

## Comments on Legislation and Judicial Decisions

### Chronique de législation et de jurisprudence

CONSTITUTIONAL LAW—AMENDMENT OF THE BRITISH NORTH AMERICA ACT—ROLE OF THE PROVINCES.—In *Reference re Amendment of the Constitution of Canada* (1981)<sup>1</sup> the Supreme Court of Canada held that the package of constitutional amendments proposed by Prime Minister Trudeau could, as a matter of law, go forward for enactment by the United Kingdom Parliament without the consent of the provinces; as a matter of convention, however, the consent of the provinces was required. This comment will examine that decision.

The decision of the Supreme Court of Canada was rendered on September 28th, 1981. After the decision a new round of discussions between the Prime Minister and the Premiers yielded an agreement on November 5th, 1981 on the essentials of an altered package of amendments. (A few elements were agreed to later that same month.) The changes, principally affecting the charter of rights and the amending formula, are not significant for the purpose of this comment. The new version of the amendments was embodied in a resolution which was adopted by the House of Commons on December 2nd, 1981 and by the Senate on December 8th, 1981. At the time of writing (February 1982) this is the version which has been sent to the United Kingdom for enactment by the United Kingdom, although it has not yet been enacted.

Unfortunately, the agreement of November 5th, 1981, which supports the current version of the amendments, included only nine of the ten Premiers, Premier Levesque of Quebec being the odd man out. The National Assembly of Quebec, on December 1st, 1981, passed a resolution formally expressing its dissent from the amendments. The government of Quebec then directed a reference to the Quebec Court

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<sup>1</sup> (1981), 125 D.L.R. (3d) 1 (S.C.C.). Four opinions were written, none attributed to an individual judge. These will hereafter be referred to as: (1) majority opinion on law, which was signed by Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., (2) dissenting opinion on law, which was signed by Martland and Ritchie JJ., (3) majority opinion on convention, which was signed by Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ., and (4) dissenting opinion on convention, which was signed by Laskin C.J., Estey and McIntyre JJ.

of Appeal calling for a decision as to whether Quebec's consent is necessary, by convention, as a precondition to the passage of the proposed amendments.<sup>2</sup> At the time of writing it seems unlikely that this new litigation will stop the enactment of the proposed amendments by the United Kingdom Parliament; and, if the United Kingdom Parliament does enact the amendments, Quebec's reference (which seeks only a decision as to the applicable constitutional convention, not a decision as to the law) will presumably become moot.<sup>3</sup>

The enactment of the amendments will also rob the Supreme Court of Canada's decision (the subject of this comment) of much of its significance. The new amendments will incorporate into the British North America Act<sup>4</sup> (to be renamed the Constitution Act) an amending formula (or, to be exact, six different amending formulas) which will for the first time eliminate the role of the United Kingdom Parliament and stipulate the precise roles of the federal and provincial levels of government in future amendments to the Act. In future, therefore, aside from any problems of interpreting the complex new amending formulas, the law (and convention) regarding provincial participation in the amending process will be settled by the provisions of the Constitution Act. Thus, despite the enormous political importance of the decision at the time of its announcement (which was televised for the first time), its importance in the longer term is more doubtful. However, the fundamental character of the issues presented, the subtlety of the competing arguments, and above all the role of the Supreme Court of Canada as an arbiter of essentially political controversies, have stimulated this comment.

### *Facts*

The first version of the constitutional amendments was introduced by Prime Minister Trudeau into the House of Commons on October 6th, 1980. It was entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada". As the name indicates, it was an "address" to the Queen (the government of the United Kingdom) requesting her to lay before the Parliament of the United Kingdom the bill that would accomplish the proposed amendments. The draft bill was incorporated in the address. The address was to be passed by both Houses of the federal Parliament and transmitted to the United Kingdom by the Governor

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<sup>2</sup> Globe and Mail, Toronto, Dec. 3rd, 1981, which supplies the full text of the question.

<sup>3</sup> The decision of the Supreme Court of Canada which is the subject of this comment, *supra*, footnote 1, does of course provide a precedent for the answer of a question which carries no legal consequences: *infra*.

<sup>4</sup> British North America Act, 1867, 30 & 31 Vict., c. 3 (Imp.); R.S.C., 1970, Appendix II, No. 5; hereinafter referred to as the B.N.A. Act.

General for enactment by the Parliament of the United Kingdom.

The resolution was passed with some amendments by the House of Commons on April 23rd, 1981 and by the Senate on April 24th, 1981; and it was this amended version which was considered by the Supreme Court of Canada. (As noted earlier, after the decision a third version was adopted by the House of Commons and the Senate to give effect to the federal-provincial agreement of November 5th, 1981.)

The leading features of the constitutional resolution in the (second) version in which it reached the Supreme Court of Canada (and in its third and presumably final version) were as follows: (1) new amending formulas which would enable the British North America Act (to be renamed the Constitution Act) to be amended in future without resort to the United Kingdom; (2) the relinquishment by the United Kingdom Parliament of its residual power to legislate for Canada (this is the "patriation" of the constitution); (3) a charter of rights which would protect various civil liberties from impairment by either the federal Parliament or the provincial Legislatures; and (4) a new provincial power over natural resources which would expand provincial power to tax and control natural resources.<sup>5</sup>

These proposals had a considerable potential impact on the provinces. The clearest adverse effect on provincial powers flowed from the proposed charter of rights which would have the effect of limiting the powers of the provincial Legislatures to enact laws curtailing the civil liberties defined in the charter. The proposed amending formula also affected the provinces in that it would enable future amendments to be made either with the consent of a specially-composed majority of the provinces or under the authority of a referendum which would bypass the provincial governments altogether. (The final version involved a new set of amending procedures which did not include a referendum.) The new resources clause added a new legislative power to the provincial Legislatures. It was obvious that the proposals had a serious effect on provincial legislative powers, and the Supreme Court decision started from that premise.<sup>6</sup>

Despite the impact on the provinces of the new constitutional proposals, Prime Minister Trudeau had introduced them into the

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<sup>5</sup> These amendments are to be accomplished by the enactment by the United Kingdom Parliament of a statute called the Canada Act 1982, which includes as a schedule the Constitution Act, 1982. The Canada Act would accomplish the "patriation" of the constitution by a provision abrogating the power of the United Kingdom Parliament to make laws for Canada. The Constitution Act, 1982 includes the amending formulas, the charter of rights and the resources clause. The Constitution Act, 1982 would also change the name of the B.N.A. Act, 1867 to the Constitution Act, 1867.

<sup>6</sup> The first question dealt with by the court related to the impact on the provinces of the proposals, and the court emphasized that the charter of rights would limit the legislative powers of the provinces: majority opinion on law, *supra*, footnote 1, at p. 20.

federal House of Commons, and proposed their passage by joint resolution of the two Houses (as a prelude to enactment by the United Kingdom Parliament), without the consent of the provinces. At the time of the Supreme Court decision New Brunswick and Ontario were the only provinces which had agreed to the proposals; the other eight provinces were opposed. The controversy in the country at large and in the courts was whether the proposals could or should proceed with the consent of only two of the ten provinces and in spite of the objection of the other eight provinces.

The package of amendments proposed by Prime Minister Trudeau represented a stage in the search for a domestic amending formula which had been going on intermittently since 1927 and intensively since 1968. For Prime Minister Trudeau, who has held office with only one brief interruption since 1968, constitutional reform has been a major objective, but he has never been able to assemble a package of amendments which would command the agreement of the ten provincial Premiers. The latest round of constitutional discussions was stimulated by the Quebec referendum on sovereignty-association which was defeated on May 20th, 1980 by a popular vote of sixty per cent to forty per cent. In the referendum campaign, the federalist forces promised that a "no" to sovereignty-association was not a vote for the status quo, and that the defeat of the referendum would be followed by constitutional change to better accommodate Quebec's aspirations. But even this commitment, although shared by the provincial Premiers and the Prime Minister, was not sufficient to secure agreement on specifics at federal-provincial conferences which lasted through the summer and early fall of 1980. Faced with yet another failure to achieve a consensus, Prime Minister Trudeau decided that the federal government should proceed, unilaterally if necessary, for the patriation of the constitution (including an amending formula) and a charter of rights. (The natural resources clause was added to the proposals later.) He therefore introduced his proposals into the federal Parliament, and used the government majorities in both Houses to secure the passage of the necessary resolution (with some changes). But, as noted earlier, at the time of the Supreme Court of Canada decision, although the resolution had been passed by both Houses of the federal Parliament, it was supported by only two provincial governments and opposed by the other eight.

### *Proceedings*

The governments of Manitoba, Newfoundland and Quebec each directed a reference to the Court of Appeal of the province with a view to testing the constitutionality of the federal proposals. The questions posed in the Manitoba reference were as follows:

1. If the amendments to the Constitution of Canada sought in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the

Constitution of Canada", or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?

2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?
3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

The same three questions were posed in the Newfoundland reference with the addition of a fourth question relating specifically to Newfoundland which will not be discussed in this comment.<sup>7</sup>

The questions posed in the Quebec reference were similar in substance, but they were differently formulated as follows:

- A. If the Canada Act and the Constitution Act 1981 should come into force and if they should be valid in all respects in Canada would they affect:
  - (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
  - (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?
- B. Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such a manner as to affect:
  - (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
  - (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?

In the lower courts a variety of answers were given to the questions. The Manitoba Court of Appeal, by majorities which differed on each question, refused to measure the effects on the provinces of the proposed amendments (question 1) on the ground that it would be premature to do so since they might be changed; answered no to the question whether there was a "constitutional convention"

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<sup>7</sup> The fourth question in the Newfoundland reference essentially asked whether the proposed amending formula would authorize changes in the Terms of Union of Newfoundland without the consent of the province, and the answer of the Supreme Court of Canada was yes (except for the province's boundaries which are protected by s. 13 of the B.N.A. Act, 1871, 34-35 Vict., c. 28): majority opinion on law, *supra*, footnote 1, at pp. 47-48.

requiring provincial consents (question 2); and also answered no to the question whether provincial consents were "constitutionally required" (question 3).<sup>8</sup> The Newfoundland Court of Appeal unanimously answered yes to each question, holding that the proposed amendments did have the stipulated effects on the provinces (question 1), that there was a constitutional convention requiring provincial consents for such amendments (question 2), and that provincial consents were "constitutionally required" (question 3).<sup>9</sup> The Quebec Court of Appeal unanimously answered yes to the question whether the proposed amendments would affect the legislative competence of the provinces (question A(i)) and the status or role of the provinces (question A(ii)); and by a majority answered yes to the question whether the constitution could be so amended without the consent of the provinces (question B(i), (ii)).<sup>10</sup> Thus, the federal side prevailed in the Manitoba and Quebec courts, and the provincial side prevailed in the Newfoundland court.

The decisions of the provincial Courts of Appeal were appealed to the Supreme Court of Canada. In the Supreme Court of Canada eight of the ten provinces supported the position that the federal initiative was contrary to constitutional convention and constitutional law. On the other side the federal government was joined by New Brunswick and Ontario to argue that the federal initiative was in accordance with constitutional convention and constitutional law.

The Supreme Court of Canada held unanimously that the proposed amendments would significantly affect the provinces in the ways stipulated by the various questions. The court then held by a majority of seven to two (Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., with Martland and Ritchie JJ. dissenting) that the agreement of the provinces to the proposed amendments was not constitutionally required "as a matter of law". The court then held by a majority of six to three (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ., with Laskin C.J., Estey and McIntyre JJ. dissenting) that there was a constitutional convention requiring the agreement of the provinces to an amendment of the kind proposed, and that the agreement of the provinces was constitutionally required "as a matter of constitutional convention". In sum, the court addressed itself separately to the laws of the constitution and to the conventions of the constitution, holding the federal initiative to be authorized by law but unauthorized by convention.

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<sup>8</sup> *Reference re Amendment of the Constitution of Canada (No. 1)* (1981), 117 D.L.R. (3d) (1 Man. C.A.).

<sup>9</sup> *Reference re Amendment of the Constitution of Canada (No. 2)* (1981), 118 D.L.R. (3d) 1 (Nfld C.A.).

<sup>10</sup> *Reference re Amendment of the Constitution of Canada (No. 3)* (1981), 120 D.L.R. (3d) 385 (Que. C.A.).

A formal peculiarity of the decision is that the legal question and the conventional question are treated in separate opinions so that each judge signed two opinions, one on the law and another on the convention. Since there is a majority opinion and a dissenting opinion on each issue, there is a total of four opinions. Another formal peculiarity of the decision is that the principal author of each opinion is not identified: the majority opinion on the law (majority opinion on law) is the opinion of seven judges. The majority opinion on the convention (majority opinion on convention) is the opinion of six judges.<sup>11</sup> Four judges, namely, Dickson, Beetz, Chouinard and Lamer JJ., were part of the majority of seven answering no to the legal question and were also part of the majority of six answering yes to the convention question.

If the court had followed the usual format for split decisions, this four-judge group would not have signed two separate majority opinions but would have written a single opinion dealing with both questions, with each of the remaining five judges adhering to the part he agreed to and dissenting from (or at least writing separately on) the part he did not agree to. This usual format would have required the four-judge group to write a single, coherent opinion, in which the answer to the legal question was reconciled with the answer to the convention question. As the separate opinions now stand, the answers are not literally inconsistent: obviously, one can say that something is in accordance with the law but is contrary to convention. But the tone and thrust of the two opinions is so different that it is hard to see how the four-judge group could have signed both opinions. The majority opinion on the legal question is sympathetic to the federal initiative.<sup>12</sup> The majority opinion on the convention question is hostile to the federal initiative.<sup>13</sup> The result is rather confusing. Indeed, after the

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<sup>11</sup> For the mode of citation to be used hereafter, see *supra*, footnote 1. Multiple-author opinions are not uncommon in the High Court of Australia and the Supreme Court of the United States, but I think the only Supreme Court of Canada precedents are a few cases in which the court has been unanimous and in which the sole opinion is described as that of "the court": *Re Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792; *A.-G. Que. v. Blaikie*, [1979] 2 S.C.R. 1016; *A.-G. Man. v. Forest*, [1979] 2 S.C.R. 1032; *Re Upper House*, [1980] 1 S.C.R. 54; *A.-G. Que. v. Blaikie (No. 2)* (1981), 123 D.L.R. (3d) 15 (S.C.C.).

<sup>12</sup> It is hard to provide authority for "tone and thrust", but see *e.g.*, *supra*, footnote 1, at pp. 33 ("we must operate the old machinery perhaps one more time"), 41 ("the completion of an incomplete constitution", "a finishing operation").

<sup>13</sup> See *e.g.*, *ibid.*, at pp. 104 ("The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities"), 106 ("the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute"). Note also the discrepancies between the opinions on the question of what degree of provincial consent is required: see *infra*, footnotes 38-40 and accompanying text.

result was announced, both sides claimed to have won the case. Of course, in law the federal side had won; but that result was obscured by the language used in the majority opinion on convention. If the four-judge group had written a single opinion dealing with both questions they would have had to reconcile the two parts of the decision, and the result would have been much clearer.

It could be argued that the obscurity of the result, offering something to both sides, was politically sound, since it helped to persuade both sides that an agreement should be reached—and of course, when the bargaining resumed, an agreement (albeit an agreement which isolated Quebec) was in fact reached. But this argument assumes the propriety of the court acting outside its legal function and attempting to facilitate a political outcome. Indeed, the only justification for even considering the convention question would be to influence the political outcome—a justification which will be criticized later in this comment.

### *Background*

The B.N.A. Act differs from the constitutions of the United States and Australia (and other federal countries) in that it contains no general provision for its own amendment.<sup>14</sup> As an imperial statute it could be amended only by the United Kingdom Parliament at Westminster. In 1931 the Statute of Westminster<sup>15</sup> conferred upon Canada (and the other Dominions) the power to repeal or amend imperial statutes applying to Canada. But, at Canada's insistence, the B.N.A. Act was excluded from this new power. Section 7(1) of the Statute of Westminster provided that its provisions did not extend to the repeal, amendment or alteration of the B.N.A. Act. This provision was inserted so that the B.N.A. Act could not be amended by an ordinary statute of either the federal Parliament or a provincial Legislature.<sup>16</sup> The idea was, and still is, that a constitution should be more difficult to amend than the Income Tax Act.<sup>17</sup>

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<sup>14</sup> Limited powers of amendment are granted by ss 91(1), 92(1) and some other provisions of the B.N.A. Act.

<sup>15</sup> 22 Geo. V. c. 4 (Imp.); R.S.C., 1970, Appendix II, No. 26.

<sup>16</sup> It is doubtful whether s. 7(1) was really necessary to protect the B.N.A. Act from fundamental change: Wheare, *Constitutional Structure of the Commonwealth* (1960), p. 69.

<sup>17</sup> An irony of the present decision is that a resolution of the two Houses of Parliament is all that is necessary to initiate an amendment. If this resolution must be complied with automatically by the United Kingdom Parliament, then, as a matter of law, the constitution is just as easy to amend as the Income Tax Act. The objecting provinces argued that the Statute of Westminster, especially s. 7(3), implicitly forbade any alteration of provincial legislative powers without the consent of the provinces. This argument was rejected: majority opinion on law, *supra*, footnote 1, at p. 40.



After the Statute of Westminster, while other imperial statutes had lost their protected status, the B.N.A. Act could still be amended only by the United Kingdom Parliament. This did not mean, however, that the amending process was outside the control of Canadians. At an imperial conference in 1930 (the same conference that recommended the enactment of the Statute of Westminster) it was agreed by the Prime Ministers of all the Dominions that the United Kingdom Parliament would not enact any statute applying to a Dominion except at the request and with the consent of that Dominion.<sup>18</sup> This agreement, which reflected already longstanding practice, created a constitutional convention which has never been departed from. This convention means that the Parliament of the United Kingdom will not enact an amendment to the B.N.A. Act except at the request and with the consent of Canada.

The convention does not stipulate which governmental bodies in Canada should make the request for, and give the consent to, proposed amendments to the B.N.A. Act. However, long before 1930 the practice had developed of requesting amendments by a "joint address" of the Canadian House of Commons and the Canadian Senate. The joint address consists of a resolution which requests the United Kingdom government to lay before the United Kingdom Parliament a bill to accomplish the desired amendment; the text of the bill is included in the resolution. After the resolution has been passed by the two Houses of Parliament it is sent by the Governor General to the United Kingdom government for enactment. This is the procedure which is being followed for enactment of the current proposals.

The provinces play no role in the amending process which has just been described. Moreover, there has been no consistent practice by the federal government of obtaining the consent of the provinces before requesting an amendment. The United Kingdom Parliament has enacted fifteen important amendments to the B.N.A. Act since confederation. Only four of these—in 1940, 1951, 1960 and 1964—were preceded by the unanimous consent of the provinces.<sup>19</sup> One other—in 1907—was preceded by consultation with the provinces (British Columbia opposed the amendment). The remaining amendments were requested by joint address of the two Houses of the federal

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<sup>18</sup> The convention is recited as a preamble to the Statute of Westminster. It is not enacted by the Statute of Westminster, because it was thought in 1931 that the United Kingdom Parliament was incompetent to limit its own sovereignty. However, s. 4 of the Statute of Westminster reinforced the convention by providing that no Act of the United Kingdom Parliament would extend to a Dominion "unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof".

<sup>19</sup> The Statute of Westminster, 1931, *supra*, footnote 15, which was not literally an amendment to the B.N.A. Act, but which added to the powers of the federal Parliament and provincial Legislatures, was also preceded by the unanimous consent of the provinces.

Parliament and enacted by the United Kingdom Parliament without prior consultation with the provinces.<sup>20</sup>

The four amendments which were preceded by unanimous provincial consent include the only amendments which have altered the distribution of legislative powers within Canada. Three of these unanimous-consent amendments<sup>21</sup> shifted a legislative power from the provincial Legislatures to the federal Parliament: (1) over unemployment insurance,<sup>22</sup> (2) over old age pensions,<sup>23</sup> and (3) over supplementary benefits.<sup>24</sup> These three amendments are the only ones which have altered the distribution of legislative powers between the federal Parliament and the provincial Legislatures.<sup>25</sup> Since each of these amendments was preceded by the unanimous consent of the

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<sup>20</sup> The amendments are listed, with information on provincial consultation and consent, in Laskin, *Canadian Constitutional Law* (3rd ed. rev. 1969), pp. 33-34. For fuller accounts of the history of constitutional amendment in Canada, see Gérin-Lajoie, *Constitutional Amendment in Canada* (1950); Livingston, *Federalism and Constitutional Change* (1956), ch. 2; Favreau, *The Amendment of the Constitution of Canada* (Government of Canada, 1965); Lalonde and Basford, *The Canadian Constitution and Constitutional Amendment* (Government of Canada, 1978). The Favreau summary, which lists 22 alleged amendments, is reproduced in *Re Upper House*, [1980] 1 S.C.R. 54, at p. 60 and in the present case, *supra*, footnote 1, in no less than three places: dissenting opinion on law, at p. 62; majority opinion on convention at p. 91; dissenting opinion on convention, at p. 116.

<sup>21</sup> The fourth amendment, namely, British North America Act, 1960, 9 Eliz. II, c. 2 (Imp.); R.S.C., 1970, Appendix II, No. 36, substituted a new s. 99 of the B.N.A. Act, imposing a retiring age on superior court judges.

<sup>22</sup> British North America Act, 1940, 3 & 4 Geo. VI, c. 36 (Imp.); R.S.C., 1970, Appendix II, No. 27, adding s. 91 (2A) to the B.N.A. Act.

<sup>23</sup> British North America Act, 1951, 14 & 15 Geo. VI, c. 32 (Imp.); R.S.C., 1970, Appendix II, No. 33, adding s. 94A to the B.N.A. Act.

