

# Constitutional Conventions and the Prince of Wales

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**Abstract:** The Upper Tribunal (Administrative Appeals Chamber) held in *Evans v Information Commissioner* that certain correspondence between Prince Charles and government officials must be disclosed under freedom of information legislation. Much of the judgment was devoted to a discussion of the constitutional conventions applicable to Prince Charles, and the case provides a useful example of how conventions and laws can interact. In this note, I argue that the Upper Tribunal misunderstood how conventions are distinguished from one another, and misapplied the test for the identification of conventions.

**Keywords:** Constitutional conventions, Prince of Wales, freedom of information, norms

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In *Evans v Information Commissioner*<sup>1</sup> (*Evans*), the Upper Tribunal (Administrative Appeals Chamber) ordered the disclosure of certain correspondence between Prince Charles and seven government departments under s 1 of the Freedom of Information Act 2000 (“the Act”) and accompanying regulations. The key finding was that disclosure would be in the public interest, in part because the correspondence at issue did not fall under any constitutional convention.

The practical significance of *Evans* is limited. Before the case was heard, the Act was amended to include an absolute, prospective exemption for correspondence with the monarch and the first two members of the Royal Family in the line of succession. A month after the decision in *Evans* was released, the Attorney General, Dominic Grieve, issued a certificate under s 53 of the Act, in effect vetoing the Upper Tribunal’s decision. It is unlikely that Prince Charles’ correspondence will be made public in the foreseeable future.<sup>2</sup>

The significance of *Evans* lies with the Upper Tribunal’s discussion of constitutional conventions. *Evans* is now the leading case on the identification of conventions, and the best example of how laws and conventions can interact. It is the kind of case that only arises very rarely, and it has the potential to shape thinking about conventions for many years to come. Yet *Evans* is flawed in important respects, and I shall argue that it should be treated with considerable caution by courts and constitutional scholars.

The sheer length of the decision (200 pages with four annexes), as well as its complexity, mean this note will be quite selective. I shall say little about the finer points of the freedom of

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<sup>1</sup> [2012] UKUT 313 (AAC). *Evans* should not be confused with the Information Commissioner’s decision on 21 August 2012 that guidance in relation to obtaining the consent of The Crown or the Duchy of Cornwall before bills are passed into law is not exempted under s 42(1) of the Freedom of Information Act 2000 (which relates to ‘legal professional privilege’).

<sup>2</sup> There was a judicial review of the Attorney’s General decision to issue the s 53 certificate on May 8 and 9, 2013.

information regime, and I shall pass fairly quickly over the public interest arguments for and against disclosure which do not relate to conventions.

## **BACKGROUND**

It is common knowledge that Prince Charles has strong views about many matters of public policy: straw burning, organic food, natural medicine, etc.<sup>3</sup> Prince Charles does not try to hide his views. On the contrary, he seeks to promote them in a variety of ways. He frequently gives speeches and publishes articles. He has established a variety of charities to advance his favoured causes. Much more controversially, Prince Charles has for many years engaged in correspondence with government ministers in an attempt to raise awareness of certain issues and to shape government policy.

In April 2005, Rob Evans, a reporter with the Guardian newspaper, requested copies of all correspondence between Prince Charles and seven government departments (“the Departments”) between 1 September 2004 and 1 April 2005. Evans relied on the Act and on the Environmental Information Regulations 2004 (“the Regulations”). Under s 1 of the Act, named public authorities are generally obligated to disclose information in their possession once it is requested. Some information is exempt, however. Information that falls under an absolute exemption need not be disclosed at all. Information that falls under a qualified exemption need be disclosed only if that would be in public interest. When Evans made his request (the relevant date in *Evans*), there was a qualified exemption for ‘communications with ... members of the Royal Family’ (s 37). There was (and still is) an exemption for information the disclosure of which would normally constitute a breach of confidence (s 40). Formally this latter exemption is absolute; in substance, it is qualified, because a defence to an action in breach of confidence is that disclosure is in the public interest. The Regulations, meanwhile, obligate public authorities to disclose ‘environmental information’ subject to several exceptions. One exception is for information the disclosure of which would adversely affect the interest of the person who provided it (regulation 12(5)(f)). This exception is qualified in that it is overridden if the public interest favours disclosure.

