The Independence of Canada

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THE INDEPENDENCE OF CANADA

Brian Slattery*

Sudden revolutions strike men’s imaginations. Their history is written, and their secret springs are uncovered. Changes are overlooked when they come about imperceptibly, by a long series of scarcely noticed steps.


There is much to be said for stealth and subtlety as methods of revolution, if revolution there must be.

Latham, The Law and the Commonwealth (1949), at 534.

INTRODUCTION

Canada is an independent state and has been for many years. Its sovereign status has long been acknowledged by the international community and is accepted by courts both in Canada and the United Kingdom.¹ For this reason alone, the recent constitutional manoeuvres, culminating in the enactment of the Constitution Act, 1982² by the British Parliament, and its proclamation by the Queen in

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¹ See infra, notes 66 and 68.

² The Constitution Act, 1982 (hereinafter the “Constitution Act”) is set out in English and French in Schedule B of the Canada Act 1982, c. 11 (U.K.) (hereinafter the “Canada Act”), which is the formal vehicle for enactment. The Constitution Act was brought into force by a Proclamation issued by the Queen on 17 April 1982 under section 58 of the Act; Canada Gazette (Part I), Vol. 116, No. 17, at 2927-28.
Ottawa, must strike even the most sanguine observer as a somewhat byzantine series of events.

It is curious enough that an ostensibly sovereign state should employ the legislature of another sovereign state to secure for itself a new constitution. But, superficially at least, it seems nothing short of bizarre that a sovereign state should consider itself constitutionally bound to act in this way. The mind boggles slightly. Can Canada really be independent when its new Constitution was dutifully despatched for firing in the old Imperial ovens? Where does Westminster derive its authority to legislate for Canada in the year 1982? Does it retain that authority even after patriation?

These are puzzling questions. The Constitution Act and its attendant documents make some attempt to deal with them, but serve only to heighten the seeming contradictions. The Royal Proclamation bringing the Constitution into effect is quick to point out that Canada already holds the status of an independent state,\(^3\) and so dampens the widely-expressed notion that the ceremony accompanying its signature was the occasion of Canada's formal independence. The Proclamation also notes that the Constitution was enacted by Westminster at the request of Canada, thus emphasizing the document's essentially domestic roots. At the same time, the Proclamation states that a major purpose of the new legislation is to allow Canadians to amend their Constitution in Canada, without having to resort to the United Kingdom Parliament, and implies that the previous absence of this power was not wholly in accord with Canada's independent position. As such, the document illustrates the essential paradox that an independent state should lack the legal wherewithal to enact its own constitution, and be forced to petition a foreign state to supply the deficiency.

Similar puzzles occur in the text of the Constitution Act itself. Section 52 states that the "Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". It goes on to provide that the Constitution includes the Constitution Act itself, and its parent statute, the Canada Act 1982, along with a series of Acts and orders listed in a Schedule, as well as any amendments to the above. The scheduled Acts and orders comprise most of Canada's basic constitutional documents in slightly amended form, including the British North America Acts, 1867 to 1975 (ren-

\(^3\) "And Whereas it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects." On this and other points, the Proclamation follows the wording of the Resolution respecting the Constitution adopted by the Canadian House of Commons on 2 December 1981 and by the Senate on 8 December 1981.
amended the Constitution Acts, 1867 to 1975). Significantly, this catalogue of the contents of the Constitution does not purport to be exhaustive. The section states only that the Constitution "includes" the Acts and orders referred to, leaving open the possibility that other sources might exist, in particular the common law.

The Constitution Act, then, attributes to itself and to other portions of the Constitution a position of legal paramountcy, so as to override any conflicting laws, past or future. Where does it derive the capacity to do this? The affirmation itself of supremacy cannot achieve the desired result any more than a man in his cups can proclaim himself King of Brazil. The matter boils down to the power of the enacting authority.

We are referred back to the parent statute, the Canada Act 1982. This provides in section 1 that the Constitution Act, as set out in a Schedule, "is hereby enacted for and shall have the force of law in Canada...". Taken together with the provisions of the Constitution Act, this section seemingly constitutes an unvarnished assertion by the United Kingdom Parliament of the power to enact for Canada legislation that is not only binding here, but also paramount to ordinary Canadian law. The first query is where Westminster obtained this authority. The second query is whether it still holds it. The Canada Act 1982 anticipates the latter point. Section 2 provides: "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law." This brave assurance only reinforces our doubt on the matter. The doctrine that Westminster cannot bind its successors has long featured in the constitutional catechisms of Commonwealth lawyers. A provision of this kind can only be greeted with raised eyebrows. How can future British Parliaments be barred from passing for Canada statutes holding an authority equivalent to that of the Constitution Act itself? If the Constitution Act can bind Canada, why cannot subsequent British Acts?

Underlying these questions are a number of fundamental issues going to the foundations of the Canadian legal system. Although often raised in one form or another, they have yet to be considered in any systematic way. Broadly speaking, these issues concern the independence of Canada and the autonomy of its legal system, the basic rules underpinning Canadian law, and the extent of the British Parliament's power to legislate for Canada. I propose to explore these matters here.

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4 For convenience of reference, the original names of these Acts are used throughout this paper.
I. THE COLONIZATION OF CANADA

The British Crown acquired the territories that now make up Canada in piecemeal fashion over several centuries. Britain's main European rival for the area, France, was eliminated in a series of wars marked by the Treaty of Utrecht (1713) and the Treaty of Paris (1763). Control over the indigenous peoples was gained by a gradual process continuing until the turn of the last century, sometimes involving armed conflict, but more usually the peaceful assertion of authority backed by overwhelming might. It should be noted that the Crown's factual acquisition of sovereignty over native peoples did not in itself, and absent further acts, nullify their rights to traditional lands or abrogate entirely their customary laws and internal governmental structures.

For many areas, the process of acquisition involved the step-by-step consolidation of sweeping territorial claims broadcast at an early stage. The protracted nature of the process often makes it difficult to say exactly when a given sector of Canada fell under British dominion. The area now forming British Columbia, for example, came within the paper limits of the famous sea-to-sea Charter issued for Virginia in 1609. The west coast was also claimed at one time by the Hudson's Bay Company under the Royal Charter of 1670 for Rupert's Land. Although Sir Francis Drake appears to have sighted Vancouver Island in 1579, during his extraordinary circumnavigation of the globe, the coast of British Columbia was not explored by British agents until the voyages of Captain Cook and Captain Vancouver some two hundred years later. The international boundaries of the region were only delin-

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5 For a detailed review of these events, see Slattery, The Land Rights of Indigenous Canadian Peoples As Affected by the Crown’s Acquisition of Their Territories (D. Phil. Thesis, Oxford University, 1979), reprinted by the University of Saskatchewan Native Law Centre (1979).


7 The genesis of European claims to western Canada is examined in Slattery, supra, note 5, at 175-90, 330-31.
eated in 1825 and 1846 by treaties with Russia and the United States, and significant European settlement did not occur until the latter half of the century. The Indian inhabitants of British Columbia acquiesced in the assertion of British rule only with reluctance, and in most areas never parted by treaty with their ancestral lands.\footnote{See Fisher, Contact and Conflict; Indian European Relations in British Columbia, 1774-1890 (1977).}


The British Parliament rarely intervened directly in the internal affairs of American colonies prior to the 1760s. The Crown was the main actor in this sphere, negotiating treaties, granting Charters, issuing Governors’ Commissions and Instructions, appointing colonial officials in both the executive and judicial branches, and maintaining a complex web of relations with the native peoples. The Crown acted
under the royal prerogative, the residual power held by the Crown in its own right, which was rather more extensive in the colonies than in Great Britain itself. No Act of Parliament was necessary for a colony to be acquired or granted a constitution, and very few Acts were passed to deal with such matters prior to the era of the American Revolution. Colonies were normally acquired and supplied with constitutions by means of prerogative instruments.\textsuperscript{12}

Thus, the Crown secured the surrender of French claims to Acadia at the Treaty of Utrecht in 1713, and followed this up by a series of treaties with the Indian inhabitants, initiated by the Treaty of Boston of 1725. A constitution was supplied for the province in the form of Royal Commissions and Instructions issued to the Governor and, under authority of these documents, courts were established and a representative assembly was eventually called.\textsuperscript{13} On a similar pattern, France relinquished its claims to Canada and Isle St. Jean in 1763 at the Treaty of Paris and, in October of that year, the Crown issued a Proclamation that described the boundaries of the new colony of Quebec and announced its constitution. The Proclamation also contained detailed provisions guaranteeing Indian peoples in their lands throughout British territories in North America.\textsuperscript{14}

One of the rare occasions, prior to the Revolution, when Parliament undertook to provide an American colony with a constitution was in 1774 with the passage of the \textit{Quebec Act}.\textsuperscript{15} Once supplied with a parliamentary constitution, Quebec never reverted to the more usual prerogative path. The Act of 1774 was followed by the \textit{Constitutional Act} of 1791,\textsuperscript{16} under which the province was split into Upper and Lower Canada, by the \textit{Union Act} of 1840,\textsuperscript{17} and ultimately the \textit{British North America Act, 1867}.\textsuperscript{18}