<sup>24</sup> British North America Act, 1964, 12 & 13 Eliz. II, c. 73 (Imp.); R.S.C., 1970, Appendix II, No. 37, amending the new s. 94A of the B.N.A. Act.

<sup>25</sup> The first of the three amendments (1940) clearly had this effect, since it transferred the power over unemployment insurance from the exclusive authority of the provincial Legislatures to the exclusive authority of the federal Parliament. The second and third amendments (1951 and 1964) are less clear in that the new s. 94A which they introduced (1951) and substituted (1964) conferred a new power on the federal Parliament which was merely concurrent, and in addition expressly withheld the power to "affect the operation of any law present or future of a provincial Legislature". It is arguable therefore that the 1951 and 1964 amendments are more closely analogous to the 1949 amendment which conferred on the federal Parliament the power to amend the constitution of Canada in certain limited ways without detracting from provincial powers: British North America Act (No. 2), 1949, 13 Geo. VI, c. 81 (Imp.); R.S.C., 1970, Appendix II, No. 31; this 1949 amendment was not preceded by provincial consents. As noted, *supra*, footnote 19, another relevant precedent is the Statute of Westminster, which although not an amendment of the B.N.A. Act, conferred upon the federal Parliament the power to legislate with extraterritorial effect and upon both the federal Parliament and the provincial Legislatures the power to repeal or amend imperial statutes in force in Canada (other than the B.N.A. Act); the enactment of the Statute of Westminster was preceded by unanimous provincial consent.

provinces, there has been an invariable practice of securing provincial consents to amendments altering the distribution of powers.<sup>26</sup>

*Convention requiring provincial consents*

The federal government's invariable past practice, of obtaining the consents of all the provinces before proceeding with an amendment affecting provincial powers, naturally invites the question whether there is an obligation to obtain the consents of the provinces. Such an obligation could be imposed by a constitutional convention or by a constitutional law. The questions put to the court by Manitoba, Newfoundland and Quebec called upon the court not only to decide the legal issue, whether there was an obligation imposed by law, but also to decide the nonlegal issue, whether there was an obligation imposed by convention. Question 2 of the questions put to the court by Manitoba and Newfoundland asked whether there was a "constitutional convention" requiring "the agreement of the provinces"; and question 3 of the questions put to the court by Quebec asked whether "by statute, convention or otherwise", the constitution empowered the federal Houses to proceed with an amendment "without the consent of the provinces and in spite of the objection of several of them".

I expected the court to refuse to rule on the existence of a convention, on the ground that the issue was not justiciable; and for reasons which I will give later in this comment I still believe that the court should not have answered this question. However, as explained, the court did answer the question. Indeed, the court was unanimous that the question should be answered. The court then divided on the answer: a six-judge majority (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ.) held that there was a convention requiring provincial consent for an amendment which like the present proposals purported to change provincial legislative powers or provide a mechanism which could effect a change of provincial legislative powers; the three dissenters (Laskin C.J., Estey and McIntyre JJ.) held that there was no such convention.

A convention differs from a mere usage or practice in that it is normative: the persons to whom the convention applies must feel obliged to follow it. In order to decide whether there was a convention in this instance the court looked at three questions: (1) what were the precedents? (2) did the actors in the precedents believe that they were bound by the rule? and (3) was there a reason for the rule?<sup>27</sup>

<sup>26</sup> There are negative precedents as well in that amendments proposed by the federal government in 1951, 1960, 1964, and 1971 which were agreed to by all but one or two provinces were not proceeded with for lack of unanimity: majority opinion on convention, *supra*, footnote 1, at p. 94.

<sup>27</sup> The three questions were taken from Jennings, *The Law and the Constitution* (5th ed., 1959), p. 136. The third question seems otiose, except as casting light on the answer to the second question.

With respect to the precedents, the six-judge majority surveyed the prior amendments (which were briefly described earlier in this comment) and concluded that there had been an invariable practice of obtaining provincial consent to amendments which made a change in legislative powers. With respect to the belief of the actors, the majority concluded from statements in a federal white paper and by various federal ministers that the actors on the federal side did feel bound to obtain the consent of the provinces to amendments changing legislative powers.<sup>28</sup> With respect to the reason for the rule, the court found that the reason was "the federal principle" which required that a modification of provincial powers should not be obtainable "by the unilateral action of the federal authorities".<sup>29</sup>

Having decided that there was a convention, the six-judge majority had to decide what the convention was. They held that the convention required "a substantial degree" or "a substantial measure" of provincial consent, but that it was not necessary for the court to decide what the required degree or measure was.<sup>30</sup> It was enough for the court to say that the current proposals, having been agreed to by only New Brunswick and Ontario, did not have "a sufficient measure of provincial agreement".<sup>31</sup> The court thus rejected the unanimity rule<sup>32</sup> which had been contended for by all objecting provinces except Saskatchewan.<sup>33</sup>

The six-judge majority's rejection of the unanimity rule seems open to criticism. If the precedents evidence a convention (as the six-judge majority holds they do), surely they are consistent only with unanimity. In no case was an amendment altering legislative powers proceeded with over the objection of even a single province. If the beliefs of the current actors are relevant (as they surely must be) is it not rather startling that only one province (Saskatchewan) apparently

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<sup>28</sup> The white paper relied upon was the Favreau paper (1965), *op. cit.*, footnote 20. The court did not refer at all to the Lalonde and Basford white paper (1978), *op. cit.*, footnote 20, although that paper asserted (p. 13) that the federal government was "not constitutionally obliged" to obtain provincial consents to amendments that involve the distribution of powers.

<sup>29</sup> Majority opinion on convention, *supra*, footnote 1, at p. 104.

<sup>30</sup> *Ibid.*, at p. 103.

<sup>31</sup> *Ibid.*

<sup>32</sup> The passage in the majority opinion on convention which refuses to rule on the degree of provincial consent required by the convention (*supra*, footnote 1, at p. 103) does not explicitly reject the unanimity rule, but I think it does so implicitly. Note also the earlier passage in the opinion (at p. 100) in which their lordships say: "It seems clear that while the precedents taken alone point at unanimity, the unanimity principle cannot be said to have been accepted by all the actors in the precedents."

<sup>33</sup> The Attorney General of Saskatchewan argued that "a measure of provincial agreement" was required, and that the court need not define what the required measure was, except to hold that the agreement of only Ontario and New Brunswick was insufficient: Factum of the Attorney General of Saskatchewan, undated, pp. 24-42.

believed the rule to be what the court said it was? Seven provinces argued that unanimity was required; two provinces and the federal government argued that there was no convention at all. In these circumstances, it is difficult to support the six-judge majority's finding that there was a convention requiring only a "substantial degree" of provincial consent. It is true, as the majority points out,<sup>34</sup> that there were statements by federal ministers asserting that unanimity was not necessary. But since these statements were not supported by any precedents it seems more plausible to treat the statements as denying the existence of any convention at all, rather than as affirming the existence of a convention but denying that it required unanimity. This was the view contended for by New Brunswick, Ontario and the federal government and accepted by the three judges (Laskin C.J., Estey and McIntyre JJ.) who dissented on the existence of the convention.<sup>35</sup> The three-judge minority also argued that so long as the degree of provincial participation "remains unresolved" the supposed convention would be so uncertain as to be unworkable: the lack of definition of the required degree of provincial participation "prevents the formation or recognition of any convention".<sup>36</sup>

The trouble with a unanimity rule, of course, is that it places the constitution in a straightjacket. The unsuccessful efforts by meetings of first ministers over the past fifty years to find a suitable amending formula certainly demonstrates the inconvenience of unanimity—but they equally demonstrate that unanimity has been the operating premise of these meetings. There has been a sentiment that a single province or a small minority of provinces should not be coerced into an unwanted amendment. Indeed, as the three-judge minority pointed out, only unanimity gives full effect to the federal principle,<sup>37</sup> and only unanimity avoids the acute problems of definition which would be raised by acceptance of anything less than unanimity. It is therefore easy to see why unanimity has been the practice of the first ministers. What is not easy to see is why the six-judge majority of the court would want to design a different rule for the first ministers. Four of the members of the six-judge majority also signed the seven-judge majority opinion on law, in which the court said, as one reason for holding that the convention had not crystallized into law, that a rule of substantial provincial compliance or consent would not be acceptable as a legal rule because its uncertainty would be "an impossible position for a Court to manage".<sup>38</sup> The remaining two members of the

<sup>34</sup> Majority opinion on convention, *supra*, footnote 1, at pp. 100-102.

<sup>35</sup> Dissenting opinion on convention, *supra*, footnote 1, at p. 115.

<sup>36</sup> *Ibid.*, at p. 125.

<sup>37</sup> *Ibid.*

<sup>38</sup> Majority opinion on law, *supra*, footnote 1, at p. 29. The opinion also implies that substantial compliance is thought to be sufficient only by Professor W.R. Leder-

six-judge majority on convention (Martland and Ritchie JJ.) had dissented on the legal issue, holding that there was a legal requirement of "the consent of the provinces".<sup>39</sup> Their lordships expressly refrained from deciding whether the consent had to be unanimous,<sup>40</sup> but the whole thrust of their reasoning would seem to lead inexorably to a unanimity requirement. If that is so, how could a convention have developed requiring a lesser degree of consent?

I think it is fair to say that the Supreme Court of Canada's first foray into political science did not yield very satisfactory reasoning or conclusions. That is not surprising. The existence and definition of a convention has to be ascertained without the help of the prior judicial decisions which would support a rule of common law and without the sworn testimony and rules of evidence which would support a finding of fact. What the court was doing I suppose (although the judges did not say so) was taking judicial notice of public statements and documents and inferring from that material the existence and definition of the convention. It is extraordinarily difficult to draw a safe conclusion from such inherently unreliable material, as is demonstrated by the range of positions taken by the contending governments (whose beliefs are supposed to be relevant in ascertaining the convention) and by the sharp difference of opinion within the court itself. Moreover, the vagueness of the rule announced by the court leaves in doubt the question whether the consent of the populous and predominantly French-speaking province of Quebec is required to be part of a "substantial degree" or a "substantial measure" of provincial consent. I will return to this point in the next section of this comment.

### *Propriety of answering the convention question*

The most important and disturbing question which is raised by the court's answer to the question about the existence of a convention is: why did the court answer the question at all? The court emphasized the truism that the striking peculiarity of the conventions of the constitution is that "in contradistinction to the laws of the constitution, they are not enforced by the courts".<sup>41</sup> That being so, no legal consequences could flow from the answer to the question. The consequences of answering the question could only be political.

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man. ("The position advocated is all the more unacceptable when substantial provincial compliance or consent is by him [*i.e.*, by Professor Lederman] said to be sufficient.") This appears to overlook the fact that the six-judge opinion also regards something akin to "substantial provincial compliance or consent" as sufficient. This is one of several passages which makes it hard to believe that four judges signed both opinions, the tone and thrust of which are so utterly different.

<sup>39</sup> Dissenting opinion on law, *supra*, footnote 1, at p. 79.

<sup>40</sup> *Ibid.*

<sup>41</sup> Majority opinion on convention, *supra*, footnote 1, at p. 84.

The six-judge majority gave two reasons for answering the question: (1) courts had in previous cases recognized the existence of conventions, and (2) the question of the existence of the convention in this case had been asked in the three orders of reference.<sup>42</sup> Neither of these reasons seems to me to be persuasive. Taking the first reason first, while there are no cases in which a court has enforced a convention,<sup>43</sup> it is true that there are a number of cases in which the courts have recognized the existence of a convention. For example, the courts have taken notice of the conventions of responsible government, involving the accountability to Parliament of Ministers of the Crown, as a consideration in deciding to give a broad rather than a narrow interpretation to a statute conferring power on a Minister.<sup>44</sup> In these cases, and in the other cases in which the existence of a convention has been recognized,<sup>45</sup> the existence of the convention was relevant to the disposition of a legal issue, usually the interpretation of either a statute or a written constitution.

The cases which have recognized the existence of a convention establish no more than the proposition that the existence of a convention may occasionally be relevant to the determination of a legal issue, and where it is so relevant the court must decide it. But this is obvious. It is equally true that a court must occasionally determine the effect of intoxication upon human behaviour, the appropriate medical procedure to deal with appendicitis, and the resistance to fire of fibreglass insulating material. There is hardly a medical, scientific, technical or other factual question which some court has not had to determine at some time—but only because the resolution of that question was necessary to dispose of a justiciable issue before the court. In the present case the resolution of the convention question would have been necessary to dispose of a justiciable issue if the court had accepted the argument that a convention requiring provincial consents had “crystallized” into a legal requirement. But, as will be explained later in this comment, the court rejected the theory that a convention could crystallize into law. When this theory was rejected, the

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<sup>42</sup> *Ibid.*, at pp. 87-88. The three dissenting judges also agreed that it was appropriate to answer the convention question, giving (at p. 107) as reasons “the unusual nature of these references” and the fact that the question had been “argued at some length before the Court and [had] become the subject of the reasons of the majority”. The first of these reasons is obscure, and the second seems to me to have no force at all.

<sup>43</sup> Two cases where courts explicitly refused to enforce a convention are *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] S.C.R. 71 and *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 (P.C., Southern Rhodesia).

<sup>44</sup> *E.g.*, *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.); *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.); cf. *A.-G. Que. v. Blaikie (No. 2)* (1981), 123 D.L.R. (3d) 15, at pp. 21-22 (S.C.C.).

<sup>45</sup> Numerous other cases are cited by the court, *supra*, footnote 1, majority opinion on law at pp. 22-28, and majority opinion on convention at p. 88.

justification for answering the convention question disappeared. The question then stood alone as a nonlegal question of no relevance to any legal question. Courts have not in the past answered such nonlegal questions.

The court's second reason for answering the convention question was that the convention question was one of the questions referred to it for an answer. This is true: the questions referred to the court by Manitoba, Newfoundland and Quebec included the question whether a convention exists.<sup>46</sup> It is also true that the provincial statutes under which the questions were referred authorized the reference of "any matter" or "any question" and did not explicitly restrict the reference to a point of law.<sup>47</sup> But this is not a sufficient reason for the court to answer the question. It is clearly established that a court has a discretion not to answer a question posed on a reference.<sup>48</sup> If the question had called for a decision as to the effect of intoxication on human behaviour, the appropriate medical procedure to deal with appendicitis, or the resistance to fire of fibreglass insulating material, and no legal consequence turned on the answer, the court would obviously have pronounced the issue nonjusticiable and refused to answer it.<sup>49</sup>

While a question about the conventions of the constitution is much closer to the traditional work of a court than biology, medicine, chemistry or physics, it is fraught with the peculiar danger of being one of the issues in a political controversy. One may confidently surmise that the referring provinces asked the convention question in case they lost on the legal question. In that event, they wanted an answer to the convention question for the purpose of strengthening their political position in bargaining with the federal government and

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<sup>46</sup> Manitoba and Newfoundland question 2; Quebec question B. The text of the questions is set out earlier in this comment, *supra*.

<sup>47</sup> The statutory provisions are set out in majority opinion on law, *supra*, footnote 1, at p. 16.

<sup>48</sup> *A.-G. Ont. v. A.-G. Can. (Local Prohibition)*, [1896] A.C. 348, at p. 370, refusing to answer questions which "have not as yet given rise to any real and present controversy" and are therefore "academic rather than judicial": *A.-G. B.C. v. A.-G. Can. (Fishing Rights)*, [1914] A.C. 153, at p. 162, refusing to answer questions "of a kind which it is impossible to answer satisfactorily"; *Reference re Upper House* (1979), 102 D.L.R. (3d) 1, at p. 16 (S.C.C.), refusing to answer questions that were too vague "in the absence of a factual context or actual draft legislation"; and in the present case, *supra*, footnote 1, at p. 16 (majority opinion on law), asserting the power to refuse to answer "questions which may not be justiciable", and at p. 107 (dissenting opinion on convention) to the same effect.

<sup>49</sup> In the Manitoba Court of Appeal (*supra*, footnote 8) three judges refused to answer question 1 and one judge refused to answer question 2. In the Newfoundland Court of Appeal (*supra*, footnote 9) and the Quebec Court of Appeal (*supra*, footnote 10) all judges answered all questions.



if necessary lobbying the United Kingdom government and Parliament.<sup>50</sup> If this was the provincial plan, it worked perfectly: the objecting provinces came away from the decision heavily rearmed for the next phase of the battle—a phase which was wholly political.

I can understand the concern of the court that an answer to the legal question only might imply judicial approval of the unilateral federal initiative and would certainly strengthen the political position of the federal government. But surely these are classic examples of the kinds of considerations of which a court should not take account. The court has no mandate to intervene in these matters. The first ministers were elected for that purpose. The judges of the court were not elected at all; they were appointed, and they were appointed to decide legal questions, not to be wise counsellors on nonlegal questions. Nor can their answer to the convention question be defended as a kind of consensual arbitration of a point in dispute between the two levels of government: the federal government's submission to the court was that the convention question was not appropriate for judicial determination, and that the question should not be answered.<sup>51</sup>

The question whether the reference procedure is a satisfactory one for determination of constitutional issues is difficult. It is obviously convenient to be able to secure an early ruling on the constitutionality of a new or proposed government initiative. Yet both the Supreme Court of the United States<sup>52</sup> and the High Court of Australia<sup>53</sup> have refused to entertain the reference of questions for advisory opinions. In their view, the reference of even purely legal questions would take them outside their judicial function because advice to government is an executive function to be performed by the law officers of the government. This objection seems rather theoretical at first blush, but it can be reinforced by some practical considerations. One practical objection to the reference procedure is that it sometimes leads to premature and abstract rulings on issues which

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<sup>50</sup> It is interesting to compare the main ground which was offered by the objecting provinces for their opposition to the proposed charter of rights, which was, that a charter of rights would require the courts to decide questions which are best regarded as political and hence not appropriate for judicial determination.

<sup>51</sup> Factum of the Attorney-General of Canada, April 21st, 1981, p. 20. The same position was taken by the Attorney General for Ontario: Factum of the Attorney General for Ontario, undated, p. 30. The Attorney General of New Brunswick (the other province on the federal side of the argument) argued that the convention question should be answered no: Factum of the Attorney General of New Brunswick, April 16th, 1981, p. 6. See also majority opinion on convention, *supra*, footnote 1, at p. 87.

<sup>52</sup> The Supreme Court of the United States has never had to formally decide the issue, but in 1793 it refused on constitutional grounds to give an advisory opinion; the refusal is contained in correspondence between the court and the executive branch: Note (1956), 69 Harv. L. Rev. 1302.

<sup>53</sup> *Re Judiciary and Navigation Act* (1921), 29 C.L.R. 257.

would have been better resolved in a concrete controversy.<sup>54</sup> More germane to our present concern is the objection that the reference procedure gives rise to the possibility that a government will try to manipulate a court for political purposes. Professor Paul C. Weiler has charged, for example, that in the *Manitoba Egg Reference*<sup>55</sup> the government of Manitoba enacted a marketing scheme for the purpose of referring it to the court, and set up the reference in such a way as to encourage a holding of invalidity.<sup>56</sup>

In the present case the only consequence of an affirmative answer to the convention question was to influence the political outcome of the controversy over the patriation package, and to influence it in favour of the referring provinces. By answering the question the court allowed itself to be manipulated into a purely political role.<sup>57</sup> A political role carries with it political risks, both to the court itself and to the substantive issue of policy which the court seeks to influence. The risk to the court itself was minimized in this case by the delphic character of the decision: by offering something to both sides the risk of attacks on the court by politicians from either side was minimized. The risk to the substantive issue was more serious. The court had no way of knowing whether a federal-provincial government agreement would subsequently be reached, and it certainly could not assume that any such agreement would be unanimous. Yet it not only undertook to affirm the existence of a convention requiring provincial consent, but it left deliberately vague the degree of consent required by the convention. In fact, as I have noted, there was a subsequent agreement, but the agreement did not include Quebec. The broadening of provincial agreement from two provinces to nine is no doubt a fortunate outcome owing a good deal to the court's decision, but the isolation of Quebec is unfortunate, and its harmful effect may well prove to have been exacerbated by the court's decision. The convention announced by the court leaves in doubt the question whether the consent of Quebec must be part of a "substantial degree" or "substantial measure" of provincial consent. There is surely a strong argument that these phrases do not stipulate merely a high numerical measure of provincial agreement (nine out of ten), but a measure of agreement which reflects the principle of duality (implying the protection of the powers of the only predominantly French-speaking province). As noted

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<sup>54</sup> Strayer, *Judicial Review of Legislation in Canada* (1968), pp. 194-199.

<sup>55</sup> *A.-G. Man. v. Man. Egg and Poultry Assn.*, [1971] S.C.R. 689.

<sup>56</sup> Weiler, *The Supreme Court of Canada and Canadian Federalism* (1973), 11 *Osgoode Hall L.J.* 225, at pp. 226-227.

<sup>57</sup> One may ask whether a private individual could sue for a declaration that a convention had been broken. Presumably, the private individual would lack both standing and a cause of action. Yet, it now appears that a government is entitled on a reference to have such a question answered.

earlier, that doubt on this issue has already led to further litigation, and (especially in Quebec) it undermines the political legitimacy of the constitutional proposals now before the United Kingdom Parliament. As Professor Peter H. Russell has put it, the court has left us in danger of acquiring an "unconstitutional constitution".<sup>58</sup>

### *Law requiring provincial consents*

Question 3 of the questions put to the court by Manitoba and Newfoundland asked whether the agreement of the provinces was "constitutionally required" for an amendment which affected the powers, rights or privileges of the provinces. Question B of the questions put to the court by Quebec asked whether the constitution "empowered" such an amendment without the consent of the provinces and in spite of the objection of several of them. The seven-judge opinion of Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. which I have been citing as the "majority opinion on law" dealt with the strictly legal aspect of these questions, that is to say, it addressed the issue whether the agreement of the provinces was required by law, as opposed to convention. The answer given, as noted earlier, was that there was no such requirement of law.

