

trying to be fair to the inspector the judge had been unfair to Mr Johns.²⁷ Clearly, however, there is no magic formula upon which the courts can always rely with both certainty and confidence.

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²⁷ [1982] 1 WLR at p.368.

THE HONOURABLE D. F. QUIGLEY'S RESIGNATION
STRICTLY POLITICAL — NOT CONSTITUTIONAL

June 1982 will be remembered for the Quigley affair. Precipitated by Mr D. F. Quigley's address to the Young Nationals on June 7,¹ the Prime Minister responded with the ultimatum that the Minister either publicly apologise to his Cabinet colleagues or resign. Mr Quigley resigned. The Prime Minister: "[H]is speech went 'well beyond' the limits of collective responsibility in which cabinet ministers worked. . . [I]t went beyond that which was acceptable from a Cabinet Minister unless accompanied by his resignation."² "Bear in mind that we are not talking about a backbencher." Said the Prime Minister: "[T]here is a real difference between what a backbencher could say and what a Minister could say."³

It is this appeal to the constitution avowedly vindicating the Prime Minister's reaction that distinguishes this political controversy from the many to have occurred since the closing of the thirty-seventh Parliament. The reference in the Prime Minister's statements is to the proclaimed constitutional convention that Ministers are 'collectively responsible' for all that passes in Cabinet — shed of euphemism, meaning that a Minister who disagrees with a Cabinet decision must either resist making known his dissent or resign. This at least is the theory Mr Muldoon averred: in the event of public disunity a Minister's resignation is constitutionally imperative rather than merely commendable, honourable or even in the Government's best interests to enforce.⁴ Thus depending upon the particular construction one might wish to give Mr Quigley's offending speech ("did it or did it not breach the doctrine of collective ministerial responsibility?") it was simply a matter of the constitution claiming an able but dissentient Minister.

But is not this notion of collective responsibility obligating a Minister's resignation novel? Fortunately, the political scientists were able to assist:

¹ ". . . designed to stimulate discussion. . . it is most important that a group such as this has the opportunity to debate the issues of the day. . . and to appreciate the role the government plays in the decision-making process". *Christchurch Press* 15 June 1982, reproducing the full text of the Minister's speech.

² *Christchurch Press*, 15 June 1982.

³ *Ibid.*

⁴ See generally, S. A. de Smith, *Constitutional and Administrative Law* (2nd ed., 1973), at 168-177.

“The convention of collective cabinet responsibility . . . [though] rarely acted on . . . dates back to around the turn of the century, according to Professor Keith Jackson, of the University of Canterbury, . . .”⁵ And furthermore:

“Political scientists . . . also agreed on the critical ground-rules of the collective responsibility principle: that it is not a legal concept; that the prerogative of deciding when it has been transgressed is the Prime Minister’s, and his alone. . . So the present Prime Minister, Mr Muldoon, was perfectly entitled to dismiss Mr Quigley from his cabinet, it was freely conceded, . . .”⁶

Whilst further conceding that Mr Muldoon’s action was “apparently . . . unique in modern New Zealand political history”, these commentators nonetheless maintained there existed a New Zealand precedent to support the convention. They cited William Downie Stewart who, in 1933, resigned as Minister of Finance and Customs in the Forbes-Coates Coalition Government following his dissent on a financial decision his Cabinet colleagues favoured.⁷

However the constitutional convention to which the Prime Minister eagerly referred as justifying his ultimatum, and which the political scientists affirmed, is fictional. In New Zealand (and probably also the United Kingdom⁸) the notion that Cabinet must stand as one on the policies it adopts has never been more than a rule of pragmatic politics. The fact that Cabinet solidarity is seldom found wanting is explained easily enough.⁹ Not only is loyalty to the parliamentary team the expected price of promotion to Cabinet (hence “the Prime Minister’s task”, reflected Harold Wilson in 1972, “. . . to get a consensus of Cabinet or he cannot reasonably ask for loyalty . . .”¹⁰) but known also is the political disfavour and loss of public confidence that is inevitably the price of disloyalty.¹¹

Viewed thus the proclaimed principle of collective ministerial responsibility is not secured by one of the hallmark characteristics distinguishing convention from mere political usage or expediency: namely, constitutional necessity. Or as three members of the Supreme Court of Canada

⁵ *New Zealand Herald*, 21 June 1982.