It should be noted that the same progress from prerogative to parliamentary constitutions did not occur in all Canadian colonies. Nova Scotia, Prince Edward Island and New Brunswick all entered Confederation with constitutions laid down by prerogative instruments, and

\textsuperscript{12} See generally Keith, \textit{Constitutional History of the First British Empire} (1930), and Labaree, \textit{Royal Government in America} (1930).
\textsuperscript{15} 14 Geo. III, c. 83 (Imp.).
\textsuperscript{16} 31 Geo. III, c. 31 (Imp.).
\textsuperscript{17} 3 & 4 Vict., c. 35 (Imp.).
\textsuperscript{18} 30 & 31 Vict., c. 3 (Imp.) (hereinafter the "\textit{British North America Act}").
Rupert’s Land was governed under a Royal Charter until its transfer to Canada in 1870.\(^{19}\)

To recapitulate, Canadian territories were acquired by Great Britain largely by virtue of military power, whether manifested in outright conquest or simple intimidation. The Crown gradually extended its power over the country, ousting European rivals and bending indigenous polities to its rule, thereby bearing witness to the dictum of Sir John Fortescue that, “amongst nearly all peoples, realms have come into being by usurpation. . . .”\(^{20}\)

II. COLONIAL LAW

The courts established by the Crown in its Canadian domains treated the issue of British sovereignty as a matter of state lying beyond their purview, so that a judge merely deferred to the Crown’s will as manifested in its official acts.\(^{21}\) Nevertheless, the question of the channels through which sovereignty was to be exercised, and the related question of what laws were in force in the colony, were viewed by the judiciary as matters of law that it might properly decide for itself. That is to say, while the courts acquiesced in the Crown’s will so far as the actual fact of acquisition was concerned, they maintained that, once the acquisition was complete, the exercise of political power in the colony was subject to law. The location and limits of that power were governed by rules articulated and administered by the judiciary.\(^{22}\)

Here the courts drew upon a body of legal principles and practice applying to the Crown’s overseas possessions, known as “colonial

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\(^{19}\) Read, supra, note 13; O’Connor, Report to the Speaker of the Senate by the Parliamentary Counsel (1939), Annex I, at 6-10; MacKinnon, The Government of Prince Edward Island (1951), at 3-140; Beck, supra, note 13, at 3-12.

\(^{20}\) Fortescue, De Laudibus Legum Angliae (c. 1470), ch. 12, quoted in Finnis, Natural Law and Natural Rights (1980), at 251.

\(^{21}\) See, e.g., R. v. Baker (1828), 1 N.B.R. 211 (S.C.), and R. v. Hannawell (1881), 1 N.B.R. 324 (S.C.), as well as the authorities in note 9, supra.

law.”23 These principles were often generated by opinions given by the Crown law officers on colonial matters and by official practice influenced by those opinions.24 In adopting or reformulating these principles, or on occasion rejecting them in favour of others, British and colonial courts pruned and brought to order the luxuriant growth of a garden planted by other hands. In this area at least, it would not be a great exaggeration to say that the courts superintended the development of the common law, but did not create it themselves.25

Colonial law provided the basic constitutional framework for the Empire and its constituent parts. It designated potential or actual sources of authority in a colony, whether executive, legislative or judicial. It also set out the presumptive rights of the local inhabitants in certain matters, and identified the laws that governed them.

Under colonial law, British colonies were classified as either “settled” or “conquered,” depending on their mode of acquisition.26 As regards “conquered” colonies (which included territories gained by cession), it was held that the Crown might legislate there under the prerogative alone and apart from Parliament, by contrast with the position in Britain where the Crown could not legislate except through Parliament. This exceptional power was forfeited once the Crown summoned a representative legislature for the colony, unless the power was explicitly reserved.27 In conquests, the local laws obtaining at the time of acquisition were held to remain in force, unless they were immoral or inconsistent with the transfer of sovereignty, or were subsequently modified by competent authority.28 This rule, which

23 The standard modern text on the subject is Roberts-Wray, supra, note 9. For a useful older work, see Clark, A Summary of Colonial Law (1834).
24 Collections of these opinions are found in Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence, 2 vols. (1814); Forsyth, Cases and Opinions on Constitutional Law (1869); O'Connell and Riordan, Opinions on Imperial Constitutional Law (1971).
25 “The system of Imperial Constitutional Law was not developed in the Courts so much as in the Law Officers' Opinions. It was the practice that evolved out of these Opinions which eventually influenced the Courts, who followed, but did not invent, doctrines such as that of Colonial legislative territoriality”; O’Connell and Riordan, supra, note 24, at vi. Compare the ideas on the evolution of the common law expressed by Simpson, “The Common Law and Legal Theory”, in Simpson (ed.), Oxford Essays in Jurisprudence (Second Series) (1973), at 77-99.
26 See generally Roberts-Wray, supra, note 9, at 98-116, 138-66. The genesis of the distinction is traced in Slattery, supra, note 5, at 10-44.
28 See Calvin's Case (1608), 7 Co. Rep. 1a, at 17a-17b, 77 E.R. 377; Blankard v. Galdy (1693), Holt 341, 90 E.R. 1089; 2 Salk. 411, 91 E.R. 356; 4 Mod. 222, 87 E.R. 359; Comb. 228., 90 E.R. 445 (K.B.); Privy Council Memorandum (c. 1722), 2 P. Wms. 75, 24 E.R. 646 (P.C.); Campbell v. Hall, supra, note 22; Blackstone, Commentaries on the
ensured that the regime of private law and rights was disturbed as little as possible by the change of sovereigns, can be described broadly as a principle of continuity. We shall meet a similar principle later in discussing the effect of Canada’s independence.

Colonies founded by British subjects settling in uninhabited territories, “settled colonies,” stood in a different position. The seeds of English law were held to cling, as it were, to the clothes of emigrating settlers and to take root in the new lands. From the rule that English law prevailed in a settled colony, it was only a short step to the proposition that the Crown had no prerogative power to legislate there. Did not the settlers enjoy all the rights of Englishmen, including freedom from arbitrary Crown rule?

In both settlements and conquests, the authority of the Imperial Parliament was held to be as extensive as in Great Britain, that is, under the standard view, without legal limits. This rule was not altogether consistent with the “rights of Englishmen” doctrine, as the fathers of the American Revolution did not tire of insisting. How could an Englishman submit to taxes imposed by a Parliament in which he was not represented? If this view carried the day on the fields of Lexington and Concord, it did not win the approval of the courts in Britain, which were steadfast in their support of Parliament.

As initially formulated, the rule regarding settled colonies was confined to settlements in wholly uninhabited territories. Had this narrow version been strictly maintained, settled colonies would have been restricted to Bermuda, the Falklands and several less salubrious outposts of empire. The continental American colonies would not have qualified, for they had substantial local populations when first settled by Englishmen. Indeed, there was a respectable line of authority running from Chief Justice Holt to Blackstone that maintained that the American colonies were conquests.

However, from an early stage, most legal authorities employed the

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29 See Blankard v. Galdy, supra, note 28; Privy Council Memorandum, supra, note 28; Blackstone, supra, note 28.

30 See the submissions of Shower in Dutton v. Howell (1693), Show. 24, at 31-32, 1 E.R. 17 (H.L.); Jennings v. Hunt (1820), 1 Newf. L.R. 220, at 225 (S.C.); the opinion of the Crown law officers, Shepherd and Gifford, dated 15 February 1819, in O’Connell and Riordan, supra, note 24, at 4-5; Killey v. Carson (1843), 4 Moo. P.C.C. 63, at 84-85, 13 E.R. 225 (P.C.); Sammut v. Strickland, supra, note 27, at 701; Clark, supra, note 23, at 7-8; Forsyth, supra, note 24, at 20.

31 See discussion and authorities below in Part V.

concept of a settled colony in a flexible manner, holding it applicable to situations rather different from the simple case originally envisaged. It was thought that a colony gained by conquest or cession might assume the characteristics of a settled colony through the departure or expulsion of the original inhabitants and an influx of English settlers.\textsuperscript{33} The concept was also extended to settlements of British subjects in territories with a native population, where the local laws and customs were deemed “barbarous,” or “unchristian,” or at any rate inappropriate for the needs of the settler communities.\textsuperscript{34} This was the general approach taken in the North American colonies (with the exception of Quebec), so that the original settlers were held to have carried English law with them.\textsuperscript{35}

If this was a satisfactory solution for the settlers, it posed problems as regards native Americans. Strictly interpreted, the doctrine would hold that Indians and Inuit were stripped of their ancient laws and customs at the instant of settlement, and subjected to the laws of an alien people sojourning on their shores. Although some judges have spoken as if this happened, a view more consonant with history and common sense has been adopted in American and some Canadian courts.\textsuperscript{36} Under this view, English law applied initially only in the settler communities, so that the indigenous peoples were not at first disturbed in their customs. Over time, this position was modified by legislation, but not necessarily to the complete exclusion of native laws. The American colonies had a “mixed” aspect, with settlers benefiting from principles applying in settled colonies, and native peoples initially enjoying the principle of continuity associated with conquests.

