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# Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*

Adam M. Dodek\*

## I. INTRODUCTION

As election results came in on the night of May 2, 2011, the justices of the Supreme Court of Canada likely breathed a collective sigh of relief. This suspected judicial solace would not have been due to any particularly political allegiance along the lines of that reported on election night in the United States in 2000, when Bush seemed to be sliding by Gore by a chad.<sup>1</sup> Rather, it is because the election of a majority government swept aside the possibility that the courts — and eventually the high court itself — could be called upon to adjudicate a host of highly contentious political issues. In a sense, the justices of the Supreme Court of Canada should have been expressing thanks to the voters of Canada for saving the judges from themselves; for the cause of this collective judicial anxiety lies in the Supreme Court’s judgment in the *Patriation Reference*.<sup>2</sup>

When the Supreme Court convened at the end of April 1981 to hear argument in the *Patriation Reference* the country did not quite hang in the balance, but Pierre Trudeau’s constitutional reform package certainly did. It might be interesting to imagine constitutional counter-factuals: what

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\* Faculty of Law, University of Ottawa (Common Law Section). Thanks to my co-panellists at the Osgoode Constitutional Cases Conference on April 15, 2011, Peter Russell, Jean-François Gaudreault-DesBiens and Carissima Mathen. A double thanks to my colleague Carissima Mathen for providing me with further food for thought for this article in her presentation on “The Use and Misuse of the Reference Function” at the University of Ottawa Faculty of Law Public Law Group’s first annual *Emerging Issues in Canadian Public Law* conference in May 2011.

<sup>1</sup> See Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford University Press, 2001), at 156-57, citing Evan Thomas & Michael Isikoff, “The Truth Behind the Pillars” *Newsweek* (December 25, 2000) (reporting on the alleged partisan preferences of certain U.S. Supreme Court justices in the outcome of the 2000 Presidential election between George W. Bush and Al Gore).

<sup>2</sup> *Reference re Amendment of Constitution of Canada*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.) [hereinafter “*Patriation Reference*”].

would have been had the Supreme Court refused to answer the question regarding the existence of a convention requiring provincial consent for proceeding with constitutional amendments that affect provincial jurisdiction? Would Trudeau have proceeded unilaterally? Would Trudeau's constitutional reforms have suffered the same fate as Fulton-Favreau, the Victoria Charter and so many proposals, consigned to the dustbin of political history? What would the last 30 years have been like in Canada without the *Canadian Charter of Rights and Freedoms*?<sup>3</sup>

These are interesting questions, perhaps frightening to some, but we need not consider them because Trudeau's constitutional reform package did of course succeed, in no small part due to the twin decisions of the Supreme Court of Canada in the *Patriation Reference* and the *Quebec Veto Reference*.<sup>4</sup> However, the legacy of these cases is more political than jurisprudential. It is fair to say that while the *Patriation Reference* was greeted by a warm response for its political implications, it received a lukewarm to negative reaction for its judicial craft. This is perhaps best summed up in the phrase "bold statescraft, questionable jurisprudence", which is the title of Peter Russell's contribution to a book of essays about the *Constitution Act, 1982*.<sup>5</sup>

Leading constitutional experts of the day disparaged the Supreme Court's judgment in the *Patriation Reference*, especially its decision to address the convention question. Eugene Forsey called the decision of the six judges on convention "not a very impressive performance, despite the rapture with which it was greeted by (surprise!) the eight provincial Governments and much of the press".<sup>6</sup> Edward McWhinney dubbed it "complex and baffling and technically unsatisfactory".<sup>7</sup> Peter Hogg commented:

I think it is fair to say that the Supreme Court of Canada's first foray into political science did not yield very satisfactory reasoning or conclusions. That is not surprising. The existence and definition of a

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<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>4</sup> *Reference re Quebec Constitutional Amendment (No. 2)*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.) [hereinafter "*Quebec Veto Reference*"].

<sup>5</sup> Peter Russell, "Bold Statescraft, Questionable Jurisprudence" in Keith Banting & Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) [hereinafter "Banting & Simeon"] 210.

<sup>6</sup> The Hon. Eugene A. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 U.N.B.L.J. 11, at 37 [hereinafter "Forsey, 'The Courts and the Conventions of the Constitution'"].

<sup>7</sup> Edward McWhinney, *Canada and the Constitution 1979-1982* (Toronto: University of Toronto Press, 1982), at 80 [hereinafter "McWhinney"].

convention has to be ascertained without the help of the prior judicial decisions which would support a rule of common law and without the sworn testimony and rules of evidence which would support a finding of fact”.<sup>8</sup>

McWhinney asserted that the decision failed “in its primary responsibility of providing a clear and logically reasoned judicial argument as an authoritative statement to the parties actually before the Court, and also as an educational guide to lower courts, the legal profession and the general public”.<sup>9</sup> Hogg commented at the time that the only justification for even considering the convention question would be to influence the political outcome.<sup>10</sup> He lamented that the “court allowed itself to be manipulated into a purely political role”.<sup>11</sup>

Despite the quite devastating and largely accurate criticism levelled at the judgment by these constitutional luminaries, injuries have largely been avoided.<sup>12</sup> Nevertheless, like the land mines that litter Angola, Cambodia and Afghanistan, the *Patriation Reference*’s ruling on the justiciability of constitutional conventions has left latent jurisprudential IEDs that could explode at a future date. In the first two decades since the *Patriation Reference*, we did not face situations where constitutional conventions were controversial to the point of threatening a political crisis. However, with the onset of minority government since 2004 and its likelihood of continuation as part of the Canadian political

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<sup>8</sup> Peter W. Hogg, “Comments on Legislation and Judicial Decisions: Constitutional Law — Amendment of the British North America Act — Role of the Provinces” (1982) 60 Can. Bar Rev. 307, at 320 [hereinafter “Hogg, ‘Comment on the *Patriation Reference*’”]. Further:

The only possible effect of answering the convention question in the *Patriation Reference* was to influence the outcome of the political negotiations over the 1981-82 constitutional settlement. ... In my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and should not have gone beyond the legal question to exert any further influence over the negotiations

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2006), at §1.10(b) [hereinafter “Hogg, *Constitutional Law of Canada*”].

<sup>9</sup> McWhinney, *supra*, note 7, at 88.

<sup>10</sup> Hogg, “Comment on the *Patriation Reference*”, *supra*, note 8, at 314, 324.

<sup>11</sup> *Id.*, at 324.

<sup>12</sup> For other analysis of the *Patriation Reference*, see Bryan Schwartz & John D. Whyte, “*The Patriation Reference* and the Idea of Canada” (1982-83) 8 Queen’s L.J. 158; Wayne MacKay, “Judicial Process in the Supreme Court of Canada: *The Patriation Reference* and its Implications for the *Charter of Rights*” (1983) 21 Osgoode Hall L.J. 55; Peter Oliver, “The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change” (1994) 28 R.J.T. 875; G.J. Brandt, “Judicial Mediation of Political Disputes: *The Patriation Reference*” (1982) 20 U.W.O. L. Rev. 101.

landscape,<sup>13</sup> constitutional conventions have taken on an increasing importance in Canadian politics. There already have been and there will continue to be attempts to use this aspect of the *Patriation Reference* to manipulate the courts into influencing a particular political outcome. The election of May 2, 2011, presented precisely such a dangerous opportunity. In this paper, I develop the concept of “constitutional danger”: the idea that certain events may constitute threats to our constitutional order. Constitutional dangers may be precipitated by actions of different actors in our system of government or they may simply arise through political serendipity. In this paper, I am concerned about judicially created constitutional dangers. I develop this theme by linking the events of the springs of 1981 and 2011.

