(Joseph, 2007)

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Jennings' test accurately depicted the questions but he presented them as establishing, in effect, *alternative* tests for the establishment of convention. He wrote:[34]

> "A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, *unless it is perfectly certain that the persons concerned regarded them as bound by it.*"

Each of Jennings' questions (b) and (c) must be answered in the affirmative to establish the existence of a convention. No convention could be asserted if the rule thought to be binding furthered no constitutional purpose, or if it frustrated rather than served constitutional ends. The minority judgments in *Reference re Amendment of the Constitution of Canada* rightly observed: "The essential condition for [the] recognition [of a convention] must be that the parties concerned regard it as binding on them [and] it must play as well a necessary constitutional role."[35] The six-member majority adopted in principle Jennings "either/or" test,[36] but found that the putative convention satisfied each of Jennings' criteria. The issue was whether the consent of the Canadian provinces was needed before the federal authorities could request the United Kingdom Parliament to pass legislation to "patriate" the Canadian constitution. The majority held: (a) the rule requiring provincial consent was based in precedent; (b) the actors regarded themselves as bound; and (c) there was a reason for the rule found in Canada's federal-provincial compact.

Usage is the main source of convention. The longer a usage, the more likely a binding convention will crystallise. However, conventions may also be sourced in rule-constitutive precedents. A single precedent may establish a convention if the action is unequivocally acknowledged. The last occasion that a British Monarch refused the royal assent to a bill was in 1708, when Queen Anne refused to agree to a Scottish militia. A century later, refusal of the royal assent was no longer an option. In 1829 George IV opposed the removal of disabilities attaching to Roman Catholics but he assented to the bill under protest. This action established a rule-constitutive precedent that confirmed a shift in the balance of the constitution.[37] Although no one could say whether the granting of the royal assent had already hardened into a constitutional obligation, George IV's acceptance of *a duty* to assent conclusively established the convention.

Other conventions have been established in the same way. The last dispute over a Governor's powers was in 1892. The Governor, the Earl of Glasgow, refused to act on Premier Ballance's advice to appoint several new Legislative Councillors. The Secretary of State for the Colonies instructed the Governor that he must accept his premier's advice in all matters not touching Imperial interests. The Governor's accession established a rule-constitutive precedent. Similarly, following the 1984 elections the Attorney-General Jim McLay advised his Prime Minister on the constitutional obligations upon an out-going Prime Minister, and this advice established a precedent for future occasions. The *Cabinet Manual* adopted McLay's advice as comprising the first limb of the caretaker

34 Jennings, above n 6, at 136 (emphasis added).
35 *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 at 114 (SCC) (emphasis added).
36 *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 at 90 (SCC).
37 See de Smith and Brazier, above n 5, at 40.

confidence on matters of supply. "A denial of supply at any point at which a debate ranging over the whole field of Government activity can arise, automatically raises a question of the confidence of the House in the Government."[62] In addition, a government may, of its own motion, declare that a vote on an issue before the House is to be treated as a confidence matter. A government may exercise this option as a tactic to enforce discipline in its ranks, by placing its survival "on the line".

A distinction must be drawn between confidence votes and ordinary votes in the House. The above situations exhaust the obligation to resign. Minority coalition governments infrequently suffer defeats when prosecuting their legislative programmes, without any calls for resignation.

(6) *Caretaker government*

MMP politics create potential for periods of political uncertainty, when it may not be clear which party or group of parties in the House has a mandate to govern. During these periods, the government must, of necessity, remain in office and attend to the business of government. The Governor-General must not be left without responsible advisers. The incumbent government is the lawful executive authority, with all the powers and responsibilities of office. However, governments in this position must act in accordance with the convention on caretaker government. Ministers are constrained in their actions until the political situation is resolved.

The caretaker convention has two limbs. The first limb applies where it is clear on election night who will form the next government. It is customary for the new ministry to be sworn in 10-14 days following the elections. During this period, the outgoing government must continue to discharge the responsibilities of office, subject to the caretaker convention. The rules were clarified following the July 1984 elections, when defeated Prime Minister Robert Muldoon refused the incoming Prime Minister's immediate advice to devalue the New Zealand currency.[63] Muldoon capitulated when his Attorney-General, Jim McLay, publicly advised that:[64]

> "(1) [A defeated Government] will undertake no new policy initiatives; and
>
> "(2) It will act on the advice of the incoming Government on any matter of such constitutional, economic, or other significance that it cannot be delayed until the new Government formally takes office — even if the outgoing Government disagrees with the course of action proposed."