The reasoning of the seven-judge majority boiled down to two very simple propositions: (1) the two Houses of Parliament could as a matter of law pass any resolution they chose, including a resolution requesting an amendment of the B.N.A. Act;<sup>59</sup> and (2) the Parliament at Westminster could as a matter of law pass any statute for Canada it chose, including a statute amending the B.N.A. Act.<sup>60</sup> Neither of

<sup>58</sup> The court's decision leaves no doubt as to the validity in law of the constitutional proposals once enacted, but it raises the possibility that without Quebec's agreement they will have been enacted contrary to convention and will be "unconstitutional" in that softer sense of the word: see majority opinion on convention, *supra*, footnote 1, at p. 87 ("... 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"). Professor Peter H. Russell used the phrase "unconstitutional constitution" in a panel discussion at the Osgoode Hall Law School of York University on Feb. 3rd, 1982. His analysis of the political risk undertaken by the court is elaborated in P.H. Russell, *The Supreme Court Decision: Bold Statescraft based on Questionable Jurisprudence* (1982) to be published along with other papers on the decision by the Institute of Intergovernmental Relations, Queen's University.

<sup>59</sup> Majority opinion on law, *supra*, footnote 1, at pp. 29-30.

<sup>60</sup> The majority opinion on law, *supra*, footnote 1, describes the authority over Canada of the Parliament at Westminster as "untrammelled" (p. 34), "untouched" (p. 37), "omnipotent" (p. 39), "unimpaired" (p. 41) and "undiminished" (p. 42). It is arguable however that the court was only discussing the Parliament at Westminster's authority to amend the B.N.A. Act, and was not considering the (purely theoretical) possibility of other kinds of laws. In any event, the court does not state or imply that Canadian consent is a legal prerequisite to the validity in Canada of laws passed by the United Kingdom Parliament—and that is the point I wish to develop later in this comment.

these propositions, in the view of the majority, was affected by Canada's evolution to independence from the United Kingdom, by the passage of the Statute of Westminster, or by the federal principle. They summarized their view as follows: "The law knows nothing of provincial consent, either to a resolution of the federal Houses or as a condition to the exercise of United Kingdom legislative power."<sup>61</sup>

One argument in favour of a legal requirement of provincial consent was that the convention requiring provincial consent (which the six-judge majority on convention held to exist) had "crystallized" into a rule of law. This argument was based on a paper published by Professor W.R. Lederman who had argued that there was a convention requiring provincial consent to important amendments and that the convention was so fundamental to the federal character of the country that it could be regarded as having crystallized into law.<sup>62</sup> The court<sup>63</sup> rejected this argument by holding that a convention was inherently different from a rule of common law, the former developing through political practice and recognition, the latter developing through judicial determinations of justiciable controversies.<sup>64</sup> The court also pointed out that in many cases a convention is essentially in conflict with a law; for example, the convention requiring a Governor General to assent to every bill duly passed by the two Houses of Parliament is in conflict with the legal power to refuse assent. In such cases, for example, where the Governor General had refused assent, the court's duty was to apply the law not the convention.<sup>65</sup> The court pointed out, finally, that there was no precedent of a convention having crystallized into law.<sup>66</sup> The court concluded, therefore, that a convention could not crystallize into law.<sup>67</sup>

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<sup>61</sup> Majority opinion on law, *supra*, footnote 1, at p. 47.

<sup>62</sup> W.R. Lederman, *Constitutional Amendment and Canadian Unity*. [1978] *Law Society of Upper Canada Special Lectures* 17, p. 23.

<sup>63</sup> The majority opinion on law rejected it explicitly; the dissenting opinion on law did not mention it at all, relying on the federal principle to supply the legal requirement.

<sup>64</sup> Majority opinion on law, *supra*, footnote 1, at p. 22.

<sup>65</sup> Majority opinion on convention, *supra*, footnote 1, at pp. 85-86.

<sup>66</sup> Majority opinion on law, *supra*, footnote 1, at pp. 22-28.

<sup>67</sup> It seems an extreme position to assert that a convention may *never* crystallize into law, which is what the seven-judge majority is asserting. This assertion would be put to the test if the United Kingdom Parliament were to enact a law for Canada without any request or consent from Canada in violation of the convention adopted in 1930 (and recited as a preamble to the Statute of Westminster) that the United Kingdom Parliament will not legislate for a Dominion except at the request and with the consent of the Dominion. It is hard to believe that a Canadian court would accept such a law as valid in Canada. However, it is possible that the rejection of such a law by a Canadian court could be accomplished without the invocation of the convention: see, *infra*, footnote 83, and accompanying text.

The most powerful argument in favour of a legal requirement of provincial consent was the argument accepted by the two judges (Martland and Ritchie JJ.) who dissented on the legal question. They held that the federal nature of the Canadian constitution imposed limitations on the powers of the various Canadian organs of government. One of those implicit limitations was the inability of either level of government to curtail the powers of the other level of government.<sup>68</sup> A resolution of the two Houses of the federal Parliament which had as its object an amendment to the B.N.A. Act which would curtail the powers of the provinces was inconsistent with that federal principle. Accordingly, in this dissenting opinion, the two Houses were held to lack the power to pass such a resolution.<sup>69</sup>

The strength of Martland and Ritchie JJ.'s dissent on the legal question is its realistic appraisal of the nature and function of the resolution to be passed by the two Houses of Parliament. They emphasized that the resolution was the major initiating step in the process of amending the Canadian constitution. When the actions of the Houses of Parliament are viewed from the perspective of their purpose (to amend the constitution) it then becomes reasonable to ask whether the institutional context does not impose restraints upon the powers of the Houses. While there are no precedents applying a federal principle to limit the power of the Houses to pass resolutions, the dissenting judges pointed out that there are precedents which can be read as applying a federal principle to limit the powers of the federal Parliament or provincial Legislatures to pass statutes, for example, the *Labour Conventions* case<sup>70</sup> limiting federal power to implement treaties dealing with matters otherwise within provincial jurisdiction, the *Nova Scotia Interdelegation* case<sup>71</sup> limiting federal and provincial power to delegate away their powers, the *Amax Potash* case<sup>72</sup> limiting provincial power to bar recovery of taxes collected under an unconstitutional statute, and the *Senate Reference*<sup>73</sup> limiting federal power to alter those institutions of central government which serve as protectors of provincial interests. In none of these cases was the limitation on power explicit in the B.N.A. Act; it was implied by the court as an implication from the federal character of the constitution. There is no reason of logic or legal doctrine why a similar limitation could not be

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<sup>68</sup> This principle was reinforced by s. 7(3) of the Statute of Westminster: dissenting opinion on law, *supra*, footnote 1, at p. 78.

<sup>69</sup> The extensive argument is briefly summarized in dissenting opinion on law, *supra*, footnote 1, at pp. 78-79.

<sup>70</sup> *A.-G. Can. v. A.-G. Ont. (Labour Conventions)*, [1937] A.C. 326.

<sup>71</sup> *A.-G. N.S. v. A.-G. Can. (Nova Scotia Interdelegation)*, [1951] S.C.R. 31.

<sup>72</sup> *Amax Potash v. Govt. of Sask.*, [1977] 2 S.C.R. 576; see also *B.C. Electric Power Corp. v. B.C. Electric Co.*, [1962] S.C.R. 642.

<sup>73</sup> *Re Upper House*, [1980] 1 S.C.R. 54.

inherent in the resolution power of the two Houses of Parliament. For the seven-judge majority of the court, however, such a holding would be "judicial legislation"—the retroactive creation by the courts of a domestic amending formula.<sup>74</sup>

The weakness of Martland and Ritchie JJ.'s dissent on the legal question is its failure to analyze the effect of an absence of provincial consent on the power of the United Kingdom Parliament. The dissenting judges carefully confine their opinion to the resolution power of the Houses of the federal Parliament. In my view, they also needed to consider the extent of the power of the United Kingdom Parliament. After all, if the seven-judge majority were right in holding that the United Kingdom Parliament still had untrammelled authority over Canada, then, even if the resolution were invalid, the United Kingdom Parliament could still enact the proposed amendments and the enactment would have to be recognized as valid by the Canadian courts. Of course, if the resolution were held to be invalid, as the dissenting judges thought it should be, presumably the federal government would not send any request to the United Kingdom government and if it did the United Kingdom Parliament might not comply with it. But these are political consequences, not legal ones. If the United Kingdom Parliament is still omnipotent for Canada, then it cannot be said that provincial consents are required *by law* for amendment of the constitution of Canada.<sup>75</sup> In other words, for Martland and Ritchie JJ. to reach their conclusion that provincial consents were required by law for the proposed amendments, they had to decide not merely that in the absence of provincial consents the Houses of Parliament had no authority to request the proposed amendments, but also that in the absence of a proper request the United Kingdom Parliament had no authority to enact the proposed amendments. Their failure to address this latter question means that their reasoning did not go far enough to warrant their conclusion.

The seven-judge majority opinion on law did not ignore the question of the scope of authority of the United Kingdom Parliament. To be sure, early in the opinion we find the proposition that "the authority of the British Parliament or its practices and conventions are not matters upon which this Court would presume to pronounce".<sup>76</sup> As the opinion continues, however, we find repeated assertions that the British Parliament's authority over Canada is "untrammelled": it was "untouched" by the Statute of Westminster, it remains "unimpaired", and "undiminished",<sup>77</sup> and it is certainly not subject to

<sup>74</sup> Majority opinion on law, *supra*, footnote 1, at p. 33.

<sup>75</sup> B. Slattery, *Westminster and the Constitution: the Effects of Patriation* (1982), to be published in the *Supreme Court Law Review*.

<sup>76</sup> Majority opinion on law, *supra*, footnote 1, at p. 21.

<sup>77</sup> *Ibid.*, at pp. 34, 37, 39, 41, 42; and see *supra*, footnote 60.

“any requirement of provincial consent”.<sup>78</sup> The court therefore did “presume to pronounce” on the authority of the British Parliament. In the remainder of this comment I will argue that the court was wrong to indicate any reluctance to determine the limits of the United Kingdom Parliament’s authority over Canada, and (having properly decided to determine those limits) was wrong to hold that the United Kingdom Parliament’s authority over Canada was unlimited.

We must start with the proposition that Canada is no longer a colony of Britain.<sup>79</sup> As an independent country Canada is subject to the laws of the United Kingdom Parliament only to the extent that the Canadian courts, applying Canadian law, recognize those laws as valid.<sup>80</sup> The authority of the United Kingdom Parliament *over Canada* cannot be determined authoritatively by the courts of the United Kingdom for whom the issue could only arise in an accidental or peripheral way. It is ultimately and exclusively for the Canadian courts to decide whether any given law is valid in Canada, whether the source of that law be the federal Parliament or a provincial Legislature or the United Kingdom Parliament. That, in my view, is why the seven-judge majority was wrong to indicate any reluctance to determine the limits of the authority over Canada of the United Kingdom Parliament, and why the two-judge minority was wrong to ignore the issue.

If it can be accepted that the extent of the authority over Canada of the United Kingdom Parliament is a question of Canadian law properly determinable by Canadian courts, is the short answer to that question of Canadian law that the United Kingdom Parliament has unlimited authority over Canada? As I have explained, that was the answer given by the seven-judge majority.<sup>81</sup> If we suppose that the United Kingdom Parliament enacted a statute which purported to apply to Canada without having obtained the request or consent of any legislative or governmental body in Canada,<sup>82</sup> would that statute be recognized as valid by Canadian courts? The answer implicit in the majority opinions in this case is yes. The statute would be in breach of the convention agreed upon in 1930 (that the United Kingdom Parliament would not legislate for a Dominion except at the request and with the consent of that Dominion), but a mere convention cannot be enforced in the courts, and the seven-judge majority on law tells us

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<sup>78</sup> *Ibid.*, at p. 47.

<sup>79</sup> Canada’s independence was judicially recognized in *Re Offshore Mineral Rights of B.C.*, *supra*, footnote 1, at p. 816.

<sup>80</sup> Slattery, *op. cit.*, footnote 75.

<sup>81</sup> *Supra*, footnote 60.

<sup>82</sup> In order to eliminate the complications created by s. 4 of the Statute of Westminster (*supra*, footnote 18), assume that s. 4 was complied with by a false declaration in the hypothetical statute that Canada had requested, and consented to, the enactment thereof.

that a convention cannot crystallize into law. The same majority adds that the legal authority of the United Kingdom Parliament is unlimited. The result is that the unwanted law would be valid, and Canada's only remedy would be in the realm of international relations, that is to say, diplomatic protests and the like.

Since there are no cases in which a Canadian court has struck down a United Kingdom statute purporting to apply to Canada, the Supreme Court of Canada's holding of unlimited United Kingdom legislative authority over Canada cannot be demonstrated to be wrong. But I think it is wrong. If the United Kingdom Parliament were to enact a statute for Canada without any Canadian consent, it is surely more likely that a Canadian court would hold that one of the consequences of Canadian independence is that a statute of the United Kingdom Parliament enacted without the consent of Canada is simply not the law of Canada. Without the consent of Canada the statute has the same status in Canadian law as a statute enacted for Canada by Australia or the United States or Poland, that is to say, it has no status at all — it is a nullity.<sup>83</sup>

If my argument is so far accepted, it follows that there is at least one legal limitation on the authority of the United Kingdom Parliament. The limitation is that the United Kingdom Parliament has no legal authority to legislate for Canada without Canada's consent. It also follows that it is the duty of the Canadian courts, when the occasion arises, to determine the nature of the consent which will provide the United Kingdom Parliament with the authority to legislate for Canada. I conclude therefore that the seven-judge majority should have considered and determined the question of the nature of the Canadian consent which was required for a United Kingdom statute which would have the effect of altering provincial legislative powers.

If there were no other relevant considerations, the federal nature of Canada's constitution would suggest that the provinces should join in the consent to any amendment affecting their powers. This was the

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<sup>83</sup> In Hogg, *Constitutional Law of Canada* (1977), p. 8, I suggested this situation as one in which the Canadian courts might give legal effect to a convention (*i.e.*, the convention that the United Kingdom Parliament will not legislate for Canada except at the request and with the consent of Canada), thus transforming the convention into a rule of law. In the present case the dissenting opinion on convention, *supra*, footnote 1, at pp. 112-113, quoted this passage but commented *obiter* that "it is our view that it is not for the Courts to raise a convention to the status of a legal principle". Professor Brian Slattery, *op. cit.*, footnote 75, argues that the hypothetical unwanted United Kingdom statute would be rejected by a Canadian court "for the simple reason that Canada is no longer a British colony". He says that such a statute "would possess no greater force in Canada under Canadian law than a decree of the former Life-President in Uganda". Professor Slattery thus does not rely on the convention at all, but simply on the fact of Canadian independence as having changed one of the fundamental rules of recognition in Canadian law. With respect, his analysis seems to me to be correct.



opinion of the Kershaw Committee, a committee of the House of Commons in the United Kingdom, which reported in 1981 on the role of the United Kingdom Parliament in enacting constitutional amendments for Canada.<sup>84</sup> The Kershaw Committee decided that when the United Kingdom Parliament receives a request for the amendment of the Canadian constitution the United Kingdom Parliament has "to decide whether or not [the] request conveys the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system".<sup>85</sup> To that end, the United Kingdom Parliament is "bound to exercise its best judgment" in determining whether "a sufficient level and distribution of provincial concurrence" exists; any measure which does not enjoy the level and distribution of provincial concurrence contemplated by the proposed amending formula would not qualify as a "proper request" and should not be complied with.<sup>86</sup>

The Kershaw Committee did not purport to state the policy of the United Kingdom government, and in fact the United Kingdom government issued a Command paper in reply to the Kershaw Committee which strongly implied that if the need had arisen the United Kingdom government would have acted in accordance with a request from the

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<sup>84</sup> First Report from the Foreign Affairs Committee, Session 1980-81, British North America Acts: the Role of Parliament, House of Commons (U.K.), Jan. 30th, 1981 (hereinafter referred to as the Kershaw Report). The Kershaw Report was followed by a reply issued by the Government of Canada: Chretien, The Role of the United Kingdom in the Amendment of the Canadian Constitution (Government of Canada, March 1981). This paper was followed by a rejoinder by the Kershaw Committee: Second Report from the Foreign Affairs Committee, Session 1980-81, Supplementary Report on the British North America Acts: the Role of Parliament, House of Commons (U.K.), April 15th, 1981. Then after the decision of the Supreme Court of Canada on Sept. 28th, 1981 and the nine-province federal-provincial agreement on Nov. 5th, 1981, the Kershaw Committee issued a third report recommending that the U.K. Parliament enact the Canada Bill in spite of Quebec's dissent: First Report from the Foreign Affairs Committee, Session 1981-82, Third Report on the British North America Acts: The Role of Parliament. House of Commons (U.K.), Jan. 18th, 1982.

<sup>85</sup> Kershaw Report, para. 8.

<sup>86</sup> *Ibid.*, paras. 9-10. In the Committee's third report (*op. cit.*, footnote 84) the Kershaw Committee recommended that the Canada Bill be enacted in spite of Quebec's dissent. This involved an abandonment of the test supplied in the Committee's first report of "a sufficient level and distribution of provincial concurrence", because under the previous proposed amending formula Quebec had a veto, and under the new formula Quebec's dissent would prevent the amendments from applying in Quebec. The Committee said in its third report that Quebec's consent was not necessary because the Supreme Court of Canada had required only "a substantial measure of provincial consent" and had stated that it was for the "political actors" to determine the degree of provincial consent. This is one reading of the Supreme Court's decision, but there are powerful arguments that Quebec's consent is necessary as part of "a substantial measure of provincial consent", and at the time the Committee reached its confident conclusion the question was already the subject of litigation in Canadian courts: see text accompanying footnote 58, *supra*.

Canadian federal government alone and would have urged the United Kingdom Parliament to do the same.<sup>87</sup> In my opinion, the position of the United Kingdom government was correct, and that of the Kershaw Committee was incorrect.<sup>88</sup> The fact which is overlooked by the Kershaw Committee in these recommendations (although lipservice is paid to it in other parts of their report) is that 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.<sup>89</sup> Rather, the relations between Canada and the United Kingdom should observe the same rules as those between other independent states. In Canada's relations with other states Canada is one state and it is the federal government which has the exclusive authority to speak for Canada as a whole, notwithstanding that Canada's internal constitutional system is a federal one. The principle of Canadian independence would thus suggest that the request from Canada to the United Kingdom should come from the federal government. Moreover, that is the way in which the request has always been made in the past: since 1896 every request has taken the form of a joint address by the two federal Houses of Parliament. Even those requests which in fact enjoyed the unanimous consent of the provinces took the usual form, not even reciting in the address the existence of provincial consents.<sup>90</sup> No request in the usual form has ever been rejected by the United Kingdom Parliament.<sup>91</sup> When a province has requested an amendment independently of the federal government (which has occurred at least nine times) the request has always been rejected by the United Kingdom Parliament.<sup>92</sup>

<sup>87</sup> Observations by the Secretary of State for Foreign and Commonwealth Affairs on the First Report from the Foreign Affairs Committee, Session 1980-81, Miscellaneous No. 26, Cmnd. 8450, Dec. 1981, especially para. 13.

<sup>88</sup> A good deal of the third report of the Kershaw Committee (*op. cit.*, footnote 84) is taken up with argument to the general effect that the Supreme Court of Canada had vindicated the position taken by the Committee in its first and second reports. But the Supreme Court of Canada did nothing of the sort: it neither said nor implied that the United Kingdom Parliament should interpret and give effect to any Canadian convention regarding provincial consents. As the U.K. government pointed out in reply to the Committee (*op. cit.*, footnote 87, para. 10), the court was at pains not to discuss that question. If the court had discussed the question, in my view it would have emphatically rejected the Committee's position for the reasons given in the following text of this comment.

<sup>89</sup> The Committee invited and heard the testimony of several British constitutional lawyers, who agreed that the United Kingdom Parliament should exercise the discretion contemplated by the Committee. The Committee did not invite or hear the testimony of any Canadian constitutional lawyers.

<sup>90</sup> *Supra*, footnote 1, majority opinion on law at p. 31; majority opinion on convention at p. 98.

<sup>91</sup> Hogg, *op. cit.*, footnote 83, pp. 19-20.

<sup>92</sup> *Ibid.*, p. 19, note 30.

In sum, therefore, while the federal principle provides cogent ground for a requirement of provincial consents to constitutional amendments affecting provincial powers, that requirement is operative only within Canada. Its breach gives rise to political consequences only within Canada. At the point when the action of a foreign government is invoked the principle of Canadian independence must dominate. The United Kingdom government (and the United Kingdom Parliament) must accept the request which is made in the usual form by the Canadian federal authority. For the United Kingdom government or Parliament to listen officially to the provinces or (worse) to enter upon an inquiry into the extent and sufficiency of provincial consents must in my opinion be condemned as "an objectionable foreign interference in Canadian domestic affairs".<sup>93</sup>

On the legal issue, therefore, I end up in agreement with the seven-judge majority that there is no legal requirement of provincial consents as a prerequisite to an amendment of the Canadian constitution which would alter the powers of the provinces. My reasoning is different because I cannot accept the view that the United Kingdom Parliament's authority over Canada is as plenary as it was in colonial times. In my view Canada's accession to independence has imposed important limitations on the authority of the United Kingdom Parliament. The question for me, therefore, is whether a requirement of provincial consents is one of the limitations. The question is difficult, but I resolve it by giving priority to the principle of Canadian independence to the extent that it comes into conflict with the principle of federalism. On balance, therefore, I conclude that only the consent of the federal Houses is necessary to provide the United Kingdom with its authority over Canada.