This paper has four parts in addition to this introduction. In Part II, I articulate the concept of constitutional danger. In Part III, I explain how the Supreme Court created such a danger in the *Patriation Reference*. In Part IV, I delve deeper into the specific problems raised by the justiciability of constitutional conventions. Part V explains how these dangers have been avoided to date. Finally, the paper ends with a brief conclusion analyzing how the election of May 2, 2011, averted constitutional danger.

## II. CONSTITUTIONAL DANGER

The Supreme Court is charged with upholding our Constitution. It is often referred to as the “guardian of our Constitution”.<sup>14</sup> Elsewhere, I

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<sup>13</sup> See generally Peter Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery, 2008).

<sup>14</sup> On occasion, the Supreme Court has referred to itself as “guardian of the Constitution”: see *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283, at para. 35 (S.C.C.); *Pacific National Investments Ltd. v. Victoria (City)*, [2000] S.C.J. No. 64, [2000] 2 S.C.R. 919, at para. 73 (S.C.C.). More frequent are references to the courts or the judiciary as “guardians of the Constitution”: see, e.g., *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.); *Ell v. Alberta*, [2003] S.C.J. No. 35, [2003] 1 S.C.R. 857, at para. 23 (S.C.C.); *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405, at para. 35 (S.C.C.); and *R. v. Kang-Brown*, [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456, at para. 7 (S.C.C.). The Governor General is sometimes also referred to as “the guardian” of our Constitution. See Eugene Forsey, “The Crown and the Constitution” in *Freedom and Order: Collected Essays* (Toronto: McClelland & Stewart, 1974) 34, at 48 (“The means [of protecting fundamental democratic rights against abuse] is the reserve power of the Crown as guardian of the Constitution.”). See also Brian Slattery, “Why the Governor General Matters” in Peter H. Russell & Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) [hereinafter “Russell & Sossin”] 79, at 88 (“the governor general has a grave constitutional responsibility ... She is the ultimate protector of the constitutional order.”); Andrew Heard, “The Governor General’s Suspension of Parliament: Duty Done or a Perilous Precedent?” in

have argued that the Court must protect its own integrity and that Parliament and the bar also share in this responsibility.<sup>15</sup> Similarly, the Court has a duty to uphold the Rule of Law and protect the Constitution. This idea is implicit in the Court's articulation of the unwritten constitutional principles of the Rule of Law and Constitutionalism.<sup>16</sup> It is clear from the Court's judgments in recent decades that it identifies with and has embraced a role as defender of the Canadian constitutional order.

The Court has willingly assumed a role as a constitutional crisis manager.<sup>17</sup> Peter Hogg explains how governments have not infrequently sought references as a way of defusing political or legal crises: *viz.* the *Manitoba Language Rights Reference*,<sup>18</sup> the *Patriation Reference*<sup>19</sup> and the *Secession Reference*.<sup>20</sup> According to Hogg, "[i]n each case, the Court came up with a solution that arguably exceeded the normal limits of judicial power, but the solution was a clever one that defused the crisis."<sup>21</sup> Other cases might qualify for this "crisis management" category such as the controversial *Provincial Judges Reference*.<sup>22</sup> My colleagues Ed Ratushny and Daphne Gilbert view this decision as "a bold but appropriate response to the arbitrary and unfair treatment of provincially appointed judges in most provinces, posing a serious threat to judicial independence".<sup>23</sup> Peter Hogg takes a starkly opposing view as one of the

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Russell & Sossin, *id.*, 47, at 48 ("The governor general exists as an integral fail-safe mechanism for our parliamentary system of government.").

<sup>15</sup> See Adam M. Dodek, "Constitutional Legitimacy and Responsibility: Confronting Allegations of Bias After *Wewaykum Indian Band v. Canada*" in P. Monahan & J. Cameron, eds. (2004) 25 S.C.L.R. (2d) 165. I would add that the Executive should have a similar duty.

<sup>16</sup> *Cf. Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Secession Reference*"].

<sup>17</sup> See Peter W. Hogg, "Canada: From Privy Council to Supreme Court" in Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 55, at 96 ("Crisis Management by the Court") [hereinafter "Hogg, 'From Privy Council to Supreme Court'"].

<sup>18</sup> *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.) [hereinafter "*Manitoba Language Rights Reference*"].

<sup>19</sup> *Supra*, note 2.

<sup>20</sup> *Supra*, note 16.

<sup>21</sup> Hogg, "From Privy Council to Supreme Court", *supra*, note 17, at 96.

<sup>22</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.) [hereinafter "*Provincial Judges Reference*"].

<sup>23</sup> Ed Ratushny & Daphne Gilbert, "The Lamer Legacy for Judicial Independence" in Adam Dodek & Daniel Jutras, eds., *The Sacred Fire: The Legacy of Antonio Lamer* (Markham, ON: LexisNexis Canada, 2009) [hereinafter "Dodek & Jutras"] 29, at 29. Ratushny and Gilbert assert that "[a] systemic solution was required and it was found by striking an important constitutional balance between the executive, legislative and judicial branches of government."

strongest critics of the *Provincial Judges Remuneration Reference*.<sup>24</sup> He asserts that

[t]he jurisprudence interpreting judicial independence is not based on any ambiguity or uncertainty in the text of the Constitution. Rather, the judges have constructed an elaborate edifice of doctrine with little or no basis in the text in order to protect the power, influence, salaries and perquisites of themselves and their colleagues.<sup>25</sup>

I dwell on the *Provincial Judges Remuneration Reference* because the first rule of Supreme Court decision-making should be: “do no constitutional harm.” As the debate above shows, there is significant division on whether the Supreme Court was constitutional hero or villain in the *Provincial Judges Remuneration Reference*. Judges are not perfect; hence the error-correcting functions of appellate courts and the possibility of legislative overruling. But the Supreme Court is different. As U.S. Supreme Court Justice Robert H. Jackson famously opined about his Court: “We are not final because we are infallible, but we are infallible only because we are final.”<sup>26</sup> Constitutional decisions are of a different magnitude: the legislature may or may not be able to override them<sup>27</sup> and significant time may pass before the Supreme Court has the opportunity to revisit a prior constitutional ruling.<sup>28</sup> The special character of constitutional

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<sup>24</sup> See, e.g., Peter W. Hogg, “The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries” [hereinafter “Hogg, ‘The Bad Idea’”] in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 25; and Hogg, “From Privy Council to Supreme Court”, *supra*, note 17, at 74.

<sup>25</sup> Hogg, “From Privy Council to Supreme Court”, *id.* My views are more sympathetic to Hogg’s position than to Ratushny & Gilbert’s. See Adam M. Dodek, “Chief Justice Lamer and Policy Design at the Supreme Court of Canada” in Dodek & Jutras, *supra*, note 23, at 93.

<sup>26</sup> *Brown v. Allen*, 344 U.S. 443 at 540 (1953) (concurring).

<sup>27</sup> The infamous notwithstanding clause only applies to ss. 2 and 7 to 15 of the Charter. See Charter, s. 33. To state the obvious, the override does not apply to the other sections of the Charter or to other provisions of the written or unwritten Constitution.