⁶ *Ibid*, referring also to Alan McRobie of the Christchurch Teachers’ College.

⁷ See *infra*.

⁸ See D. L. Ellis, *Collective Ministerial Responsibility and Collective Solidarity* [1980] Public Law 367, observing the “dramatic ‘metamorphosis’” collective responsibility has undergone in the United Kingdom over the past 100 years: “from being a tool of the Constitution, it has become a tool of the political party” (at p. 395). See also I. G. Eagles, *Cabinet Secrets as Evidence* [1980] Public Law 263, at 266-68.

⁹ But cf. Ellis, *ibid.*, observing the breakdown of collective responsibility in the United Kingdom; even if it “superficially appears” that collective responsibility is being upheld “the underlying motives for this policy may well be more coldly political” (at p. 395). See also *Att-Gen. v Jonathan Cape* [1976] 1 QB 752, [1975] 3 All ER 484, at 495 per Lord Widgery CJ: “I find overwhelming evidence that the doctrine of joint responsibility. . . is on occasion ignored”.

¹⁰ *New Statesman*, May 5 1972 (quoted by Ellis, *ibid.*, at 372).

¹¹ E.g. see K. J. Scott, *The New Zealand Constitution* (1962), at 159, commenting on the embarrassment Downie Stewart caused the 1931 Coalition Government and which eventually led to his resignation (*infra*).

couched the test recently, "it must play a necessary constitutional role."¹² In contrast, in his celebrated work *The New Zealand Constitution* (1962) the late Professor K. J. Scott reflected that "the [very] establishment" of collective responsibility "was dictated by self-interest":

"It was a protection against the Sovereign preventing him from learning of the divisions in Cabinet, and thus lessening his chances of intriguing to widen any splits that might exist in Cabinet. Cabinet later used collective responsibility against Parliament. In days when party discipline was not strict many backbenchers who usually supported Ministers would sometimes vote against them, and would be more likely to vote against a single Minister to force him to resign than to vote against a whole ministry and bring down a government."¹³

Professor Scott recognised however that the enforced practice nowadays of Cabinet solidarity "is usually regarded" as a convention of the constitution. "But probably", he advised, "it should be regarded as one of the rules of party expediency that are not also conventions of the constitution."¹⁴ Sir John Anderson, a former British Home Secretary, expressed a similar view in 1946: "Collective responsibility . . . is not in the . . . strict sense a constitutional principle at all. . . . It is, from one point of view, little more than a rule of practical expediency."¹⁵ And United Kingdom Cabinet Secretary Sir John Hunt, under cross-examination in the *Crossman Dairies* case, replied "no" to the question whether he regarded collective responsibility to be a convention: although "an important part" of the constitution, it was, he proffered, no more than "a reality."¹⁶ Indeed, even as a mere "reality" it was less than perfect observed Lord Widgery CJ in that case, for not even Ministers themselves — those most directly affected and whom collective responsibility was ultimately supposed to protect — wholeheartedly supported the practice of Cabinet unanimity.¹⁷

Underlying these reflections are two thoughts. First, that Ministers must 'speak as one' on important policy matters does not impose an obligation "founded in conscience", to use Professor Wade's description of the psychology enjoining obedience to convention.¹⁸ It has little or nothing to do with standards of political conduct critical to the Westminster constitutional democracy; and concerned with neither constitutional necessity nor

¹² *Re Amendment of the Constitution of Canada* (1981) 125 LDR (3d) 1 (S.C.C.) at 114 per Laskin CJC Estley and McIntyre JJ (emphasis added). As O. Hood Phillips comments, [1982] LQR 194, at 195, the case is remarkable from a constitutional viewpoint in that the Supreme Court accepted jurisdiction to determine whether an alleged constitutional convention exists (viz. on the question whether the agreement of the Provinces was required before seeking Westminster amendment of the Canadian Constitution affecting federal-provincial relations and/or rights). Cf. the authorities Hood Phillips cites at 195, where recognised conventions have at most featured incidentally in aid of judicial decision.