### *Conclusions*

1. In my view, the court was wrong to answer the question whether there was a constitutional convention requiring the consent of the provinces to a constitutional amendment affecting provincial powers. Since a convention is not judicially enforceable, no legal consequence could flow from the answer. The only consequence of an answer to the convention question could be a political one, namely, to influence the political outcome of the controversy over the proposed amendment.

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<sup>93</sup> *Ibid.*, p. 21. The strongest form of the argument to the contrary would assert that the relationship between Canada and the United Kingdom is not an external one with respect to amendment of the B.N.A. Act. With respect to that matter (and that matter only) the relationship is part of Canada's domestic amending machinery and must take account of the federal principle. In my view, the force of this line of argument is not sufficient to override the considerations of democratic accountability and Canadian independence which are elaborated in the text.

2. Assuming that it was appropriate for the court to answer the convention question, the absence of any accepted methodology to answer the question became a big problem. In particular, what weight was to be attributed to statements by federal Ministers denying the existence of an obligation to obtain the consent of the provinces to significant constitutional amendments? The majority of the court held that these statements did not negate the existence of a convention, but merely negated a requirement of unanimity: there was a convention, but it called for only "a substantial degree" of provincial consent. The more plausible conflicting interpretations of the material in my view were either (1) that there was merely a usage lacking a normative element (which is what the three-judge minority decided), or (2) that there was a convention of unanimity (which is what the past practice would suggest). The majority's middle ground seems to me to be the least plausible of the possible interpretations.

3. Finally, the court was right to decide that there was no legal requirement of the consent of the provinces. However, the seven-judge majority should not in my view have held that there were absolutely no limitations on the authority over Canada of the United Kingdom Parliament. The better view is that there is a legal requirement of some form of Canadian consent as a precondition of the United Kingdom Parliament's authority over Canada. The only question then is whether that Canadian consent must include the provinces as well as the two Houses of the federal Parliament. The reason why provincial consents need not be included is that the relationship between Canada and the United Kingdom is that between two independent states, and it is not appropriate for the latter to take upon itself the ascertainment and effectuation of provincial opinions which form part of Canada's internal affairs.

P.W. HOGG\*

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CONTRACTS—INNOMINATE TERMS: CONTRACTUAL ENCOUNTERS OF THE THIRD KIND.—A major function of the law of contract is to ensure that the reasonable expectations of the contracting parties are met and enforced.<sup>1</sup> In turn, those expectations will be conditioned and informed by the anticipated legal consequences that will attach to proposed or actual agreements.<sup>2</sup> This "supportive" role of contract law was clearly recognised by John Austin:<sup>3</sup>

Now, as much of the business of human life turns or moves upon conventions, frequent disappointments of those expectations which conventions naturally excite, would render human society a scene of baffled hopes and of thwarted projects and labours. To prevent disappointments of such expectations, is therefore a main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements.

Yet, the protection and promotion of such interests is not the only function of contract law. Contract law is not exclusively designed to facilitate business activities or oil the wheels of commerce; it has a responsibility to fulfil in regulating and controlling business practices and, thereby, contribute to the solution of the problems of economic justice. Contract law must not allow itself to be used to reinforce and perpetuate economic inequalities; "justice and the interests of society are furthered when the law to some extent ranges itself upon the side of the party who for some reason or another is unable properly to safeguard his own interests".<sup>4</sup> Obviously, this "regulatory" role will be more appropriate in certain types of agreements, such as contracts between consumers and manufacturers. In large commercial contracts between independent corporations the "regulatory" role will be of less importance.

Contract law is concerned with planned relationships of an economic nature.<sup>5</sup> The formation of a contract creates risks. In most cases, the contracting parties will have allocated between themselves the foreseeable risks and the law provides various devices by which such risks might be allocated. If the contracting parties fail to allocate or foresee certain risks, contract law will determine which party is to

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<sup>1</sup> See Farnsworth, "Meaning" in the Law of Contracts (1967), 76 Yale L.J. 939, at p. 951.

<sup>2</sup> The reliance by businesses on the law, especially in continuing relationships, is open to severe doubt; see Macauley, *The Use and Non-Use of Contracts in The Manufacturing Industry* (1963), Vol 9, *The Practical Lawyer* 13 and Beale and Dugdale, *Contracts between Businessmen: Planning and Use of Contractual Remedies* (1975), 2 Brit. J. of L. & Soc. 45.

<sup>3</sup> Lectures on Jurisprudence (2nd ed., 1861), pp. 299-300.

<sup>4</sup> C. Havinghurst, *The Nature of Private Contract* (1961), p. 111 and I. Stone, *Social Dimensions of Law and Justice* (1966), pp. 251-254.

<sup>5</sup> For an excellent analysis of contract as an exchange transaction, see I.R. Macneil, *Cases and Materials on Contract* (1971).

bear those risks.<sup>6</sup> As such, contract law is an institutional attempt "to mark out a range and an apportionment of risks".<sup>7</sup> In so far as legal doctrine contributes to the planning or drafting of agreements,<sup>8</sup> the law must be certain so as to permit the parties to allocate risks with certainty and, thereby, ensure that appropriate insurance arrangements are effected; "it is an important function of a court . . . to provide [contracting parties] with legal certainty at the negotiating stage".<sup>9</sup> Uncertainty will mean that an informed allocation of risks cannot be made and this may lead to over-insurance.<sup>10</sup>

Nevertheless, although predictability and certainty has obvious and substantial commercial advantages, contract law must strive to incorporate a dimension of flexibility in order to accommodate and reflect the complex reality of commercial activity.<sup>11</sup> Indeed, a due measure of flexibility contributes to certainty in the long run by avoiding anomalous situations. Of course, in so doing, it is important that the possibility for reasonable planning is not seriously curtailed or impaired.<sup>12</sup> In all contractual arrangements, a predominant concern of the contracting parties and their legal advisors is the availability and nature of remedies when a contract is broken, especially the circumstances in which an innocent party is entitled to treat the contract as being at an end. In recent years, English courts have attempted to move away from a rigid categorisation of contractual terms and, through the introduction of innominate terms, to move towards a more commercially responsive and realistic formulation of contract law. Unfortunately their efforts have tended to exacerbate rather than ameliorate the situation.<sup>13</sup>

<sup>6</sup> See Patterson, *The Apportionment of Business Risks Through Legal Devices* (1924), 24 Col. L. Rev. 335.

<sup>7</sup> Llewellyn, *What Price Contract?—An Essay in Perspective* (1931), 40 Yale L.J. 704, at p. 746.

<sup>8</sup> See *Photo Productions Ltd v. Securicor Ltd*, [1980] 2 W.L.R. 283, at p. 289, per Lord Wilberforce.

<sup>9</sup> *Federal Commerce v. Tradax Export*, [1978] A.C. 1, at p. 8, per Lord Diplock. For other judicial statements of the need for certainty, see *Pau On v. Lau Yin*, [1980] A.C. 614, at p. 634, per Lord Scarman; *Photo Productions*, *ibid.*, at p. 296, per Lord Diplock; *White & Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413, at p. 430, per Lord Reid; and *Woodhouse A.C. Israel Cocoa Ltd v. Nigerian Produce Marketing Co.*, [1972] A.C. 741, at p. 758, per Lord Hailsham.

<sup>10</sup> It must be remembered that insurance only reduces the risk, it does not dispense with it completely. As Macneil notes, "instead of a risk of a large loss, the insured has a certain smaller loss, namely the premium", *op. cit.*, footnote 5, p. 805.

<sup>11</sup> See *Reardon-Smith Line v. Hanzen-Tangen*, [1976] 1 W.L.R. 989, at p. 998, per Lord Wilberforce.

<sup>12</sup> See Atiyah, *From Principles to Pragmatism: Change in the Function of the Judicial Process and Law* (1980), 65 Iowa L. Rev. 1249, at p. 1275.

<sup>13</sup> In his inaugural lecture, Professor Trietel suggested that innominate terms are part of a broader legal trend; "a process by which reasonably precise rules are replaced

*Revolution or Aberration*

Traditionally, the English law of contract has maintained a simple bifurcation of contractual terms and the identity of a term is the exclusive determinant of the remedy available. A condition is a major ingredient of an agreement and its breach entitles the victim to repudiate and claim for damages. On the other hand, a warranty is only a subsidiary term of an agreement and its breach can be adequately remedied by the recovery of damages; no right to repudiate arises. Once a term is identified as being a condition, *any* breach of that term gives rise to the right to repudiate. There is no additional requirement that the victim must actually be seriously prejudiced; a trivial breach will suffice.<sup>14</sup>

In 1962, this rigid bipartite categorisation was severely shaken by the decision of the Court of Appeal in *Hong Kong Fir Shipping Ltd v. Kawasaki Kisen Kaisha Ltd.*<sup>15</sup> The defendants chartered a ship from the plaintiffs for a period of twenty-four months. Due to antiquated machinery and incompetent staff, twenty weeks were lost and the defendants repudiated the contract. Although the plaintiffs admitted that they were in breach of a "seaworthiness" clause, they claimed that the defendants were only entitled to damages and that their repudiation was wrongful. In the event, the plaintiffs prevailed.<sup>16</sup> Yet, while the decision was unremarkable, if quite hard on the charterer, the reasoning of the court was little short of "revolutionary".<sup>17</sup> The Court of Appeal refused to treat the dual categorisation of contractual terms as exhaustive; such a simple dichotomy distorted the complex reality of business life. In the words of the landmark judgment of Diplock L.J.:<sup>18</sup>

by . . . vague or open-textured terms": see Doctrine and Discretion in the Law of Contract (1981), p. 2.

<sup>14</sup> See, for example, *Re Moore & Co. Ltd and Landover & Co.*, [1921] 2 K.B. 519; *Jackson v. Rotax Motor & Cycle Co.*, [1910] 2 K.B. 937 and *Arcos Ltd v. E. A. Ronaasen & Sons*, [1933] A.C. 470.

<sup>15</sup> [1962] 2 Q.B. 26. For a contemporary discussion of the case, see Furmston, Note (1962), 25 Mod. L. Rev. 584, and Reynolds, Warranty Condition and Fundamental Term (1963), 79 L.Q. Rev. 534. For an early criticism of the simple bifurcation, see Montrose (1960), 23 Mod. L. Rev. 550.

<sup>16</sup> The case was similarly decided at first instance by Salmon J., [1961] 2 W.L.R. 76. For a short note on this decision, see Sealy, [1981] Camb. L.J. 152.

<sup>17</sup> See Atiyah, Book Review (1981), 1 L.S. 100, at p. 103 and *The Sale of Goods* (6th ed., 1980), pp. 42 and 45.

<sup>18</sup> *Supra*, footnote 15, at p. 72. Diplock L.J.'s use of "rescind" is confusing for he presumably means "repudiate"; the two terms are different and cannot be used interchangeably. Whereas repudiation means terminating an existing contract, rescission renders a contract void *ab initio*. For a good account of the importance of keeping them separate, see Dawson, Fundamental Breach of Contract (1975), 9 L.Q. Rev. 380, at pp. 393-399. Failure to do so caused Megarry J. considerable difficulties in *Horsler v. Zorro*, [1975] 2 W.L.R. 183.

What the judge had to do in the present case, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, and the contract itself makes no express provision as to this, was to look at the events which had occurred as a result of the breach at the time at which the characters purported to rescind the charterparty and to decide whether the occurrence of these events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings.

Accordingly, *Hong Kong Fir* recognised the existence of a third category of contractual terms. Whereas any breach of a condition or warranty gives rise to a previously and precisely ascertainable remedy, the remedy available on the breach of an "innominate term" is not so ascertainable at the time of making the agreement. Whether there is a right to repudiate will depend upon the actual repercussions of the breach. It is not the nature of the term broken but the effect of the breach that will determine the remedy available.

The subsequent judicial treatment of *Hong Kong Fir* was predictably ambivalent. With characteristic conservatism, the courts have begrudgingly recognised the existence of "innominate terms", but endeavoured to neutralise the potentially radical impact of that decision. In the *Mihalis Angelos*,<sup>19</sup> the Court of Appeal was happy to hold that a "readiness to load" clause in a charterparty was a condition and not an innominate term. The court expressly opted for increased certainty at the expense of greater flexibility. In *The Hansa Nord*,<sup>20</sup> the Court of Appeal held that a clause in a sale of goods contract requiring "shipment to be made in good condition" should not be treated as a condition, but as an innominate term. Moreover, as the breach did not go to the root of the contract, the buyer was not entitled to repudiate by rejecting the goods. Also, in *Federal Commerce*,<sup>21</sup> the House of Lords treated a clause in a time-charter requiring the master to follow the charterers' orders as an innominate term.

These decisions left the law in a state of considerable confusion. Although *Hong Kong Fir*<sup>22</sup> has introduced a third category of contractual stipulation in order to bring the law more in line with commercial reality, it had failed to specify the indicia by which such terms could be identified. The choice for the courts was clear. It could revert to the original traditional bifurcation with its considerable appeal of predictability; even though it might distort reality, the contracting

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<sup>19</sup> *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H. The Mihalis Angelos*, [1971] 1 Q.B. 164. For an extended discussion of this case, see Greig, *Condition—or Warranty?* (1973), 89 L.Q. Rev. 93.

<sup>20</sup> *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. The Hansa Nord*, [1976] Q.B. 44.

<sup>21</sup> *Supra*, footnote 9.

<sup>22</sup> *Supra*, footnote 15.



parties would be able to ascertain their legal obligations and entitlements at the time of making the agreement. On the other hand, the tripartite classification could be retained with its greater elasticity, provided a thorough analysis of the constitutional and distinguishing properties of "innominate terms" was effected. The forlorn hope was expressed that "complete understanding must await a decision of the House of Lords".<sup>23</sup> Sadly, the House did not warm to such a challenge.

### *A Tarnished Opportunity*

In *Bunge Corporation, New York v. Tradax Export, S.A. Panama*,<sup>24</sup> the House was presented with, but missed a golden opportunity. In essence, there was a contract for the sale of 15,000 tons of soya beans of which delivery was to be made in three consignments of 5,000 tons each. The contract provided that the buyers, Bunge Corporation, should give fifteen days' notice before each shipment and specify the vessel to be used. In breach of this "probable readiness to load" clause, Bunge gave only fourteen days' notice in respect of the second consignment. Although the contract was silent as to the status of this stipulation, the sellers, Tradax S.A., contended that this breach was sufficiently serious to entitle them to repudiate the contract. Incredibly, this issue occupied the attention of five different tribunals over six years, only one of the fifteen members found for Bunge and, at the end of the day, no clear statement of general principle emerged from this extensive litigation.<sup>25</sup> The House of Lords, unanimously affirming the "powerful and closely reasoned"<sup>26</sup> judgment of Megaw L.J. in the Court of Appeal,<sup>27</sup> held, as in *The Mihalis Angelos*,<sup>28</sup> that the relevant clause was, as a matter of construction, a condition and, therefore, Tradax was entitled to repudiate the contract.

<sup>23</sup> M. P. Furmston, *Cheshire and Fifoot's Law of Contract* (9th ed., 1976), 143. The major source of difficulty lies in the failure of the courts to heed Diplock L.J.'s jurisprudential advice: "... the common law evolves not merely in breeding new principles, but also, when they are fully grown, by burying their progenitors"; See *supra*, footnote 15, at p. 71.

<sup>24</sup> [1981] 1 W.L.R. 711. For a comment on this case, see Reynolds, (1981), 97 L.Q. Rev. 541.

<sup>25</sup> *Ibid.*, at p. 723, per Lord Roskill. As he went on to say, "the 'relevant phrase' 'give at least 15 consecutive days' notice' consists only of six words and two digits. But the able arguments of which your lordships have had the benefit have extended over three full days". After the issue was decided by an umpire, there was an appeal to the Board of Appeal of GAFTA, another appeal to Parker J. in the Commercial Court, on to the Court of Appeal (Megaw, Browne and Brightman L.J.J.), and, finally to the House of Lords (Lords Wilberforce, Fraser, Scarman, Lowry and Roskill).

<sup>26</sup> *Ibid.*

<sup>27</sup> [1980] 1 L.I. Rep. 294, at pp. 297-309.

<sup>28</sup> *Supra*, footnote 19.

In reaching this decision, their lordships exposed the "fundamental fallacy"<sup>29</sup> of the arguments urged in support of Bunge. Counsel had argued that, since the parties had left their intentions as to the contractual status of the "readiness" clause unexpressed, the issue could be disposed of by the application of the test contained in Diplock L.J.'s classic judgment in *Hong Kong Fir*; namely, that to justify repudiation, the breach must be such as to deprive the innocent party of substantially the whole benefit of the contract. Accordingly, it was argued, Tradax was not entitled to repudiate because the breach did not have such an effect. The House of Lords unanimously rejected the force of this argument. It held, in effect, that the mere failure of the parties to express their intention as to what rights should be available in event of breach is a necessary but not a sufficient characteristic for the existence of an innominate term.<sup>30</sup>

Regrettably, the House of Lords did not proceed to enumerate those other characteristics sufficiently to signify the existence of innominate terms. It contented itself with a slight but necessary emendation of Diplock L.J.'s account of such terms so as to make it clear that a term may nevertheless be a condition despite the lack of any express intention to that effect in the contract.<sup>31</sup> Obviously, a contrary decision would utterly fail to explain the status of terms already established as conditions as a matter of statutory or judicial implication.<sup>32</sup> Furthermore, the House of Lords continued to rely upon and cite with approval the standard tests of vague generality to

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<sup>29</sup> *Supra*, footnote 24, at p. 715.

<sup>30</sup> As Megaw L.J. stated "no-one now doubts the correctness of [*Hong Kong Fir*]: that there are intermediate [sic] terms . . .", *supra*, footnote 27, at p. 307. The tendency of the judges to use the labels "innominate" and "intermediate" interchangeably can scarcely contribute to clarity of exegesis; for the introduction of the appellation "intermediate", see *Bremer v. Vanden*, [1978] 2 L.J. Rep. 109, at p. 113, per Lord Wilberforce. It is suggested that neither term is wholly satisfactory.

<sup>31</sup> *Supra*, footnote 24, at pp. 715 and 725, per Lords Wilberforce and Roskill respectively. Furthermore, as Lords Wilberforce and Lowry noted "[Diplock L.J.'s judgment] does not profess to be more than clarificatory" and "by his illuminating analysis purport to establish a new light on old and accepted principles; he did not purport to establish new ones": *ibid.*, at pp. 715 and 719. This is a splendid example of the declaratory theory of common law at work and Hercules J. would be proud of Diplock L.J.'s achievement; see R. M. Dworkin, *Taking Rights Seriously* (1979), *passim*.

<sup>32</sup> See, for example. Sale of Goods Act 1979, c. 54, ss 12-15; *Behn v. Burness* (1863), 1 B. & S. 751; and the *Mihalis Angelos*, *supra*, footnote 19. For a modern judicial analysis of "conditions", see *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 and *Reardon-Smith*, *supra*, footnote 11. As Ormrod L.J. said "a decision in one case will, in effect, categorise the stipulation for other cases in which the same form is used"; see *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. The Hansa Nord*, *supra*, footnote 20, at p. 62.

identify conditions, especially those contained in the judgment of Bowen L.J. in *Bentsen v. Taylor*.<sup>33</sup>

### *A New Formula*

The recognition of a new "species" of "innominate" or "intermediate" terms also calls into question the *established* tests for identifying terms where the parties have left their intentions unexpressed. The inherent weakness of the traditional formulae is that they were devised at a time when only a simple dichotomy existed and it was only necessary to concentrate on specifying the properties of one term; for if a term was not a condition, it must be a warranty. If the courts are to insist on a tripartite categorisation of contractual terms, a completely new test must be formulated that captures and better reflects this state of affairs.<sup>34</sup> Prior to *Bunge v. Tradax*, the courts maintained that unless a term was a condition as a matter of express intention or on the basis of previous authority, there was a presumption that the term was innominate.<sup>35</sup> The form of this presumption had never been fully explored, especially in regard to the quality and quantity of evidence required in rebuttal. The House of Lords in *Bunge v. Tradax* did not advert to this approach and the decision suggests, but does not articulate, an altogether different approach which concentrates on the substantive rather than the presumptive distinction between conditions and innominate terms. It is also clear that the new approach must focus on this distinction and not, as in the traditional approach, on the difference between conditions and warranties, for a breach of warranty can never give rise to a right to repudiate.

Accordingly, the logic of admitting the existence of innominate terms as a discrete category of contractual stipulation requires a reappraisal of the logical and constitutional properties of conditions. The difficulty with the old test for identifying conditions is that it must also be satisfied in the case of those innominate terms that give rise to the right to repudiate. The challenge is to define a new formula to discriminate between conditions and innominate terms with sufficient precision so as to accommodate the crucial characteristic of a condition: that is, while a breach may not in fact substantially deprive a party of the entire benefit of the contract, it will always generate a right to repudiate. This reveals that the focus for a new approach must sensibly be put on the *consequences* of a breach. Quite apart from the

<sup>33</sup> [1893] 2 Q.B. 274, at p. 281.

<sup>34</sup> In *Schuler*, Lord Wilberforce interpreted *Hong Kong Fir* as not casting any doubt on the meaning of "conditions"; *supra*, footnote 32, at p. 262. As to whether such a tripartite categorisation is desirable, see *infra*.