By April 2006, the Departments had all refused Evans’s request. The Department for Environment, Food and Rural Affairs relied on the exception in regulation 12(5)(f). The other six departments relied on the exemption for communications with the Royal Family in s 37 of the Act. Following the Departments’ refusals, Evans complained to the Information Commissioner. After ‘two years of intensive investigation and consideration’ (at [16]), the Information Commissioner held that the Departments were entitled to refuse Evans’ request. On 13 January 2010, Evans appealed to the First-Tier Tribunal. The First-Tier Tribunal then transferred the appeal to the Upper Tribunal (as it was empowered to do under its regulations), presumably because of the complexity and constitutional significance of the case.

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<sup>3</sup> The Upper Tribunal surveys Prince Charles’ interventions in Open Annex 2. There it quotes at length from a biography of Prince Charles by Jonathan Dimbleby, *The Prince of Wales: A Biography* (London: Warner Books, 1994), which was written with Prince Charles’ cooperation.

## THE UPPER TRIBUNAL'S DECISION

The correspondence sought by Evans was clearly 'information' for the purpose of the Act. Just as clearly, it fell under at least one qualified exemption. Similarly, although some correspondence might be considered 'environmental information' for the purpose of the Regulations, the parties assumed its disclosure would adversely affect Prince Charles's interests, meaning it fell under the exception in regulation 12(5)(f). Whether under the Act or the Regulations, disclosure would only be justified if it was in the public interest. As a result, *Evans* is essentially a case about the public interest arguments for and against disclosure of Prince Charles's correspondence.

The Upper Tribunal<sup>4</sup> began by distinguishing what it termed "advocacy correspondence" – correspondence seeking to 'advance the work of charities or promote views' (at [7]) – and correspondence of a purely personal or social nature. The Upper Tribunal treated it as given that the disclosure of personal or social correspondence would not be in the public interest, and the decision in *Evans* is therefore only about advocacy correspondence. Ultimately, the Upper Tribunal allowed the appeal and ruled that Evans was generally entitled to disclosure of advocacy correspondence falling within his request. In total, the Upper Tribunal ordered the disclosure of 27 pieces of information.

Several public interest factors counted heavily in favour of disclosure of advocacy correspondence. First, disclosure would promote good governance by increasing 'accountability and transparency' (at [131]). Second, disclosure would increase public awareness about the 'extent and nature of interaction between government and the royal family, and how the monarchy fits into our constitution' (at [142]). Finally, disclosure would increase the public's understanding of Prince Charles's influence on matters of public policy, and help to inform the debate about whether Prince Charles has exercised 'undue influence' on government (at [159]).

The Upper Tribunal gave little weight to the public interest arguments against disclosure. There was a 'short answer' to the argument that disclosure could lead to the 'misperception' that Prince Charles is not politically neutral, namely, 'the essence of our democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be' (at [188]). With respect to the possible 'chilling effect on frankness' (at [189]) of disclosure, the Upper Tribunal considered that it was unlikely Prince Charles would be deterred from expressing his views. Further, any chilling effect would be minimized by the fact that only advocacy correspondence (and not personal or social correspondence) would be disclosed.

The most important public interest argument against disclosure, and the focus of this note, was the argument that disclosure would undermine what the Upper Tribunal termed the "education convention".<sup>5</sup> The education convention is the convention 'that the heir to the throne is entitled and bound to be instructed in and about the business of government'

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<sup>4</sup> The panel was composed of Mr Justice Walker, Judge John Angel, and Ms Suzanne Cosgrove.

<sup>5</sup> In *Attorney General v Jonathan Cape Ltd* [1975] 3 All ER 484 it was similarly argued that disclosure of the views of individual cabinet members would undermine the convention of collective responsibility, contrary to the public interest. However, in that case, unlike in *Evans*, there was no serious dispute about the existence or extent of the relevant convention (*ibid* at 495).