¹³ *Supra*, at 116.

¹⁴ *Ibid.*, at 115-6 (emphasis added).

¹⁵ *The Machinery of Government*, Public Administration, Vol. XXIV (Autumn 1946), at 147.

¹⁶ *Att-Gen. v Jonathan Cape* [1975] 3 All ER 484 (see Ellis, *supra*).

¹⁷ *Ibid.*, at 495.

¹⁸ In giving expert evidence in *Att-Gen. v Jonathan Cape*, *ibid.*, at 491 (per Lord Widgery CJ).

morality, it lacks the *raison d'être* of convention.¹⁹ The second is that in the event of a clear breach of the rule no adverse political consequence would befall the nation. Significantly, one of the more crude, yet effective, tests for determining whether a particular usage is buttressed by the binding force of constitutional convention is empirical: namely 'break it and see'. Mr Muldoon claims Mr Quigley breached the rule of collective cabinet responsibility. But where, it may be asked, is the abuse of power occasioned by Mr Quigley which overt breaches of convention ordinarily imply? Indeed, not only was Mr Quigley's speech incapable of threatening the existing distribution of constitutional authority, but on the contrary many would contend that his attempt to concentrate public attention on the Government's economic strategies was aimed at enhancing — not denigrating — the democratic process.

This answers what constitutional analysts are agreed are "the crucial questions": "the crucial questions must always be whether or not a particular class of action is likely to destroy respect for the established distribution of authority and whether it is likely to maintain respect for the constitutional system by changing (or sustaining) the distribution of authority."²⁰ Regardless of politicians' attempts to bolster allegations of unconstitutional conduct (that is, regardless of appeals to "constitutional convention", actual or otherwise), not in answer to either of these questions, it is submitted, is it possible to impugn the former Minister of Works and Development. *Pro tanto* whether his speech was also "political ineptitude" as the Prime Minister charges can have no bearing on the latter's appeal to the constitution in this instance.²¹

One rationale suggested in support of Cabinet unanimity being secured by constitutional convention pertains to the perceived interest in maintaining free and frank discussion between Ministers *inter se* and their departments.²² The thought that such discussion was not absolutely privileged would, it is supposed, inhibit most Ministers for fear of disclosure and public accountability. Lord Widgery CJ accepted this in broad terms in the *Crossman Diaries* case.²³ Declaring the premature disclosure of the diaries of a former Cabinet Minister to be contrary to the public interest, his Lordship held that the expressed opinion of Ministers deriving from Cabinet discussions are matters of confidence and observed: "[Whereas] [t]o leak a cabinet decision a day or so before it is officially announced is an accepted exercise in public relations. . . . to identify ministers who voted one way or the other is objectionable because it undermines the doctrine of joint responsibility."²⁴

¹⁹ See Dicey's definition of convention as "a body not of laws, but of constitutional or political ethics", the "constitutional morality of the day"; A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1965), at 417 and 422.

²⁰ Marshall and Moodie, *Some Problems of the Constitution* (5th ed.), at 32. See also Sir Ivor Jennings, *Cabinet Government* (3rd ed.), Ch. 1.

²¹ *New Zealand Herald*, 21 June 1982.

²² But see Eagles, *supra*, note 8, at 266-68.

²³ *Supra*.

²⁴ *Ibid.*, at 495.

Against that, consider the views of three Law Lords in *Conway v Rimmer*,²⁵ who rejected or doubted that candour as between Ministers *inter se* and their departmental servants had any appreciable bearing on the question of Cabinet confidentiality. Lord Upjohn:

"I cannot believe that any Minister or any high level . . . civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject . . . by the thought that his observations might one day see the light of day. His worst fear might be libel, and there he has the defence of qualified privilege."²⁶

Lord Morris, to similar effect, summarily dismissed any suggestion to the contrary as being "of doubtful validity".²⁷ And Lord Reid:

"Virtually everyone agrees that cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest; but I do not think that many people would give as the reason that premature disclosure would prevent candour in the cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism."²⁸

