

The Supreme Court and the Conventions of the Constitution

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I. INTRODUCTION

In the set of opinions that came to be known as the *Patriation Reference*, the Supreme Court of Canada observed that “many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the 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”.¹ These “important parts of the constitution” are constitutional conventions. Despite its belief that conventions do not belong to the realm of law, the Supreme Court has pronounced on a number of claims involving them, both before and since the *Patriation Reference*. This jurisprudence deserves attention, and criticism — which indeed it has not failed to attract.

The doctrine that conventions are not legal rules, and perhaps the very idea of constitutional conventions, entered the constitutional lawyers’ belief system thanks to A.V. Dicey’s *magnum opus*, *Introduction to the Study of the Law of the Constitution*.² Conventions, as Dicey explained, are “understandings, habits, or practices which ... regulate the conduct of the several members of the sovereign power, of the Ministry, or other officials”.³ Indeed, they are not mere understandings or habits, but rules, understood to be binding by those to

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¹ *Re: Resolution to amend the Constitution*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753, at 876-77 (S.C.C.) [hereinafter “*Patriation Reference*”].

² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915).

³ *Id.*; see also W.S. Holdsworth, “The Conventions of the Eighteenth Century Constitution” (1932) 17 Iowa L.R. 161, at 162 (“conventional rules spring up to regulate the working of the various parts of the constitution, their relations to one another, and to the subject”).

whom they apply. Generally speaking, conventions dictate that political actors or institutions must exercise the discretion that they would otherwise enjoy in a certain way, or within certain parameters. For example, with a few exceptions, the Crown exercises its prerogative powers in accordance with the advice of its responsible ministers; the ministers must resign or advise the Crown to dissolve Parliament if they lose a vote of confidence in the House of Commons; and so on.⁴

The actors' discretion must be limited in accordance with conventions to ensure, in Holdsworth's words, that it is always exercised "in accordance with the prevailing constitutional theory of the time".⁵ A breach of conventions means nothing less than that some political actor is acting contrary to fundamental constitutional principle. As the Supreme Court put it in the *Patriation Reference*, a fundamental breach of convention "could be regarded as tantamount to a *coup d'état*".⁶ In Eugene Forsey's words, "conventions are the sinews and nerves of our body politic."⁷ If they were severed, the body would be paralyzed.

Yet important as they are, conventions are not, on Dicey's theory, part of constitutional law. Dicey divided the constitution, understood as the set of "rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state"⁸ into two subsets "of a totally distinct character".⁹ Constitutional law, whether enacted or common law, and whether entrenched or susceptible of amendment by ordinary legislation, is one of them. Conventions make up the other. The rules of constitutional law, Dicey wrote, are judicially enforceable. By contrast, constitutional conventions "are not in reality laws at all since they are not enforced by the courts",¹⁰ no matter how crucial they are for the operation of the constitution as we know it.

The Supreme Court embraced Dicey's view in the *Patriation Reference*, stating that "constitutional conventions plus constitutional law equal the total constitution of the country".¹¹ Although, in the wake of

⁴ For a comprehensive study of Canadian constitutional conventions, see Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2d ed. (Toronto: Oxford University Press, 2014) [hereinafter "Heard, *Conventions*"].

⁵ Holdsworth, *supra*, note 3, at 163.

⁶ *Patriation Reference*, *supra*, note 1, at 882.

⁷ Eugene A. Forsey, "The Courts and The Conventions of The Constitution" (1984) 33 U.N.B.L.J. 11 [hereinafter "Forsey"].

⁸ Dicey, *supra*, note 2, at 22.

⁹ *Id.*, at 23.

¹⁰ *Id.*

¹¹ *Patriation Reference*, *supra*, note 1, at 884-85.

the Supreme Court's opinion in *Reference re Senate Reform*,¹² it is now doubtful whether this dichotomy accurately describes Canadian law, an exploration of that issue must be postponed due to lack of space.¹³ For the same reason, it is impossible to cover here any of the lower-court cases dealing with conventions, real or alleged. I must content myself with setting out in Part II, the Supreme Court's views on conventions prior to the *Senate Reform Reference*, as well as the scholarly response to this jurisprudence in Part III. In the concluding Part IV, I will argue that the Court's embrace of the distinction between law and convention was and remains misguided.

II. CONVENTIONS AT THE SUPREME COURT

The Supreme Court's first engagement with constitutional conventions came in the set of references dealing with the constitutionality of legislation by which Parliament sought to implement the "labour conventions" concluded as part of the Treaty of Versailles.¹⁴ One of the arguments against the validity of this legislation was that Canada could not have entered into the international agreements which it implemented because "in point of legal rule, as distinct from constitutional convention, the Governor General in Council had no authority to become party by ratification to the convention with which we are concerned".¹⁵ Chief Justice Duff, speaking for three of the six judges of the Supreme Court, rejected this contention. In his view, "constitutional usage", evidenced in this instance by the proceedings of Imperial Conferences, could acquire the force of law, and although "[a]s a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long period of time; ... the Great War accelerated the pace of development in the region with

¹² [2014] S.C.J. No. 32, 2014 SCC 32, [2014] 1 S.C.R. 704 (S.C.C.).

