BEYOND THE B.N.A. ACT*

AMENDMENT AND PATRIATION

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This paper, delivered following the judgment of the Manitoba Court of Appeal, summarizes and updates several of the issues presented in the preceding article. Commentaries by Peter W. Hogg and W. L. Lederman, which were presented after this address, follow.

As a non-Canadian, perhaps I should begin by entering a small personal plea for forgiveness for uttering any words at all on Canadian matters. The Kershaw Committee was, not without some justice, criticized for taking evidence from witnesses who knew nothing about Canadian constitutional law. There may have been some excuse for it. I think there was, in the terms of reference. But at any rate, I shall promise to say nothing at all about Canadian constitutional law. If I stray and do so, then I beg you to ignore it entirely. On the other hand, if I say anything about United Kingdom constitutional law, then you can treat it merely with a certain amount of moderate skepticism.

We shall try to divide this discussion into three parts, roughly using the "Manitoba formula"; that is to say, taking the three areas that were chosen to put questions to the court in Manitoba.[1] Therefore, we may discuss, firstly, something about the Canada Act[2] and its effects; secondly, the question of action required in Canada for amending the British North America Act; and thirdly, the action required in the United Kingdom. Those were roughly the areas put before the courts.

We call our topic "Amendment and Patriation". I think the better phrase would be "the problem of getting an amendment formula into the B.N.A. Act". I am not sure that the talk over the years about patriation, and patriating the constitution, has not perhaps done more harm than good. It may confuse people to run together questions as to where things happen with the way in which things happen. I venture to take the view that patriation of the Canadian constitution took place, in some constitutional sense or other, in 1931.[3] In terms of all the conventions of behaviour, Canada has had a Canadian constitution in some sense since then, in the same way that Canada has had a Queen.

I will deal rather quickly with the effects of the Canada Act. That will, I think, involve some propositions about Canadian constitutional law. We may

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1. *Reference re Questions Concerning Amendment of the Constitution of Canada as Set Out in O.C. 1020/80* [1981] 2 W.W.R. 193 (Man. C.A.).
2. Canada Act, 1980 (Proposed Act to Amend the Constitution of Canada by enactment of the Constitution Act, 1980).
3. Statute of Westminster, 1931 (U.K.), 22 Geo. V, c. 4.

question whether this is simply the same question: is the present Canada Act something which could be enacted by the federal Parliament under its powers, most recently conferred in 1949,[4] under the B.N.A. Act. That in a sense is a negative way of putting it. The Manitoba Court, or some of the judges, have said that this question is a speculative one. It does seem to me that the word for it is really "hypothetical", not so much "speculative". Unless one assumes that the Canada Act is to be radically transformed, and is to have its middle taken out, that there is to be no entrenched Bill of Rights and no patriation clause, it seems hard to convince oneself that there is no impact on the powers reserved to the provinces by the B.N.A. Act, as drafted originally and in 1949. However, that is a matter which will be determined in due course.

Therefore I will proceed, rather precipitately, to what to me are questions of even greater difficulty: the actions that are required in the United Kingdom and in Canada. This has been the focus of debate before both the Kershaw Committee and, of course, the judicial tribunals in Canada. They both have had to answer the same questions.

If we ask ourselves, "is there a convention in Canada that requires the assent and agreement of the provinces to action requesting an amendment to the B.N.A. Act", one of the first difficulties is in assembling the convention from the many disparate instances of B.N.A. Act amendment. This is a problem in Canada and in the United Kingdom, because a survey of the various amendments, (even if confined to those since 1931) shows that they have been amendments of different kinds. Some of them have not affected the rights or powers of the provinces; some have affected the rights and powers of the provinces but with the agreement of the provinces; some (like those of 1943[5] and 1946[6]) debatably affecting the rights of the provinces but it not being agreed whether they did. In some cases there has been agreement, in some cases there has not. I believe it is right to say there has never been a case in which more than two provinces have disagreed with the action of the federal government and Parliament in requesting British amendment. And the most important case of disagreement, in 1943, involved only one province, which was Quebec.

The difficulty in assembling a convention from these many instances is that one has to ask, "a convention for what?". A convention for amending the B.N.A. Act — full stop? Or does one complicate it by saying that what we want is a convention for amending the B.N.A. Act in cases where (a) the amendment affects the powers of the provinces, and (b) it is opposed by a number of provinces or a substantial number of provinces? The convention in that case might well be a different one from the convention for amending the B.N.A. Act when the provinces have agreed. Thus, there is a complication in knowing what task one is about in setting out to create a convention. But I would concede, and argue, that there is certainly a difficulty in creating a clear convention from the past instances of B.N.A. Act amendments.

4. B.N.A. Act, 1949 (U.K.), 12 & 13 Geo. VI, c. 22.
5. B.N.A. Act, 1943 (U.K.), 7 Geo. VI, c. 30.
6. B.N.A. Act, 1946 (U.K.), 10 Geo. VI, c. 63.

