UN Charter). The UN Charter provides that member states fall within the purview of the International Court of Justice.

16 16 December 1966, 999 U.N.T.S. 171, Can.T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can.T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

17 16 December 1966, 993 U.N.T.S. 3, Can.T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 May 1976).

18 *Supra* note 7.

19 S.C. 1960, c. 44.

20 R.S.C. 1985, c. H-6.

21 *Supra* note 2 at s. 2. As such the fundamental freedoms listed in section 2 of the *Charter* are not an exhaustive list. Also note section 26 which specifically states that the guarantee of rights and freedoms in the *Charter* should "not be construed as denying the existence of any other rights or freedoms that exist in Canada."

22 *Ibid*. at s. 7.

23 *Ibid*. at s. 15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

24 *Ibid*. at s. 1.

25 *Ibid*. at s. 7.

26 *Ibid*. at s. 33(1): "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." A declaration shall operate for at most five years, but it can be extended by re-enactment: *ibid*. at ss. 33(3)-(4).

27 *Supra* note 1 at 79-80.

28 *Ibid*., citing Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada, 2004) 7 at 36 ["Waldron"].

29 Professor Whyte summarizes Jeremy Waldron's claim that the latter class of rights conflicts are "rights misgivings: the executive or the legislature believes that in a particular situation *rights claims are simply not as important as achieving governmental policy* and, therefore, should not be allowed." *Supra* note 1 at 79-80 (emphasis added). Professor Waldron writes: "I think the trouble with the 'notwithstanding' clause is that it requires the legislators to present themselves as having rights-misgivings, when in fact they may not be having rights-misgivings … but rather attempting to legislate in the face of judicial conceptions of rights that they disagree with." Waldron, *supra* note 28 at 37. Professor Waldron is responding to Jeffrey Goldsworthy's claim that the notwithstanding clause was designed to "enable legislatures to override judicial interpretations or applications of Charter rights with which they reasonably disagree." Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy" (2003) 38 Wake Forest Law Review 451 at 452. Note that Professor Goldsworthy is of the opinion that the section 33 "notwithstanding" clause is not required for legislatures to balance competing rights with protected rights, believing instead that a proper interpretation of section 1 provides for the possibility of a need for balance between competing rights claims.

30 An 8.0 magnitude earthquake hit China's southwestern Sichuan province on May 12, 2008 and is estimated to have killed nearly 70,000 people, injured another 375,000 (approximately), and rendered homeless an estimated 4.8 to 11 million individuals.

The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?

Heather MacIvor*

> On 3 January 1642 the Commons sat, and claimed a breach of privilege which, deliberately or not, incited the king to attempt force. On 4 January [King Charles I] entered the Chamber, leaving the door open so that members could see the troops "making much of their pistols." ... He asked the Speaker if the five [rebel MPs] were present. Lenthall, on his knees, spoke. "May it please Your Majesty, I have neither eyes to see, nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here; and I humbly beg Your Majesty's pardon that I cannot give any other answer than this to what Your Majesty is pleased to demand of me."[1]

On April 27, 2010, the speaker of the Canadian House of Commons ruled on a question of parliamentary privilege. Although most such rulings pass unnoticed outside Parliament Hill, Peter Milliken's address to the House attracted intense interest. He declared that the government of Prime Minister Stephen Harper had committed a *prima facie* breach of privilege by withholding documents pertaining to the handling of Afghan prisoners by Canadian soldiers and officials from the Special Committee on the Canadian Mission in Afghanistan. He also scolded both sides for refusing to cooperate, and told them to work out a solution to the impasse. If they failed to do so within two weeks, he would ask the House to decide whether the executive branch was in contempt of Parliament.[2] A majority vote in favour could have brought down the Harper government.

In the wake of Milliken's ruling, the cabinet was unusually meek. There were no partisan denunciations of the speaker (who happened to be a Liberal MP), and no trumped-up charges of unconstitutional chicanery. Instead, justice minister Rob Nicholson announced that the government would immediately begin talks with the three opposition parties. They reached an agreement in principle on May 14. The final accord was signed a month later by only three of the party leaders, and approved by Speaker Milliken despite substantial concessions by two of the opposition parties.[3]

It is possible that the government accepted the April 27 ruling because there is no appeal from the speaker's ruling on a *prima facie* question of privilege.[4] However, the most likely explanation is simply that Milliken's decision was unassailably correct. He did what speakers in the British tradition are supposed to do: he vindicated the collective privilege of Parliament against an exaggerated assertion of Crown prerogative. Having done so, he invited the executive and legislative branches to strike a balance between these two fundamental constitutional principles. Milliken's speech to the House lacked the drama of the confrontation between Speaker Lenthall and King Charles I, for which – given the bloody events of the 1640s – we should be grateful.[5] Then again, subsequent developments suggest that Canada's current MPs might benefit from the bellicose spirit of their British predecessors. Nonetheless, Milliken's

ruling remains important because it offers a distinctively Canadian answer to two longstanding political questions. First, should the legislative branch hold the upper hand over the executive branch, or vice versa? Second, does Crown prerogative trump the powers of Parliament just because national security is invoked? Before considering the practical impact of the ruling, I will briefly outline the controversy at issue and the two contending constitutional principles which Milliken was asked to reconcile.

The Afghan Detainee Documents and the Question of Privilege

In June 2008, the House of Commons approved a government motion to extend Canada's military deployment in Afghanistan from February 2009 until February 2011. As recommended in the Manley Report,[6] the motion provided for the creation of a Commons committee to monitor the Canadian mission. The committee was instructed to "review the laws and procedures governing the use of operational and national security exceptions for the withholding of information from Parliament, the Courts and the Canadian people with those responsible for administering those laws and procedures, to ensure that Canadians are being provided with ample information on the conduct and progress of the mission." The motion also committed the Government of Canada "to meeting the highest NATO and international standards with respect to protecting the rights of detainees," and to "a policy of greater transparency with respect to its policy on the taking of and transferring of detainees including a commitment to report on the results of reviews or inspections of Afghan prisons undertaken by Canadian officials."[7]

The Special Committee on the Canadian Mission in Afghanistan started work in April 2008. It issued a preliminary report in June of that year, before the House was dissolved. The committee was finally reconstituted in March 2009. In early November it started to investigate the treatment of Afghan prisoners by Canadian personnel. Specifically, the committee (or at least the majority of opposition members) wished to know whether prisoners had been mistreated after being handed over to Afghan authorities, and if so, whether Canadian soldiers or civilians had known in advance that their detainees were at risk. Any such prior knowledge would raise doubts about Canada's compliance with international law.

Most of the officials who appeared before the committee refused to provide essential information about the handling of Afghan detainees. Lawyers for the various departments argued that solicitor-client privilege trumped parliamentary privilege, a claim the Commons Law Clerk and Parliamentary Counsel rejected.[8] Others said that they were bound by section 38 of the *Canada Evidence Act*, which prohibits the public disclosure of "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security."[9] In response, the committee offered to allow witnesses to answer "potentially injurious" questions *in camera*, rather than in a public and transcribed session.[10] This concession did not make the officials any more forthcoming.

The one crack in the stonewall was Canadian diplomat Richard Colvin, who appeared on November 18. Colvin testified that Canadian military officials had knowingly or recklessly transferred detainees to torture, and that civilian officials in Afghanistan and Ottawa had either ignored his warnings or tried to cover them up.[11] The ensuing firestorm in the House and the media may have made the government even more reluctant to cooperate with the committee. Opposition MPs grew increasingly frustrated as they tried to question witnesses about documents which had been withheld from them.

On November 25, the opposition members of the committee[12] passed a motion by Liberal MP Ujjal Dosanjh, giving the government one week to produce hundreds of documents. These included Colvin's reports to his superiors, the official replies to those reports, and any information turned over by the government to the parallel investigation by the Military Police Complaints Commission.[13] The following day the committee reported to the House that "a serious breach of privilege has occurred and members'

rights have been violated, that the Government of Canada, particularly the Department of Justice and the Department of Foreign Affairs and International Trade, have intimidated a witness of this Committee,[14] and obstructed and interfered with the Committee's work and with the papers requested by this Committee."[15]

On December 10, the House of Commons adopted Dosanjh's motion as an order for the production of documents. The preamble referred to "the undisputed privileges of Parliament under Canada's constitution, including the absolute power to require the government to produce uncensored documents when requested," and "the reality that the government has violated the rights of Parliament by invoking the Canada Evidence Act to censor documents before producing them."[16] The order remained in force despite the December prorogation. After Parliament reconvened in March 2010, three opposition MPs raised formal questions of privilege concerning the government's refusal to comply with the order. Over the next few weeks the House sporadically debated the question. Meanwhile the government tabled – without prejudice, advance notice, or translation – thousands of pages of heavily redacted documents, claiming that it was now in compliance with the order and the privilege question was moot.

The Harper government probably expected a favourable ruling from the speaker: "In the vast majority of cases, the Chair decides that a *prima facie* case of privilege has not been made."[17] Their confidence was likely increased by the subject-matter of the documents at issue. The government justified its refusal to comply by pointing to the Crown's undoubted duty to protect national security (see the discussion of Crown prerogative below). Its spokesmen in the House asserted that the executive branch could legally defy an order to produce documents – reflecting the will of a majority in the Commons – when the information contained therein pertained to national security. By extension, the government claimed to be the sole judge of its own compliance (in tabling the heavily redacted documents in the House). Given the tendency of the legislative and judicial branches to defer to the executive when the safety of the public or the military is at stake, a ruling in favour of the government seemed likely. In some quarters, therefore, the speaker's ruling was a welcome surprise.

Parliamentary Privilege

In the course of their public duties, parliamentarians enjoy two types of privilege which are denied to other citizens. The first is individual privilege, such as the freedom to speak in the House without fear of prosecution. That particular immunity also extends to witnesses before parliamentary committees. The second, with which we are concerned, is collective privilege. The Compendium of Commons Procedure identifies seven distinct rights which make up collective privilege, ranging from the power to punish to "the right to publish papers containing defamatory material."[18]

Parliamentary privilege is entrenched in the Constitution of Canada by the preamble to the *Constitution Act, 1867*.[19] The phrase "a Constitution similar in Principle to that of the United Kingdom" incorporated much of the British common law, as well as the central principles and documents of the British constitution. Several such principles have been identified as prerequisites for parliamentary government,[20] including the individual and collective privileges of legislators. Parliamentary privilege was also explicitly entrenched in section 18 of the *Constitution Act, 1867*,[21] and subsequently elaborated in the *Parliament of Canada Act*.[22]

Canadian legislators enjoy fewer privileges than their British counterparts. The common-law powers of the English Parliament reflect its origins as a judicial body, which has no parallel in the former colonies. Consequently, "Canadian legislative bodies properly claim as inherent privileges [only] those rights which are necessary to their capacity to function as legislative bodies."[23] A privilege will be recognized in law if its exercise is essential to the efficiency, the dignity, and/or the autonomy of the legislature or the member who asserts it.[24]

As Milliken pointed out in his April 27 ruling, "the fundamental role of Parliament is to hold the

Government to account" for the actions of its officials.[25] It follows that withholding or excessively redacting essential documents, and thus obstructing the committee's investigation into the Afghan mission, is a *prima facie* breach of parliamentary privilege. The speaker quoted Bourinot, the pre-eminent authority on British parliamentary procedure: "under all circumstances it is for the house to consider whether the reasons given for refusing the information are sufficient."[26] In other words, there is no unilateral executive power to withhold or to black out "potentially injurious" documents.