By this and his ensuing comments ("The business of government is difficult enough as it is, . . .")²⁹ his Lordship seems to be suggesting there is an identifiable public interest in positively suppressing "ill-informed or captious public or political criticism". This is a contention over which some Ministers might enthuse, but consider the constitutional ramifications. First, what Lord Reid preferred to call "captious . . . political criticism" is surely the very criticism demanded of any Opposition whose principal function in a two-party parliamentary system is to act as an adversary (*quaere* indeed the political justification of an Opposition that is not "fond of taking exception or raising objections"³⁰). Secondly, is not the thrust of modern government away from *fait accompli* decision-making towards more open methods of government, specifically that is to assist the "ill-informed"?³¹ And thirdly, does not government secrecy leading up to ministerial decision merely postpone the unpopularity unpopular decisions inevitably invite, yet rendering it too late nonetheless to do anything about it? Observe hence the recent comments of Lord Keith of Kinkel in *Burmah Oil Ltd v Bank of England*,³² made also in the course of examining the question of discovery of documents sought against the Crown (concerning communications between Ministers *inter se* and senior civil servants *inter se*):

"There can be discerned in modern times a trend towards more open governmental methods than were prevalent in the past. . . . This may demand, though no doubt

²⁵ [1968] AC 910, [1968] 1 All ER 874.

²⁶ [1968] 1 All ER 874, at 915.

²⁷ *Ibid.*, at 891.

²⁸ *Ibid.*, at 888.

²⁹ *Ibid.*

³⁰ "Captious", Oxford Dictionary.

³¹ Hence the Official Information Bill 1981 presently at the Select Committee stage.

³² [1980] AC 1090.

only in a very limited number of cases, that the inner workings of government should be exposed to public gaze, and there may be some who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen.”³³

Here is a judicial pronouncement of the highest authority that executive secrecy may be no more justified at Cabinet level today than in the lower reaches of the administration. Ignore then (as does Lord Reid in his rejection of the candour argument³⁴) the obvious need to resist disclosure of state secrets and perhaps the only perceptible interest left in maintaining collective responsibility is the party political interest; the protection of which is not the concern of the constitution.³⁵

It now remains to negative the suggestion earlier noted that the Downie Stewart resignation of 1933 is a precedent justifying the Prime Minister's call for Mr Quigley's resignation.³⁶ (The political scientists advocating this rightly concede that the three further ministerial resignations in New Zealand each support the principle of individual ministerial responsibility — enjoining a Minister's resignation where properly charged with private or public conduct unbecoming to a Minister of the Crown.³⁷) Professor K. C. Scott deemed Downie Stewart's public criticism of the 1931 Coalition Government's fiscal measure “the most spectacular departure” from collective cabinet responsibility “in the history of New Zealand”.³⁸ Professor Scott lists three reasons: first, the Minister's dissent involved a major policy decision of Cabinet (namely, to reduce rents and interest rates); secondly, this decision came within the dissentient Minister's own departmental jurisdiction (that is, in his capacity as Minister of Finance); and thirdly, he not only publicly opposed this decision of his colleagues but also voted against it in the House. Significantly, the statute implementing the measure, the National Expenditure Adjustment Act 1932, received royal assent on 10 May 1932, yet not until January 28 the following year — some eight and a half months later — did Downie Stewart resign.³⁹ Given this effluxion of time between the dissent and resignation, what persuaded Downie Stewart to perform this final public act cannot be attributed to his unyielding stance on the rents and interest rates issue. It appears his

³³ *Ibid.*, at 1134. But cf., Lord Scarman, at 1144-45 preferring to retain the candour argument as a factor to be considered in balancing the public interest in the proper functioning of the public service and the public interest in the administration of justice (i.e., for purposes of determining whether discovery should be ordered against the Crown).

³⁴ *Supra.*, corresponding to note 28.

³⁵ But cf., Cl. 7 paras. (d) and (e) of the Official Information Bill 1981 specifying the protection of “the principles and conventions of the constitution” and “[t]he full and frank expression by or between or to Ministers of the Crown. . .” as providing in the proper case good reason for withholding information.