¹³ In a nutshell, it seems to me that the notion of an "architecture" that is part of the judicially enforceable law of the constitution, which the Court invoked there, embraces at least some, although perhaps not all, conventions.

¹⁴ *Reference re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.J. No. 31, [1936] S.C.R. 461 (S.C.C.) [hereinafter "*Labour Conventions S.C.C.*"]; see Fabien Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la 'sécession' du Québec : le fantôme du rapatriement" (1997) 57:2 R du B du Québec 291, at 303-307 for a discussion of Duff C.J.C.'s treatment of conventions, and the Supreme Court's mischaracterization of his opinions in the *Patriation Reference* [hereinafter "Gélinas, 'Fantôme'"].

¹⁵ *Labour Conventions S.C.C.*, *id.*, at 476.

which we are concerned”.¹⁶ As a result, the extent of the prerogative powers of the federal Crown, and indeed the very existence of a Canadian Crown, distinct from the Imperial one, both legal issues, could be answered only with reference to “constitutional usage” or convention. Indeed, in Fabien Gélinas’s words, “for the Chief Justice, a constitutional convention morphed into a common law rule, with the common law now providing that in Canada the prerogative of making treaties ... belongs to the Governor-General in Council”.¹⁷ Although the Privy Council differed from Duff C.J.C. in its views on the legislative competence of Parliament to *implement* the labour conventions,¹⁸ it did not reverse his conclusion as to the Canadian executive’s power to *enter into* them.

The Supreme Court and Duff C.J.C. returned to the issue of conventions a short time thereafter, when dealing with the controversy over the disallowance of key planks of Alberta’s Social Credit government’s legislative program by the federal government.¹⁹ Alberta had argued that the powers which the *Constitution Act 1867*²⁰ grants provincial Lieutenants General of reserving a bill passed by the legislature for the signification of the Governor General’s pleasure, and the Governor General of disallowing provincial legislation,²¹ were no longer extant. In substance, although not in form, the basis for this claim was what was arguably an emerging convention preventing federal interference in the provincial legislative process.

Here, however, Duff C.J.C., insisted that he was “not concerned with constitutional usage”, but only “with questions of law which ... must be determined by reference to the enactments” of the imperial Parliament (such as the *Constitution Act 1867*) and of the Canadian one, if relevant.²² This position is seemingly at odds with that which the Chief Justice had taken in *Labour Conventions S.C.C.*,²³ and indeed neither he

¹⁶ *Id.*, at 477.

¹⁷ Gélinas, “Fantôme”, *supra*, note 14, at 306 (Author translation).

¹⁸ *Canada (Attorney-General) v. Ontario (Attorney-General)*, [1937] J.C.J. No. 5, [1937] A.C. 326 (J.C.P.C.).

¹⁹ *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] S.C.J. No. 1, [1938] S.C.R. 71, at 73 (S.C.C.) (headnote explaining the factual background of the reference) [hereinafter “*Disallowance Reference*”].

²⁰ 30 & 31 Vict., c. 3 (U.K.).

²¹ *Id.*, ss. 55-57 and 90.

²² *Disallowance Reference*, *supra*, note 19, at 78.

²³ But see Gélinas, “Fantôme”, *supra*, note 14, at 308 (arguing that there is no contradiction between opining, in *Labour Conventions S.C.C.* that a convention could crystallize into law, and in

nor any of his colleagues so much as mention that opinion. Of course, the issue before the Supreme Court might appear to have been more difficult than in *Labour Conventions S.C.C.*, which concerned the evolution of common law rules about the Crown. In the *Disallowance Reference*, by contrast, the Court was invited to recognize a convention that contradicted the clear terms of the *Constitution Act, 1867*. However, this is only so on the assumption that the references to the Crown in the *Constitution Act, 1867*²⁴ were capable of judicial re-interpretation, from the unified imperial Crown to a separate Canadian one. This is at least arguably contrary to the more originalist interpretive approach that prevailed at the time.²⁵

Be that as it may, here the Chief Justice concluded that as no legislation had modified the provisions of the *Constitution Act 1867* which granted them, “the power of disallowance and the power of reservation are both subsisting”.²⁶ The other judges reached the same conclusion. The Chief Justice’s repeated disclaimers of “concern[] with constitutional usage or constitutional practice”²⁷ hint that he was well aware that the Court’s opinion went against such practice. Justice Cannon’s insistence, in a somewhat surprising *obiter dictum*, that “[a]n additional reason for the preservation of this power of disallowance of provincial statutes is its necessity, more than ever evident, in order to safeguard the unity of the nation”²⁸ suggests that he understood how uneasily the power sat with the federal principle. But the Court behaved just as Dicey believed it ought to, confining itself to applying the orthodox legal sources and ignoring convention.