(at [67]). The Upper Tribunal observed that ‘[u]ntil the present case the education convention could have been regarded as little more than a footnote’ (at [89]). Certainly it is uncontroversial that the Prince of Wales has the right to make enquiries of ministers and they the duty to supply the information requested. The novel contention of the Departments was that, at some unspecified time, the education convention had been ‘extended’ to advocacy correspondence. If that were true, the education convention would now entitle the heir to two things: to be instructed in government, and to engage in advocacy. Evans argued that the education convention retained its original scope.

To assist the Upper Tribunal, the Departments provided expert evidence from the constitutional scholar, Rodney Brazier.<sup>6</sup> In 1995, Brazier published an article on ‘The Constitutional Position of the Prince of Wales’<sup>7</sup>. He argued that ‘it is time to recognize as a constitutional convention the Prince of Wales’ rights to obtain information from ministers, to comment on their policies, and to urge other policies on them’<sup>8</sup>. In his article, Brazier presented the Prince of Wales’ right to engage in (what amounts to) advocacy correspondence as falling under a *new convention*, separate from the education convention. However, in his witness statement and in his oral testimony in *Evans*, Brazier supported the Departments’ claim that the advocacy right was conferred by an *extended education convention*. He said that the present education convention confers a ‘clutch of rights’ on the Prince of Wales (at [94]). Questioned regarding the discrepancy, Brazier replied that, ‘rather than saying [the right to engage in advocacy correspondence is] a sort of add-on extra or a separate convention or principle, I think it is better ... to subsume it within [the education convention]’ (at [95]).

The Upper Tribunal was concerned that Brazier’s oral evidence ‘might presage a submission that even if the disputed information did not fall within the education convention it nevertheless fell within the new constitutional convention urged in the 1995 article’ (at [96]). Given that the change in Brazier’s views only became clear during his oral evidence, after ‘cross-examination had focused on [Brazier’s] current thesis’, such a submission could have ‘major ramifications’ (at [96]). After hearing from the parties, the Upper Tribunal ruled that ‘if there were to be any suggestion of any new convention, then that would have to be subject to an application to amend’ (at [96]). There was none. An important opportunity was thus missed, as I shall argue.

Although the parties disagreed about whether the education convention had been ‘extended’, they agreed on how the Upper Tribunal should resolve the disagreement. The parties referred the Upper Tribunal to a widely accepted ‘test for identifying whether a constitutional convention exists at all’ (at [69]), which was first proposed by Sir Ivor Jennings. According to Jennings, to decide whether there is a convention that regulates some action,

[w]e have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish

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<sup>6</sup> Adam Tomkins gave evidence for Evans. Brazier’s and Tomkins’ evidence is summarized in Open Annex 3 at [39] – [111].

<sup>7</sup> Rodney Brazier, ‘The Constitutional Position of the Prince of Wales’ [1995] Public Law 401.

<sup>8</sup> *Ibid* at 404.

the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.<sup>9</sup>

I shall refer to this as “Jennings’ Test”. Following the Upper Tribunal, I shall refer to precedents, a belief in an obligation, and a reason as the three “elements” of Jennings’ Test.

The Upper Tribunal looked at each element in turn. It had no difficulty finding that the first element was present, given that Jennings himself had allowed that a single precedent was enough, and that Prince Charles had clearly engaged in advocacy correspondence.

Regarding the second element, the Upper Tribunal described the issue as whether the parties to the education convention (at [75])

considered themselves to be bound to treat Prince Charles’ education in the business of government ... as extending not merely ... to government informing Prince Charles about what it is doing and responding to queries from him.

The Upper Tribunal found that Prince Charles believed he was ‘entitled’ to contact government ministers to ‘set up and drive forward charities and to promote views’ (at [105]). It found, too, that ministers ‘felt themselves obliged to respond’ (at [105]), and that they gave ‘every appearance of thinking ... [they] are under ... an obligation to consider what is said’ (at [106]). Nonetheless, the Tribunal held that this second element was absent because Prince Charles did not feel entitled to contact ministers, and they did not believe they were obligated to respond, ‘as part of his preparation for kingship’ (at [105]).