However, as one reads in the Manitoba Court judgment, there is more than one way of establishing conventions. One judge remarks, rather accurately, that one can think of conventions as being established in a kind of instantaneous way simply by people agreeing. Conventions become established partly — only partly — because people act in certain ways over a period of time, believing that they are acting in that way because they have to. But also, conventions become established because at some point, as in international law and as the word "convention" might suggest, they sit down and say, "we think this is the rule". If they all agree, there is some evidence that they accept the rule. And a convention, as we all know, is a rule of political behaviour which the political persons involved believe to be morally and politically binding upon them, though not legally binding.

So you can look not only to the various B.N.A. Act amendments, but also to such quasi-instantaneous agreements as the 1965 White Paper on the amendment of the constitution of Canada.[7] That Paper was said to be issued with the unanimous agreement of the provinces and the federal government who published it. It is said that Principle 4 of the Paper[8] requires the agreement of the provinces to amendment of the B.N.A. Act. But, of course, the Principle is said to be one which has received increasing recognition, and which, in detail, is non-specific. That is, it does not specify exactly the nature of the rule. It does not say whether unanimity is required, or whether a substantial number of provinces is required to fulfil the rule. However, this may not be fatal. There are many conventions — in fact, I would say most conventions — of the Anglo-Canadian political system which undoubtedly exist though no one can specify in detail to what exact circumstances they apply. Let me give you an obvious analogy: everyone admits that there is a clear convention to the effect that the Crown is not obliged to grant a dissolution to a Cabinet automatically, in every conceivable circumstance. That is to say, there is a convention to the effect that the Crown has a constitutional right to refuse a dissolution. Now specifying the circumstances in which that right may be exercised is impossible. Nobody who acknowledges the convention is prepared to enumerate the circumstances, though they are prepared to enumerate some. A Prime Minister might ask for a series of dissolutions, one every week, and obviously that could be refused. But we do not know; the convention is a vague one. That does not mean it does not exist. And I think you can easily fall into the argument (and I suggest with some hesitation that one sees some signs of this argument in some of the Manitoba Court opinions) that because the principle set out in Principle 4 of the White paper of 1965 is non-specific, that because its degree and application to particular circumstances have never been clearly set down, then there is some doubt about its existence. Perhaps that may not be so. At least, I simply set out the argument that it may not be fatal to the existence of a convention that you cannot specify all the cases for its application. So Principle 4 would be some evidence that there is such a convention.

It may simply be a negative convention, and perhaps in present circumstances that is all we require. We are not, after all, if one looks at the present

7. *The Amendment of the Constitution of Canada*, A White Paper of the Government of Canada (Ottawa, 1965).

8. *Id.* at 16; *see* Appendix, preceding paper.

situation, in a marginal position of doubt about whether two or three provinces are required. The doubts that one might state hardly apply to the present case. So it may simply be, as with the Queen and dissolution, that there is a negative convention. The convention, as I said, that there is no automatic duty on the Crown to assent to dissolution is a negative convention. It may be that you could state a similar one: there is no automatic entitlement to proceed with a request for amendment and consent without some approval of the provinces, though the exact number of provinces may well never, as yet, have been determined.

The question (interesting, perhaps, to legal philosophers) arises at this point as to the distinction between convention and law. And a certain amount of attention has been paid to this question. Though I say this with considerable deference, it was perhaps unwise, tactically speaking, for those who wished to establish the existence of a convention to argue too strongly that the conventions of the constitution had crystallized or hardened or transmogrified into principles of constitutional law. It is perfectly right to say that there is an argument that this can happen. But it is possible that this allegation has confused some of the questions currently put to the courts. It seems to me to have persuaded at least one of the judges in the Manitoba case that Question 3 was actually about the law; that the third question put to them, which was essentially whether there was a convention in the United Kingdom requiring consent before enactment of B.N.A. Act amendments, was a question as to whether there was any law requiring it. And clearly it was not. But the whole flow of the argument before the Court tended to suggest that the question being put by the provinces was, "Had the convention hardened into law"?

It is not surprising, though the question is an interesting and arguable one, that some people might feel some skepticism about that, and more skepticism about that than about whether there was in fact a constitutional convention. So there is very little discussion in the Manitoba judgments of the third question, namely, "what is the rule for enactment?", which is obviously a question about a convention in the United Kingdom.

Finally, to the perhaps parochial question of action in the United Kingdom. To some extent the difficulties of arguing about what is required in Britain are parallel to those which one finds in Canada. That is, there is first of all the difficult question of determining what convention we have in mind. The British government, quite justifiably, has said over and over again that "we always assent to requests for amendment of the B.N.A. Act". That is perfectly true. And certainly since 1931, British governments have always said "it is not our duty to look behind federal requests for amendment", and one can understand that. One can understand it in terms of psychology — because psychologically the inquiry into the views of the provinces is almost certain to be (as it has been) treated as interventionist or intermeddling. Therefore, one can understand why British governments wanted to make that point. One can also understand that perhaps they have not considered the situation as fully as they might have done.