Milliken acknowledged, also in the words of Bourinot, that parliaments usually "acquiesce when sufficient reasons are given for the refusal,"[27] but he made it clear that this was a description of practice and not a binding precedent. He also implied that if acquiescence was not forthcoming in this instance, it was likely due to the poisonous relationship between the Harper government and the three opposition parties. As John Locke pointed out in the late seventeenth century, the Crown prerogative reaches its greatest extent when it is vested in wise and trusted hands.[28] In this context, the speaker's ruling – his assertion, in effect, that Crown prerogative ends where parliamentary privilege begins – is more than an attempt to resolve a temporary partisan impasse. It is a contribution to the longstanding debate over the proper relationship between the two branches. We will explore that relationship further in the conclusion.

The Crown Prerogative

The Conservatives who participated in the privilege debate justified the government's refusal to comply with the order on three grounds. First, the Commons had overstepped its powers by trying to force the government to produce sensitive documents pertaining to defence and national security. The minister of justice argued that "finding a breach of privilege on this matter would be an unprecedented extension of the House's privileges."

> There are diverging views on whether the House and its committees have an absolute and unfettered power to be provided with any and all documents they order from the executive branch and within the Crown prerogative.
>
> It is true that the House of Commons has significant powers and privileges that are necessary to support its independence and autonomy. However, the Crown and the executive branch is also entrusted with powers and privileges as well as responsibilities for protecting public interest, implementing the laws of Canada and defending the security of the nation, in particular, as the Government of Canada has an obligation to protect certain information for reasons of national security, national defence and foreign relations.
>
> Crown privilege as part of the common law recognizes that the government has a duty to protect these and other public interests.[29]

Second, making the documents public would risk the lives of Canadian military and civilian personnel in Afghanistan.[30] Third, divulging information provided by third parties would jeopardize "the future of our ability as a nation to be able to deal with international agencies like the Red Cross and other sources of information and intelligence that is so absolutely vital for our nation to be a player in the world."[31]

The nub of all three arguments is the idea that Crown prerogative should prevail over parliamentary privilege (at least in this instance). In Dicey's famous formulation, the prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown."[32] It is a common-law power, which "can be limited or displaced by statute"[33] – but only with the consent of the Crown itself, given the requirement of Royal Assent.

In domestic matters, the prerogative is barely visible in Canada. The situation is very different in foreign affairs, including defence, national security, and the power to conclude agreements with other sovereign states. Here the Crown prerogative remains broad and largely unconstrained by statute,[34] but by no means unlimited:

> Traditionally the courts have recognized that within the ambit of these powers the Governor in Council may act in relation to matters

> concerning the conduct of international affairs including the making of treaties, and the conduct of measures concerning national defence and security. The prerogative power is, of course, subject to the doctrine of parliamentary supremacy and Parliament, by statute, may withdraw or regulate the exercise of the prerogative power.[35]

In sum, the Crown prerogative is part of Canada's constitution. It is not absolute, nor is it the full extent of the powers the government considers to be necessary or expedient for its purposes at a given time. The prerogative is limited by other constitutional principles and provisions, including parliamentary privilege and the *Canadian Charter of Rights and Freedoms*.[36]

If the Crown prerogative stretched as far as the Harper government claimed, then justice minister Rob Nicholson might have been correct to argue that "finding a breach of privilege on this matter would be an unprecedented extension of the House's privileges."[37] But as Milliken observed, "This can only be true if one agrees with the notion that the House's power to order the production of documents is not absolute." Such a claim, he suggested, "subjugates the legislature to the executive."[38] He concluded that "accepting an unconditional authority of the executive to censor the information provided to Parliament would in fact jeopardize the very separation of powers that is purported to lie at the heart of our parliamentary system and the independence of its constituent parts."[39] In effect, the vast scope of the Crown prerogative claimed by the Harper government is inconsistent with the logic of Canada's constitution – even when national security is invoked to justify the government's reluctance to share information.[40]

The Broader Implications of the Speaker's Ruling

Milliken's reference to the separation of powers highlights the breadth of his ruling. The proper limits of executive and legislative power, both in isolation and in their mutual relations, have been debated for centuries. Thomas Hobbes, having lived through the horrors of the English Civil War, argued that it was too dangerous to divide the powers of government among different institutions: "this division is it, whereof it is said, a kingdom divided in itself cannot stand."[41] Much safer, he thought, to unite all the sovereign powers in one man.[42]

Most subsequent thinkers have rejected Hobbes's argument for an indivisible sovereign, preferring to divide the legislative power from the executive power (either partially or completely).[43] There is less agreement about the proper relationship between the two branches: should one be subordinate to the other, and if so, which one? Locke asserted that the Crown was subordinate to the legislature (a view that gained some credibility from the 1689 Bill of Rights).[44] In the eighteenth century, the French lawyer Montesquieu famously argued that "When both the legislative and executive powers are united in the same person or body of magistrates, there is no liberty."[45] Less well-known is his claim that the legislature "would become despotic" if the executive failed to keep it in check; the latter branch was naturally weaker because it issued temporary decrees rather than permanent laws.[46] So Montesquieu agreed with Locke that the legislative branch was supreme, but did not share his view that this was necessarily a good thing.

The American framers shared the eighteenth-century fear of encroaching legislative power, which they attributed to the legislature's democratic legitimacy and its control over the public purse.[47] Unlike Montesquieu, they came up with a solution to the problem: not the complete separation of powers, as is commonly believed, but partially overlapping powers which "give to each [branch] a constitutional control over the others."[48] The only effective way to keep each branch within its "parchment barriers" is to give its members "the necessary constitutional means, and personal motives, to resist encroachments of the others."

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.... [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the

> private interest of every individual, may be a sentinel over the public rights.[49]

Such a check on arbitrary power will only work where members of the two branches contest the same field of power. In cases of direct conflict, one must yield to the other. Such acquiescence is only to be counted on where one is *a priori* subordinate to the other, and that subordination is recognized in law. In the Afghan detainee controversy the Harper government tried to assert just such an *a priori* principle, by claiming that Parliament must defer to the Crown whenever national security is at stake. It is significant that Milliken rejected that argument. In the immediate wake of 9/11, legislators and judges throughout the Western world backed off and allowed their executives to expand prerogative powers to an extraordinary extent. Hobbes began to sound less like an aberration than a prophet. The prevailing attitude was forcefully expressed by the senior British judge Lord Hoffmann in the immediate wake of the terror attacks: "the recent events in New York and Washington ... are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on … question[s] of ... national security."[50]

Since 2001 the legislative and judicial branches have gradually recovered their nerve. They have increasingly challenged their governments' handling of the "war on terror" and the treatment of those who have been caught up in it. Hoffmann himself implicitly repudiated his own dictum just three years later, writing that terrorism did not pose a sufficiently grave threat to the British nation to justify derogating from the *European Convention on Human Rights*. In a slightly Churchillian cadence, he declared:

> [Britain] is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.[51]

It appears that the resurgence of the Hobbesian sovereign was a temporary phenomenon – although of course it could recur in the wake of future terror attacks.

In the absence of an *a priori* hierarchy among the branches of government, politicians must work out mutually agreeable compromises. Like the Supreme Court of Canada in its 1998 ruling on secession,[52] Milliken did not try to impose his own solution to the impasse. Instead he defined the applicable principles and invited the government and opposition parties to strike a workable balance among them.[53] This is what they initially did: the government negotiators agreed to turn over the documents essential to the committee's investigation, while the opposition accepted the Crown's responsibility to protect national security and confidentiality. Unfortunately, the balance did not last. Having lost the argument over Crown prerogative, the government now insisted that "Cabinet confidences" and "solicitor-client privilege"[54] entitled it to withhold documents as it saw fit. On June 15, the Liberals and the Bloc Québécois accepted this condition; the New Democrats refused, and were excluded from the committee. Milliken accepted the June 15 accord, apparently willing to overlook the fact that his broad assertion of parliamentary privilege had been rejected by a large majority of MPs.

When it was first issued, the April 27 ruling appeared to herald a change in the relations between the House of Commons and the government of the day. Milliken followed Lenthall's example, asserting the privileges of Parliament against an overweening Crown prerogative, because of his own character, expertise, and love for the institution. In all likelihood, he also did so because he is fully independent of the prime minister. Ever since the English House of Commons chose its first presiding officer in 1376, the speaker of the British House of Commons has been ostensibly elected by the MPs.[55] In practice, the speaker was nominated (and could thus be replaced) by the prime minister of the day. So despite their claims to be servants of the House, speakers were until recently servants of the Crown. Prime ministerial appointment persisted in Canada until 1986, when the Standing

Orders were amended to permit MPs to freely elect one of their own as speaker without interference from the Prime Minister's Office.[56] It is difficult to imagine a speaker standing up to the prime minister quite as boldly as Milliken did if he feared for his job. So the April 27 ruling seemed to demonstrate that the move from a *de facto* appointed speaker to a genuinely elected speaker changed the relationship between the two branches of government.

In the event, the conflict over the handling of Afghan detainees did not initiate a period of greater cooperation between the legislative and executive branches. Nor did it herald a renaissance of parliamentary privilege. Indeed, it may have the opposite effect. Now that a majority of MPs have agreed that the government can withhold cabinet documents and legal advice, it will be very difficult for any future speaker to repeat Milliken's sweeping assertion of privilege. On April 27, 2010, Milliken could say that "procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents."[57] Today, thanks to the Liberals and the Bloc, that is no longer true. The House is the ultimate procedural authority. For the sake of averting a vote to hold the government in contempt, and a consequent snap election, two of our opposition parties may have permanently weakened the institution in which they serve.

Notes

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1 John Field, *The Story of Parliament in the Palace of Westminster* (London: James & James, 2002) at 107.

2 *House of Commons Debates,* No. 034 (27 April 2010) at 2039-2045 (Hon. Peter Milliken, Speaker).

3 The four parties in Parliament agreed to strike an *ad hoc* committee to review the documents under strict conditions of confidentiality. Each would have one member (and one alternate). Disputes over the public release of specific information would be referred to a panel of three "eminent jurists." See *House of Commons Debates,* No. 047 (14 May 2010) at 2847-2848 (Hon. Rob Nicholson).

4 *Standing Orders of the House of Commons*, s. 10, online: Parliament of Canada <http://www.parl.gc.ca/information/about/process/house/standingorders/chap1-e.htm>.

