CAN LAME DUCKS LAY GOLDEN EGGS? THE POWER OF DEFEATED GOVERNMENTS TO MAKE BINDING COMMITMENTS

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Only a week before the Manitoba Government of Howard Pawley was defeated in the House in March, 1988, it suffered a politically significant legal defeat at the hands of the Manitoba Court of Appeal. The Court ruled in *Somerville Belkin Industries Ltd.* v. *Government of Manitoba*[1] that a financial commitment made by the previous administration of Sterling Lyon on the very day of the election that brought Pawley to power was legally binding on the Pawley government.

The *Somerville* case involved a promise by the Lyon government to provide a grant in excess of $800,000.00 to assist the plaintiff company in its purchase and modernization of a Winnipeg factory facing financial difficulties that threatened to close it down and put more than 100 employees out of work. The promise stemmed from an initiative by the Manitoba Minister of Economic Development and Tourism to prevent the closing of the plant. The Economic Development Committee of Cabinet and the Treasury Board had both approved a grant to the prospective purchaser of the operation, but the final step normally taken in such matters – an Order-in-Council by the Lieutenant-Governor-in-Council – had not yet been taken. On election day, for reasons not disclosed by the Court, but perhaps not difficult to imagine, the Minister caused his Deputy Minister to write a letter to the plaintiff company promising the grant. This promise was repeated by the Deputy Minister not long after the election had brought about a change of government. The new administration disapproved of the grant, however, and the Deputy was instructed a few months later to inform the plaintiff company that no money would be forthcoming. This action resulted.

The appeal was heard by a three-judge panel of the Court of Appeal, which divided two to one in favour of the plaintiff's claim. O'Sullivan J.A., dissenting, was of the opinion that failure to formalize the promise by Order-in-Council was fatal to the claim. Monnin C.J.M. and Hall J.A., however, took the position that the promise made in the Deputy Minister's letter was legally binding in itself. They relied upon a decision of the Federal Court of Appeal, *R.* v. *C.A.E. Industries Ltd.*,[2] in which a majority of that Court ruled that a Minister of the Crown has the authority to bind the Crown to contracts concerning matters within the normal scope of that Minister's normal responsibilities. Mr. Justice O'Sullivan's dissent was based on his belief that the evidence did not disclose that it was within the Minister's usual authority to enter into such arrangements in this manner.

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1. (1 March 1988), (Man. C.A.) [unreported].

3. (1985), 61 N.R. 19, 20 D.L.R. (4th) 347, [1985] 5 W.W.R. 481 (Fed. C.A.).

Although none of the judges did so, it is interesting to note a similarity between this case and one of the most celebrated decisions of American constitutional law: *Marbury* v. *Madison*.[3] That case arose from the famous "midnight appointments" made by the Adams administration in the closing hours of its reign, to fill as many vacant federal appointments as possible before the Jefferson regime took over. In the last-minute flurry there were some oversights, one of which involved the appointment of William Marbury as Justice of the Peace for the District of Columbia. Though signed and sealed, the Marbury appointment had not been delivered to him when the witching hour struck. The new administration refused to honour the appointment, and Marbury took the matter to litigation.

He expected a sympathetic hearing from the Supreme Court of the United States, because Chief Justice John Marshall was an appointee of the old regime (and had, in fact, been the person who, as Attorney-General, had signed the Marbury appointment). On the merits of his claim, the Supreme Court did not disappoint him; it ruled that the appointment was valid even though the final formality of delivery had not been carried out. Marbury lost in the end, however, because the Court took the position that it lacked the procedural power to order the remedy sought. There was a federal statute granting it such a remedial power, but the Court found the statute to be unconstitutional. The case is famous for the fact that in the course of conceding this small victory to the Jeffersonians, Chief Justice Marshall had contrived to affirm the Supreme Court's power to review the constitutionality of legislation, a power the Jeffersonians had long denied, and thus to win a much more important constitutional war. In the present context, it simply provides interesting corroboration for the view that governments can be bound legally by undertakings that fail to comply fully with all relevant formalities.

The *Somerville* case provides an occasion for speculation about the constitutional position in which the Pawley Government found itself between the date of its defeat in the Legislative Assembly and the subsequent election several weeks later. It was a situation, typical of Canadian constitutional matters, in which constitutional law and constitutional convention walked hand in hand.