\textsuperscript{33} See Lord Mansfield’s remarks regarding Jamaica in Campbell v. Hall, supra, note 22, at 211-12.


\textsuperscript{35} See the opinion delivered in 1720 by Richard West, Counsel to the Board of Trade, regarding the American plantations, in Chalmers, supra, note 24, Vol. II, at 202, 208-10, and the authorities referred to in Smith, “The English Criminal Law in Early America”, in Smith and Barnes, The English Legal System: Carryover to the Colonies (1975), at 15-16, 21-22, 45. See also Pownall, The Administration of the Colonies (2nd ed. 1765), at 72-74; Smith, The History of the Province of New-York (1972), Vol. I, at 259-60 (the first volume of this work was originally published in 1757).

III. THE NATURE AND SOURCES OF COLONIAL LAW

Colonial law provided basic rules for assessing the validity of laws in a colony, "rules of validity" for short. It also furnished rules identifying the persons or bodies competent to legislate there, what may be called "rules of change."37 Rules of change were closely related to rules of validity, for when legislation was passed in accordance with a rule of the former sort, it would be binding under a corresponding rule of validity.

As we have seen, colonial law harboured a number of distinct rules of validity. It specified that Crown legislation in a conquest was valid, that Acts of Parliament extending to a colony took force there, that statutes passed by a local assembly were binding, that English common law applied in settled colonies, and so on. Certain rules of validity were ultimate; they did not depend on other rules for either their content or their own validity. Thus, the rule allowing for Crown legislation in a conquered colony did not flow from the rules recognizing Acts of Parliament, nor was a statute necessary to validate Crown legislation. Nevertheless, a rule of validity, although ultimate in this sense, might be subordinate to another rule of validity. Where a law was valid under one rule but invalid by another, one of the two would take precedence. Thus, an otherwise valid law enacted by the Crown in a conquest would fall if it conflicted with an Act of Parliament extending there. The rule recognizing the binding force of Imperial statutes took precedence over that validating Crown Acts.38

What was the nature of the ultimate rules of validity in colonial law? An initially plausible answer is provided by the English legal thinker, H.L.A. Hart. Hart argues that an ultimate rule of validity (what he terms a "rule of recognition") exists in a legal system simply as a matter of fact, demonstrated by the way in which courts or other officials or private persons use it to identify rules of law.39 An ultimate rule of validity cannot be said to be legally valid or invalid. To assert that a rule is valid is to maintain that it satisfies criteria provided by a rule of validity. The statement that an ultimate rule of validity is valid involves an internal contradiction. It implies that there is some further criterion under which the rule can be tested, in which case the rule is not ultimate. The same difficulty would arise as regards the further

37 This is an adaption of the terminology used by H.L.A. Hart in The Concept of Law (1961), esp. at 92-94. The following account is indebted to his ideas, if it also departs from them in several major respects.
38 Compare id., at 98, 102-04.
39 Id., at 98, 105-07, 245.
criterion, and so on in an endless chain. It follows that an ultimate rule of recognition "can neither be valid nor invalid but is simply accepted as appropriate for use. . . ." 40

Attractive as this theory appears, it breaks down in practice. While it is true that courts sometimes employ rules of validity in deciding whether or not to accept purported rules of law, they also use quite different methods; courts do not necessarily resort to rules of validity. Secondly, the manner in which lawyers and judges have handled questions about the ultimate rules of validity in colonial law suggests very strongly that these questions are viewed as matters of law, not matters of fact.

To take the first objection, if one considers the way in which a British or Commonwealth court characteristically determines the existence of a rule of law that is not derived from statute or binding precedent — that is, if one considers how a court formulates for the first time a rule of common law — it becomes clear that it does not use any criterion so simple or definite as the phrase "rule of recognition" suggests. A survey of common law decisions reveals a rich array of references to public policy, justice, morality, practicality, reasonableness, and necessity, to standard community practices and expectations, social statistics, and sociological observations, to academic legal writings, legal opinions, foreign judgments, and state practice, to related areas of the law, legal maxims, and fundamental legal principles, to the works of philosophers, economists, historians, political scientists and even theologians — in sum, to a broad range of matters such as suggest themselves to any judge of learning and experience. To say that, in drawing upon these and other sources, a court uses definite criteria of validity found in a rule of recognition either seriously misrepresents the process or so blunts the concept of a "rule of recognition" as to render it virtually useless as a tool of analysis. The concern of a court in such cases is not so much to determine which rule is valid, in the formal sense, as to determine which rule is right.

The importance of this point for our purposes is this. If British-style courts characteristically decide common law questions of first impression without reference to rules of validity, and decide them by a complex process involving the reasoned assessment of a variety of factors in the light of accepted values or objectives, this suggests that questions respecting certain ultimate rules of validity are resolved in essentially the same manner. Observation of how lawyers and courts have actually proceeded in arguing and deciding basic issues of colonial law tends to confirm this.
The case of *Campbell v. Hall*¹⁴¹ provides one example among many. The great question before the Court concerned the validity of a Crown Act imposing a tax on a colony without parliamentary warrant. In Hart's terminology, the case concerned the rule of recognition governing the validity of Crown legislation in British colonies. Lord Mansfield held that the Crown might legislate for a conquered colony, but that this power was forfeited once the right to call a local assembly was granted without reserve. This principle is clearly an "ultimate" rule in Hart's sense, in that its validity is not determined by reference to some more basic rule. Yet the question is treated by court and counsel alike as one of law and not of fact, meriting extensive legal argumentation pro and con, and resoluble on essentially the same basis as many a humble issue of common law.

To summarize, there were a number of common law rules of validity and change that underpinned the legal systems of Canadian colonies during the British regime. These rules functioned as ultimate principles; they were not logically deducible from one another or from more general legal principles, nor did they owe their status to other rules of validity. This does not mean that lawyers and judges determined these rules in an arbitrary fashion. Rather, they employed traditional common law techniques, formulating the rules in the light of a diversity of sources, including judicial dicta, law officers' opinions, necessity, convenience, reasonableness and justice.

The application of these rules to Canada, of course, depended on the factual subordination of Canadian legal and political institutions to the British Crown. Here, in a sense, Hart's theory comes into play. Canadian courts and officials recognized that allegiance was owed to the reigning monarch of Great Britain as sovereign of Canada. This was viewed ultimately as a matter of state rather than law. But courts maintained that the channels through which power might be exercised were strictly regulated by the common law.

### IV. THE DIVERSITY OF COLONIAL LAW

The laws and political institutions supported by colonial law did not need to be English in origin. For example, it has been held that, under the principle of continuity, French law remained partially in force in Quebec even prior to the *Quebec Act 1774*,¹⁴² and that native customary

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¹⁴¹ (1774), Lofft 655, 98 E.R. 848; 1 Cowp. 204, 98 E.R. 1045, 20 St. Tr. 239 (K.B.). Note particularly the elaborate submissions of counsel reported in Lofft. The case was argued in court four distinct times before judgment was rendered: 1 Cowp. 204.

¹⁴² 14 Geo. III, c. 83 (Imp.) (hereinafter the "Quebec Act"). The question is complicated by the terms of the Royal Proclamation of 7 October 1763, which, superficially at
law survived in Rupert's Land and the old North-West.\textsuperscript{43} There is also some authority for the view that colonial law allowed for the continued existence of traditional native political structures under the shelter of the Crown's overall sovereignty.\textsuperscript{44}

One must distinguish, therefore, between the historical source of a law or institution and the legal basis for its validity at any given time. The fact that certain ordinances of the French King were accepted as valid in Quebec after the conquest did not imply any continuing power of the French Crown over the colony. Rather, the validity of these ordinances rested, after 1774, upon the Quebec Act's recognition of the old law of Canada in private matters. That Act, of course, emanated from the Imperial Parliament, whose authority over Quebec derived jointly from a rule of colonial law recognizing the supremacy of Westminster and from the factual conquest and cession of New France.

The Quebec Act confirmed not only substantive French rules, but also French rules of validity. Thus, the Privy Council has held that certain French ordinances never came into force in Canada because they were not registered by the Conseil Souverain at Quebec, as required under old French law.\textsuperscript{45} Thus a rule of validity forming part of British colonial law validated an Imperial statute (the Quebec Act), which recognized certain rules of validity embodied in French law, which in turn governed the acceptance (or non-acceptance) of ordinances of the French Crown in Quebec.

In theory, perhaps, there was a single set of rules applicable to colonial constitutions throughout the Empire. The system of appeals from

\textsuperscript{43} See Connolly v. Woolrich, supra, note 6; R. v. Nan-e-quis-a Ka, supra, note 36; Re Noah Estate, supra, note 36.