After a lengthy hiatus, the Supreme Court returned to the subject of conventions in the *Patriation Reference*, having been asked for an opinion on the twin questions of whether the federal government’s attempt to secure the Patriation of the Constitution and the entrenchment

the *Disallowance Reference*, that the Court was not to consider the existence of an alleged convention).

²⁴ See especially *Constitution Act, 1867*, s. 9 (providing that “[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen”).

²⁵ See e.g., *Aeronautics Reference*, [1931] J.C.J. No. 4, [1932] A.C. 54, at 70 (J.C.P.C.) (stating that “[t]he process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded”); see also Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 49 U.B.C. L. Rev. (forthcoming) (discussing this and other cases).

²⁶ *Disallowance Reference*, *supra*, note 19, at 79.

²⁷ *Id.*, at 78.

²⁸ *Id.*, at 83.

of the *Canadian Charter of Rights and Freedoms*²⁹ unilaterally, without provincial assent, was unconstitutional as a matter of law and of convention. Differently constituted but overlapping majorities,³⁰ answered the legal question in the negative, and the conventional one in the affirmative.

The answer to the legal question was orthodox enough. The majority rejected the contention “that a convention may crystallize into law”³¹ and thus become a fit subject for judicial enforcement. It echoed Dicey by insisting that there was a sharp distinction between rules of law, and in particular those of the common law, and convention. The former, the majority said “are 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”.³² The latter, by contrast, are “political in inception” and thus by their “very nature” incapable of “legal enforcement”.³³ There can be no “common law of constitutional law, but originating in political practice”, because “[w]hat is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute.”³⁴ To hold otherwise would have meant to “enact by what would be judicial legislation” a formula for amending the Constitution; or perhaps “to say retroactively that in law we have had an amending formula all along, even if we have not hitherto known it”.³⁵ There is, in the majority opinion, perhaps only one sign that constitutional thought had moved on from the *Disallowance Reference*. “[R]eservation and disallowance of provincial legislation,” the majority noted, “although in law still open, have, to all intents and purposes, fallen into disuse.”³⁶ This is an observation about “constitutional usage” that Duff C.J.C. and his colleagues would not make; a small departure from orthodoxy, perhaps, but a revealing one.

The Court’s answer to the conventional question was not orthodox — in that it was given at all. The majority opinion on the legal question

²⁹ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³⁰ Chief Justice Laskin and Dickson, Beetz, Estey, McIntyre, Chouinard, and Lamer JJ. on the legal question; Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ. on the conventional one.

³¹ *Patriation Reference*, *supra*, note 1, at 774.

³² *Id.*, at 775.

³³ *Id.*, at 774-75.

³⁴ *Id.*, at 784.

³⁵ *Id.*, at 788.

³⁶ *Id.*, at 802.

quoted Colin Munro’s assertion that “[t]he validity of conventions cannot be the subject of proceedings in a court of law [and] the idea of a court enforcing a mere convention is so strange that the question hardly arises.”³⁷ The majority on the conventional question, four of the six of whose members were also in the majority on the legal question, observed that courts had, in the past, “recognized” conventions “to provide aid for and background to constitutional or statutory construction”.³⁸ In its view, it was also proper to do so in this case — even though this would not be in the service of elucidating a legal issue — because recognizing conventions would not entail their enforcement.³⁹ Indeed, the dissenting opinion on the conventional question agreed with the majority that it was proper for a court to “recognize” conventions, although perhaps reluctantly.⁴⁰

In the course of “recognizing” the conventions governing constitutional amendment, the majority articulated a general test for determining whether a constitutional convention exists, adopting the criteria developed by Sir W. Ivor Jennings: “We have to ask ourselves three questions: first, what are the precedents; second, did the actors in the precedents believe that they were bound by a rule; and third, is there a reason for the rule?”⁴¹ Applying this test, the Court reviewed the various instances of constitutional amendment that occurred since 1867; found that the actors considered themselves bound by a rule requiring “substantial”⁴² — but not necessarily unanimous — provincial consent before Parliament would initiate amendment procedures; and declared that “[t]he reason for

³⁷ *Id.*, at 783, quoting Colin R. Munro, “Laws and Conventions Distinguished” (1975) 91 L.Q.R. 218, at 228.

³⁸ *Patriation Reference, id.*, at 885.

³⁹ *Id.*, at 880 (“[i]n contradistinction to the laws of the constitution, [conventions] are not enforced by the courts”).

⁴⁰ Compare *id.*, at 853 (“[c]ourts ... may recognize the existence of conventions and that is what is asked of us in answering the questions”) and *id.*, at 849 (“Because of the unusual nature of these References and because the issues raised in the questions now before us were argued at some length before the Court and have become the subject of the reasons of the majority ... we feel obliged to answer the questions notwithstanding their extra-legal nature”). See also Forsey, *supra*, note 7, at 37 (arguing that the latter passage shows that “the three dissenting judges were clearly unhappy answering” the conventional question); Forsey does not discuss the dissent’s acknowledgment of the propriety of judicial “recognition” of conventions, however.