<sup>28</sup> Perhaps the best example is the Supreme Court’s decision in *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.), where the Supreme Court’s decision on the right to trial within a reasonable time led to 47,000 criminal charges being dropped in Ontario alone; Hogg, *Constitutional Law of Canada*, *supra*, note 8, at § 52.5. Justice Peter Cory of the Supreme Court of Canada stated publicly that he and his high court colleagues were taken by surprise by the government’s response of staying thousands of criminal charges following his Court’s decision in *R. v. Askov*, *supra*, on the right to trial within a reasonable time. See David Vienneau, “High court chocked at Ontario dismissals” *Toronto Star* (July 16, 1991) A9. At its next opportunity, the Court resiled from but did not overrule *Askov*. See *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.).

Sometimes the Supreme Court does revisit a prior constitutional ruling very quickly. See *R. v. Marshall*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533 (S.C.C.), clarifying *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 (S.C.C.). However, such “clarifications” are extremely unusual. However, the Supreme Court under Chief Justice McLachlin has demonstrated a willingness to revisit prior constitutional rulings. See generally Thomson Irvine, “Changing Course or Trimming

adjudication is encapsulated in Chief Justice John Marshall's phrase: "[w]e must never forget, that it is *a constitution* we are expounding."<sup>29</sup>

For these reasons, courts may apply prudential rules to avoid ruling on constitutional issues.<sup>30</sup> These include the doctrines of justiciability and ripeness.<sup>31</sup> As Lorne Sossin has identified, the McLachlin Court has demonstrated a penchant for setting out procedural processes in constitutional cases rather than more firm substantive rules.<sup>32</sup> In addition, at times courts rely on the rule (often honoured in the breach) of not deciding constitutional issues where the case can be decided on other grounds.

All of these rules reflect the magnitude of the importance of constitutional adjudication and the need for judicial humility in engaging in this enterprise. The first rule for a Supreme Court therefore should be to avoid doing damage to the Constitution itself. It must avoid unnecessarily damaging its own integrity and that of other constitutional organs, to wit, the Crown, the Executive and Parliament. This does not mean that the Court must avoid controversy; indeed, contentious issues are destined for determination by supreme courts. Rather, the Supreme Court should not invite controversy or overstep its judicial role.<sup>33</sup>

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Sails: The Supreme Court Reconsiders" in David A. Wright & Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) [hereinafter "Wright & Dodek"]. More recently, see *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20 (S.C.C.), revisiting the Court's decision in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.).<sup>29</sup> 17 U.S. (4 Wheaton) 316, at 407 (1819), quoted with approval in *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357, at para. 13 (S.C.C.). On the special nature of constitutional adjudication and its consequences, see generally Adam M. Dodek, *Complementary Comparativism: A Jurisprudence of Justification* (LL.M. Thesis, University of Toronto Faculty of Law, 2008).

<sup>30</sup> Cass Sunstein has articulated a theory of "judicial minimalism" based on this idea of prudence in deciding constitutional issues. See Cass R. Sunstein, "Incompletely Theorized Agreements" (1995) 108 Harv. L. Rev. 1733 and Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999). In the Canadian context, Lorne Sossin has argued that the McLachlin Court's first decade of public law jurisprudence can be characterized in terms of "prudential proceduralism". See Lorne Sossin, "The Promise of Procedural Justice" in Wright & Dodek, *supra*, note 28.

<sup>31</sup> See generally Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999), at 229-36 [hereinafter "Sossin, *Boundaries of Judicial Review*"].

<sup>32</sup> See Lorne Sossin, "The Promise of Procedural Justice" in Wright & Dodek, *supra*, note 28.

<sup>33</sup> See the comments of Justices LeBel and Deschamps in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at paras. 110-111 (S.C.C.):

... the principle of separation of powers has an obverse side as well, which equally reflects the appropriate position of the judiciary within the Canadian legal system. Aside from their duties to supervise administrative tribunals created by the executive and to act



To take the U.S. Supreme Court as an example, it showed necessary and proper judicial leadership in *Brown v. Board of Education*<sup>34</sup> and *United States v. Nixon*,<sup>35</sup> but severely damaged its legitimacy in *Bush v. Gore*.<sup>36</sup> In *Brown v. Board of Education* and its progeny, the U.S. Supreme Court was very cognizant of its relationship with the executive and patient and cautious in its approach. In contrast, the Supreme Court of Canada took a very broad, sweeping and unnecessary approach in the *Patriation Reference*, thus creating constitutional danger.

### III. OPENING PANDORA'S BOX: THE *PATRIATION REFERENCE* AND THE CREATION OF CONSTITUTIONAL DANGER

The *Patriation Reference* is a complicated and convoluted judgment. It is probably one of the best known but least read Supreme Court of Canada judgments. At over 150 pages and with four separate sets of reasons, the *Patriation Reference* was never going to win awards for clarity. In terms of judicial leadership and communication,<sup>37</sup> it compares unfavourably with the *Secession Reference*.<sup>38</sup> In fairness to Chief Justice Laskin and the members of his Court, the justices were served a dog's breakfast both legally and politically: three separate references from different provinces with a total of nine questions with at least as many sub-questions.<sup>39</sup> Essentially, there were three common questions in the references:<sup>40</sup>

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as vigilant guardians of constitutional rights and the rule of law, courts should, as a general rule, avoid interfering in the management of public administration.

More specifically, once they have rendered judgment, courts should resist the temptation to directly oversee or supervise the administration of their orders. They should generally operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. Once they have declared what the law is, issued their orders and granted such relief as they think is warranted by circumstances and relevant legal rules, courts should take care not to unnecessarily invade the province of public administration. To do otherwise could upset the balance that has been struck between our three branches of government.

<sup>34</sup> 347 U.S. 483 (1954).

<sup>35</sup> 418 U.S. 683 (1974).

<sup>36</sup> 531 U.S. 98 (2000).

<sup>37</sup> On Chief Justice Laskin's leadership in the *Patriation Reference*, see Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Osgoode Society, 2005).

<sup>38</sup> *Supra*, note 16.

<sup>39</sup> This situation demonstrates the need for the Supreme Court to have the power to reformulate reference questions and order argument on those questions.

<sup>40</sup> The Government of Newfoundland had added an additional question of whether the proposed Resolution could amend the Terms of Union of Newfoundland and Canada without the consent of the government, legislature or people of Newfoundland. The Supreme Court largely

- (1) Did the proposed Resolution affect provincial legislative powers and/or the role of the provincial legislatures or governments within the Canadian federation?
- (2) Could the federal government proceed with the proposed Resolution unilaterally as a matter of law? and
- (3) Could the federal government proceed with the proposed Resolution unilaterally as a matter of constitutional convention?

On the first question, there was no dispute. Canada conceded this point and the justices did not take issue with it.<sup>41</sup> On the second question, a majority of seven (“The Legal Majority”) held that “[t]he law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power.”<sup>42</sup> On the third question, a majority of six justices (“The Convention Majority”) held that there existed a constitutional convention that the federal government would only proceed with constitutional amendment affecting provincial powers with “a substantial measure of provincial consent”.<sup>43</sup>

The enduring jurisprudential legacy of the *Patriation Reference* is two-fold: the justiciability of constitutional conventions and the operative test for recognizing a constitutional convention. The rest of the case has been rendered moot by the enactment of Part V of the *Constitution Act, 1982*. It is ironic that the most enduring jurisprudential legacy of a 158-page judgment is less than half a page. Without discussion, the Supreme Court adopted Sir Ivor Jennings’ test for recognizing a constitutional convention. The Court’s complete discussion on this issue is as follows:

The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must also be normative.