\textsuperscript{44} See, e.g., Worcester v. State of Georgia, supra, note 6, and Connolly v. Woolrich, supra, note 6. In the latter case, Justice Monk stated (11 L.C. Jur. 197, at 204-05; see also at 207):

Now, as I said before, even admitting, for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France, and that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated — that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not — that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives.

local courts to the Privy Council was a strong stimulus for uniformity in this area. But the relatively undeveloped nature of colonial law, the heterogeneity of the Empire, and the fact that many local cases never reached the Privy Council, allowed for considerable diversity of views from colony to colony, not only as to the precise application of basic principles, but also regarding their essential character. Some Canadian colonies developed rules of validity differing substantially from those accepted elsewhere in the Empire. The reception of English law is a case in point. The standard rule on the subject, enunciated as early as 1720 in an opinion of Richard West,\textsuperscript{46} was that English common law and statutes were received in a settled colony as of the time of settlement, so that statutes subsequently passed by Westminster that did not explicitly extend to the colony did not come into force there. The "cut-off" date was the time of settlement. A different view has received judicial approval in Newfoundland, and has been extended to Nova Scotia, namely, that the cut-off date was not the time of first settlement but the date when a local assembly was first summoned.\textsuperscript{47} Still another viewpoint has surfaced in New Brunswick, where some authorities have held the cut-off date to be the year of the Restoration (1660), on the premise that subsequently the Imperial Parliament specifically mentioned the colonies when it intended its Acts to apply there.\textsuperscript{48}

These views may appear, from one perspective, as mere vagaries of provincialism. But they also illustrate a more fundamental process at work — the tendency of lawyers and judges in a common law system to generate rules considered appropriate to the surrounding social and political milieu. If Canadian courts had sufficient spark to articulate unique rules of validity during colonial times, it should hardly be surprising that they continued doing so after Canada became independent.

We have seen, then, that British sovereignty in Canadian territories was acquired over a period of several centuries in a variety of ways. From the time of acquisition, British colonies in Canada were governed by constitutional principles developed by lawyers and

\textsuperscript{46} Supra, note 35, at 202. See also, for example, Blackstone, supra, note 28 (7th ed.), Vol. I, at 107, and Roberts-Wray, supra, note 9, at 540.


courts. These principles, which formed part of colonial law, provided the ultimate legal basis (as distinct from the factual basis or, alternatively, the historical sources) for the laws and governmental institutions of Canadian colonies.

The application of colonial law depended upon the continuing factual subordination of Canada to British rule, as recognized by Canadian courts. Once that state of subordination came to an end, colonial law as such ceased to apply to Canada.

V. THE SUPREMACY OF WESTMINSTER AND COLONIAL INDEPENDENCE

To understand the process by which a colony becomes independent, it is necessary to examine more closely a basic principle of British colonial law, which made an early appearance, but only assumed its final shape during the controversy leading up to the American Revolution. The rule states that the Imperial Parliament may legislate for British colonies overseas in any matters whatsoever; such legislation is not only binding in the colonies but possesses overriding force there, so as to nullify any existing or future local laws that conflict with it.

Various facets of this principle have received expression in Imperial statutes. As early as 1696, it was provided that any laws in force in the American colonies that were repugnant to the terms of British statutes extending there were null and void. The Declaratory Act of 1766, passed in response to American protests against British taxation, roundly declares that the colonies in America "have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of Great Britain" and that the Parliament at Westminster had full power to make laws binding on the American colonies in all cases whatsoever. The same concepts received expression in the familiar Colonial Laws Validity Act, 1865,

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49 For historical background, see Schuyler, Parliament and the British Empire (1929); Keith, supra, note 12, at 3-9, 342-85; McIlwain, The American Revolution: A Constitutional Interpretation (1923).

50 An Act for preventing frauds and regulating abuses in the plantation trade, 7 & 8 Wm. III, c. 22, s. 9 (Imp.).

51 An Act for the better securing the dependency of his Majesty's dominions in America upon the crown and parliament of Great Britain, 6 Geo. III, c. 12 (Imp.). An early precedent for this Act can be seen in An Act for the better securing the dependency of the kingdom of Ireland upon the crown of Great Britain, (1719) 6 Geo. I, c. 5 (Imp.). The Act regarding America was later qualified by An Act for removing all doubts and apprehensions concerning taxation by the parliament of Great Britain in any of the colonies ... in North America and the West Indies ..., (1778) 18 Geo. III, c. 12 (Imp.).

52 28-29 Vict., c. 63, s. 2 (Imp.) (hereinafter the "Colonial Laws Validity Act"). See also An Act to regulate the trade of the British possessions abroad, (1833) 3 & 4 Wm. IV, c. 59, s. 56 (Imp.).
states that a colonial law in conflict with a British Act extending to a colony is void to the extent of the repugnancy.

Despite the existence of these statutes, the rule that they embody rests ultimately on the common law. A moment's reflection shows why. A statute purporting to authorize Parliament to pass laws that bind the colonies (or confirming its power to do so) would not itself be binding in the colonies if the common law did not already make it so; otherwise colonial courts could disregard the statute. Similarly, a British statute affirming that Imperial Acts are paramount to local legislation would itself be repealable by local Act were it not already paramount under the common law.\(^{53}\)

It was reasonably clear by the close of the eighteenth century that the common law endorsed the claims of Parliament respecting the colonies. Lord Mansfield stated as much in *Campbell v. Hall*,\(^{54}\) where he affirmed, in effect, that an overseas dominion held by the King in right of his Crown was necessarily subject to the Parliament of Great Britain. Blackstone had earlier expounded the same rule in his classic *Commentaries on The Laws of England*,\(^{55}\) published in 1765. It has since been applied in numerous cases decided by British and colonial courts.

The rule recognizing the supremacy of the Imperial Parliament, as we have seen, belongs to a branch of the common law that governs the relations between the United Kingdom and its colonies — 'colonial law.' Certain basic principles of British colonial law applied to a colony immediately upon its acquisition by the Crown, irrespective of whether the territory was settled or conquered, or whether the common law as a body was introduced there. The rule that Westminster was supreme became part of the laws of the various British colonies in America when they were acquired, and was inherited by the colony of Canada at Confederation.\(^{56}\)

It is important to note that there is nothing in the rule itself specifying which particular countries it applies to — no definitive list of terri-

\(^{53}\) Compare Roberts-Wray, *supra*, note 9, at 140: "where Parliament possesses legislative authority it requires no assertion; where Parliament has no power to make laws it could not, by making one, give itself the power." See generally Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957-58), 31 Aust. L.J. 240.

\(^{54}\) (1774), 1 Cowp. 204, at 208-09, 98 E.R. 1045. See also his earlier speech in the House of Lords; Keith, *supra* note 12, at 355-57.


\(^{56}\) As Lord Reid remarked in *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, at 722, [1968] 3 W.L.R. 1229, [1968] 3 All E.R. 561 (P.C.): "it has never been doubted that, when a colony is acquired or annexed, following on conquest or settlement, the Sovereignty of the United Kingdom Parliament extends to that colony, and its powers over that colony are the same as its powers in the United Kingdom."
tories subject to the Imperial Parliament. The rule is cast in general terms and refers broadly to the overseas possessions of the British Crown. The question whether a specific country falls within the scope of the rule depends upon whether, at a given time, it constitutes a British colony or possession. Likewise, the Colonial Laws Validity Act does not provide an exhaustive catalogue of countries to which it extends. Rather, it is drafted so as to apply, with a few stated exceptions, to all Her Majesty's possessions abroad that have a legislature. In short, the Act establishes a "floating" category, the content of which varies from time to time with fluctuations in the extent of the British Empire.

British colonies may be gained or lost in a variety of ways too numerous and complex to detail here. A few general observations will suffice. When a territory is officially and unequivocally claimed as a colony by the Crown, British courts perforce follow suit and acknowledge the binding force of colonial law and the supremacy of the Imperial Parliament as regards the territory. This holds true even if the country in question is not factually under British control, or if the Crown's claim violates international law. It can be seen that the local courts of the country claimed will not necessarily share the viewpoint of British courts. If the British government, emboldened by victory in the Falkland Islands, should lay claim to the ancient fief of Normandy, British courts might well feel compelled to participate in this bit of flim-flam, though they would no doubt employ every judicial stratagem at their disposal to avoid doing so. For their part, the courts of Normandy would be given the opportunity to express a quantity of healthy indignation, but would not otherwise be much exercised in disposing of the claim. The situation is, of course, quite different where the Crown has conquered or otherwise gained factual control of the territory claimed and set up its own courts there. In that case, as we have seen, the local courts so established will defer to the will of the Crown and recognize its claim to sovereignty as a matter of state.