⁴¹ Sir W. Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), at 136.

⁴² *Patriation Reference, supra*, note 1, at 905; somewhat curiously, the majority did not repeat this term in its conclusion, speaking instead *id.*, at 909, of “the agreement of the provinces of Canada, no views being expressed as to its quantification”. Surely, that this agreement must involve a “substantial” number of the provinces is such a view, if a vague one.

the rule is the federal principle”.⁴³ Thus, although legal, and although the Court could issue no remedy to block it, unilateral Patriation would be unconstitutional because contrary to convention.⁴⁴

The majority’s findings as to the contents of the convention governing provincial consent to constitutional amendments have been criticized as inaccurate by writers of high authority.⁴⁵ Indeed, one of them, John Finnis, has done so not merely in an academic capacity, but as the special adviser to the Foreign Affairs Committee of the United Kingdom Parliament on the U.K. government’s and Parliament’s response to Canada’s eventual request for the enactment of legislation patriating the Canadian Constitution. Recounting this experience more than three decades later, Finnis stated his belief that the “Supreme Court’s majority had *made up* a convention of substantial provincial concurrence to replace the actual convention of unanimous concurrence”,⁴⁶ although he, and the Committee, concluded that the Westminster Parliament had a responsibility to enact any constitutional amendment requested by Canada so long as it reflected “the clearly expressed wishes of Canada as a federally structured whole”.⁴⁷ Whether these criticisms are valid, or whether there might be something to say in the majority’s defence, is not my concern here. As Forsey acknowledged, with the enactment of the *Constitution Act, 1982*, “[t]he specific question” of the conventions that governed constitutional amendment until then (if any did) “is ... of merely historical interest”.⁴⁸ The question that is still relevant now is that of the Supreme Court’s jurisprudential treatment of conventions generally.

⁴³ *Id.*, at 905.

⁴⁴ See *id.*, at 884 (noting that “it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence”).

⁴⁵ Peter Hogg, in section “Comments on Legislation and Judicial Decisions” of 60 *Can. Bar. Rev.* 307, at 318-20, 334 [hereinafter “Hogg”] (arguing that the Court’s conclusion was “the least plausible of the possible interpretations” of the precedents it identified and the statements of the actors involved in these precedents; Forsey, *supra*, note 7, at 29-37 (criticizing the indeterminacy of the majority opinion and concluding that it “is not a very impressive performance”); John Finnis, “Patriation and Patrimony: The Path to the Charter” (2015) 28:1 *Can. J.L. & Jur.* 51.

⁴⁶ Finnis, *id.*, at 73 (emphasis in original).

⁴⁷ *First Report from the Foreign Affairs Committee, Session 1980-81: The British North America Acts: The Role of Parliament* HC 42 (Session 1980-81) xii, para. 14(10), quoted in Finnis, *id.*, at 71-72; but see Hogg, *supra* note 44, at 332 (arguing that the Report’s conclusion “was incorrect” because “Canada is no longer a British colony. It is no longer appropriate that fundamental decisions regarding Canada’s constitution should depend upon the ‘best judgment’ of a legislative body whose members are not in any way accountable to the Canadian electorate”).

⁴⁸ Forsey, *supra*, note 7, at 26.

The Supreme Court chose, however, to return to the conventions of constitutional amendment in a follow-up reference, which asked whether the “substantial” provincial consent of which the Court had spoken in the *Patriation Reference* had to include Quebec.⁴⁹ Quebec asserted the existence of two alternative (and indeed, as the Court remarked, mutually exclusive⁵⁰) conventions: one requiring unanimous provincial consent to constitutional amendments affecting provincial interests, so as to further the federal principle; the other, giving Quebec alone, a veto on amendments by virtue of its status as a distinct society within Canada.⁵¹

The Court again agreed to pronounce on the existence of the alleged conventions, even though it acknowledged that as the patriated Constitution had come into effect, and “[i]ts legality [was] neither challenged nor assailable”, the matter “ha[d] become moot”.⁵² Unanimously this time, the Court reiterated its endorsement of Jennings’ test for ascertaining the existence of conventions. It explained the importance of applying such a test by stating that although not rules of law, conventions

[l]ike legal rules, ... are positive rules the existence of which has to be ascertained by reference to objective standards. In being asked ... whether the convention did or did not exist, we are called upon to say whether or not the objective requirements for establishing a convention had been met. But we are in no way called upon to say whether it was desirable that the convention should or should not exist.⁵³

Applying the “objective standards” supplied by Jennings’ test, the Court rejected the existence of either convention alleged by Quebec. Although precedents might seem to support their existence (as no amendment had taken place without unanimous provincial consent), the actors in the precedents did not consider themselves bound by either of the alleged rules, and thus, the test’s requirements were not met.