McLay's exposition of the constitutional position established a rule-constituent precedent. The *Cabinet Manual* adopted verbatim his formulation of the obligations on an out-going Prime Minster.[65] Situations to which those restraints apply will not usually extend beyond

61 See D McGee, *Parliamentary Practice in New Zealand* (3rd ed), Wellington, Dunmore Publishing, 2005, at 95-99.

62 McGee, above n 61, at 98.

63 See para 5.3.1.

64 Attorney-General's press statement, 17 July 1984, reproduced by F M Brookfield, "The constitutional crisis of July '84" [1984] NZLJ 298.

(2) Admission to or expulsion from partnerships (s 36);

(3) Admission to or loss of membership of industrial, professional or trade associations, or of professional qualifying and vocational training bodies (ss 37-41);

(4) Access to places, vehicles and facilities (ss 42-43);

(5) Provision of goods and services (ss 44-52);

(6) Sale, occupation and use of land, housing and accommodation (ss 53-56); and

(7) Access to educational establishments (ss 57-60).

The Human Rights Commission Act 1977 prohibited discrimination on grounds of colour, race, sex, ethnic or national origins, marital status, and religious or ethical belief. Section 21 of the Human Rights Act 1993 re-enacted those grounds and added the following six new grounds: disability, age, political opinion, employment status, family status, and sexual orientation. Under the heading "Other forms of discrimination", the Act also outlaws sexual harassment, racial harassment, and inciting racial disharmony.[123] Sexual or racial harassment is unlawful if it occurs in any of the areas of activity to which the s 21 grounds relate. Inciting racial disharmony is not "context-specific" but is unlawful per se.

The legislation acquired new public law significance under the Human Rights Amendment Act 2001. For the Minister who promoted the Act, it heralded "a new era in public sector accountability."[124] The Act did three things: it extended the anti-discrimination apparatus to cover the public sector, it introduced a new institutional framework for promoting human rights, and it bolstered the processes for resolving discrimination disputes. The new institutional framework and dispute resolution services transformed the Human Rights Commission from a predominantly anti-discrimination body to one aimed at promoting respect for human rights. A further major change was the bringing of all government activity under the umbrella of the Human Rights Act 1993.

From its inception in 1977, the legislation had applied only in the private sector in the seven enumerated areas of activity. Section 151 had exempted the Act's application to the public sector until 31 December 1999, pending completion of a human rights audit of government legislation, practices and policies (the project that became "Consistency 2000").[125] That audit encountered difficulties from perceived, widespread non-compliance with the Human Rights Act 1993 in the public sector, and the 1999 expiry date was extended until 31 December 2001. This timing coincided with the coming into force of the Human Rights Amendment Act 2001, which extended the human rights regime to the public sector. The object was to promote a cultural shift within government — to sensitise politicians and officials to human rights standards when formulating and implementing government policy. Previously, the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 had operated along parallel lines, without intersecting

123 Human Rights Act 1993, ss 61-63.

124 (2001) 597 NZPD 13,759 per Hon Margaret Wilson (Associate Minister of Justice).

125 See para 9.3.7(1) for the problems the "Consistency 2000" audit encountered..

Section 19 of the Bill of Rights
grounds of discrimination in th
Act's institutional framework.
unlawful public-sector discrimi

The number of complaints lod
the year ended 30 June 1999, t
319 allegations of unlawful disc
complaints totalling 754 allega
30 June 2005, the commis
complaints.[129] Complaints have
reflect an altered method of cl
human rights epidemic. The
relatively constant: in 2004-0
(58 percent in 1998-99), 26
(17 percent in 1998-99), 10 p
1998-99), and 10 percent arose
discrimination have also remai
23 percent of complaints (26
9 percent (24 percent in 1998-
and age accounted for 9 perce
for the year 2004-05, accounti
commission's annual reports t
category "other".