<sup>35</sup> See *Reardon-Smith*, *supra*, footnote 11.

denial of self-help remedies entailed by such an approach, any breach which is serious enough in its effects will always have a repudiatory quality and there will be no way to distinguish conditions from innominate terms. Accordingly, scrutiny must instead be devoted to the properties of the term itself, which is a question which may be decided in advance of breach at the moment of contracting. Notwithstanding their failure to stipulate expressly, the parties are surely entitled to be able to ascertain at the time of contracting, what rights and obligations their consensual bargain has imposed on them. However, the question of what are the characteristics of a condition, which distinguish it from an innominate term, does not admit of any easy answer. As Megaw L.J. underlined in the Court of Appeal, although any breach of a condition gives rise to the right to repudiate, it does not follow that there has been a loss of substantially the whole benefit of the contract. Therefore, the test for a condition is not co-extensive with an inquiry into whether each and every breach must have that effect. If this were the test, no term could ever pass such a stringent test and conditions would cease to exist. It is always possible to imagine some set of circumstances, however remote or fanciful, which would not result in the loss of substantially all the benefit of the contract.<sup>36</sup>

Although such a test is condemned by its own excesses, it does suggest a more acceptable approach. For, if instead of asking whether every breach of a term would actually result in the loss of substantially the whole contract, it could be asked whether every potential breach *might* have this effect. In this way, it does indeed become possible to determine in advance the difference between conditions and innominate terms. The justification for granting the innocent party a right to repudiate the contract is that the contract is rendered substantially less beneficial than it would have been, but for the breach. However, the assessment of the extent of the benefit which is to be gained from the business of contracting is, like all other contractual risks, capable of being anticipated before performance and, therefore, ahead of breach. It is at that time that the categorisation of terms into conditions, innominate terms and warranties is, if not made express, assumed by the parties. It may be that the effects of a breach of a term assumed to be of the first importance to the contract are not in fact greatly prejudicial. Yet that cannot justify the re-opening of an issue in the light of subsequent events which has already been decided by the act of bargaining. If a term is such that, at the time of contracting, it can fairly be said that each and every breach of it *might* result in the loss of substantially the whole benefit of the contract, that should be enough to fix that term with the status of a condition. However, as events unfold, its breach is easily remediable. In that case, no doubt,

<sup>36</sup> See *Bunge v. Tradax (C.A.)*, *supra*, footnote 27, at p. 308, per Megaw L.J.

the innocent party will avail himself of his option wisely. On the other hand, if it cannot be said that each and every breach *might* have that effect, the term will be an innominate term and the availability of a precise remedy for its breach must await the determination of the effects of its breach.

Typically, a condition will be a term that can only be broken in one way and this fact, in the light of the factors known to the parties at the time of contracting, will have fundamental significance for the contract as a whole. Thus, a contractual stipulation as to time, such as an expected readiness to load clause or title to goods, can only be broken in one way. Its significance is that the range of consequences of breach is predictably narrow and may fairly be treated as being fundamental. Innominate terms will be those which can be broken in a variety of ways because, although each is expressed substantively as a single term, it is in essence a bundle of obligations; some of great and others of small significance to the contract. Consequently, it will not be possible, at the time of contracting, to say of such a term that each and every breach even *might* have the potentially catastrophic effect required to give it a repudiatory quality. As Upjohn L.J. emphasised in *Hong Kong Fir* itself.<sup>37</sup>

Why is this apparently basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted "in every way" for service. Thus, to take examples from the judgments in some of the cases I have mentioned above, if a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances the parties contemplated that the charterer should at once be entitled to treat the contract as at end for such trifling breaches.

In summary, therefore, the proposed regime of contractual stipulation would consist of three clearly defined and separate categories.<sup>38</sup> A contractual term would be a condition if every breach of it might deprive the innocent party of substantially the whole benefit of the contract; a right to repudiate the contract would be available whatever the actual effects of breach. A contractual term would be an innominate clause if some, but not necessarily every breach might deprive the innocent party of substantially the whole benefit of the contract; a right to repudiate the contract would only be available if the breach did in fact result in the innocent party being deprived of substantially the whole benefit of the contract. A contractual term would be a warranty if its breach could never deprive the

<sup>37</sup> *Supra*, footnote 15, at pp 62-63. Upjohn L.J. repeated his views in *Astley Independent Trust v. Grimley*, [1963] 2 All E.R. 33, at pp. 46-47.

<sup>38</sup> Lord Hailsham described conditions and warranties as "mutually exclusive and starkly contrasted compartments"; see *London & Clydeside Estates Ltd v. Aberdeen D.C.*, [1980] 1 W.L.R. 182, at p. 189.

innocent party of substantially the whole benefit of the contract; a right to repudiate the contract would never arise.

The major appeal of such a regime of contractual stipulations is that it rightly concentrates on the several ways in which a term might be broken rather than upon the term itself.<sup>39</sup> Moreover, it introduces a dimension of realistic flexibility without any appreciable diminution in predictability. Indeed, the critical balance between "the equity of a particular situation" and "the overmastering need of certainty in the transactions of commercial life"<sup>40</sup> has been left undisturbed. The parties remain entirely free to categorise expressly any term of a contract as a condition. As Lord Diplock noted, in regard to shipping parties, when the parties "are matched in bargaining power", they are "at liberty to enter into [agreements] in whatever contractual terms they please".<sup>41</sup> If the parties fail to stipulate expressly the contractual status of any term in their agreement, the need of certainty is no longer of relevance. In such circumstances of unexpressed intention, the courts ought surely to look to the justice of the situation. This will require an inquiry into the possible consequences of breach. Accordingly, when there is a gap or failure in planning by the contracting parties, as there inevitably will be in complex and continuing contractual arrangements,<sup>42</sup> the court must focus its attention on performance and not formation. The proposed tripartite regime best reflects such concerns. Nevertheless, it remains a matter for future debate as to whether the introduction of a third category of contractual term is desirable. Its mere existence and the ensuing difficulties attached to identifying and distinguishing an innominate term from other terms is likely to provide further grist for the litigation mill. There is much to be said for a regime that simply recognises two categories of contractual term; a breach of one type justifying termination and a breach of another not so doing. A decision on which category any particular contractual term falls into will depend on the express or implied choice of the parties; the finding of an implied choice being a matter of construction on all the circumstances of the case.

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<sup>39</sup> See Lord Devlin, [1966] Camb. L.J. 192, at p. 204.

<sup>40</sup> B.N. Cardozo, *The Growth of Law* (1924), pp. 110-111.

<sup>41</sup> *Federal Commerce*, *supra*, footnote 9, at p. 7.

<sup>42</sup> See Macneil, *op. cit.*, footnote 5, at p. 716.

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CONTRACT LAW—FORMATION—UNILATERAL MISTAKE—SUPREME COURT OF CANADA.—In *The Province of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Ltd.*,<sup>1</sup> the Supreme Court of Canada considered both what constitutes a sufficient unilateral mistake as well as the consequences of a mistaken tender being expressed as irrevocable. The judgment of the court is predicated in large part on the finding of a contract collateral to the construction contract. Therefore of necessity this comment analyses issues of contract formation as well as unilateral mistake. In order to place the court's discussion of the interrelated issues of formation and mistake in perspective, it is useful at the outset to review the law of unilateral mistake.

When an offer is mistaken in some material way, it often is said that if the offeree knows of the mistake at the time of his purported acceptance, then the offeree cannot enforce the alleged contract against the offeror. This principle has been alternately expressed in stating that the law will not allow the offeree to "snap up" an offer made in mistake. Such a mistake is sometimes referred to as "unilateral mistake". This principle, while relatively easy to state, is uncertain in its application. For one thing, orthodox legal theory has held that for unilateral mistake to operate as a vitiating factor, the mistake must be as to the "promise" or offer being made and not merely in the motive for making the offer.<sup>2</sup> A classic example of the difference between a mistake as to motive and one as to offer can be found in Anson's four Dresden china propositions:<sup>3</sup>

A sells X a piece of china.

- (a) X thinks that it is Dresden china. A thinks it is not. Each takes a chance. X may get a better thing than A intended to sell, or a worse thing than he himself intended to buy; in neither case was the validity of a contract affected.
- (b) X thinks that it is Dresden china. A knows that X thinks so and knows that it is not. The contract holds. A must do nothing to deceive X, but he is not bound to prevent X from deceiving himself as to the quality of the thing sold. X's error is one of motive alone, and although it is known to A, it is insufficient.
- (c) X thinks that it is Dresden china and thinks that A intends to contract to sell it as Dresden china; and A knows that it is not

<sup>1</sup> (1981), 35 N.R. 40.

<sup>2</sup> In the classic case of *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 (D.C.), this distinction was also characterized as the difference between a mistake as to terms and one of subject matter only. See also *Bell v. Lever Bros.*, [1932] A.C. 161, at p. 222.

<sup>3</sup> Anson's Law of Contract (24th ed., 1975), p. 290.

Dresden china, but does not know that X thinks that he is contracting to sell it as Dresden china. The contract says nothing of Dresden, but is for a sale of china in general terms. The contract holds. The misapprehension by X of the extent of A's promise, *if unknown to A*, has no effect. It is not A's fault that X omitted to introduce terms which he wished to form part of the contract.

- (d) X thinks it is Dresden china, and thinks that A intends to contract to sell it as Dresden china. A knows that *X thinks that he is contracting to sell it as Dresden china*, but does not mean to, and in fact does not, offer more than china in general terms. The contract is void. X's error was not one of judgment as to the quality of the china, as in (b), but was an error as to the nature of A's promise, and A, knowing that his promise was misunderstood, nevertheless allowed the mistake to continue.

That the distinction between a mistake as to promise and one as to motive can be a very fine one indeed, is illustrated by *Imperial Glass Co. Ltd v. Consolidated Supplies Ltd.*<sup>4</sup> A party who was asked for a quotation on glass was given the sizes and number of units of each size of glass. The offeror made a calculation mistake in multiplying the square footage per unit by the number of units. The square footage arrived at was one-tenth of what it ought to have been. Accordingly, the offer to supply was \$2,000.00, whereas had the calculation as to total square footage been correct, the bid would presumably have been considerably larger. The bid was accepted by the offeree whom the court found knew of the "mistake". The court held that in spite of this, this could not be considered as an operative unilateral mistake since the mistake was as to motive, not offer:<sup>5</sup>

It is clear the Respondent intended to offer the goods at the price named. The mistake was not in the offer. All that is claimed is that the offer would not have been made had the mistake been detected. The mistake was therefore in the motive or reason for making the offer, not in the offer. There is consequently a consensus and a valid contract.

That is, it was not a case where the offer was intended to be \$20,000.00 and communicated as \$2,000.00. The offeror always intended to make an offer of \$2,000.00; it was just the assumptions made and processes used in arriving at such an intention which were mistaken. The *Imperial Glass* decision has been much criticized<sup>6</sup> and obviously had serious ramifications for those submitting tenders: an offer with an obvious clerical mistake in its transcription could not be

<sup>4</sup> (1960), 22 D.L.R. (2d) 759 (B.C.C.A.).

<sup>5</sup> *Ibid.*, at p. 763.

<sup>6</sup> See particularly Carr, Comment (1961), 39 Can. Bar Rev. 625.



validly accepted whereas another arrived at by mistaken calculations in arriving at the bottom line tender figure, even when known by the offeree, could be accepted.<sup>7</sup>

The recent case of *Belle River Community Arena Inc. v. W.J.C. Koffmann Ltd Co.*<sup>8</sup> was thought to mark a retreat from this orthodox position. There an error had been made in arriving at a bid of \$640,603.00. This was in error by \$70,800.00. What had happened was that one out of some seventy-five summary sheets had been omitted in adding up the components in the bid. Prior to acceptance the offeree knew of the mistake because they were so informed by the offeror. The Ontario Court of Appeal refused to follow *Imperial Glass*.<sup>9</sup>

In my view, the authority is established that an offeree cannot accept an offer which he knows has been made by mistake *and which affects a fundamental term of the contract*. . . . In substance, the purported offer, because of the mistake, is not the offer the offeror attempted to make and the offeree knows that.

Mistakenly made tenders or offers present additional complications where there is a separate option-like contract not to revoke one's offer for a period of time. Typically a tender will be made on terms that it is to be irrevocable for a specified number of days. When the tenders are opened, one tender is found to be considerably lower than the others. After an investigation, the low tenderer discovers its mistake, and, prior to any acceptance of the tender, so informs the offeree. If the offeree should subsequently purport to accept the offer, can the doctrine of unilateral mistake operate in this circumstance, that is, where there is a separate contract not to revoke? In *Bell River* it was held that the irrevocability of such a tender was irrelevant.<sup>10</sup>

The principle of unilateral mistake applies even if there is a provision binding the offeror to keep the offer open for acceptance for a given period. . . . In view of the conclusion I have reached as to the inability of the plaintiff to accept the tender, it does not matter, in my opinion, whether the purported tender could be withdrawn, or was in fact withdrawn, before the purported acceptance.

The facts in *Ron Engineering*<sup>11</sup> are not dissimilar from what occurs in many instances of mistakenly made tenders. The plaintiff Contractor (hereinafter referred to as "C") filed a tender in response to a call for tenders issued by the defendant Owner (hereinafter referred to as "O"). The general conditions applicable to the call for tenders

<sup>7</sup> Quære if the mistaken calculations leading to the ultimate tender figure are in the tender document itself? See *ibid.*, at p. 627. It would seem that justice demands that the rights of individuals should not depend on such arbitrary facts. If a tender is out by such a factor that it is obvious a mistake has been made, that should be sufficient.

<sup>8</sup> (1978), 20 O.R. 447 (C.A.).

<sup>9</sup> *Ibid.*, at p. 452, italics supplied.

<sup>10</sup> *Ibid.*, at p. 453.

<sup>11</sup> *Supra*, footnote 1.

(which are normally incorporated into the tender itself) provided for a deposit which was to be forfeited on the occurrence of a number of stipulated events:

- (a) Withdrawal of tender before O had considered the tenders.
- (b) Withdrawal of tender before or after C has been notified that "his tender has been recommended to the commission for acceptance. . .".<sup>12</sup>
- (c) Refusal to execute contract documents accompanied by performance bond and payment bond within seven days of submission of contract documents by O.

C's tender was for \$2,748,000.00 accompanied by a certified cheque for \$150,000.00 by way of deposit. When the tenders were opened, an employee of C learned that C's tender was the lowest bid filed by about \$632,000.00. Suspicions aroused, C's employees undertook an investigation which led to the discovery that they had erred in arriving at their tender by not adding in a sum for their own work forces in the amount of \$750,058.00. Almost immediately upon discovering this error, and certainly before any purported acceptance of the tender, C informed O of the mistake and asked to be allowed to revoke its offer. (C maintained the position that their tender never was withdrawn, that they had merely requested permission to withdraw it.) O refused to accommodate C and eventually submitted the contract documents for signature and execution. C refused, giving as the reason the mistake it had made. O then accepted the next lowest tender and retained the deposit. C sued for recovery of the deposit and O counter-claimed for damages for breach of contract. The trial judge held that O was entitled to retain the deposit, but dismissed O's counterclaim. C appealed to the Ontario Court of Appeal which reversed the trial judgment, holding that the principles set forth in *Belle River* applied.<sup>13</sup>

On appeal to the Supreme Court of Canada, the Court of Appeal was reversed and the trial judgment restored. The main contention of the plaintiff was simply that its offer was incapable of acceptance; hence their deposit should be returned.

This argument was rejected by the Supreme Court and the doctrine of unilateral mistake held inapplicable to the particular fact situation before it. The court's reasoning can be summarized as follows:

<sup>12</sup> There is a difference between actual acceptance of a tender and a recommendation by some official, such as an architect, to the accepting body that the latter ought to accept. Since notification of a recommendation of the above type is not an acceptance and hence does not bind the owner, it is unwise for the contractor to rely on it. The same can be said for most so-called "letters of intent".

<sup>13</sup> (1979), 24 O.R. 332, 35 N.R. 55.

- (1) There were two contracts or potential contracts to be considered here: the main construction contract which eventually comes into existence and a prior collateral contract imposing obligations on the tenderer not to revoke his offer, and so on. It was to secure the obligations of the tenderer under this collateral contract that the deposit of \$150,000.00 was given.
- (2) The application of the doctrine of unilateral mistake had to be determined with reference to the collateral contract and not the construction contract itself. According to the court (which described the collateral contract as Contract "A") it must be determined whether the mistake was known to O at the time of the formation of this collateral contract:<sup>14</sup>

... Contract "A" (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender. If the tenderer has committed an error in the calculation leading to the tender submitted with the tender deposit, and at least in those circumstances where at the moment the tender is capable of acceptance at law, the rights of the parties under Contract "A" have thereupon crystallized. The tender deposit, designed to insure the performance of the obligations of the tenderer under Contract "A", must therefore stand exposed to the risk of forfeiture upon the breach of these obligations by the tenderer.

At the time that this collateral contract was formed O could not be said to know of the mistake, either actually or constructively. There was no actual knowledge since C had not at the time actually informed O of the mistake and there was no constructive knowledge since the mistake was not so obvious that the offeree could be deemed to have knowledge of it. In respect of this latter finding, the court commented:<sup>15</sup>

We are not here concerned with the case where the mistake committed by the tendering contractor is apparent on the face of the tender. Rather the mistake here involved is one which requires an explanation outside of the tender documents themselves.

There are several aspects to this case that must be critically examined. One is the finding that there existed a collateral contract quite apart from the construction contract itself and that it came into existence upon the submission of the tender. This was described by the court as a unilateral contract, that is, an offer of a promise in exchange for an act:<sup>16</sup>

The tender submitted by the respondent brought Contract "A" into life. This is sometimes described in law as a unilateral contract, that is to say, a contract which results from an act made in response to an offer, as for example in the simplest

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<sup>14</sup> (1981), 35 N.R. 40, at p. 49.

<sup>15</sup> *Ibid.*, at p. 45.

<sup>16</sup> *Ibid.*, at p. 50.

terms. "I will pay you a dollar if you will cut my lawn." No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of a submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide.

Leaving aside any questions of mistake, the characterization of the collateral contract as unilateral is questionable. A unilateral offer is normally described as an offer of a promise in exchange for an act. The contract is formed when the requested act is performed in response to the offer, there being no obligation on the offeree to perform the act. The performance of the requested act by the offeree, the acceptance of the offer, and the consideration provided by the offeree are one and the same thing. But in *Ron Engineering* what the court is apparently stating is that the requested act constituting the acceptance of the unilateral offer was the submission of the bid by the tenderer in response to the call for tenders. This presupposes that O was the offeror and C the offeree under the unilateral contract. It also necessarily implies (a) that there was some sort of obligation by O—a promise—which came into existence upon acceptance by C and (b) that upon acceptance of the unilateral offer C had rendered full performance and thus was under no obligation, the very essential attribute of a unilateral contract being that there is no executory obligation upon the offeree. It is here that the court's analysis of a unilateral contract fails conceptually. The very point in issue was a promissory or executory obligation by the plaintiff, a promise not to revoke the tender and to execute certain documents upon certain conditions, which obligations were secured by the giving of a deposit. By definition, a *unilateral* contract under which C was the offeree, could not have been formed. Nor could there have been a unilateral contract under which C was the offeror, promising not to revoke, and so on in exchange for an act of O. This is so because apparently there was no request by C to O to do any particular act.

This does not mean that the court's finding of a separate collateral contract was erroneous. It might be that a collateral *bilateral* contract was formed when C submitted its tender, in which case the submission of the tender (while constituting an offer to build), could be viewed as an acceptance of a bilateral offer of O. In short, the promise by C not to revoke would be given in exchange for a *promise* of O. The extant obligation of O would also be the consideration for C's promise. The crucial question here is what is this promissory obligation by O? Without it, there is no consideration and hence no collateral contract.

In spite of characterising the collateral contract as unilateral the court did in fact touch upon what this obligation of O might be. The court stated:<sup>17</sup>

The principal term of Contract "A" is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (Contract "B") upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

Consider first the statement that one of the obligations of O under this collateral contract is the "obligation . . . to enter into a contract (Contract "B") upon the acceptance of the tender". Read literally this ought not really to be viewed as an "obligation" under the collateral contract at all. Since at the time that the supposed collateral contract is formed, there is no obligation on O to accept the tender, it is difficult to comprehend how it could be viewed as any sort of obligation. It is totally contingent upon an act (acceptance of the tender) within the unfettered discretion of the supposed obligor. It is analogous to saying that a prospective purchaser is under an obligation to pay the purchase price upon acceptance of the vendor's offer. Prior to accepting, the purchaser is under no obligation, contingent or otherwise, certainly not an obligation which could constitute consideration under a bilateral contract. When he does accept, obligations do arise but only by reason of acceptance and only under the contract of purchase. In short, this "obligation" is but an illusory consideration.

The court also referred to ". . . the qualified obligations of the owner to accept the lowest tender . . .",<sup>18</sup> noting that the nature of this obligation is controlled by the terms and condition in the call for tenders. Such an obligation could indeed furnish the consideration sufficient to establish a collateral bilateral contract. It is, however, unfortunate that the court did not refer specifically to the terms and conditions in the call for tenders to establish such a promissory obligation. One hopes that the court is not implying that such a promise, qualified or otherwise, is normally made when a call for tenders is issued. Usually the reverse is true. Most invitations or calls for tenders explicitly state that the lowest or any tender will not necessarily be accepted. There is also authority that where the call for tenders is silent on this, no promise to accept the lowest tender ought to be implied.<sup>19</sup> Therefore, in the absence of any express promise by the owner in a call for tenders, the call is merely an invitation to treat giving rise to no obligation on the part of the owner, even when

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Spencer v. Harding* (1870), L.R. 5 C.P. 561.

tenders are finally submitted. This also makes sound business sense and is usually in accord with the intentions of the parties calling for tenders.

To summarize my analysis so far, the court based its decision in large part upon the finding of a unilateral collateral contract similar to an option contract. It is the obligations under this contract to which the giving of the deposit relates. My point is technical: there does not seem to be a basis for finding a unilateral contract of the type described by the court. A collateral *bilateral* contract is plausible but highly dependent on a specific promise being made by the owner in the call for tenders. Because such a promise would be contrary to what exists in most calls for tenders, specific evidence ought probably to have been adduced in support of such a finding. The fact that no evidence was cited does lead one to suspect that the court was really *assuming* that such promises can be implied as a matter of law. If this is the case the court is simply wrong. In short, the analysis by the court of a collateral contract, is, to say the least, inadequate.