The process may also operate in reverse. Where the British Crown, by Act of Parliament or other authoritative act, acknowledges that a former colony is now a sovereign and independent state, British courts will conform to this viewpoint and rule accordingly. The same result will be achieved in the courts of the former colony, though for slightly more complex reasons, to be examined later. On the other hand, if a colony successfully revolts against British rule, and yet the Crown is adamant in maintaining its claims there, British courts will uphold the

57 28-29 Vict. c. 63, s. 1 (Imp.).
58 See generally Roberts-Wray, supra, note 9, chs. 3, 4, 6.
59 Supra, notes 9 and 21.
claims and disregard the facts. What about the local courts? Assuming that they are still in operation, their attitudes may vary. They may decide to sustain Britain's title, and thereby incur the displeasure of the new rulers or, more likely, they will accede to the realities of power and recognize the new regime. In either case, their decision may well be based on a different and more complex set of criteria than that used in British courts.\footnote{See Eekelaar, "Principles of Revolutionary Legality", in Simpson (ed.), supra, note 25, at 22-43.}

the Crown acting alone. A Crown act under the prerogative will be ineffective to remove a colony permanently from the reach of Parliament. Thus, a former British colony holds its "independence," such as it is, only at the sufferance of Westminster, which might terminate it at will.

This reasoning has an attractive simplicity, which gives it considerable force. However, it involves two important confusions. First, the argument does not sufficiently distinguish the question of the abstract power of Westminster from the question of the status of a foreign country. Secondly, no differentiation is made between the positions in British law and local law.

To address the first point, it is often said that, in British law, the power of Parliament knows no limits, so that Westminster might, if it wished, prohibit public prayers in Mecca, or whistling in the streets of Oklahoma City. Whether it would be successful in practice is beside the point; under the standard theory, such regulations would be valid for all purposes of English law. Even if we assume that this is so, the reason is not altogether clear. It surely cannot be true that in the eyes of British courts Parliament holds sway over the entire globe, so that no other nation can be said to be truly sovereign and independent. To the contrary, it is beyond doubt that British law, for all its imperfections, concedes that such states as Saudi Arabia and the United States are fully independent. The problem is to reconcile this fact with the doctrine of parliamentary supremacy.

The true position would appear to be this. The British Parliament does not have the power under British law to legislate for independent states so as to alter their laws, not at least without their consent. To maintain that Westminster possesses such a power involves an internal contradiction. If Parliament holds the authority to impose laws on another country, that country cannot be fully independent, but must in some sense be subject to the British Crown. The assertion of parliamentary capacity to alter unilaterally the laws of another state necessarily implies a subordination of that state's legal system to Great Britain, a subordination inconsistent with full independence. So, if a country is completely independent of Britain, it cannot be subject to the compulsory authority of Westminster. The existence of a limitation on Westminster's powers in this area is a purely logical deduction from the existence of other independent states.

The question of the British Parliament's authority to legislate for other states as part of their law should not be confused with its ability to attach legal consequences in English law to the performance of certain acts in foreign countries. Westminster could, for example, render punishable in British courts activities carried on by its subjects in other states, without necessarily purporting to alter the laws of those
states or to interfere with their sovereign independence.\textsuperscript{63} Such legislation is very different in character from a British statute claiming to render acts performed in another state punishable in the courts of that other state.

This purely logical restriction on Parliament's power to impose laws on independent states is, however, rendered largely nugatory in practice by the operation of a distinct doctrine, considered earlier, whereby the Crown holds the power to determine conclusively the status of other countries for purposes of British law.\textsuperscript{64} Thus, where a United Kingdom statute clearly impinges on the sovereignty of another country, a British court cannot rule that the country affected is beyond the Crown's jurisdiction and strike the statute down. Rather, the Act will be taken as evidence of a Crown assertion of jurisdiction over the country, which is immune to judicial review. In a nutshell, while the common law does not recognize the power of Parliament to legislate unilaterally for other independent states, it admits the Crown's authority, in Parliament or otherwise, to determine finally which territories are subject to its jurisdiction.\textsuperscript{65} The law presumes that the Crown will observe its international obligations, but does not authorize British courts to enforce that responsibility.

The point for our purpose is that the Crown's power to decide the status of other countries in British law does not affect adversely its own capacity, in Parliament or otherwise, to confer independence upon a former colony. To the contrary, that ability stems from the more general power. The possibility that the Crown might in future lay claim once again to a former colony does not diminish that country's current independence in the eyes of British law any more than the chance that Britain might disinter a claim to Normandy compromises the position of that region as part of an independent France.

The argument that Parliament cannot confer genuine independence on a colony has a further weakness. It does not distinguish the position in British law from that obtaining in the law of the country concerned. It may be true that, if the Crown in Parliament revokes a grant of independence, this Act will be good in British law. But it does not follow that the revocation will take effect in the law of the former colony.

\textsuperscript{62} For authorities supporting this view, see, \textit{e.g.}, Forsyth, \textit{supra}, note 24, at 231-32, 238; \textit{Jefferys v. Boosey} (1854), 4 H.L. Cas. 815, at 926, 10 E.R. 681 (H.L.); \textit{MacLeod v. A.G. New South Wales}, [1891] A.C. 455, at 458-59 (P.C.).

\textsuperscript{63} For early examples see the \textit{Murders Abroad Act}, (1817) 57 Geo. III, c. 53 (Imp.), and the \textit{Merchant Shipping Act}, (1854) 17 & 18 Vict., c. 104, s. 267, amended by 18 & 19 Vict., c. 91, s. 21.

\textsuperscript{64} \textit{Supra}, notes 9 and 21, and see generally O'Connell, \textit{International Law} (2nd ed. 1970), at 114-19.

\textsuperscript{65} Compare Roberts-Wray, \textit{supra}, note 9, at 140-41; de Smith, \textit{supra}, note 61, at 73-74.
When a colony attains independence, it is released automatically from the application of colonial law for the future, in somewhat the same way that the attainment of maturity frees an individual from the legal regime governing juveniles. From the standpoint of the former colony, the principles of colonial law conferring autonomous powers on the British Crown and Parliament have no more force. They cannot validate acts performed subsequently by those institutions. The ultimate rules of validity of the country have changed.

VI. CANADIAN INDEPENDENCE

Canada attained independence by a process of accretion. Fragments of political power were detached from the crumbling banks of Imperial authority and swept downstream to more placid colonial shores. This factual shift in power, although achieved gradually and for the most part with Britain's acquiescence, resulted in a legal revolution, in the sense that it fundamentally altered the basis of Canadian law in a manner not envisaged by existing rules of change. The effects of erosion can match those of an earthquake.

The slowness and complexity of Canada's evolution have fostered differences of opinion as to when independence occurred. Nevertheless, a strong case can be made that it was achieved in the period between 1919 and 1931, extending from Canada's signature of the Peace Treaty to the enactment of the Statute of Westminster, 1931. The Supreme Court of Canada has recently adopted this view. If

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67 22 Geo. V, c. 4 (Imp.) (hereinafter the "Statute of Westminster").

Canada actually became a sovereign state during this period, the fact was not universally recognized at the time, and controversy about the matter persisted throughout the thirties. Canada's separate declaration of war in 1939 laid to rest one lingering doubt about Canada's autonomy, and the post-war abolition of civil appeals to the Privy Council removed another. By 1950, there could be little question that Canada was a fully sovereign state. One can quibble about the precise moment of day-break, but the matter becomes academic by high noon.

More important for our purposes than the exact date of Canada's independence is the manner in which it came about. By contrast with some other Commonwealth countries, Canada did not attain nationhood by reason of an Imperial statute or Crown Act. It gained autonomy as the result of a largely factual process, though one carrying important legal consequences. Independence was not conferred; it was achieved.

Some have surmised that Canadian independence rests on the Statute of Westminster. But, as we shall see shortly, the document cannot easily bear this weight. Although certain of the Act's terms arguably presume the independence of the Dominions covered, it would be difficult to contend, in the case of Canada, that full sovereignty flows from its provisions. The main reason is that the British North America Acts, 1867-1930, are excluded from the scope of the Act. The true position seems to be that our independence is founded on the factual assumption of sovereign powers by Canadian authorities and the accompanying withdrawal of British power in the period after World War I. Canada's independence is at root a matter of fact. Certain terms upon which independence was achieved, and some of its consequences, are set out in the Statute of Westminster. But the Act is not a complete glossary of those terms and consequences, nor is it the source of the fundamental legal principles underlying Canada's independent Constitution.

When Canada achieved sovereignty, there was a shift in the basic

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753, 11 Man. R. (2d) 1, 34 Nfld. & P.E.I.R. 1, 95 A.P.R. 1, [1981] 6 W.W.R. 1, 125 D.L.R. (3d) 1, at 44 (majority opinion/law), and at 66, 68, 78 (dissenting opinion/law) 39 N.R. 1 (subsequent references are to 125 D.L.R. (3d)) (hereinafter referred to as the "Constitutional Reference"); Madzimbamuto v. Lardner-Burke, supra, note 56, at 722, where Lord Reid, speaking for the majority, referred to the Statute of Westminster, 1931, as conferring "independence and Sovereignty on the six Dominions therein mentioned." For a remarkable (and obiter) throwback to views entertained in the 1930s, see R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta, supra, note 6, at 128, per Lord Denning M.R.