³⁶ Cited by the political scientists quoted *supra*, corresponding to notes 6 and 7.

³⁷ Cited were the resignations of George Fisher in 1889 (then Minister of Customs); Sir Apirana Ngata in 1934 (then Minister of Native Affairs); and C. J. Eyre in 1956 (then Minister of Industries and Commerce). For comment, see Scott, *supra*, at 120-24.

³⁸ *Ibid.*, at 115.

³⁹ N.Z.P.D. Vol. 235 (1933), at ii.

was a continuing disagreement with his colleagues over financial policy (he was the sole urban voice in a Cabinet dominated by country Reform members), and that not until the Government's decision in January 1933 to devalue did Downie Stewart elect to resign.⁴⁰

In fact, if these events establish any precedent it is that Downie Stewart and his Coalition partners positively disclaimed any constitutional obligation incumbent on a dissentient Minister to resign. For following Downie Stewart's dissent on the rents and interest rates issue it was announced that Cabinet had "agreed to differ".⁴¹ Scott notes that Downie Stewart's disagreement the following year proved sufficiently embarrassing to the Government nonetheless, and that "his resignation was no doubt welcomed".⁴² In other words, if this can be construed as eventually affirming the principle of collective responsibility then it does so only in the sense that the resignation was politically, not constitutionally, inspired.

Three further matters warrant mention. First, Scott considers it to be an obligatory rule of the constitution that pending a general election a party shall agree on a set of broad policies for its election campaign. Scott says: "in this one situation a major departure from the principle of collective responsibility would not only be a breach of a rule of party expediency but also a breach of a convention of the Constitution."⁴³ Scott observes that with the strengthening of party discipline it soon became the established right of electors to be consulted on broad policies — from which the electors could express their choice of government — rather than on personalities alone. However, whether Scott is justified in attributing the special status of convention to what he himself emphatically regards as "only a rule of party expediency between elections"⁴⁴ can be disposed of briefly.

First, whilst it is invariably the practice for contesting parties to narrow the election contest to certain key issues (tactically selected more often than not by the incumbent governing party) it is difficult to appreciate that this converts the practice into a constitutional obligation demanding conformance. Ask any Minister scarcely able to conceal his opposition to a particular Cabinet decision, "why do you publicly support that decision on the hustings?", it is not likely he will reply "because the constitution requires it of me". To the question "what dire consequences would making public your dissent herald for the constitution?", he would answer "none". But by the same token he would doubtless lament his chances of promotion within the Cabinet, or of even remaining a frontbencher depending on the party's (or leader's) desire to publicly censure; which indicates that collective responsibility is no less a rule of pragmatic politics pending a general election as it is during the remainder of the parliamentary cycle.

Secondly, consider the development this century of the Shadow Cabinet. Is not this group today as insistent on collective 'ministerial' responsibility,

⁴⁰ *The Oxford History of New Zealand* (ed. W. H. Oliver, 1981), at 221.

⁴¹ The terminology adopted from the British "agreement to differ" of a few months earlier; for comment see Ellis, *supra*, at 383-85.

⁴² Scott, *supra*, at 115.

⁴³ *Ibid.*, at 116-17.

⁴⁴ *Ibid.*, at 118.

whereby even those occupying the Opposition frontbenches must toe the collective line or 'vacate'? Whether leading up to or following an election no one would attempt to explain this practice by reference to convention: as one writer concludes with respect to Opposition 'collective responsibility' in the United Kingdom "[it] is very much a reality, not in the traditional sense of being a constitutional convention, but as a manifestation of practical politics in the twentieth century".⁴⁵ Yet if all are agreed as to this, in what essential respect does Opposition 'collective responsibility' differ from the observed practice of unanimity on the other side of the House?

Finally on this matter, although the opportunity has been taken to rebut Professor Scott's concession this should not be read as implying that the Prime Minister issued Mr Quigley his "apologise or resign" ultimatum on the basis of an election-year dissent.