5 Charles's violation of the Commons did much to precipitate the bloody civil war which consumed England, Scotland and Ireland. The King was defeated, captured by the parliamentary forces, and ultimately executed for treason seven years after Lenthall's speech. To this day, the monarch and his or her representatives are barred from entering the lower house in Westminster-style parliaments (hence the reading of the Throne Speech in the upper house). See Trevor Royle, *Civil War: The Wars of the Three Kingdoms, 1638-1660* (London: Abacus, 2004), especially Chapter 10 at 149-166.

6 The Panel concluded that "The Government should provide the public with franker and more frequent reporting on events in Afghanistan, offering more assessments of Canada's role and giving greater emphasis to the diplomatic and reconstruction efforts as well as those of the military." See Independent Panel on Canada's Future Role in Afghanistan, *Final Report* ["Manley Report"] (Ottawa: Minister of Public Works and Government Services, 2008) at 38, online: <http://dsp-psd.pwgsc.gc.ca/collection_2008/dfait-maeci/FR5-20-1-2008E.pdf>.

7 *House of Commons Journals*, 39th Parl., 2nd sess., No. 66 (13 March 2010) at 596.

8 Special Committee on the Canadian Mission in Afghanistan, *Evidence*, 40th Parl., 2nd sess., No. 014 (4 November 2009) at 7-8 (Rob Walsh).

9 *Canada Evidence Act*, R.S.C. 1985, c. C-5.

10 Special Committee on the Canadian Mission in Afghanistan, 40th Parl., 2nd sess., *Evidence* No. 015 (18 November 2009) at 1 (Rick Casson, Chair).

11 *Ibid.* at 1-5.

12 The Conservatives abstained, citing concerns about national security and Cabinet confidentiality.

13 The actual list reads as follows: "All documents referred to in the affidavit of Richard Colvin, dated October 5, 2009; All documents within the Department of Foreign Affairs written in response to the documents referred to in the affidavit of Richard Colvin, dated October 5, 2009; All memoranda for information or memoranda for decision sent to the Minister of Foreign Affairs concerning detainees from December 18, 2005 to the present; All documents produced pursuant to all orders of the Federal Court in

Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada; All documents produced to the Military Police Complaints Commission in the Afghanistan Public Interest Hearings; [and] All annual human rights reports by the Department of Foreign Affairs on Afghanistan." Special Committee on the Canadian Mission in Afghanistan, *Minutes of Proceedings*, Meeting No. 16 (25 November 2009).

14 Presumably a reference to Colvin.

15 Special Committee on the Canadian Mission in Afghanistan, *Third Report* (26 November 2009).

16 *House of Commons Debates* No. 128 (10 December 2009) at 7877.

17 Audrey O'Brien and Marc Bosc, eds., "Procedure for Dealing with Matters of Privilege", in *House of Commons Procedure and Practice*, 2nd ed. (Ottawa: House of Commons, 2009), online: Parliament of Canada <http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=1&sbdid=ABBC077A-6DD8-4FBE-A29A-3F73554E63AA&sbpid=13E698A7-333F-42DA-9C20-AD416E51BD1C#13E698A7-333F-42DA-9C20-AD416E51BD1C>.

18 "Application of Parliamentary Privilege to the House of Commons as a Whole," *Compendium: House of Commons Procedure Online* (2007), online: Parliament of Canada < http://www.parl.gc.ca/compendium/web-content/c_d_applicationparliamentaryprivilegehouse-commonswhole-e.htm>.

19 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319 at para. 108 [*New Brunswick Broadcasting*].

20 See the famous dictum of Chief Justice Duff in *Reference re Alberta Statutes*, 1938 CanLII 1 (S.C.C.), [1938] S.C.R. 100 at 133: "the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions."

21 That section reads as follows: "The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof." *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3.

22 Section 4 of the *Parliament of Canada Act*, R.S.C. 1985 c. P-1, reads as follows:

> The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise
>
> (a) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and
>
> (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

23 *New Brunswick Broadcasting*, *supra* note 19 at para. 118. See also *Gagliano v. Canada (Attorney General)*, 2005 FC 576 at paras. 64-82 (CanLII).

24 *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 29 (CanLII).

25 *House of Commons Debates* No. 034 (27 April 2010) at 2043.

26 *Ibid*.

27 *Ibid*.

28 John Locke, "Of Prerogative" (The Second Treatise, ch. XIV [1690]) in C.B. MacPherson, ed., *John Locke: Second Treatise of Government* (Indianapolis: Hackett, 1980) at 83-88.

29 *House of Commons Debates* No. 021 (31 March 2010) at 1227 (Hon. Rob Nicholson).

30 Justice Minister Nicholson told the House that "The release of at least some of this information would clearly undermine the safety of Canadian officials working in Afghanistan. Information about when and how Canadian officials visit a particular prison, for instance, would be of great value to the insurgents and to the terrorists. They could use this knowledge to attack our monitors and free the detainees." *House of Commons Debates* No. 128 (10 December 2009) at 7882.

31 Hon. Jim Abbott, Parliamentary Secretary to the Minister of International Cooperation, *House of Commons Debates* No. 128 (10 December 2009) at 7878.

32 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 424, quoted in *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON C.A.), 199

D.L.R. (4th) 228 (Ont. C.A.) at para. 25 [*Black*].

33 *Black*, *ibid*. at para. 27.

34 *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras. 34-37 (CanLII).

35 *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (F.C.), [1994] 1 F.C. 102 at 141, quoted in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C.R. 218 at para. 92 (CanLII).

36 *Black*, *supra* note 32 at para. 46.

37 *House of Commons Debates* No. 121 (31 March 2010) at 1227.

38 *House of Commons Debates* No. 034 (27 April 2010) at 2043.

39 *Ibid*.

40 Milliken stated: "the procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security." *Ibid*.

41 Thomas Hobbes, *Leviathan* (Oxford World's Classics, 1998 [1651]) at 121.

42 The likelihood that this man would suffer from the same failings which Hobbes attributed to humanity in general – greed, ambition, irrationality – does not seem to have bothered him. Locke was less sanguine: "he that thinks that absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary." Locke, s*upra* note 28 at 49.

43 Judicial power receives surprisingly little attention in the literature, apart from Alexander Hamilton's contributions to the Federalist Papers. The separation between legislative and executive power in the British model has never been absolute, insofar as the Crown is an integral part of the legislative branch.

44 Locke, *supra* note 28 at 69-70.

45 Charles de Secondat, Baron de Montesquieu, "The English Constitution" (The Spirit of the Laws, Book XI, ch. VI [1748]) in Melvin Richter, ed., *Montesquieu: Selected Political Writings* (Indianapolis: Hackett, 1990) at 182.

46 *Ibid*. at 187-188.

47 James Madison, "The Federalist No. 48" in J.R. Pole, ed., *The Federalist* (Indianapolis: Hackett, 2005 [1788]) at 269.

48 *Ibid*. at 268.

49 James Madison, "The Federalist No. 51" in J.R. Pole, ed., *The Federalist* (Indianapolis: Hackett, 2005 [1788]) at 281.

50 *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, [2002] ACD 6 (BAILII) at para. 62.

51 *A and Others v. Secretary of State for the Home Department,* [2004] UKHL 56, [2005] AC 68 (BAILII) at para. 96.

52 *Reference re Secession of Quebec*, [1998] CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217.

53 In this context, it is interesting to reflect on the similarities between the judicial function and the job of the Speaker – as Canada's Chief Justice has done: Beverley McLachlin, "Reflections on the Autonomy of Parliament", *Canadian Parliamentary Review* 27:1 (Spring 2004) 4.

54 "Memorandum of Understanding" between the Rt. Hon Stephen Harper, the Hon. Michael Ignatieff, and Gilles Duceppe (15 June 2010), at 1, online: CBC.ca <http://www.cbc.ca/politics/insidepolitics/2010/06/memorandum-of-understanding-on-the-afghan-detainee-documents.html>.

55 Sir Peter de la Mare was chosen in early 1376 to express the Commons' concerns to King Edward III on its behalf. Because the King was frail and sick, de la Mare met with his oldest surviving son and regent, John of Gaunt, and told him bluntly that the King must rid himself of his "evil counsellors" if he wanted Parliament to approve any more taxes. The worst offenders were duly tried in the Lords, impeached, and banished. Ann Lyon, *Constitutional History of the United Kingdom* (London: Cavendish, 2003) at 105-106.

56 C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987) at 122.

57 *House of Commons Debates* No. 034 (27 April 2010) at 2043.

Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates

Andrew Heard*

Given the fundamental role that conventions play in the Canadian constitution, it is not surprising that litigants try from time to time to engage the courts in defining or even enforcing the terms of a particular convention. The Federal Court's September 2009 decision in *Conacher v. Canada (Prime Minister)*[1] is the latest high-profile example. Duff Conacher, Coordinator of Democracy Watch, had launched a court case that challenged the 2008 federal election call as contravening either the provisions of the government's fixed-date election law (Bill C-16,[2] passed in 2007), or conventions supporting the law. The Federal Court rejected Conacher's application, holding among other things that there was no constitutional convention constraining the prime minister from advising an election before the October 2009 date prescribed in the statute. Conacher's appeal was also rejected. In May 2010, the Federal Court of Appeal upheld the lower court's decision, stating that "no such convention exists" based on the evidentiary record.[3] For many observers, the *Conacher* decision may seem unsurprising and solidly based on the existing jurisprudence dealing with constitutional conventions.

A closer examination of the Federal Court's decision, however, reveals some disturbing logic and flaws in reasoning. Some of these problems are not peculiar to the judge in the case, but flow from the positions adopted by the Supreme Court of Canada in the patriation cases.[4] *Conacher* usefully highlights the flaws of orthodox thinking in Canadian legal circles about the nature of conventions. In particular, there are major problems with the three-part Jennings test adopted by the Supreme Court of Canada in the *Patriation Reference* and employed in *Conacher*. A fresh analysis of the issues in *Conacher* is needed to determine whether in fact a constitutional convention had arisen to support the fixed election date legislation.

Any pronouncement by a court of the terms of a convention can and often does amount to a political enforcement of the convention. The authority of the courts adds considerable weight to their opinions, and their conclusions are often portrayed as authoritative. Thus, it matters whether a court is correct in its assessment of the existence or terms of a convention. Unfortunately, the Jennings test can only usefully identify a subset of constitutional conventions, and it can seriously mislead analysis in other cases. The combination of problems evident in the *Conacher* decision raises concerns about the institutional capacity of Canadian courts to deal with constitutional conventions. Some observers might suggest that this judicial weakness could be remedied by a stricter insistence on Dicey's dictum that conventions have no place in the courtroom.[5] However, as *Conacher* illustrates, the law is sometimes so dependent on supporting conventions that it is either unenforceable or untenable without them. In the absence of any recognized convention, the fixed election date law would appear futile.