A government that has been defeated in the Legislative Assembly, but continues to carry on its duties pending an election, retains all the legal powers it held prior to being defeated. By political convention, however, such administrations are expected to restrict their activities to caretaker functions: the day-to-day tasks of government, the implementation of ongoing commitments, and so on. To undertake controversial new initiatives during the hiatus would contravene the convention. In 1922, for example, after the Government of Manitoba had been defeated in the Legislative Assembly, but had been asked by the Lieutenant-Governor to carry on until

3. 5 U.S. 137, 2 L.Ed. 60 (1803). The case and its implications are well described in R.G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960) at 40ff.

an election, the Lieutenant-Governor pointed out to the Premier in a letter that the Government:

> ... while they continued to possess their official authority and functions, ... are not expected, pending an appeal to the electorate, to perform more than routine duties.[4]

Conventions are customary constraints, which are not legally enforceable, but are broken at the risk of incurring the displeasure of the electorate.[5]

The Pawley government was operating under an additional constraint after its defeat in the House, because the defeat occurred before the Legislative Assembly had voted supply, thereby placing severe restrictions on the financial resources available to the Government. It is both a conventional and a legal requirement that all governmental expenditures must normally be approved by the Legislative Assembly.[6] This means that unless an expenditure had been previously approved, or could be met from surplus or contingency funds (seldom the case), the only source from which money can be obtained by a Government denied supply would be Special Warrants.

Special Warrants can be issued by the Lieutenant-Governor-in-Council in order to meet unforeseen expenditures between sessions of the Legislature. They are extraordinary measures, however, and are not available unless the Minister responsible for the subject of the expenditure is prepared to assert that it is "urgently and immediately required for the public good."[7] While the decision as to what is urgent for these purposes is left entirely to the discretion of the Minister and the Lieutenant-Governor-in-Council, a Government that used Special Warrants for matters of questionable urgency would be running a considerable political risk.

There is one way in which governments can make legally binding commitments with respect to matters over which they have no present spending authority: by contract. The Crown in the right of the province may be bound by contract entered into on its behalf by a Minister or the Minister's delegate if the contract has been authorized by the Lieutenant-Governor-in-Council or the Minister of Finance.[8] The authorities relied upon in the *Somerville* case seem to establish that "authority" for this purpose does not have to be explicit, but may be based upon the "usual authority" of the contracting Minister. In Manitoba, the value of the contract is restricted to

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4. Quoted in J. Saywell, *The Office of Lieutenant-Governor* (Toronto: University of Toronto Press, 1957) at 158.

5. See, generally: G. Marshall, *Constitutional Conventions: the Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984).

6. See J.R. Mallory, *The Structure of Canadian Government* (Toronto: Macmillan of Canada, 1971) at 135–7 and N. Ward, *The Public Purse: A Study in Canadian Democracy* (Toronto: University of Toronto Press, 1961). In Manitoba the relevant legislation is: *Executive Government Act*, C.C.S.M. c.E170, s.9(1); *Financial Administration Act*, C.C.S.M. c.F55, s.39.

7. *Financial Administration Act*, *supra*, note 6, s.42(1).

8. *Executive Government Act*, *supra*, note 6, s.16; *Financial Administration Act*, *supra*, note 6, s.45(2).

"the amount provided in the Annual Appropriation Act,"[9] which might mean that there has to have been some heading of expenditure authorized the previous year under which the subject-matter of the contract could have been included, and which was large enough to encompass an expenditure as great as the value of the contemplated contract. Given the size and generality of many budget categories, however, this requirement would seldom create a serious problem.

It is not at all clear that the *Somerville* case involved a contract. The promise related to a grant-in-aid, with no obvious consideration passing to the Government. On the other hand, the Lyon administration was not operating under the same financial constraints as the defeated Pawley Government. Whether a government lacking budget approval could make legally binding financial commitments in non-contractual form is open to considerable doubt. It does appear, however, that a government having legislative approval for its Budget can bind its successors without the need for a contract, and that even a government lacking such authority can do so if it employs contractual means. Sight should never be lost, however, of a point that was made earlier: while a government has the *legal* power to bind its successors to financial commitments, such a step would contravene *conventional* proprieties if it were unduly innovative or controversial.

9. *Financial Administration Act, ibid.*