After the *Quebec Veto Reference*, the Supreme Court only very rarely returned to the issue of conventions in any depth.⁵⁴ In two cases where the

⁴⁹ *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.) [hereinafter “*Quebec Veto Reference*”].

⁵⁰ *Id.*, at 801.

⁵¹ See especially *id.*, at 812-14.

⁵² *Id.*, at 806.

⁵³ *Id.*, at 803.

⁵⁴ The Court was asked to consider arguments involving conventions in *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.) (convention allegedly preventing a unilateral modification of Parliament’s obligations to provinces under a cooperative program); *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46,

constitutionality of legislation imposing political neutrality requirements on civil servants was at issue, the Court took note of the conventions imposing such requirements as part of the broader arrangements of responsible government.⁵⁵ This was done in the course of answering the strictly legal question of whether such legislation was constitutional — in *OPSEU*, in respect of the federal division of powers, and in *Osborne*, in respect of the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms* — and was thus unobjectionable from the standpoint of orthodox constitutional theory.

Less orthodox, however, were the remarks made by Beetz J. for the majority in *OPSEU*, suggesting in an *obiter* that “[i]t may very well be that the principle of responsible government” — which is largely a set of constitutional conventions — “could, to the extent that it depends on ... important royal powers, be entrenched to a substantial extent”.⁵⁶ This seems to suggest that conventions, while perhaps not entrenched as such, must at least be taken into account when interpreting the constitutional references to the Governor-General and the Lieutenant-Governors (and perhaps other constitutional provisions too), although there is debate over just how such an interpretation would proceed.⁵⁷

In *Reference re Secession of Québec*, the Court referred to conventions as being among the “supporting principles and rules” that “are a necessary part of our Constitution”.⁵⁸ The “principles”, the Court held, “may in certain circumstances give rise to substantive

[1991] 2 S.C.R. 158 (S.C.C.) (the drawing of electoral boundaries being allegedly subject to convention so as to make it immune to judicial review); and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] S.C.J. No. 25, [2011] 2 S.C.R. 306, 2011 SCC 25 (S.C.C.) (the court below allegedly impermissibly relied on conventions). In each of these cases the Supreme Court brushed these arguments aside with little discussion.

⁵⁵ *Ontario (Attorney General) v. OPSEU*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2 (S.C.C.) [hereinafter “*OPSEU*”]; *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69 (S.C.C.) [hereinafter “*Osborne*”].

⁵⁶ *OPSEU*, *id.*, at 108.

⁵⁷ See Mark D. Walters, “The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7” (2013) 7 J. Parliamentary & Political L. 37, at 58 (arguing that the entrenchment of the vice-regal offices also entrenches the Prime Minister’s advice-giving role); Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis” (2009) 27 NJCL 217 (same); Fabien Gélinas and Léonid Sirota, “Constitutional Conventions and Senate Reform” (2013) RQDC 107, at 116-17 (arguing that the entrenchment of the vice-regal office only extends to such powers of that office as actually exist after taking the existence of conventions into account).

⁵⁸ [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 32 (S.C.C.) [hereinafter “*Secession Reference*”].

legal obligations”.⁵⁹ But, while it found support for that proposition in the dissenting judgment on the legal question in the *Patriation Reference* (without acknowledging that it was citing the dissent!),⁶⁰ the Court also seemed to renew its embrace of the *Patriation Reference*’s “distinction ... between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions”.⁶¹

The Supreme Court last seriously engaged with alleged constitutional conventions in two cases where provincial reforms to the organization of school systems were challenged on the basis that, among other things, conventions protected the autonomy of existing school boards⁶² or their ability to set local tax rates.⁶³ In both cases, the Court found that the alleged convention did not exist. That policy in this area had long remained unchanged was not enough to show otherwise. In *Catholic Teachers*, Iacobucci J. for the unanimous Court went further and questioned whether any convention can regulate “how a particular power, which is clearly within a provincial government’s jurisdiction, is to be exercised”.⁶⁴ In his view, “[c]onstitutional conventions [instead] relate to the principles of responsible government”.⁶⁵ These musings seem to flatly contradict the majority opinion on the conventional issue in the *Patriation Reference*, which did not involve the principle of responsible government at all, and was in fact concerned with the question of how an undoubted power of Parliament (to adopt resolutions) was to be exercised. Presumably, Iacobucci J. did not mean to narrow down or even overturn the *Patriation Reference* in this way. Indeed, the interesting fact about both *Public School Boards* and *Catholic Teachers* seems rather to be that the Court would entertain at all, seriously if briefly, submissions about conventions.

⁵⁹ *Id.*, at para. 54.

⁶⁰ *Id.* (citing *Patriation Reference*, *supra*, note 1, at 845).

⁶¹ *Secession Reference*, *id.*, at para. 98.

