



## The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 54 (2011)

Article 3

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### Citation Information

Russell, Peter H.. "The Patriation and Quebec Veto References: The Supreme Court Wrestles with the Political Part of the Constitution." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54. (2011).  
<http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/3>

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# ***The Patriation and Quebec Veto References: The Supreme Court Wrestles with the Political Part of the Constitution***

**Peter H. Russell\***

## I. THE SUPREME COURT OF CANADA'S ROLE IN CONSTITUTIONAL POLITICS

Several times in Canada's history the turbulent waters of constitutional politics have roared up to the Supreme Court, when for a moment the political gladiators in a constitutional struggle put down their armour, don legal robes and submit their claims to the country's highest court. September 1981 was surely such a moment.

Indeed, it is difficult to find any other constitutional democracy whose highest court has been called upon to render such a crucial decision in the midst of a mega constitutional struggle over the future of the country. The U.S. Supreme Court in *Dred Scott*<sup>1</sup> may be the closest example. The German Constitutional Court rendered important decisions in the reunification process and in relation to the European Union.<sup>2</sup> But these decisions did not have as direct a bearing on the political conflict of constitutional change as the 1981 *Patriation Reference*,<sup>3</sup> or indeed the *Quebec Veto Reference*<sup>4</sup> that followed a year later. And I might add to

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<sup>1</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857). See Don E. Fehrenbacher, *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective* (Oxford: Oxford University Press, 1981).

<sup>2</sup> See Peter E. Quint, *The Imperfect Union: Constitutional Structures of German Reunification* (Princeton: Princeton University Press, 1997).

<sup>3</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*"].

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

these extraordinary incidents of the Supreme Court of Canada's constitutional statecraft, the *Quebec Secession Reference* of 1998.<sup>5</sup>

For better or worse, Canada, more than any other constitutional democracy in the world, has called upon its highest court to adjudicate disputes of fundamental importance to its very existence.

## II. A TECHNOLOGICAL FARCE

An indication of the importance of the *Patriation Reference* to the body politic is that the Supreme Court decided it would deliver its decision to the country on live television, the newest communications technology of the day. And what a farce that turned out to be!

On the morning of September 28, 1981, as the nine justices filed through the door to take their places at the long table facing the courtroom, Justice William McIntyre, then the junior member of the Court so the last in line, caught his shoe on the wire carrying the television sound system. Justice McIntyre had no idea what he had done. Nor did his Chief Justice, Bora Laskin, who at 10:30 a.m. precisely began reading summaries of the majority and minority opinions. Millions of viewers watched the Chief Justice solemnly mouthing the words. There was no sound. If this was disconcerting to the television audience, it was much more than that for the three members of the CBC colour commentary crew consisting of Dan Soberman (Dean of Law at Queen's), CBC reporter Peter Mansbridge and myself. We were downright panic-stricken. For when Justice Laskin was finished, it was our job to explain to Canadians — in a nutshell — the meaning of the Supreme Court's decision. With no written text available to us, what were we to say?

A great Canadian communicator saved our bacon. Mike Duffy, then a CBC television reporter, had managed, nimble as that rotund fellow is, to climb up on a chair and get his ear up against a sound amplifier. On the proverbial back of an envelope Duffy scribbled what he took to be the main points: a green light on law for the federal government but a red light on convention. When Duffy's bit of paper was handed to us by our producer, Arnold Amber, the three of us had just a minute or two to decide whether we should go with Duffy or ask for a break to read the text. We decided to go with Duffy and, luckily for us, he had nailed the decision: legally the federal government could ask the U.K. Parliament to

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<sup>5</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Quebec Secession Reference*"].

patriate the Constitution with only two provinces' consent, but if they did so they would be violating a convention of the Constitution. Thank you Michael Duffy — you well deserve your appointment to the Senate!

This was the first and last time the Supreme Court endeavoured to release a decision on live television. That is the technological legacy of the *Patriation Reference*.

### III. A JURISPRUDENTIAL LANDMARK

But, much more significantly, the Court's decision in the *Patriation Reference* is a jurisprudential landmark decision, not only for Canada but also for the common law world, on the part of our Constitution referred to as constitutional conventions. Since there was no written constitutional text on the requirements for a Canadian request to the U.K. Parliament to amend Canada's Constitution, if the Court agreed to answer the questions posed in the reference, it could not avoid dealing with arguments based on unwritten constitutional convention. In doing so, Canada's Supreme Court provided the most extensive consideration of constitutional conventions ever rendered by the high court of a country whose institutions are based on British constitutional culture.

In terms of legal theory, fundamental metaphysical or ontological questions were in play: What is convention? What is law? Is convention part of the law of the Constitution? It is not surprising that the Court stumbled in handling these questions. The Canadian justices' intellectual formation — like that of the vast majority of lawyers — has little room for such profound philosophical questions.

All nine judges considered that law and convention are separate things. For the three dissenting justices (Laskin C.J.C., Estey and McIntyre JJ.), that was reason enough for the Court not to consider arguments about conventions. "It is not the function of the Court," they said, "to go beyond legal determinations."<sup>6</sup> However, these three decided to ignore their own logic and deal with the constitutional convention question anyway. They did so simply because the other judges had decided to answer questions about constitutional convention and they did not want to be left out of the game.