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agreed with the reasons of the Newfoundland Court of Appeal on this issue. See *Patriation Reference*, *supra*, note 2. The specific question asked:

Question 4 — If Part V of the proposed resolution referred to in question 1 is enacted and proclaimed into force could

- (a) the Terms of Union, including terms 2 and 17 thereof contained in the Schedule to the *British North America Act, 1949* (12-13 George VI, c. 22 (U.K.)), or
- (b) section 3 of the *British North America Act, 1871* (34-35 Victoria, c. 28 (U.K.))

be amended directly or indirectly pursuant to Part V without the consent of the Government, Legislature or a majority of the people of the Province of Newfoundland voting in a referendum held pursuant to Part V?

<sup>41</sup> *Id.*, at 772 (majority) and 813 (dissent).

<sup>42</sup> *Id.*, at 807.

<sup>43</sup> *Id.*, at 905.

We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

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.<sup>44</sup>

Andrew Heard takes issue with the Court's adoption of the Jennings test, offering a persuasive critique of the precedent-based nature of the test.<sup>45</sup> Heard catalogues competing conceptions of constitutional conventions that were not considered by the Court. To me it is notable that the Jennings test has not been adopted or commented upon by high courts in the United Kingdom or in Australia.

Despite their central importance in the *Patriation Reference*, the meaning of constitutional conventions continues to be contested. The term "convention" is used loosely to refer to a variety of usages, customs and practices of the executive. There is a tendency to attempt to elevate many such practices to the status of "constitutional conventions".<sup>46</sup> Conventions are rules that define significant rights, powers and obligations of officeholders in the three branches of government, as well as the relations between the different branches or officeholders.<sup>47</sup> As Forsey explained, "[c]onvention is the acknowledged, binding, extra-legal customs, usages, practices and understandings by which our system of government operates."<sup>48</sup> Thus, the most enduring legacy of the *Patriation Reference* is a single paragraph adopting a test that was contested at the time and has not been followed in our jurisdictions, including the one in

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<sup>44</sup> *Id.*, at 888.

<sup>45</sup> See Andrew Heard, "Constitutional Conventions: The Heart of the Living Constitution" (Paper Presented to the Canadian Bar Association 2011 National Constitutional Law Conference, Ottawa, June 10, 2011) (cited with permission) (forthcoming in the *Journal of Parliamentary and Public Law*).

<sup>46</sup> See Lorne Sossin & Adam Dodek, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture and the Governor General" [hereinafter "Sossin & Dodek, 'When Silence Isn't Golden'"] in Russell & Sossin, *supra*, note 14, 91, at 92-99.

<sup>47</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984), at 210 [hereinafter "Marshall, *Constitutional Conventions*"].

<sup>48</sup> Forsey, "The Courts and the Conventions of the Constitution", *supra*, note 6, at 12.

which it originated. This is problematic at the least but also potentially dangerous, in the constitutional sense. However, my chief concern is that the Supreme Court unnecessarily answered the convention question.<sup>49</sup>

The lasting legacy of the *Patriation Reference* is the justiciability of constitutional conventions. It is also the continuing constitutional danger of the decision. The judges agreed that constitutional conventions were political creatures and not subject to enforcement; however, in the same breath, the justices held that conventions are justiciable and that courts may “recognize” them. This distinction between “recognizing” and “enforcing” conventions is artificial and untenable.

The judges agreed that conventions are political and unenforceable in court. The Legal Majority opined that “[t]he very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.”<sup>50</sup> The judges further explained:

The attempted assimilation of the growth of a convention to the growth of the common law is misconceived. The latter is the product of judicial effort, based on justiciable issues which have attained legal formulation and are subject to modification and even reversal by the courts which gave them birth when acting within their role in the state in obedience to statutes or constitutional directives. No such parental role is played by courts with respect to conventions.<sup>51</sup>

The Legal Majority cited approvingly the academic statement that: “[t]he validity of conventions cannot be the subject of proceedings in a court of law. Reparation for breach of such rules will not be effected by any legal sanction. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.”<sup>52</sup>

However, both the Convention Majority and the Convention Dissent held that it was appropriate for a court to “recognize” a constitutional convention.<sup>53</sup> The disagreement between them was whether a convention

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<sup>49</sup> Heard argues that both the test for recognizing a constitutional convention and the answer provided by the Court in the *Patriation Reference* were flawed. See *supra*, note 45.

<sup>50</sup> *Patriation Reference*, *supra*, note 2, at 774-75.

<sup>51</sup> *Id.*, at 775.

<sup>52</sup> *Id.*, at 783, quoting Colin Munro, “Laws and Conventions Distinguished” (1975) 91 Law Q. Rev. 218, at 228.

<sup>53</sup> *Id.*, at 853 (Dissent) and 885-86 (Majority).

of substantial provincial consent existed.<sup>54</sup> The Legal Majority had previously held that the scope of the authority under which the references were made in each case was “wide enough to saddle the respective courts with the determination of questions which may not be justiciable and there is no doubt that those courts, and this Court on appeal, have a discretion to refuse to answer such questions.”<sup>55</sup> Yet, all the members of the Court agreed that the convention question should be answered. To the justices, that this question was “purely political” did not constitute a reason to refuse to answer the question. They expressed their agreement with the Chief Justice of Manitoba, who had stated:

That there is a political element embodied in the question, arising from the contents of the joint address, may well be the case. But that does not end the matter. If Question 2, even if in part political, possesses a constitutional feature, it would legitimately call for our reply.

In my view, the request for a decision by this Court on whether there is a constitutional convention, in the circumstances described, that the Dominion will not act without the agreement of the Provinces poses a question that i[s], at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it.<sup>56</sup>

The Court thus concluded that the convention question was “not confined to an issue of pure legality but it has to do with a fundamental issue of constitutionality and legitimacy.”<sup>57</sup> It thus broadly equated justiciability with anything arising under the Constitution. It was imprudent to do so.

Until the *Patriation Reference*, one of the defining features of conventions was their non-judicial character. A sharp distinction was usually drawn between “law”, interpreted and enforced by the courts, and “convention”, developed by political actors and enforced, if at all, through political sanctions. Thus, Hogg characterized constitutional conventions as “rules of the constitution that are not enforced by the law courts”.<sup>58</sup> Forsey opined that: “The law of the Constitution is interpreted and enforced by the courts; breach of the law carries legal penalties. The

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<sup>54</sup> The Convention Dissent chastised the majority for answering the question in a matter that exceeded what had been stated. According to the Convention Dissent, the question posed was whether it was a constitutional convention that the federal government would only proceed with a constitutional amendment impacting provincial powers where consent from all the provinces (*i.e.*, unanimous consent) had been sought and obtained: *id.*, at 850.

<sup>55</sup> *Id.*, at 768.

<sup>56</sup> *Id.*, at 884, quoting Freedman C.J.M.

<sup>57</sup> *Id.*

<sup>58</sup> Hogg, *Constitutional Law of Canada*, *supra*, note 8, at § 1.10(a).

conventions are rarely even mentioned by the courts. Breach of the conventions carries no legal penalties. The sanctions are purely political.”<sup>59</sup> In his seminal work on Canadian constitutional conventions, Andrew Heard preferred the following explanation articulated by Marshall and Moodie:

By conventions of the constitution, we mean binding rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognise their existence), nor by the presiding officers in the Houses of Parliament.<sup>60</sup>

Thus, one of the defining features of constitutional conventions is that they are not “enforced” by the courts. It is this characteristic which has made the *Patriation Reference* so problematic.