69 See text below following note 77.

70 This is not necessarily true of other Dominions covered by the Act.
norms supporting our legal system. During colonial times, Canadian laws and law-making bodies derived their authority ultimately from principles of colonial law. These principles specified the respective powers of the Imperial Parliament, the Crown and local legislatures, and spelled out their interrelationship. They also regulated the presumptive degree to which English laws were received and local laws retained, and other matters of this type. Colonial law as such ceased to have any force of its own in Canada after independence. It was replaced by a body of fundamental Canadian common law drawing inspiration and strength from the new-found autonomy of our legal system. This body of law provides the ultimate rules of validity and change for the system.\footnote{71}{Compare Hart, supra, note 37, at 116-18.}

Some of these rules have been explicitly stated by Canadian courts. Others are accepted in practice. But many are as yet inchoate, evolving slowly in the collective unconscious of judges and lawyers. The manner in which these principles coalesce has been graphically described by a distinguished judge:

> The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. They are abstract ideas usually arrived at by generalization and developed by analysis. But it is a mistake to regard such ideas as no more than philosophic theories supplied \textit{ex post facto} to explain a legal structure which has already been brought into existence by causes of some other and more practical nature. On the contrary, sometimes the conceptions, even though never analysed and completely understood, obsess the minds of the men who act upon them. Sometimes indeed they are but instinctive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action.\footnote{72}{Dixon, supra, note 61, at 590.}

We cannot hope to explore here in any complete way the common law foundations of the modern Canadian Constitution. That undertaking must be left to another occasion. Instead, I shall focus on several basic rules of validity and change particularly germane to our topic. The following is the first cast of the rod in a virgin stream.

**VII. THE PRINCIPLE OF CONTINUITY**

The transition of Canada from colony to independent state was, I suggest, regulated by a basic rule, what may be called the \textit{principle of continuity}. This principle has long been accepted in practice by Canadian courts, although it has never been explicitly formulated as such,
or fully grasped in all its ramifications. It holds that all laws, legal principles and legal institutions existing under the colonial regime remained valid after independence, with the exception of those inconsistent with the status of an independent state.\textsuperscript{73} The rule, it may be noted, parallels the principle of colonial law governing newly-conquered territories, whereby the old laws of the country remain in effect unless unconscionable or inconsistent with the change in sovereignty.

The principle of continuity applied not only to substantive laws directly affecting people's rights and duties, but also to the rules of validity and change that provided the constitutional framework for the Canadian legal system. Thus, rules of the latter kind that prevailed here during colonial times presumptively continued in force except where they were incompatible with Canada's new autonomy, in which case they were automatically superseded. This means that certain rules of colonial law played an on-going role even after independence. But if the historical source of these rules was colonial law, the legal basis for their continuing application was different — a principle of purely Canadian law providing for qualified continuity between the old regime and the new.

To examine in detail the way in which the principle of continuity worked out in practice would take us well beyond our present scope. Two matters only will be considered. First, I shall review the impact of Canadian independence upon Imperial statutes forming part of Canadian law, in particular the British North America Acts. I shall then discuss the question of Westminster's powers in Canada after independence.

VIII. THE STATUS OF IMPERIAL STATUTES

Under the principle of continuity, Imperial Acts extending to Canada at the time of independence presumptively continued in force, except to the extent that they embodied features incompatible with

\textsuperscript{73} The principle of continuity was effectively adopted by the Privy Council in \textit{Ibra\-lebbe v. R.}, supra, note 61, where the issue was whether the independence of Ceylon automatically terminated appeals to the Privy Council as being inconsistent with the status of a sovereign state. The Court stated at 922: "Independence as such did not, of course, alter the existing corpus of law in Ceylon. The only question, therefore, can be whether the appeal was affected by some necessary implication derived from the fact that its continuance would be in plain conflict with what was actually established." Compare the remarks by St. George Tucker, regarding the effects of the American Revolution on the laws prevailing in the Thirteen Colonies, in Blackstone, \textit{Commentaries on the Laws of England}, (Tucker ed. 1803), Vol. I, Part 1, Appendix, at 405-12. See also Finnis, "Revolutions and Continuity of Law", in Simpson (ed.), \textit{supra}, note 25.
Canadian autonomy. This meant that, while such statutes usually retained their validity as such, with some important exceptions to be discussed shortly, their paramount status generally ceased. Henceforth Imperial statutes were in principle amendable by an ordinary Act of a competent Canadian legislature, federal or provincial. For Imperial Acts to have retained their former paramount status would have been inconsistent in most cases with Canada’s new status and, in particular, with its position of juridical equality with the United Kingdom.

These concepts received recognition in sections 2 and 7(2) of the Statute of Westminster. Section 2(1) provides that the Colonial Laws Validity Act shall not apply to any law made in future by the Parliament of a “Dominion,” which is defined in section 1 to include Canada. The Colonial Laws Validity Act, it will be remembered, states that any local law of a colony that is repugnant to the terms of an Imperial statute extending there is void to the extent of the repugnancy. In this respect, the Act of 1865 merely confirms the existing common law rule. Indeed, as we have seen, the Act would not itself have been binding and paramount in the colonies had the common law not made it so.74

By merely repealing the Colonial Laws Validity Act in its application to the Dominions, the Statute of Westminster would have left intact the principle of colonial law ordaining the paramountcy of Imperial Acts. Section 2(2) attempts to deal with this difficulty. It provides that no law made in future by the Parliament of a Dominion shall be void on the ground that it is repugnant to the provisions of any existing or future Act of the British Parliament, and that a Dominion Parliament shall have the power to repeal or amend any such Act. Section 7(2) rounds out this provision by stating that, in the case of Canada, section 2 shall also apply to provincial laws and legislatures.

The evident aim of section 2 is to ensure that laws passed in future by Dominion Parliaments will not be struck down for inconsistency with British statutes, existing or future. This goal can be achieved as regards future British Acts only if the Dominions are permanently released from the bonds of colonial law, that is to say, gain their independence from Great Britain. The reason is simple. If the British Parliament should at some future time pass an Act explicitly repealing a Dominion statute enacted after 1931, the former Act would presumably be valid under British law and amend section 2 of the Statute of Westminster. Were the Dominion affected still subject to the tenets of colonial law, the British Act would likewise be valid there, and override the Dominion statute. The aim of section 2 would thus be frus-

74 See text supra, at note 53.
trated. This section only makes sense on the premise that it confirms the independence of the Dominions, and recognizes that independence has the effect of freeing a colony from the application of colonial law, and hence from the continuing power of Westminster.

The question arises: if Canadian legislatures were generally empowered upon independence to amend Imperial statutes applying here, what was the position of the *British North America Acts* and, in particular, the provisions limiting the powers of federal and provincial authorities? Were these provisions now amendable by ordinary statute, so that the Canadian Parliament might invade fields reserved to the provinces, and vice versa?

In principle, where the powers of a colonial legislature have been restricted in certain respects by Imperial statute (or some other Imperial instrument), independence would have the effect of removing any limits that reflect a subordination to Imperial interests or are inconsistent with the status of an independent state. Thus, a provision in an Imperial statute preventing a former colony from concluding treaties with foreign powers would fall automatically to the wayside.75

Most of the statutory constraints on legislative power in Canada prior to independence were not of this type. Canada came to independence with a constellation of distinct legislative bodies governed by an overall scheme. The limits placed on the powers of each individual body largely mirrored the powers conferred on the others. The Canadian Parliament, for example, was debarred from legislating with respect to “property and civil rights,” not because these matters were reserved for Imperial initiative, but because they fell within exclusive provincial jurisdiction. Other limitations sprang from the need to preserve the overall federal structure from local or central attack, or to protect vested interests in such areas as language, religion and education. There is no reason why Canadian independence should have removed limits that were explicable, not in terms of colonial subordination to Imperial interests, but as the result of the Canadian federal scheme or other strictly local factors.

Such considerations gave rise to sections 7(1) and 7(3) of the *Statute of Westminster*. These provide in effect that the power of Canadian legislatures to amend Imperial Acts, recognized elsewhere in the statute, does not extend to the amendment of the *British North America Acts*, 1867 to 1930, so that such legislatures remain confined to matters within their existing competence under those Acts. The same proposition held true, I suggest, quite apart from the *Statute of Westminster*,

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75 This is not to say that all such limitations disappear in an independent state. The threat of economic sanctions, for example, may still exist, but the power to impose them no longer resides in Imperial hands.
as the necessary consequence of the scheme of divided authority in place when Canada became independent.

The position may be summed up as follows. After independence, Canadian rules of validity generally recognized the continuing force of Imperial statutes applying to Canada at the time of independence, except where their terms conflicted with Canada’s autonomy. Under a new rule of change, Canadian law allowed for the amendment of such statutes by competent Canadian legislatures, with the exception of the British North America Acts. As regards those Acts, a special rule of validity directed that any ordinary Canadian laws repugnant to their terms were void.

Thus, no Canadian legislative body held the power to amend any portion of these Acts, except where such amendments were already provided for, as in the case of provincial constitutions under section 92.1 of the 1867 Act. Since Canadian legislatures could not directly amend substantial portions of the Constitution, there was necessarily some other amending procedure available, unless Canada now found itself with an immutable Constitution. The nature of that procedure can best be ascertained as part of a general examination of Westminster’s authority in the post-independence period.