But let us assume, for the purposes of discussion, that there was indeed a collateral contract created on the submission of the bid. Does it necessarily follow, as the court assumed, that rights crystallized at that time, and that since the owner did not know of the mistake at the time of contract formation it could not be accused of snapping up an offer?

In one sense this collateral contract is akin to an option contract. A typical option contract consists of a promise by one party to keep an offer to sell open for a period of time (or, phrased differently, a promise not to revoke for a set period of time). The consideration for the promise is normally the payment of a sum of money. The collateral contract described by the court is, I think, analogous to a standard option contract. The plaintiff promised not to revoke; instead of a sum of money the consideration for this promise would be the giving of another promise by the defendant.

Now, suppose a party enters into an option contract in which by mistake the option exercise price is lower than intended. Further assume that at the time the option contract was made, the exercisor neither knew nor ought to have known of the option grantor's mistake. Under these circumstances, it is not, I think, open to the grantor of the option to claim that the option cannot be exercised merely because the exercisor knew of the mistake prior to the *exercise* of the option. Such a holding would effectively deprive the exercisor of his expectation interest under the option contract. The principle of unilateral mistake has indeed been utilized to deprive parties of their expectation interests but only where (a) there is knowledge, whether actual or constructive of the mistake of the other party, and (b) where this

knowledge was placed with the "guilty" party *prior* to contract formation—this is the so-called "snapping up" of a mistaken offer. It has never been applied where the mistake became known *after* contract formation.

Thus it would seem that if the deposit was retained as forfeiture for breach of a term of the collateral contract, then the court was correct, according to traditional legal theory, in not permitting the mistake to vitiate the loss. After all, when the collateral, as opposed to the main, contract was formed the mistake was not known to the owner (nor for that matter to the contractor).

But even accepting that there was a collateral contract, and that such contract ought to be treated as analogous to an option contract, it is still possible that the court was in error. The deposit was retained as forfeiture for breach of a contract term. But what term was breached, and of which contract?

It seems clear from the judgment that the conduct that constituted the breach was not the revocation of the tender—the contractor maintained throughout that they had never revoked their tender and the court did not dispute this—but rather the failure to execute contract documents within seven days of being called to do so. Normally such a clause in a construction contract is considered part of the main (as opposed to collateral) contract and is secured by a bid bond or cash deposit. It is sensible to so consider it, because the performance of this obligation occurs after acceptance of the tender (and hence after formation of the construction contract itself). To the extent that the collateral contract exists at all it would seem to relate to obligations and conduct *before* formation of the construction contract. If this analysis is correct, then because the term breached (and secured by the deposit) was but part of the construction contract it is arguable that the result in the case ought to have been different. At the time that the tender was accepted the defendant did know of the mistake. Nevertheless the court treated the execution of the contract documents as an obligation under the *collateral* contract. The court found that:<sup>20</sup>

The corollary term [of the collateral contract] is the obligation of both parties to enter into a contract . . . upon the acceptance of the tender.

Indeed the court's analysis of when the actual construction contract came into existence seems open to dispute. The court stated, that "the construction contract has not and did not come into existence . . .",<sup>21</sup> implying that acceptance of the tender was not sufficient to create such a contract and that execution of the contract documents was a true condition precedent to the formation of the construction

<sup>20</sup> *Supra*, footnote 14, at p. 50.

<sup>21</sup> *Ibid.*

contract.<sup>22</sup> Where the execution of further documents is required after acceptance, the legal principle to be applied in determining whether a contract exists upon acceptance or only upon execution is found in the oft quoted passage in *Von Hatzfeldt-Widenburg v. Alexander*:<sup>23</sup>

It is a question of construction whether the execution of the further contract is a condition or a term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

One of the factors considered in determining this issue is whether the parties have left an important matter to be agreed upon. If so, it is not too difficult to construe the tender and acceptance as merely an agreement to agree, the final documentation being the mechanism through which the unsettled matters are to be finally determined. However, in most construction contracts, after acceptance there is nothing left to be negotiated. The bid itself contains all the important terms incorporating by reference the contract documents specified or referred to in the call for tenders. The execution of documents is in fact a promissory term crystallizing upon acceptance; the failure to execute is simply a breach of this term. Certainly, each case is dependent upon its own facts and cases can indeed be found which find the formation of the construction contract occurring only upon execution of the subsequent documents.<sup>24</sup> It is, nevertheless, unfortunate that the court stated without further explanation that there never was a construction contract. It seems that there was acceptance of the tender, at the latest at the time that the documents were proffered for execution.<sup>25</sup> In the absence of any elaboration of the facts by the court, one could only conclude that the court was under the assumption that as a *general rule*, construction contracts are not formed until the documents are executed. This is unfortunate and incorrect.

Apart from the difficult technical questions of contract formation, the court also commented on the type or quality of mistake which must be proved for the doctrine of unilateral mistake to operate:<sup>26</sup>

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<sup>22</sup> Indeed, at p. 47, the court stated that "... the construction contract did not come into being solely by reason of the contractor's refusal to execute the form of contract forwarded to the contractor by the owner".

<sup>23</sup> [1912] 1 Ch. 284, at pp. 288-289.

<sup>24</sup> *McMaster University v. Wilchar Construction Ltd.*, [1971] 3 O.R. 801, at pp. 818-820.

<sup>25</sup> In the Court of Appeal judgment, *supra*, footnote 13, at p. 333, the court stated that the Commission did "... at no time ... attempt to signify its acceptance of the tender". This however seems unlikely since the Commission did proffer the documents for execution. This necessarily implies either a prior notification of acceptance or else would be acceptance in itself. A party who proffers documents for execution is, after all, at least implicitly assenting to the offer of the side.

<sup>26</sup> *Supra*, footnote 14, at p. 51.



There is no question of a mistake on the part of either party up to the moment in time when Contract "A" came into existence. The employee as a respondent intended to submit the very tender submitted, including the price therein stipulated. Indeed, the president, in instructing the respondent's employee, intended the tender to be as submitted. However the contractor submits that as the tender was a product of a mistake in calculation, it cannot form the basis of a construction contract since it is not capable of acceptance and hence it cannot be subject to the terms and conditions of Contract "A" so as to cause a forfeiture thereunder of the deposit. The fallacy in this argument is twofold. Firstly, there was no mistake in the sense that the contractor did not intend to submit the tender as in form and substance it was . . . .

This appears to be a reversion to the distinction made in *Imperial Glass*<sup>27</sup> between a mistake as to promise and one as to motive. It is unfortunate if the court is indeed retreating from the more liberal test for mistake set forth in *Belle River*.<sup>28</sup> The requirement of there being a mistake as to promise (a mistake in calculating *how* one arrives at an offer being insufficient) has little to recommend it. An obvious clerical mistake in the *transmission* of a bid or tender such as the omission of a zero would be a sufficient mistake; however if the mistake occurred in private calculations such that the bid was reduced by a factor of ten then the mistake would be insufficient—at least according to *Imperial Glass*. In both cases one can assume that the mistake ought to be known to the offeree. Yet it is only in the former instance that the mistake would operate. A requirement of a *fundamental* mistake, whether as to motive or promise, ought to be sufficient, so long as it is known to the other party prior to contract formation. Anson's Dresden china should be relegated to the museum.

In the future, *Ron Engineering* could perhaps be distinguished and the requirement of a mistake precisely as to the promise dispensed with, on the ground that the court also emphasized that the mistake was latent and not patent. That is, unlike the situation in *McMaster University v. Wilchar Construction Ltd.*,<sup>29</sup> (where a page containing a cost escalator clause was obviously left out of a tender) the mistake was not apparent on the face of the tender documents; here the mistake only became known when the offeree was actually informed by the tenderer. If this is the real reason why the mistake was insufficient, then perhaps the *Belle River* test of a mistake ". . . affecting a fundamental term . . ." may yet survive. A patent mistake as to motive is after all possible; an *Imperial Glass* type of mistake would be an illustration.

Overall this judgment is disturbing in several respects. First, apart from the vague notion that ". . . integrity of the bidding system

<sup>27</sup> *Supra*, footnote 4 and accompanying text.

<sup>28</sup> *Supra*, footnote 8 and accompanying text.

<sup>29</sup> *Supra*, footnote 24.

must be protected . . .” the decision is not well justified in terms of public policy. Nowhere in the judgment does the court truly confront the fundamental question: where there has been no reliance on an offer, why should an offeree be permitted to take advantage of a mistake which he knows the offeror has made? To say, as the court did, that there was a collateral contract to which the deposit related, and that therefore the issue, “. . . concerns not the law of mistake but the application of the forfeiture provisions contained in the tender documents . . .” is merely to retreat into legal formalism. The fact remains that before the offer had been accepted, the owner knew of the mistake and had not in any way relied on the tender. What conceivable policy is served by permitting the effective confiscation of \$150,000.00 in these circumstances? Nowhere does the court answer this question.

Secondly, the legal devices used by the court in arriving at the decision are not well articulated and at times seem to assume propositions quite contrary to more conventional legal analysis. There are several instances of this. For example, the court just seemed to assume that the submission of a bid expressed to be irrevocable establishes a collateral contract to that effect. As noted elsewhere in this comment, it is possible to devise a collateral contract in such circumstances, but the court’s analysis was hardly persuasive. The characterization as a unilateral contract is wrong and in fact inconsistent with other aspects of the court’s analysis. Likewise, the cryptic comment that there was a qualified obligation on the part of the owner to accept the lowest tender, is quite at odds with both business practice and orthodox legal theory.

No doubt many would welcome a change in the law making “firm” offers binding even when unsupported by consideration. However the court was not purporting to deliberately change the law; rather it just assumed, reinforced by some shaky conceptual analysis, that tenders expressed as irrevocable are binding. At the level of the Supreme Court of Canada one would expect the present law to be correctly stated and then reasons given why the law is to be changed.

Into the same category falls the notion that a construction contract comes into existence only upon execution of formal documents. While there are in fact situations in which this is possible, normally the contract is formed upon acceptance.

Also regrettable was the court’s failure to clearly articulate the quality of the mistake which must be established before relief can be claimed. Certainly, the mistake must be patent or known at the time of acceptance of the offer. But must it also be a mistake only as to the promise or will a mistake *affecting* a fundamental term, to use the *Belle River* test, be sufficient, so long as patency is proved? The court’s answer is unclear.

Finally, there are significant ramifications for tenderers. In spite of careful precautions mistakes of considerable magnitude which are not apparent on the face of the tender, will continue to be made, and will only be discovered when tenders are opened. Assuming that requirements for tenders are carefully drafted there will be a temptation for some owners to go after the deposit<sup>30</sup> whereas prior to this decision if the error was an obvious one they probably would have foreborn. The decision in *Ron Engineering* only encourages the cunning drafting of calls for tenders and the windfall confiscation of deposits.<sup>31</sup> There are no reliance interests protected here and the expectation interests supposedly protected are not reasonable ones.

This judgment runs contrary to most recent Ontario judgments in *McMaster University v. Wilchar Construction Ltd, Belle River*, and the Court of Appeal decision in *Ron Engineering* itself. Even the hard line British Columbia Court of Appeal *Imperial Glass* case, which goes the other way, is distinguishable because there was some reliance by the offeree. *Ron Engineering* neither serves to clarify the law—in some respects the law is now more confused—nor does it serve to implement any particular social policy. This judgment can best be characterized as ad hoc legal formalism. It is a bad judgment and all the more disappointing because the court was unanimous.

R.S. NOZICK\*

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<sup>30</sup> This was the case in *McMaster University v. Wilchar Construction Ltd*, *supra*, footnote 24.

<sup>31</sup> For example, if as is often the case, the bid bond or deposit is *not* in the call for tenders stated to be security for non-revocation of the tender and if one accepts my analysis put forward in this comment that the execution of contract documents is really an obligation accruing under the primary construction contract, then it seems that the deposit or bid bond must be returned where the mistake is known prior to acceptance of the tender. The construction contract itself cannot come into existence because of the doctrine of unilateral mistake and if the collateral option-like contract does exist, the deposit will not secure an obligation under it. For instances of the latter type where the deposit had to be returned see e.g., *Hamilton Board of Education v. U.S. Fidelity and Guaranty Company*, [1960] O.R. 594 (H.C.); *Belle River Community Arena Inc. v. W.J.C. Koffman Ltd Co.*, *supra*, footnote 8.

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EVIDENCE—SIMILAR FACTS—FACTS FALLING SHORT OF ACT CHARGED.—In recent years, as a result of *Boardman v. D.P.P.*<sup>1</sup> and the case following it, the law relating to the admissibility of similar facts has provided something of a growth industry for writers on the law of evidence, not least the present commentator.<sup>2</sup> It seems safe to say that two divergent schools of thought exist: those who seek to adhere rigidly to the principle of “striking similarity” enunciated in the original case<sup>3</sup> and those who seek to liberalise the admission of similar fact evidence by the use of tests such as “positively probative”.<sup>4</sup> Yet outside the boundaries in which this broad dispute is conducted, other questions involving the reception of similar fact evidence remain to be determined, and it is the purpose of this comment to discuss two recent cases, one from England and the other from Australia, involving the periphery of similar fact evidence. Thus, there are issues outside but, at the same time, touching upon the main debate which are worth canvassing.

The first case which falls to be considered is *R. v. Barrington*.<sup>5</sup> there, the accused had been charged with indecently assaulting three young girls at the house of a woman with whom he was living. He had persuaded the woman that he was a well-known personality in the entertainment industry and made use of that same fabrication on occasions which were relevant to the trial. The prosecution alleged that he had lured the girls to the house on the pretext that they were required as babysitters but, in fact, he had wanted them for sexual purposes. In the house, he had shown them pornographic photographs, asked them to pose for similar photographs and had sexually assaulted them. Evidence was given by the three girls to that effect. The accused contended that the evidence was wholly fabricated and that each girl had a private motive for making the false allegation. In order to show that the girls were telling the truth and that the accused was operating a system, the prosecution, with the leave of the trial judge, called three other young girls who testified that they had also been lured to the house on the pretext of babysitting and had been shown, and asked to pose for, pornographic photographs. However, none of these witnesses claimed to have been sexually assaulted. The

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<sup>1</sup> [1974] 3 All E.R. 877.

<sup>2</sup> F. Bates, *What Happened After Boardman?*, [1978] N.Z.L.J. 178; *Boardman in the Commonwealth* (1979), 129 N.L.J. 534; *Similar Facts in the Commonwealth: Recent Developments* (1981), 131 N.L.J. 645. Also P. Fallon and G. Buorsell, *Similar Fact Evidence and Corroboration*, [1978] Crim. L.Rev. 188.

<sup>3</sup> See, for example, *R. v. Tricoglus* (1976), 65 Cr. App. Rep. 16; *Markby v. R.* (1978), 52 A.L.J.R. 626.

<sup>4</sup> *R. v. Rance and Herron* (1975), 62 Cr. App. Rep. 118; *R. v. Chee*, [1980] V.R. 303.

<sup>5</sup> [1981] 1 All E.R. 1132.

accused was convicted and appealed on the grounds that the evidence of the second group of girls was incapable of amounting to similar fact evidence because it did not include evidence of the commission of offences similar to those with which he had been charged and which, hence, ought not to have been admitted. The Court of Appeal, Criminal Division, applying *R. v. Scarrott*<sup>6</sup> dismissed the appeal.

The central issue in *Barrington* was, therefore, whether evidence of similar facts, in order to be admissible, must relate to the facts of an offence similar to that with which the accused was charged and not, merely, to the surrounding circumstances. Or, to relate specifically to the facts of the instant case, evidence to be admissible must be probative of an indecent assault, not merely of an intention to commit an indecent assault.<sup>7</sup> Dunn L.J., giving the judgment of the court, rejected this contention and stated,<sup>8</sup> that similar fact evidence had, hitherto, only been admitted where it has disclosed the commission of similar offences, “. . . although it has also included the surrounding circumstances. In some cases, the similarity of the surrounding circumstances has been stressed more than the similarity of the mode of commission of the offences themselves. Surrounding circumstances include the preliminaries leading up to the offence, such as the mode and place of the initial approach and the inducement offered or words used”. A case which contained these elements was *R. v. Johannsen*,<sup>9</sup> to which passing reference was made in *Barrington*. There the facts that the accused had invariably accosted boys against whom offences were committed in amusement arcades and that his methods of enticing the boys to his place of residence were similar were taken into account, together with his methods of obtaining sexual gratification. The difficulty with *Johannsen*, as with *Scarrott* upon which more reliance was placed<sup>10</sup> is that it seems predicated factually on the accused's homosexual propensity. Thus, given that propensity, the facts that he sought to meet the objects of his attention in places they were well known to frequent and the offering of financial inducement does not seem to be all that extraordinary!

The passage from Scarman L.J.'s judgment in *Scarrott*<sup>11</sup> which forms the basis of the decision in *Barrington* reads as follows: “Plainly some matters, some circumstances, may be so distant in time or

<sup>6</sup> [1978] 1 All E.R. 672.

<sup>7</sup> It was admitted by counsel for the accused that had the evidence of the three witnesses included evidence of indecent assault then the whole of their evidence would have been admissible. *Supra*, footnote 5, at p. 1140.

<sup>8</sup> *Supra*, footnote 5, at p. 1140.

<sup>9</sup> (1977), 65 Cr. App. Rep. 101.

<sup>10</sup> *Supra*, footnote 6.

<sup>11</sup> *Ibid.*, at p. 679.

place from the commission of an offence as not to be properly considered when deciding whether the subject-matter of similar fact evidence displays striking similarities with the offence charged. On the other hand, equally plainly, one cannot isolate, as a sort of laboratory specimen, the bare bones of a criminal offence from its surrounding circumstances and say that it is only within the confines of that specimen, microscopically considered, that admissibility is to be determined. . . . Some surrounding circumstances have to be considered in order to understand either the nature of the offence charged or the nature of the similar fact evidence which it is sought to adduce and in each case it must be a matter of judgment where the line is drawn.” Dunn L.J., in *Barrington*<sup>12</sup> was of the view, and there can be no doubt but that he was correct, that the facts which constituted the surrounding circumstances were so similar to those which were admitted as similar fact evidence that “striking” was an appropriate epithet.

Thus, the admission of evidence of similar facts falling short of similar offences with which an accused is tried may sometimes—at any rate, in circumstances such as those in *Barrington*—be properly admitted. And, as Scarman L.J. noted in *Scarrott*<sup>13</sup> one cannot draw an inflexible line as rule of law; but, at the same time, drawing effective and appropriate lines is one of the court’s major tasks. First, it is submitted that evidence which relates to similar surrounding circumstances predicated on the assumption of propensity, as occurred in *Johannsen* and *Scarrott*, ought to be treated with caution. Second, the surrounding circumstances must be sufficiently similar to the offence charged to justify the additional description of “striking”, as required in the usual situations comprehended in *Boardman*. Indeed, it may be that where the surrounding circumstances do fall short of the offence alleged, the similarity ought to be still more acute. For instance, although it cannot be questioned that the evidence was properly received in *Barrington’s* case, it ought not to have been the same had the accused, say, merely exposed himself to the second group of girls or, again, showed them obscene photographs in the street. Although it may be true that no line ought to be drawn as a matter of law, the courts should beware of being too liberal in the admission of evidence of similar surrounding circumstances.

The second case deals with a rather different situation from those with which the courts have generally been concerned since the original decision in *Boardman*. In *R. v. Andrews*<sup>14</sup> the appellant had been convicted of the manslaughter of his *de facto* wife; the prosecution case was that the appellant had killed the deceased by lying on top of

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<sup>12</sup> *Supra*, footnote 5, at p. 1141.

<sup>13</sup> *Supra*, footnote 6, at p. 680.

<sup>14</sup> (1981), 2 A. Crim. R. 182.

her, deliberately putting his hands over her nose and mouth and asphyxiating her. Both to the police and in his statement from the dock, the appellant said that, when they were both drunk, the deceased had run at him, and that he had grabbed at, and fallen on top of, her. When he recovered consciousness, he was lying on top of her and she was (apparently) dead, though he disputed that any act of his had caused her death. However, evidence was given by the appellant's former wife that he had, about six months before the alleged offence, assaulted her some eight or more times by sitting on her midriff and holding his hand over her nose and mouth so that she was unable to breathe. His ex-wife had also testified that, after the commission of the alleged offence, the appellant had told her that he had caused the death of the deceased in "... the same way I used to do to you".

In ordering, by a majority, a new trial,<sup>15</sup> the New South Wales Court of Criminal Appeal considered the application of the similar fact evidence. Nagle C.J. at Common Law, with whom Street C.J. agreed, was of the opinion,<sup>16</sup> that it was unnecessary to consider the admissibility of the similar fact evidence, except insofar as it related to the defence of accident raised by the accused. This is, of course, the traditional utility of similar fact evidence and was originally advanced in *Makin v. A.-G. for N.S.W.*<sup>17</sup> Nagle C.J. at Common Law expressed the view,<sup>18</sup> that the trial judge had not made it clear that the evidence was, "... tendered by the Crown and could only be used for the purpose of proving that the fall on [the deceased] by the appellant was deliberate and intended". The Chief Justice at Common Law went on to say that "once the evidence of the 'similar facts' was tendered as a defence to accident, it was incumbent on his Honour to stress upon the jury the limitation on the use of the evidence. The jury should have been informed clearly that it was limited to the question of accident or no accident and could have been used in no other way".<sup>19</sup> At the same time, Nagle C.J. at Common Law,<sup>20</sup> considered that the evidence was admissible to rebut the defence of accident, even though the direction was inadequate. On the other hand, Begg J., in a dissenting judgment considered,<sup>21</sup> that the evidence was admissible on three grounds: first, to show that it was the act of the accused which caused the death of the deceased. Second, to show that the asphyxiation of the de-

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<sup>15</sup> On the basis of a misdirection regarding evidence of good character.