The *Patriation Reference* attempted to maintain this distinction while holding that courts could “recognize” constitutional conventions. The distinction between “recognizing” and “enforcing” conventions is a problematic one. Barry Strayer stated that it was hard to distinguish between enforcing and defining conventions: “they are ‘enforced’ by political actors and ultimately the public in accordance with their views on the existence, definition, continuing relevance of, or possible need for modification, the convention in question. How can a court judge, let alone prejudge, these issues?”<sup>61</sup>

The distinction between “enforcing” and merely “recognizing” conventions does not hold up when one looks further afield. There are other areas where the courts, strictly speaking, do not “enforce” their rulings. References are the most notable category,<sup>62</sup> but declarations against the Attorney General are another. In both cases, we expect compliance by government with the court rulings. As a practical matter, references are not accorded less precedential value on the grounds that they are merely

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<sup>59</sup> Forsey, “The Courts and the Conventions of the Constitution”, *supra*, note 6, at 12.

<sup>60</sup> Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), at 3 [hereinafter “Heard, *Canadian Constitutional Conventions*”], quoting Geoffrey Marshall & Graeme Moodie, *Some Problems of the Constitution* (London: Hutchinson, 1959). Heard notes that this definition is a refinement of one first proposed by O. Hood Phillips in *Constitutional and Administrative Law*, 5th ed. (London: Sweet & Maxwell, 1973). See Heard, *id.*, at 3, n. 4. Heard must be referring to an earlier edition of this latter text.

<sup>61</sup> Barry Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3d ed. (Toronto: Butterworths, 1988), at 231, quoted in Sossin, *Boundaries of Judicial Review*, *supra*, note 31, at 176.

<sup>62</sup> See Hogg, *Constitutional Law of Canada*, *supra*, note 8, at § 8.6(d).

advisory.<sup>63</sup> If anything, many references may be considered “strong precedents” because of the importance of the issues canvassed by the courts. So the distinction between “recognizing” and “enforcing” conventions is problematic *ab initio*.

However, the nature of conventions makes this distinction even more problematic. References and declarations against the Attorney General are distinguished from other cases not by the substance of the issues, but by their procedural posture. Conversely, the justiciability of constitutional conventions is distinguished from other cases precisely because of its subject matter. Constitutional conventions are the rules of political morality.<sup>64</sup> When the courts become the political vice squad, problems inevitably follow.

Courts should not opine on constitutional conventions because they lack the necessary nexus to enforceable legal rights. Opining on the existence of a constitutional convention is akin to a court’s declaratory judgment power. Courts will only consider exercising its declaratory judgment powers where “there [is] a cognizable threat to a legal interest.”<sup>65</sup> Sir Robert Megarry V.-C. explained the Court’s jurisdiction on this issue:

In my judgment, the power to make declarations is confined to making declarations on matters that are justiciable in the courts ... so if the proceedings are brought in respect of moral, social or political matters in which no legal or equitable rights arise, the objection to the court deciding such matters remains.<sup>66</sup>

Thus, an English text notes that courts in that country will not grant a declaration about religious law or that a referee at a football match was right or wrong to award a penalty kick.<sup>67</sup> We might observe that the two

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<sup>63</sup> See Hogg, *id.*, explaining that the black letter law is that references are not binding even on the parties to the reference and lack the same precedential weight as an opinion in an actual case; however, there are no recorded instances where a reference opinion was disregarded by the parties or where it was not followed by a subsequent court on the ground of its advisory character. In practice, reference opinions are treated in the same way as other judicial opinions.

<sup>64</sup> Marshall, *Constitutional Conventions*, *supra*, note 47, at 7.

<sup>65</sup> *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at 457 (S.C.C.) (*per* Dickson C.J.C.). See the discussion in Sossin, *Boundaries of Judicial Review*, *supra*, note 31, at 216-19.

<sup>66</sup> *Malone v. Metropolitan Police Commissioner*, [1979] Ch. 344 at 353 (D.C.). Accord *Thorpe v. Australia (No. 3)* (1997), 144 A.L.R. 677. See generally The Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf: The Declaratory Judgment*, 3d ed. (London: Sweet & Maxwell, 2002), at 120 [hereinafter “Woolf & Woolf”].

<sup>67</sup> See Woolf & Woolf, *id.*, and n. 27, citing *R. v. The Chief Rabbi, ex p. Wachmann*, [1991] C.O.D. 309, and *R. v. Football Association, ex p. Football League*, *The Times*, August 22, 1991.

subject matters are really one and the same as football is often considered of religious importance to the English. And the same might be said of hockey in this country. But the importance of the issue does not qualify it for justiciability. If this were the case, constitutional conventions would surely lose out to a disputed goal in the Stanley Cup finals. Both examples share the lack of the necessary nexus to an enforceable legal right. The Supreme Court's equation of "constitutional equals justiciable" thus overreaches.

Moreover, even after the Court assumed the power to recognize constitutional conventions in the *Patriation Reference*, it is a further question whether it is necessary or prudent for the Court to exercise this power. It is not. As set out in the discussion above regarding the "crisis management" cases, in limited circumstances the Supreme Court has exceeded the normal bounds of judicial power in order to attempt to pour salve on a political dispute. The conventional wisdom is that the *Patriation Reference* successfully soothed a festering political sore. However, we do not know what would have happened had the Supreme Court refused to "recognize" the purported convention of substantial provincial consent. There are numerous possibilities. Perhaps 1980-81 would have been another failed attempt at constitutional reform and we would not have got the Charter. Perhaps, bolstered by the Supreme Court's ruling, Trudeau would have proceeded unilaterally and would have had no need for a kitchen compromise resulting in either the notwithstanding clause or the isolation of Quebec. It is not clear whether the country would have ended up in a better or worse position today had the Supreme Court not answered the convention question in 1981.

What is clear is that by answering the convention question and assuming the power to "recognize" constitutional conventions, the Supreme Court courted constitutional danger. It unnecessarily invited future controversy and conflict between the courts and the executive. In the next section, I explain how.

#### IV. DANGER AHEAD: THE *PATRIATION REFERENCE*'S LEGACY OF JUSTICIABILITY OF CONSTITUTIONAL CONVENTIONS AND CONTINUED CONFUSION RE THE CONSTITUTION OF CANADA

Constitutional conventions should not be justiciable. Conventions are a species of the Constitution and errors in constitutional adjudication are of greater magnitude than miscalculations in statutory or common law



interpretation that can be addressed by the legislature.<sup>68</sup> However, the dangers of constitutional adjudication are heightened respecting constitutional conventions. Constitutional conventions are “a body of constitutional morality”.<sup>69</sup> As the Supreme Court stated in the *Patriation Reference*, the main purpose of constitutional conventions is “to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period”.<sup>70</sup> The problem is that political morality changes (hopefully evolving rather than regressing) and given the rarity of adjudication of constitutional conventions, courts are unlikely to be able to keep up with changes to political mores. The Supreme Court is presented with the opportunity to comment on most Charter rights each year, but it may not be presented with an opportunity to revisit a constitutional convention in decades. The justiciability of constitutional conventions is therefore destined to freeze conventions at a certain point of time.