Some laws, such as Bill C-16, are crafted with the full knowledge and intent that the bare bones of the law will be modified by supporting

conventions. Indeed, a number of statutes passed by the United Kingdom Parliament that now serve as Canada's bedrock constitutional documents granted personal powers to the governor general or lieutenant governors. And yet, it was understood at the time that those powers would usually be exercised according to constitutional conventions that deprive a governor of any personal choice in most circumstances. Had that understanding not existed, those statutes would have been drafted in a very different fashion. Hundreds of federal and provincial statutes providing powers to the governor in council assume that the governor will in fact neither take part in nor reject the decisions of their council. A great irony of both decisions in *Conacher* arises from their emphatic recognition of the conventional right of the prime minister to advise the governor general on an election, while steadfastly refusing to recognize any convention that might constrain when that election might be called.

Several interrelated problems are evident in Justice Shore's handling of conventions in *Conacher*. The first difficulty arises with his discussion of whether conventions must be based upon actual precedents or whether they can arise through the explicit agreement of the relevant political actors. A second flaw is apparent in his interpretation of how the Jennings test must be followed, particularly in the analysis of the views of the relevant political actors concerning a purported conventional rule. The review of the historical record that supports this analysis displays serious weaknesses. These related problems may well have led to an erroneous conclusion about the existence of a constitutional convention in this case.

The Creation of Conventions by Explicit Undertakings

The application filed on Duff Conacher's behalf argued that a constitutional convention had arisen to preclude the prime minister from advising the election in 2008, a year in advance of the date ostensibly set in Bill C-16's amendments to the *Canada Elections Act*.[6] In essence, Conacher's counsel argued that various government statements, given during Parliament's consideration of Bill C-16, amount to an explicit undertaking that elections would henceforth be held on fixed election dates unless the government of the day lost the confidence of the House of Commons. Expert testimony from Peter Russell argued that conventions could arise through such undertakings, becoming established without the need for an actual precedent beforehand. Justice Shore considered the argument by Conacher's counsel – previously asserted in my own book[7] – that conventions could arise in this way. However, the judge rejected all of these points, holding that the legislative record was not consistent and that, in any case, constitutional conventions could not arise in a domestic setting through explicit undertakings. Although Justice Shore noted that Peter Hogg had also recognized that conventions could arise through explicit agreement, he took solace in a footnote that appeared in Hogg's text. He noted, on the authority of this footnote, that R.T.E. Latham had written in 1949 of his belief that the only examples of conventions arising through agreement were to be found in the context of Commonwealth relations.[8] The trial judge embraced Latham's objection that domestic political actors could not create conventions by agreement, because they could not bind their successors to those commitments; by contrast in the international context, it is accepted that governments can and do bind their successors.

Justice Shore's stance on these points does not survive close scrutiny. First of all, the supposed problem of actors not being able to bind their successors in the domestic context is at best something of a red herring and at worst illogical. If one considers the context of traditional conventions that arise through historical precedent, there is the inescapable assumption that future actors are bound by the views of their predecessors. One must rely on statements by the relevant political actors in historical precedents that they believed themselves to be bound by a rule in order for a convention to be recognized under the Jennings test. Many years can separate the historical events from the current situation, and yet it is accepted that present-day actors are obliged to follow the precedents set in the past. Indeed, when the Supreme Court

of Canada declared in the *Patriation Reference* that there was a convention requiring substantial provincial consent to constitutional amendments affecting provincial powers, the majority decision only explicitly considered the precedents and statements involving political actors who had long left the stage, or even died. And yet, the Court held that this convention continued to exist, and as a consequence it bound the current government.

Secondly, there are a range of examples of constitutional conventions arising through the explicit undertakings of the relevant actors. As Justice Shore noted, the most widely cited examples of these types of conventions arose during the Imperial Conferences in the 1920s and 1930s, in which the British and Dominion governments agreed to a series of changes in their relationships. These were considered as binding rules right from the time of the agreements. However, there are examples of domestic conventions as well. For example, the first ministers agreed in 1987 that the prime minister would only appoint senators from lists of nominees submitted by provincial premiers until the *Meech Lake Accord* was formally ratified: "Until the proposed amendment relating to the appointments to the Senate comes into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted by the Government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada."[9] This was the practice until the death of the *Accord* in 1990. Another example of conventions arising through explicit undertakings can be found in the commitments made by the premiers of Nova Scotia and New Brunswick that they would not allow Prince Edward Island to be isolated in any proceedings under the regional veto formula enacted in the *Constitutional Amendments Act*[10] of 1996. More recently, one could view as constitutional conventions the undertakings of Prime Minister Harper's most recent Senate appointees that they would resign within eight years of their appointment, to honour the spirit of the government's legislative proposals to limit the tenure of future senators. This informal obligation, binding the actors in ways that transform the legal framework, seems to qualify as a constitutional convention. Furthermore, British scholars argue that conventions can be created by unilateral declarations, such as when prime ministers impose limits on how cabinet colleagues exercise their legal powers.[11] These unilateral undertakings can create conventions which bind that actor and even others over whom he or she has some power of enforcement.

Critics of this view might object that none of these examples of purported conventions created by agreement or declaration should really be recognized as conventions until some precedent demonstrates that the actors are indeed observing a binding rule. But such an objection should also logically be applied to any convention established by precedent. One should equally say that we cannot know if there is still any convention until current actors articulate a sense of obligation and actually confirm their obedience to the rule by demonstrably following it in relevant circumstances. Indeed, sceptics of conventions argue that they should not be considered rules, because in the final analysis political actors are free to break with tradition and amend, ignore, or destroy any convention at any time; they simply have to get away with their new behaviour. [12]

These general objections, however, seem to degenerate into *reductio ad absurdum* and provide as little analytical guidance as objections that there can be no enduring law because what is "law" can be changed at any moment by the courts, legislature, or executive. The reality with both conventions and law is that there is a palpable and enduring acceptance of a range of rules; these rules may change or be extinguished, but until then they are considered binding and generally observed by most actors most of the time.

The Jennings Test

Fundamental flaws in how the Federal Court's *Conacher* decision treats the convention question stem from following what might now be called the orthodox view of conventions in Canada, given a stamp of approval by the Supreme Court of Canada when it considered constitutional conventions in the *Patriation Reference*.

The majority of the Court in that reference case adopted Sir Ivor Jennings's suggestions for identifying whether a convention exists:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[13]

Implicit in the Jennings approach is the belief that a convention cannot be established without a clear historical precedent. So, in *Conacher*, Justice Shore appears at first glance to be on firm ground in declaring that there could be no convention restraining the timing of elections: "The three questions test fails because there are no precedents in this regard from the relevant actors."[14]

Unfortunately, neither Jennings nor the Supreme Court provided any useful guidelines as to how to make this test work. Major problems arise from trying to rely definitively on either historical precedents or statements by political actors. It is essential to explore these problems in depth, because they may prove insurmountable in many situations. If the Jennings test is flawed, then judges should be aware of the flaws before placing too much faith in it. And there do appear to be serious weaknesses in both the heavy reliance on precedents and the narrow approach to examining the actors' beliefs. A review of these problems can usefully lay the foundation for a reassessment of the conventions question put to the court in *Conacher*.

A reliance on historical precedents is a bit like trying to navigate by the stars. It is all well and good in a clear sky, but the heavens are not always obliging. The sky may be entirely clouded over, or large patches of the sky may be covered. Similarly, political precedents work wonderfully when they exist and when one can tell which precedents are relevant to our constitutional navigation. But historical precedents can be completely missing, date from a bygone era, or contradict one another. And as already noted, some constitutional conventions exist as binding rules even before a precedent has occurred. Another issue is whether one considers both positive and negative precedents. Sometimes, what did not happen and why can be just as revealing, or even more so, than what has happened. Furthermore, an actor's breach of an apparent conventional obligation need not be evidence that the rule has ended or never existed, as the public reaction can be enough to reinforce that obligation; at times, the exception can indeed prove the rule. It is, therefore, quite erroneous to conclude that the absence of a clear line of consistent precedents demonstrates that political actors are not bound by convention.

Precedents can provide useful insights in the identification of conventions, but their importance should be viewed in perspective. Precedents can be informative and illustrative of past political practices. At times there are clear chains of events that can be discerned, and those precedents add weight to the identification of conventions. However, one must keep in mind the passage of time and any shifts in political values that have occurred over the course of any set of precedents, and particularly since the last precedent. The reactions of the attentive public are also important in the historical events surveyed. As will be discussed below, the opinions and beliefs relevant to the identification of conventions cannot be limited to the prime political actors involved.

Relying on precedents can be problematic in the great many contexts where precedents are few and far between or not publicly revealed. For example, there are certain challenges in dealing with the relationships between the Canadian governors and their first ministers. Most of what transpires is strictly confidential, leaving us with a very incomplete picture of what transpires; only occasionally are glimpses provided in memoirs. Until recently, for example, commentators had to reach back to 1926 and 1896 for examples of a governor general refusing the advice of a prime minister. However, Adrienne Clarkson's memoirs reveal an occasion where she refused Paul Martin's advice to hold his swearing-in ceremony on Parliament Hill. The governor general refused on the grounds that

this would have imposed an American presidential element, which she believed to be entirely inappropriate in a parliamentary system.[15] If Clarkson had not revealed this, we would still be left believing that the last instance of refused advice was in 1926. Similarly, there has been little general public knowledge of the occasions on which lieutenant governors have refused advice. The published accounts of a refused election call in Newfoundland[16] in 1972 and of an Albertan order in council[17] in 1993 (authorizing a financial grant to an individual) leave one wondering what else may be occurring behind the scenes that never sees the light of day.

Nevertheless, precedents can be particularly helpful in cases where there is little or no commentary by relevant actors or scholars on possible rules and obligations. For example, there is undoubtedly a constitutional convention that the governor general issues the separate proclamations for the dissolution of Parliament and for the issuance of election writs at the same time. However, this convention would fail the Jennings test, as there do not appear to be any substantive public comments on the necessity for the governor general to issue these proclamations together. Indeed, there has been little public awareness until recently that these are separate actions. And yet, this practice is much more than a simple habit or custom. When combined with the practical and constitutional reasons for a rule, a string of precedents can help cement a practice into a binding convention.

The Jennings test really only works for a subset of conventions which arise from political practice and develop into convention. And even then, this test can only easily identify conventions with a clear string of consistent precedents that reach into the contemporary era. If one were able to draw only from century-old precedents, for example, one might well end up simply trying to resurrect long-lapsed rules that are no longer supported. While a number of conventions can be categorized through this test, others cannot because of unclear, contradictory, or antiquated precedents. And conventions can and do arise without any historical precedent, through express agreement among all the relevant actors or unilateral declaration by someone (such as the prime minister) in a position to enforce them. While precedents can offer important insights into identifying conventions, in the end they may be too problematic to be either determinative or essential to a convention.