Constant reference is made in arguments about the British precedents to the statement of Lord Jarrett in 1940, who, I think, was the first clear enunciator in the United Kingdom of what you might call the "no sniffing at the package theory". That is to say, you do not look inside. Whatever suspicions you may have, it is none of your business what is going into the box. The

package must be sent back unopened, and you must not even look too closely at its origins.

The central point I am making is that to found a convention on this is unsatisfactory because nobody in 1940 had considered what circumstances might arise, and nobody had debated this. There has never been any discussion or debate in the United Kingdom House of Commons about this convention. It was simply an off-the-cuff remark, no doubt considered by Ministers, that they would not look behind it. And, of course, in that case (in 1940), there was no reason whatsoever to look behind it. There was complete agreement on the amendment involving the unemployment insurance power. And so there are successive U.K. Ministers on all subsequent occasions simply citing the same statement, making the same point. There was no debate on it, no discussion of what would be the case if there were in fact substantial provincial dissent. It was a view which grew up in a sense without full discussion and without being based on any proper principle. Nevertheless, conventions can grow up in that way; but such conventions are not, I think, without a basis of certainty.

I would also argue the negative thesis that there is no United Kingdom requirement of automatic approval of any federal Parliamentary request for amendment whatsoever, whatever it may be. At least, there is no convention based upon the previous actions of British governments in approving of the existing amendments. One can say that the present situation, a proposed amendment to the B.N.A. Act opposed by a majority of provinces at a time when they are seeking to establish their rights to object in the courts, is an unprecedented one, for which previous occasions provide no clear guide. Therefore one has to fall back on principle and on argument about the nature of the case. Here, I think one simply has to spin out the implications of the Statute of Westminster; the implications of the federal system of government; the implications of what was done in the B.N.A. Act originally, in protecting it in 1931, in renewing the protection in 1949, and in dividing the powers. That was all intended to create a federal structure. One can argue that such structures are not legally protected. They may be, and if they make any sense and if they have any reality, they must be protected by at least some informal conventional rules of behaviour, to prevent their turning into something that is not federal at all.

But I fully concede that, on this point, there are arguments both ways. It can be said that there is nothing specifically written in; there is no legal protection; there is no legal requirement that the government and the Parliament of Canada assume they are not entitled to carry out their statutory right, as set out in such law as there is about it. It is a complex argument, and no doubt many people will have views about it.

One interesting point about the United Kingdom convention, which has been argued before the Kershaw Committee, is the following. Is there really a separate British convention, or is there simply a single Anglo-Canadian convention? I would suggest that there is, in the logic of the Canadian and British political systems, only a single convention. There is a convention as to what ought to happen when amendment to the B.N.A. Act is sought. And if that convention requires provincial assent to the making of the request, then it requires provincial assent for enacting the request into law. That is the proposition which I am asserting.

That implies that there is only a single convention. It operates in two places, and it is both a British and a Canadian convention. It is a single con-

vention and the implication of that, I submit, is that the British convention ought simply to be whatever rule can be properly derived from the constitutional practice of Canada. That yields for us the principle which has been hinted at but not fully stated, in the Kershaw Report. The Kershaw Report reached the conclusion, (a) that there is no automatic rule of assent to any federal request whatsoever; (b) that there is no rule of unanimity in any form, that no convention requiring unanimous consent of the provinces is necessary; (c) that it would be beneficial in some ways if attention were to be paid to the litigation in Canada by the members of the United Kingdom Parliament. And indeed it would.

In fact, the suggestion which most easily reconciles the notion of there being a British convention involving the amendment of its own statute, which reconciles that with the notion of a single convention, is simply that the members of the United Kingdom Parliament should follow, to the best of their ability, constitutional practice as set out in the courts of Canada. I am merely inventing that rule as a possible convention. It does seem to me that the Kershaw Committee have in fact adumbrated it, and it is one which allows the British, if they follow the Supreme Court of Canada, to escape the charge that they are in some sense making their own decisions as United Kingdom legislators. They can say: "We are not for this purpose United Kingdom legislators, we are simply part of the constitutional amendment process of Canada."

That argument (and I conclude with this point) has been developed in an interesting way in one of the judgments in the Manitoba appeal, which goes very much further. It argues that by convention, what happens when a request for amendment goes from Canada is that a petition is made not to the Queen in Right of the United Kingdom, but to the Queen in Right of Canada. That is, Canadian subjects, when they subscribe to the curious declaration that is made in these matters, "We, Your Majesty's humble and obedient subjects", are speaking as humble and obedient subjects of Her Majesty the Queen in Right of Canada. It is then argued that the enactment of the final bill is, of course, by the Queen in Right of the United Kingdom.

This, of course, introduces some metaphysical difficulties, because one is then presented with the question: if the petition is to the Queen of Canada and if the enactment is by the Queen of the United Kingdom, who actually lays the petition before the United Kingdom Parliament? It cannot be the Queen of Canada, because she cannot lay it. It must be the Queen of the United Kingdom. But if it is the Queen of the United Kingdom, what is the point of petitioning the Queen of Canada? This leads one into interesting metaphysical byways, and although one could go on about those, and their implications, I do not want to venture onto any further remarks about either the Queen of Canada or the Queen of the United Kingdom.