IX. THE RESIDUAL POWERS OF WESTMINSTER

As seen earlier, the original authority of Westminster to legislate for Canada stemmed from a general principle of colonial law empowering the British Parliament to pass laws for the colonial possessions of the Crown. Once a country ceased to be a British colony and attained sovereign independence, it no longer came within the scope of colonial law, and so, as a matter of the country’s own domestic law, passed beyond the legislative purview of the British Parliament.

It follows that the rule recognizing Westminster as the supreme legislative body for British colonies no longer applied to Canada after independence, for the simple reason that Canada was no longer a British colony. So far as Canadian law was concerned, a post-independence Act of the British Parliament purporting to extend here would not, ipso facto, be recognizable as binding. It would only be recognizable if it satisfied the rules of validity and change laid down by Canadian law. Should, for example, Westminster have decided, by some whim, to tax the purchase of pucks in Trois Rivières, or to limit the consumption of digestive biscuits in Victoria, these Acts, however entertaining, would have possessed no greater force in Canada under Canadian law than decrees of the former Life-President of Uganda.

The same conclusion can be drawn from more general premises. Sovereign independence entails the exclusive right of a state to make
laws for its own territory and population, without unsolicited intervention from foreign countries. If the courts of a certain country recognized that another state had an autonomous legal power to legislate for it without its consent and to amend or repeal unilaterally the enactments of its legislature, that country could not be considered fully sovereign. Once Canada attained independence, Westminster necessarily lost its authority to pass laws for Canada without our agreement, at least as a matter of Canadian law. Canadian legislatures, as regards matters falling within their respective spheres, obtained the sovereign power to make laws for Canada, exclusive of the authority of any foreign legislature, including that of the United Kingdom.

If this was true in a general way, it was nevertheless subject to a significant exception prior to patriation. As we have seen, major portions of the *British North America Acts* retained their paramountcy after independence and could not be amended by any domestic legislature. Canadian authorities, in the discussions leading up to the *Statute of Westminster*, were unable to agree on a local procedure for constitutional amendment. In the result, nothing was done, and Canada became an independent state without any domestic machinery for amending important portions of its own Constitution.

What were the legal consequences? Under the principle of continuity, the old rule of change governing the amendment of the *British North America Acts* presumptively continued in force after independence, subject to any modifications necessarily consequential to the change in sovereignty. This meant that the British Parliament still retained the power to amend the entrenched portions of the Canadian Constitution, subject to one major condition dictated by Canada’s independent status. This was the requirement that any constitutional amendments passed by Westminster must be requested and approved by Canada. Any other position would have been incompatible with Canadian sovereignty.76

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76 It has been argued that the Supreme Court of Canada in the *Constitutional Reference*, *supra*, note 68, did not recognize the existence of any legal limitations whatever on the authority of the British Parliament to legislate for Canada: see *Hogg, supra*, note 61, at 325-34. Certain expressions are found in the majority opinion/law that can be taken to support this interpretation. But the preferable view is that the Court only considered (and properly rejected) the narrow argument that provincial consent was a necessary legal precondition to action by Westminster. As the Court stated at 47, “the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it. The law knows nothing of any requirement of provincial consent... as a condition of the exercise of United Kingdom legislative power.” The Court did not specifically address the broader, and more complex issue (which was not before it), as to whether other legal preconditions might exist, such as a request by Canada. Clearly, if Westminster retained complete authority under Canadian law to legislate for Canada in all matters whatsoever without Canada’s prior agreement, it would be difficult to maintain that Canada was a sovereign and indepen-
The Statute of Westminster refers to the necessity of Canadian consent, but it is not the source of that requirement. The preamble states that, under the “established constitutional position”, no British statute shall extend to any of the Dominions except at the request and with the consent of that Dominion. A preambular statement, of course, has no independent binding force, and this one indicates that the source of the rule referred to lies outside the statute. Section 4 supplements this reference with a provision that no future British statute shall be deemed to extend to a Dominion unless it contains a declaration that the Dominion has requested and consented to the Act. This rule of interpretation clearly assumes that Dominion consent is necessary, but stops short of directly requiring it. In any case, the scope of section 4 is restricted by section 7(1), which states that nothing in the Act shall apply to the amendment of the British North America Acts.  

77 Thus, the requirement of a declaration of consent does not apply to constitutional amendments. The seeming purpose of this restriction is to prevent any inferences from being drawn from the wording of section 4 as to how Canadian consent should be given, in view of federal-provincial disagreement on this point. As a result, the Statute of Westminster cannot be regarded, in the case of Canada, as the basis of independence, because it does not require Canadian consent to constitutional amendments, a necessary ingredient of full sovereignty. That requirement flows from a different source, namely, the factual assumption of full sovereign powers by Canada.

To sum up, Canadian rules of validity and change did not afford the British Parliament any general power to legislate for Canada after independence; however, they conferred on Westminster the authority to amend the British North America Acts at Canada’s request and with its consent. Such amendments would not only be valid in Canadian law, but would occupy the same paramount position as the enactments they amended, so that ordinary Canadian laws that were inconsistent with their terms would be void.

This attribution to a foreign Parliament of a role in the amendment of the Canadian Constitution was no doubt a somewhat extraordinary circumstance. However, contrary to first appearances, it was not incompatible with Canadian independence. The essential point to grasp is that, when the British Parliament amended our Constitution, 

77 In the Constitutional Reference, supra, note 68, at 39-40, the Supreme Court of Canada rejected the argument that section 7(1) did not exclude the application of section 4.
it did so, as far as Canadian law was concerned, only by virtue of powers attributed by a Canadian rule of change. It acted, in short, as a Canadian legislature.\textsuperscript{78}

X. THE ISSUE OF CONSENT

Far more debatable than the question whether Canadian concurrence was necessary to validate constitutional amendments was the question of which Canadian authority (or group of authorities) was competent to furnish the requisite consent. Did the Canadian government alone possess this power, which it could exercise apart from the provinces and without their agreement? Or did the provinces have some role to play? In the recent \textit{Constitutional Reference},\textsuperscript{79} the Supreme Court of Canada held that, as a matter of law, no provincial assent was required; however, under existing constitutional convention, a substantial measure of provincial concurrence was necessary. Leaving aside the question of constitutional convention, which is not germane here, the Court’s ruling on the law seems essentially correct.

If the matter is analyzed from the perspective adopted in this paper, the issue seems, on the surface, fairly straightforward. The legal requirement of consent stemmed from the fact of independence, and exclusively from that fact. The entity whose consent was required was \textit{prima facie} the same entity that became independent, and no other. That entity was Canada, considered as a single international unit. The provinces did not obtain independence when the colonial ties with Britain were severed. Only Canada did. The Canadian government alone was in a position to speak for the country as a whole \textit{vis-à-vis} foreign states. It follows that this government had exclusive competence to consent to British legislation affecting our Constitution, and its assent to such legislation was both necessary and sufficient.\textsuperscript{80}

\textsuperscript{78} As the Supreme Court of Canada remarked in the \textit{Constitutional Reference}, \textit{supra}, note 68, at 44: “The remaining badge of subservience, the need to resort to the British Parliament to amend the \textit{British North America Act}, 1867, although preserved by the \textit{Statute of Westminster}, 1931, did not carry any diminution of Canada’s legal right in international law, and as a matter of Canadian constitutional law, to assert its independence in external relations, be they with Great Britain or other countries.”

\textsuperscript{79} \textit{Supra}, note 68.

\textsuperscript{80} There appears to be nothing arising from the fact of independence that would suggest that the Canadian Parliament alone was competent to act in this area, and not the Canadian government. However, constitutional practice or convention may have required Parliamentary action. See Gérin-Lajoie, \textit{Constitutional Amendment in Canada} (1950), at 145-52. Henceforth, for convenience, I shall refer simply to the necessity of action by the Canadian government, without prejudice to the issue of parliamentary involvement.
On this reasoning, it was not open to the provinces to request legislation from Westminster on their own, even as regards strictly provincial matters. Ontario, acting by itself, could not secure from the British Parliament a constitutional amendment entrenching basic human rights in Ontario law, even if this entailed no intrusion into the federal realm. The agreement of the Canadian government was necessary because it alone could authorize the United Kingdom to deal with domestic Canadian matters.\textsuperscript{81}

The same considerations dictating that the Canadian government alone could act in this area also suggested that it could act alone. Provincial concurrence was not legally required, even where provincial powers and rights were affected. The reason is that consent is a function of independence. During the colonial era, there was no legal prerequisite of Canadian concurrence, whether federal or provincial, to British legislation affecting Canada. In strict legal theory, Westminster might have abolished the federal structure of Canada and substituted a legislative union, however unlikely this would have been as a matter of practical politics. Independence changed this, so that no further British legislation could be valid in Canada unless enacted at our request. The beneficiary of independence in this respect was the state of Canada.