Even so, Justice Shore may have been mistaken to assert that there were no relevant precedents that related to the federal fixed-date election legislation. Precedents from provincial jurisdictions can also be relevant for constitutional conventions that relate to similar situations at the federal level. When dealing with conventions at the national level, constitutional scholars and actors alike refer to provincial precedents relating to the governors' prerogative powers, the details of the confidence convention, or other aspects of responsible government; federal precedents are also frequently cited in provincial politics. Where the principles and details are similar, precedents from the other level of government are highly instructive and widely relied upon. It is, therefore, only logical to look to provincial precedents when examining the operation of federal legislation, such as Bill C-16, that was explicitly drafted according to the existing provincial models. Furthermore, the conventions relating to the calling of an election that would potentially be modified by the new legislation are essentially identical at the federal and provincial levels in Canada. When Bill C-16 passed through Parliament, similar legislation was to be found in five provinces and the Northwest Territories; since that time, two more provinces have enacted fixed election date legislation. By the time of the 2008 election call, there had already been five provincial or territorial elections held in keeping with a legislated rotation of elections every four years. British Columbia held an election on May 17, 2005, the Northwest Territories on October 1, 2007, Ontario on October 4, 2007, and Newfoundland on October 9, 2007. In addition, Prince Edward Island held an election on May 18, 2007 in keeping with the future four-year limit included in legislation passed just three days before the election call.[18] While these five precedents may not be determinative, they do demonstrate that all other Canadian governments considered themselves bound by their

four-year election cycles. They reveal a strong consensus that where fixed election date laws exist, they must be respected.[19]

The second part of the Jennings test is equally problematic in its operation, and its application in *Conacher* no less flawed. A serious practical hurdle is the simple fact that political actors are not obliging enough to provide clear or forthright public statements about many of the conventions they consider themselves bound by. It is just impractical to require clear statements as a necessary requirement for determining every convention, because the search will often be futile. For example, Prime Minister Harper does not appear to have made any clear declarations about the conventions concerning the appointment of the governor general when he advised the Queen to appoint David Johnston as the new governor general in 2010, even though he set up an independent advisory committee to propose a non-partisan nominee. Jennings himself conceded that this part of the test may not be necessary when he asserted, "A single precedent with a good reason may be enough to establish the rule."[20]

There is also a temptation to take Jennings's words too literally, that all one should be concerned with are the views of the actors directly involved in an historical precedent. The Supreme Court of Canada's examination of the conventions in the 1981 *Patriation Reference* was seriously weakened by not including any statements by cabinet ministers later than 1965. This omission was all the more curious since the 1971 *Victoria Charter* was negotiated with the explicit understanding that the agreement of every province was necessary to its enactment; and it failed once Quebec rescinded its support. As well, the Court did not bother to assess the views of provincial premiers, which is curious considering the convention in question related to amendments to provincial powers. The views of a range of political leaders across time can be equally, and often more, informative than focusing simply on precedents plucked here and there from their full context.

Justice Shore also took this part of the test literally when he concluded that the only relevant actors in dissolution are the governor general and the prime minister. This is problematic from the start since governors general in Canada are precluded from speaking publicly about the exercise of their prerogative powers. But having identified only two relevant actors, Shore then went on to base his judgment not on statements by Stephen Harper, but on statements by Rob Nicholson, the cabinet minister who sponsored Bill C-16.[21] Shore also approached the identification of statements as if identifying conventions involved the same process as statutory interpretation. He limited his examination to statements contained in *Hansard* and in transcripts of parliamentary committee hearings. However, one cannot restrict one's examination to the legislative record followed in statutory interpretation. Constitutional conventions are political rules and the political arena in which they are discussed is vast. Political figures give vital statements of their views in myriad settings beyond parliamentary precincts. In principle and practice, one cannot restrict this analysis to the legislative record.

The views of the most relevant political actors can be sufficient to determine a convention where the statements are clear and supported by principle. For example, the creation of conventions through express agreement or declaration relies upon the combination of a commitment to the new rule and a sound constitutional reason for the rule. However, such statements cannot always be relied upon to determine the existence of a convention, because they may be missing, contradictory, or deliberately misleading. In the case of the governor general, prevailing customs actually prevent incumbents from publicly discussing their reasons for exercising their reserve powers in a particular way.

Conventions as Rules of Critical Morality

On a broader perspective, the second part of the Jennings test promotes an untenable view of constitutional conventions as rules dependent upon the internal morality of specific political actors. One of the most often quoted definitions of constitutional conventions is offered by O. Hood Phillips; he said they are "rules of

political practice which are regarded as binding by those to whom they apply."[22] At one level, this is a sensible notion. Political actors cannot be bound by rules in the absence on an obligation. Certainly if none of the actors believe a convention exists, it is hard to argue from any perspective that one does. But as F.F. Ridley points out, if a convention must be something that the political actors feel obliged by, then they are freed from that obligation at any time they no longer feel it. Indeed, he objected to Hood Phillips's definition as a tautology: "Conventions are considered binding as long as they are considered binding."[23]

Conventions must be much more than rules of internal morality if they are to operate as constitutional rules at all. The reliance on the internal sense of obligation opens the door to tremendous abuse and damage by the deliberately deceptive and the innocently ignorant. But in reality our political system does not operate in the vacuum of our political leaders' internal morality. Despite the determination of Canadian judges to adhere to the literal wording of Jennings's test and only concern themselves with the beliefs of actors in specific historical precedents, our constitutional discourse is very much richer. And the discussion and portrayal of the obligations facing our political actors is very much a product of this community discussion. The views of constitutional experts, think tank analysts, and leading journalists not only fill the airwaves and print columns, but the former in particular are routinely consulted and quoted by politicians in their own assessment of whether a convention exists. Legislative committees often invite scholars and other experts to give their perspectives on particular conventions and constitutional obligations. Thus, the views of key political actors may at times be crucial, but the purported views of any one actor may at times be outweighed by the consensus of the broader political community.

Jennings's own concession that conventions might arise through a single precedent with "a good reason" for the rule points to the important role of the larger constitutional community. Jennings does not elaborate on who decides whether there is a good enough reason for the rule. But that determination must in practice be the prevailing view of the engaged community.

The literal view of the Jennings test adopted in *Conacher* wrongly implies that conventions are rules of internal morality, and thus holds them hostage to the personal whims, ignorance, or connivance of individual political actors. However, most constitutional conventions operate in reality as a system of critical morality, with the preponderant views of the larger constitutional community framing moral obligations on the current political actors.[24] An important step in understanding conventions better can come from moving beyond the Hood Phillips notion of conventions as rules considered binding by those to whom they apply. As Geoffrey Marshall writes, "It would seem better to define conventions as the rules of behaviour that ought to be regarded as binding by those concerned in working the constitution when they have correctly interpreted the precedents and the relevant constitutional principles."[25] And Bradley and Ewing underscore that conventions are best viewed as prescriptive rules and not just descriptions.[26] Implicit in these views is the notion that there is a standard of behaviour that in some sense must be independent from the actual beliefs of the political actors in a given situation. Jeremy Waldron made this point quite explicitly when he wrote about conventions: "They are normative. They are used for saying what *ought* to be done, and … they are used as a basis for *criticism* if someone's behaviour does not live up to them. We use them to *judge* behaviour, not merely to predict it."[27]

The Evidence for a Convention Respecting Fixed Election Dates

The question then becomes whether there was a general expectation that the prime minister would be obliged to respect the spirit of the legislation. There are a number of components to the analysis required to answer this question. The first is the understanding of the legislators who debated and passed Bill C-16. Important evidence for this understanding can be found in the specific statements given by the prime

minister and other government spokespersons regarding this legislation. Also relevant is the behaviour of the government between the passage of C-16 and the 2008 election, as well as the public discussion of perceived constraints on the government.

Very clear messages were in fact given by the prime minister and other members of cabinet about both the need for, and the intended effects of, fixed election date legislation. Four days before Bill C-16 was introduced into the Commons, Prime Minster Harper gave a speech in Victoria in which he announced the intention to legislate fixed elections dates:

> First, we will introduce a bill calling for fixed election dates, at the federal level. As you know, BC – as well as Ontario, Newfoundland and Labrador – has gone this route. Fixed election dates would prevent governments from calling snap elections for short-term political advantage. They level the playing field for all parties. The rules are clear to everyone. In the case of our proposal, we will be asking for fixed election dates every four years, with the first vote set for the fall of 2009. Of course, such legislation always requires respect for confidence votes. So the will of the majority in Parliament always prevails. But fixed election dates stop leaders from trying to manipulate the calendar simply for partisan political advantage. Now I know the polls say, if an election were held now, we'd win a majority. But the polls also say that no one wants an unnecessary election. So unless we're defeated or prevented from governing, we want to keep moving forward and to make this minority Parliament work over the next three years.[28]

After that speech, Harper is quoted as telling reporters, "The only way we can have justice is to have a fixed election date, because an election without a fixed election date is a tremendous advantage for the party in power."[29] On the day the government introduced Bill C-16 into the House of Commons, Harper was asked about the possibility of an early election call. He replied:

> Mr. Speaker, the government is clear that it will not be seeking an early election. At any time Parliament can defeat the government and provoke an early election, if that is what the opposition irresponsibly chooses to do.... We brought in legislation, modelled on those of the provinces, to set elections every four years and set the next election for October 2009.[30]

Shortly after the introduction of Bill C-16, Government Whip Jay Hill is reported to have said:

> I think it's an important step and sends a signal to Canadian people that this Prime Minister and this government are willing to give up that power of having the authority to call an election when he sees fit. He's willing to turn that over to the Canadian people in the sense of having a law on the book that mandates when the next election will be, of course, other than the possibility of being defeated.[31]

On several occasions the minister principally responsible for the bill, Rob Nicholson, underlined a number of important statements about the purpose behind and operation of the bill. Nicholson's speech at third reading clearly detailed the intention to eliminate the prime minister's ability to call elections simply for partisan advantage:

> All parties agree with the principle that the timing of elections should not be left to the Prime Minister, but should be set in advance so all Canadians know when the next election will occur.… What we have is a situation where the Prime Minister is able to choose the date of the general election, not based necessarily on what is in the best interests of the country, but what is in the best interests of his or her political party. Bill C-16 would address this problem and would produce a number of other benefits.[32]

And on the day that Parliament finally passed Bill C-16 the new minister in charge of the legislation, Peter Van Loan, said, "This important piece of legislation will ensure fairness in the electoral process by eliminating the power of the governing party to call an election to capitalize on favourable political circumstances."[33]

The only exception to the legislation's schedule of fixed election dates that government leaders emphasized in debate involved occasions when a government loses the confidence of the House. As Nicholson told the House, "In particular, the Prime Minister's prerogative to

advise the Governor General on the dissolution of Parliament is retained to allow him or her to advise dissolution in the event of a loss of confidence."[34] As noted earlier, however, Prime Minister Harper had also alluded to a second possible justification for an early election, if the government was "prevented from governing."

The government statements announcing Bill C-16's introduction, and during Parliament's consideration of the measure, are very clear and consistent in several respects. These common messages include the recognition that the pre-existing prime ministerial discretion was unfair, and that the new legislation would put an end to that situation. The new norm would be elections held at fixed dates. There was a recognition that this fixed schedule could not necessarily apply to a minority government. The principal exception related to the defeat of a government on a matter of confidence. The other possible exception, vaguely alluded to, would arise if a government was "prevented from governing," implicitly through some parliamentary stalemate.