The majority on convention (Beetz, Chouinard, Dickson, Lamer, Martland and Ritchie JJ.), citing numerous cases in which courts have used convention to interpret formal legal powers and have given legal

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<sup>6</sup> *Patriation Reference*, *supra*, note 3, at 849.

effect to conventions, held that a question about convention was justiciable. I agree with the majority, but think its position would have been more coherent, and intellectually more respectable, if instead of saying as they did, “constitutional conventions plus constitutional law equal the total constitution of the country”,<sup>7</sup> they had followed A.V. Dicey, who introduced the concept of convention to distinguish two sets of constitutional rules — one set that he referred to as laws “in the strictest sense” and another, which although it formed “a portion of constitutional law”, he called convention.<sup>8</sup>

What makes it difficult for many lawyers and legally trained scholars, and indeed the three dissenting Supreme Court justices, to accept that questions about constitutional questions can be justiciable is the sharp line they draw between law and politics. Here I think they err by being attached to too narrow a view of politics. Aristotle held that what distinguishes human societies from the societies of inanimate nature is their capacity to conduct their affairs through a discourse about justice rather than through the play of brute force or instinct. In this sense it is man’s distinctive nature to be “a political animal”, and a discourse about justice is fundamental to politics. Law and adjudication are fundamentally about justice. That is why we say courts administer justice. Of course, there are other aspects of politics than exchanging views about justice. But it is wrong to let these other aspects — particularly the contest for power among competing politicians — blind us to politics in the Aristotelian sense. Law is the specialized sphere of the political realm where we aim to deal with questions of justice in a manner that is insulated from the rough and tumble aspects of politics.<sup>9</sup> But law and the work of courts should never be treated as outside of politics. Following Dicey, we should understand conventions to be the part of our constitutional law that is shaped by politicians acting in response to their times and circumstances, and does not depend on the courts for its enforcement.

The majority did a better job in clarifying the role of constitutional conventions in our system of government. They captured well the essence of Dicey’s conception with the following words:

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<sup>7</sup> *Id.*, at 883-84.

<sup>8</sup> A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), at 24 [hereinafter “Dicey”]. For my full argument on this point, see Peter Russell, “The Supreme Court Decision: Bold Statescraft Based on Questionable Jurisprudence”, in Peter Russell, Robert Décaré *et al.*, *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment* (Kingston: Queen’s University Institute of Intergovernmental Relations, 1982) 1-32.

<sup>9</sup> See Peter H. Russell, “The Politics of Law” (1991) 11 Windsor Y.B. Access Just. 127.

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>10</sup>

To use Dicey's language, conventions are "a body of constitutional or legal ethics" concerning the proper use of legal powers.<sup>11</sup>

It is on the question of how to identify a constitutional convention that the Supreme Court may have made its most important contribution to constitutional theory. They did this by adopting the test set out by the constitutional historian, Sir Ivor Jennings, in *The Law and the Constitution*:<sup>12</sup>

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>13</sup>

In essence, the Jennings test makes the existence of a constitutional convention depend on (1) whether there is a good principle of government for the rule; and (2) whether the key actors in the situation (who will be political leaders or government officials) feel ethically bound to abide by the rule. Admittedly this two-fold test is not easy to apply. It requires conscientious, responsible thinking about the core principles of our system of government. And it requires a consensus among elected political leaders. That, indeed, is the inherent democratic component of constitutional conventions. They are made and unmade in the arena of politics.

In Canada in recent years we have witnessed a breakdown of that necessary political consensus on conventions that is fundamental to the operation of parliamentary democracy. The majority's discussion of constitutional conventions is a useful guide to what is needed if we are to avoid conflict and possible crises in operating our parliamentary system in the future.<sup>14</sup> It is particularly helpful in pushing those who debate and

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<sup>10</sup> *Patriation Reference*, *supra*, note 3, at 880.

<sup>11</sup> Dicey, *supra*, note 8, at 417.

<sup>12</sup> W. Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), at 136.

<sup>13</sup> *Patriation Reference*, *supra*, note 3, at 888.

<sup>14</sup> See Peter H. Russell, "The Need for Agreement on Fundamental Conventions of Parliamentary Democracy" (2009-2010) 27 N.J.C.L. 201.

discuss constitutional conventions to appreciate that ascertaining what constitutional convention requires is not simply a matter of searching for precedents.

#### IV. A SUCCESSFUL APPLICATION OF THE MAJORITY'S TEST

The majority on convention, applying Jennings' test, found that "the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required" as a matter of convention for the passing of the Parliament of Canada's address to the U.K. Parliament requesting the changes to the Constitution incorporated in the proposed package of patriation amendments.<sup>15</sup>

This ruling was successful in satisfying both of the key requirements of the Jennings test. First, this rule was justified by the federal principle that is fundamental to the very nature of Canada and its constitutional structure. Second, not only did the precedents indicate the need for provincial consent for such amendments, but the actors currently involved in operating this part of our constitutional system — the Prime Minister of Canada and the provincial premiers — demonstrated by their actions that they felt bound by this rule.