⁶² *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, [2000] S.C.J. No. 45, 2000 SCC 45, [2000] 2 S.C.R. 409 (S.C.C.) [hereinafter “*Public School Boards*”].

⁶³ *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, [2001] S.C.J. No. 14, 2001 SCC 15, [2001] 1 S.C.R. 470 (S.C.C.) [hereinafter “*Catholic Teachers*”].

⁶⁴ *Id.*, at para. 65.

⁶⁵ *Id.*

III. SCHOLARLY RESPONSES TO THE SUPREME COURT'S TREATMENT OF CONVENTIONS

The Supreme Court's approach to conventions, especially in the *Patriation Reference*, has been strongly criticized — both by those who argued that the Court went too far in engaging with the conventional issue at all, and by those who argued that it was wrong to insist on the Diceyan distinction between convention and law. There is no room to review these criticisms in detail here. It is only possible to make note of some salient points.

One conclusion on which both sorts of critics can agree is that the Supreme Court was wrong to count on the efficacy of the distinction between recognizing conventions and enforcing them (assuming, that is, that it really did count on the efficacy of the distinction, and not on its futility). Andrew Heard notes that the Court's opinion on the conventional question “may have resulted in the enforcement of those conventions, since it has been widely credited with spurring on political leaders to reach an accord”.⁶⁶ Adam Dodek insists that “[t]he distinction between ‘recognizing’ and ‘enforcing’ conventions is a problematic one”.⁶⁷ Indeed, one can safely go further, and say that the distinction between recognizing that a rule binds the government as a matter of constitutional legitimacy, so that breaching it would be unconstitutional if not “tantamount to a *coup d'état*”, and enforcing that rule, is one without a difference.⁶⁸

⁶⁶ Heard, *Conventions*, *supra*, note 4, at 223; see also Andrew Heard, “Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates” (2010) 19:1 Const. Forum 129, at 129 [hereinafter “Heard, “Missed the Mark””] (observing that “[a]ny pronouncement by a court of the terms of a convention can and often does amount to a political enforcement of the convention”).

⁶⁷ Adam M. Dodek, “Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*” in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 117, at 129 [hereinafter “Dodek”].

⁶⁸ Fabien Gélinas, “La Cour suprême du Canada et le droit politique” (2008) 24 C. du Cons. Const. 72, at 77 (pointing out that “la décision judiciaire prise à l'encontre du gouvernement ou du législateur est utile non pas parce qu'elle pourrait faire l'objet d'une exécution forcée – ce n'est pas le cas – mais bien parce qu'elle est respectée”); Léonid Sirota, “Towards a Jurisprudence of Constitutional Conventions” (2011) 11:1 OUCLJ 29, at 42-43 (arguing that there is no substantial difference between mandatory and declaratory court orders so far as giving effect to the obligations of the state is concerned); Heard, *Conventions*, *supra*, note 4, at 223 (stating that “[s]ince the essence of enforcement of a rule by the courts is to assure compliance with that rule, the courts may be ‘enforcing’ conventions even without formal legal sanctions”). Of course, it is possible for a court merely to recognize a convention, in the course of arriving at some *other* conclusion: see *e.g.*, *OPSEU*, *supra*, note 55, at 45.

Those who believe conventions should be left to the political realm accordingly argue that the Court should have refused to answer the conventional question at all. One complaint is that the Supreme Court overstepped the bounds of the judicial role by answering a question which, by its own (majority's) account was not a legal one.⁶⁹ We might call this the jurisdictional criticism. As one of its proponents, Peter Hogg, has acknowledged, its strength rests entirely on the acceptance of the sharp divide between convention and law.⁷⁰ But other criticisms, which have to do with the courts' capacity to address conventional questions and with the consequences of their doing so, go to the heart of the issue of whether that divide should be maintained.

What we might call the competence criticism is stated most forcefully by Forsey, who insists that “[k]nowledge of constitutional conventions is not easily come by”, and that most judges and lawyers are sorely lacking in this regard, thus being at risk of being misled by “plausible constitutional quacks, or authors rich in learning but poor in judgment”.⁷¹ The competence criticism echoes the idea that constitutional conventions are “matters too high for ... a lawyer, ... a mere legist” — expressed by Dicey himself.⁷² Andrew Heard's sharp criticism of Canadian courts for adopting Jennings' test for identifying conventions may well support this view. Heard argues that the test cannot be usefully applied when the public record regarding the precedents and the political actors' view is not sufficiently clear (which is often the case).⁷³ Indeed, in Heard's view the test is not only impractical, but fundamentally misconceived, because conventions are rules of “critical” rather than “internal” morality, and relying on the political actors' sense of obligation “opens the door to tremendous abuse and damage by the deliberately deceptive and the innocently ignorant”.⁷⁴ It is worth noting, however, that — critical as he is of the courts' treatment of conventions — Heard does not argue that they should not

⁶⁹ See especially Hogg, *supra*, note 45, at 321-22 (arguing that while a court can pronounce on non-legal questions in the course of answering legal ones, it ought not to address such questions in the abstract); see also Dodek, *supra*, note 67, at 130.