Moreover, as rules of political morality, conventions often express minimum expectations of behaviour. As political morality changes, some conventions should be abandoned to the dustbin of history. For example, there used to be acknowledged conventions about religious representation in Cabinet and on the Supreme Court. These have properly been jettisoned as political mores have changed. Elsewhere, Lorne Sossin and I have argued that the evolving political mores of accountability and transparency support the disclosure of reasons by the Governor General for controversial actions.<sup>71</sup> This would require abandoning a purported convention against gubernatorial disclosure of the reasons for a decision.<sup>72</sup> If the courts were to recognize the existence of such a convention, a reformist Governor General who sought to exercise power with more transparency and accountability would be said to be acting unconstitutionally. At the least, this is a recipe for a constitutional mess. However, I fear it is more constitutionally dangerous than that, as Forsey has explained.

Eugene Forsey was a constitutional visionary. In literal terms, Forsey warned soon after the *Patriation Reference* of the grave danger that

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<sup>68</sup> The *Askov* crisis is Exhibit A respecting the problems of errors in constitutional interpretation. See *supra*, note 28.

<sup>69</sup> Marshall, *Constitutional Conventions*, *supra*, note 47, at 7.

<sup>70</sup> *Patriation Reference*, *supra*, note 2, at 880.

<sup>71</sup> See Sossin & Dodek, “When Silence Isn’t Golden”, *supra*, note 46.

<sup>72</sup> Sossin and I argue both that no such convention exists and, in the alternative, that if it could be said to exist, it should be abandoned: *id.*

would ensue with the courts increasingly being called upon to rule on constitutional conventions.<sup>73</sup> While Forsey is generally venerated in constitutional circles, on this issue his warnings were ignored by the courts. Writing in 1984, Forsey opined that there was no shortage of conventions or alleged conventions on which someone inspired by the *Patriation Reference* might seek a judicial decision.<sup>74</sup> Forsey listed the following potential conventions for the Supreme Court's potential "recognition":

- whether a particular defeat in the House of Commons constitutes a vote of confidence;
- whether a bill dealing with language or culture requires a majority of votes of both English-speaking and French-speaking members of one House or both; and
- whether the Senate's veto over legislation had become unconstitutional.<sup>75</sup>

Forsey queried whether such hypothetical cases were "mere figments of an overheated imagination".<sup>76</sup> Forsey was a deep and creative thinker. He challenged us to think during the course of his prolific career and he continues to do so. His questions are not ones of an overheated imagination but of a thoughtful constitutional theorist. Forsey's writing demonstrates that there are serious issues with the courts "recognizing" constitutional conventions.

The first problem is institutional capacity. Constitutional conventions inhabit their own world at the intersection of constitutional history, political science, public administration and law. Many political scientists gave the Supreme Court failing marks for its explication of convention in the *Patriation Reference*. Their position is supported by Peter Hogg, who gently criticized the Court's "first foray into political science" as not yielding very satisfactory reasoning or conclusion.<sup>77</sup> Conventions are often subtle, complex and subject to competing interpretations or applications. The responses to the crisis of 2008 demonstrated this.<sup>78</sup>

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<sup>73</sup> Forsey, "The Courts and the Conventions of the Constitution", *supra*, note 6, at 38.

<sup>74</sup> *Id.*

<sup>75</sup> When Forsey was writing the Senate had not exercised its veto in over 40 years.

<sup>76</sup> Forsey, "The Courts and the Conventions of the Constitution", *supra*, note 6, at 39.

<sup>77</sup> Hogg, "Comment on the *Patriation Reference*", *supra*, note 8.

<sup>78</sup> See generally Russell & Sossin, *supra*, note 14. See especially the competing contributions of C.E.S. (Ned) Franks and Andrew Heard in this collection.

Conventions do not lend themselves to the definitive answers that courts are good at providing in binary litigation.

This problem of institutional capacity is demonstrated by an example in the *Patriation Reference* where the judges erroneously “recognized” a constitutional convention. In short, they got one wrong. As noted by Forsey, as an example of a constitutional convention, the dissenting opinion on convention cited the alleged “rule” that after a General Election, the Governor General calls upon the leader of the party with the greatest number of seats to form a government.<sup>79</sup> This “rule” has to be distinguished from the widely accepted rule that if a party receives a majority of seats, that party’s leader should form a government and an incumbent Prime Minister facing such a situation should resign.<sup>80</sup> But this does not appear to be what the Supreme Court is speaking about in its rule. Most constitutional experts would strongly dispute the existence of such a rule.

The articulation of the alleged rule is flawed. It fails on the Court’s own terms. To invoke the Court’s tripartite test for recognizing a constitutional convention: (1) What are the precedents? (2) Did the political actors believe that they were bound to act according to the rule? and (3) Is there a normative reason for the rule?<sup>81</sup> The Supreme Court’s alleged rule fails on each prong.

First, what are the precedents? They are decidedly mixed. To begin, Canadians did not face a minority government situation until after the 1921 elections. In 1921, Liberal Mackenzie King won a bare majority of 118 out of 235 seats, positioning him as the natural Prime Minister by convention. Due to several resignations, King’s government went back and forth between majority and minority. This precedent does not shed light on the purported rule because after the General Election, King had a majority.

In 1925, King “lost” the election, receiving 100 seats to Arthur Meighen’s 115. However, the Progressives held the balance of power with 22 seats. King continued in office after the election and attempted to govern with the support of the Progressives. The King-Byng crisis erupted only after King was unable to command the confidence of the majority of the House of Commons — the hallmark of responsible

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<sup>79</sup> *Patriation Reference*, *supra*, note 2, at 857, cited by Forsey, *supra*, note 6, at 38.

<sup>80</sup> See Eugene A. Forsey, *How Canadians Govern Themselves*, 7th ed. (Ottawa: Library of Parliament, 2010), at 3.

<sup>81</sup> *Patriation Reference*, *supra*, note 2.

government — and sought a dissolution from the Governor General. There was no indication among the political actors that the Governor General should have called upon Meighen with the return of the writs because Meighen had obtained the most seats. To the contrary, that surely would have precipitated an earlier crisis. Thus, this precedent is a strong negative one.

In the election that followed, King obtained a plurality and was able to govern with the support of other smaller parties. Fast forwarding to 1957, Progressive Conservative John Diefenbaker won a plurality over Liberal Louis St. Laurent. St. Laurent did not immediately resign. Four days after the election, Diefenbaker flew to Ottawa to meet with St. Laurent in his office on Parliament Hill. According to Diefenbaker, St. Laurent told him that several members of his cabinet were counselling St. Laurent to stay in office until the House met and let the St. Laurent government face a confidence motion. St. Laurent told Diefenbaker that “the people had spoken” and that unless the as yet untallied soldiers’ vote substantially changed matters, St. Laurent would resign.<sup>82</sup> The press speculated that St. Laurent would continue in office. Several days later — a full week after election night — St. Laurent announced his decision to resign and the Governor General called upon Diefenbaker to form a government.<sup>83</sup> This precedent does not support the existence of the purported rule.

Diefenbaker won a majority government in the ensuing election in 1958 but in 1962 he was back to a plurality and was able to hold on to a minority government with the support of the Social Credit Party.