Several arguments, however, could be marshalled against this conclusion. The first argument, and perhaps the most fundamental, rests on the fact that Canada achieved independence as a federal state, with powers and rights divided between federal and provincial authorities. It was beyond the capacity of either level of government to affect that basic division by ordinary legislation. If the federal government and Parliament, acting alone, could not diminish the powers and rights of the provinces, neither could it employ the British Parliament to achieve the same result without appropriate provincial assent. What cannot be done directly, cannot be done indirectly.\textsuperscript{82}

This argument suffers from a serious difficulty. It would apply with equal force to any conceivable mode of formulating a Canadian request for action by Westminster, and not merely to "unilateral" federal requests. Prior to patriation, no Canadian legislature, or group of legislatures, was competent to amend the entrenched portions of the Constitution. If the federal Parliament and the provincial legislatures together could not make such amendments directly, then (so the logic of the argument dictates) neither could they achieve that end indi-

\textsuperscript{81} For past practice, see Forsey, "Provincial Requests for Amendments to the B.N.A. Act" (1966-67), 12 McGill L.J. 397; Gérin-Lajoie, supra, note 80, at 138-44.

\textsuperscript{82} The dissenting opinion/law in the Constitutional Reference, supra, note 68, makes this argument, esp. at 73, 77. The majority opinion/law deals with it at 40-41.
rectly, by using the British Parliament. The startling conclusion is that no Canadian body or bodies would be capable of triggering the amending mechanism at Westminster.

The flaw in the argument is its implicit premise that the only Canadian authorities competent to secure constitutional amendments via Westminster were those that might already achieve the same result directly and without British intervention. But if a mechanism had already existed in Canada for amending the Constitution, there would have been no need to resort to Westminster. To turn the maxim around, what cannot be done directly, must be done indirectly — otherwise the Constitution would be unamendable.

A second argument may be presented. Under the scheme embodied in the Act of 1867, provincial legislatures were sovereign within their allotted spheres. During the colonial era, this “sovereignty” was held subject to the ultimate authority of the British Parliament. However, after independence, Westminster had no further power to act regarding Canada without our permission. The only Canadian authorities competent to assent to British legislation affecting Canada were those authorities whose sovereign position was affected. Where provincial powers and rights were at stake, the consent of the provinces was an essential prerequisite to action. The federal Parliament was no more capable of consenting on behalf of the provinces regarding matters within their sovereign jurisdiction than it was of legislating in those areas. Canadian independence entailed that provincial sovereignty could not be affected without provincial consent.

The principal shortcoming of this argument is its assumption that an exclusive power to legislate in certain fields logically entails the right to veto any changes in the limits of that power. The fact that a body is given sole competence to deal with certain subjects does not necessarily import that its powers cannot be removed or altered without its consent. The provinces were vested with exclusive authority to legislate in a range of areas specified in the British North America Acts. They possessed this power even prior to Canadian independence. During the colonial period, it could hardly have been said that the “sovereignty” of the provinces within their spheres gave rise to a legal requirement of provincial consent to British acts affecting provincial powers. In law, Westminster could have acted at its own initiative.


84 For arguments to this effect, see Gérin-Lajoie, supra, note 80, at 155-68; St. Laurent, “Presidential Address” (1931), 9 Can. Bar Rev. 525, at 532-34. For the Supreme Court of Canada’s discussion of this argument in the Constitutional Reference, 41 D.L.R. (2d) 326 (1947).
Canadian independence had the effect of enabling the provinces to legislate contrary to ordinary Imperial statutes, but it did not otherwise alter their basic position. Their authority was still held subject to the Act of 1867, which, in most important respects, still could be amended only by the British Parliament. If provincial "sovereignty" did not necessitate provincial consent prior to independence, it is difficult to see why it should do so after independence.

XI. THE EFFECTS OF PATRIATION

This brings us, at last, to the main subject under consideration. The journey has not been in vain. As we shall see, most of the puzzles posed by patriation are solvable on principles already articulated.

The Constitution Act, 1982 makes two major changes in existing arrangements. It supplies a local mechanism for amending the entrenched segments of the Constitution, and it guarantees certain basic rights and freedoms. As regards the amending machinery, no serious questions arise concerning its validity. Prior to patriation, there was no local Canadian procedure for putting in place an amending mechanism. Consequently, Westminster was still competent to act in this area.

The new Canadian Charter of Rights and Freedoms poses questions of greater complexity that cannot be fully discussed here. Briefly, these arise from the fact that the Statute of Westminster appears to render Canadian statutes enacted after 1931 paramount to the terms of any future British Acts. Insofar as the Charter purports to operate retroactively to invalidate any existing Canadian laws repugnant to its terms, it arguably violates the Statute of Westminster in attempting to govern post-1931 Canadian statutes.

The wording of the Statute of Westminster provides some support for this argument. Section 2(2) reads in part: "No law . . . made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant . . . to the provisions of any existing or future Act of Parliament of the United Kingdom, . . . and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act. . . ."\textsuperscript{85} These provisions are extended to provincial laws and legislatures by section 7(2).

It can be argued that the Constitution Act, which is a "future" Act of the British Parliament, falls squarely within the terms of section 2(2). Therefore, since the Statute of Westminster embodies certain fundamental terms of Canadian independence, and is unrepealable by West-

\textsuperscript{85} Emphasis added.
minister under Canadian law, the *Charter of Rights and Freedoms* is governed by the *Statute of Westminster*’s terms. In consequence, no Canadian law passed after 1931 can be struck down for inconsistency with the Charter.

The difficulty with this chain of reasoning, which is plausible as far as it goes, is that it takes no account of section 7(1) of the *Statute of Westminster*. This provides that nothing in the Act should apply to the “repeal, amendment or alteration” of the *British North America Acts*, 1867 to 1930. It would be difficult to argue that the Charter, which is a basic constitutional instrument imposing significant restrictions on the powers of Canadian legislatures, is not in substance an amendment or alteration of the *British North America Acts*, a prime function of which is to delimit the competence of Canadian legislative bodies.

The consequences of the enactment of the *Constitution Act* are of the greatest interest. Prior to its passage, the only matters lying beyond Canadian legislative competence were the amendment of the Constitution and the establishment of a local amending formula. The *Constitution Act* remedies these deficiencies. It follows that, in Canadian law, the United Kingdom Parliament possesses no further authority to legislate for this country. What residual power Westminster retained after independence stemmed from the absence of any corresponding local power. There is no longer any sphere in which Canada cannot act, and so Westminster’s role automatically expires. What can be done in Canada cannot be done elsewhere if Canada is fully sovereign. Section 2 of the *Canada Act* attempts to ensure the same result by providing that no future United Kingdom Act shall extend to Canada. I suggest that this provision is as redundant in Canadian law as it is ineffectual in British law. It is hard to imagine that English courts could ignore a future British statute that is clearly worded so as to extend to Canada. It is equally difficult to envisage Canadian courts giving the statute legal effect.

What then is the legal basis of the new Constitution? The *Canada Act* and *Constitution Act* are enactments of the British Parliament, like the *British North America Acts* which preceded them. Superficially, it would appear that the Canadian Constitution derives its force in Canada from the power of the British Parliament. But if this is the case, how can it be said that Canada possesses a fully patriated Constitution, in the sense of one possessing a local root? Further, if the Constitution rests on the power of Westminster over Canada, can it be maintained convincingly that this power is at an end?

We saw earlier that Canadian independence was an evolutionary process with revolutionary effects, culminating in the period 1919-1931. The ultimate rules of validity and change formerly prevailing in
Canadian law were swept away and replaced by new ones. The Canadian legal system no longer found its basis in British colonial law, but rested on a body of fundamental Canadian common law. That law allowed for the continuing validity and paramountcy of the *British North America Acts* in Canada and, in the absence of any local amending machinery, for the continuing power of the British Parliament to amend these Acts at Canada's request. Thus, while the historical source of the *British North America Acts* was the Parliament at Westminster, the legal basis for their validity and paramountcy after independence was a rule of Canadian law, the *principle of continuity*. In short these Acts, although generated elsewhere, had developed local roots. Similarly, while the power of Westminster to amend the *British North America Acts* found its historical origins in the former supremacy of the Imperial Parliament over Canada, it no longer rested on that basis, but on a Canadian rule of change.

Under fundamental Canadian rules, amendments to the *British North America Acts* enacted by Westminster with Canada's consent, after independence and prior to patriation, are valid and paramount to ordinary Canadian laws. The *Canada Act* and the appended *Constitution Act* are statutes of this kind. It follows that section 52 of the *Constitution Act*, which defines the Constitution of Canada and assigns it a position of paramountcy, is valid.

The answer, then, to the question of the foundation of the Canadian Constitution lies in the common law of Canada. Preoccupation with the *British North America Acts* has fostered the unconscious assumption that, in Canada, the Constitution is ultimately a matter of statute law. So long as it was possible to assume, somewhat hazily, that the Acts in question rested on a continuing power held by Westminster over Canada, it seemed unnecessary to push the matter farther. Patriation has removed that apparent prop. It can now be seen that the Constitution rests firmly on a distinctive body of fundamental Canadian law. The Imperial life-support system has been unplugged, and the patient has survived. She may even awake.