⁷⁰ Hogg, *id.* (noting that had the Court accepted the claim that conventions can “crystallize” into law, it would have had to ascertain what the relevant conventions were so as to answer a legal question).

⁷¹ Forsey, *supra*, note 7, at 37; see also Dodek, *supra*, note 67, at 133.

⁷² Dicey, *supra*, note 2, at 20-21.

⁷³ Heard, “Missed the Mark”, *supra*, note 66, at 132-34.

⁷⁴ *Id.*, at 135.

pronounce on conventions altogether, but rather that they should take a different approach to identifying them.⁷⁵

As for what can be termed the consequentialist criticism of the judicial “acknowledgment” of conventions, it holds that a variety of ill-effects will flow from such acknowledgment. Forsey warned that “[e]ven if the judges state a convention correctly, there is the danger that they may freeze it, embalm it, petrify it”.⁷⁶ Dodek’s language is as grimly, but more violently, evocative: “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”.⁷⁷ Depending on the critic’s perspective and sensibilities, the concern is that courts will either be dragged, or project themselves, into properly political debates, with disastrous consequences for the politicians (who will be paralyzed by fear of overbearing judges) or judges (whose independence and authority will be crippled by their stepping over politically explosive issues).

By contrast, Fabien G  linas has argued that the Supreme Court’s insistence on a rigid separation between the realms of convention and law, and in particular its conclusion that courts could not apply and enforce legal rules inspired by political practice and values, is untenable. While starting with the concession that “the distinction between law and convention ... amounts to an unavoidable reality”,⁷⁸ he concludes that “the reasons which, in the shape of more or less precise principles, are at the origin of the emergence of constitutional conventions on the one hand, and of the evolution of unwritten constitutional law on the other, *are the same*”.⁷⁹ The Supreme Court was wrong, in the *Patriation Reference*, not to allow for the possibility that the conventions which it would go on to identify crystallized into legal rules, just as Duff C.J.C. said they could in *Labour Conventions S.C.C.* More broadly, the Court was also wrong to imply that the common law of the Constitution had stopped evolving.

Andrew Heard’s views are similar. He too points to the relationship between conventions and principles, noting that the former “are born out of and protect the largely unwritten principles of the constitution”.⁸⁰ This implies that the Supreme Court’s position in the *Secession Reference*,

⁷⁵ Heard, *Conventions*, *supra*, note 4, at 227.

⁷⁶ Forsey, *supra*, note 7, at 40.

⁷⁷ Dodek, *supra*, note 67, at 119.

⁷⁸ G  linas, “Fant  me”, *supra*, note 14, at 300 (translation mine).

⁷⁹ *Id.*, at 320 (emphasis in the original; translation mine).

⁸⁰ Heard, *Conventions*, *supra*, note 4, at 227.

according to which principles are part of the (judicially-enforceable) constitutional law, but conventions cannot be enforced by courts, is incoherent. Heard argues that the courts should give effect to those conventions that are of fundamental importance to the constitutional order and sufficiently certain, at least “through authoritative declarations of their terms”,⁸¹ but possibly also by relying on conventions to depart from “archaic” legal rules, if only to the extent of “declaring that conventions have so changed a particular legal rule that, despite being valid law, it may not be actively enforceable”.⁸²

IV. CONCLUDING THOUGHTS

For my own part, having argued elsewhere that there is no compelling reason preventing courts from approaching conventions in exactly the same way as legal rules,⁸³ I too am of the view that the Supreme Court’s treatment of conventions in the *Patriation Reference* is indefensible. Indeed, the majority opinion on the legal question, which enshrined the Diceyan dichotomy between convention and law into Canadian constitutional jurisprudence is self-contradictory.⁸⁴ It claims at once that courts “give birth” — presumably legitimately — to common law rules, and also that “judicial legislation” is quite illegitimate. It denies the possibility of a “common law of constitutional law”, asserting that legal limits on the powers of government institutions can only arise through enactment, and yet recognizes that some important rules of constitutional law are in fact common law rules.

The majority’s jurisprudential stance might be described as pusillanimous positivism — which simultaneously insists that any rules of law that are not enacted, whose existence cannot seriously be denied, must have been *made* by judges, and that judges have no mandate to engage in such law-making. This approach condemns a vast swathe of English and Canadian law⁸⁵ — from Coke C.J.’s opinions in *Prohibitions del Roy*⁸⁶ and the *Case of Proclamations*,⁸⁷ to Duff C.J.C.’s in *Labour*

⁸¹ *Id.*, at 228.

⁸² *Id.*, at 229.

⁸³ Sirota, *supra*, note 68.

⁸⁴ For a more in-depth treatment of this issue, see Gélinas, “Fantôme”, *supra*, note 14, at 315-21.

⁸⁵ See *id.*, at 320 for additional examples.