Regarding the third element, the Upper Tribunal thought there was an ‘overwhelming difficulty’ with the idea that there was a reason for the education convention to extend to advocacy correspondence. According to the Upper Tribunal, ‘it is the constitutional role of the monarch, not the heir to the throne, to encourage or warn government’. As a result, ‘it is fundamental that advocacy by Prince Charles cannot have constitutional status’ (at [106]). The Upper Tribunal also claimed that it would be ‘inconsistent’ with the Queen’s rights to warn, to encourage, and to be consulted by government ‘to afford constitutional status to the communication by Prince Charles, rather than the Queen, of encouragement or warning’ (at [106]).

Having found that two out of three elements of Jennings’ Test were lacking, the Tribunal concluded that the education convention does not extend to advocacy correspondence. Therefore disclosure of Prince Charles’ advocacy correspondence would not undermine the education convention. That finding cleared the way for the Upper Tribunal to conclude that the public interest favoured disclosure of the advocacy correspondence.

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<sup>9</sup> Sir Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 4<sup>th</sup> edn, 1952) 135. As Professor Tomkins said in his evidence, this test ‘has been accepted by constitutional legal scholarship throughout the 80 year period since the first edition of [Jennings’] book was published’: *Evans* at [70].

## DISCUSSION

My main criticism of *Evans* is that the Upper Tribunal misunderstood how constitutional conventions are distinguished from one another. Whatever else conventions are, they are norms (or rules).<sup>10</sup> At the heart of every norm is a specific act. What this means, according to virtually every legal philosopher who has considered the issue, including John Gardner, Andrei Marmor, and Joseph Raz, is that we can distinguish one norm from another (i.e., we can individuate norms) in part based on the acts they regulate.<sup>11</sup> The regulation of two different acts implies the existence of two different norms. The point is obvious when we think of legal norms. “Everyone is prohibited from committing murder” and “everyone is prohibited from committing manslaughter” are not descriptions of the same law (legal norm). They are descriptions of different laws, and we know that because they describe the regulation of different actions.

Instructing oneself in the business of government and advocating for one’s views are very different actions. No *one* norm can regulate both actions. Hence no *one* convention can regulate both actions. Hence the education convention, which already regulates the Prince of Wales’ instruction in government, cannot ‘extend’ to advocacy correspondence. The central question in *Evans* – regarding the scope of the education convention – has a simple, even trivial, answer. That answer has nothing to do with Jennings’ Test, however, and everything to do with how norms, including conventions, are individuated.

It follows that if the Prince of Wales has the ‘clutch of rights’ the Departments said he does, it is because they are conferred by separate conventions. The question the Upper Tribunal should have been asked, therefore, is whether there is a *separate* convention entitling the Prince of Wales to engage in advocacy correspondence. Jennings’ Test has nothing to say about the extent of a convention, but it *can* answer this kind of question. There is an irony here. The Upper Tribunal was asked the wrong question and was advised to answer it using an inappropriate test. That test is, however, the appropriate means of answering the right question – which the Upper Tribunal was not asked.

Did this misunderstanding make a difference? That is to say, would the Tribunal have found that there is a separate convention for advocacy correspondence, had it considered the issue? The first element of a separate convention was clearly present, because Prince Charles’ advocacy correspondence provides a precedent. The second element was present, too. The Upper Tribunal said that Prince Charles felt entitled to carry on advocacy correspondence, and ministers felt obligated to respond, *but not as part of Prince Charles’ education*. That last bit seems relevant if we are thinking about the extent of the education

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<sup>10</sup> See, e.g., Nick Barber, ‘Laws and Constitutional Conventions’ [2009] LQR 294, 296; Joseph Jaconelli, ‘The Nature of Constitutional Convention’ (1999) 19 Legal Studies 24, 28ff; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) 3; Colin Munro, *Studies in Constitutional Law* (London: Butterworths, 1987) 35.

<sup>11</sup> See, e.g., John Gardner, ‘What is Tort Law For? Part I: The Place of Corrective Justice’ (2011) 30 Law and Philosophy 1, 29-30; George Letsas, ‘Harmonic Law: The Case Against Pluralism’ in Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford: OUP, 2012) 88; Andrei Marmor, *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009) 45 n19; Joseph Raz, *The Concept of a Legal System* (Oxford: OUP, 1970) 144; Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) 50, 130; Georg Henrik von Wright, *Norm and Action* (London: Routledge & Kegan Paul, 1963) 70-73.

convention. But it has no bearing when the issue is the existence of a separate advocacy correspondence. All that matters in that case is whether the parties felt that Prince Charles was entitled to carry on advocacy correspondence – which they did. So, the Upper Tribunal would have – or at least it should have – found that two of the three elements of a separate advocacy convention were present.