For an hour or so after the Court's decision was rendered, it was not entirely clear that the Prime Minister, Pierre Trudeau, did feel bound by the rule. He was in Seoul, South Korea at the time. When the Supreme Court's decision reached Cabinet Secretary Michael Pitfield, who was travelling with the Prime Minister, it was the middle of the night in Seoul and Pitfield decided not to wake Trudeau up. While Trudeau slept in Korea, in Canada, we in the media heard that his Justice Minister, Jean Chrétien, was roaring around his department threatening to act on the legal green light the Court had given his government and ignore its red light on convention.

It was surely a good thing for the integrity of our federation that Prime Minister Trudeau, once he had a chance to digest the Court's decision, did not hesitate to say that he would have to meet with the provincial premiers to make the changes in the proposed constitutional amendments necessary to increase substantially the level of provincial support for them.

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<sup>15</sup> *Patriation Reference*, *supra*, note 3, at 909.

### V. THE *QUEBEC VETO REFERENCE* — A QUESTIONABLE APPLICATION OF THE TEST

Within a year and two months of deciding the *Patriation Reference*, the Supreme Court was called upon, in very different circumstances, to make its second decision on constitutional convention, the *Quebec Veto Reference*.<sup>16</sup> The altered circumstances had much to do with the Court's decision in the previous year.

In early November 1981, Prime Minister Trudeau and the premiers of all the provinces except Quebec reached an accord on the terms of patriation. Three weeks later the Quebec National Assembly passed a resolution objecting to making these changes in Canada's Constitution without Quebec's consent. At the same time, the government of Quebec referred to the Quebec Court of Appeal the question whether proceeding with these amendments without Quebec's consent was "unconstitutional in the conventional sense". This did not stop the Canadian government from proceeding with patriation on the terms agreed to with the other provinces, nor the U.K. Parliament from passing the *Canada Act, 1982*<sup>17</sup> implementing the requested amendments. On April 7, 1982, the Quebec Court of Appeal brought down its decision, holding unanimously that as a matter of constitutional convention, Quebec's consent was not required.<sup>18</sup> On April 13, 1982, the Quebec Court of Appeal's decision was appealed to the Supreme Court of Canada. Four days later the changes to which Quebec objected were proclaimed in force by Queen Elizabeth II.

Thus, the Supreme Court of Canada in dealing with this case was truly between a rock and a hard place. If, applying the Jennings test, it found that the Quebec Court was wrong, it would render patriation, much celebrated outside of Quebec, unconstitutional. Even if the finding was based on convention, it would be extremely embarrassing to the federal government and the other provinces. Given the precedent of a year earlier, it would be difficult for Trudeau to say he could ignore convention. If, on the other hand, the Court upheld the decision below, it seemed that it would have to deny the principle that Quebec, as the home of one of Canada's founding peoples, is not a province like the rest, and should not have its powers or place in Confederation altered without the consent

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<sup>16</sup> *Supra*, note 4.

<sup>17</sup> (U.K.), 1982, c. 11.

<sup>18</sup> *Quebec (Attorney General) v. Canada (Attorney General)* (1982), 134 D.L.R. (3d) 719 (Que. C.A.).



of its government. In the face of Canadian history going back to Confederation, that is not an easy principle to deny.

So what did the Court do? Well, the same nine justices who had decided the *Patriation Reference* on December 6, 1982 unanimously held that as a matter of convention Quebec did not have a veto over constitutional amendments affecting its power and status.<sup>19</sup> They did this by tiptoeing around the question of principle and applying only Jennings' rule that the actors involved must feel bound by the convention. There was no tangible, documentary evidence demonstrating that the Prime Minister of Canada and the premiers of the other provinces had in the past felt bound by a rule that required Quebec's consent. And certainly the behaviour of these actors in the present, in going ahead with the patriation package of amendments without Quebec's consent, demonstrated that they did not feel bound to recognize a Quebec veto. So, with a negative finding on one of Jennings' two tests, they thought they could avoid the embarrassment of dealing with the principle at issue.

This decision has had a most unfortunate legacy for Canada. Mr. Trudeau and the nine premiers who supported him, by proceeding without Quebec, broke the bond of trust between French and English Canada that lies at the heart of Confederation. In doing so, they took a roll of the die that would make even Brian Mulroney blush. The gamble came very close to misfiring on the night of October 30, 1995, when Quebecers came within 31,000 votes of registering a referendum vote for independence. In giving judicial protection to the political actors who effected patriation, the Supreme Court, in my view, did not administer justice.

The politics of Canada's federal union, reinforced by Jean Chrétien's 1996 *Constitutional Amendments Act*,<sup>20</sup> have now settled the matter: in convention and in statute law, the Quebec veto exists. It is my fervent hope that the bond of trust that was broken in 1982 will eventually be restored.

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<sup>19</sup> *Quebec Veto Reference*, *supra*, note 4.

<sup>20</sup> S.C. 1996, c. 1.