Secondly, the political scientists quoted above believed it to be a "critical ground-rule" of their proclaimed convention that the prerogative of deciding whether it had been breached was the Prime Minister's ". . . and his alone".⁴⁶ Consequently, "the present Prime Minister, Mr Muldoon, was perfectly entitled to dismiss Mr Quigley from his cabinet, it was freely conceded, . . ." ⁴⁷ This is instructive, not for their analysis of the constitutional ramifications of Mr Quigley's speech but because it confirms the absence of any *constitutional* principle of collective responsibility. In fact, to advocate the Prime Ministerial prerogatives above is to relegate what is claimed to be a constitutional convention to a mere indoor-management rule of the National Party.

As is known, the leader of the National Party has a *carte blanche* not only in the allocation of portfolios to those who will fill the frontbenches but also in the actual selection of those persons. In this sense, Mr Muldoon's power to enforce Mr Quigley's removal is undoubted — for that purpose, to alone determine whether Mr Quigley transgressed Cabinet's collective responsibility. But if it is constitutional convention that sanctions these powers of adjudication and dismissal, they would remain true to the constitution regardless of the political party in power. Consider, therefore, the position under a Labour government. Although a Labour Prime Minister allocates the portfolios, it is caucus which selects the office-holders. It follows that the "critical ground-rules" of which the political scientists speak cannot be maintained, because a Labour Prime Minister wishing to relegate a dissentient Minister to the backbenches would be powerless to do so as long as the Minister retained the support of his caucus colleagues. In that event, all the Minister need anticipate would be a reallocation of portfolios accompanied by a drop in Cabinet ranking. Further, what sense would there be in then saying to the Labour leader, "yours is the prerogative alone to determine whether the Minister breached the principle of collective cabinet responsibility"? Clearly, there would be none since it is the caucus and not the Prime Minister who, under Labour Party rules, determines the composition of Cabinet.

⁴⁵ Ellis, *supra*, at 392.

⁴⁶ *New Zealand Herald*, 21 June 1982.

⁴⁷ *Ibid.*

Finally, little has been said here about the peculiar status the Westminster constitutional democracy accords constitutional convention. Although no one definition adequately portrays their nature,⁴⁸ they are a *sui generis* body of rules; not laws, yet recognised forms of political behaviour regarded as obligatory. General acceptance by those whom the usage affects (the Governor General, Ministers, Members of Parliament, civil servants and judges) that there is *an obligation* to continue to behave in a certain way is what renders defiance of constitutional convention as unconstitutional as defiance of the law.⁴⁹ Indeed, law and convention are closely interlocked: “[conventions] provide the flesh which clothes the dry bones of the law; they make the legal constitution work”.⁵⁰ Those attuned to the more extensive legal form of the codified constitution could not readily grasp that some constitutional conventions are vastly more important than the bulk of statute and common law connected with the British constitutional system New Zealand inherited. One English authority instances the convention enjoining the Queen to assent to bills duly passed by the Lords and Commons (a convention likewise of the New Zealand constitution, albeit expressed in terms of the Governor General and our single parliamentary chamber⁵¹). This, he observes, is “overwhelmingly more important” than the Queen’s strictly legal prerogative power to withhold assent.⁵² Although not strictly laws, constitutional conventions ought therefore to be treated, he says, as part of constitutional law.⁵³

For the reasons above, however, collective ministerial responsibility is not of this ilk. Whilst politicians least of anyone would regard the basic practice of collective responsibility as being dispensable to politics and the process of government as we know it, this does not elevate it into constitutional convention. Be it not suggested then that the Prime Minister was simply the servant of the constitution when on June 11 1982 he issued Mr Quigley his “apologise or resign” ultimatum.

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⁴⁸ See generally S. A. de Smith, *Constitutional and Administrative Law* (2nd ed., 1973), 47-63.

⁴⁹ For judicial acceptance, see *Re Amendment of the Constitution of Canada*, (S.C.C.), *supra*, note 12.

⁵⁰ Sir Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at 81.

⁵¹ For discussion of the prerogative power it regulates in New Zealand, see *Simpson v Attorney General* [1955] NZLR 271, per Stanton and Hutchison JJ.

⁵² S. A. de Smith, *supra*, note 48, at 47.

⁵³ *Ibid.*