Constitutional scholars, government lawyers, and party officials who appeared before the Commons and Senate committees that reviewed Bill C-16 consistently voiced a view that the measure would not provide legal constraints on the prime minister's ability to request and secure an election whenever he wished. But most did also indicate that the passage of such legislation would significantly change expectations of government behaviour and lead to an informal obligation to respect the fixed election schedule. Michael Donison, then executive director of the Conservative Party, told the Commons committee, "This is really a relinquishment, a voluntary relinquishment of prime ministerial discretionary power when it comes to calling an election.… What fixed date elections do is create the expectation in the political classes and in the citizenry that this is the new norm, the new standard."[35] Department of Justice lawyer Warren Newman also testified, "[T]his legislation contains a directive to officials, to the public at large, and to all those associated with the elections process that there will be an election on this date."[36] And as Patrick Monahan concluded:

> [T]he practical effect of this is to say that the previous situation is no longer acceptable. It will no longer be acceptable for the Prime Minister, virtually at any time but effectively two or three years after a previous election, to simply say, "We will now have an election because I think I can win." The presumption is that the election will be held in the fourth year.… It will very quickly become the custom and the accepted practice.[37]

After the enactment of Bill C-16 into law, there followed a period of over a year in which the government consistently indicated that the timing of the next election depended entirely upon whether the opposition decided to defeat it on a matter of confidence. The media commentary also consistently worked with the assumption that an election would only come if the government was defeated. There was speculation that the government was trying to manoeuvre the opposition into defeating it on a matter of confidence, consistent with the belief that an election would only come on a lost confidence vote.

A selection of comments by media commentators can convey the tone of discussions in this period. Alexander Panetta wrote, "Unless Harper turned his back on his promise of fixed election dates and unilaterally went to the Governor General seeking a fresh mandate, there could only be an election if all three opposition parties combined to vote down the minority Conservative government."[38] John Ivison mused, "The passage of the fixed-elections legislation means that the next general election will take place in October, 2009, unless all three opposition parties combine to bring down the Harper government. Since none are yet ready to fight an election, Mr. Harper can plan for another two years in office with some confidence."[39] And Don Martin said, "Mr. Harper is handcuffed by his self-designated fixed election date in October, 2009, so he needs three willing partners to lose the confidence of Parliament and theoretically win big in an election."[40] Norman Spector's views are encapsulated in the following: "As Prime Minister, Stephen Harper's second-biggest mistake was to legislate fixed election dates, thereby transferring the power to call an election before October of next year to the opposition parties."[41] Even Tom Flanagan,

Harper's former chief of staff, wrote:

> Before the passage of C-16, a prime minister could have responded by declaring gridlock and asking for an election. Even a behind-the-scenes threat to that effect would have probably sobered up the opposition parties because none actually want an election right now. But with C-16 in place, the government may have to resort to different tactics, declaring high-priority bills to be matters of confidence and daring the opposition to defeat them.[42]

More than a year after the enactment of the fixed-date legislation, Ian MacDonald believed that the prime minister no longer had the personal discretion to call an early election:

> The Harper Conservatives, like the Pearson Liberals in 1965, are tired of a minority House, and itching to go to the polls. But by introducing a fixed election date of October 2009, Harper has denied himself a prime minister's greatest advantage of incumbency - the power of dissolving the House whenever he thinks it's a nice day for an election. He thought it was the right thing to do. Go figure. As a result, he must await his government's demise, or somehow engineer his defeat in the House.[43]

From the brief review of a range of political commentators, it is clear that a general belief had developed that the fixed date legislation created a new set of obligations concerning when and how elections should be called.

With this review in hand, of the history of the fixed-date election legislation and the events leading up to the 2008 election, one can reach some clearer conclusions as to whether there was indeed a constitutional convention constraining the prime minister from calling an early election. Numerous statements by the prime minister, cabinet ministers, and the executive director of the party consistently reinforced the notion that this legislation meant an end to the prime minister's discretion to call early elections. There was a commitment to a new norm of scheduled election dates. The only exceptions would be if a government lost a vote of confidence or somehow was prevented from governing. Far from being ambiguous, as Justice Shore would have it, the record is very clear and consistent on this commitment. The commitment was sufficiently clear and widely understood that for over a year after the enactment of this legislation, media commentary and government statements assumed that an early election could only come about if the government was defeated on a test of confidence. The provincial and territorial precedents of elections held on their legislated dates further reinforced the consensus that the prime minister was under an obligation not to call an early election unless defeated or stalemated. Those provincial precedents and the adoption of fixed election date legislation in seven provinces provide good evidence of the broadly held belief in the need to respect fixed election dates.

Conclusion

It is accepted by modern British and Canadian scholars who have made any significant study of the matter that conventions can be created through undertakings by the relevant actors. And there is considerable evidence that such an understanding was indeed given. In light of the repeated commitments made by leading government actors and the general acceptance of those commitments as binding, it appears that a constitutional convention had indeed been created.

The reaction of the informed public to the early election call adds further weight to the conclusion that a convention did – and continues to – exist. In the run-up to the actual election call, the government had started to spin the obligation under the legislation as only necessarily applying to majority governments. And it argued that the House of Commons had become dysfunctional, and that meetings between the prime minister and the opposition leaders failed to secure any commitment from them to allow Parliament to continue to operate until the scheduled election. Far from saying that the prime minister was under no obligation at all to respect the fixed date legislation, government statements seemed to be at pains to reconcile the need for an early election with the legislation. The generally negative media reaction to the early election call also reinforced the belief that the prime minister was evading a clear duty, even if there was a legal loophole he could exploit.

In conclusion, it does appear that the prime minister broke a convention in securing an early election. The reasoning on this question in *Conacher* is deeply flawed. The judge was simply wrong in asserting that conventions cannot exist in the absence of precedents. The heavy reliance on the Jennings test reveals a serious deficiency in the judicial approach to conventions. That test has not been widely adopted elsewhere; indeed, it has not been embraced by modern British scholars precisely because of its weaknesses. The Jennings test may seem like an attractive tool to some, but it is a very unreliable one for identifying political rules like conventions. While it has its uses in helping to identify a subset of conventions, there are too simply many problems to apply it rigorously. Its supporters claim that it provides a rigorous test for identifying conventions, but it is simply impractical to apply this test consistently. The Jennings test is also based upon flawed views of the nature and genesis of conventions that, when applied literally, relegate conventions to being weak rules of internal morality. In any event, the *Conacher* decision is also factually mistaken in its insistence that the public record was ambiguous. Commitments were clearly and consistently given. These commitments underscored that the government could no longer advise an early election simply for its own advantage, and it could only advise an early election if it lost a vote of confidence or was rendered incapable of governing for some other reason. This commitment was widely accepted and structured public discourse after the enactment of the legislation. It also framed a negative reaction to the early election call in 2008. Far from demonstrating that no convention constrained the prime minister, a full analysis of the enactment of Bill C-16 and of the events leading up to the 2008 election reveals the prime minister's actions to be a breach of a clear conventional obligation.

Notes

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1 2009 FC 920 ["*Conacher* (FC)"].

2 Bill C-16, *An Act to amend the Canada Elections Act*, 1st Sess., 38th Parl., 2007 (assented to 3 May 2007).

3 *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 at para. 12 (CanLII). Democracy Watch immediately announced its intention to seek leave to appeal the decision to the Supreme Court of Canada. See: Democracy Watch, News Release, "Federal Court of Appeal Ruling Means Harper Conservatives Broke Their 2006 Election Promise to Fix Election Dates" (26 May 2010), online: Democracy Watch <http://www.dwatch.ca/camp/RelsMay2610.html>. Given the brevity of the appeal decision, this paper will focus principally on the lower court's decision.

4 *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (S.C.C.), [1981] 1 S.C.R. 753 [*Patriation Reference*]; *Reference re Objection by Quebec to a Resolution to Amend the Constitution,* 1982 CanLII 219 (S.C.C.), [1982] 2 S.C.R. 793.

5 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1924) at 30-31.

6 S.C. 2000, c. 9.

7 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 10-14.

8 *Conacher* (FC), *supra* note 1 at para. 45, citing R.T.E. Latham, *The Law and the Commonwealth* (Oxford: Oxford University Press, 1949) at 610.

9 *1987 Constitutional Accord* ("The Meech Lake Accord"), s. 4, online: Solon.org <http://www.solon.org/Constitutions/Canada/English/Proposals/MeechLake.html>.

10 S.C. 1996, c. 1.

11 S.A. de Smith, *Constitutional and Administrative Law*, 2nd. ed. (Harmondsworth: Penguin, 1973) at 60.

12 F.F. Ridley argues that conventions should rather be thought of as "maxims or precepts": "There is No British Constitution: A Dangerous Case of the Emperor's Clothes" (1988) 41 *Parliamentary Affairs* 340 at 358.

13 Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 136.

14 *Conacher* (FC), *supra* note 1 at para. 46.

15 Adrienne Clarkson, *Heart Matters* (Toronto: Viking, 2006) at 195.

16 Edward Roberts, "Ensuring Constitutional Wisdom During Unconventional Times" (2009) 32:1 *Canadian Parliamentary Review* 13 at 16.

17 Joan Crockatt, "Lt.-Gov. Wouldn't OK Grant from Kowalski" *Edmonton Journal* (23 December 1994) A1.

18 The P.E.I. precedent is all the more instructive since Bill 38 had originally stipulated that an

election must be held by May 2008, and thereafter every four years. The 2008 date marked the maximum five year life allowed under the Constitution. Instead, the premier called the 2007 election at the four-year mark.

19 Since the 2008 federal election there has been a second provincial election in B.C. (2010), held according to the fixed election date legislation.

20 Jennings, *supra* note 13 at 136.

21 *Conacher* (FC), *supra* note 1 at paras. 47, 56.

22 O. Hood Phillips, *Constitutional and Administrative Law*, 5th ed. (London: Sweet & Maxwell, 1973) at 77.

23 Ridley, *supra* note 12 at 358.

24 For a contrary view, that conventions struggle to operate as rules of critical morality, see Joseph Jaconelli, "The Nature of Constitutional Convention" (1999) 19 *Legal Studies* 24 at 42-45.

25 Geoffrey Marshall, "What Are Constitutional Conventions?" (1985) 38 *Parliamentary Affairs* at 39.

26 A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 14th ed. (London: Pearson, 2007) at 20.

27 Jeremy Waldron, *The Law* (London: Routledge, 1990) at 62.

28 Stephen Harper, "An address by the Prime Minister on democratic reform" (26 May 2006), online: Prime Minister of Canada <http://www.pm.gc.ca/eng/media.asp?id=1183>.

29 "Harper Wants Fixed Dates for Federal Elections" *CTV News* (27 May 2006), online: CTV.ca <http://calgary.ctv.ca/servlet/an/plocal/CTVNews/20060526/harper_fixed_elexns_060526/20060527/?hub=EdmontonHome>.

30 *House of Commons Debates*, No. 029 (30 May 2006) at 1722.

31 Bea Vongdouangchanh, "Conservatives say fixed-date elections 'just one step'" *The Hill Times* (12 June 2006) 23.

32 *House of Commons Debates*, No. 077 (6 November 2006) at 4729.