<sup>16</sup> *Supra*, footnote 14, at p. 192.

<sup>17</sup> [1893] A.C. 57.

<sup>18</sup> *Supra*, footnote 14, at p. 193.

<sup>19</sup> Nagle C.J. at Common Law stated, in addition, that, had it been necessary, he would have ordered a new trial on that basis.

<sup>20</sup> *Supra*, footnote 14, at p. 192.

<sup>21</sup> *Ibid.*, at p. 199.

ceased was not accidental and, third, to show that the act of the deceased was done either with specific intent to kill or was an unlawful and dangerous act done voluntarily.

*Andrews* is a rather curious case: Nagle C.J. at Common Law made one passing reference to *Boardman* and Begg J. did not refer to the case at all. Similarly, neither judge referred to the High Court of Australia's decision in *Markby v. The Queen*.<sup>22</sup> The similarity to *Barrington* is apparent in that the similar facts sought to be adduced by the prosecution fell short of those in respect of which the prosecution was mounted. Again, although it is quite clear that the evidence, given in appropriate direction, was admissible under the *Makin* principle, it does not appear to have been argued that the events were "strikingly similar" to bring it within *Boardman*. Nor does it seem to have been argued that the particular nature of the acts involved in *Andrews* was sufficiently graphic as to constitute a "hallmark" as referred to by Slade J. in *R. v. Straffen*.<sup>23</sup>

What conclusions are to be drawn from *Barrington* and *Andrews*? First, it is clear from both cases that similar facts which fall short of the offence charged may be admissible: though how far short they are permitted to fall is not specified in *Barrington* and the basis of the admissibility is unclear in *Andrews*. Second, these cases also demonstrate that similar fact evidence has utility in a variety of cases and is not immediately capable of reduction to a simple formulation, although *Boardman* provides an important starting point which the courts should always bear in mind when considering particular instances. It is worth noting that legislative attempts to describe the position are not particularly simple: thus, Rule 404(b) of the Federal Rules of Evidence for United States Courts and Magistrates of 1975<sup>24</sup> provides that: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The Law Reform Commission of Canada, in clause 18 of their proposed Evidence Code<sup>25</sup> also devised in 1975, adopted a like formulation. One might wonder how much further, in view of the illustrative phrase "such as", statutory involvement is likely to take us.

F. BATES\*

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<sup>22</sup> *Supra*, footnote 3.

<sup>23</sup> [1952] 2 Q.B. 911, at p. 917.

<sup>24</sup> 28 U.S. C.S.

<sup>25</sup> Bill C423 (1976).

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IMMIGRATION—DEPORTATION ORDER—FOREIGN CRIMINAL CONVICTION—CONCURRENCY OF MEANING.—The decision of the Federal Court of Appeal in *Brannson v. Minister of Employment and Immigration*<sup>1</sup> has shed valuable light upon attempts to resolve considerable procedural difficulties engendered by application of the substantively simple provisions in paragraph 19(2)(a) of the Immigration Act, 1976.<sup>2</sup>

The court was asked to review proceedings leading to the issuance of a deportation order against Brannson. The applicant, a visitor to Canada, was ordered deported pursuant to subsection 32(6) of the Act, which provides:<sup>3</sup>

Where an adjudicator decides that a person who is the subject of an inquiry is a person described in subsection 27(2), he shall . . . make a deportation order against the person. . . .

Persons within subsection 27(2) include:<sup>4</sup>

. . . a member of an inadmissible class other than an inadmissible class described in paragraph 19(1)(h) or 19(2)(c).

The inadmissible class into which Brannson was alleged to fall is described in paragraph 19(2)(a):<sup>5</sup>

. . . persons who have been convicted of an offence that . . . if committed outside Canada, would constitute an offence that may be punishable by way of indictment under any other Act of Parliament. . . .

The conviction which formed the basis for the deportation order against Brannson was for a federal offence committed in the United States. Pursuant to Title 18 of the United States Code, he was convicted of using the mails to defraud under the following provisions:<sup>6</sup>

Whoever, having devised or intending to devise any scheme . . . to defraud . . . for the purpose of executing such scheme . . . or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever, to be sent or delivered by the Postal Service, . . . shall be fined not more than \$1,000 or imprisonment not more than five years, or both.

The offence was treated by the adjudicator as equivalent to section 339 of the Canadian Criminal Code, which provides:<sup>7</sup>

339. Every one who makes use of the mails for the purposes of transmitting or delivering letters or circulars concerning schemes devised or intended to deceive

<sup>1</sup> (1980), 34 N.R. 411 (Fed. C.A.).

<sup>2</sup> S.C., 1976-77, c. 52 as am. by S.C., 1977-78, c. 22, s. 16, S.C., 1980, c. 1, S.C., 1981, c. 47, ss 23, 53.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, s. 27(2)(a).

<sup>5</sup> *Ibid.*

<sup>6</sup> U.S. Code, Tit. 18, § 1341.

<sup>7</sup> R.S.C., 1970, c. C-34, as am.

or defraud the public is guilty of an indictable offence and is liable to imprisonment for two years.

In the Federal Court of Appeal, all three judges agreed that the order should be quashed. In this case, the offence committed by Brannson was not one which, if committed in Canada, would have fallen within section 339 of the Criminal Code. In the process of this determination their Lordships raised several points worthy of further examination.

It will readily be seen that the main problem in *Brannson* arose from the difference in wording of the Canadian and American provisions. Section 339 of the Criminal Code deals with "transmitting or delivering letters or circulars . . .", while the United States Code covers placing "in any post office or authorized depository for mail matter, any matter or thing whatsoever, to be sent or delivered . . .". A much wider range of items may thus be the subject of a prosecution in the United States than in Canada.

The first judgment was delivered by Ryan J. Concurring with the disposition suggested therein Urie J., with whom Kelly D.J. agreed, expanded only upon the issue of concurrency.<sup>8</sup> Ryan J. based his finding of error on the adjudicator's apparent conclusion that an offence the subject of a conviction under the United States Code provision would be an offence under section 339 of the Criminal Code. Such a conclusion by the adjudicator was incorrect as it could not be inferred on the mere basis of the United States provision that Brannson had sent "letters or circulars", an essential element of the Canadian offence.

As a first step, then, the adjudicator holding an inquiry to determine concurrency must be satisfied that the "essential elements" of the two offences coincide. Thus far Ryan and Urie JJ. agreed. As to the steps to be taken where the foreign definition is found to be of wider application than the Canadian provision, however, there is an important divergence of opinion. Ryan J., who must be taken to be in the minority on this point, summed up his view of the law as follows:<sup>9</sup>

I should, perhaps, indicate that where, as here, the definition of the foreign offence is broader than, but could contain, the definition of an offence under a Canadian statute, it may well be open to lead evidence of the particulars of the offence of which the person under inquiry was convicted. If, for example, the relevant count—the count on which a conviction was obtained—in a foreign indictment contained particulars of the offence, such particulars might well, in my view, be pertinent in establishing that the actual conviction was a conviction of an offence which, had it been committed in Canada, would have been an offence

<sup>8</sup> Other issues canvassed by the court, relating to adjournment procedure and an "accumulation of errors", will not be discussed here.

<sup>9</sup> *Supra*, footnote 1, at pp. 420-421.

here. Such particulars might so narrow the scope of the conviction as to bring it within the terms of a Canadian offence.

Mr. Brannson was, it is true, questioned on what he had done, but what he was convicted of depends on what he was charged with, not on evidence that might have been led had there been a trial. From what he said in his evidence, and having in mind the evidence as to the elements of the offence, it could not, in my view, be inferred that the offence to which he pleaded guilty contained, as an element, transmitting or delivering letters or circulars by mail.

Despite the reference to Brannson's own evidence, it would appear that Ryan J. would in general discount *factual* evidence as to the nature of the offence committed and prefer official documentation as to the precise charge. A problem not fully canvassed by his Lordship is whether, in the event that precise documentary evidence does not fully answer the question of concurrency, oral evidence by the applicant as to the facts giving rise to a conviction *might* be relied upon.

The judgment of Urie J. is more determinative upon this issue. Pointing out that the essential question is as to "what extent the Adjudicator is entitled to flesh out the evidence relating to the . . . offence . . .", his Lordship first stated clearly his position that mere documentary evidence is insufficient:<sup>10</sup>

There must be some evidence to show firstly that the essential ingredients constituting the offence in Canada include the essential ingredients constituting the offence in the United States. Secondly, there should be evidence that the circumstances resulting in the charge, count, indictment or other document of a similar nature, used in initiating the criminal proceeding in the United States, had they arisen in Canada, would constitute an offence that might be punishable by way of indictment in Canada. Thus, it would seem that such a document would constitute the best, but not the only, evidence upon which the Adjudicator might base her decision.

In the absence of such documentary evidence, it was held, the presenting officer ought to have been permitted to introduce *viva voce* evidence as to the facts which gave rise to the conviction. Such evidence could be given through the applicant or "some other credible witness".

At first blush, the judgment of Urie J. seems eminently reasonable. The policy of the Immigration Act, 1976 is clearly and apparently to deny entry to Canada to persons previously convicted of serious offences.<sup>11</sup> The measure of seriousness is conveniently settled by

<sup>10</sup> *Ibid.*, at p. 425.

<sup>11</sup> The principles of the Act were discussed at the Canadian Bar Association (Ontario), Continuing Legal Education Immigration Update (April 6th, 1979). "The basic principles remain unchanged. All those who pose a threat to . . . safety, order and national security will be refused admission to Canada. . . . Applicants who have violated foreign laws will be assessed according to the seriousness with which their offences would be viewed in Canadian law. . . . New provisions . . . exclude persons . . . who are known to be involved with organized crime, or who, on reasonable grounds, are likely to engage in acts of violence." (pp. 9-10).

cross-reference to the classification of statutory offences in the Criminal Code and other federal statutes. The basic scheme is to exclude from Canada anyone who has done something which, if he had done it in Canada, might have given rise to a conviction on indictment. Hence the reference to the facts of the foreign conviction. This common-sense approach unfortunately ignores, however, the possibility that an applicant may have pleaded guilty to one offence having committed another, or have pleaded guilty to an inappropriate charge. To borrow Ryan J.'s phrase, "what he was convicted of depends on what he was charged with, not on evidence that might have been led had there been a trial".<sup>12</sup>

Thus arises the first major controversy; documentary or factual evidence. The question assumes particular importance with reference to the practice of plea-bargaining; the offence as formally charged may fit one offence-category in Canadian law, while the facts susceptible of demonstration by *viva voce* evidence may reveal offences of a much more serious nature. Again, the intended entrant may have been incorrectly charged under a broad section and have pleaded guilty; the details of his or her *actual* conduct may not greatly avail the adjudicator in making a determination.

Secondly, in a qualification of his views as just described, Urie J. suggested that some crimes, those *mala in se*, might be susceptible of easier disposition. It is questionable, as will be expanded upon below, whether the notion of crimes *mala in se* is of real utility in this area of the law.

Two further issues, which did not arise on the facts of *Brannson* are brought into focus. First, is a person in Brannson's position obliged to testify at the behest of the presenting officer? Secondly, in the case of a person who, unlike Brannson is outside the country and applying to enter, what is the effect of section 8, which moves the burden of proof of admissibility into Canada onto the shoulders of the visitor?

### 1. *Documentary or factual evidence?*

This issue arises only where documentation of the foreign offence already available to the adjudicator is insufficient to determine whether the act "proven" committed would fall within a Canadian provision. Three problem situations may arise.

- (1) Further documentary evidence, such as the count in the foreign indictment, exists but has not been obtained. (This was the case in *Brannson*.)
- (2) Documentary evidence as described in (1) above exists but is unobtainable for political or administrative reasons.

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<sup>12</sup> *Supra*, footnote 1, at p. 421.

- (3) Whatever documentary evidence exists and is available to the adjudicator is, perhaps because of procedural requirements in the country of origin, insufficient to answer the question of concurrency.

In situation (1), it is suggested, the factual nature of the offence committed should not be the proper subject of an inquiry either by the presenting officer or by the adjudicator. Rather, the onus should be upon the presenting officer to establish with reference to the detailed documentation that the offence of which the visitor was convicted would be an indictable offence under Canadian law. It follows that in *Brannson*, though the quashing of the deportation order was a fair result in the circumstances, the better view is that oral evidence should have been excluded from consideration both in the Court of Appeal and on return to the inquiry for a re-hearing.

To hold otherwise may have results unfair to either party in future similar cases. Where the person convicted of an offence abroad gives factual evidence of his offence, which evidence discloses a greater degree of culpability than that involved in his conviction (for instance a person who testifies to having *committed* the equivalent of an indecent assault, where he was *convicted* only of the equivalent of an indecent act), he might be excluded on the basis of his evidence even though in fact he would be entitled to admission into Canada. Conversely, because many convicted persons are unaware of the technicalities of legal proceedings against them, an unjust result may accrue to the party opposing admission. Brannson, for example, gave evidence that he was convicted as a result of advertising a book in newspapers and selling it by mail. This, apparently the extent of his clear recollection of the technicalities of his case, was rightly held by the court to be insufficient evidence to establish that his offence would have fallen within section 339 of the Criminal Code. However, in a mail fraud scheme similar in nature to that carried on by Brannson, it is far from inconceivable that the charges *actually laid* against the subject might have involved delivery of a letter or letters. Reference to the details of the counts would resolve this problem, mere oral evidence as to the scheme in general would not. It follows that, in the writers' opinion, the Federal Court should have directed that the adjudicator on the resumed hearing instruct the presenting officer to obtain copies of the original counts.

When the original counts are unavailable or incomplete, such a disposition would be ineffective and the question of oral evidence again arises. Assuming for the moment that the visitor may be so questioned, its use is more acceptable, subject to one caution not expressed by Urie J. That is the general evidentiary criterion of relevance; oral evidence should be given in response to the question "What were you charged with doing?" or "What were you actually convicted of doing?" rather than, as in *Brannson*, "What did you do in order to get convicted?". This last form of question puts the legally

unsophisticated entrant at a greater disadvantage, literally inviting him to run the risk of misleading the adjudicator by giving factual details of an offence *committed* but not the subject of a *conviction*, as required by the Immigration Act, 1976. The distinction is close to hair-splitting, and may not be relevant in a majority of cases. Deportation, however, is a serious matter, particularly where it is based on a determination that the deportee is a undesirable criminal.

The result of these conclusions is the shifting of a greater onus onto the presenting officer to establish that the offence committed falls within a Canadian provision, and a diminishing of reliance on the notion that testimony as to the facts of an offence create any presumption as to the nature of a conviction. As will be shown below, however, different implications would ensue in the case of a person applying for admission into Canada, as contrasted to a party contesting a deportation proceeding.

## 2. *Crimes mala in se: a lesser test?*

Qualifying his remarks as to the necessary extent of inquiry into concurrency of offences, Urie J. commented in *obiter dicta*:<sup>13</sup>

I recognize, of course, that there are some offences such as murder, which may be compendiously described as crimes *malum in se*, where the extent of the proof required to satisfy the duty imposed on the Adjudicator is not so great. A conviction for such a crime would usually arise from circumstances which would constitute offences in Canada. It is in the sphere of statutory offences which may be described as offences *malum prohibitum* in contradistinction to offences *malum in se*, that the comments which I have previously made have particular applicability.

While the suggestion that "the duty imposed on the Adjudicator is not so great" is at best vague, it is suggested that the distinction of offences *mala in se* and *mala quia prohibita* adapts very uneasily to this area of the law. It is difficult to see why the further evidence requirement need turn on any test more philosophical than the extent of overlapping of definitions. His Lordship based his comments on the words of Devlin J. in *R. v. Martin*:<sup>14</sup>

Crimes conceived by the common law, however, which are mostly offences against the moral law, such crimes as murder and theft, are not thought of as having territorial limits. . . . Broadly speaking, therefore, distinction can be drawn between offences which are offences against the moral law and to be regarded as wrong wherever they are committed, and offences which are merely breaches of regulations that are made for the better order or government of . . . a particular country. . . .<sup>15</sup>

The concept that certain actions or activities constitute offences which are *mala in se* is well established in criminal law. Blackstone,

<sup>13</sup> *Ibid.*, at p. 426.

<sup>14</sup> [1956] 2 All E.R. 86.

<sup>15</sup> *Ibid.*, at p. 92.

in his *Commentaries*, distinguished between crimes *mala in se* and *mala prohibita*. He stated, for example, that the defence of necessity could only apply to "... positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences, so declared by the law of God . . .".<sup>16</sup> To Blackstone, the former "affect the conscience because the laws laid down in the superior forces of nature were in being before any human laws were made. The latter . . . annex a penalty to non-compliance on account of the 'positive duty' created by human laws and not on account of any pre-existing moral duty . . .".<sup>17</sup>

The concept that some offences are to be regarded as *mala in se* is therefore one which is interfused with a notion of morality. To suggest, then, that the adjudicator's duty of further inquiry is "not so great" where documentary evidence illuminating the specifics of a foreign conviction is unavailable, and the mere label applied thereto indicates that the offence was one which could be "compendiously described" as *malum in se*, is an alarming position indeed. On what basis is an adjudicator to decide whether or not the offence described is one which is wrong in itself or one which is only wrong because it is prohibited by the law of a particular jurisdiction? The notion that certain crimes are *mala in se* in the sense that they constitute transgressions of some universal human conscience is not conceptually difficult to comprehend. However, it is a notion that defies logical, practical or just application to immigration administration. Although the concept can be relatively easily defined, there is no unanimity as to what offences actually fall into this category. Commentators and judges within our own jurisdiction have been unable to reach a consensus as to which offences constitute crimes which are *mala in se*; and:

... whenever any such distinction has actually been attempted, positive legal systems have achieved only a very limited degree of success. In order to show the way in which even a clear moral transgression will require the intervention of human agency in creating the limits of a criminal offence which embodies it, we may take the prime example of murder. Even in this clear case of moral turpitude, a *malum in se* depends for its very presence in a positive law system on creative and definitive human agency. Coupled with this so called "relativity of law" is the even more obvious relativity of moral standards among human beings. . . .<sup>18</sup>

The problems encountered in the application of such a notion become even more complex where, as in *Brannson*, the court is required to assess and measure the Canadian equivalent of foreign criminality. Perceptions relating to the nature of activities which offend the moral conscience of the public and thus are characterized

<sup>16</sup> Blackstone, *Commentaries* iv (1769), p. 30.

<sup>17</sup> Finch, *Introduction to Legal Theory* (2nd ed., 1974), p. 38.

<sup>18</sup> *Ibid.*, pp. 38-39.

as *mala in se* are moulded by the political and cultural *mores* of a given society. For example, conceptions of property offences may be vastly different in countries administered by extreme left-wing regimes. The very real possibility exists that a person could be convicted in a Soviet state for an offence labelled by the foreign jurisdiction as a variety of theft but which, in the Canadian or western context, would not be considered criminal at all. Therefore, if information relating to the applicant indicates that he had been sent to jail for "stealing", there is no logical reason why an adjudicator should be under any less of a duty to ascertain that the elements of the offence committed correspond to an offence for which the applicant would be denied admission under section 19(2)(a), simply because the adjudicator classifies theft as a crime which is *mala in se*. Sedition and treason, offences which have been classified by some commentators as *mala in se*, provide a further example. Due to the fact that the precise natures of these offences are dictated by the political philosophy extant in any particular jurisdiction, in some autocratic nations a conviction for treason may result from the mere criticism of the government or from speaking out against a military or political leader. In Canada, however, more dangerous actions are required to constitute sedition. Should the fact that an applicant has been convicted of one of these offences in his home jurisdiction disentitle him from admission to Canada, where evidence is unavailable to ascertain whether or not the actual offence committed would coincide with a statutory offence in Canada?

It is submitted that the distinction based on the difference between crimes which are *mala in se* and those which are *mala quia phohibita* has no rational application to the administration of the Immigration Act and provides no basis in law for the reduction of the statutory onus of proof upon an adjudicator to establish concurrency of convictions.

### 3. *Is the visitor a compellable witness?*

Where insufficient documentation is available to determine whether or not an applicant has committed a criminal offence of the variety described in section 19(2)(a) can he be compelled to answer questions put to him in order to "flesh out" the circumstances of the offence, thus assisting the presenting officer in discharging his duty to ascertain whether the offence actually committed would constitute an offence in Canada?

The subject of an inquiry is in general compellable pursuant to section 95(g) of the Immigration Act, 1976 which provides a criminal penalty for refusal to answer a question. It is instructive to consider, however, the effect of paragraph 2(d) of the Canadian Bill of Rights



upon this provision. That provision restricts construction which would:<sup>19</sup>

. . . authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied . . . protection against self incrimination. . . .

Such protection against self-incrimination as is provided to the subject of an inquiry by section 5 of the Canada Evidence Act<sup>20</sup> is limited to use of information against the witness in a *subsequent* proceeding. If compelling him to testify would lead to his "crimination" at the instant proceeding, no protection against self-incrimination would be available to the accused, and section 95(g) of the Immigration Act, 1976 would be rendered inoperative to that extent by the Bill of Rights.<sup>21</sup> The crucial question is, however, whether oral evidence as to the nature of a foreign conviction or crime at an immigration inquiry can "criminate" the subject.