After he lost the 1963 election, Prime Minister Diefenbaker considered the 1925 Mackenzie King precedent. Diefenbaker “lost” the election to Liberal Lester Pearson, who won a plurality but not a majority of seats. Diefenbaker did not concede defeat on election night, nor did he immediately resign. In an interview on election night, he explicitly invoked the precedent of Mackenzie King in 1925 “when Prime Minister King had decided, as was his right, to meet Parliament on the basis that no party had a majority”.<sup>84</sup> In fact, while he did not acknowledge it,

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<sup>82</sup> The Rt. Honourable John G. Diefenbaker, *One Canada: Memoirs of the Right Honourable John G. Diefenbaker, Volume 1: The Years of Achievement, 1956-1962* (Toronto: MacMillan Canada, 1976), at 36.

<sup>83</sup> *Id.*, at 37.

<sup>84</sup> The Rt. Honourable John G. Diefenbaker, *One Canada: Memoirs of the Rt. Honourable John G. Diefenbaker, Volume 3: The Tumultuous Years, 1962-1967* (Toronto: Macmillan, 1977), at 189.

Diefenbaker was following the precedent of Louis St. Laurent after the 1957 election. Diefenbaker considered hanging on to see whether he could continue to govern with a minority government with the support of other parties, but ultimately concluded that he could not and resigned, paving the way for Lester Pearson to head a minority government.

In 1965, Pearson's Liberals won another plurality and he was able to continue as Prime Minister heading a minority government. Trudeau succeeded Pearson in 1968 and won a massive majority which was reduced to a thin plurality in 1972. We might wonder what would have happened in 1972 when on election night, the returns appeared to be 109 to 107 in favour of the Progressive Conservatives over Trudeau's Liberals, with the New Democratic Party holding the balance of power with 31 seats (the Social Credit Party had 15 seats and there was one independent). Would Trudeau have resigned to make way for Robert Stanfield?

The last precedent before the Supreme Court in the *Patriation Reference* was the election of 1979, when Joe Clark's Progressive Conservatives won a plurality of seats. Trudeau resigned on election night, leaving the Governor General with Joe Clark as his only choice to call upon to form a government. When the Clark government fell in 1980, Trudeau returned to power with a majority government.

Thus, when the Supreme Court decided the *Patriation Reference* in 1981, the precedents were decidedly mixed. In the first truly minority situation, King set the precedent that a sitting Prime Minister can continue in office even if his party does not receive a plurality of votes at the polls. Both St. Laurent in 1957 and Diefenbaker in 1963 clearly thought that this was the convention when they considered holding onto power and we can imagine that in 1972 Trudeau would have also seriously considered remaining in office, even with Stanfield's Progressive Conservatives enjoying a two-seat plurality. The precedents thus do not support the existence of the purported rule identified by the Supreme Court of Canada. If anything, the precedents support the existence of a counter-rule.

On the second prong of the test, the relevant political actors did not feel bound by the rule articulated by the Supreme Court in the *Patriation Reference*. If anything, the general understanding was that in the absence of any one party having a majority, an incumbent Prime Minister has the right to continue in office and face a confidence vote when the House resumes.

Most problematic is the third prong of the test: the normative basis for the rule. Forsey asserted that accepting the rule that the Governor General calls upon the leader of the party with the most seats to form a government “would transfer to the Governor General a most important power which properly belongs, and in a parliamentary democracy which properly belongs, and in a parliamentary democracy must belong, to the House of Commons”.<sup>85</sup>

Let us imagine the following scenario. On election night, the results are inconclusive; no single party obtains a majority of seats. The official Opposition receives a razor-thin plurality of two more seats than the governing party. Two other opposition parties hold the balance of power. Such election results present a number of possible scenarios. On election night, the Prime Minister does not resign but announces his intention to engage in discussions with leaders of the other parties. The scenario is complicated by the surrounding context of statements by the Prime Minister and members of his party that coalitions are illegitimate and that “the party with the most seats should get to form a government.” On the basis of the *Patriation Reference* and the governing party’s own statements, outraged members of the official Opposition demand that the Governor General call upon their leader to attempt to form a government. This of course would require the Governor General to fire the incumbent Prime Minister, something the Prime Minister would not take lightly and something that any Governor General would be understandably hesitant to do.

The official Opposition — supported by friendly academics — file an emergency application for a declaration the next day in the Superior Court of Justice seeking a declaration that the Court “recognize” the alleged constitutional convention that the Governor General calls upon the leader of the party that receives the most seats in an election to form the government. Following the *Patriation Reference*, a Superior Court Justice issues such a declaration. What would the Prime Minister do? What should the Prime Minister do if he (rightly) thinks that the Court got the constitutional convention wrong? What would the Governor General do? What should he do if he also thinks that the Court got the constitutional convention wrong?

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<sup>85</sup> Forsey, “The Courts and the Conventions of the Constitution”, *supra*, note 6, at 38.

This scenario would be our own *Bush v. Gore*<sup>86</sup> except worse: it would involve unelected judges transferring power to an unelected Governor General. And so predicted Forsey in 1984:

But the next time an election fails to give any party more than half the seats, the leader of the largest party might well call on the Court to give its imprimatur to that part of the dissenting opinion of September 28, 1981. If the Court obliged, he would then be in a position to say that it was the constitutional duty of the Governor-General to dismiss the Government in office, and call on him to form a Government. Refusal would be branded “unconstitutional”.<sup>87</sup>

Thus, the Supreme Court’s inaccurate articulation of the relevant constitutional convention has set the stage for confusion, conflict and potential crisis. In the next section, I explain how the Supreme Court has developed practical ways of avoiding adjudicating such crises.

#### V. THE SUPREME COURT’S *MODUS VIVENDI* ON CONSTITUTIONAL CONVENTIONS

To date, Forsey’s dire predictions have not come to fruition. The *Participation Reference* did not engender an onslaught of litigation around constitutional conventions. There are three reasons for this. First, there have been limited instances where constitutional conventions have been contentious. The crisis of 2008 is an obvious exception. We might ask what would have happened if Governor General Michaëlle Jean had declined Prime Minister Harper’s request for prorogation. We must recall the Prime Minister’s comments: “We will use all legal means to resist this undemocratic seizure of power.”<sup>88</sup>

Second, the constitutional conventions provide relatively few opportunities for litigants.<sup>89</sup> In contrast, another aspect of the unwritten

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<sup>86</sup> *Supra*, note 36.

<sup>87</sup> Forsey, “The Courts and the Conventions of the Constitution”, *supra*, note 6, at 39.

<sup>88</sup> “Tories begin battle against coalition” CBC News (December 2, 2008), online: <<http://www.cbc.ca/news/canada/story/2008/12/02/harper-coalition.html>>.