33 Privy Council Office, News Release, "Canada's New Government Delivers on Fixed Date Elections" (3 May 2007).

34 *House of Commons Debates*, No. 077 (6 November 2009) at 4730.

35 House of Commons Standing Committee on Procedure and House Affairs, *Evidence*, 39th Parl., 1st sess., No. 020 (3 October 2006) at 2, 10.

36 House of Commons Standing Committee on Procedure and House Affairs, *Evidence*, 39th Parl., 1st sess., No. 018 (26 September 2006) at 6.

37 Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings*, 39th Parl., 1st sess., Issue 21 (15 February 2007) at 48, 53.

38 Alexander Panetta, *Telegraph Journal* (17 March 2007) A5.

39 John Ivison, "Do the shuffle" *National Post* (11 August 2007) A5.

40 Don Martin, "Dion left with two bad options" *National Post* (4 October 2007), online: NationalPost.com <http://www.financialpost.com/scripts/story.html?id=b7ada19c-c364-4099-a012-b8aa606c5b87&k=51765>.

41 Norman Spector, "The haunting of Harper: fixed date, public inquiry" *The Globe and Mail* (3 January 2008), online: GlobeandMail.com <http://www.theglobeandmail.com/news/opinions/article658506.ece>.

42 Tom Flanagan, "It's Time for Conservative Minority Brinkmanship" *The Globe and Mail* (1 August 2007) A15.

43 L. Ian MacDonald, "The Harper minority appears to have run its course" *Montreal Gazette* (28 July 28, 2008), online: Canada.com <http://www.canada.com/story_print.html?id=3b73ea2f-2cb3-4ff6-983c-599fb6452c10&sponsor=>.

The Fixed-Date Election Law: Constitutional Convention or Conventional Politics?

Robert E. Hawkins*

On September 17, 2009, Justice Michel Shore of the Federal Court of Canada refused a request from Duff Conacher and Democracy Watch, applicants, to declare "that a constitutional convention exists that prohibits a Prime Minister from advising the Governor General to dissolve Parliament except in accordance with Section 56.1 of the *Canada Elections Act*."[1] That section, known as the "fixed-date election law," received Royal Assent on May 3, 2007. The court application was triggered by Prime Minister Harper's September 7, 2008 request to Governor General Michaëlle Jean asking her to dissolve Parliament and call a "snap" election. The resulting election, held on October 14, 2008, returned another Conservative minority government, albeit a stronger one.

The fixed-date election law states that it does not affect the powers of the governor general to dissolve Parliament at his or her discretion. It then goes on to provide that "each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election."[2] Justice Shore's decision leaves unaltered the existing convention that the governor general must accept the prime minister's recommendation to dissolve Parliament except when, immediately following a general election, there exists another potential government able to command the confidence of the House of Commons. This convention ensures responsible government.

Duff Conacher and Democracy Watch unsuccessfully appealed Justice Shore's decision. In brief reasons given from the bench on May 25, 2010, the Federal Court of Appeal upheld that the lower court's conclusion that there was no new constitutional convention on fixed election dates. The appeal court said that Justice Shore's finding on this point was "amply supported by the evidentiary record."[3]

Conventions are unwritten rules that ensure the constitution operates in accordance with the generally accepted practices governing parliamentary democracy. They modify the constitution's written rules and, in so doing, prevent the constitution, which is difficult to amend, from becoming out-of-step with the times. Breaches of convention are penalized in the political arena by the electorate, rather than in the legal arena by the courts. A convention must embody a constitutional principle, it must command "unquestioned acceptance,"[4] and it must be sufficiently precise as to be identifiable and workable.[5]

Several preliminary points should be made concerning proof of a constitutional convention. First, declaring a constitutional convention to exist is a serious business. The elaboration of a new constitutional convention has the same effect as adopting a formal constitutional amendment. The emergence of a new convention allows the formal constitutional amendment process to be circumvented. While the

standard for proving the existence of a constitutional convention is the civil "balance of probabilities" standard, the evidence adduced for meeting that standard must be commensurate with the occasion, that is, it must be clear, cogent and persuasive.[6] This is important to keep in mind when evaluating statements from the politicians who debated the adoption of the fixed-date election law.

Second, either the fixed-date election law is an unconstitutional interference with the powers of the governor general – something which it expressly purports not to be – or it leaves the prime minister's discretion to advise dissolution unchanged, in which case there is no new convention.[7] There are no other possibilities. Rob Nicholson, then Leader of the Government in the House of Commons and Minister Responsible for Democratic Reform, testified accurately on this point before the Standing Committee on Procedure and House Affairs prior to the passage of the fixed-date election law. He stated:

> Under the rules and conventions of responsible government, the Governor General's power to dissolve Parliament has to be exercised on the advice of the Prime Minister. The Governor General's legal power under the Constitution and the exercise of that power on the advice of the Prime Minister are fundamentally and inseparably linked. If one limits the Prime Minister's ability to advise, one risks constraining the Governor General's powers in a way that would be unconstitutional.[8]

Third, as indicated above, a convention must be sufficiently precise as to be identifiable and workable. The fixed election law, which the applicants submit establishes a new convention,[9] is neither precise nor workable. For one thing, the law simply sets a fixed election date; it does not prohibit the prime minister from recommending dissolution prior to that date.[10] For another, the law does not make an exception for dissolution when the government loses the confidence of the House prior to the fixed election date. In order to fill in these gaps, the applicants suggest that the law be interpreted in light of a new convention limiting the right of the prime minister to seek dissolution except in the case of a loss of confidence in the House.[11] It is difficult, however, for the applicants to argue that the law establishes a convention of a fixed election date, while at the same time relying on just such a convention to fill the critical gaps in the law. This is indeed a dog in search of its tail.

Fourth, it is questionable whether the existence of a fixed-date election convention is justiciable. Although the Supreme Court of Canada was prepared to rule on the existence of conventions in the *Patriation Reference*[12] and the *Quebec Veto Reference*,[13] the Court may have been enticed onto this political terrain because the very survival of the country was at stake. Those extraordinary circumstances are not present in the litigation over the existence of a fixed-date election convention. Further, there is danger that in ruling on such a convention, a court could become instrumental in generating, *ex post facto*, the kind of general acceptance that should be a pre-condition for establishing the convention. Also, a ruling that a fixed-date election convention exists could eventually require the courts to define the circumstances in which a government is deemed to have lost the confidence of the House – a matter that is political in nature and which, if a court becomes involved, could threaten the separation of powers between the judicial branch on the one hand and the legislative and executive branches on the other.[14] Finally, a declaration confirming the existence of a fixed-date election convention would have no legal effect. It would invalidate neither the results of the 2008 election nor the work of the Parliament returned in that election, although it might cast a political shadow over the legitimacy of that work. Put simply, the declaration being sought is in relation to a matter that is legally moot.

In deciding that a convention of fixed election dates did not exist, Justice Shore applied the Jennings test, as adopted by the Supreme Court of Canada in the *Patriation Reference*. He stated: "That test consists of three questions: first, what are the precedents; second, did the actors in the precedents believe that they were bound by a rule; and third, is there a reason for the rule?"[15] The great merit of the Jennings test is its rigour. A constitutional norm is proven to exist when those charged with the operation of the constitution feel bound by past practice (a

temporal dimension), bound by their own belief that they are bound (a normative dimension), and bound by the reason for the norm (a rational dimension). Applying these criteria, there is little danger that purely political choices, or choices made out of a desire to circumvent the exigencies of the formal constitutional amendment process, will qualify as conventions.

Jennings does not require that all three criteria be met in order to prove the existence of a convention: "A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it."[16] In other words, the key to establishing a constitutional convention is that the "persons concerned," the actors in the precedents, consider themselves "bound" to follow the rule. They must feel that they have no choice but to follow the norm, either because there is a compelling precedent from the past or because there is a good constitutional reason for the norm. In the *Quebec Veto Reference*, the Supreme Court held that the actor's belief that he or she had no option but to follow the norm is the most important sign of the existence of a convention. This feeling of obligation, because of its normative force, is what distinguishes "a constitutional rule from a rule of convenience or from political expediency."[17]

Professor Andrew Heard, in his critique of the *Conacher* decision, suggests that Justice Shore failed to consider adequately an alternative model in concluding that a fixed election convention did not exist.[18] Heard maintains that an explicit agreement between politicians on the operation of the constitution can give rise to a general expectation amongst constitutional experts that a new convention has been brought into existence. This expectation will be evidenced by statements made by members of the constitutional community, including constitutional scholars and journalists. Applying this model, Heard argues that the agreement of all political parties to pass the fixed-date election law created a general expectation amongst constitutional experts, and so a convention, that the prime minister would not recommend dissolution prior to the date set in the legislation, unless the government were to lose the confidence of the House.

Apart from not having been sanctioned by the Supreme Court, Heard's alternative model differs from the Jennings model on three counts. First, it looks to an "explicit agreement," as opposed to a past precedent, as the source of a constitutional convention. Second, it draws its normative or binding power from the "general expectations" raised by that explicit agreement rather than from the beliefs created by precedent or the reasons for the convention. Third, it identifies the persons concerned as the "broader constitutional community" rather than the relevant actors charged with making the constitutional decisions in the precedents.

The contention here is that the three criteria which make up this alternative model – explicit agreement, general expectations, and constitutional community – fail to distinguish a constitutional imperative from a simple exercise in political expediency. Each one of the three criteria in the alternative model obscures this crucial distinction, and therefore raises a serious problem of constitutional principle. Moreover, each of them raises practical issues, that is, problems in applying the criteria that would recur in future constitutional disputes. The remainder of this article considers the three suggested departures from the Jennings model in turn.

First, contrasting explicit agreements with past precedents misunderstands the issue. For Jennings, and for us, the issue is not the source of the norm in question, but rather whether the relevant actors feel bound by the norm to operate the constitution in a given manner. Are they obliged by what they regard as a constitutional imperative to proceed in a particular way or do they have a political choice with respect to the matter? If an explicit agreement were irrevocable, these actors might well believe that it bound them just as much as a chain of precedent, or an incontestable rationale, would bind them. The problem is that explicit agreements are normally subject to reconsideration, renegotiation and change, whereas past precedents or incontestable rationales are immutable. As a result, an explicit agreement provides less convincing

proof that the relevant actors feel irrevocably bound than would an unchanging precedent or an unanswerable rationale. This difficulty is compounded by the need to demonstrate the binding force of the norm with clear and cogent evidence if the norm is to rise to the level of a convention.[19]

There is also a practical problem with the explicit agreement approach in the fixed-date election case. Simply put, no such agreement can be found. Constitutional convention prevents the position of one of the principal actors, the governor general, from ever being known.[20] Justice Shore held, and the Federal Court of Appeal agreed, that the statements of the actors involved in this case are inconclusive. There is no signed document evidencing any explicit agreement. There is, of course, the unanimously adopted fixed-date election law, but it is too vague to amount to an explicit agreement that would support a workable convention. It says nothing about the prime minister's discretion to advise dissolution, and it does not deal with matters such as the House losing confidence in the government, or the existence of a dysfunctional House,[21] or even the desire of a prime minister to consult the people because of changed circumstances or the emergence of important national issue.[22] There is no conclusive evidence that such an explicit agreement ever existed on these points or that the relevant actors ever believed they were bound by such an agreement in this case.