The case for a separate advocacy convention likely would have foundered at the third stage of Jennings’ Test. The question at this stage would have been whether there is a constitutional reason for the Prince of Wales to be entitled to carry on advocacy correspondence. The Upper Tribunal was emphatic that there is not one. Its reasoning is dubious, however. As I said, according to the Upper Tribunal, it is the monarch’s, not the heir’s role, ‘to encourage or warn government’; it would be ‘inconsistent’ with the Queen’s rights to ‘afford constitutional status to the communication by Prince Charles, rather than the Queen, of encouragement or warning’. As I read these remarks, the Upper Tribunal is saying: advocacy is warning or encouragement; the Queen has a right to warn and encourage government; so, by engaging in advocacy correspondence, the Prince of Wales is doing something the Queen has a right to do.<sup>12</sup> All this seems reasonable. From this, however, the Upper Tribunal infers that the Prince of Wales does not have a right to engage in advocacy correspondence (in other words, to warn and encourage government). How does that follow?

Perhaps the Upper Tribunal thought that only *one* person can have a right to warn and encourage. It is not clear why this would be, though. It is not because all the Queen’s rights are held by her exclusively. She shares with the Prince of Wales the right to make enquiries of government, for example. Nor is it because of the nature of warning or encouragement. It is possible to receive warning and encouragement from more than one person. Perhaps it is because this right is particularly important. If the Queen shares it, her role will be less distinctive. The worry is hard to credit, however. Even if the Prince of Wales has a right to issue warning and encouragement, ministers would not be required to take his views into account, as they are the Queen’s. The Queen would also retain a range of other rights and powers held by her alone. The distinctiveness of her role seems secure.

Another possibility is that the Upper Tribunal thought it is so well-established that the monarch alone has a right to warn and encourage government that, once we think of advocacy correspondence as warning and encouragement, it becomes obvious that the Prince of Wales do not have a right to engage in it. This would appear to beg the question. If advocacy really is a kind of warning or encouragement, then the whole issue is whether the Prince of Wales, in addition to the monarch, should be recognized as having a right to warn and encourage government. The way to resolve that question in a *reasoned* way is to apply Jennings’ Test. To simply assume the monarch alone possesses the right to warn and encourage is to prejudge the outcome of that test.

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<sup>12</sup> The Attorney General took the same view: ‘Discussing matters of policy with Ministers, and urging views upon them ... entails actions which would (if done by the Monarch) fall squarely within [her conventional rights]’. Attorney General’s Office, ‘Exercise of the Executive Override Under Section 53 of the Freedom of Information Act 2000: Statement of Reasons’ (16 October 2012) (available at: <https://www.gov.uk/government/publications/evans-v-1-information-commissioner-2-seven-government-departments-2012-ukut-313-aac>) [9].

Each of these lines of thinking treats the similarity between advocacy and giving warning or encouragement as a reason *not* to recognize a right to engage in advocacy correspondence. This looks as if it gets things the wrong way around. Advocacy, like most activities, is something we tend to get better at the more we do it. Does it not stand to reason, then, that a monarch will be better at presenting his opinions on government policy, and thus better at executing one of his constitutional duties, if he has done so before, as heir? It would seem that the value of preparing the Prince of Wales for kingship is a reason to recognize in him a right to warn and encourage government.

The Upper Tribunal considered this argument to be ‘divorced from reality’. Here is the explanation it gave (at [170]):

[W]hat is known publicly about [Prince Charles’] advocacy interchanges shows them to be very different from the function of the monarch when exercising the constitutional entitlement to encourage or to warn.