In a recent appellate decision of the County Court, *R. v. Cole*,<sup>22</sup> Ferg Co. Ct J. put forward the above reasoning and refused a Crown appeal against acquittal of a person who refused to answer a question put to him at an inquiry. As to the meaning of "criminate", his Honour was greatly influenced by the words of Laskin J. (as he then was) in *Curr v. The Queen*:<sup>23</sup>

I cannot read s. 2(d) as going any further than to render inoperative any statutory or non-statutory rule of federal law that would compel a person to criminate himself before a Court or like tribunal through the giving of evidence, without concurrently protecting him against its use against him.<sup>24</sup>

His Lordship was of the opinion that Cole had not been afforded protection against self-incrimination. Although section 5 of the Canada Evidence Act would operate to prevent his answers from being used against him in a subsequent proceeding, the provision would avail him nothing at the very hearing at which his immigration status was being determined and at which, by necessity, the applicant himself must be the chief witness.<sup>25</sup> Ferg Co. Ct J. was also heavily

<sup>19</sup> R.S.C., 1970, App. III.

<sup>20</sup> R.S.C., 1970, c. E-10, as am.

<sup>21</sup> For a contrary view see Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979), pp. 78-94. Professor Ratushny concludes that the protection afforded by s. 2(d) of the Bill of Rights "extends no further than to the protection embodied in section 5(2) of the Canada Evidence Act". In fact, he suggests that "the present status of the Canadian Bill of Rights is such that it can be completely ignored in the present context."

<sup>22</sup> (1980), 54 C.C.C. (2d) 324 (Man. Co. Ct).

<sup>23</sup> (1972), 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603 (S.C.C.).

<sup>24</sup> *Ibid.*, at pp. 201 (C.C.C.), 623 (D.L.R.).

<sup>25</sup> On this basis, his Lordship distinguished the authorities of *Batary v. A.G. Sask. et al.*, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125, [1965] S.C.R. 465 and *R. v. Wolfe, Ex parte Vergakis*, [1965] 1 C.C.C. 343, 48 D.L.R. (3d) 608 (B.C.S.C.).

influenced by the severity of the consequences which could befall an applicant from the decision of such a tribunal. Although the subject of an immigration inquiry cannot actually be convicted of a criminal offence and be subjected to criminal punishment in a true sense, his Lordship tended toward the view that the inquiry amounted to a quasi-criminal fact-finding process capable of resulting in drastic penalties. On this basis, his Honour found that the word "criminate" as found in section 2(d) of the Bill of Rights is not limited in its application to criminal proceedings aimed at determining whether a person "was guilty of an actual crime".<sup>26</sup>

The decision in *Cole*, subject only to differences in the facts, has a direct bearing on the situation where insufficient documentation is available to determine whether or not the criminal offence committed by an applicant would place him in an inadmissible class under section 19(2)(a). By logical extension, a person compelled to answer questions put to him which might establish that he had committed a criminal offence, as described therein, should be afforded protection of section 2(d), since section 5 avails him nothing.

The judgment of Ferg Co. Ct J. in *Cole* adequately puts the case for a broadly-based application of the concept of self-incrimination. If this approach is not acceptable, it is further submitted that the more classical interpretation still imposes significant fetters on the freedom of the presenting officer to compel testimony. Well-established authority indicates that "crimination" refers at least to an "admission of a criminal offence, of which the witness has not hitherto been convicted".<sup>27</sup> When a presenting officer is attempting to establish concurrency of an offence committed in a foreign jurisdiction based on *viva voce* evidence of the actual crime committed, the applicant runs the risk of establishing that he has committed a crime of greater degree of culpability than the crime with which he was actually charged or convicted, or both. In other words, where documentation relating to the nature of the foreign charge or conviction is unavailable, an applicant may conceivably render himself liable to deportation from Canada if he is compelled to tell the inquiry "what he did in order to get convicted". In such a situation, he may well be incriminating himself in the sense that his testimony may amount to an admission of a criminal offence of which he has not been convicted. This problem is easily alleviated by the process suggested earlier: questions put to the applicant should be limited to "What were you actually convicted of doing?". It follows that if the narrow view of the meaning of crimination is taken, the subject of an inquiry would be

<sup>26</sup> However, see *contra* Turpin (1968), 6 I.A.C. 1.

<sup>27</sup> *Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd*, [1939] 2 K.B. 395, at p. 405, [1939] 2 All E.R. 613, at p. 618 (C.A.).

compellable only subject to strictures upon the type of question which may be asked.

#### 4. *The effect of subsection 8(1).*

It remains to discuss the effect of subsection 8(1)<sup>28</sup> upon an applicant presently outside Canada who finds his eligibility to enter the subject of a dispute similar to that in *Brannson*. The Immigration Act, 1976 here clearly throws the burden of proof of admissibility upon the shoulders of the intended entrant.

No legal policy further than that elaborated above is needed to explore this area; indeed, the issue is simpler as the intended entrant has no complaint of being compelled to criminate himself. In keeping with the suggestion that a party who does not produce available documentary evidence from the convicting court should not have the benefit of presumption or oral testimony, an applicant who did not produce details of available original counts would fail by virtue of subsection 8(1). Where, however, such counts were unavailable or inconclusive, again testimony as to what he or she was *actually* convicted of would, in the absence of countervailing evidence, satisfy the burden of proof required. It is suggested, however, that where the applicant is unable to testify except as to the facts of the offence, such testimony would not be sufficiently relevant and should be excluded.

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#### STARE DECISIS—VALUE OF OBITER DICTUM—SUPREME COURT OF CANADA.

It is an excellent rule not to go, for the purposes of your decision, beyond what is necessary.<sup>1</sup>

A quiet revolution took place in the very basis of the common law in 1980, but as yet few have noticed it. Its potential effects for the future, however, are limitless.

<sup>28</sup> Immigration Act, 1976, S.C. 1976-77, c. 52, s. 8(1).

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<sup>1</sup> Strutton (1856-1934), taken from R. Fountain, *Wit of the Wig* (1968), p. 100.

In the past, the dicta of the highest court of a jurisdiction have always been accorded respect and readily followed if providing a useful form of relief. The dicta arose in two ways. First, the court might have stated a principle wider than was necessary for the instant decision or, secondly, it might have assumed facts not before it. Two obvious examples spring to mind from the House of Lords: *Donoghue v. Stevenson*<sup>2</sup> and *Hedley Byrne v. Heller*.<sup>3</sup>

*Donoghue v. Stevenson* is an illustration of the case where the court stated a principle wider than was necessary. The ratio of the case concerns only the duty a manufacturer owes to the ultimate consumer.<sup>4</sup>

However, it is for the wider statement of principle relating to negligence liability in general that Lord Atkin is chiefly remembered.<sup>5</sup>

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

From this statement of principle, which was *obiter*, the whole law of negligence in England has sprung. In fact, the entire case is to a certain extent based on hypothetical facts for no-one ever proved the snail was decomposing in the bottle.<sup>6</sup> The courts, though, took Lord Atkin's neighbour principle and developed a new cause of action.

*Hedley Byrne v. Heller*<sup>7</sup> is an example of a court giving a decision on facts not before it. The judgment contains five<sup>8</sup> long speeches discussing the liability of persons for negligent misstatements causing economic loss. The speeches are all *obiter* for the case was decided on the basis of a disclaimer, but subsequent courts in England and Canada have adopted their reasoning.

However, whenever a subsequent court has followed such *obiter* from any final court of appeal, it has done so voluntarily; admittedly,

<sup>2</sup> [1932] A.C. 562.

<sup>3</sup> [1964] A.C. 465.

<sup>4</sup> "... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care". *Supra*, footnote 2, at p. 599.

<sup>5</sup> *Ibid.*, at p. 580.

<sup>6</sup> Ashton-Cross, Note (1955), 71 L.Q.Rev. 472.

<sup>7</sup> *Supra*, footnote 3.

<sup>8</sup> Lords Reid, Morris of Borth-y-Gest, Hodson, Devlin and Pearce.

the lower court judge was under the pressure of a subsequent appeal reversing his decision, but he was not bound under the principles of stare decisis. Statements of principle by the highest court of a jurisdiction were merely strongly persuasive.

The Supreme Court of Canada, through Chouinard J. seems to have changed that approach in *Sellars v. The Queen*.<sup>9</sup>

... in *Paradis v. The Queen*<sup>10</sup> ... a majority of this court expressed the opinion that the same rule of caution must be applied to the testimony of an accessory after the fact as to an accomplice, and in my opinion, therefore, this is the interpretation that *must* prevail.<sup>11</sup>

Sellars was convicted mainly on the evidence of an admitted accessory after the fact.<sup>12</sup> He appealed on the ground that the trial judge had failed to warn the jury of relying on this evidence since it was uncorroborated. He claimed accessories after the fact and accomplices should be treated the same for the purposes of uncorroborated evidence. The judge ruled against Sellars on this point, but in his summing-up to the jury the judge gave the equivalent of an accomplice warning, telling them to be careful of using the evidence of a disreputable witness. Subsequent to the trial, the Supreme Court in *Paradis*<sup>13</sup> said *obiter* that accessories after the fact fell within the accomplice rule in evidence. On appeal to the Supreme Court in *Sellars*, Chouinard J. followed *Paradis*, but did not quash the conviction, applying section 613(1)(b)(iii) of the Criminal Code.<sup>14</sup> If *Sellars* had merely affirmed that accessories after the fact were subject to a jury warning in the same way as accomplices, it would merit little attention. However, the decision is achieved by following a statement of principle from a previous Supreme Court case. This is held to be not only strongly persuasive, but binding on later courts, including the Supreme Court itself. Such a radical change in the principle of stare decisis needs to be examined carefully.

Chouinard J. starts by referring to several cases where the Supreme Court had given its opinion on a matter although this was not strictly necessary to determine the appeal. He declares that these opinions have been followed. Three of those cases concern constitutional issues.<sup>15</sup> While the court's statements are *obiter*, the discussion of constitutional points in a wider sphere than is necessary for

<sup>9</sup> [1980] 1 S.C.R. 527, (1980), 52 C.C.C. (2d) 345.

<sup>10</sup> [1978] S.C.R. 264, (1977), 33 C.C.C. (2d) 387.

<sup>11</sup> *Supra*, footnote 9 at pp. 529 (S.C.R.), 347 (C.C.C.), italics supplied.

<sup>12</sup> See s. 23(1), Criminal Code, R.S.C., 1970, c. C-34.

<sup>13</sup> *Supra*, footnote 10.

<sup>14</sup> *Supra*, footnote 12.

<sup>15</sup> *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396, (1941), 76 C.C.C. 227; *Switzman v. Elbling*, [1957] S.C.R. 285, (1956), 117 C.C.C. 129; *R. v. Zelensky*, [1978] 2 S.C.R. 940, (1978), 41 C.C.C. (2d) 97.

the actual decision has always been accepted. The United States Supreme Court has developed the Bill of Rights on the basis of wide ranging opinions on cases that needed far less by way of decision, as for example, in *Regents of the University of California v. Bakke*.<sup>16</sup> On the wider issue in that case of guidelines for university admissions programmes, the Supreme Court advocated following the Harvard College Admissions Programme.<sup>17</sup> There is no doubt this will be followed, even though it is mere *obiter*.

Similar issues arose in the three cases chosen by Chouinard J. to exemplify Supreme Court of Canada dicta.<sup>18</sup> *Switzman v. Elbling*<sup>19</sup> concerned Quebec's Communistic Propaganda Act,<sup>20</sup> under which a tenant could be evicted for using his premises to produce or distribute such literature.<sup>21</sup> By the time the case reached the Supreme Court, the lease in question had well expired, so from that point of view, the judgment of the court on the constitutionality of the Act was wholly *obiter*. However, the Quebec statute was still in force so its status had to be determined. The tenant had claimed it was invalid and this issue had to be decided on its merits. Therefore, what Chouinard J. alleges is an example of *obiter*, was, in fact, held to be an issue before the court requiring consideration. *Egan* and *Zelensky* raise similar constitutional issues. Answers to constitutional questions receive a greater scope of authority.

The fourth case Chouinard J. adopts as an example of Supreme Court dicta, is *Schwartz v. The Queen*.<sup>22</sup> However, in that case there had been full argument on the point considered *obiter*, and the dissent<sup>23</sup> even pointed out that counsel for the Crown had conceded there would be a new trial if the Supreme Court differed on this matter from the trial judge. Chouinard J. has chosen a very narrow form of *obiter* to make binding if it has to have been fully argued by counsel.

The cases used to exemplify previous Supreme Court *obiter* dicta differ from *Paradis*, in that the latter case's ruling on jury warnings and accessories after the fact was a true statement of principle, unnecessary to decide that case. In the four cases Chouinard J. cites, there was some need to deal with the point claimed to be *obiter*.

<sup>16</sup> (1978), 438 U.S. 265, 98 S. Ct. 2733.

<sup>17</sup> "Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Ibid.*, at p. 314 per Powell J., and see at pp. 315-319 and 321.

<sup>18</sup> *Supra*, footnote 15.

<sup>19</sup> *Ibid.*

<sup>20</sup> R.S.Q., 1941, c. 52.

<sup>21</sup> *Ibid.*, s. 3.

<sup>22</sup> [1977] 1 S.C.R. 673, (1976), 29 C.C.C. (2d) 1.

<sup>23</sup> Per Dickson J., Laskin C.J.C., Spence and Beetz, JJ., concurring in dissent.

Chouinard J. then gives examples of courts following Supreme Court *obiter* dicta. It is not doubted that statements of principle of the Supreme Court are highly influential in later cases and no-one can deny that such opinions may be followed. *Donoghue v. Stevenson*<sup>24</sup> and *Hedley Byrne*<sup>25</sup> prove that. It is also shown by two of the cases Chouinard J. cites here: in *Attorney-General for Quebec v. Cohen*<sup>26</sup> the court followed dicta in *Patterson v. The Queen*.<sup>27</sup> However, it is not stated to be binding on the court in *Cohen* or other subsequent courts. It is only stated to have authority. This is no difference from the previous position that Supreme Court *obiter* dicta should receive the respect of lower courts. Furthermore, the Supreme Court in *Cohen* actually held that the two quoted paragraphs from *Patterson* are the ratio anyway. More blatantly, in the passage cited by Chouinard J. in *Sellars*<sup>28</sup> from *Ottawa v. Nepean Township*, the Ontario Court of Appeal stated the following:<sup>29</sup>

What there was said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada and we should respect it and follow it, *even if we are not strictly bound by it*.

Supreme Court *obiter* dicta are accorded a lot of authority, but are not binding under principles of stare decisis, even allowing for *Cohen* and *Ottawa v. Nepean Township*.

On the other hand, Chouinard J. derives a lot of support from the Court of Appeal of Alberta in *Re Depagie and The Queen*,<sup>30</sup> where McDermid J.A., for the majority, speaking again of *Patterson*,<sup>31</sup> said the following:<sup>32</sup>

However, even if the last quoted paragraph of the judgment I have quoted is *obiter*, as stated by Bouck, J., in *R. v. Hubbard et al.*,<sup>33</sup> I would not feel justified in not following it even if I thought it was not in accord with the previous authorities. . . . However, . . . a principle asserted to be the law by a final Court of Appeal becomes the authority for the principle so asserted.

On its interpretation of *Patterson*, *Depagie* is distinguished by the ruling in *Cohen* in 1979, but it is still relevant for its views on Supreme Court *obiter* dicta. No precedent is provided to support such wide generalisations, yet it is this judgment more than any other

<sup>24</sup> *Supra*, footnote 2.

<sup>25</sup> *Supra*, footnote 3.

<sup>26</sup> [1979] 2 S.C.R. 305, (1979), 46 C.C.C. (2d) 473.

<sup>27</sup> [1970] S.C.R. 409, (1970), 2 C.C.C. (2d) 227.

<sup>28</sup> *Supra*, footnote 9, at pp. 540 (S.C.R.), 348 (C.C.C.).

<sup>29</sup> [1943] 3 D.L.R. 802, at p. 804; italics supplied.

<sup>30</sup> [1976] 6 W.W.R. 1, (1976), 32 C.C.C. (2d) 89.

<sup>31</sup> *Supra*, footnote 27.

<sup>32</sup> *Supra*, footnote 30, at pp. 5 (W.W.R.), 92 (C.C.C.).

<sup>33</sup> [1976] 3 W.W.R. 152.

which provides support for Chouinard, J.'s opinion that Supreme Court *obiter dicta* are binding.

If such *obiter dicta* are binding, a lot of problems are created. First, the court giving the *obiter* may not have turned its mind to such issues as are now presented before the instant court. In *Depagie*, Moir J.A., dissenting,<sup>34</sup> thought that Judson J. in *Patterson*, did not turn his mind to the question of improper restriction of cross-examination. Of course, the *obiter* can be distinguished in the same way as a ratio, but it is so much simpler to dispose of *obiter* as not binding. The *Egan* case<sup>35</sup> shows the Supreme Court having to deal with a previous *obiter* that was causing problems, now. If it was only *obiter* there would have been no problem for all courts would have ignored it.

Secondly, apart from not having considered a particular situation, the Supreme Court may not have been referred to all the relevant authorities when they made their statement of principle.<sup>36</sup> Counsel may not have considered the point. To talk upon an unargued topic is always dangerous for it may lead to a *per incuriam* decision. In *Rahimtoola v. Nizam of Hyderabad*,<sup>37</sup> Lord Denning did some research of his own, considering cases in his judgment that were not cited by counsel.<sup>38</sup> However, the rest of the House of Lords refused to consider anything not argued by counsel. Chouinard J. appears to assert the authority of opinions given without the benefit of research or counsel's argument.

Finally, the Supreme Court in *Patterson* appears to have ignored a previous decision of its own which had adopted the statement of Lord Sumner in *R v. Nat. Bell Liquors Ltd.*<sup>39</sup> Speaking *ex tempore* is very dangerous in a judicial context. To give so much authority to statements of principle about which there has been no argument, which may have been given *per incuriam* and which may contradict previous ratios is to convert the Supreme Court into a quasi-legislature. Whatever the Supreme Court now says becomes binding authority. The age-long right of litigants in the adversarial process to argue their case fresh if there has been no previous authority on point, is gone. If the Supreme Court ever discusses a point, irrelevant to its instant decision but pertinent to a subsequent case, the lower court is bound by its *obiter*.

However, is *Sellars* really such a change? Dias,<sup>40</sup> when discussing *Hedley Byrne*,<sup>41</sup> considers how binding it is, since the House of

<sup>34</sup> *Supra*, footnote 30, at pp. 7 (W.W.R.), 94 (C.C.C.).

<sup>35</sup> *Supra*, footnote 15, at pp. 411-412 (S.C.R.), 241 (C.C.C.).

<sup>36</sup> *R. v. Hubbard*, *supra*, footnote 33, at p. 158.

<sup>37</sup> [1958] A.C. 379.

<sup>38</sup> *Ibid.*, at pp. 423-424.

<sup>40</sup> [1963] Camb. L.J. 220, at p. 221.

<sup>39</sup> [1922] 2 A.C. 128, at p. 154.

<sup>41</sup> *Supra*, footnote 3.



Lords actually decided the case on the basis of the disclaimer. He makes some points which indicate little will change now. Lower courts tend to follow statements of principle by a final court of appeal as if they were ratios anyway. Chouinard J. may just be reflecting reality. To treat it as pure and simple dicta is even more unreal for Supreme Court statements of principle are readily followed. Dias thinks there is little difference between ratios and *obiter* dicta at the final court of appeal level. So has *Sellars* made very much of a difference?

It has been cited on three occasions, at least, since the judgment was delivered. In *R. v. Baxter*,<sup>42</sup> the Superior Court of Quebec, per Barrette-Joncas J., having stated that *Sellars* means there are no *obiter* dicta of the Supreme Court, only considered opinions (unless it means that the statement of principle must relate to the instant case, there seems to be little difference), that ought to be respected and followed, then respects and follows *obiter* dicta from *Lemieux v. The Queen*.<sup>43</sup> The court wanted to come to the same result as *Lemieux* and added weight to its judgment by citing *Sellars*. *Sellars* added authority to the act of following *obiter* dicta. The same is true in the second case, *Haldimand-Norfolk Regional Health Unit v. Ont. Nurses' Association*,<sup>44</sup> a labour law case. The court again wanted to follow Supreme Court *obiter* dicta and not only did they cite *Sellars* in support of this, but found that Estey J. was not speaking *obiter* in the *Bradburn* case,<sup>45</sup> anyway. Finally, in *Re McKibbin and the Queen*,<sup>46</sup> the Ontario High Court of Justice not only followed the *Sellars* rationale, that in certain circumstances Supreme Court *obiter* dicta ought to be binding on lower courts, but applied this to the *obiter* of the Ontario Court of Appeal. It is all well and good to say Supreme Court of Canada *obiter* dicta should be binding, but for lower courts to apply this to other superior courts is disturbing. Is *obiter* as a concept in Canadian law to be thoroughly changed? Once again, though, one can be reassured by the fact the court wanted to come to the decision it reached and merely used the Court of Appeal statement of principle to save time in argument.

Apart from those three cases *Sellars* has gone unnoticed. It is difficult to gauge its effect for it will only be cited when a court wants to follow Supreme Court *obiter* dicta, regardless of the pronouncements of Chouinard J. In cases where a court wants to ignore a statement of principle, *Sellars* will be quietly forgotten, or restricted

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<sup>42</sup> (1980), 16 C.R. (3d) 397 (Que. S.C.).

<sup>43</sup> [1967] S.C.R. 492.

<sup>44</sup> (1981), 81 C.L.L.C. 14,085, at 12,425.

<sup>45</sup> *Re Bradburn and Wentworth Arms Hotel, Ltd.* [1979] 1 S.C.R. 846.

<sup>46</sup> (1981), 61 C.C.C. (2d) 126 (Ont. H.C.).

to those *obiter* statements which have had the benefit of full argument by counsel.

It is interesting to conclude with the tautology that under conventional interpretation, Chouinard J.'s ruling on Supreme court statements of principle is *obiter* itself, unnecessary to determine the instant appeal.

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