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CONSTITUTIONAL CONVENTIONS

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What Is a Constitutional Convention?

Conventions are rules of the Constitution; however, they are not enforced by the courts because they are not laws.

Constitutional conventions originated in the principles of British representative democracy, and became an integral part of Canada's constitutional system because of the Preamble to the *British North America Act, 1867* (now the *Canada Act, 1867*) which refers to Canada having a "constitution similar in principle to that of the United Kingdom." It is generally accepted that the penalty for breaching a constitutional convention is political, not legal.

In 1981, the Supreme Court of Canada dealt with the issue of whether a court could properly recognize a constitutional convention, given that they are not justiciable. In the case that came before the Court, eight provinces opposed the patriation of the Constitution on the terms proposed by the federal government. They argued that there was a constitutional convention that Parliament would not request a constitutional amendment from the Parliament of the United Kingdom without provincial concurrence. The Supreme Court found that it could properly recognize conventional rules and even comment on them, notwithstanding their political aspects, supposed vagueness, uncertainty or flexibility.

The Court noted that conventional rules are not enforced by the courts in large part because they may be in conflict with the legal rules that the courts are bound to enforce. Legal constitutional provisions can create wide powers, discretions and rights; conventions often limit the way in which these powers can be used. For example, the written Constitution would allow the Governor General to refuse Assent to any bill passed by both Houses of Parliament, but convention circumscribes this power entirely.⁽¹⁾

How Do We Recognize a Constitutional Convention?

Some experts argue that constitutional conventions should rest on an acknowledged principle of governance, such as the rule of law.⁽²⁾ Accordingly, some conventions may be more important than some laws, depending on the value or principle that they are meant to safeguard.

For example, the Supreme Court, in the *Patriation Reference, 1981*, found that enacting the proposed amendment without a substantial measure of provincial consent would be unconstitutional in the conventional sense because the process would offend the federal principle. Although the Court could not enforce the convention, it was widely accepted that the Parliament of the United Kingdom would not pass an amendment to the Canadian Constitution in the face of a statement by the Court that the process was unconstitutional. This had the effect of forcing the federal government back to the negotiating table.⁽³⁾

There are many instances, however, when experts cannot agree whether a particular type of conduct is simply a "usage" or "custom," or whether it has matured into a constitutional convention.

In October 1993, the Progressive Conservative government authorized an agreement for the privatization of Pearson Airport in Toronto in the midst of a federal election campaign; this occurred just three weeks before the election itself. This conduct was criticized as contravening the "caretaker convention" that a government's discretionary decision-making should be restricted as much as possible in the midst of an election campaign. Andrew Heard and John Wilson explored the issue from different perspectives in light of the differences between constitutional convention, custom and usual practice.⁽⁴⁾

Some debate has also taken place as to whether a constitutional convention can ever invalidate a written constitutional law. For example, many commentators argue that the federal power to reserve or disallow provincial legislation no longer exists because it has been allowed to atrophy over time. However, it is

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difficult to see how lack of exercise can vitiate a written and legal constitutional power. Moreover, the courts upheld the appointment of eight extra Senators in 1990, although the pertinent section of the *Canada Act, 1867* had never been previously used and was considered by many to be archaic.

Examples of Constitutional Conventions

Conventions that limit the Governor General's powers with respect to the executive government and Parliament:

- The Governor General accepts the Prime Minister's advice as to when to dissolve Parliament, with the possible exception of situations where the government has clearly lost the confidence of the House of Commons and there is another party leader capable of forming the government. He or she also accepts the Prime Minister's advice as to when to recall Parliament, so long as it is clear or probable that the Prime Minister can sustain the confidence of Parliament.
- The Governor General may dismiss a government if (1) an opposition party has won a majority in an election and the existing government refuses to resign, or (2) a government has been defeated on a clear vote of confidence and neither calls an election nor resigns.
- The Governor General must appoint as first minister a party leader who is certain or likely to command a majority in the legislature.
- The Governor General appoints the rest of the Cabinet on the advice of the Prime Minister.
- The Governor General cannot refuse Royal Assent to a bill that has been passed by both Houses of Parliament at his/her own discretion, but only on the advice of the Prime Minister.

Conventions supporting responsible government:

- Most of the rules of responsible government and, in particular, Cabinet government are to be found through constitutional conventions rather than the written constitution.

- The government must maintain the confidence of the House of Commons, and resign or call an election if it loses a confidence vote.
- Cabinet solidarity requires that Cabinet ministers maintain a public front of unanimity on Cabinet decisions, and this is facilitated by the convention of collective responsibility.
- The vast majority of Cabinet members are expected to be elected members of the House of Commons; when a Cabinet minister is appointed from outside of Parliament, he or she is expected to sit in Parliament as soon as possible.

Notes

- (1) "Many Canadians would perhaps be surprised to learn that important parts of the Constitution of Canada, with which they are most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the Constitution. For instance, it is a fundamental requirement of the Constitution that if the Opposition obtains the majority at the polls, the Government must tender its resignation forthwith. But fundamental as it is, this requirement does not form part of the law of the Constitution" (Supreme Court of Canada, *Patriation Reference, 1981*).
- (2) Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Oxford University Press Canada, Toronto, 1991.
- (3) "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 will be of no avail, unless it is perfectly certain that the persons concerned regarded themselves as bound by it" (Supreme Court of Canada, *Patriation Reference, 1981*).
- (4) Andrew Heard, "Constitutional Conventions and Election Campaigns," *Canadian Parliamentary Review*, Vol. 18, Autumn 1995, pp. 8-11; John Wilson, "Constitutional Conventions and Election Campaigns: The Status of the Caretaker Convention in Canada," *Canadian Parliamentary Review*, Vol. 18, Winter 1995-1996, pp. 12-19.

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