9.3.2 Philosophical dime

The Human Rights Act 1993 is
a State proceeds from encoura
its observance. There are practi
legislative intervention. These
interests — enforced social e
choice. The controversial *Sides*
the limitations. Critics argued
bigotry on the one hand, and
Equal Opportunities Tribunal
evangelical Christian's employ

126 *Quilter v A-G* [1998] 1 NZLR 5
of Appeal held that the Marri
s 19 of the Bill of Rights whic

127 *Report of the Human Rights Comm*

128 *Report of the Human Rights Comm*

129 *Report of the Human Rights Com*
2005 [2005] AJHR E.6 at 10.

130 *Human Rights Commission v Er*
9.3.8(1)). See M Jones, "Quest
Motor Company Ltd and Others"

(unless the legislative prerogative was expressly preserved).[35] In a settled colony, the Crown retained a narrower (constituent) legislative power for establishing the office of Governor and an Executive Council, appointing a Governor and issuing Royal Instructions establishing courts of justice, and providing for the summoning of a legislature. New Zealand was considered, at law, to have been established by settlement rather than by voluntary cession under the Treaty of Waitangi.[37]

The Crown's constituent legislative power may be exercised for New Zealand at New Zealand's request. The Queen exercised this power in 1983 when she issued new Letters Patent to reconstitute the office of Governor-General. The Letters Patent of 28 October 1983 superseded the Governor-General's former instruments, the Letters Patent and Royal Instructions of 11 May 1917. The Queen issued this instrument on request of the Governor-General in Council[38] and it has force of law under the Crown's legislative prerogative. The final clause states: "XIX. And We do further declare that these Our Letters Patent shall take effect as part of the law of Our Realm of New Zealand." Clause 18 expressly preserves the Crown's constituent power "from time to time to revoke, alter or amend these Our Letters Patent".

Parliament's legislative power takes primacy over the Crown's constituent power. Although the Letters Patent have force of law, New Zealand enactment may supplement, override, or derogate from them. The Constitution Act 1986, for example, altered the rules under the Letters Patent governing eligibility for appointment to the Executive Council. Clause 8 of the Letters Patent affirmed the principle of the parliamentary ministry by restricting membership of the Executive Council to sitting members of Parliament. Section 6(1) of the Constitution Act 1986 relaxed the requirement by authorising the ministerial appointment of persons who stood at the general election held immediately preceding the appointment (whether or not at the time of the appointment they were members of Parliament). This alteration to the law necessitated a further request to Her Majesty to amend the Letters Patent. Clause 8 as amended now refers to eligibility for ministerial appointment under the Constitution Act 1986. Where Parliament confers on the Crown an identical power already delegated under the Letters Patent and does not subject it to some limitation or restriction, a court may hold that the prerogative and statutory powers coexist.[39]

35 *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045. The legislative prerogative automatically revives when representative government is revoked by Act of the Imperial Parliament or under the prerogative: *Sammut v Strickland* [1938] AC 678 (PC).

36 *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225 (PC). Apart from its constituent power, the Crown could not legislate for settled colonies: *Re Lord Bishop of Natal* (1865) 3 Moo PC (NS) 115 at 148 per Lord Chelmsford LC.

37 See paras 3.6.2 and 3.6.3.

38 Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/22) (reproduced in the appendix).

Taxation

(Joseph, 2007)

Historical precedents

…was a perennial issue in the struggle for supre…, the king found it expedient to seek the consen…hs and shires for new taxes for the royal revenue. I… would agree to remedy some local grievance. From … constitutional principle that the levying of taxati…ithout consent of Parliament, was illegal. The Magn…ute of Westminster 1354 proclaimed the principle o… guided Parliament's victory over the Crown. Insis…revenues ensured the king could not govern fc…ning Parliament for supply.