⁸⁶ (1607) 12 Co. Rep. 63, 77 E.R. 1342.

⁸⁷ (1611) 12 Co. Rep. 74, 77 E.R. 1352.

Conventions S.C.C. to, as Gélinas shows, the future McLachlin C.J.'s in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.⁸⁸ Nor can this approach support decisions that explicitly recognized sources of Canadian constitutional law that were neither legislated nor created by courts — notably the *Secession Reference*, which invoked constitutional principles (to which Gélinas had sought to draw attention), and the *Reference re Senate Reform*, which relied on the notion of a constitutional “architecture”. It seems fair to say, then, that, even in constitutional cases, except when asked to deal with conventions (and, as *Labour Conventions S.C.C.* shows, not always even then), common law courts have not been so diffident.

But what of the views of those critics of the *Patriation Reference* who argue that the courts should keep away from conventions? What I called above the “competence criticism” touches on a real difficulty that courts have in understanding the political environment in which conventions develop. But while real, this difficulty is not unique; nor need it be insuperable. Judges are not only relatively ignorant, and face difficulties in acquiring and understanding information, about the political process. “Judicial knowledge deficits”, to borrow Richard Posner’s expression, concern all manner of “real-world activities that give rise to ... litigation”.⁸⁹ Yet it is never said that judges must refrain from adjudicating in the (increasingly numerous) cases where their lack of familiarity with the relevant social or natural sciences or technologies could potentially be problematic. Judges must educate themselves, and lawyers must assist them. The same is surely true when courts are confronted with the admittedly difficult questions about the existence and scope of conventions. Once one acknowledges, as Dodek does (and as the Supreme Court did in the *Patriation Reference*) that “[c]ourts may need to comment on the existence of constitutional conventions in the course of adjudicating other matters”,⁹⁰ one must also abandon the Diceyan pretence that conventions are “too high” for lawyers to deal with.

As for the consequentialist criticism, its strength too depends on seeing disputes about conventions as somehow unique, or at least radically different from those involving “mere” legal rules. As the events

⁸⁸ [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.); see Gélinas, “Fantôme”, *supra*, note 14, at 315-28 (contrasting the approach taken by McLachlin J. with that reflected in the *Patriation Reference*).

⁸⁹ Richard Posner, *Reflections on Judging* (Cambridge, M.A.: Harvard University Press, 2013), at 80.

⁹⁰ Dodek, *supra*, note 67, at 141.

that followed the Supreme Court's invalidation of the appointment of Justice Marc Nadon⁹¹ — relying (correctly or not) on orthodox legal sources — show, legal issues, no less than conventional ones, can be politically explosive, and may involve courts and elected officials in bitter acrimony.⁹² And judicial decisions based on orthodox legal sources, no less than those based on conventions, can result in institutions being undermined — as that same opinion has arguably done with the Federal Courts.⁹³ It is not judicial cognizance of constitutional conventions that creates these difficulties, but the existence of a supreme law constitution which the courts are authorized to enforce, and they are a cost that we have to incur in order to obtain the benefits of having such a constitution.

Now, there *may* be particular cases where the applicable conventions are especially uncertain, or where judicial intervention will be seen as unduly trespassing on the constitutional preserve of another branch of government, or where no adequate remedy will exist for a court to grant. In these particular cases, courts may find that conventional issues are not justiciable, or refuse to go beyond outlining the existing rules, leaving the political actors to deal with this information as best they can — just as the Supreme Court did in the *Secession Reference*. Justiciability and the limits of judicial power in Canada are topics deserving of careful further study. But there is no reason to think that the outcome will be a rule of categorical non-justiciability for conventions.⁹⁴ The Supreme Court's embrace of Dicey's unjustified categorical distinction between constitutional convention and constitutional law was a mistake.

⁹¹ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, [2014] 1 S.C.R. 433 (S.C.C.).

⁹² See *e.g.*, The Canadian Press, "Harper, McLachlin issue conflicting statements in unprecedented battle between a prime minister and chief justice" *National Post* (May 2, 2014), online: <<http://news.nationalpost.com/news/canada/canadian-politics/harper-mclachlin-issue-conflicting-statements-in-unprecedented-battle-between-a-prime-minister-and-chief-justice>>; John Ibbitson, *Stephen Harper* (Toronto: Signal, 2015), at 570-71 (stating that then-Prime Minister Stephen "Harper was furious with the ruling. The Court had set itself up as the unofficial opposition to his prime ministership" and that he considered "launching a full public assault on the impartiality of the court" in response).

⁹³ See Marc Noël, "Speech delivered to the members of the Conseil du Barreau du Québec", December 4, 2014, online: <http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/pdf/Speech-Barreau-du-Quebec_eng.pdf>.

⁹⁴ See Heard, *Conventions, supra*, note 4, at 229 (arguing that "conventions ... should not all be dismissed [*i.e.*, declared non-justiciable] as the province of politicians").