<sup>89</sup> For judicial consideration of constitutional conventions, see *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, [2001] S.C.J. No. 14, [2001] 1 S.C.R. 470, at paras. 63-66 (S.C.C.) (rejecting the argument that a constitutional convention had arisen regarding the design of the public education system in Ontario); *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69, at para. 31 (S.C.C.) (recognizing the existence of a constitutional convention of political neutrality of civil servants as central to the principle of responsible government); *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, [2000] S.C.J. No. 45, [2000] 2 S.C.R. 409, at paras. 39-42 (S.C.C.) (rejecting claim of the existence of a

constitution, the Unwritten Constitutional Principles (“UCPs”) provided more possibilities to litigants. In the *Secession Reference*, the Supreme Court stated that the UCPs are invested “with powerful normative force, and are binding upon both courts and governments”. They can give rise to substantive legal obligations, *i.e.*, have “full legal force”.<sup>90</sup> Thus, adjudication of the UCPs has usurped much of the role that constitutional conventions might otherwise have played. In particular, the unwritten principles of judicial independence and the Rule of Law might also be very well considered constitutional conventions.<sup>91</sup>

Third, the Supreme Court has demonstrated an unwillingness to adjudicate constitutional conventions. This flies in the face of the precedent created by the *Patriation Reference* identified by Professor Lederman that “serious allegations concerning established constitutional conventions are justiciable to the extent explained”.<sup>92</sup>

Instead, the Supreme Court has engaged in issue avoidance. This is most recently observed in the Court’s refusal to grant leave in the fixed election date case, *Conacher v. Canada (Prime Minister)*.<sup>93</sup> On the Osgoode Hall Law School website TheCourt.ca, the editors of that publication singled out *Conacher* for an award for the most disappointing refusal of leave to appeal in 2010. In justifying this decision, they explained:

Had the Supreme Court granted leave and issued a ruling in the case, it would have prompted unnecessary but near-certain political push-back from either side of the aisle over what many contend was an open-and-shut case. And yet others would rather the court hear the appeal, as some uncertainty lingers about whether a constitutional convention had

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constitutional convention recognizing the reasonable autonomy of school boards); *Reference re Canadian Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525, at para. 68 (S.C.C.) (refusing to address the question of the existence of a constitutional convention regarding the legitimate expectations of provinces); and *Conacher v. Canada (Prime Minister)*, [2009] F.C.J. No. 1136, 2009 FC 920 (F.C.), affd [2010] F.C.J. No. 701, 2010 FCA 131 (F.C.A.), leave to appeal refused [2010] S.C.C.A. No. 315 (S.C.C.) (finding that the federal fixed election date legislation did not create a constitutional convention that restricts the Prime Minister from advising the Governor General to dissolve Parliament prior to the fixed election date in the absence of a loss of a vote of confidence).

<sup>90</sup> *Supra*, note 16, at para. 54.

<sup>91</sup> See Heard, *Canadian Constitutional Conventions*, *supra*, note 60, at 118-39 (judicial independence).

<sup>92</sup> W.R. Lederman, “The Supreme Court of Canada and Basic Constitutional Amendment” in Banting & Simeon, *supra*, note 5, 176, at 184.

<sup>93</sup> *Supra*, note 89. For my comments on this case, see Adam M. Dodek, “The Past, Present and Future of Fixed Election Dates in Canada” (2010) 4 *Journal of Parliamentary and Political Law* 215 [hereinafter “Dodek, ‘Past, Present and Future’”].



in fact arisen to support the fixed date legislation. It would seem among *TheCourt* staffers that there are more in the latter camp, and so the Golden Gavel goes.<sup>94</sup>

For whatever reasons, the Supreme Court decided that it wanted no part of this political issue.

There are numerous ways to explain the denial of leave in *Conacher*. The first is that the case did not involve a serious allegation regarding established constitutional convention. It is certainly my view and those of other scholars that the case was neither a serious allegation nor did it involve an established constitutional convention.<sup>95</sup> To the contrary, it involved the assertion of a creation of a new constitutional convention. I would think that the Court (not *TheCourt.ca*) could have rightly asked itself: “What are the precedents?” The answer to this must surely be “none”. As I have written, the question of the creation of a constitutional convention surrounding the fixed election date legislation becomes much more difficult after a first minister has respected the legislation for several rounds, creating a number of positive precedents.<sup>96</sup> In *Conacher*, we had one negative precedent. The issue is far more interesting in British Columbia, should Premier Christy Clark seek an early election in the face of the fixed election date of May 2013, after positive precedents of 2005 and 2009.<sup>97</sup>

The second possible reason for the Supreme Court to deny leave in *Conacher* is that the Supreme Court simply saw the case as inherently political and not requiring judicial intervention. Whether the fixed election date created a constitutional convention or not is beside the point. For Prime Minister Harper, the sanction for ignoring his own legislation, or for breaking constitutional convention, was to be found in the political realm, not the courts of law. And in the case, citizens did not exact any political sanction against the Prime Minister. In fact, they returned the Prime Minister with a stronger plurality. The political process played out as it should have. There was no need for court intervention in this case. As Forsey stated, “... any attempt by the courts to define conventions is a judicial invasion of the independence of the

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<sup>94</sup> Daniel Del Gobbo, “‘And the Winner Is ...’ — Announcing the Second Annual Golden Gavel Awards!” *TheCourt.ca* (March 23, 2011), online: <<http://www.thecourt.ca/2011/03/23/and-the-winner-is-announcing-the-second-annual-golden-gavel-awards/>>.

<sup>95</sup> See *contra* Andrew Heard, “*Conacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates” (2010) 19(1) *Rev. Const. Stud.* 21.

<sup>96</sup> Dodek, “Past, Present and Future”, *supra*, note 93, at 237.

<sup>97</sup> See Adam Dodek, “Defuse the fixed-election time bomb” *The Citizen* (April 4, 2011), online: <<http://www.ottawacitizen.com/news/Defuse+fixed+election+time+bomb/4558935/story.html>>.

political power and usurpation of its rights”.<sup>98</sup> Canadians continued to roast the Liberal party of Stéphane Dion at the polls. Intervening in the *Conacher* case would have been an improper attempt to corral the Supreme Court to “pull politicians’ chestnuts out of the fire”.<sup>99</sup> In short, the democratic process worked, demonstrating there was no need for judicial intervention to define constitutional conventions.

#### VI. CONCLUSION: THE LEGACY OF THE *PATRIATION REFERENCE* — MAY 2, 2011 AND BEYOND

At the end of the day, the *Patriation Reference*’s holding that constitutional conventions are justiciable and that courts may “recognize” but not “enforce” them has had little practical effect on constitutional adjudication, the relationship between the courts and other branches of government and Canadian politics. Like the “duty to negotiate” in the *Secession Reference*, the justiciability of constitutional conventions in the *Patriation Reference* renders that judgment largely *sui generis*, an island unto itself. The *Patriation Reference* properly belongs to a special category of national emergency cases including the *Manitoba Language Rights Reference*,<sup>100</sup> the *Provincial Judges Reference*<sup>101</sup> and the *Quebec Secession Reference*.<sup>102</sup> “In each case, the Court came up with a solution that arguably exceeded the normal limits of judicial power, but the solution was a clever one that defused the crisis.”<sup>103</sup> What distinguishes the *Patriation Reference* is that it contains incendiary material that could ignite in a future crisis. The election of May 2, 2011, avoided such a crisis, but only through the intervention of the voters.

Courts may need to comment on the existence of constitutional conventions in the course of adjudicating other matters. In this sense, the Supreme Court was correct in stating that courts “recognize” the existence of constitutional conventions. However, the *Patriation Reference* erred by translating this practice of “recognition” into “declaration”. Constitutional conventions are dynamic rules of political morality and they should be left to political actors to adjudicate and sanction. The courts are too static to adjudicate conventions matters and they risk doing

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<sup>98</sup> Forsey, “The Courts and the Conventions of the Constitution”, *supra*, note 6, at 40-41.

<sup>99</sup> *Id.*

<sup>100</sup> *Supra*, note 18.

<sup>101</sup> Hogg, “The Bad Idea”, *supra*, note 24.

<sup>102</sup> *Supra*, note 16.

<sup>103</sup> Hogg, “From Privy Council to Supreme Court”, *supra*, note 17, at 96.

more constitutional harm than good. Constitutional conventions should be left in the political arena to evolve, disappear and be replaced by new conventions.