…7th century, the Stuarts resorted to indirect taxatic…oans under pretence of the prerogative. The statu… taxation without consent of Parliament to be illeg…equer Chamber found for the king. Bate had refi…s levied by James I and the judges upheld the levy …revenue is an inseparable Crown prerogative nc…ent and, secondly, that the imposition of duties fo… the royal prerogative in foreign affairs, and the court …of an admitted prerogative. The levy was lawful, alth…

…art kings continued their indulgences under cover …ued to hold for the king. In 1627, Charles I impr…thers for refusing to pay a forced loan Charles had l… Court of King's Bench for writs of habeas corpus b… writs showed sufficient cause. The prisoners had b…embers of the Privy Council, ordering their comm… On the medieval precedents, the court upheld the …it stating reasons. In *Hampden*'s case[42] judgment w…

…*Sabally and N'Jie v A-G* [1965] 1 QB 273 (CA) per Russell LJ …ld that the statutory power abridged the prerogative. For … …mmary Proceedings Act 1957 and ss 406-407 of the Crimes …ercy delegated to the Governor-General by cl 11 of the L… …roceedings Act 1957 and s 378 of the Crimes Act 1961 (enac… …osequi delegated by implication under the Letters Patent); s 1… …s Crown's power of assent to bills formerly expressly deleg… …elegated by implication; but compare *Simpson v A-G* [1955] … …18 of the Constitution Act 1986 (enacting the powers of … Parliament formerly expressly delegated under the Letters Pa…

Bate's Case (1606) 2 St Tr 371. Parts of the judgments are re… …32, at 78-79, 93-94.

Darnel's Case (1627) 3 St Tr 1 (*Case of the Five Knights*). See Ke…

R v Hampden (1637) 3 St Tr 825 (*Case of Ship-Money*). See Keir…

The Royal Powers Act 1983 re-enacted the 1953 provisions and provided for a Regent to perform the royal functions of the Sovereign in right of New Zealand where United Kingdom law authorises a Regent to act on behalf of the Sovereign. The Constitution Act 1986 repealed the Royal Powers Act 1983 but carried over the provisions authorising the exercise of royal powers by the Sovereign and a Regent.[38]

19.6 Seal of New Zealand

It was fitting that the Queen in her silver jubilee celebrations should assent to the Seal of New Zealand Act 1977 and proclaim it without affixing a seal — the existing ones not being appropriate in her realm of the United Kingdom.[39] This further reflected New Zealand's growing constitutional self-image. The Act elevated New Zealand's national sovereignty by authorising the establishment of a seal to be known as the Seal of New Zealand. Until then certain state instruments relating to New Zealand and its territories (Niue, Tokelau and the Cook Islands) were, in some cases, sealed with the Public Seal of New Zealand and, in other cases, with the Great Seal of the United Kingdom or one of the lesser United Kingdom seals. Under the Seal of New Zealand Act 1977 instruments issued by the Sovereign or the Governor-General on ministerial or conciliar advice must be sealed with the one official seal — the Seal of New Zealand. The Seal of New Zealand Proclamation 1977 adopted the seal bearing the design and style set forth in the Queen's warrant dated 29 June 1959.[40] Judicial notice is to be taken of the Seal,[41] which is held in the custody of the Governor-General.[42] The affixing of the Seal is a matter of form rather than substance. Section 5(1) provides that no instrument shall be invalid by reason of the Seal not having been affixed, except where statute expressly requires it.

It has been queried whether the Seal of New Zealand Act 1977 imported into law the conventional rule of ministerial responsibility and participation.[43] However, this would be constitutional change by a side wind. Section 3(1) authorises use of the Seal on any instrument that is made by the Sovereign or the Governor-General "on the advice of the Minister of Her Majesty's Government in New Zealand or on the advice and with the consent of the Executive Council of New Zealand". The statutory reference to ministerial or conciliar advice is merely recognition that, by convention, the Sovereign or Governor-General acts on advice when issuing instruments to be affixed with the seal.

38 Constitution Act 1986, ss 3 and 4.

39 Section 2(3) of the Seal of New Zealand Act 1977 removed the need to seal the Queen's proclamation establishing the seal.

40 Seal of New Zealand Proclamation 1977 (SR 1977/29). The seal contains the New Zealand Coat of Arms surrounded by the inscription "New Zealand · Elizabeth the Second · Queen ".

41 Seal of New Zealand Act 1977, s 6.

42 Seal of New Zealand Act 1977, s 4.

43 F M Brookfield, "No nodding automaton: A study of the Governor-General's powers and functions" [1978] NZLJ 491 at 497.