Second, whereas Heard looks to general expectations to establish the existence of a convention, Jennings looks to the reasons why such a convention might exist. The reasons that are required to establish a convention are constitutional, not political, in nature. Political reasons are debating points. They are the plausible arguments that frame each side of a political debate. Arriving at the political reasons that eventually carry the day is a matter of weighing and balancing, a polycentric choice, a political judgment. Constitutional reasons, the only kind of reasons that can justify a constitutional convention, are of a different order. They are a matter of constitutional logic; they are unanswerable. For example, the convention of responsible government that requires the executive to maintain the confidence of the House is necessary to the parliamentary form of government. The constitution makes no mention of a cabinet but such a body must be constituted both to organize the legislative agenda of Parliament and to ensure the implementation of laws passed by Parliament. The convention that requires the governor general to assent to all bills duly passed by Parliament is necessary in order to preserve the democratic nature of our constitution. There can be no legitimate doubt, no controversy, on these points. While "general expectations" may be based on the kind of incontrovertible constitutional reasons needed to turn norms into conventions, such expectations may equally be based on nothing more than transient political preferences. These preferences do not amount to the enduring acceptance that a constitutional convention must enjoy.

General expectations with respect to fixed election dates illustrate the point. The debate on this change to electoral rules was, and indeed still is, political. There is no one correct outcome to the debate based on unanswerable constitutional logic. On the one hand, those favouring fixed elections will point to the need to ensure that the governing party has no unfair electoral advantage as a result of its control over the timing of the ballot. On the other hand, those opposed will argue that fixed elections are a republican idea that is fundamentally incompatible with the notion of responsible government in a parliamentary system. They might also argue, citing the democratic principle, that the prime minister must have discretion to consult the electorate at any time on matters of pressing national importance. There no logical right or wrong between these positions that would amount to a constitutional imperative. Rather, there is a legitimate, ongoing political debate.

There is here, too, an overwhelming practical problem. Statements of general expectation rarely amount to the kind of clear and cogent evidence needed to prove the existence of a constitutional convention. The statements are unlikely to reflect a consensus, and the expectations to which they attest are often ephemeral and difficult to discern. The norms described in

such statements frequently lack the clarity and the precision to be workable as constitutional conventions. For example, statements dealing with the pros and cons of fixed election dates reveal no consensus, nor anything like a general expectation, as to the desirability of fixed election dates. While one can be confident in the existence of general expectations concerning conventions such as responsible government, the existence of general expectations concerning the desirability of fixed election dates is quite another matter.

Third, Jennings and Heard differ as to whose beliefs are determinative in establishing the existence of a constitutional convention. Jennings points to the beliefs of the relevant actors in the constitutional precedents. Heard cites the general expectations of a "larger constitutional community," encompassing constitutional scholars, think-tank experts, and journalists. He criticizes the "insular approach" of considering only the beliefs of the actors exercising constitutional authority. Jennings has this right. The relevant actors in the precedents were the individuals who had the practical responsibility of making the constitution work, who actually made the operative decisions, and who knew that they would have to deal with the immediate consequences of those decisions. Their beliefs as to whether they were bound by a constitutional norm, or rather were exercising a political choice, were beliefs born of their immediate obligations. That might not be determinative except that the actors were also accountable to the electorate for their constitutional decisions. If they failed to honour a convention under the mistaken belief that they were not bound by a constitutional imperative, there would have been a democratic remedy in the ballot box. By placing responsibility for safeguarding constitutional conventions with those actually administering the constitution, the electorate is made the ultimate arbiter of the existence and wisdom of the conventions. There would be no way to hold the "larger constitutional community" to account if its general expectations as to the existence of a convention proved unsound. The larger constitutional community does not have the same degree of responsibility, or indeed any responsibility, for its general expectations.

There are also practical problems in relying on the broader constitutional community to determine if a convention exists. Who is in this privileged constitutional community, and who is out? Of the diverse views in this community – and there will be great diversity – which views win the day and which are dismissed? Do the opinion writers at the *Globe and Mail* carry more weight than the editorialists at the *Regina Leader-Post*? Are the views of the constitutional professor with the most Supreme Court of Canada citations to be preferred over those of a professor at the leading law school in the country? Why do constitutional "experts" get to determine which rules amount to conventions – as opposed to, say, members of Parliament, a Senate committee, or a representative panel of ordinary citizens? And, who will hold the chattering constititutional heads to account for their opinions on the existence, or not, of constitutional conventions?

Constitutional change is not to be approached lightly. Theories that would make it easier to prove the existence of conventions are to be treated with caution. In any event, in the *Conacher* case, the courts have correctly held that the evidentiary record does not support, under any theory, a claim that there exists a constitutional convention restricting the powers of the prime minister to recommend dissolution to the governor general.[23]

Notes

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1 *Conacher v. Canada (Prime Minister)*, 2009 FC 920 (CanLII) [*Conacher* (FC)].

2 *Canada Elections Act*, S.C. 2000, c. 9.

3 *Conacher v. Canada (Prime Minister),* 2010 FCA 131 at para. 12 (CanLII) [*Conacher* (FCA)].

4 *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (S.C.C.), [1981] 1 S.C.R. 753 at 858 (Laskin, C.J.C. dissenting) [*Patriation Reference*].

5 Similar language is used to define the term "principles of fundamental justice" found in Section 7 of the *Canadian Charter of Rights and Freedoms*,

Schedule B, part I to the *Canada Act 1982* (U.K.) 1982, c. 11. See: *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 113 (CanLII).

6 See *R. v. Oakes*, 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103 at para. 68, and cases cited there, indicating that clear and cogent evidence will be required for proof in constitutional matters.

7 See Eugene A. Forsey and G.C. Eglington, "The Question of Confidence in Responsible Government," study prepared for the Special Committee on the Reform of the House of Commons (Ottawa: 1985), cited in James R. Robertson, "Bill C-16: an Act to Amend the *Canada Elections Act*" (Legislative Summary 530E), Library of Parliament (29 June 2006, revised 3 May 2007), online: Parliament of Canada <http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/bills_ls.asp?lang=E&ls=c16&source=library_prb&Parl=39&Ses=1>. Forsey and Eglington argue that fixed election dates could be effected only by means of a constitutional amendment.

8 Standing Committee on Procedure and House Affairs, *Evidence*, 39th Parl., 1st sess., No. 018 (26 September 2006) at 2 (Hon. Rob Nicholson). Section 41 of the *Constitution Act, 1982* provides that amendments in relation to "the office of … the Governor General" can only be made "where authorized by resolution of the Senate and House of Commons and of the legislative assembly of each province."

9 *Conacher* (FC), *supra* note 1 (Applicant's Memorandum of Fact and Law at para. 47), online: Centre for Constitutional Studies <http://www.law.ualberta.ca/centres/ccs/uploads/Conacher-factum.pdf>.

10 The government of Canada maintained that the fixed election date set by the law was not meant to limit the prime minister's discretion to advise dissolution but was only meant to create a "statutory expectation" of a certain date for future elections without making that expectation legally enforceable. See *Conacher* (FC), *supra* note 1 at para 52, citing Respondents' Memorandum of Fact and Law at para. 38, online: Centre for Constitutional Studies < http://www.law.ualberta.ca/centres/ccs/uploads/1-Governmentfactum.pdf>. The Federal Court of Appeal appears to have accepted this position when it held that the law "expresses the will of Parliament but leaves the Prime Minister and the Governor General able to act in the way they did." *Conacher* (FCA), *supra* note 3 at para. 9. Note also that Professor Ned Franks said in April 2008 that the fixed-date election law does not limit the prime minister's right to seek dissolution. "PM can override fixed-date vote: expert" *Ottawa Citizen* (9 April 2008), online: Canada.com < http://www.canada.com/ottawacitizen/news/story.html?id=15c68d91-edff-467f-9045-6f8c44c631d3>.

11 Applicant's Memorandum, *supra* note 9 at para. 47.

12 *Supra* note 4.

13 *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, 1982 CanLII 219 (S.C.C.), [1982] 2 S.C.R. 793 [*Quebec Veto Reference*].

14 *Conacher* (FC), *supra* note 1 at para. 59.

15 *Ibid*. at para. 37. See also *Patriation Reference*, *supra* note 4 at 888, citing Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 136.

16 Jennings, *ibid*.

17 *Supra* note 13 at 816.

18 Andrew Heard, "C*onacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates," (2009, in this volume). Shore J. referred to Professor Heard's book, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: University of Toronto Press, 1991) and held that there was insufficient evidence of a new convention even using the "explicit agreement" approach advocated by Heard. *Conacher* (FC), *supra* note 1 at para. 44.

19 The 1931 Statute of Westminster, by which the United Kingdom recognized the independence of certain of its former dominions, is frequently cited as an example of a convention brought into existence by way of an explicit agreement. The Statute codified explicit agreements reached by dominion leaders at Imperial Conferences held in 1926 and 1930. What makes dominion independence, as evidenced by the Statute of Westminster, a constitutional convention is not the fact that its source is in an explicit agreement, but rather that this particular explicit agreement, like past precedent, is permanent and irrevocable. Any attempt to revoke the Statute of Westminster would either be ignored by the former dominions (external parties will not examine the internal affairs of another country) or would result in the former dominions unilaterally declaring independence. The principle of independence, like the principle of responsible government, is a constitutional convention not because of its origin but rather because of its binding and permanent character. The Statute of Westminster example, far from representing an alternate method of identifying constitutional conventions, is entirely consistent with the Jennings test. A fixed election agreement, embodied in a domestic law, is subject to reconsideration,

amendment or revocation in a way that the Statue of Westminster could never be.

20 Conversations between the governor general and the prime minister are strictly privileged. Such a convention insures that the neutrality of the Crown will be preserved and that the prime minister may benefit from the advice of a source whose sole interest is the welfare of the nation.

21 Prime Minister Harper indicated that his reason for calling the September 2008 election was the dysfunctional nature of the Parliament that had been elected in January 2006. He cited the inability of Parliament to function productively, the stalling of government legislation in the opposition-dominated Senate and in the House, and a committee system "increasingly in chaos." See "Harper hints at triggering election," *CBC News* (14 August 2008), online: CBC.ca < http://www.cbc.ca/canada/new-brunswick/story/2008/08/14/harper-election.html>. Prior to visiting the governor general to request dissolution, the prime minister, who was in a minority situation, met each of the three opposition party leaders separately. Following those meetings, each opposition leader stated that there was "no common ground" between his party and the government with respect to a legislative agenda.

22 The 1988 "free trade" election is an example. Also, see *Conacher* (FCA), *supra* note 3 at para. 7.

23 *Conacher* (FC), *supra* note 1 at para. 46; *Conacher* (FCA), *supra* note 3 at para. 12.