There is some tension between this statement and the Upper Tribunal’s remarks, above, to the effect that a right to engage in advocacy correspondence would amount to a right to warn and encourage. One way to reconcile them is to suppose that, while advocacy is warning or encouragement, the *kind* of warning and encouragement Prince Charles provides is not the kind that a monarch provides, and therefore does not count as preparation for kingship. If this is indeed the Upper Tribunal’s reasoning, it seems to overlook the fact that there are few substantive limits on the monarch’s rights to warn and encourage (though there are requirements as to confidentiality and political neutrality). Different monarchs may exercise these rights in different ways. Queen Victoria (say) chose to intervene in government business frequently and forcefully; Edward VII did not.<sup>13</sup> The heir is not completely free to decide what kind of king he will be; that choice is, and ought to be, constrained by the constitution. Nonetheless, there is a wide range of warning and encouragement permitted to the monarch. The kind of correspondence Prince Charles engages in may well prepare him for the kind of kingship he is likely to have and, more importantly, the kind of kingship he is constitutionally permitted to have.

So it is at least arguable that there is a separate advocacy convention. The first and second elements of Jennings’ Test are present, based on the Upper Tribunal’s findings, and there are grounds for thinking the third element is present, too. If there is a separate advocacy convention, the reason underlying it is preparation for kingship. This happens to be the same reason underlying the education convention. That does not mean there is one convention that regulates both instruction in government and advocacy. It means there are two conventions, underpinned by one reason.

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<sup>13</sup> ‘[Queen Victoria] induced ministers to alter despatches and referred or compelled them to refer matters to the Prime Minister or to Cabinet. She wrote long memoranda. She once tried to persuade Sir William Harcourt, as minister in attendance, to alter the Queen’s speech, though without effect.’ Sir Ivor Jennings, *Cabinet Government* (Cambridge: CUP, 3<sup>rd</sup> edn, 1961) 372.

## THE SECTION 53 CERTIFICATE

The Attorney General's issuance of a Section 53 certificate had the effect of vetoing the Upper Tribunal's decision. As a political intrusion into the judicial process, the use of the veto is concerning. It may turn out to be significant for another reason as well. In his statement of reasons, the Attorney General says that he consulted with members of Cabinet and former ministers and is of the opinion that Prince Charles has a right to engage in advocacy correspondence. Whether that is correct as a description of the situation before the certificate was issued is, of course, debatable. Regardless, Jennings' Test treats beliefs such as the Attorney General's as evidence that the heir does, in fact, have a right to engage in advocacy correspondence. That is to say, the Attorney General may have helped establish the existence of the heir's right to engage in advocacy correspondence by taking himself to be defending that right. This does not show the use of the veto was justified, and it would not be relevant in a review of the Attorney General's decision. However, it adds to the evidence that the Prince of Wales now has a right to engage in advocacy correspondence, and ought to figure in the broader discussion of his constitutional status.

## CONCLUSION

The key issue in *Evans* was whether disclosure of Prince Charles' correspondence would undermine a constitutional convention, in which case it would be less likely that the public interest favoured disclosure of that correspondence. The parties asked the Tribunal whether the education convention extends to advocacy correspondence. It should have been asked whether there is a separate convention for advocacy correspondence. The difference mattered. Even though the Upper Tribunal would have rejected a separate advocacy convention, it would have rejected it on narrower grounds than it rejected an extended education convention. Further, there is reason to think that there is a separate advocacy convention, and thus that the public interest does not weigh as heavily in favour of disclosure as the Upper Tribunal supposed.

Despite these flaws, *Evans* is a significant decision, for several reasons. First, it clearly endorses Jennings' Test as a means for the identification of conventions. That test was adopted by the Supreme Court of Canada in the *Patriation Reference*<sup>14</sup>, but *Evans* marks the first time it has been judicially endorsed in this country. Second, *Evans* takes the place of *Attorney General v Jonathan Cape Ltd*<sup>15</sup> as the leading example of how conventions can influence legal decision-making. Third, *Evans* is a cautionary tale. Because cases involving conventions are rare, courts are not used to identifying conventions, and *Evans* shows the problems that can result. Overall, *Evans* stands as a strong endorsement of Jennings' Test, but should not be taken as an example of how to apply that test or as a guide to the conventions relevant to the Prince of Wales.

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<sup>14</sup> *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, 888.

<sup>15</sup> n 5 above. Surprisingly, neither *Jonathan Cape* nor the *Patriation Reference* were cited in *Evans*.